



International Centre for Trade  
and Sustainable Development

# Reforming Dispute Settlement in Trade: The Contribution of Mega-Regionals

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Think Piece



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## Abbreviations

CETA	Comprehensive Economic and Trade Agreement
CPTPP	Comprehensive and Progressive Agreement for Trans-Pacific Partnership
DSU	Dispute Settlement Understanding
EU	European Union
FTA	free trade agreement
GATT	General Agreement on Tariffs and Trade
ICSID	International Centre for Settlement of Investment Disputes
ISDS	investor-state dispute settlement
NAFTA	North American Free Trade Agreement
RCEP	Regional Comprehensive Economic Partnership
RTA	regional trade agreement
TBT	technical barriers to trade
TPP	Trans-Pacific Partnership
TTIP	Transatlantic Trade and Investment Partnership
US	United States
WTO	World Trade Organization

## **Abstract**

Dispute settlement rules and procedures are an important component of so-called mega-regional trade agreements. Reacting to recurrent criticism of the legitimacy of dispute settlement in international economic law, their characteristics and innovative features are driven by two partly competing, partly overlapping concerns: to decrease the autonomy of dispute settlement mechanisms and their potential to develop into independent institutions of international public authority, and to minimise friction with existing multilateral governance mechanisms, particularly under the World Trade Organization (WTO). Given the economic and political weight of the parties involved, the means used in the European Union–Canada Comprehensive Economic Trade Agreement and the (Comprehensive and Progressive Agreement for) Trans-Pacific Partnership to address these concerns are likely to influence the development of dispute settlement provisions in future regional trade agreements, as well as negotiations to reform WTO dispute settlement.



# 1. Introduction

So-called mega-regional trade agreements establish rules between some of the world's largest economies for deep economic integration beyond existing commitments under the World Trade Organization (WTO) and often cut across continental divides.<sup>1</sup> Most of these agreements, such as the Transatlantic Trade and Investment Partnership (TTIP),<sup>2</sup> the Regional Comprehensive Economic Partnership (RCEP),<sup>3</sup> and the European Union (EU)–Japan Economic Partnership Agreement,<sup>4</sup> are still under construction. Other agreements are further advanced and have resulted in final texts. This holds true for the Trans-Pacific Partnership (TPP), whose text, following United States (US) withdrawal, was incorporated into the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP) and signed by 11 Asia-Pacific nations in March 2018,<sup>5</sup> and the

Comprehensive Economic and Trade Agreement (CETA) between Canada and the EU, which was signed in October 2016 and provisionally entered into force in September 2017.<sup>6</sup>

In addition to their economic importance, mega-regionals are relevant from a legal perspective. Given the challenges of agreeing to new rules at the WTO, mega-regionals offer insights into the direction in which large economies seek to develop existing trade rules as well as into the legal language negotiators can agree on to give form to their innovations. Consequently, mega-regionals not only serve as sources of inspiration for possible future developments in international economic governance, as would other RTAs, but also give tangible indications of what rules are acceptable for some of the major actors in their reciprocal relations.

This think piece focuses specifically on developments in mega-regionals in the field of dispute settlement.<sup>7</sup> This area has received a major boost with the conclusion of the WTO Dispute Settlement Understanding (DSU), but this development has also laid bare certain tensions. Thus, while the WTO Appellate Body has been key in judicialising international trade law and serving as an effective mechanism for compliance, its functioning has also received critical attention from WTO members, commentators, and civil society. Echoing concerns issued with respect to other dispute settlement mechanisms, criticism has focused on the role of the WTO Appellate Body as an allegedly activist lawmaker, imposing unforeseen regulatory constraints on governments (Ruiz Fabri 2016; Howse 2016; Tietje and Lang 2016).<sup>8</sup> Furthermore, WTO dispute settlement procedures have been criticised as secretive, closed to public participation, and

<sup>1</sup> For a definition of mega-regionals see Draper et al. (2014). Often these agreements also mirror supply chains between the continental blocks that have been called "Factory Asia, Factory North America and Factory Europe" (Baldwin and Lopez-Gonzales 2015).

<sup>2</sup> For information on the state of negotiations see Office of the United States Trade Representative (2017). For more information see also the websites of the European Commission on TTIP at <http://ec.europa.eu/trade/policy/in-focus/ttip/> and the United States Trade Representative at <https://ustr.gov/ttip>.

<sup>3</sup> RCEP is negotiated among 16 countries: the 10 members of ASEAN and 6 countries with which ASEAN has existing free trade agreements (FTAs): Australia, China, India, Japan, New Zealand, and the Republic of Korea; see Kawharu (2015).

