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Regional Trade Agreement Dispute Settlement Mechanisms: Modes, Challenges and Options for Effective Dispute Resolution

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Abbreviations

ASEAN	Association of Southeast Asian Nations
BIT	bilateral investment treaty
CEMAC	Economic and Monetary Community of Central Africa
CETA	Comprehensive Economic and Trade Agreement
CJEU	Court of Justice of the European Union
COMESA	Common Market for Eastern and Southern Africa
CUSFTA	Canada–United States of America Free Trade Agreement
DESTA	Design of Trade Agreements
DSB	Dispute Settlement Body
DSM	dispute settlement mechanism
DSU	Dispute Settlement Understanding
EAC	East African Community
ECOWAS	Economic Community of West African States
EEC	European Economic Community
EFTA	European Free Trade Association
EU	European Union
GATT	General Agreement on Tariffs and Trade
MAS	mutually agreed solution
NAFTA	North American Free Trade Agreement
RTA	regional trade agreement
SADC	Southern African Development Community
WTO	World Trade Organization

Executive Summary

The ongoing deadlock in multilateral trade negotiations and the strain on the dispute settlement mechanism (DSM) of the World Trade Organization (WTO) mean that regional trade agreements (RTAs) will likely continue to grow in importance along with the number of their standalone DSMs in use. In this context, the study of their design and effectiveness has taken on new significance. The incremental legalisation and judicialisation of RTA DSMs has tracked closely similar developments in multilateral dispute settlement. This evolution reflects a continuous effort to improve the avenues available to resolve disputes while calibrating a careful balance between retaining state flexibility and control on the one hand, and the degree of delegation of resolution to neutral third parties on the other hand.

The result is that modern RTA DSMs usually contain a common set of core features, with variations reflecting the nature of the relationship between the parties, the depth and breadth of the substantive commitments, and regional experiences and preferences. The common features fall into six categories: the initiation of disputes (standing, scope of coverage, choice of forum); methodology of dispute resolution (negotiation, mediation, adjudication); procedures for adjudication (including selection of adjudicators, time limits, appellate review); implementation and enforcement (remedies, surveillance); openness to others (third parties, transparency, amicus submissions); and institutional arrangements (political bodies, standing tribunals, secretariats). There are a number of ways to design each of these features to achieve the correct balance between different objectives.

Despite the effort put into the creation of increasingly sophisticated RTA DSMs, they remain largely underused relative to the growing scope of their subject matter and country coverage. While underuse does not necessarily mean they are ineffective, there may be several explanations for lack of recourse to RTA DSMs, including underreporting, the numerous and important benefits of pursuing dispute settlement in the multilateral forum of the WTO, and certain design constraints or institutional limitations of RTA DSMs. However, aging WTO substantive rules combined with the increasingly cumbersome WTO DSM might begin to change the calculation of whether to take future disputes to RTA DSMs. In anticipation of this potential increased use and to ensure availability of the widest range of options for trade dispute settlement, the RTA Exchange could support a number of steps to make RTA DSMs more accessible and effective. For example, information and policy options could be developed to improve the design and architecture of existing and new RTA DSMs, facilitate information exchange about the use of RTA DSMs, and increase the level of support made available to RTA DSMs.

1. Introduction

Over the past several decades there has been a dramatic proliferation of regional trade agreements (RTAs),[1] accompanied by an almost equal proliferation of dispute settlement mechanisms (DSMs). With the ongoing deadlock in multilateral trade negotiations, RTAs are expected to remain the focal point of the development of new trade rules, at least for the foreseeable future, with more RTAs including obligations that are so-called WTO-plus (more onerous versions of existing World Trade Organization (WTO) disciplines) and WTO-extra (new disciplines on issues not in the WTO). It is, therefore, likely that RTA DSMs will grow in importance and frequency of use, giving the study of their design and effectiveness new significance.

The design of RTA DSMs has evolved over time, tracking closely developments of multilateral mechanisms for dispute settlement. Variations in the design of RTA DSMs reflect different political, economic, and cultural factors. Among other things, this may include the nature of the relationship between the parties, the depth and breadth of the substantive obligations of the RTA, and regional preferences. Experience in multilateral and regional dispute settlement has influenced the design of RTA DSMs, which in turn will affect the future behaviour of states. However, despite the growing number and sophistication of RTA DSMs, for a variety of reasons they are not used very often or effectively.

The objective of this paper is to review the design features and use (or non-use) of RTA DSMs to better understand the explanations for, and consequences of, certain design choices. Section 2 reviews previous evaluations of RTA DSMs and the data that have emerged from these evaluations. Section 3 briefly surveys the evolution of RTA DSMs, highlighting some of the considerations driving developments. Section 4 looks at some of the basic considerations that may influence design choices. Section 5 identifies the design features most commonly found in RTA DSMs. Section 6 explores the factors that might explain current levels of (non-) use of RTA DSMs. The concluding section suggests several practical initiatives to support efforts to improve the design, operation, and use of RTA DSMs, both those currently existing and in the future.

