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Designing Common but Differentiated Rules for Regional Trade Disputes

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Abbreviations

AD/CVD	antidumping/countervailing duties
ALADI	Latin American Integration Association
ASEAN	Association of Southeast Asian Nations
CAFTA-DR	Dominican Republic–Central America Free Trade Agreement
DSU	Dispute Settlement Understanding
ICSID	International Centre for Settlement of Investment Disputes
NAFTA	North American Free Trade Agreement
PCA	Permanent Court of Arbitration
RTA	regional trade agreement
TRIPS	Agreement on Trade-Related Aspects of Intellectual Property Rights
WTO	World Trade Organization

Abstract

In the twenty-first century, World Trade Organization (WTO) members have put great energy and creativity in liberalising trade through regional trade agreements (RTAs), even as trade liberalisation in the WTO has met increasing challenges. This paper discusses how the parties to RTAs have approached the problem of enforcing RTA obligations and settling disputes. It examines why there have been relatively few known RTA panel disputes so far, and how this situation could change. Even if dispute settlement mechanisms are not currently used, they give RTA parties the option to bring and pursue disputes about RTA compliance. This is important as having options matters for real-world outcomes. The paper further introduces a proposal to facilitate options for RTA parties to settle their disputes by drafting a model set of unambiguous common dispute settlement procedures, with standardised differentiated options to accommodate governments' needs and situations. Other suggestions include creation of a reference database of RTA dispute settlement provisions and a checklist of practical issues for administering an RTA dispute.

1. Why Regional Trade Agreements Need Functioning Dispute Settlement

Over the past 18 years, trade liberalisation in the World Trade Organization (WTO) has, with a few limited exceptions, slowed and come to a halt. Governments' desire for trade liberalisation has continued, but they have pursued market opening on a preferential basis through regional trade agreements (RTAs). Hundreds of RTA relationships have been negotiated and come into existence since 2000. As of early 2018, WTO members have notified 455 RTAs to the WTO, of which 284 RTAs have entered into force (WTO 2018).

Influenced by the WTO example and other factors, in very many of these RTAs the parties have chosen to give a right of access to third-party adjudication to settle disputes between the parties or to provide a means for the parties to ensure compliance with concessions. According to a 2013 WTO Secretariat survey, the vast majority of RTA dispute settlement mechanisms that allow for such third-party adjudication provide for binding adjudication by an ad hoc panel (Chase et al. 2013, 11–12).

RTA dispute settlement procedures may be quite elaborate and may consume substantial negotiating time and effort. They may include provisions for an appeals mechanism—as in the Mercosur and Association of Southeast Asian Nations (ASEAN) dispute settlement mechanisms. RTA dispute settlement chapters have innovated some procedural ideas taken up in later agreements, such as the interim panel reports invented in the Canada–United States of America Free Trade Agreement and adopted in the WTO Dispute Settlement Understanding (DSU). Some innovations have been less successful, such as cross-selection of panellists in the North American Free Trade Agreement (NAFTA). RTA dispute settlement procedures may also be underdeveloped and considered an afterthought, with little investment by negotiators.

Why settlement? There are good reasons for governments choosing to have binding means of settling disputes. Some means of peaceful dispute settlement is essential to avoid escalation of disagreements and widening of trade conflicts, which can lead to an RTA falling apart. As many studies have found in relation to NAFTA, when an RTA has succeeded in its job of integrating the partners' economies, the costs of RTA dissolution can be enormous in terms of business disruption, lost jobs, and damage to regional economies.

Why enforcement? Governments that enter into RTAs expect—at least publicly—that their RTA partners will deliver the commitments agreed. Every ex ante economic estimate of the probable economic effect of an RTA on jobs and economic growth assumes that the RTA will be implemented as signed.

