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Mapping of Dispute Settlement Mechanisms in Regional Trade Agreements – Innovative or Variations on a Theme?

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Abstract:

Regional trade agreements (RTAs) have become an indelible feature of the international trading landscape. Most, if not all, RTAs contain provisions that establish procedures for resolving disputes among their signatory members. Yet, the design and functioning of these dispute settlement mechanisms (DSMs) and, more specifically, how they differ from the WTO dispute settlement system remain relatively unexplored. Existing academic literature has primarily focused on the narrow issue of jurisdictional conflict between DSMs of RTAs and the WTO dispute settlement system. Literature mapping out and classifying systematically the DSMs of RTAs is more limited. This research paper goes beyond considering the issue of jurisdictional conflict between the multilateral and "regional" regimes. We map out the DSMs in RTAs that have been notified to the WTO and were in force at the end of 2012, and consider a typology of these DSMs based on their nature and design. We also use the data obtained from our mapping exercise in two ways. First, we identify trends and patterns of use, either regionally or by individual countries, of the different types of DSMs in RTAs. Trends are analysed in relation to five key factors: (i) evolution over time, (ii) level of economic development, (iii) regional characteristics, (iv) level of integration (partial scope agreement, free trade agreement or customs union), and (v) configuration (bilateral or plurilateral). Second, we undertake a "nuts and bolts" analysis of the DSMs of RTAs by examining their approach to various issues in international dispute settlement. Our aim is to draw conclusions about the extent to which the predominant type of DSM in RTAs has features that are different from those of the WTO dispute settlement system.

Keywords: Dispute Settlement, Regional Trade Agreements, RTAs, Dispute Settlement Mechanisms, WTO Dispute Settlement

JEL classification: F13, F15, F53, K33

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1 INTRODUCTION

Regional trade agreements (RTAs)[1] have become an indelible feature of the international trading landscape. The number of RTAs has not only increased exponentially over the years, but their content has also evolved over time. In particular, RTAs have become quite expansive in their regulatory coverage, moving from the reduction of tariffs to behind-the-border issues such as the harmonization of standards, and further, to so-called "WTO-extra" (WTO-X) issues such as competition and investment.[2] Moreover, the enforcement mechanisms established by RTAs have increasingly shifted from politically-oriented procedures, to more sophisticated, legalistic forms of dispute settlement.

Most, if not all, RTAs contain provisions that establish procedures for resolving disputes among their signatory members. There is, however, a lack of uniformity in the design of these dispute settlement mechanisms (RTA-DSMs). A large body of academic research has focused on possible jurisdictional conflict between RTA-DSMs and the WTO's dispute settlement mechanism (WTO-DSM).[3]

Academic literature mapping out and classifying systematically the DSMs of RTAs is more limited. Yet, an understanding of the design of RTA-DSMs is important for a number of reasons.

First, the relationship between international trade dispute settlement at the WTO, and at the bilateral and plurilateral level under RTAs, can be more fully explored by considering the extent to which RTA-DSMs have features that are similar to, and different from, those of the WTO dispute settlement system. These differences may reflect a range of divergent views among WTO Members as to what the dispute settlement rules should be, as well as new thinking about the best approach to certain issues based on experience.[4] Second, a comparative analysis of the design of dispute settlement mechanisms might provide causal explanations of forum choice, i.e., the choice that RTA members make in electing to pursue a claim at the bilateral or plurilateral level, or instead at the multilateral level through the WTO dispute settlement system. Third, RTA-DSM design is, to some extent, a reflection of the manner in which RTA parties think about how the balance between treaty compliance and domestic regulatory autonomy should be struck. Some have suggested in this connection that more legalistic dispute settlement procedures tend to augur well for improved RTA compliance, while less legalistic dispute settlement procedures tend to reserve more domestic policy space for RTA members.[5] Thus, by tracking the design of RTA-DSMs, it might be possible to discern the extent to which States' perception of the dispute settlement function has evolved over time. Finally, observing the trends in the design of RTA-DSMs might provide useful indicators or predictors of the type of DSM likely to be included in future RTAs.

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[1] In this paper, the term "regional trade agreements" (RTAs) is used to refer to agreements that have been notified to the WTO under Article XXIV of the GATT 1994; Article V of the GATS; or paragraph 2(c) of the WTO Decision on "Differential and More Favourable Treatment, Reciprocity and Fuller Participation of Developing Countries" (Enabling Clause).

[2] See WTO Secretariat, "World Trade Report 2011 – The WTO and Preferential Trade Agreements: From Co-existence to Coherence" (WTO, 2011).

[3] See e.g. J. Hillman, "Conflicts between Dispute Settlement Mechanisms in Regional Trade Agreements and the WTO – What Should the WTO Do?" (2009) 42(2) *Cornell International Law Journal* 193; S. Yang, "The Key Role of the WTO in Settling its Jurisdictional Conflicts with RTAs" (2012) 11(2) *Chinese Journal of International Law* 281; K. Kwak and G. Marceau, "Overlaps and Conflicts of Jurisdiction between the World Trade Organization and Regional Trade Agreements", in L. Bartels and F. Ortino (eds.), *Regional Trade Agreements and the WTO Legal System* (Oxford University Press, 2006) 465-524; E.U. Petersmann, "Proliferation and Fragmentation of Dispute Settlement in International Trade: WTO Dispute Settlement Procedures and Alternative Dispute Resolution Mechanisms", in J. Lacarte and J. Granados (eds.), *Inter-Governmental Trade Dispute Settlement*: *Multilateral and Regional Approaches* (Cameron May, 2004) 417-483; G. Marceau and J. Wyatt, "Dispute Settlement Regimes Intermingled: Regional Trade Agreements and the WTO" (2010) 1(1) *Journal of International Dispute Settlement* 67; and C. Henckels, "Overcoming Jurisdictional Isolationism at the WTO-FTA Nexus: A Potential Approach for the WTO" (2008) 19(3) *European Journal of International Law* 571.

[4] V. Donaldson and S. Lester, "Dispute Settlement", in S. Lester and B. Mercurio (eds.), *Bilateral and Regional Trade Agreements, Commentary and Analysis* (Cambridge University Press, 2009) 367-414, at 367.

[5] See J. Smith, "The Politics of Dispute Settlement Design: Explaining Legalism in Regional Trade Pacts", (2000) 54(1) *International Organization* 137, at 147-150. Smith accounts for varying levels of legalism in RTA-DSMs through a theory of trade dispute settlement design based on a domestic political trade-off between treaty compliance and policy discretion.

At the end of our examination of the universe of RTA-DSMs, we arrive at a paradox. Together with the proliferation of RTAs, there has been a proliferation of RTA-DSMs. But while dispute settlement provisions are included in RTAs as a matter of course, the number of actual government-to-government disputes formally initiated within RTAs is very small. The vast majority of RTA-DSMs have not been used at all, at least in the sense of formal disputes having been initiated in such fora.[6] In fact, RTA partners continue to have recourse to the WTO dispute settlement mechanism to resolve disputes between them.[7]

Our examination of the 226 RTA-DSMs notified to the WTO also finds that the degree of innovation in their design is limited. The design of most RTA-DSMs that adopt a model based on third party adjudication follows a structure that is similar to the WTO panel process. These RTA-DSMs generally consist of a consultations stage, followed by arbitration-like third party adjudication[8], and an implementation stage. Departures from WTO panel procedures are relatively few. With few exceptions, the level of institutionalization of RTA-DSMs is far lower than that of the WTO dispute settlement mechanism. The other significant departures we have identified concern transparency, implementation procedures, and remedies. Some RTA-DSMs require more transparency than the WTO's Dispute Settlement Understanding. In terms of remedies, some RTA-DSMs provide for the possibility of provisional measures and others provide for financial compensation, both of which are remedies that are generally considered not to be available in the WTO.[9] In many cases, RTA-DSMs contain shorter deadlines than the DSU. Nevertheless, it is difficult to determine whether these shorter deadlines are not aspirational until such deadlines are tested in actual cases. A small number of RTA-DSMs include provisions that would seem to have been intended to resolve procedural problems that have arisen in the operation of the implementation stage of the DSU. For example, some RTA-DSMs address the so-called "sequencing" issue, which concerns the sequence between a proceeding to review the consistency of a compliance measure and the right to suspend concessions or other obligations. Others have addressed the question of whether a respondent party can itself initiate a compliance review proceeding where it has taken a measure to comply after the complaining party has suspended concessions or other obligations.

Aside from these limited instances of innovation, it would seem that DSU provisions are often being replicated in RTA-DSMs. However, in some cases, such replication raises problems that already have been resolved at the WTO. The most evident example is the issue of the automaticity of the dispute settlement process and the inability of a respondent party to block the dispute from advancing to subsequent stages.[10] In particular, the negotiators would seem to have spent considerable efforts coming up with approaches to the composition of the dispute settlement panels that would limit the possibility of blockage. Under the DSU, the parties can request the Director-General to compose the panel when the parties are unable to agree on the panellists. That RTA-DSM negotiators are spending resources to resolve problems that have already been resolved in the DSU involves transaction costs and raises questions of efficiency.

