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- *Regional trade agreement dispute settlement is prejudiced by the lack of a support structure for panels.*
- *Using an external body – as proposed in the EU-Japan Economic Partnership Agreement – is a cost-effective way of addressing this issue.*
- *Using a court of arbitration – such as the Permanent Court of Arbitration – could remedy another weakness: the absence of a recognisable brand for decisions.*

As commentators in this space have noted, the WTO dispute settlement system is under challenge. Unless WTO members overcome the stalemate over appointments, from December 2019 the Appellate Body will be *de facto* non-operational. WTO members will still be able to initiate disputes and obtain panel reports but, unless the parties agree on an alternative appeals procedure, any party will be able to derail the proceedings by appealing the report.

One alternative for settling trade disputes is adjudication under Regional Trade Agreements (RTAs). RTA dispute settlement has attracted little litigation so far, in part because many bilateral relations that engender WTO litigation, in particular EU-China, US-China and US-EU, are not covered by RTAs, and some RTAs (US-Korea, North American Free Trade Agreement (NAFTA), Australia-New Zealand) have carve-outs or weak dispute settlement clauses.

In other cases, however, the low usage of RTA dispute settlement relates to lack of certainty with respect to the operation and concrete utility of RTA adjudication. Diplomats and industries considering whether to resort to RTA dispute settlement may be concerned, on the one hand, with the predictability of proceedings and legal quality of decisions, and on the other hand with the effectiveness of decisions in the sense of producing concrete effects on the conduct of the other party.

This post argues that both defects can meaningfully be addressed by having an external body provide support to RTA panels. Besides options such as using the WTO secretariat or creating a new organisation, parties should consider using an established "court of arbitration" for this purpose.

Considering an external body: the court of arbitration model

The EU-Japan Economic Partnership Agreement (EPA), whose preliminary text was released in April 2018, explicitly allows the parties to "entrust an external body with providing support for certain administrative tasks for the dispute settlement procedures" (Article 21.25(2)). The reference to an "external body" implies not the creation of a fully-fledged secretariat for the agreement but the use of a separate, independent structure. This avoids the expenses of an RTA-specific secretariat while providing the benefits of specialised assistance to RTA panellists/arbitrators.

A number of options can be considered for this external body. Conceivably, assistance could be provided by the WTO secretariat itself, although this would seem to require at least consensus among WTO members (which appears unlikely under the present circumstances). Support could also be provided by a unified Trade Dispute Settlement Registry (TDSR), separated from the WTO (in terms of legal form, the model for this could be the Advisory Centre for WTO Law, instituted by its own treaty). This TDSR would become economically viable if sufficient RTAs referred to it and dispute settlement under RTAs took off.

Another possibility is to use existing "courts of arbitration": institutions that, despite being called courts, do not employ full-time judges. Instead, they provide administrative and legal support to adjudicators

deciding disputes under various legal regimes. Among these institutions are the Permanent Court of Arbitration (PCA) in The Hague, the International Court of Arbitration of the International Chamber of Commerce (ICC) in Paris, the London Court of International Arbitration and the Arbitration Institute of the Stockholm Chamber of Commerce.

The PCA would be the most logical option. It has a budget paid for by states, an established, time-tested and flexible set of procedural rules, and expertise in case management. Its current workload concentrates on disputes under investment agreements and the United Nations Convention on the Law of the Sea, but the PCA is flexible enough to have assisted the Eritrea-Ethiopia Claims Commission on war reparation in the 2000s, the 2016-2018 Timor-Leste-Australia Conciliation Commission, and the 2003 Eurotunnel Arbitration.

The PCA is not a stranger to trade agreements. In fact, several RTAs already refer to PCA rules for the composition of trade panels as well as for standard procedural rules. Among these are the Cotonou Agreement and the Montenegro-Ukraine Free Trade Agreement, as well as nine RTAs signed by the European Free Trade Area (EFTA), with Canada, Albania, Colombia, Montenegro, Ukraine, Serbia, Bosnia and Herzegovina, Costa Rica and Panama, and the Gulf Cooperation Council. And, although there has been no public litigation on these agreements so far, there is evidence that the PCA has provided support in at least one trade arbitration, which resulted in a 2010 arbitral award issued under the Southern African Customs Union (SACU) Agreement (kept confidential by the SACU council of ministers).

The brand effect

Besides providing secretariat and composition of adjudicators assistance, a court of arbitration provides adjudication with a less palpable, but highly relevant, benefit: the "brand" of the court. Court-supported awards are often referred to as decisions "of" the PCA, of "The Hague Tribunal," or of the "Paris Arbitral Tribunal." Association with a recognised entity may be even more important for trade decisions than it is for arbitral awards. Given that dispute settlement in trade focuses on substantive compliance and not on monetary remedies that can be enforced in domestic courts, association with a recognised brand increases the symbolic power of the decision and the reputational costs of non-compliance.