In a world of finite capital, RTAs are in competition to attract investment. As the sunk investment needed to compete in an RTA market increases (e.g. the cost of building a telecommunications network, a manufacturing value chain, or a network of insurance agents and claims processors), a rational investor seeks more certainty. The same applies when foreign goods or services suppliers depend on deep integration provisions. Governments offer compliance mechanisms, including RTA dispute settlement, as a means to provide this sort of certainty. Governments may also want to signal their own stakeholders, especially if adjustment to the RTA involves collective action problems.

2. Demand for RTA Dispute Settlement: How Many Disputes Are There, What Are They About, and Why Is There Not More Use of Dispute Settlement?

Is there an objective need to improve RTA dispute settlement procedures? To answer this question, we can examine the record of actual use of RTA formal dispute settlement.

2.1 Demand for RTA Dispute Settlement Exists

Panel reports in RTA disputes provide a partial index to the demand for dispute settlement. An incomplete list of ad hoc panel reports in RTA disputes is shown in Box 1.[1] These panel reports record the efforts of RTA parties, pursuing disputes all the way through a formal decision. The total comes to fewer than 30 disputes since 1995, even though 284 RTAs have been notified to the WTO and have entered into force. To this list should be added disputes before supranational courts, including the European Court of Justice and regional courts in Africa, Central and South America, and Europe; these bodies have together issued over 2,100 binding legal rulings (Alter 2011),[2] although very few of their rulings involve state-to-state disputes.

[1] See also annotated webpages on disputes with links to panel reports and documents at http://porgeslaw.com/rta-disputes/.

[2] Courts include the Andean Tribunal of Justice; Benelux Court of Justice; Central African Monetary Community Court; Central American Court of Justice; Common Market for Eastern and Southern Africa Court of Justice; Court of Justice of the Economic Community of West African States; Court of Justice of the European Free Trade Association States; East African Court of Justice; Southern African Development Community Tribunal (currently suspended); and West African Economic and Monetary Union Court of Justice.

2.2 Most Formal RTA Disputes Have Focused on RTA-Only Obligations

The vast majority of the ad hoc panel decisions listed in Box 1 have concerned benefits available only within an RTA. This was true of all three NAFTA panel reports, which concerned preferential access under NAFTA for US dairy and poultry exports to Canada;[3] application of the NAFTA provisions on safeguards;[4] and preferential market access rights under NAFTA for cross-border trucking operators.[5] Mexico's NAFTA dispute against the US concerning sugar exports, in which the US blocked panel formation, also concerned preferential market access.

The two panel reports under the Dominican Republic–Central America Free Trade Agreement (CAFTA-DR) concerned denial of preferential tariff treatment by El Salvador[6] and compliance by Guatemala with obligations under the CAFTA-DR labour chapter.[7]

[3] North American Free Trade Agreement (NAFTA) 1996. Tariffs Applied by Canada to Certain U.S.-Origin Agricultural Products. Final Report of the Panel. CDA-95-2008-01.

[4] North American Free Trade Agreement (NAFTA) 1998. In the Matter of the U.S. Safeguard Action Taken on Broom Corn Brooms from Mexico. Final Report of the Panel. USA-97-2008-01.

[5] North American Free Trade Agreement (NAFTA) 2001. Review of the Final Determination of the Antidumping Investigation on Imports of High Fructose Corn Syrup, Originating from the United States of America. Final Report of the Panel. MEX-USA-98-1904-01.

[6] Dominican Republic–Central America Free Trade Agreement (CAFTA-DR) 2014. Costa Rica vs El Salvador: Tratamiento Arancelario A Bienes Originarios De Costa Rica. Informe Final del Grupo Arbitral. CAFTA-DR/ARB/2014/CR-ES-18.

[7] Dominican Republic–Central America Free Trade Agreement (CAFTA-DR) 2017. In the Matter of Guatemala: Issues Relating to the Obligations under Article 16.2.1(a) of the CAFTA-DR. Final Report of the Panel.