<sup>4</sup> The EU and Japan concluded negotiations for their mega-regional in December 2017; the agreement is undergoing legal revision. See European Commission (2017).

<sup>5</sup> Trans-Pacific Partnership, signed 4 February 2016, and Comprehensive and Progressive Agreement for Trans-Pacific Partnership, signed 8 March 2018. The CPTPP incorporates by reference the provisions of the TPP unless explicitly modified or suspended; CPTPP, article 1. No provisions discussed in this think piece have been modified or suspended.

<sup>6</sup> Comprehensive Economic and Trade Agreement, signed 30 October 2016, provisionally entered into force on 21 September 2017.

<sup>7</sup> It draws on and further develops ideas first presented in Schill (2017).

<sup>8</sup> Critically on the activity of international adjudicators more broadly, see von Bogdandy and Venzke (2012).

administered by bureaucrats with little democratic legitimacy (Charnovitz 1996).

Similarly, the very existence of strong dispute settlement mechanisms in the trade context has been criticised as privileging economic interests over competing social values promoted by decisions of elected governments, whether for the protection of the environment, labour rights, or human rights (Thuong Gathii 2011; Hestermeyer 2007; Lang 2011).<sup>9</sup> This concern for external fragmentation is complemented by the risk of internal fragmentation arising out of the proliferation of RTAs with dedicated dispute settlement mechanisms (Sacerdoti 2008; Koskenniemi 2006).<sup>10</sup> These could produce divergent interpretations of international trade law, leading to less, rather than more, security and predictability for trade relations and potentially undermine the functioning of the multilateral trading regime of the WTO (Marceau and Wyatt 2010; de Mestral 2013; Bhagwati 2008).<sup>11</sup>

Mega-regionals address both of these legitimacy concerns in their dispute settlement mechanisms. As we argue in this think piece, by examining CETA and the TPP/CPTPP<sup>12</sup> (the only two mega-regionals that so far have resulted in agreed texts), mega-regionals ensure the effectiveness of dispute settlement,<sup>13</sup> while preventing the development of entrenched views and interpretations that contradict either determinations

made by the parties or interpretations developed at the WTO level. At the same time, innovations included in CETA and the TPP address criticisms that RTA dispute settlement is non-transparent by delegating key decisions to individuals chosen undemocratically who privilege economic interests over social values. The dispute settlement mechanisms in mega-regionals, therefore, are geared to address core legitimacy concerns connected with the proliferation of RTAs (Schill 2017). They seek to provide effective means to make states parties comply with the agreements' substantive disciplines, while curbing the potential for dispute settlement mechanisms to develop into independent institutions of international public authority. At the same time, they seek to minimise frictions with existing multilateral governance mechanisms, particularly under the WTO, and avoid foreclosing possibilities for the future multilateralisation of RTA disciplines within the WTO. On this basis, we conclude that the innovations agreed to in CETA and the TPP are likely to be a source of inspiration for RTA negotiations more broadly and may not only become blueprints for such negotiations, but also influence and guide negotiations to reform the WTO system. Thus, mega-regionals can contribute to shaping the future development of global trade regulation.

## 2. Effective Dispute Settlement Without Institutional Autonomy

The broad goal of dispute settlement provisions in CETA and the TPP is to allow the parties to enhance compliance with the agreements' substantive obligations. Arguably at least as important, however, is for states parties to mega-regionals to avoid dispute settlement organs either turning into independent sources of authority capable of prevailing over the will of the parties in shaping the interpretation of the agreements beyond individual cases or undermining the authority of the WTO Dispute Settlement Body,

<sup>9</sup> For views that this is less of an issue, see Trachtman (2002), Kurtz (2016), Ewing-Chow (2007), Green and Epps (2008), Barrett Lydgate (2012), and Wagner (2014).

<sup>10</sup> On RTAs, see Bartels and Ortino (2006).

<sup>11</sup> For a more positive outlook on RTAs, see Baldwin (2006) and Johnston and Trebilcock (2013).

<sup>12</sup> In the following, we only include references to the provisions of the TPP, as the CPTPP does not contain substantive or procedural provisions that differ from the TPP. Instead, the CPTPP incorporates the TPP by reference; see CPTPP, article 1.

<sup>13</sup> On the functions of dispute settlement, see McDougall (2018).

either with respect to existing WTO disciplines or in light of the interest of states in the possible future multilateralisation within the WTO of WTO-plus or WTO-extra trade disciplines included in RTAs.<sup>14</sup> While these issues may not have motivated individual negotiators or formed part of the official negotiation objectives, they correspond to the broader legitimacy concerns addressed above, which the proliferation of RTAs and the dispute settlement mechanisms they contain have raised.