This paper proceeds as follows: First, we discuss the rationale for including a dispute settlement mechanism in an RTA. Second, we consider a taxonomy of RTA-DSMs based on their nature and design. In this regard, our paper makes an empirical contribution to the study of RTA-DSMs by

[6] We do not mean to suggest that a dispute settlement mechanism is only effective if disputes are brought to it. A dispute settlement mechanism is effective if it encourages compliance, particularly when such compliance occurs without parties having to file formal disputes.

[7] See WTO Secretariat, *supra*, fn 2, pp. 175-178.

[8] Only five RTA-DSMs include an appellate stage. Three of these are classified under the quasi-judicial model and two are classified under the judicial model. See subsection 5.5.7.

[9] See WTO Secretariat, "A Handbook on the WTO Dispute Settlement System" (Cambridge University Press, 2004), p. 80. We note, however, that there have been disputes in the WTO that reportedly resulted in arrangements involving financial transfers between the parties. See e.g. the Notification of a Mutually Satisfactory Temporary Arrangement in *US – Section 110(5) of the US Copyright Act*, WT/DS160/23, 26 June 2003, and the Memorandum of Understanding between the Government of the United States of America and the Government of the Federative Republic of Brazil Regarding a Fund for Technical-Assistance and Capacity-Building with respect to the Cotton Dispute (WT/DS267) in the WTO, available at:
<http://www.state.gov/documents/organization/143669.pdf>.

[10] See W. J. Davey, "Dispute Settlement in the WTO and RTAs: A Comment" in Lorand Bartels and Federico Ortino (eds.), Regional Trade Agreements and the WTO Legal System (Oxford University Press, 2006), pp. 343-357, at 354.

classifying DSMs contained in 226 RTAs[11], in accordance with three models of dispute settlement adopted to facilitate systematic classification. Third, we identify trends and patterns of use, either regionally or by individual countries, of the different types of DSMs in RTAs. Trends are analysed in relation to five key factors: (i) evolution over time, (ii) level of economic development, (iii) regional characteristics, (iv) level of integration (partial scope agreement, free trade agreement or customs union), and (v) configuration (bilateral or plurilateral). Fourth, we undertake a detailed mapping of the key features of RTA-DSMs. Next, we consider the reasons that may explain why, despite the growing number of RTA-DSMs, so few of them actually have had dispute settlement activity. Finally, in the concluding section, we offer an overall appraisal of this universe of RTA-DSMs and compare the dominant model of dispute settlement being used in RTAs to the dispute settlement procedures set out in the WTO's Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU).

Before proceeding, we note two points about the scope and objectives of this paper. First, we focus exclusively on State-to-State dispute settlement provisions. We do not examine investor-State dispute settlement mechanisms included in many RTAs. While we may refer at times to mechanisms other than State-to-State mechanisms, we do so for comparative purposes only. Second, in reviewing the features of the different RTA-DSMs, it is not our intention to pass judgment on their effectiveness. Rather, our main objectives are to identify trends and draw comparisons among the choices made by WTO Members in the design of their RTA-DSMs.

2 WHY NEGOTIATE AN RTA-DSM AND HOW DOES THE RATIONALE INFLUENCE THE RTA-DSM'S DESIGN?

Dispute settlement mechanisms provide a means to enforce the commitments made in international trade agreements. If the commitments cannot be enforced, international trade agreements would be expected to break down or would not have been concluded in the first place.[12]

Drawing on the contractual nature of international trade agreements, the WTO World Trade Report 2007 explains how dispute settlement mechanisms contribute to the enforcement of an international trade agreement. The Report describes enforcement as a function of enforcement capacity and enforceability. It defines the former as the ability to reciprocate credibly against a violation of the terms of the international trade agreement, while the latter is made up of three components: verifiability (where the complaining party can point to a provision in the international trade agreement and prove its violation); observability (the ability to detect the infringement in the first place); and quantifiability (the ability to quantify the damage incurred as a result of the breach). Enforcement can be delegated to a neutral third party or the aggrieved party can itself seek to enforce the agreement (self-help). However, even where enforcement under an international trade agreement is predicated mostly on self-help – as is the case of the vast majority of RTA-DSMs examined in this paper – a dispute settlement mechanism plays a central role in its enforceability by making it easier to detect, prove and retaliate against violations.[13]

From an economic perspective, the rationales of an RTA-DSM and of the WTO DSU are similar.[14] Given the similarity in economic rationales, the question that arises is to what extent is an RTA-DSM necessary in the light of the existence of the GATT/WTO dispute settlement mechanism?

[11] These RTAs were notified to the WTO and were in force at the end of 2012. Our dataset is based on the physical number of RTAs that have been notified to the WTO and are currently in force (counting separate notifications of goods and services as one physical RTA).

[12] WTO Secretariat, "World Trade Report 2007: Six Decades of Multilateral Co-operation – What Have We Learned?" (WTO, 2007), pp. 155-162.

[13] Mathis has suggested that the effectiveness of an international trade agreement is not entirely predicated on the extent to which its provisions are legally enforceable. In this connection, he has noted, for example, that, while a number of RTAs include provisions for addressing anti-competitive practices that affect trade and provide for cooperation mechanisms to assist enforcement among RTA members, these provisions are commonly excluded from the dispute settlement chapters of RTAs. Nevertheless, many competition authorities have attributed the institutional development and resulting capacity of their agencies to the competition policy provisions in their important RTAs. This is not so much attributable to the "legal effect" of the provisions, but rather "their softer impact in raising the profile of a regulatory subject as a domestic priority." (J. Mathis, "From the Board: Preferential Trade Agreements - The WTO Speaks … Again" (2011) 38(4) *Legal Issues of Economic Integration* 291, at 293)

[14] Most studies of the economic rationale of the DSU are undertaken on the basis of a two-country model.

For one thing, the WTO dispute settlement mechanism may not be available to enforce deeper RTA commitments (WTO+) or commitments in areas not currently covered by the WTO (WTO-X). Once parties to an RTA need to negotiate a dispute settlement mechanism to enforce such commitments, the transactional costs of extending its coverage to commitments or areas also covered by the WTO would be low. Alternatively, the negotiation of an RTA-DSM could be motivated by a desire on the part of RTA parties to increase their enforcement capacity or the enforceability of commitments.[15] If this were indeed the motivation, one would expect to see this reflected in the design of the RTA-DSM. Such evidence could be reflected in the design of RTA-DSMs by, for example: stronger remedies; the establishment of standing adjudicating bodies to develop and apply consistently a body of RTA law; or the establishment of institutions responsible for defending RTA rights. Conversely, to the extent that the design of the RTA-DSM does not depart significantly from the design of the WTO dispute settlement mechanism, this would suggest that higher enforcement capacity or enforceability are not the main reasons behind decisions to include a dispute settlement mechanism in an RTA.

The costs of maintaining a dispute settlement mechanism and of prosecuting a case could also be relevant factors when negotiating a dispute settlement mechanism. Costs considerations would weigh in favour of ad hoc approaches to dispute settlement and would weigh against more institutionalized frameworks when the number of players is small. Based on this logic, one would expect ad hoc proceedings to predominate in bilateral agreements where only two parties would bear the costs of maintaining an institutional framework. More institutionalized frameworks would be more likely in plurilateral arrangements where the costs can be borne by more parties and where the number of potential disputes would be expected to be higher because of the larger number of parties. Indeed, one would expect there to be economies of scale when dispute settlement mechanisms are plurilateral or multilateral.

3 CONSTRUCTING A TAXONOMY OF RTA-DSMS

3.1 Previous efforts to classify RTA-DSMs

Much of the existing literature on RTA-DSMs consists of surveys of RTA-DSMs in specific regions or networks[16], or general surveys that compare the basic enforcement-related features of RTA-DSMs without classifying them in accordance with pre-defined criteria.[17]

The first systematic empirical classification of RTA-DSMs is contained in an article by Smith, published in 2000.[18] Smith's data set consists of 62 agreements and spans the period 1957-1995. While the data set used by Smith can hardly be described as narrow, it is somewhat dated and, notably, does not account for RTAs which entered into force after the creation of the WTO in 1995. Smith's typology of RTA-DSMs is based on a spectrum, at one end of which lies "diplomacy", and at the other end of which, lies "legalism". Smith classifies RTA-DSMs along this continuum, using the descriptors "none", "low", "medium", "high", and "very high" to describe the varying levels of legalism in RTA-DSMs.

[15] Arguably, the parties to an RTA may wish to lower the enforcement capacity or enforceability of a rule that is also covered by the WTO Agreement. To effect this, they would have to include a clause in the RTA foreclosing recourse by either party to the WTO dispute settlement mechanism to enforce such a rule. This situation, however, raises the issue of whether such a clause would be given effect by a WTO panel.