[1] For the purposes of this note, the shorthand "RTA" is used to refer to any trade agreement between countries, whether it is bilateral, multi-country, or cross-regional.

2. Previous Evaluations and Existing Data Sets on Regional Trade Agreement Dispute Settlement Mechanisms

The growth of RTAs since the 1990s has generated with it efforts to evaluate and understand the operation and effectiveness of their associated DSMs. Early studies generally involved descriptive or qualitative reviews of hand-picked samples of RTAs that provided valuable insights into high-level trends (see McCall Smith 2000; Donaldson and Lester 2009; Porges 2011; Jo and Namgung 2012). The first comprehensive empirical study was conducted in 2013 by the WTO Secretariat, based on a manual review of the 226 RTAs that had been notified to the WTO at the time of the study (Chase et al. 2013). This was quickly followed by the Design of Trade Agreements (DESTA) project, which analysed 589 RTAs according to 30 hand-coded variables and a variety of text-mining techniques (Dür, Baccini, and Elsig 2014; Allee and Elsig 2015).

Most recently, the Mapping Bilateral Investment Treaties (BITs) initiative expanded its BIT database to include trade agreements, allowing for computational analysis of large numbers of RTAs to identify variations over time and across regions (Alschner,

Seiermann, and Skougarevskiy 2017). The Mapping BITs project has not yet conducted an analysis of RTA DSMs, but it has made machine-readable versions of 284 RTAs publicly available for further analysis based on techniques that might involve hand coding, text mining, and analyses of textual similarities.[2]

These projects, and the mutually supportive approaches each has employed, have provided a rich analytical framework and accompanying data sets to evaluate qualitatively and quantitatively the various features of RTA DSMs. As interest in RTA DSMs grows, this framework and data set can be further improved and mined for insights into the factors that affect state preferences in the design of RTAs and correlate these with outcomes. This note is not based on original analysis of the existing data set but instead is intended only to summarise and consolidate the conclusions from these previous studies regarding the essential features of RTA DSMs to pave the way for more comprehensive evaluations in the future.

3. A Brief History of Regional Trade Agreement Dispute Settlement Mechanisms

The evolution of RTA DSMs is inseparable from that of international trade dispute settlement more generally. While trading nations have for centuries found ways to resolve their trade differences, the seeds of modern approaches to dispute settlement can be found in Articles XXII and XXIII of the General Agreement on Tariffs and Trade (GATT) 1947. Calling for disputes between GATT contracting parties to be resolved through diplomatic consultations and negotiations, these two basic provisions laid the foundation for a process of experimentation that eventually led to the methodology of dispute settlement that today serves both the multilateral trading system and RTAs. While the original GATT diplomatic approach ultimately proved incapable of resolving more difficult disputes (Hudec 1978, 14), it provided states with iterative experiences and confidence with formal mechanisms for the peaceful settlement of trade disputes (Robles 2006, 4–10).

The next major innovation came with the establishment in 1958 of the European Economic Community (EEC), which eventually became the European Union (EU). The EEC inherited from the European Coal and Steel Community the European Court of Justice, which eventually evolved into the Court of Justice of the European Union (CJEU), a standing tribunal that had compulsory jurisdiction and an effective enforcement mechanism. Over the next few decades, partly in response to the weaknesses of the GATT approach of unenforceable ad hoc panels composed largely of diplomats, the EU/CJEU model inspired several regional integration projects, including the European Free Trade Association (EFTA) and several African and Latin American initiatives,[3] to include institutionalised standing tribunals (Porges 2010, 472).

Between 1958 and 1995, RTA DSMs were based on either the GATT diplomatic model or the EU/CJEU standing tribunal model (Porges 2010, 472; Chase et al. 2013, 13). The GATT model, however, continued to evolve incrementally through a succession of agreements and procedural understandings (Hudec 1993), culminating in the 1989 decision on "Improvements to the GATT Dispute Settlement Rules and Procedures" (GATT 1990). The arrival of the Canada–United States of America Free Trade Agreement (CUSFTA) in 1988, the North American

[2] Available at https://github.com/mappingtreaties/tota.