Mega-regionals respond to these concerns, on the one hand, by increasing—compared with the WTO—state control with respect to dispute settlement and preventing the development of institutional preferences through the choice for arbitration, and, on the other hand, by requiring arbitrators/panellists to consider WTO dispute settlement rulings on similar matters. Furthermore, by keeping certain substantive disciplines non-justiciable through their dedicated adjudication mechanisms, the agreements contribute, depending on the subject matter in question, to either one of the same two objectives.

## 2.1 Member State Control

The essential features of CETA and TPP dispute settlement procedures are similar to those established in the DSU and in previous RTAs (Schill 2017). Only states may resort to dispute settlement. Individuals or companies that feel injured by a violation cannot invoke these provisions directly and must convince their governments to initiate proceedings, providing a first layer of state control over dispute settlement: where and when to initiate. CETA and the TPP also encourage non-adjudicatory dispute resolution and, like article 5 of the DSU, allow the use of good offices, conciliation, and mediation. CETA even goes a step further and establishes detailed mediation procedures (CETA Annex 29-C), allowing parties to conduct mediation in parallel to adjudicatory proceedings.

Even after adjudication is selected, parties must go through an obligatory consultations stage prior to requesting the establishment of an adjudication panel. At this stage, parties must “provide sufficient information to enable a full examination” of the matter of the dispute by the other party (CETA article 29.4(5)(a); TPP article 28.5(6)). Both CETA and the TPP also allow consultations with respect to proposed measures, or measures not yet in force. Since proposed measures cannot be challenged through adjudication (CETA article 29.4(8); TPP article 28.7(7)), requesting consultations at this stage allows parties to reach a negotiated solution, without adjudicatory intervention, even before the implementation of the measure begins. Still, such negotiations may be a double-edged sword: while agreed outcomes tend to be easier to implement, negotiations may also result in favouring the economically or politically stronger party as compared to a rules-based dispute settlement process.

Within panel procedures, mega-regionals establish means for governments to intervene in interpretations adopted by panels. Parties may contract out of the procedural rules themselves (CETA article 29.16; TPP article 28.12(2)). Like in the WTO (DSU article 15), panels must submit to the parties an interim or initial report, on which parties may comment, before issuing their final and binding report (CETA article 29.9; TPP article 28.17). This allows parties to provide input and correct what they see as inadequate interpretations or qualifications of fact by panels.

In addition, the TPP and CETA allow the contracting parties to jointly interpret the respective agreement authoritatively. The CETA Joint Committee may “adopt interpretations” of CETA provisions “which shall be binding” on dispute settlement panels, and the TPP Commission may issue interpretations of specific TPP provisions (CETA article 26.1(5)(e); TPP article 27.2(2)(f)). Although these interpretations are used sparingly and, given the need for consensus, tend to be particularly complicated in multilateral treaties, in the case of mega-regionals collective interpretations have already been issued. Even before the respective agreement came into force, a CETA Joint Interpretative

<sup>14</sup> On the latter aspect, see Horn et al. (2010).

Declaration<sup>15</sup> and a TPP Ministerial Statement<sup>16</sup> were issued, providing guidance for future panels on the strict limits of their review powers over domestic regulatory activity. The CETA Declaration noted that CETA was meant to preserve the ability of the parties to “regulate economic activity in the public interest,” while the TPP Ministerial Statement specified that the TPP preserved parties’ “inherent right to regulate,” including the flexibility for each party to set legislative and regulatory priorities and “preserve, develop and implement its cultural policies.”<sup>17</sup>

Once reports are issued, they create implementation obligations which, like in the WTO, are not accompanied by a duty of reparation (Vidigal 2013). This increases party control of the implementation process, allowing parties flexibility to comply only for the future. Implementation involves the establishment of a “reasonable period of time” for compliance, after which parties may request a compliance panel; in the case of continued non-compliance (whether due to inaction of the violator or to measures deemed insufficient by the panel), an aggrieved party may adopt trade retaliation. If necessary, the level of retaliation may be determined by arbitration (CETA articles 29.13–29.15; TPP articles 28.19(3)–28.21).

Like in the WTO (DSU article 22.1), in CETA and the TPP parties can negotiate temporary compensation instead of immediate compliance. The TPP permits a party found in breach to declare that it will pay a monetary assessment; the amount can be determined

by arbitration (TPP article 28.20(7)), and CETA allows a complainant to formally request compensation, in which case the respondent is required to present an offer for compensation (CETA article 29.14(10)). While this regulation of compensation may be useful for complainants, it also provides a wrongdoer with a handy alternative to compliance. To prevent this, the TPP limits the payment of monetary assessments (i.e. compensation) to a year. This is a stricter temporal limitation than that imposed by the WTO (DSU article 22.1), which only provides that compensation must be temporary. At the same time, the difficulties with implementation seen at the WTO (Davey 2009) can also be expected to exist with respect to mega-regionals, thus casting some doubt on the effectiveness in practice of this limitation.