[16] See e.g. E. Robles, "Political & Quasi-Adjudicative Dispute Settlement Models in European Union Free Trade Agreements: Is the Quasi-Adjudicative Model a Trend or Is It Just Another Model?", Staff Working Paper ERSD-2006-09, WTO Economic Research and Statistics Division, Geneva, available at: <http://www.wto.org/english/res_e/reser_e/ersd200609_e.pdf>; L. Biukovic, "Dispute Resolution Mechanisms and Regional Trade Agreements: South American and Caribbean Modalities" (2008) 14(2) *UC Davis Journal of International Law and Policy* 255; F. Abbott, "NAFTA and the Legalization of World Politics: A Case Study" (2000) 54(3) *International Organization* 519; D. Gantz, "Settlement of Disputes under the Central America–Dominican Republic–United States Free Trade Agreement" (2007) 30(2) *Boston College International & Comparative Law Review* 331.

[17] See e.g. Donaldson and Lester, *supra*, fn 4; and D. Morgan, "Dispute Settlement under RTAs: Political or Legal?" in R. Buckley, V.I. Lai, and L. Boulle (eds.), *Challenges to Multilateral Trade: The Impact of Bilateral, Preferential and Regional Agreements* (Kluwer Law International, 2008) 241-260.

[18] See Smith, *supra*, fn 5, at 147-150. Smith accounts for varying levels of legalism in RTA-DSMs through a theory of trade dispute settlement design based on a domestic political trade-off between treaty compliance and policy discretion.

In order to classify RTA-DSMs along the spectrum of varying levels of legalism, Smith asks certain questions of each RTA-DSM considered. These questions concern: (i) the extent to which delegation is allowed to occur, i.e., the extent to which third-party adjudication is provided for; (ii) whether the result of third-party adjudication is binding; (iii) whether third-party adjudication is administered by a standing tribunal or by arbitrators that are appointed on an ad hoc basis; (iv) whether dispute settlement procedures can be initiated by treaty organs or private entities; and (v) what types of remedies are at the disposal of parties to enforce compliance with third-party rulings. If third party adjudication is not provided for in the RTA, the level of legalism is described as "none". Where third party adjudication is possible, but the result rendered by the adjudicating body is not binding, the level of legalism is described as "low". In cases where an RTA provides for third party adjudication *and* the result rendered by the adjudicating body is binding on the parties to the dispute, the level of legalism is described as "medium". Where third party adjudication is administered by a standing tribunal, the level of legalism is described as "high". Finally, in cases where an RTA allows for third party adjudication by a standing tribunal, allows treaty organs and private entities to initiate disputes (standing), and provides for sanctions prescribed by the standing tribunal, and/or the direct effect of rulings in the domestic legal system of a State party, the level of legalism is described as "very high".[19]

A more recent study by Jo and Namgung updates the statistical analysis on dispute settlement design conducted by Smith.[20] The data set consists of 221 RTAs and spans the period 1957-2008. Although Smith classifies RTA-DSMs in five categories corresponding to "none", "low", "medium", "high", and "very high" levels of legalism, Jo and Namgung simplify this spectrum by omitting its two polar extremes. Thus, the authors classify RTA-DSMs in three categories corresponding to "low", "medium" and "high" levels of legalism. The criteria used by Jo and Namgung to situate RTA-DSMs along the legalism spectrum are: (i) whether third-party review is allowed; (ii) whether third-party review has any binding legal effect; and (iii) whether there are institutionalized bodies such as standing courts. "Low legalism" refers to RTA-DSMs that do not provide for third-party adjudication, as well as those that do provide for third-party adjudication, but the result of which is not binding. "Medium legalism" refers to RTA-DSMs that provide for legally binding third-party review. Finally, "high legalism" refers to RTA-DSMs that permanently institutionalize standing courts or tribunals.[21]

A study by Porges on dispute settlement in RTAs defines three models of dispute settlement that are representative of the types of DSMs established by RTAs.[22] Porges' study is qualitative in nature, and does not entail an empirical classification of a data set of RTAs. Rather, Porges defines three broad models of dispute settlement which she posits are, in practice, the "basic options" available to RTA negotiators in determining the type of DSM to include in an RTA. Thus, these models can be understood as constituting the foundational structures of three distinct types of dispute settlement systems. RTA negotiators craft specific dispute settlement clauses around these foundational structures to establish the means by which RTA rights and obligations are clarified and enforced.

According to Porges, RTA-DSMs fall into three broad categories: (i) political or diplomatic dispute settlement; (ii) referral to an ad hoc arbitral panel; and (iii) systems administered by a standing tribunal.[23] These models, as defined by Porges, appear to be differentiated in at least two respects: First, in the extent to which delegation is allowed to occur through the referral of a dispute to a third-party adjudicator (political/diplomatic model *versus* ad hoc and standing tribunal models), and second, in respect of the nature of the third-party adjudicating body, assuming that the RTA-DSM allows for delegation of the dispute settlement function to a third-party (ad hoc tribunal model *versus* standing tribunal model).[24]

[19] Ibid., at 155-159.

[20] H. Jo and H. Namgung, "Dispute Settlement Mechanisms in Preferential Trade Agreements: Democracy, Boilerplates, and the Multilateral Trade Regime" (2012) 56(6) *Journal of Conflict Resolution* 1041.

[21] Ibid., at 1044-1045.

[22] A. Porges, "Dispute Settlement", in J. Chauffour and J. Maur (eds.), *Preferential Trade Agreement Policies for Development* (The International Bank for Reconstruction and Development/The World Bank, 2011), at 467.

[23] Ibid., at 470.

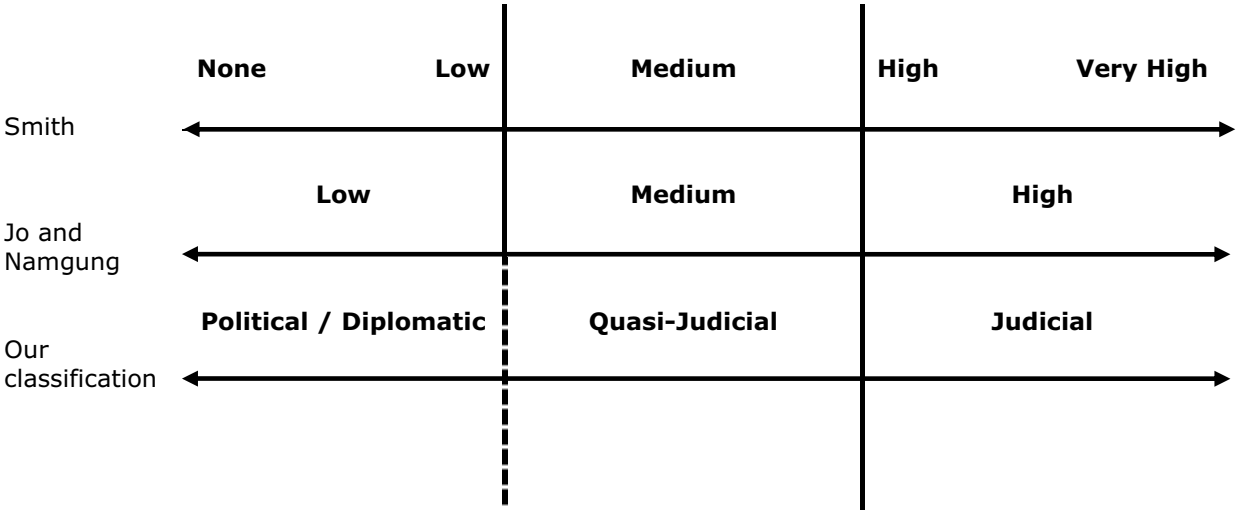
[24] The definitions of these models are explained further below.

3.2 Classification of the data set of RTA-DSMs – Methodology

For purposes of this paper, we conducted a systematic classification of the DSMs of the 226 RTAs notified to the WTO through the end of 2012 and that were still in force at that time. The resulting taxonomy is, in large part, based on the three models of dispute settlement defined by Porges, namely, the political/diplomatic model; the ad hoc tribunal model; and the standing tribunal model.

However, given that access to third-party adjudication and the nature of the adjudicating body were factors examined in Smith's[25] and Jo and Namgung's[26] studies, the results of our classification would not be expected to diverge significantly. Thus, some correlation should be expected between the categories used in the three studies as illustrated below:

Figure 1: Degree of legalism



Although our classification of RTA-DSMs is constructed on the basis of the dispute settlement models defined by Porges, we depart from these models in a somewhat significant way. We recall that Porges defines three dispute settlement models, namely, the political/diplomatic model, the ad hoc tribunal model, and the standing tribunal model. The fundamental distinction between the latter two models is the transient *versus* permanent nature of the adjudicating bodies that are envisaged under each model of dispute settlement. Yet, as we explain below, this distinction can be tenuous.