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

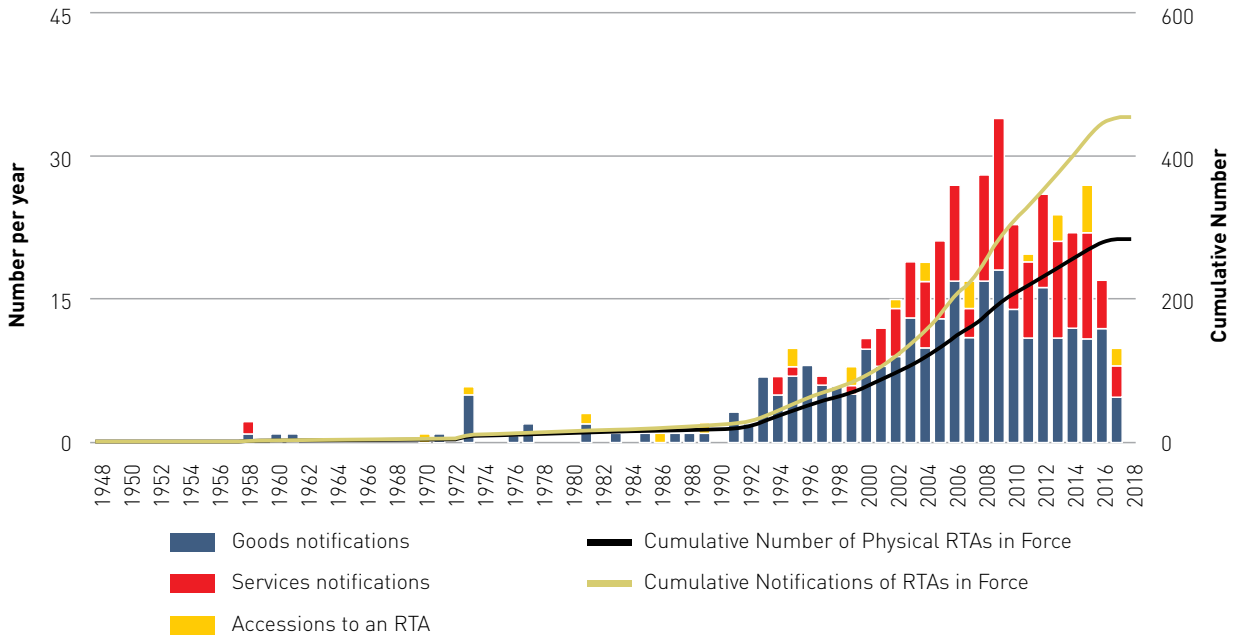
Free Trade Agreement (NAFTA) in 1994, and the entry into force of the WTO, with its Dispute Settlement Understanding (DSU), in 1995 all contributed to the consolidation of an adjudicative model based on ad hoc arbitration.

The evolution from the early GATT diplomatic model to the NAFTA/WTO arbitration model involved an incremental process of legalisation and judicialisation,[4] which was a response to experiential learning as well as changes in the substantive nature of RTAs (McCall Smith 2000; Bezuijen 2015; Elsig and Eckhardt 2015). As RTAs moved beyond traditional border measures and intruded further into domestic lawmaking, more effective approaches to dispute resolution were required to guarantee that the benefits of deeper commitments would be realised (Chase et al. 2013, 17–19; Allee and Elsig 2014). Successive innovations gradually eliminated any remaining opportunities to block the process, leading to greater security, predictability, and enforceability. After 1995 there was an explosion of RTAs (see Figure 1), the DSMs of which have almost all been based on the core features of the NAFTA/WTO model (Chase et al. 2013, 13–15).

Figure 1.

Regional trade agreements currently in force (by year of entry into force), 1948–2018

Source: Regional Trade Agreements Information System (RTA-IS) database, http://rtais.wto.org/.



Note: Notifications of RTAs: goods, services, and accessions to an RTA are counted separately. Physical RTAs: goods, services, and accessions to an RTA are counted together. The cumulative lines show the number of notifications/physical RTAs currently in force.

[4] The term "legalisation" refers to the "increase in the use of formal legal rules to regulate a particular domain", while the term "judicialisation" refers to the "increase in enforceability through adjudication and the possible authorisation of sanctions by an independent third party" (De Bièvre and Poletti 2015, s3; see also Abbott et al. 2000).

The experience between 1947 and the present highlights three different stages in the development of mechanisms to settle trade disputes. First, the approach of the early GATT DSM provided political and diplomatic means to resolve many kinds of disputes but turned out to be insufficiently robust to resolve more intractable disputes. Second, the standing tribunal model of the EU/CJEU introduced powerful and innovative mechanisms for enforcement, often involving recourse by non-state actors, but it required elaborate institutional arrangements and entailed a greater surrender of sovereignty to international institutions. Finally, ad hoc arbitration based on the NAFTA/WTO model emerged as a compromise that is less expensive and reserves more control for states, but that can become paralysed by trapdoors in the design or hampered by the lack of institutional support.

It has become common to classify RTA DSMs as adhering to one of these models to reflect their degree of legalisation and judicialisation (Allee and Elsig 2015, 323; De Bièvre and Polletti 2015, s3). However, distinguishing between approaches based on single features often leads to arbitrary classification of otherwise similar DSMs into different categories. For instance, other than very early agreements, most RTA DSMs contain both diplomatic and legal mechanisms, and most disputes, in fact, are resolved through negotiated settlement, sometimes even after legal proceedings have been initiated (Koremenos and Betz 2012; Allee and Elsig 2014, 33). Given the increasing sophistication and differentiation of RTA DSMs, it is perhaps more instructive to evaluate them according to the existence and operation of specific features to better understand the implications of certain DSM design choices. The next two sections identify the main considerations in the design of DSMs and the main features that have emerged in modern RTA DSMs.