This is particularly so, because, unlike DSU articles 3.5 and 3.7, CETA and the TPP do not require mutually agreed solutions to be consistent with parties’ obligations (CETA article 29.19; TPP article 28.2). This allows parties to reach mutually agreed solutions whereby one of them renounces rights created by the respective agreement. Adjudication panels asked to review the measure could be required to consider in their reports the mutually agreed solution rather than the text of the agreement. This reduces the multilateral aspect of even an agreement like the TPP. Moreover, even before the TPP came into force, a number of side letters had been signed between the parties; their purpose has been described as “to clarify bilateral matters between two Parties [without] affect[ing] the rights and obligations of the other TPP Parties.”<sup>18</sup>

<sup>15</sup> Joint Interpretative Instrument on the Comprehensive Economic and Trade Agreement (CETA) between Canada and the European Union and its Member States, 27 October 2016 (Official Journal of the European Union, 14 January 2017, L11/3).

<sup>16</sup> Trans-Pacific Partnership Ministerial Statement, 11 November 2017. [https://www.mti.gov.sg/MTIInsights/SiteAssets/Pages/TPP/TPP%20Ministerial%20Statement\\_11%20Nov%202017.pdf](https://www.mti.gov.sg/MTIInsights/SiteAssets/Pages/TPP/TPP%20Ministerial%20Statement_11%20Nov%202017.pdf).

<sup>17</sup> CETA Joint Declaration (n 15) para. 2; TPP Ministerial Statement (n 16) para. 4.

<sup>18</sup> This is the description offered by Canada (<http://www.international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/tpp-ptp/text-texte/instruments.aspx?lang=eng>). The legal value of these letters is unclear, as they are not referred to in the texts of the CPTPP or the TPP.

## 2.2 Deinstitutionalised Adjudication and the Authority of WTO Dispute Settlement

A common feature of these mega-regionals is the low level of institutionalisation of dispute settlement (Schill 2017). CETA and TPP panels are closer to ad hoc arbitral tribunals than to the highly institutionalised WTO panels. At the same time, these agreements seek to prevent the fate of interstate dispute settlement in the North American Free Trade Agreement (NAFTA), which became de facto non-compulsory, owing to procedural rules that allowed a recalcitrant defendant to block interstate adjudication panels by not cooperating in their composition and causing parties to revert to direct retaliation as a means of dispute settlement (Vidigal 2017). Thus, while CETA and the TPP both operate in principle based on lists of arbitrators (CETA article 29.8) or rosters of panellists (TPP article 28.11, limited to panel chairs) determined by the parties, they also establish fall-back procedures allowing the composition of panels without cooperation from the defendant (CETA article 29.7(6); TPP article 28.9(2)).

The TPP and CETA panels operate independently from each other as well as from institutions internal to the agreements. Panels are constituted ad hoc for each dispute, and there is no secretariat to provide legal or administrative assistance. Reports are final and not subject to either appeal or annulment. Thus, panels make their decisions outside of any institutional structure designed to maintain coherence, either by guiding panels during the proceedings and highlighting existing jurisprudence (as the WTO Secretariat does) or by resolving conflicts between divergent interpretations (as the WTO Appellate Body does). The result is that the divergent and incoherent interpretations that inevitably arise will coexist, without any unifying mechanism to provide them with consistency.

While this lack of structure in dispute settlement inevitably affects the legal certainty and predictability of commitments, it also prevents the emergence of an

authority for treaty interpretation independent from the states parties. Some WTO members, in particular the United States (US), have been highly critical of what they see as the WTO Appellate Body overstepping its function of applying the agreements and engaging in judicial law-making. This expression denotes not only legal interpretations that are allegedly not necessary to resolve the case at hand, but also the Appellate Body practice of referring back to its own decisions as authoritative interpretations of WTO law that is binding in future cases. Because reversing an interpretation adopted by the Appellate Body requires consensus among the WTO membership (whether by blocking adoption of a whole report or by issuing an interpretation under article IX:2 of the Agreement Establishing the WTO), the Appellate Body tends to have the last word on interpretation.<sup>19</sup> The absence of a standing adjudicator in mega-regionals, by contrast, makes the emergence of such an authoritative body of jurisprudence outside the WTO context more difficult.