The difficulty concerns the very small number of RTAs that establish standing bodies with an appellate review function, but that envisage the adjudicative function being exercised by an ad hoc panel in the first instance.[27] This combination of an ad hoc, first instance adjudicative body, and a standing appellate body, presents a dilemma with respect to classifying RTA-DSMs on the basis of the dispute settlement models defined by Porges. It seems somewhat imprecise to classify such RTA-DSMs under the ad hoc tribunal model since these RTA-DSMs have standing adjudicative bodies, albeit at the appellate stage. At the same time, it seems equally imprecise to classify these RTA-DSMs under the standing tribunal model in the light of the fact that the dispute settlement function is exercised, in the first instance, by an adjudicating body that is composed on an ad hoc basis.[28]

In the light of the foregoing consideration, we have modified two of the dispute settlement models defined by Porges. Instead of "ad hoc tribunal model" and "standing tribunal model", we refer to the two models as quasi-judicial and judicial, respectively. All RTAs that envisage the dispute settlement function being exercised by an ad hoc adjudicating body as well as a standing appellate

[25] Smith, *supra*, fn 5.
[26] Jo & Namgung, *supra*, fn 20.
[27] MERCOSUR, ASEAN, and SADC. See subsection 5.5.7.
[28] It does not appear that RTA-DSMs with an ad hoc first instance and standing appellate body formed part of Smith's dataset. We have been unable to determine how Jo and Namgung characterized such RTA-DSMs.

body are classified under the quasi-judicial model. In contrast, RTAs that establish permanent tribunals as *courts of first instance* for the adjudication of trade disputes are classified under the judicial model. Thus, the distinction between the two models is not centrally focussed on whether the adjudicating bodies envisaged thereunder are ad hoc or permanent in nature.

Before setting forth the results of this classification exercise, we clarify below our understanding of the three models of RTA-DSMs and, by extension, the methodology employed in our classification of the data set.

3.2.1 Political/diplomatic model

In our classification of the data set, the following types of RTAs are classified under the political model: (i) RTAs that have no dispute settlement provisions at all; (ii) RTAs that provide exclusively for negotiated settlement among disputing RTA members *and/or* the referral of a dispute to a *political body* for resolution[29]; and (iii) RTAs that provide for referral of a dispute to a third-party adjudicator but accord to RTA members a right to veto such referral. The last type of RTA-DSM is classified under the political model notwithstanding the possibility of third-party adjudication.[30]

3.2.2 Quasi-judicial model

The quasi-judicial model comprises RTA-DSMs that provide an "automatic" right of access to third-party adjudication at some stage of the dispute settlement process.[31] An "automatic right", in this context, exists where there is an absence of an explicit right accorded to RTA members to block the referral of a dispute to a third-party adjudicator. In practice, some RTAs enable their members to block the referral of a dispute to a third-party adjudicator even without explicitly conferring such a right. This would occur, for example, where an RTA member fails to comply with an obligation under the treaty to appoint a panellist to serve on an ad hoc arbitral panel. Assuming that the treaty does not provide a default mechanism for composing a panel, the otherwise automatic right of access to third-party adjudication could, effectively, be blocked. In such cases, however, the obstacle to third-party adjudication does not stem from an explicit right of veto, but rather from non-compliance with a treaty obligation. Thus, the issue is more appropriately framed as an issue of compliance, rather than of RTA-DSM design. Because this study is focused on the design of RTA-DSMs, all RTAs that provide for third party adjudication are classified under the quasi-judicial model, insofar as these RTAs do not explicitly confer on an RTA member the right to veto the referral of a dispute to third-party adjudication.

As noted above, the vast majority of RTA-DSMs that fall within this category provide for ad hoc adjudication. By "ad hoc" we mean that the adjudicating body is established for purposes of resolving the specific dispute and dissolved once it has issued a decision. However, we have also included under this category the small group of RTA-DSMs that combine an ad hoc, first instance adjudicative body, with a standing body at the appellate stage.

We realize that, as we have defined it, this is a broad category and includes at its extremes dispute settlement mechanisms that have important differences. At one extreme, it includes the three RTA-DSM mechanisms that combine ad hoc third party adjudication in the first instance, with a standing tribunal at the appellate stage. We explained above why we opted to include these RTA-DSMs in this category.[32] At the other extreme, it includes two RTA-DSMs[33] that have ad hoc third party adjudication, but the decisions of the ad hoc adjudicating body are not binding. We included them in this category because we have placed more emphasis on access to third party adjudication, but we recognize that others would classify them under the political/diplomatic model.[34] Ultimately,

[29] The RTA between Iceland and the Faroe Islands does not contain a dispute settlement provision. A few others have a very general reference to consultations between the parties. For example, the India-Nepal RTA (2009) states: "In order to facilitate effective and harmonious implementation of this Treaty, the Contracting Parties shall consult each other regularly."

[30] Such was the case of dispute settlement under the GATT 1947, where positive consensus was required in order to refer a dispute to a GATT dispute settlement panel.

[31] According to Porges, this model is based on the WTO's dispute settlement system – originally developed in the GATT – in which a panel is convened on an ad hoc basis, with terms of reference limited to that dispute. (See Porges, *supra*, fn 22, at 473)

[32] MERCOSUR, ASEAN, and SADC. See subsection 5.5.7.

[33] US-Israel and US-Jordan.

[34] See Smith and Jo & Namgung, *supra*, fns 5 and 20.

the vast majority of RTA-DSMs classified under the quasi-judicial model provide for a single instance of binding third party adjudication. And we considered that limiting the number of categories to three had significant practical advantages, particularly because, if we were to break down the quasi-judicial model further into three categories, two of those categories would include only 2 and 3 RTA-DSMs, respectively.

3.2.3 Judicial model

The judicial model shares a defining characteristic with the quasi-judicial model, namely, the automatic right of referral of a dispute to third-party adjudication. Moreover, the function of both quasi-judicial and judicial dispute settlement mechanisms is to resolve disputes by application of law.[35] In some cases, the differences between dispute settlement models classified under the two models may be a matter of degree. Yet, the following features can be used to distinguish the judicial model from the quasi-judicial.

Generally speaking, judicial bodies have a greater degree of independence and institutional permanence. Instead of being appointed by the parties to hear the specific dispute, members of judicial bodies are usually appointed for fixed terms.[36] Judicial bodies also tend to have more functional and administrative autonomy, including having their own legal personality and budget. Another feature is a greater degree of legalism in terms of the applicable procedures and the qualifications of the adjudicators, such as the requirement that members of judicial bodies have legal training.

The judicial model can also be characterized by a clearer emphasis on private rights and this may be reflected in broader requirements relating to standing, that is, the question of who is entitled to make a claim directly before an adjudicating body. In such cases, the RTA-DSM may allow private parties to bring claims directly before RTA tribunals (standing), or indirectly through the medium of national courts (preliminary reference procedures). The ability of private parties to have claims reviewed directly or indirectly by the RTA adjudicating body suggests that the RTAs establishing such bodies confer rights that can properly be considered as being addressed directly to individuals.

In some cases, RTA-DSMs classified under the judicial model are situated within integration schemes with supranational elements[37], and with objectives that transcend the liberalization of trade between Member States. Such RTA-DSMs can be very different to RTA-DSMs classified under the quasi-judicial model.

Further, to the extent that the majority of RTA-DSMs under the judicial model allow for RTA bodies to bring claims before standing RTA tribunals, these courts operate within a highly institutionalised environment in which treaty bodies, as opposed to Governments of Member States, have a bureaucratic interest in the treaty's effective implementation. All of the foregoing considerations suggest that, for the most part, RTA-DSMs classified under the judicial model exist within systems that have very unique features that are absent in the RTA systems within which political and quasi-judicial DSMs exist. Nevertheless, we have included RTA-DSMs classified under the

[35] Charles H. Bower II, "Arbitration" in the Max Planck Encyclopaedia of Public International Law, available at: www.mpepil.com, at para. 4.

[36] See Bower, *supra*, fn 35, para. 4 There can be exceptions, however. We note, in this regard, the role of ad hoc judges at the International Court of Justice.