4. Considerations in the Legalisation and Judicialisation of Dispute Settlement Mechanisms

The degree of legalisation and judicialisation of trade DSMs can be evaluated based on at least two, sometimes contradictory, considerations. First, governments have sought to improve continuously the contribution that DSMs make in promoting settlement of disputes. Second, governments have simultaneously sought to strike a balance between state control (flexibility) and delegation to neutral third parties (autonomy). Different emphasis on these two considerations may explain some of the variation in the features of RTA DSMs, as observed over time and among modern agreements.

4.1. Settlement Promotion

Trade DSMs help solve two categories of cooperation problems between states in their trade relations: information provision and enforcement (Koremenos and Betz 2012; von Stein 2013; Allee and Elsig 2015). First, information problems may arise when there is ambiguity about the meaning of the obligations or uncertainty about state behaviour. By providing new information to parties, DSMs can help settle disagreements about the interpretation of the rules or the nature and operation of measures taken by other parties.

Second, if breaches of RTA obligations are established, DSMs can provide a range of mechanisms for enforcement of compliance (Allee and Elsig 2015). DSMs are often judged primarily according to the strength of their enforcement function. Given that very few disputes involve unambiguous breaches of obligations, and even fewer disputes ever engage enforcement mechanisms, this may be misplaced (Maggi and Staiger 2008; Vidigal 2017, 945). An emphasis on the "enforceability" of DSMs treats the

process as essentially a legal one for the benefit of the complaining party, neglecting a much richer story about the nature of trade disputes and how they are settled.

4.2. Degree of Delegation

The development of DSMs, in trade relations as much as in other fields of international cooperation, has also involved the increasing delegation of authority to neutral third parties (arbitrators, adjudicators, and supporting institutions) to pursue a resolution according to a predefined process (Abbot et al. 2000, 415–18; Allee and Elsig 2015, 341). The desire of states to have effective DSMs may, however, be tempered by an unwillingness or inability to cede too much control to third parties. DSMs, therefore, reflect a calibrated balance between, on the one hand, state flexibility and control over dispute settlement and, on the other hand, the autonomy and effectiveness of neutral third parties to whom the resolution of disputes is delegated.

There are a number of ways states may try to preserve flexibility and control in the design of DSMs, such as exclusions from jurisdiction, control over adjudicator appointments, opportunities to block procedures or to comment on draft adjudicator reports, and limits on the selection of sanctions. While these features are often considered design errors, which in some cases may be true, they may also reflect deliberate and legitimate policy choices.

The two considerations of settlement promotion and delegation are not necessarily on opposite ends of a single spectrum (see Figure 2), but they do interact directly with each other and may sometimes even conflict. For example, effective enforcement may require a state to cede more control, but more autonomous third-party adjudication may actually impede amicable information sharing. The various design features of RTA DSMs can be evaluated according to whether and how they reflect these considerations.

5. Features of Modern Regional Trade Agreement Dispute Settlement Mechanisms

The design features of modern RTA DSMs can be divided into six categories: initiation, method of settlement, procedures for adjudication, enforcement, openness, and institutional arrangements.

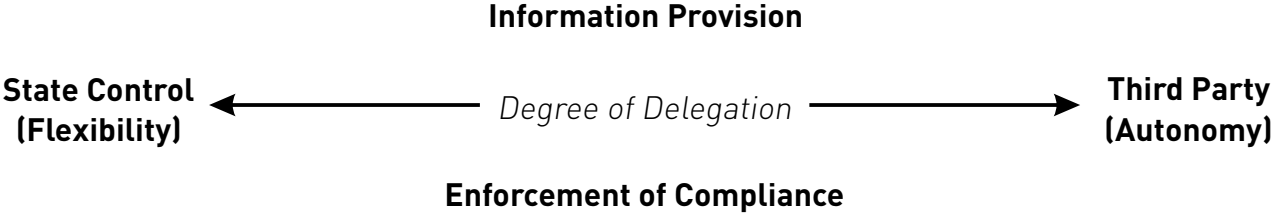
5.1. Initiation of a Dispute

Several features of an RTA may affect which trade irritants get brought before a formal DSM. These include who can bring a dispute (standing); whether an issue is subject to the DSM (scope of coverage);

Figure 2.

Dynamic interaction between settlement and delegation

Source: Author



and whether the RTA DSM is the appropriate forum (choice of forum).

- Standing: the vast majority of modern RTAs provide only for state-to-state dispute settlement, reserving dispute initiation to governments. Some regional integration initiatives, such as the EU and the Andean Community, through direct effect in national legal systems, empower non-state entities to bring claims. Some also grant standing to institutions of the RTA itself to initiate claims (Chase et al. 2013, 23). Denying non-state actors the opportunity to initiate claims directly allows governments to maintain control over which matters get challenged.

- Scope of coverage: not all RTAs provide recourse to formal dispute settlement for every area covered by the RTA. Some exempt entire subjects, especially newer areas of coverage, such as labour, environment, and competition. Others may limit the scope of formal dispute settlement in other ways, such as by specifying whether it applies only to interpretation. RTAs can either specify to which areas the DSM applies or which areas are excluded from the DSM (Porges 2011, 476; Chase et al. 2013, 20; Allee and Elsig 2015, 339). States may use exceptions and exemptions to reserve flexibility for policy action in politically sensitive areas.