At the same time, the text of mega-regionals acknowledges and protects the authority of WTO dispute settlement and is not intended to undermine the multilateral trading system. Specific provisions require panels to take into account any “relevant interpretations” in adopted WTO dispute settlement reports either in the interpretation of equivalent provisions (TPP article 28.12(3)) or as a “[g]eneral rule of interpretation” (CETA article 29.17). In addition, both agreements establish that if a party initiates a dispute to enforce an obligation that exists under both an RTA and the WTO in either forum, that party is precluded from subsequently filing a claim with respect to the equivalent obligation under the other dispute settlement mechanism (CETA article 29.3(2); TPP article 28.4(2)). While the WTO Appellate Body signals that it might disregard such a forum selection clause, because it would require

<sup>19</sup> While article IX:2 allows the issuing of interpretations by three-fourths of the membership, no decision by the WTO members has ever been made other than by consensus. See Guan (2017).

it to apply an extra-WTO treaty,<sup>20</sup> adjudicators under the respective mega-regional's dispute settlement mechanism have to heed this provision. Finally, CETA explicitly provides that a waiver adopted under the WTO produces effects over equivalent CETA obligations, and a WTO authorisation for suspending concessions and other obligations also suspends equivalent CETA obligations (CETA articles 28.10 and 29.3(4)). As a result, WTO dispute settlement reports will retain significant influence over the operation of mega-regionals, both as a source of authority in rule interpretation and as a means of settling disputes between the parties to mega-regionals.

## 2.3 Selective Judicialisation

Part of the institutional strength of the WTO dispute settlement organs stems from the fact that WTO members may, in principle, resort to adjudication with respect to any “measures affecting the operation of any [WTO] agreement.”<sup>21</sup> By contrast, the scope of dispute settlement under mega-regionals is reduced; there are whole chapters of CETA and the TPP that are non-justiciable in the sense that parties may not resort to formal dispute settlement under the mega-regional to enforce them (Schill 2017).

Under CETA, provisions that are not subject to the regular dispute settlement procedures include those on antidumping and countervailing duties (CETA article 3.7); subsidies (CETA article 7.9); decisions under the Investment Canada Act (CETA article 8.45 and Annex 8-C); competition policy (CETA article 17.4); trade and labour (CETA article 23.11(1)); and trade and environment (CETA article

24.16(2)).<sup>22</sup> Under the TPP, the list of non-actionable commitments comprises obligations on antidumping and countervailing duties (TPP article 6.8(3)); the equivalence between the sanitary or phytosanitary measures of the exporting and importing parties and the conformity of risk assessment with scientific standards (TPP articles 7.8(6) [fn 2] and 7.9(2) [fn 3]); the violation of the provisions of the WTO Agreement on Technical Barriers to Trade, which are incorporated into the TPP article (TPP article 8.4(2)); disciplines on competition policy (TPP article 16.9); cooperation and capacity building (TPP article 21.6); rules for cooperation with respect to competitiveness and business facilitation (TPP article 22.5), cooperation under the development chapter (TPP article 23.9), and cooperation on small and medium enterprises (TPP article 24.2); disciplines for regulatory coherence (TPP article 25.11); and the refusal to grant temporary entry unless as part of a pattern of practice (TPP article 12.10(1)).

A less radical limitation on the role of adjudicators is produced by provisions limiting their powers of review, as well as for self-judging exceptions for security matters (CETA article 28.6(b); TPP article 29.2(b)) and by provisions limiting the standards of review applied by the respective dispute settlement mechanism in specific areas of regulation and policy. Besides the general instruction in the two interpretative instruments for panels to acknowledge the wide regulatory freedom of the parties, the CETA Joint Interpretative Instrument mentions specific measures—such as labour and environmental criteria in regulations, government monopolies over water services, or preferences for aboriginal peoples—which panels are not to consider as contrary to the parties' obligations. In addition, both CETA and the

<sup>20</sup> See Appellate Body Report, *Mexico–Soft Drinks*, adopted 24 March 2006 (WT/DS308/AB/R), paras. 53, 78; and Appellate Body Report, *Peru–Agricultural Products*, adopted 31 July 2015 (WT/DS457/AB/R), para. 5.25.

<sup>21</sup> DSU article 4.2. See, for example, Krajewski (2003).

<sup>22</sup> Although some of these provisions are subject to specific dispute settlement rules (see further below), these enforcement possibilities are invariably less stringent than those under the ordinary dispute settlement provisions of CETA.

TPP establish that governments may intervene in the financial sector for prudential reasons (CETA article 13.16(1); TPP article 11.11(1)). On these issues, mega-regionals, thus, permit recourse to dispute settlement while limiting the panels' power to consider governmental interventions as violations.