[37] A related consideration is that of direct effect, that is, the ability of individuals to invoke RTA law before national courts. Direct effect is rarely provided for explicitly under international agreements. The most notable exception is found in Articles 30 and 31 of the Treaty establishing the Court of Justice of the Andean Community, which explicitly provides that individuals may claim damages derived from the RTA law before national courts. In a less straightforward manner, the wording in Article 26 of the COMESA Treaty suggests that direct effect may be invoked by legal and natural persons before national courts. The direct effect of RTA law has been established through judicial decisions under a few systems. The European Union, through the ECJ landmark case *Van Gend en Loos v Nederlandse Administratie der Belastingen (1963),* set forth the principle of direct effect of EC law. By way of analogy, it can be argued whether the advisory opinion issued by the EFTA Court in the Case E-9/97, *Sveingjörnsdottir v Government of Iceland*, recognizes direct effect under the EEA Agreement. In its opinion, which undeniably resembled to the *Van Gend en Loos* case, the EFTA Court stated that "the EEA Agreement is an international treaty *sui generis* which contains a distinct legal order of its own" (par. 59) and it concluded that "Contracting Parties to the EEA Agreement are obliged to provide for compensation for loss and damage caused to individuals by breach of the obligations under the EEA Agreement (…)" (par.62). In relation to the rest of RTAs, the wording contained in the treaties and/or the lack of case-law specifically addressing this issue, do not seem to indicate the existence of a direct effect as such, yet it is neither specifically precluded.

judicial model in our dataset on the basis that they exercise an international trade dispute settlement function.

4 TRENDS IN RTA-DSMS

This section uses the data obtained from the RTA mapping exercise to identify trends and patterns of use, either regionally or by individual countries, of the three RTA-DSM models. The statistics presented take into account all RTAs notified to the WTO as of December 2012 and currently in force.[38] The use of the three DSM models is measured in relation to five key factors: (i) evolution over time; (ii) level of economic development; (iii) regional characteristics; (iv) level of integration (partial scope agreement, free trade agreement or customs union); and (v) configuration (bilateral or plurilateral).

4.1 Evolution of RTA-DSM models

The aim of this subsection is to track the evolution and frequency of DSM models in RTAs from the establishment of the GATT in 1947 through the end of 2012. Figure 1 presents the growth of RTAs, on a cumulative basis by year of entry into force, with the corresponding DSM model employed. The earliest RTAs notified to the GATT and still in force today are the European Union (established by the Treaty of Rome in 1958), EFTA (established by the EFTA Convention in 1960), and the Central American Common Market (in force as of 1961). Both the EU and EFTA use the judicial model of DSM, while the CACM uses the quasi-judicial model. The political model of DSM was first used in RTAs that entered into force during the 1970s (involving the EU with Iceland, Norway, Switzerland and Syria; the Asia Pacific Trade Agreement;[39] and Australia and Papua New Guinea).

Overall, from 1958 to the early 1990s, the growth of RTAs was modest. At the time of the establishment of the WTO in 1995, only 43 of today's RTAs were in force.[40] Of these, the majority (28) employed the political model of dispute settlement, followed by the quasi-judicial (9) and judicial (6) models. The proliferation of RTAs that began in the early 1990s continues to the present day.[41] As shown in Chart 1, the use of the political model of DSM closely follows the upward trend of overall RTA growth from the 1970s till the late 1990s when its growth rate begins to slacken and the use of the quasi-judicial model accelerates. Since 2000, the number of RTAs using the quasi-judicial model has grown at more or less the same pace as the overall growth of RTAs, while those using the political model have declined in relative terms. In 2005, the number of RTAs applying the quasi-judicial model exceeded those applying the political model for the first time. As of the end of 2012, the quasi-judicial model was employed in 147 RTAs, while the political model accounted for 69 RTAs. Only a minority of RTAs use the judicial model with little growth observed during the period analysed. As of the end of 2012, the judicial model was found in only ten RTAs.

Table 1: Frequency of RTA-DSM models

DSM Model	Number of RTAs	Share of total
Political	69	30%
Quasi-judicial	147	65%
Judicial	10	5%
Total	**226**	**100%**

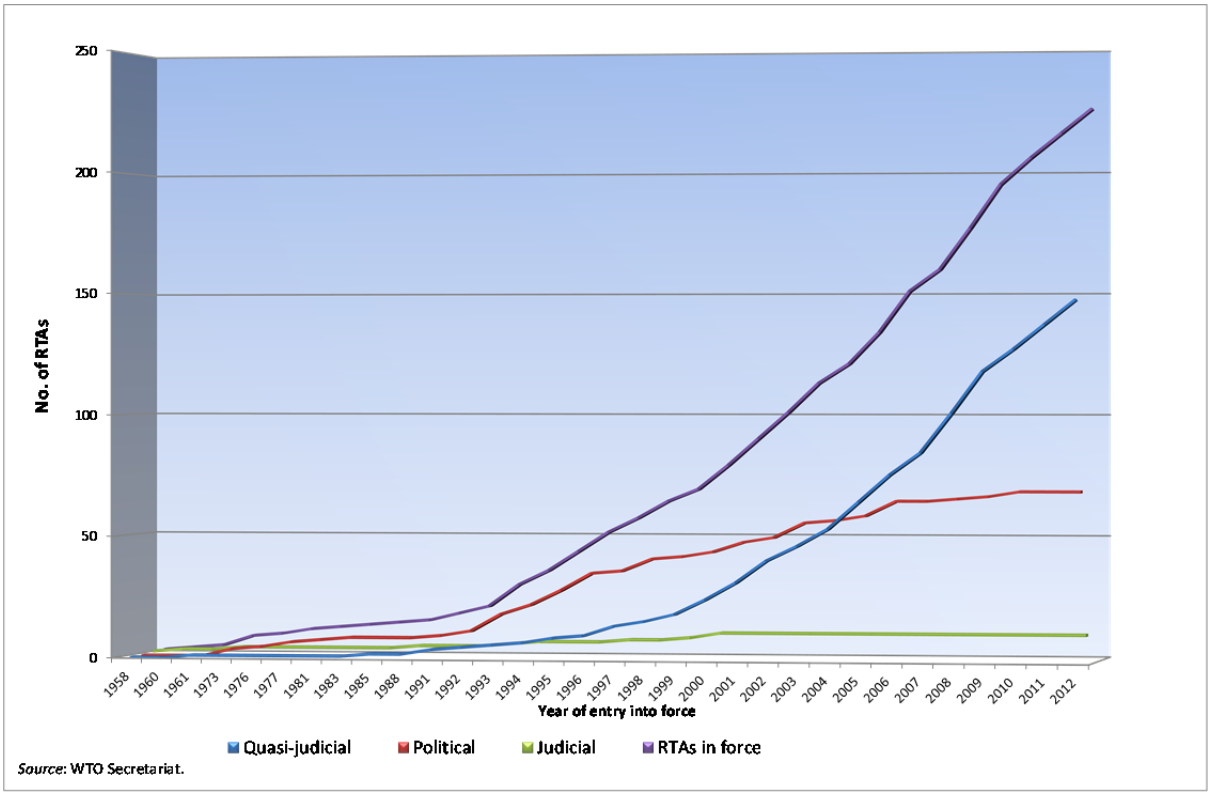
[38] Sufficient information was not available with respect to the customs union between the Russian Federation, Belarus, and Kazakhstan. We also note that the agreement establishing the European Economic Area (EEA) is not included in our dataset. We have excluded this agreement from our dataset on the basis that, in contrast to other agreements in our dataset, only the trade in services component of the EEA has been notified to the WTO. However, our dataset includes agreements between EEA members that have been notified to the WTO, namely, the EU, EFTA, EU-Norway, EU-Iceland, and EU-Switzerland-Liechtenstein agreements.

[39] Bangladesh, India, Korea, Lao People's Democratic Republic, and Sri Lanka.

[40] It should be noted that this figure does not represent the *actual* number of RTAs in force in 1995 as a number of RTAs in force in 1995 have subsequently been superseded or are no longer in force. For instance, following the enlargement of the EU to 25 and 27 members in 2004 and 2007, a number of bilateral RTAs in which the acceding countries were engaged ceased to exist.

[41] An explanation of the proliferation of RTAs can be found in R. Acharya, J-A. Crawford, M. Maliszewska, and C. Renard, "Landscape", in J-P. Chauffour and J-C. Maur (eds.), *Preferential Trade Agreement Policies for Development* (World Bank, Washington DC, 2011).