- Choice of forum: recourse to an RTA DSM may be affected by restrictions on the choice of forum, which usually involves the relationship with the WTO DSM given the frequent overlap with, and incorporated references to, WTO obligations. An RTA may establish one of three options: give exclusive priority to one forum or the other; permit an initial choice of forum that then becomes exclusive for that dispute ("fork-in-the-road"); or permit use of both DSMs (Porges 2011, 476–8; Chase et al. 2013, 21). Initially, the proliferation of RTAs raised concerns about forum shopping, but except in rare cases, this has not turned out to be a significant problem. Most RTAs adequately address concerns about forum shopping (Allee and Elsig 2015, 331).

5.2. Method of Dispute Settlement

Approaches to dispute settlement can be distinguished by whether they are bilateral in nature, leaving the parties to arrive at a resolution on their own, or whether they delegate some degree of authority for dispute settlement to a neutral third party.

5.2.1 Bilateral/political/diplomatic (negotiations and consultations)

Almost all RTA DSMs provide mechanisms for the parties to solve disputes through amicable negotiation and consultations, with many indicating that mutually agreed solutions (MAS) are the preferred outcomes. Some RTAs, especially those in Asia and the Americas, even encourage an MAS after an adversarial process has been initiated (Chase et al. 2013, 24; Allee and Elsig 2015, 325). Despite the increasing legalisation and judicialisation of RTA DSMs, mechanisms for bilateral diplomatic efforts to resolve disputes remain an important, albeit perhaps less well-documented, component of effective dispute settlement.

5.2.2 Delegation to a third party (mediation, conciliation, and adjudication)

As already indicated, the evolution of RTA DSMs can be seen as a continuous process of experimentation and incremental improvement to mechanisms for involving neutral third parties in the dispute settlement function. Since most RTA DSMs include some form of delegation, the main distinctions generally relate to the nature and extent of the delegation, which is an important reflection of how much flexibility and control states reserve for themselves (Abbot et al. 2000, 416; Allee and Elsig 2015, 341). Delegation can include mediation and conciliation and adjudication.

- Mediation and conciliation: most recent RTA DSMs, especially those in Asia and the Americas, but much less so in Europe, include some form of mediation or conciliation that involves the

appointment of a third party to help the parties arrive at an MAS.[5] Unlike bilateral consultations, which are often mandatory, mediation is usually voluntary and confidential. These mechanisms normally complement, but do not replace, other methods of dispute settlement. While some RTA DSMs simply refer to the right to have mediation, others, such as the Association of Southeast Asian Nations (ASEAN) and the Comprehensive Economic and Trade Agreement (CETA), set out more elaborate procedures. Given the confidential nature of most mediation procedures, it is difficult to ascertain how often they take place or how effective they are at resolving disputes (Porges 2011, 489–90; Allee and Elsig 2015, 326).

- Adjudication: almost all modern RTA DSMs include some form of compulsory and legally binding adjudication, which involves neutral third-party determinations based on the adversarial presentation of argument and evidence.[6] While most forms of adjudication are based on the same rules-based methodology to interpret and apply RTA obligations, variations in how the adjudication operates can affect their effectiveness (see section 5.3). Most modern RTA DSMs resort to ad hoc panels of three to five panellists appointed only for the purposes of a specific dispute. Some RTAs, mostly those involving more ambitious regional integration projects established before 1995, refer disputes to permanent standing tribunals, such as the CJEU, Court of Justice of the Andean Community, East Africa Court of Justice, and Caribbean Court of Justice (Chase et al. 2013, 25; Allee and Elsig 2015, 327).

In addition to whether the adjudication is ad hoc or permanent, design features related to the proceedings, enforcement mechanisms, and institutional arrangements can all influence settlement promotion and the level of delegation of an RTA DSM.

5.3. Features of Procedures for Adjudication

RTA DSMs contain a number of common design features in the procedures for adjudication, especially that conducted by ad hoc panels. Variation may reflect different regional experiences and preferences, the number of parties in an RTA, or a reluctance to delegate too much authority to third parties (Chase et al. 2013, 13–20; Allee and Elsig 2014, 20–31; Bezuijen 2015). The choices made in the design of each of these features will affect the effectiveness and enforceability of the RTA DSM:

- Referral to adjudication: overcoming one of the main flaws in the early GATT panel process where one party could unilaterally block referral to arbitration, most RTA DSMs now provide the automatic right of panel establishment or referral to a tribunal (De Bièvre and Poletti 2015, s3).

- Selection of adjudicators: a variety of techniques are employed to ensure that a party cannot delay a dispute by holding up appointments of the adjudicator(s). Most RTA DSMs provide for initial consultations between the parties, failing which arbitrators (or sometimes just the chair) are appointed either by lot or by an appointing authority, if one exists. Since very few RTAs have institutional support or natural appointing authorities, some refer to an external authority, but this practice is uncertain and, therefore, still rare (Porges 2011, 485; Chase et al. 2013, 25–7; Allee and Elsig 2015, 332–3; Lester et al. 2018).