Selective judicialisation, and similar limits on the review of state measures by the dispute settlement mechanisms in mega-regionals, can serve a variety of objectives, depending on the subject matter at play. In some cases, selective judicialisation will function principally to increase policy space for states, given that the obligations in question cannot be enforced through the formal dispute settlement mechanism of the agreement. It also prevents dispute settlement organs from imposing a legal binary view (obligation/no obligation, violation/no violation) on provisions drafted using constructive ambiguity, thereby preventing the encroachment of panels into parties' freedom to interpret and develop the treaty provisions themselves.<sup>23</sup> In other cases, selective judicialisation will serve to protect the authority of the WTO, as parties may resort to bringing disputes under the WTO DSU for breach of the parallel WTO obligation.

All in all, the various features of the architecture of dispute settlement mechanisms in mega-regionals, as contained in CETA and the TPP, discussed so far (the inclusion of procedural safeguards, provisions on the coordination with, and respect for, WTO dispute settlement, the choice for deinstitutionalised arbitration, rather than institutional adjudication, and a selective approach to judicialisation) respond to criticisms of dispute settlement mechanisms in RTAs. They not only seek to address the problem of internal fragmentation by minimising friction with

the WTO, but also prevent RTA dispute settlement mechanisms from developing into independent sites of governance. These elements tackle what has been called the internal legitimacy of dispute settlement—its legitimacy vis-à-vis participating governments (Weiler 2001). Other elements address issues of external legitimacy, or the legitimacy of decision-makers in the eyes of non-governmental entities.

### 3. Increasing the Social Legitimacy of Dispute Settlement

Besides limiting the authority of panels vis-à-vis the respective dispute settlement mechanisms, mega-regionals are designed to respond to criticism addressed to dispute settlement in trade agreements by civil society groups. These groups have challenged, in particular, the secrecy of procedures and the lack of opportunity for stakeholder involvement.<sup>24</sup> More broadly, some have questioned the strength of provisions protecting economic interests and the lack of equivalent provisions protecting other social interests (Petersmann 2000; Howse 2002). To bolster their legitimacy, CETA and the TPP seek to address both types of concern (Schill 2017).

#### 3.1 Procedural Legitimacy: Transparency and Participation

Both CETA and the TPP establish rules on transparency of procedures and participation of civil society organisations. Thus, with exceptions to safeguard information specifically flagged as

<sup>23</sup> As an example, in the WTO, it is well-known that the Appellate Body never derived any effect from article 17.6(ii) of the Anti-Dumping Agreement, which requires WTO panels to accept as lawful actions by domestic authorities resting on a "permissible interpretation" of that agreement and, in principle, should have led to a higher threshold for findings of violation.

<sup>24</sup> Although recent criticisms have often targeted investor-state dispute settlement (ISDS) provisions, in particular, the move toward transparency responds to criticisms levelled against WTO adjudication in the past and non-transparent decision-making in the WTO in general. See Guzman (2004).

confidential, all submissions presented to CETA and TPP panels, panel hearings themselves, and panel reports must be made public. Besides the usual rights of third parties to be heard in the procedures—which is relevant for the TPP—panels are also required to receive *amicus curiae* submissions from non-governmental entities located in the territory of the disputing parties (although CETA allows the parties to agree otherwise) (CETA Annex 29-A, articles 38–39 and 43–44; TPP articles 28.13(b–f), 28.14 and 28.18).

These provisions consolidate procedural innovations that were proposed at the WTO but are difficult to implement there, owing to a lack of consensus among WTO members (Lee 2017). While final reports of WTO panels and the Appellate Body are public, the DSU inherited from dispute settlement under the General Agreement on Tariffs and Trade (GATT) a culture in which inter-governmental disputes were kept away from the public eye. It still provides that panel and Appellate Body proceedings are to remain confidential (DSU articles 17.10 and 18.2 and Appendix 3.3). While parties to disputes may disclose to the public their own statements made in dispute settlement—and this has happened in a number of cases—many members, in particular developing country members, prefer to keep their submissions and arguments confidential. Mega-regionals, instead, require parties to provide their arguments to the public.

The possibility of non-governmental entities submitting *amicus curiae* briefs was originally highly contentious at the WTO, with developed countries favouring acceptance of such submissions while developing countries worried that this would tilt the scales in favour of developed countries, where most non-governmental organisations (NGOs) are based. Although the Appellate Body concluded in *US–Shrimp* that *amicus curiae* submissions could be received in DSU proceedings,<sup>25</sup> the response of WTO members in the Dispute Settlement Body was highly critical. Subsequently, *amicus* briefs have been accepted in

DSU proceedings, but have consistently been found to be immaterial to resolve disputes (Squatrino 2018).