Three other CAFTA-DR complaints also focused on denial of preferential tariff treatment.[8] In El Salvador's challenge to Mexico's laws on pharmaceutical registration, under the Northern Triangle–Mexico Free Trade Agreement, key arguments were based on side-letters on Mexico's pharmaceutical register.[9] Three disputes were brought concerning Chile's price band tariffs under the Latin American Integration Association (ALADI) economic complementation agreements;[10] two of the three preceded the WTO dispute against these tariffs.[11] A fourth ALADI dispute concerned access to preferential market access in Peru for computers from Mexico.[12]

The three known disputes in ASEAN have all concerned access to preferential tariff treatment. Singapore brought a dispute against the Philippines' suspension of preferential tariff agreements, and Thailand brought a dispute against Malaysia's delay in reducing its preferential automobile tariff; both were settled informally (Ewing-Chow and Yusrao 2018, 389). The Philippines reportedly brought a dispute in ASEAN in 2007 concerning preferential market access for cigarettes under ASEAN, before bringing the dispute to the WTO (Natividad 2007).

8 The other complaints concerned denial of preferential tariff treatment for certain products produced in Costa Rican free trade zones by the Dominican Republic (2009–2010) and El Salvador (2010), and US denial of preferential tariff treatment for ethanol from Costa Rica (2015); see http://www.porgeslaw.com/rta-ds-latin-america.

9 Northern Triangle 2006. El Salvador vs Mexico-Medidas Vigentes Para El Otorgamiento Del Registro Sanitario y Acceso de Medicamentos. Informe Final.

10 Disputes brought by the Plurinational State of Bolivia (2000, vegetable oil), Argentina (2000, vegetable oil), and Colombia (2002, sugar-containing food preparations); see http://www.porgeslaw.com/rta-ds-latin-america.

11 World Trade Organization (WTO) 2007. Chile: Price Band System and Safeguard Measures Relating to Certain Agricultural Products. DS207.

12 Latin American Integration Association (ALADI) 2004. Origen de Computadoras Importadas a Perú Procedentes de México. Informe Final.

2.3 The List of Known Panel Reports Underrepresents the True Extent of Disputes

The information available on RTA disputes is incomplete. There is no single repository for RTA dispute settlement reports and documents, as there is for WTO disputes. The vast majority of RTA dispute settlement procedures do not require public disclosure of consultation requests, panel requests, or even panel reports. Disclosure of consultation requests informs the public when a formal dispute exists—and, by implication, when a dispute is not pursued or is settled formally but without a panel report.

Any list of formal disputes will also inherently underrepresent underlying demand for dispute settlement procedures. RTA parties need to be able to bring a formal dispute and obtain a third-party ruling on legal claims. More frequently, they also need access to a channel to raise and resolve (even informally) intra-RTA disagreements, before a disagreement rises to the level of a dispute.

Disputes are likely to be invisible to the public if they can be settled informally. Many RTAs are quite recent and are still implementing RTA tariff elimination. During the period of tariff implementation, if one side fails to carry out its promise to implement a tariff concession on time, then the other side will be able to rebalance by holding back on implementing a counter-concession on time. Scenarios of this sort could be occurring in a number of RTAs with no public notice.

2.4 Political Conditions Can Pre-empt Recourse to Third-Party Dispute Settlement

Governments may choose not to use dispute settlement procedures because of the external political environment. This choice does not necessarily mean that dispute settlement procedures are useless or irrelevant, but simply that conditions are not favourable at that time.

The parties to Mercosur brought 12 commercial disputes between 1999 and 2006, but then stopped, as the commercial policy environment in the region became more inward-looking. During Argentina's period of non-automatic import licensing in 2012–2016, the other Mercosur parties did not bring disputes under Mercosur's free circulation rules or under the WTO; instead, they dealt directly and informally with the many problems that Argentina's licensing regime caused for stakeholders in Mercosur partners. Similarly, ASEAN members have chosen not to pursue disputes under the ASEAN dispute settlement mechanism but to solve matters informally (Ewing-Chow and Yusrao 2018).