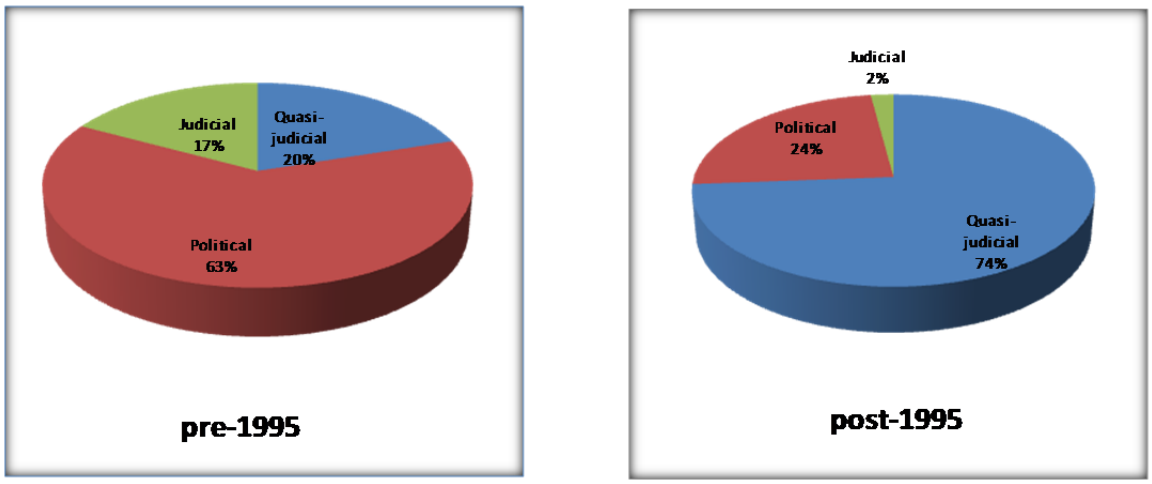
Figure 2: Evolution of RTAs and corresponding DSM model, cumulative figures



Source: WTO Secretariat.

Figure 2 shows the use of each model before and after the entry into force of the WTO DSU in 1995. In the pre-1995 period, the quasi-judicial model accounted for 20% (7) and the judicial model for 17% (6) of RTAs. The political model was predominant during this period, and was present in 63% of RTAs in force. In the post-1995 period, the figures are reversed. The quasi-judicial model is used in 74% of RTAs (141), the political model in 24% (46) of RTAs, and the judicial model in 2% (4) of RTAs.

Figure 3: Dispute Settlement in RTAs, pre- and post-entry into force of the DSU



Source: WTO Secretariat.

The switch in preference from the political model to the quasi-judicial model may be explained by a number of factors. The entry into force of NAFTA in January 1994 ushered in one of the first sophisticated quasi-judicial models in an RTA.[42] The DSU came into effect a year later with the establishment of the WTO. By the late 1990s, the number of RTAs using the quasi-judicial model started to accelerate, indicating countries' growing acceptance and confidence in the NAFTA and DSU models.

At the same time, RTA dynamics were changing. The rapid increase in the number of RTAs in the late 1990s and 2000s was accompanied by more diverse participation. A number of countries (particularly in Asia), that had previously relied mainly upon MFN liberalization, opted for market liberalization with preferential partners. Thus the geographical mix of countries involved in RTAs changed.[43] Another change has been of the shift from the traditional pattern of regional integration among neighbouring countries to an increased number of cross-regional partnerships.[44] In addition, countries began to demonstrate a preference for bilateral as opposed to plurilateral RTAs (involving a number of partners), presumably because bilateral RTAs are faster to negotiate and less complex to administer. A concurrent development was the increasing sophistication of RTAs. These treaties have become broader in scope with the inclusion of provisions on trade in services, investment, competition and other regulatory areas which are largely absent from the older generation of RTAs negotiated during the GATT years. These moves towards more complex regulatory regimes in RTAs among countries with a wider geographic scope have been accompanied by the use of more sophisticated mechanisms to address disputes among parties and render decision making binding.

4.2 RTA-DSM models by level of economic development

In this subsection, we map the membership of our dataset of 226 RTAs by World Bank Income Classification broken down by DSM model (Table 1). This classification consists of the following categories: Low income economies (LI), lower-middle income economies (LM), upper middle income economies (UM), high-income non-OECD economies (HI), and high-income OECD Members (OECD). Thirteen of the 15 possible bilateral pairings are represented in the Table, together with a final category that encompasses RTAs whose members fall into three or more income categories.[45] The political model is used across most income classification pairings, though more frequently among lower and upper middle income economies. Only five of the 26 RTAs involving OECD and high income non-OECD members use the political model. The quasi-judicial model is not a feature of RTAs involving low income economies, but is widely used among the other income categories. RTAs with members in three or more income categories account for almost a third of all RTAs and half of those using the judicial model.[46]

[42] The NAFTA contains three principal dispute settlement processes: State-to-State; a process for review of AD and CVD determinations; and an investor-State mechanism.

[43] As of January 2013, all but one of the WTO's 157 Members are engaged in one or more RTAs. The exception is Mongolia.

[44] For instance, in 2000-2001, the following RTAs came into force: EU-Israel, EU-Mexico, EU-Morocco, EU-South Africa, Israel-Mexico, EFTA-Mexico, New Zealand-Malaysia, and US-Jordan. All of these use the adjudicative ad hoc model.

[45] There is no instance of RTAs falling into the following categories: LI-HI and LI-OECD.

[46] This is not surprising given that, for instance, the European Union, which is composed of OECD, high income economies non-OECD, and upper middle income economies accounts for almost half of RTAs involving countries falling into three of more income categories. Likewise, EFTA, itself composed of OECD and high income non-OECD economies, has signed a number of RTAs with upper and lower middle income economies.

Table 2: Classification of DSM models by World Bank income classification

Pairings	Total no. of RTAs	Political	Quasi-judicial	Judicial
LI-LI	1			1
LI-LM	9	7		2
LI-UM	3	3		
LM-LM	10	10		
LM-UM	42	18	23	1
LM-HI	4		4	
LM-OECD	7	1	6	
UM-UM	23	7	16	
UM-HI	7	3	4	
UM-OECD	24		24	
HI-HI	1	1		
HI-OECD	19	3	15	1
OECD-OECD	6	1	5	
3 or more income categories	70	15	50	5
Totals	226	69	147	10

4.3 RTA-DSM models by region

In the Americas, all RTAs (both pre- and post-1995) involving Canada and the United States use the quasi-judicial model. For Latin American and Caribbean countries, of the five RTAs predating 1995 and still in force today, two (CACM and MERCOSUR) have opted for the quasi-judicial model, two (the Andean Community and CARICOM) for the judicial model, and one (LAIA) uses the political model of dispute settlement. All post-1995 RTAs involving Latin American and Caribbean countries use the quasi-judicial model, whether these are intra-regional RTAs or RTAs concluded with partners outside the region.

In Europe, of the ten pre-1995 RTAs still in force involving European countries, two (European Union and EFTA) use the judicial model, six (EU-Iceland, EU-Norway, EU-Switzerland/Liechtenstein, EU-Syria, EFTA-Turkey, and Norway-Faroe Islands) use the political model, and two (EU-Andorra and EFTA-Israel) use the quasi-judicial model. Since 1995 the EU has concluded 24 RTAs, four of which (EU-Faroe Islands, EU-Croatia, EU-Albania, and EU-FYROM) employ the political model.[47] The remainder, including the recent Economic Partnership Agreements signed with ACP countries, employ the quasi-judicial model.

RTAs between individual EFTA member States and the Faroe Islands use the political model of DSM.[48] Collectively, the EFTA States have concluded 23 RTAs, the first of which, EFTA-Turkey (1992), uses the political model. All other RTAs subsequently concluded by EFTA with European and cross-regional partners use the quasi-judicial model. In addition, the recent Switzerland-Japan FTA uses the quasi-judicial model.

Turkey's RTAs include its customs union with the European Union (1996) that uses the quasi-judicial model and its RTA with EFTA (1992) uses the political model. The choice of DSM model in Turkey's other RTAs shows a strong regional bias: those concluded recently with Balkan countries all use the political model[49], while those signed with North African and Middle Eastern partners all use the quasi-judicial model.[50] Turkey's RTAs with Georgia (2008) and Chile (2011) also use the quasi-judicial model.

[47] These entered into force between 1997 and 2006.
[48] Norway (1993), Switzerland/Liechtenstein (1995), and Iceland (2006).
[49] Beginning with FYROM in 2000 and followed by Bosnia and Herzegovina, Croatia, Albania, Montenegro, and lastly Serbia in 2010.
[50] Beginning with Israel in 1997 and followed by the Palestinian Authority, Tunisia, Morocco, Egypt, Syria, and latterly Jordan in 2011.

In the Middle East and North Africa (MENA), plurilateral groupings such as the Pan Arab Free Trade Area (1998) and the Gulf Co-operation Council (2003) employ the political model , while cross-regional post-1995 RTAs involving MENA countries, e.g. US-Bahrain, EFTA-Egypt, EU-Morocco and Turkey-Tunisia all use the quasi-judicial model.

Of the 12 RTAs involving sub-Saharan countries, seven are intra-regional and five are cross-regional. Of the intra-regional RTAs, five (ECOWAS, COMESA, CEMAC, EAC, WAEMU) use the judicial model and two (SADC, SACU) use the quasi-judicial model. The five RTAs involving sub-Saharan countries with cross-regional partners all use the quasi-judicial model.[51]

In Asia, six of the seven pre-1995 RTAs involving Asian countries use the political model of dispute settlement. The exception is the ASEAN, the first RTA in the region to use the quasi-judicial model. Since 1995, the majority of RTAs involving Asian countries (whether intra or extra-regionally) use the quasi-judicial model. Exceptions are RTAs concluded among west Asian countries, e.g. the South Asian Preferential Trade Agreement (SAPTA), India-Sri Lanka, India-Afghanistan, Pakistan-Sri Lanka, India-Bhutan and India Nepal, and the RTAs between China and Hong Kong, and China and Macao.[52] Countries such as India and Pakistan that have RTAs with other Asian countries outside West Asia, e.g. with China, Korea, Malaysia, and Singapore, all use the quasi-judicial model. With the exception of the CER Agreement between Australia and New Zealand (which dates back to 1983 and uses the political model), all RTAs involving Australia and New Zealand use the quasi-judicial model.