This effect would be strengthened if various RTAs were to employ the same brand, "multilateralising" to a degree RTA adjudication. Whereas non-compliance with the report of an *ad hoc* panel is unlikely to affect relations between the violator and third countries, non-compliance with a report backed by an institution may raise eyebrows among trade partners whose agreements with the violator rely on the same institution for enforcement. And, while the degree of public awareness and multilateral concern that is generated by a WTO ruling is difficult to match, a public, PCA-backed decision will tend to produce significantly stronger effects than the decision of an *ad hoc* RTA panel.

The Hague and Geneva

A significant advantage of the WTO is the fact that governments can concentrate their trade personnel in Geneva, where they may not only follow adjudication proceedings but also conduct parallel negotiations and keep abreast of developments in the field. For developing countries and least developed countries, even attending and keeping up with the work of the various trade committees in Geneva is a challenging task. Having trade dispute settlement take place elsewhere, even in a place such as The Hague where other dispute settlement proceedings take place regularly, could unnecessarily complicate matters.

This invites two possible responses. First, PCA arbitral tribunals are not required to sit in The Hague. Arbitral tribunals have a large measure of control over their procedures and hearings can take place anywhere. The Chagos Arbitration (Mauritius v United Kingdom) tribunal, for example, held hearings in Dubai, Istanbul, and The Hague. Second, the PCA already has overseas offices, including hearing facilities, in Singapore and Mauritius, and has host country agreements with a number of other PCA contracting parties. Signing a similar agreement with Switzerland, possibly leading to an office in Geneva if RTA

adjudication takes off, seems relatively simple.

"Administrative" and "legal" support

A final question concerns the extent to which the PCA, or another institution, will be able to provide the sort of legal support to panels/arbitrators that makes WTO adjudication attractive. The PCA – like other institutions that host arbitral tribunals – usually has a limited role in assisting tribunals with substantive issues. Besides providing registrar and secretariat services, PCA legal personnel may scrutinise awards for errors and inconsistencies that could lead to the award being challenged. But arbitrators often employ their own legal assistants, who respond to the individual members of the tribunal employing them rather than to the PCA as an institution. This inevitably affects the degree to which tribunals diverge from previous jurisprudence.

In this respect, two outcomes are possible. One is that RTA parties establish, or request the PCA to establish, a division capable of providing the stability offered by WTO dispute settlement divisions, employing full-time personnel responsible for assisting panels/arbitrators. Given that the PCA currently employs 20 assistant legal counsel, 10 legal counsel, and seven senior legal counsel, it is likely that it has the capacity to provide high-quality legal assistance, mirroring the way in which the WTO secretariat assists panels. The other possibility is that RTA parties actually decide to move away from the WTO adjudication model, giving RTA panellists more freedom to make legal interpretations *ex novo* and diverge among themselves (even when adjudicating on similarly worded provisions in different RTAs), to the detriment of security and predictability.

Some may consider the latter option to be a step back when compared to the more highly institutionalised and predictable model of WTO adjudication. But there are signs that parties themselves could prefer this. One is that the vast majority of RTAs, including recent ones, foresee *ad hoc* arbitration with even less institutional support than PCA adjudication – indirectly allowing for greater interpretative divergence.

Another sign is the criticism by some WTO members, in particular the United States, of what they see as excessive reliance by WTO panels and the Appellate Body on interpretations made in previous reports. The logic behind this criticism is that panels should in each dispute listen to the parties' arguments (which may be different from those made previously) and provide the best interpretation of the treaty in light of these arguments.

The third sign is the very wording of the relevant provision in the EU-Japan EPA, involving two large economies which are not usually critical of WTO dispute settlement. The EPA specifies that the external body should provide "support for certain administrative tasks." Under the Dispute Settlement Understanding, the WTO secretariat "assist[s] panels, especially on the legal, historical and procedural aspects of the matters dealt with" (Art 27.1) and the Appellate Body secretariat provides "administrative and legal support" to the Appellate Body (Art 14.7). The more restrictive wording of the EPA may indicate a preference for divergence from the WTO model.

Looking forward

If they wish to make RTA dispute settlement a credible alternative to WTO adjudication, parties to RTAs may consider entrusting a common institution to support panels/arbitration. While establishing a new institution could provide advantages in terms of flexibility, it would also require parties to different RTAs, with different interests and models in mind, to reach an agreement. The ensuing mechanism would have to build its reputation. Existing institutions such as the PCA already provide this service, are paid for by states, and have both the expertise and the reputation that make a supporting organisation attractive.

Arbitration institutions would do well to consider moving first in this regard and preparing a set of standard rules on trade disputes, such as exist for environmental and outer space disputes, taking into

account the substantive and institutional provisions of at least the main RTAs. Given its status as an intergovernmental organisation, the PCA is particularly well placed to take up this task. Other institutions, including the main international arbitration institutions, could take advantage of their greater flexibility, including by establishing offices where the main participants to trade disputes are located. Since part of the benefits of institutionalised dispute settlement require a single institution to administer procedures under various RTAs, once an institution is selected for this purpose in some of the main RTAs, it is likely that others will follow.

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