2.5 If WTO Rules Address the Commercial Problem, it May Be Rational to Take a Dispute to the WTO

The government that brings a dispute may have a choice between the WTO and an RTA as a forum for dispute settlement, and many RTA partners have taken their disputes to the WTO. As of 2011, 19 percent of all WTO disputes (82) were between preferential trade agreement partners; the largest share of these (35) was between parties to NAFTA (WTO 2011, 176).

Box 1.

Regional trade agreement ad hoc panel rulings in government-to-government disputes (incomplete list)

Pre-World Trade Organization

Canada–US Free Trade Agreement Chapter 18: five panel reports (salmon and herring, 1989; lobsters, 1990; automotive rules of origin, 1992; durum wheat exports by Canadian Wheat Board, 1993; Puerto Rico regulations on ultra-heat treated milk, 1993)

Israel–US Free Trade Agreement: one non-binding advisory panel ruling (machine tools, 1992)

Since 1994

NAFTA Chapter 20: three panel reports (Canada tariffs on dairy and poultry, 1996; US safeguard measure on broom corn brooms, 1998; US provisions on cross-border trucking services, 2001)

Canadian Free Trade Agreement: 2017, between federal, provincial, and territorial governments; replaced the 1995 Agreement on Internal Trade (AIT); the AIT has delivered panel reports in 12 disputes on interprovincial trade barriers (8 by governments, 4 by private parties)

Mexico–Northern Triangle Free Trade Agreement: one panel report (on Mexico's rules requiring that pharmaceuticals registered in Mexico must be manufactured there, 2006)

Dominican Republic–Central America Free Trade Agreement (CAFTA-DR): two panel reports (El Salvador denial of CAFTA-DR tariff treatment for certain Costa Rica exports to El Salvador, 2014; Guatemala—issues relating to labour rights obligations under CAFTA-DR Article 16.2.1(a), 2017)

Latin American Integration Association (ALADI) agreements: four panel reports (Chile price band tariffs on vegetable oil: disputes brought by the Plurinational State of Bolivia and Argentina, both 2000; Chile price-band tariffs on food preparations: dispute brought by Colombia, 2004; Peru denial of ALADI tariff preferences to computers from Mexico, 2004)

Mercosur: panel and appeal reports in 12 commercial disputes (Brazil restrictions on trade with Argentina, 1999; Brazil subsidies on pork production/exports to Argentina, 1999; Argentina safeguard on textiles from Brazil, 2000; Argentina antidumping measures on imports of chickens from Brazil, 2001; Argentina denial of originating status to bicycles from Uruguay, 2001; Brazil ban on remoulded tyres from Uruguay, 2001; Brazil sanitary and phytosanitary barriers to Argentine products, 2002; Uruguay taxes on cigarette sales, 2002; Uruguay wool subsidies, 2003; Brazil tariff on tobacco/tobacco products from Uruguay, 2005; Argentina ban on imports of remoulded tyres from Uruguay, 2005 (appeal, 2005; rulings on lawfulness of Uruguay compensatory measures, 2007, 2008); Argentina failure to act against blockage of bridges from Uruguay, 2006 (appeal 2006)); also 2012 urgent appeal by Paraguay against its suspension from the organs of Mercosur and the incorporation of the Bolivarian Republic of Venezuela as a full member (direct appeal to Mercosur Permanent Review Tribunal, rejected)

Some dispute types can be settled only in the WTO. If the commercial problem consists of an antidumping or countervailing duty (AD/CVD) measure of an RTA partner, and the RTA does not have any AD/CVD rules, then the WTO provides the only possible solution for the problem.

