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Addressing interstate dispute settlement concerns in mega-regional agreements

by Geraldo Vidigal, **Stephan W. Schill**, May 2018

The stalemate in WTO Appellate Body appointments may help bring to life dispute settlement in “mega-regional” trade agreements, such as the EU-Canada Comprehensive Economic Trade Agreement (CETA) and the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP). These agreements innovate, with respect to previous regional trade agreements, to address criticisms of overreach by adjudicators, of privileging economic interests over social ones, and of fragmenting trade rules. But can these adjustments assuage concerns over their legitimacy?

Over the past decade, major negotiated outcomes at the World Trade Organization (WTO) have not been forthcoming. In order to forge new rules for global trade and investment, large economies that previously traded between themselves on the basis of WTO rules have negotiated “mega-regional” economic agreements. While they have established stronger rules and ventured into areas unexplored at the WTO level, mega-regionals have also aroused concerns. Some worry that these agreements will displace the WTO as the central decision-making forum for international trade issues. In addition, the legitimacy of these agreements has been contested, largely on the grounds that they privilege economic interests over other concerns, allow unelected decision-makers to override the decisions made by democratically elected governments, and further develop the law governing them without sufficient control by the contracting parties.

Zooming in on dispute settlement mechanisms in the CPTPP and CETA

While much of the criticism has focused on investor-state dispute settlement, concerns have been voiced about interstate dispute resolution as well. Our paper, [Reforming Dispute Settlement in Trade: The Contribution of Mega-Regionals](#), examines how these latter rules, which are principally used to resolve trade disputes, reflect and address legitimacy concerns. It examines the two mega-regional agreements signed to date: the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP), signed by 11 Asia-Pacific nations on 8 March 2018, and the Comprehensive Economic and Trade Agreement

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(CETA) between the European Union (EU) and Canada, which provisionally entered into force in September 2017.



Both mega-regionals faced an uphill battle for signature and ratification. The CPTPP was the solution found by parties to enable the Trans-Pacific Partnership (TPP), originally signed in 2016, to survive after President Trump's **withdrawal**. The CPTPP incorporates most of the TPP by reference, except for several provisions championed by the United States, such as enhanced protection for intellectual property rights. CETA, too, faced major public criticism, both in Canada and the EU, and is still to survive constitutional challenges before Germany's Federal Constitutional Court and the **Court of Justice of the European Union**.

Addressing concerns over legitimacy and fragmentation

Criticism of mega-regionals has differed depending on the actors voicing it. Parties negotiating the agreements were worried about the prospect of creating another layer of international governance capable of developing the new rules beyond the original intentions, simultaneously fragmenting international trade rules and displacing the WTO as the key forum for addressing global trade challenges. Non-parties, in particular civil society groups, were concerned about the legitimacy of these agreements, mentioning the lack of transparency of decision-making processes, the alleged preference they give to economic values over social values, and their supposed ability to prevent democratically elected governments from carrying out policies in the public interest.

The interstate dispute settlement mechanisms in CETA and the TPP/CPTPP address the concerns of both parties and non-parties. For the parties, CETA and the TPP/CPTPP enhance their control over the outcome of disputes. Dispute settlement is carried out by arbitrators (CETA) or panels (TPP) selected for each dispute, without support from a permanent secretariat. Additionally, parties have broad scope for reaching negotiated outcomes, either before or after adjudication. These include authoritative interpretations by treaty-based bodies, but also bilateral solutions between disputing parties. This "light" institutional structure prevents the dispute settlement mechanism from establishing its own authority over the agreements. It strengthens the authority of the parties to the agreements and prevents new institutions from coming into being as counterweights to the WTO Dispute Settlement Body.

Additionally, not all matters covered by CETA or the TPP/CPTPP can be submitted to arbitrators or panellists. While at the WTO all rules are subject to dispute settlement, mega-regionals establish rules for new areas, such as competition policy or regulatory cooperation, that cannot be enforced through dispute settlement. Instead, parties must reach negotiated solutions in these fields. Even before mega-regionals entered into force, the parties issued joint interpretations (on CETA and the CPTPP) stressing that the agreements are meant to preserve the right of parties to regulate in the public interest. Finally, the agreements

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require arbitrators/panels to take into account decisions made within the WTO in interpreting similar provisions. This does not prevent the fragmentation of trade rules through divergent interpretations and maintains the WTO as the principal locus for developing the multilateral trade regime.

Since civil society groups are in large measure concerned with preserving the ability of states to regulate, some of the features that increase state control over the agreement should also assuage concerns about the overreach of adjudicators into regulatory issues. With the goal of increasing the legitimacy of dispute settlement procedures, CETA and the TPP/CPTPP establish that hearings should in principle be open to the public and require parties to publicise their submissions, as well as decisions issued by panels/arbitrators. Besides having access to the procedures, civil society groups are able to participate in the proceedings through *amicus curiae* submissions.

CETA and the TPP/CPTPP also seek to address concern about their inherent bias favouring economic liberalisation over competing social values. Once more, this is in part achieved by reducing the scope for adjudicators to override governmental regulatory decisions. Additionally, mega-regionals feature obligations concerning environmental protection and the preservation of labour rights. These obligations are subject to dispute settlement by panels, with a requirement that panellists possess specialised expertise, rather than being purely trade lawyers. And, while CETA adopts a more cooperative approach to implementation, under the TPP/CPTPP a party that violates its environmental and labour commitments is subject to trade retaliation.

The prospect of increased use of these dispute settlement mechanisms

It is still too soon to tell whether these features will appease civil society groups, some of which mistrust the very idea of economic agreements among states. With respect to trade, restrictions on judicial review, together with concerns about the predictability of procedures and quality of decisions, may mean that complainants will continue to favour the WTO where they can. At the same time, the existence of **WTO-plus** and **WTO-extra** rules in mega-regionals, coupled with the prospect of a non-operational WTO Appellate Body if the current stalemate over appointments continues, could lead to a greater use of dispute settlement mechanisms in mega-regionals than has been seen in other trade agreements. Paradoxically, this increased use of mega-regionals, with parties showing greater confidence in their dispute settlement mechanisms, could serve to increase civil society concerns about their legitimacy.

*This post is derived from the paper **Reforming Dispute Settlement in Trade: The Contribution of Mega-Regional Trade Agreements** commissioned by ICTSD under the **RTA Exchange**, jointly convened with the Inter-American Development Bank (IDB). The paper*

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