In sum, CETA and the TPP provide that dispute settlement must take place not only before the eyes of the contracting parties, but also under the gaze of the affected public, academic observers, and NGOs. With this, they seek to increase both the accountability of panels and the legitimacy of dispute settlement.

### 3.2 Beyond Trade: Enforceable Rules on Labour and Environment

Besides increasing the transparency and openness of procedures, mega-regionals seek to address a common criticism directed at trade agreements: that they privilege economic interests at the expense of competing social values (Cass 2005; Howse and Langille 2012). Since, under free trade, production tends to be allocated wherever it is cheaper to produce, many fear that RTAs create incentives for a regulatory race to the bottom between states parties trying to reduce the cost of production by lowering the protection of workers and the environment (Hafner-Burton 2005). Given the (comparably) strong dispute settlement disciplines in trade agreements and the weakness of adjudication provisions in labour and environmental agreements, trade obligations could in practice end up prevailing over labour rights and environmental protection, even where the latter were themselves the subject of international obligations (Pauwelyn 2003).

The TPP and CETA seek to counter this criticism and increase the legitimacy of trade agreements by incorporating, and making enforceable through

<sup>25</sup> Appellate Body Report, *US–Shrimp*, adopted 6 November 1998 (WT/DS58/AB/R), paras. 99–110.

<sup>3</sup> Examples include the Andean Community; the Common Market for Eastern and Southern Africa (COMESA); the East African Community (EAC); the Economic Community of West African States (ECOWAS); the Economic and Monetary Community of Central Africa (CEMAC); and the Southern African Development Community (SADC), whose Tribunal was later suspended.

dispute settlement mechanisms, sets of labour and environmental obligations (TPP Chapters 19–20; CETA Chapters 23–24) (Schill 2017). These rules include (i) incorporation by reference of key norms of core conventions of the International Labour Organization and various multilateral environmental agreements; (ii) a clarification that good faith action pursuant to these conventions and other action taken to fulfil labour and environmental objectives are not violations of the trade disciplines; (iii) a prohibition on using derogations and waivers of labour and environmental norms to encourage trade and investment; and (iv) an affirmative obligation for parties to enforce their own labour and environmental regulations.

Importantly, the labour and environmental chapters in CETA and the TPP are enforceable through dispute settlement. In the TPP, this enforcement takes place in the same manner as the enforcement of other TPP provisions, meaning that in case of non-compliance with panel reports, trade retaliation is available as a sanction (TPP articles 19.15(12) and 20.23(1)). By contrast, CETA sets up specific sets of rules for dispute settlement in these areas. In CETA, specialised panels of experts may be requested to assess compliance with labour and environmental obligations. But these expert reports only lead to implementation obligations requiring cooperation between the parties, rather than allowing trade retaliation in case of non-compliance (CETA articles 23.10 and 24.15).

The different dispute settlement options for labour and environmental provisions in the TPP and CETA correspond less to substantive disagreement about the importance of these chapters than to different approaches taken by the US on the one hand and the EU on the other hand to the issue of how to promote non-trade objectives. While the US concentrates (or at least has in the past) on providing effective mechanisms for enforcing labour and environmental obligations, the EU focuses on creating opportunities for cooperation (Bartels 2008). While both allow for formal dispute settlement mechanisms, the approach in the TPP arguably has greater bite in making states comply with the underlying competing concerns.

## 4. Conclusion: Mega-Regionals and Reform of International Trade Dispute Settlement

Inter-state dispute settlement provisions in mega-regionals are carefully crafted to balance the need of contracting parties for an effective compliance mechanism with the desire to limit both overreach of the dispute settlement mechanism into sensitive areas of public policy and undermining the existing multilateral trading regime. By constraining and controlling the powers of dispute settlement panels, contracting parties in CETA and the TPP seek to ensure that the states remain masters of the treaties.

The relevance of these innovations will depend to some extent on the actual use parties make of the inter-state dispute settlement provisions in these agreements. Experience with RTA dispute settlement indicates that contracting parties continue settling their trade disputes in the WTO rather than under RTAs (Vidigal 2017). This may change, though, in particular, with respect to so-called WTO-plus and WTO-extra provisions contained in mega-regionals.<sup>26</sup> While a party may wish to preserve its own policy space when drafting an agreement, a prospective complainant will look for the system in which the respondent will be given the least leeway to escape its commitments. Still, the lack of institutionalised dispute settlement mechanisms under mega-regionals would arguably allow WTO members to multilateralise those rules in the future more easily, possibly using centralised institutional mechanisms (perhaps even RTA panels assisted by the WTO Secretariat)<sup>27</sup> to enforce these rules, given that no institution around which vested interests coalesce is created.