Only one of the cases listed in Box 1 deals with AD/CVD. Brazil brought a Mercosur complaint that an Argentine antidumping measure on chicken was inconsistent with Mercosur's rules on free circulation of goods. The Mercosur panel found that Mercosur did not have any rules regulating antidumping, and the measures were not an abuse of power.[13] Dissatisfied, Brazil took its dispute to the WTO; the panel report found various breaches of the WTO Anti-Dumping Agreement. Argentina did not appeal, and it quickly complied.[14]

Similarly, if an RTA has WTO-minus provisions, and the commercial complaint falls within the scope of those provisions, then the WTO will provide a more advantageous forum. The US chose the WTO rather than NAFTA for its 1996 complaint on a Canadian excise tax on split-run magazines,[15] because NAFTA has a WTO-minus exception for measures affecting cultural industries.

[13] Mercosur 2001. Laudo del Tribunal Arbitral Ad Hoc del Mercosur Constituido Para Decidir Sobre la Controversia Entre la República Federativa de Brasil y la República Argentina Sobre Aplicación de Medidas Antidumping Contra la Exportación de Pollos Enteros Provenientes de Brasil. Resolución No. 574/2000.

[14] World Trade Organization (WTO) 2003. Argentina: Definitive Anti-Dumping Duties on Poultry from Brazil. Panel Report. WT/DS241/R.

[15] World Trade Organization (WTO) 1998. Canada: Certain Measures Concerning Periodicals. DS31.

3. It Is Still Essential for RTA Parties to Have the Option of Using RTA Dispute Settlement

RTA parties should be able to bring and pursue disputes about RTA compliance. Having options matters for real-world outcomes: even in a negotiation, a party that has a real dispute settlement option will negotiate a better settlement than a party that does not. If there are problems with RTA dispute settlement, they need to be addressed and solved, not avoided.

3.1 Components of Dispute Settlement

What is needed to establish a dispute settlement mechanism and make it operational? In a dispute settlement process, three elements are key. The disputing parties need dispute settlement institutions of some sort, even on an ad hoc basis. They need a panel or other arbiter to interpret and apply substantive law governing their rights and obligations. They need predictable procedures that facilitate settlement.

The WTO has standing mechanisms for all three of these. The Dispute Settlement Body and the WTO Secretariat administer disputes. Panels and the Appellate Body interpret and apply the covered agreements. They follow the procedures in the DSU and other WTO dispute settlement rules. RTA parties must create equivalent processes on their own.

3.2 Institutions

Institutions are a major practical issue for disputes. The WTO dispute settlement mechanism as an institution is the ideal that most RTAs aspire to reach.

WTO members have made a substantial investment in maintaining the WTO Secretariat and the network of Geneva institutions that surround it. The Secretariat handles the jobs of maintaining the panel roster, nominating panellists, and administering the dispute process (meeting rooms, docket management, translation, interpretation, payment of honoraria, expense reimbursement). A government's regular WTO contribution covers all tribunal costs, including the services of the Secretariat, panellists, and the Appellate Body; no fees are charged for handling disputes. Most governments have missions in Geneva that can handle dispute administration issues. Developing countries can draw on the Advisory Centre for WTO Law for legal advice and litigation assistance.

Most RTA members have not been willing to make a WTO-level investment in a standing secretariat and dispute settlement institutions. Most RTAs have chosen to use ad hoc panels to settle disputes, with the consequence that they must generate the institutional backup for each dispute as it occurs. The parties must obtain budget resources to pay tribunal costs and must handle the expense and effort of dispute administration, with no standing secretariat or a minimal national secretariat. Administering a dispute ad hoc over a substantial period can be quite difficult and burdensome for the parties, as seen in the Guatemala labour dispute under CAFTA-DR (ICTSD 2017). Perhaps as a reaction, Article 21.25 of the recently-concluded Japan–EU Economic Partnership Agreement provides that its parties may "agree to jointly entrust an external body with providing support for certain administrative tasks for ... dispute settlement".[16]