In the CIS, one RTA (the Eurasian Economic Community) uses the judicial model. All other RTAs among CIS countries use the political model.[53] The two RTAs involving CIS countries with cross-regional partners, Turkey-Georgia (2008) and EFTA-Ukraine (2012), use the quasi-judicial model.

The observations in this subsection indicate a strong preference in some geographic regions for certain DSM models. In the Americas, the quasi-judicial model is the preferred model; the same is true in Europe, with the exception of Turkey's RTAs with Balkan countries. In Asia, a cluster of countries in West Asia use the political model (for intra-regional RTAs), while all other Asian RTAs (except China's with Hong Kong and Macao) use the quasi-judicial model. In the CIS there is a clear preference for the political model (except with extra-regional partners). In Africa, there is a split between the use of the judicial model and the quasi-judicial model, with the judicial model used in the majority of plurilateral intra-regional groupings and the quasi-judicial model with extra-regional partners. No RTA involving African countries uses the political model of DSM.

4.4 RTA-DSM models by level of integration and configuration

This subsection examines whether the level of trade liberalization in an RTA and the type of configuration has a bearing on the DSM model chosen. For this purpose, the dataset has been classified according to partial scope agreements (PSAs) which liberalize a limited number of tariff lines; free trade agreements (FTAs); customs unions (CUs); and economic integration agreements (EIA). The first three liberalize trade in goods, while the fourth liberalizes trade in services.[54] The dataset is comprised of 124 RTAs that liberalize only trade in goods (shown as "PSA", "FTA" and "CU" in Figure 3), and 102 RTAs that liberalize both goods and services (shown as "FTA & EIA" and "CU & EIA").[55]

Figure 3 shows the RTA-DSM model applied in these types of RTAs by year of entry into force both pre and post-1995. In the ten partial scope agreements in the data set, there is a clear preference for the political model (eight RTAs)[56] over the quasi-judicial model (two RTAs).[57] With the exception of the LAIA (which entered into force in 1981), the other partial scope agreements using the political model involve Asian or Pacific countries and were concluded between 1976 and 2009. The

[51] EU-South Africa, EFTA-SACU, EU-Cameroon, EU-Côte d'Ivoire, and EU-Eastern and Southern Africa (ESA).

[52] All of these RTAs except SAPTA (1995) were entered into force between 2001 and 2009.

[53] There were concluded between 1993 and 2006.

[54] RTAs liberalizing trade in services are generally accompanied or preceded by an RTA liberalizing trade in goods.

[55] There is no instance in the dataset of a partial scope agreement that also liberalizes services.

[56] The eight PSAs using the political model are: Asia Pacific Trade Agreement (APTA), ECO, India-Afghanistan, India-Nepal, LAIA, Lao-Thailand, Melanesian Spearhead Group (MSG), and SAPTA.

[57] These are Chile-India and MERCOSUR-India.

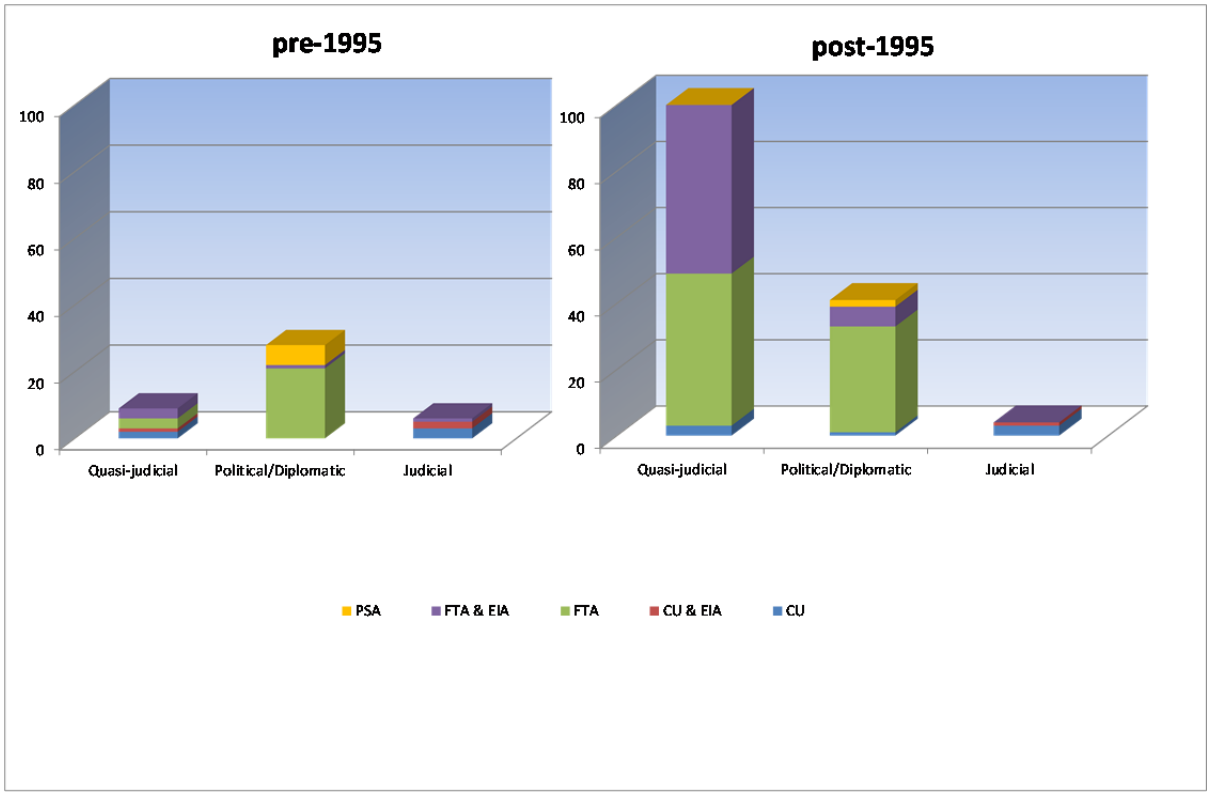
two partial scope agreements that use the quasi-judicial model were concluded in 2007 and 2009 and involve South American countries which have shown a clear preference for the quasi-judicial model and thus may have influenced the choice of DSM used.

102 FTAs in our sample liberalize only trade in goods and thus have a more limited regulatory scope: 24 pre-date 1995 and 78 were concluded since 1995. Of those pre-dating 1995, the use of the political model of DSM (21 RTAs) outweighs that of the quasi-judicial model (3 RTAs). The use of the quasi-judicial model has increased in the post-1995 period, accounting for 46 RTAs, compared to 32 that use the political model.

FTAs that liberalize trade in both goods and services (indicative of a broader regulatory scope), are a relatively recent phenomenon. In the pre-1995 period there were five, three of which use the quasi-judicial model, one uses the political model, and one uses the judicial model. Since 1995, the number of RTAs liberalizing both goods and services has increased dramatically. Of the 93 such RTAs concluded since 1995, 87 use the quasi-judicial model and six the political model. Those using the political model are outliers involving candidate countries for EU accession, China's RTAs with Hong Kong and Macao and Iceland-Faroe Islands. Thus there seems to be a clear preference for the quasi-judicial model in RTAs with broader regulatory scope.

Customs unions require a greater degree of harmonization and coordination between their members than do FTAs. For the 12 customs unions in our sample that liberalize only trade in goods, there is a more or less even split between use of the quasi-judicial model (5 RTAs) and the judicial model (6 RTAs). One customs union, the GCC, uses the political model. Where a customs union also liberalizes trade in services and thus has a broader regulatory scope, there is a preference for the judicial model (3 RTAs) over the quasi-judicial model (1 RTA).[58] Of the ten RTAs using the judicial model,[59] nine are customs unions or customs unions in the making, and all are plurilateral RTAs involving a number of countries in the same geographic region.

Figure 4: DSM models in RTAs, by level of integration



[58] There is no instance of a customs union liberalizing both goods and services using the political model.