<sup>26</sup> See Horn et al. (2010).

<sup>27</sup> See Gao (2018).

At the same time, the importance of mega-regionals is not exhausted by the trade relations they regulate directly. The text developed in these agreements will tend to be carried on to other RTAs the respective countries sign, leading to the consolidation of these rules in international practice. Paradoxically, the most immediate effect of CETA and TPP innovations could be to consolidate, and provide a “hard” treaty text for, transparent and open procedures that, at the WTO, either have been blocked by reticent members<sup>28</sup> or have been accepted but have a thin legal basis.<sup>29</sup>

Other innovations are more daring, in particular the incorporation of labour and environmental obligations. The growing acceptance of these themes in treaties primarily concerned with the regulation of international trade means that further RTA negotiations may include or remove some flexibilities, but they can hardly be expected to backtrack entirely on the incorporation of these topics into international economic regulation. Whether these non-trade obligations are going to be enforced in practice, however, remains to be seen.<sup>30</sup>

<sup>28</sup> On the difficulties with including transparency provisions in the DSU, see Davey (2006).

<sup>29</sup> This is particularly the case with respect to amicus curiae briefs; see Squatrito (2018).

<sup>30</sup> In the sole RTA labour dispute to be adjudicated so far, under the Dominican Republic-Central America FTA (CAFTA-DR) (signed 5 August 2004, entered into force 1 March 2006), the panel dealing with enforcement of labour rights in Guatemala found that demonstrating a breach of the agreement’s labour obligations required showing both recurring and sustained violations of labour rules and a specific causal link between these recurring and sustained violations and a competitive advantage granted to an employer or employers. See *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 (14 June 2017), paras. 190, 505. Key labour and environmental obligations in CETA and the TPP are phrased similarly to the corresponding obligation in the CAFTA-DR (CAFTA-DR articles 16.2 and 17.2; CETA articles 23.4 and 24.5; TPP articles 19.5 and 20.3). If similarly strict standards are applied in future litigation on CETA and TPP non-trade obligations, panel reports may expose poor practices and lack of law enforcement in these areas and that the facts do not allow them to find that a violation has taken place.

Future RTAs may also be expected to go beyond mega-regionals and further develop the regulation of the more innovative topics included in CETA and the TPP and currently not subject to dispute settlement, including disciplines on competition and regulatory coherence. Once parties have advanced in the political interpretation of commitments and the establishment of necessary exceptions, these rules may be seen to be ripe for enforcement by adjudication panels.

Finally, in the overall picture, CETA and the TPP may be key stepping stones in the reform of the WTO. The negotiating arm of the organisation has been paralysed by a lack of consensus among the members, coupled with fears that anything that is agreed upon will immediately be subject to enforcement through dispute settlement, with purposefully vague statements of intentions being interpreted with legal rigour by the Appellate Body. While the development of international trade rules since 1995 has occurred largely through RTAs, until 2016 most post-WTO negotiated RTAs governed essentially asymmetric large economy-small economy relations or relations between developing economies. Mega-regionals are a key turning point, as they offer rules, including on dispute settlement, that large economies are prepared to adopt and make enforceable vis-à-vis each other. In the case of the TPP, these rules have also been accepted by widely different economies, such as Australia, Japan, Mexico, and Viet Nam.

Missing from mega-regionals signed so far are, most blatantly, the four largest emerging economies: Brazil, China, India, and the Russian Federation. One of the presumable original goals of mega-regionals was precisely to consolidate, at the regional level, rules proposed by the US and the EU at the WTO that the emerging economies either rejected or accepted only subject to advances in other areas, such as agricultural subsidies. The US disengagement from rule development following the election of Donald Trump, coupled with difficulties in agreeing on the appointment of new Appellate Body members at the WTO (Shaffer et al. 2016), may mean that mega-regionals become means for other countries to maintain, through a different medium, the rules-

based international trading system. While short-term developments in the field have become difficult to predict, in the long term re-multilateralisation remains a logical outcome, with mega-regionals providing blueprints for new legal developments at the WTO.<sup>31</sup> In the field of dispute settlement, in particular, re-multilateralisation would not only lead to objectively more legitimate procedures that apply between all WTO members, but also—if innovations such as rules on labour and environment and their enforcement are multilateralised—could revolutionise the regulation of the global economy.

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<sup>31</sup> See Cottier (2015) and Messenger (2016).

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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.