Does this mean the WTO should also handle RTA disputes, with payment by the RTA parties for Secretariat services? Not necessarily. The WTO has become so popular and overloaded as a dispute settlement forum that it is not clear whether it would have the capacity or personnel to take on more disputes. WTO dispute settlement is also expensive and time-consuming. Panels and the Appellate Body work hard to produce high-quality reports as a collective good for the members, but WTO disputes now take well over double the WTO's notional 18-month timetable. They also cost millions of dollars to bring a dispute and an average of US$ 1 million a year during the dispute, according to an academic estimate (Brutger 2015). If it costs so much to bring any WTO dispute, parties naturally load more claims on to each dispute they bring, further escalating costs and adding time to the process. It is a good question whether RTA parties can bear costs of this order.

The WTO is not the only institution that can provide dispute settlement services. If outsourced administration would be useful for RTA disputes, then it could equally be provided on a case-by-case basis by the experienced secretariats at the Permanent Court of Arbitration (PCA) or the International Centre for Settlement of Investment Disputes (ICSID). The PCA and ICSID also have standing arrangements for facilities and staff to hold hearings in Europe, Asia, Africa, and Latin America.

3.3 Interpreting Substantive Law

In the WTO, panels and the Appellate Body interpret and apply WTO law to the claims and facts brought before them. In RTAs that use ad hoc panel procedures, the parties to a dispute need to find potential panellists, select panellists, and replace panellists when necessary. (This can be a challenge; access to panellists is one of the WTO's major advantages as a means to settle disputes.)

Does this mean that RTA disputes should be handled by WTO panels? Again, not necessarily. Unless WTO dispute settlement comes to a standstill as a whole, RTA parties are likely to continue the current pattern in which all, or almost all, RTA disputes concern RTA-only obligations. The question then is whether WTO panels should handle disputes concerning non-WTO rules, as suggested by Gao and Lim (2008) and Flett (2015).

[16] See http://worldtradelaw.typepad.com/ielpblog/2018/04/secretariats-in-bilateral-trade-agreements.html.

Aside from fundamental jurisdictional issues,[17] it may not be acceptable to RTA parties or WTO members to have WTO panels interpret and apply RTA obligations. WTO panels do not necessarily have subject matter expertise in interpreting RTA-only obligations, which may concern non-WTO issues such as labour rights, anti-corruption, or human rights. Even when they do, such as in cases involving tariffs, RTA parties may be reluctant to have non-RTA panellists determine the extent of RTA preferential treatment. WTO members that have chosen not to have non-WTO provisions in their RTAs may also not welcome having RTA-only provisions such as labour rights rules interpreted and applied in a WTO-run process. The same applies for RTA obligations that are merely WTO-plus, such as RTA rules on intellectual property enforcement that go beyond the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) Part III or conformity assessment rules in RTAs that go beyond the Agreement on Technical Barriers to Trade Article 5.

RTA negotiations let the parties make law that is purposely different from WTO law. If WTO institutions are perceived as enforcing mutual consistency, then RTA parties that have purposely drafted obligations diverging from the WTO approach may not want their texts interpreted into conformity with the WTO approach. Diversity of this sort—competition with rather than subordination to WTO norms—may lead to fragmentation of the law, but it may be what governments want.

[17] The WTO dispute settlement procedures do not as such apply to any agreements outside the WTO. DSU Article 1.1 limits the application of DSU rules and procedures to disputes brought pursuant to the consultation and dispute settlement provisions of the "covered agreements" listed in DSU Appendix 1. The negotiators intentionally made Appendix 1 a closed list of WTO agreements because they wanted to allow Dispute Settlement Body-authorised suspension of WTO concessions only for WTO violations. They provided that Appendix 1 could be amended, but only by consensus.

3.4 Procedures

The third ingredient for dispute settlement is a set of procedures that are predictable, efficient, fair (and perceived as fair), fast, inexpensive, and unblockable, and that facilitate settlement.