[5] The difference between mediation and conciliation is in the degree of proactivity of the third party in finding an agreeable solution.

[6] A distinction is usually made, especially in domestic legal systems, between "arbitration" (ad hoc determinations based on discreet and often private contractual obligations) and "adjudication" (determinations made by courts on the basis of a wider system of law). Since the features that distinguish these two terms can be blurred in the context of international trade relations, the term "adjudication" is used in this note to encompass all types of neutral third-party determinations based on an adversarial process.

- Rules of procedure and evidence: rules of procedure have become increasingly detailed and prescriptive in an effort to facilitate the process once a dispute has commenced. However, rules of evidence and common approaches to effective fact-finding remain undeveloped. Leaving the procedural rules to be established only once a dispute has been initiated may create uncertainty and diminish the appeal of the DSM (Porges 2011, 480).

- Time limits: subject to some regional differences, the majority of RTA DSMs now include specific time limits for various stages of disputes. While experience has shown most deadlines to be unreasonably short, their existence can provide momentum that increases a DSM's enforceability (Porges 2011, 481; Chase et al. 2013, 30; Allee and Elsig 2015, 335).

- Interim review: allowing parties the opportunity to review panel reports before their public issuance is a controversial practice, occurring in about a third of RTAs that have adjudication, all of them involving ad hoc arbitration mechanisms, and none in standing bodies. Interim review is more common in RTAs in Asia and the Americas but nonexistent in European RTAs (Porges 2011, 481; Chase et al. 2013, 30; Allee and Elsig 2015, 334).

- Appellate review: while providing for a second-level review of adjudicator findings can ensure greater coherence in results over time, maintaining such a system can be expensive and time-consuming. As a result, outside regional integration agreements, very few RTA DSMs provide for appeal (Porges 2011, 481; Chase et al. 2013, 30–31).

- Dissenting opinions: encouraging dissenting opinions among arbitrators can provide more nuanced jurisprudence over time. Some RTA DSMs with ad hoc panels explicitly allow dissents, but none of those with standing tribunals and none involving the EU allow it (Allee and Elsig 2015, 334).

- Adoption and status of reports: the difficulty in early GATT practice of having adjudicator reports adopted has largely been addressed in most RTAs, which grant reports binding legal status either automatically or through some form of automatic adoption. A minority of RTAs still allow parties to block final reports. More ambitious regional political integration initiatives may allow for adjudicative decisions to create direct liability for states (Allee and Elsig 2015, 336).

5.4. Implementation and Enforcement

Once an adjudicator's report is final and acquires binding legal status, an RTA DSM may provide different options to enforce implementation of the results:

- Remedies: the most common remedy available in RTA DSMs is the authorisation of retaliatory tariffs. Some RTAs also allow for monetary sanctions or compensation, mostly found in United States RTAs and some EU RTAs, and often in side agreements that provide for the funds to be used to assist in achieving regulatory compliance (Porges 2011, 490–91; Chase et al. 2013, 36–8; Allee and Elsig 2015, 337–9).

- Selection of sanctions: RTA DSMs reveal more variation in the rules and procedures for determining the appropriate amount and form of retaliation. Many provide for a sequence, involving first an attempt to reach agreement, and then allowing the complainant to establish the amount, and in some cases referral to third-party arbitration. Some agreements (especially in Asia, but less so in the Americas) allow for cross-retaliation (Chase et al. 2013, 39; Allee and Elsig 2015, 338).

- Monitoring and surveillance: some RTAs, especially those involving multiple countries, may provide for mechanisms for monitoring and surveillance of compliance by political bodies.

They may also provide mechanisms for further compliance review of implementation measures (Porges 2011, 488; Chase et al. 2013, 34; Vidigal 2017, 935).

5.5. Openness to Others

One trend in the evolution of RTA DSMs is an increasing degree of interaction of the DSM with non-parties and non-state actors, intended in part to give the outcomes broader social legitimacy. Variation in these mechanisms may reflect different regional and domestic experiences and preferences as well as the number of parties to the RTA.

- Third parties: while bilateral trade agreements rarely allow for non-parties to participate in dispute settlement proceedings, most multi-country RTAs provide other parties to the RTA some level of participation, if only to provide views on systemic and interpretative issues (Chase et al. 2013, 41).

- Transparency: it is becoming more common, especially in RTAs that involve North American and European countries, to make all or part of dispute settlement proceedings open to the public in some format as part of an effort to demystify and legitimise international adjudication. Most RTA DSMs with standing tribunals allow for open hearings (Porges 2011, 486–8; Chase et al. 2013, 41).

- Intervenors/amicus curiae: RTA DSMs that explicitly provide for amicus curiae briefs to be submitted by third countries and non-state actors are rare but growing in frequency (Porges 2011, 487; Chase et al. 2013, 41).

5.6. Institutional Arrangements

Very few RTAs have established extensive institutional arrangements to support the DSM. The absence of such arrangements may reflect a reluctance to establish new international institutions or concern about the costs associated with maintaining them. Permanent institutions are more likely to be created for RTAs with more parties or with regional integration ambitions. The institutional arrangements can, nonetheless, significantly influence the operation and effectiveness of the DSM.