DSU procedures are predictable, well known, easily explained to stakeholders, perceived as fair, and widely accepted. They were designed to avoid unilateral blockage.

If an RTA has no procedures agreed in advance, and a party wants to enforce an RTA obligation, then it may need to negotiate procedures before it can bring a dispute. That first dispute may be difficult to explain to stakeholders. Some RTAs have loopholes that allow disputes to be blocked (as in Mexico's NAFTA dispute against the US on market access for sugar). Sometimes RTA negotiators build in blockage opportunities because they do not really want binding dispute settlement. Sometimes blockage is an unintentional consequence of bad drafting.

Should parties to RTAs automatically follow DSU procedures? Again, not necessarily. The DSU is not perfect but it has proved to be impossible to amend. Dispute settlement negotiators for some RTAs have invented some significant innovations that are worthy of study and perhaps adoption. Non-WTO features of RTAs, such as lack of standing institutions, also call for non-WTO solutions.

4. RTA Disputes: What Help Would Be Useful?

RTAs provide WTO-plus market access and WTO-plus rules in order to attract investment in producing goods or services to sell in the RTAs' markets. Governments are not likely to be much better at implementing RTAs than they are at implementing the WTO Agreement, but there have been disproportionately few RTA

disputes compared with the hundreds of RTAs in force and hundreds of WTO complaints.

This think piece has discussed factors that can explain this gap. It has also set out why it is important for RTAs to have viable means to settle disputes.

The day is arriving when RTAs will need effective enforcement or settlement mechanisms. Many of the RTAs in force today were concluded in the past 10–15 years and are still not completely implemented. In an RTA, the tariff cuts or other rules that are most politically difficult to implement are likely to be backloaded. We are at or nearing the time when governments must deliver on their most difficult promises, and the rate of RTA non-implementation may be about to increase. And, as RTA tariffs approach zero, the margin of preference between RTA and most-favoured nation tariffs increases. This, in turn, could provide greater leverage to induce an RTA partner's compliance.

In some RTAs, the parties have negotiated elaborate and detailed dispute settlement rules, rules of procedure, and institutional arrangements in advance of entry into force. In others, the RTA negotiators may not be lawyers, may have no dispute settlement experience, may have assumed there would never be any disputes, or may not have a sense of how difficult trade agreement enforcement can be.

A government may not pay attention to dispute settlement details until it has an RTA dispute and only then discover that the RTA rules have gaps that make them difficult to operationalise or (at worst) have trapdoors that let a non-complying RTA party frustrate any dispute. It may be possible to fix the rules by agreement, but not after a dispute has arisen.

Negotiating better rules is a task for governments, but three types of assistance might be useful: improved knowledge on the range of options, a handbook on how to administer RTA disputes, and a model set of dispute settlement rules.

Better rules and more knowledge will not remove all obstacles to using RTA dispute settlement to solve market access and compliance problems. If the political climate in the RTA has changed so that the only way to solve problems is by deal-making, rather than rights enforcement through dispute settlement, then rules alone will not provide the answer. But this does not change the desirability of building RTAs that have better rules at the start.

4.1 Better Information on Options

There are many collections of RTA texts by the WTO and regional institutions. It might be worthwhile to compile an online collection of dispute settlement clauses in a format that would be widely accessible and useful to negotiators.[18] This collection could provide wider dissemination and cross-fertilisation for new ideas emerging from RTA negotiations.

4.2 Handbook on Administering RTA Disputes

To prepare for the day when RTA disputes are more common, another useful research project could produce a handbook on how to administer an RTA dispute. The project team would consult widely with governments in many regions that have handled, dealt with, or worked on RTA disputes; the WTO Secretariat; and the secretariats at the PCA and ICSID and other organisations that deal with disputes involving governments under international law. The handbook would provide an annotated checklist of budget, organisation, and administration issues for the party administering a dispute. The checklist could discuss issues such as costs, panellist remuneration, paper flow issues, and problems that often arise.

[18] See FTAA (2000) as an out-of-date example.

4.3 Drafting Model Rules

A process could be convened to draft model RTA dispute settlement rules for use by interested governments as they negotiate or improve their RTAs.

4.3.1 Why model rules?

The model rules would provide a set of possible choices that governments could draw on as they negotiate RTAs. The rules would set out choices for addressing necessary issues for each step in an efficient dispute settlement process, dealing with such topics as:

- institutions (various approaches);
- choice of forum;
- procedures for initiating disputes, consultation, and panel requests; consolidation of disputes; and terms of reference;
- alternative dispute resolution options, such as mediation, conciliation, and good offices;
- panellist selection (including rosters) and replacement, and authority for panels to complete their work if a panellist ceases to be available;
- panellist ethics issues, such as conflicts of interest, disclosure of interests, impartiality, maintaining confidentiality of information, and ex parte contacts;
- use of experts or panel assistants, and remuneration and expenses of panellists, assistants, and experts;
- panel timetable and steps in a dispute;
- panel submissions; protection of confidential information; third-party participation in disputes (in plurilateral RTAs); submissions from non-governmental entities; and consultation of experts;
- transparency and public release of documents;
- panel operations, including deliberations and hearings, and attendance at hearings;
- translation, interpretation, and other language services;
- panel reports (initial, final);
- appeals process (if any);
- implementation.

The reason for having such rules is to plug avoidable gaps, rather than to overthink dispute settlement procedures or to unduly add to dispute settlement costs and time.

4.3.2 What type of rules?

The model rules could be common but differentiated. They would be common in the sense that they would deal with the most familiar issues in dispute settlement, which are issues that every disputant has in common. But they would be differentiated in the sense that they would not be one-size-fits-all or DSU-fits-all, or otherwise assume that every RTA will approach a given problem in the same way. Should panel processes require unanimity, or should they permit dissenting opinions? Should separate opinions be anonymous or signed? Different governments have differing views on issues such as these. The rules could provide alternative approaches with comments that would explain the policy implications of each drafting approach.

The model text would provide drafting options for both bilateral and plurilateral RTAs. It would emphasise clarity in drafting: the same term needs to have a consistent meaning throughout the text.

4.3.3 How would the rules be used?

Governments negotiating an RTA would be able to use these model rules as a reference when they negotiate

the RTA's dispute settlement chapter, or they could simply incorporate a model text by reference. The existence of model rules might make the use of terms more consistent between RTAs and clarify that where different terms were used, different results were intended.

A set of model rules would also help if an RTA is about to have its first dispute and the disputing parties need procedural rules. The parties could draw from the set of model rules and arrive more quickly at a negotiated agreement.

Where the parties to an RTA discover a gap in their dispute settlement rules, a model set of rules could provide a focal point or reference for agreeing on how to fill the gap.

The provisions should be neutral and balanced. They should be oriented towards efficient use of the parties' time and funds. They could include a commentary, if that would be helpful.

4.3.4 Drafting process

These rules should be drafted with the input of people who have experience in dispute settlement, including those experienced in RTA disputes, dispute administration, and legal drafting. Participants and people consulted should represent a diverse range of geographies and legal traditions. Inclusiveness in the drafting process would help make the product more compatible with different legal systems, and would help with acceptance of the result. The drafting process could take place in a non-governmental setting, with participation from government officials, arbitrators, panellists, litigators, and academics with practical experience.

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Jointly implemented by the International Centre for Trade and Sustainable Development (ICTSD) and the Inter-American Development Bank (IDB), the RTA Exchange works in the interest of the sharing of ideas, experiences to date, and best practices to harvest innovation from RTAs and leverage lessons learned towards progress at the multilateral level. Conceived in the context of the E15 Initiative, the RTA Exchange creates a space where stakeholders can access the collective international knowledge on RTAs and engage in dialogue on RTA-related policy issues.