- Joint committees/dispute settlement bodies: the political body of an RTA may participate in the resolution of disputes through either direct involvement in consultations or a formal role in the establishment of panels and adoption of reports. The involvement of political bodies, especially those in RTAs with more parties, may also contribute to resolution due to the reputational costs associated with the public profile given to non-compliance under a monitoring and surveillance regime (Chase et al. 2013, 42; Vidigal 2017, 935).

- Standing tribunals: outcomes may be more coherent and consistent, promoting more security and predictability, when adjudication is conducted by standing tribunals. However, standing tribunals are costly and may pursue separate institutional interests, making states reluctant to delegate too much authority. As a result, very few RTAs have standing tribunals (Porges 2011, 471–3; Chase et al. 2013, 27–8; Allee and Elsig 2014, 15).

- Secretariats: in addition to permanent adjudicators, permanent secretariat support to DSMs, of both an administrative and legal kind, can ensure a more consistent and predictable process and more coherent outcomes. Secretariats may also be granted autonomous surveillance functions and independent power to initiate enforcement proceedings. For similar reasons that RTAs do not have standing tribunals, most RTA DSMs do not have permanent secretariats, other than for mailbox functions (Porges 2011, 479; Chase et al. 2013, 43).

- Costs: in the absence of institutional arrangements for tribunals and supporting

secretariats, the costs for which would generally be shared among all parties, disputes brought before RTA DSMs need to be funded on a case-by-case basis. This raises the complexity of administering and funding ad hoc adjudication, diminishing its attractiveness in many disputes, especially if there are alternative options available (Porges 2011, 479–80; Chase et al. 2013, 45).

6. Factors Affecting the Use of Regional Trade Agreement Dispute Settlement Mechanisms

The apparent paradox of RTA DSMs is that, despite the creation of increasingly elaborate mechanisms to resolve disputes over what may be WTO-plus and WTO-extra obligations, these mechanisms do not appear to be used very often (Chase et al. 2013, 46–9; Vidigal 2017, 928).[7] This may be for several reasons:

6.1. Incomplete Information

One explanation may simply be that there is incomplete information about the actual number of disputes brought before RTA DSMs. There is no central registrar for disputes pursued under RTAs, and most RTA DSMs do not have well-developed institutional support structures to disseminate results widely. The results of informal settlement mechanisms, such as mediation, may be confidential (Chase et al. 2013, 46). RTAs may also have different traditions of transparency, and even when dispute results are published, they may be in only local languages, limiting wider distribution (Ghatti 2010; Gomez-Mera and Molinari 2014; Alter and Helfer 2017). As a result, there may, in fact, be far more RTA dispute settlement activity than is currently considered by the wider community to be the case.

6.2. Effectiveness Without Use

Even if actual use is less than expected, this does not mean that RTA DSMs are ineffective. The repeated interactions and closer ties that take place within the framework of an RTA and that are backed up by the prospect of a formal dispute may contribute to avoiding disputes or facilitating their resolution outside of formal mechanisms (Koremenos and Betz 2012). It may be that RTA DSMs were never meant to be used as the primary forum for dispute settlement, but instead amount to a form of "reinsurance" against an eventual weakening of the WTO (Froese 2014). The effectiveness of RTA DSMs, therefore, needs to be understood in terms broader than just the successful completion of formal legal disputes.

Nonetheless, there do seem to be proportionately fewer formal disputes than might be expected given the number and scope of RTAs with DSMs. The fact that 20 percent of the disputes pursued in the WTO are between parties to RTAs with DSMs confirms that disputes do still arise between RTA parties (Vidigal 2017, 929–32). Understanding the factors that underlie this relatively lower usage may, therefore, help improve the design and operation of future RTAs.

6.3. The World Trade Organization Option

One of the most important considerations is likely the option to have the dispute settled in the WTO. There are many reasons for a state, when faced with a choice of forum, deciding to bring a dispute to the WTO instead of the RTA DSM:

- Scope of coverage: some RTAs, especially older ones, may have a narrower scope of coverage than

[7] The widely accepted conclusion that there is very little dispute settlement activity under RTA DSMs applies mostly to traditional RTAs that focus on economic relations. The DSMs of more ambitious regional integration initiatives, such as the EU and the Andean Community, see much more frequent use. See, for example, Gomez-Mera and Molinari (2014) and Alter and Helfer (2017).

the WTO, or may contain explicit deferrals to the WTO for some subject areas, such as sanitary and phytosanitary measures, technical barriers to trade, trade remedies, and intellectual property. In these cases, going to the WTO may be the only option (Chase et al. 2013, 20; Allee and Elsig 2015, 328–9).

- Nature and appointment of the adjudicators: bringing a dispute to the WTO provides for a larger pool of neutral panellists, compared with panels established under an RTA that often include representatives of the parties. With the option for involvement of the WTO Director-General, the appointment of panellists may also be more streamlined and guaranteed than in an RTA (Lester et al. 2018).

- Effective and proven procedures: the dispute settlement procedures in the WTO are familiar, tested, and proven. There is a high degree of certainty about the process to be followed to take a dispute from consultations, through adjudication, and to enforcement. Some RTA DSMs, especially older ones, may have design flaws (or features) that allow responding parties to block or delay certain stages or may simply not have enough practice to generate confidence about how a dispute will proceed (Porges 2011, 480–81; Vidigal 2017, 932).

- Exploiting or setting precedents: the large body of WTO case law, and informal tradition of adhering to precedent, makes it easier to predict the outcome of a dispute in the WTO. Conversely, bringing a dispute to the WTO provides an opportunity to set precedents that may be relevant in trade relations beyond the RTA parties (Busch 2007; Vidigal 2017).

- Benefits of multilateralising the dispute: dispute settlement proceedings in the WTO provide an opportunity to form broader alliances or mobilise third-party support. The reputation of the WTO may lend the results more legitimacy, and airing the dispute in the Dispute Settlement Body (DSB) may entail greater reputational costs, both of which might improve the chances of securing full compliance (Vidigal 2017).

- Institutional support and costs: few RTA DSMs have experienced secretariats to provide the kind of administrative and legal support provided by the WTO Secretariat. The costs of WTO dispute settlement are shared among all members, while in most RTAs the parties pay the costs of adjudication on a case-by-case basis. For some WTO members, technical assistance is available through the Advisory Centre on WTO Law (Porges 2011, 479; Chase et al. 2013, 43).

When there is a choice between pursuing a dispute at the WTO or in an RTA DSM, these considerations may push states to the WTO option. However, even when there is no WTO option (for example, when a dispute involves RTA obligations not contained in the WTO), these weaknesses may still affect the decision to initiate a formal dispute. The absence of proven procedures, the ability of a responding party to delay or block a given step, or the absence of administrative and legal support may all make a party to an RTA reluctant to initiate a formal dispute under the RTA instead of pursuing alternative options, including unilateral self-help.

6.4. Prospects for Future Use

These considerations may change in the future, at least for more recent DSMs that have fixed some of the design flaws in earlier versions, leading to increased recourse to RTA DSMs. Factors that may drive change include the following:

- Full implementation: many RTAs are relatively new, with many obligations still being phased in, especially in sensitive sectors. More disputes may arise as these RTAs achieve full implementation.

- WTO-plus and WTO-extra RTA obligations: there may be no choice but to go to the RTA DSM in areas that are WTO-plus or WTO-extra, especially if they involve significant new obligations in sensitive sectors.

- Overburdened WTO: the WTO DSM is increasingly under strain (Azevedo 2015; WTO 2018). If the

delays in WTO DSM become significant, whether caused by political, institutional, or practical reasons, there may be an increased incentive to use RTA DSMs, despite all the benefits offered by the WTO DSM.

7. The Way Forward: Options for Improving Dispute Settlement in Regional Trade Agreements

The continued difficulty in adopting new trade rules at the multilateral level will cause RTAs to grow in importance as a venue for governing international trade relations. As new WTO-plus and WTO-extra obligations in more recent RTAs become fully implemented and as the WTO DSM struggles to cope with increased demand amid institutional constraints, recourse to currently untested RTA DSMs may increase.

In preparation for this potential increased use and to help governments ensure they have the widest range of options for settling their trade disputes, a number of steps could be taken to make current and future RTA DSMs more accessible and effective. Information and policy options can be developed with at least three objectives in mind, including to improve the design and architecture of existing and new RTA DSMs, information exchange about the use of RTA DSMs, and the level of support made available to RTA DSMs.

7.1. Promoting Optimal Design and Architecture

States currently negotiating new RTAs or improving existing RTAs might benefit from having access to detailed information and analysis of the design and architecture of DSMs, based on evaluations of the experiences of existing RTA DSMs. This might include the development of (1) guidance on optimal design to support informed policy choices about the operation, advantages, and disadvantages of specific features of DSMs; and (2) annotated model RTA DSM provisions, rules of procedures, and other supporting operational material.

7.2. Fostering Information Exchange about Use

More information about the current use of RTA DSMs (to the extent that information is not confidential) would assist others in how to design better substantive provisions and to understand the impact on state behaviour of various features of DSMs. This might be accomplished by (1) the development of a central repository of information about disputes in different RTA DSMs; and (2) further analysis of the kinds of design features and other factors that lead to successful DSM use and resolution of disputes.

7.3. Improving Support for Resolving Disputes

Given that individual RTA DSMs often do not justify the development of separate institutional structures, most DSMs suffer from capacity problems. Recommendations could be developed for options to provide pooled support infrastructure to RTA DSMs. Such options might include (1) support, on a cost recovery basis, from the WTO Secretariat; (2) referral to existing arbitration organisations or other centres; or (3) support through the pooling of resources across RTAs.

The RTA Exchange could act as a convener for discussion and a clearing house of the information and analysis set out in the first two recommendations, and for an evaluation of ideas on how states can cooperate to achieve the third recommendation.

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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.