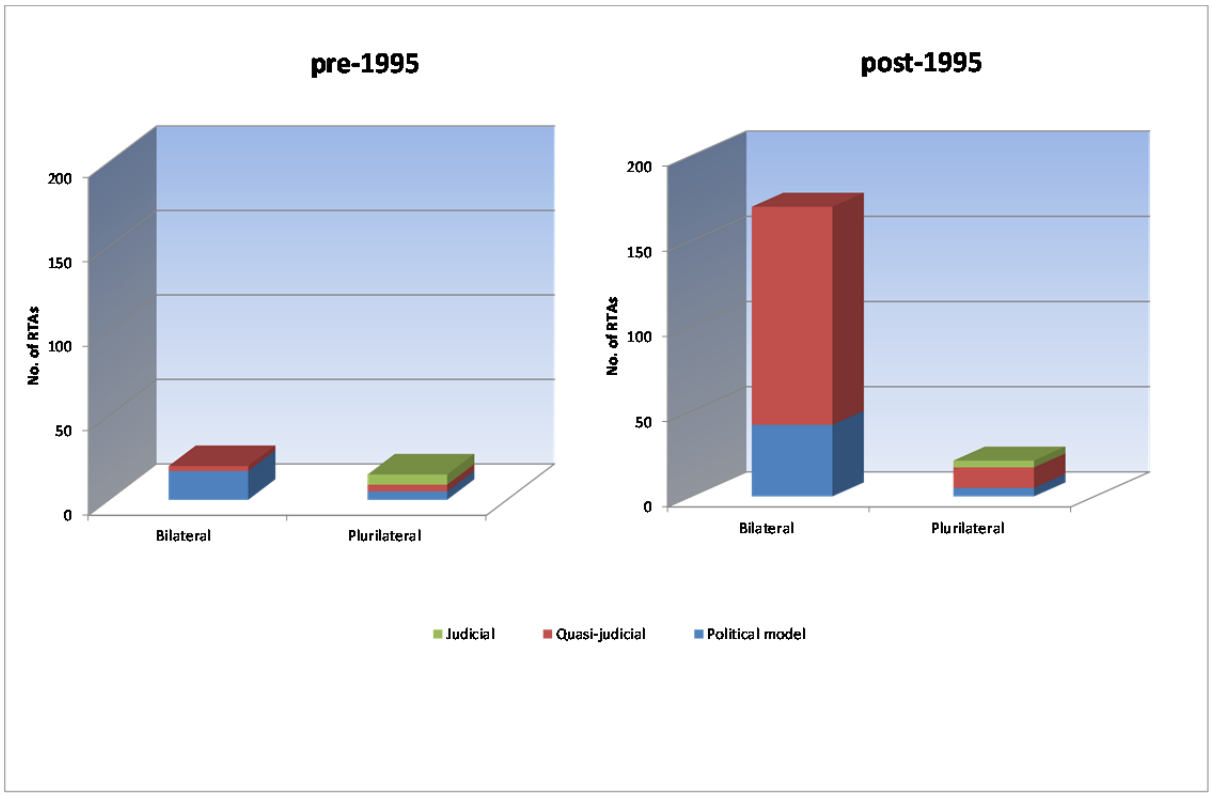
[59] The European Union, EFTA, CARICOM, the Andean Community, ECOWAS, COMESA, the Eurasian Economic Community, CEMAC, EAC, and WAEMU.

These findings indicate a relationship between the level of integration and regulatory scope of RTAs and the choice of dispute settlement model. The majority of partial scope agreements (which liberalize few tariff lines and have limited regulatory scope) use the political or diplomatic model to solve disputes. For FTAs which liberalize only trade in goods, the use of the political model predominates in pre-1995 RTAs. Since 1995, for FTAs liberalizing only trade in goods, the use of the quasi-judicial model outstrips the use of the political model. For RTAs with broader regulatory scope – characterized here by a commitment to liberalize both goods and services – the quasi-judicial model was favoured in pre-1995 RTAs (in a small sample of 5 RTAs). Since 1995, a preference for the quasi-judicial model has been firmly established. Customs unions, a deeper form of integration than FTAs, use almost exclusively the quasi-judicial or judicial models (the GCC is the exception). Customs unions that liberalize trade in services as well as goods show a preference for the judicial model over the quasi-judicial model.

4.5 RTA-DSM models by configuration

Lastly, we look at whether a bilateral or plurilateral configuration of RTA parties has a bearing on the type of DSM model chosen. Figure 4 demonstrates a slight preference for bilateral RTAs in the pre-1995 period that has become a sharp preference in the post-1995 period. Of the 226 RTAs in our sample, 190 are bilateral and 36 are plurilateral (i.e. involving three or more countries).[60] Fifteen plurilateral RTAs were concluded prior to 1995, of which there is a more or less even split between the political (5), quasi-judicial (4) and judicial (6) models. Post-1995 there is a growing preference for the quasi-judicial model (12) over the political (5) and judicial (4) models in plurilateral RTAs. Twenty bilateral RTAs were concluded in the pre-1995 period, of which 17 use the political model and 3 the quasi-judicial model. Since 1995, 170 bilateral RTAs have entered into force, 128 of which use the quasi-judicial model and 42 the political model. No bilateral RTA employs the judicial model.

Figure 5: DSM models in RTAs, by configuration



[60] An RTA where one of the parties is an RTA itself, e.g. EU-Chile or EFTA-Montenegro, is considered a bilateral RTA.

5 THE FUNCTIONING OF RTA-DSMS – A NUTS AND BOLTS ANALYSIS

Together with the classification of our data-set under three models of dispute settlement, we conducted a detailed mapping of key dispute settlement provisions in each RTA considered. In the subsections that follow, we describe the main features of the RTA-DSMs identified in our mapping exercise.

5.1 The jurisdictional scope of RTA-DSMs

5.1.1 Subject matter

Several RTAs exclude certain substantive chapters of the RTA from their dispute settlement mechanisms. In our mapping of RTA-DSM provisions, we found that 96 RTA-DSMs under the quasi-judicial model and 1 RTA-DSM under the judicial model contain subject matter exclusions from dispute settlement.

In respect of the judicial model, under the EU system, the ECJ does not have jurisdiction with respect to the provisions relating to the common foreign and security policy nor with respect to acts adopted on the basis of these provisions.[61]

With regard to RTA-DSMs using the quasi-judicial model, exclusions of certain subject matter from RTA dispute settlement are relatively widespread, with 65% of the RTA-DSMs classified under that model excluding at least one subject. There is a high degree of variation in respect of the types of subject matter which these RTAs exclude from their DSMs. Moreover, certain subject matter may be excluded in whole, but more frequently in part, from the RTA-DSM. We found that 46% of these RTA-DSMs exclude provisions under their competition chapters; 38% exclude trade-in-services related issues; 33% exclude sanitary and phytosanitary (SPS) measures; 20% exclude anti-dumping and countervailing measures; 19% exclude provisions relating to the environment; 18% exclude provisions under their technical barriers to trade (TBT) chapter; 12% exclude provisions related to labour; 12% exclude provisions requiring co-operation between members on certain issues; 9% exclude provisions concerning government procurement; 8% exclude investment-related provisions; 8% exclude intellectual property related provisions; and 7% exclude global safeguard measures.

More often than not, particular provisions of a substantive chapter of an RTA, rather than an entire substantive chapter, are excluded from RTA-DSMs classified under the quasi-judicial model. For example, the majority of RTA-DSMs that exclude services related issues do not exclude the entire services chapter. Rather, most exclude provisions relating to the temporary entry of persons. A significant number of the RTA-DSMs which do not contain any subject matter exclusions at all are agreements to which EFTA is a party, and older agreements to which the EU is a party. Due to a high degree of variation among the RTA-DSMs to which an individual country/institution is a party, it is difficult to discern any specific trends as to which parties typically exclude what type of provisions from their RTA-DSMs.

5.1.2 Measures and types of complaints

All RTA-DSMs classified under the quasi-judicial model allow claims against existing measures that are inconsistent with the RTA; 61 additionally specify that "proposed measures" can be the subject of a claim; and 56 provide for non-violation complaints, that is, complaints concerning measures that are RTA-consistent, but which nullify and impair benefits that an RTA member may reasonably expect to accrue to it under the RTA.

Some RTA-DSMs classified under the quasi-judicial model define their scope of application broadly, while others are more specific with regard to which measures are covered, and which are not. Thus, in virtually all RTAs to which Japan is a party, the dispute settlement chapter is stated to apply to the settlement of disputes between the parties "concerning the interpretation or application" of the agreement. Other RTAs are more precise in delineating their scope of application. Thus, RTAs to which the United States is a party explicitly state that their dispute settlement chapters apply to: (i) "actual measures"; (ii) "proposed measures"; and (iii) measures that are not RTA-inconsistent but

[61] Article 46 of the Treaties Establishing the European Union (TEU).

which are, nevertheless, nullifying and impairing a benefit that an RTA member may reasonably expect to accrue to it under the RTA.

It is notable that 41 of RTA-DSMs classified under the quasi-judicial model *explicitly* allow for "proposed measures" to be the subject of a claim. Some RTAs only allow such measures to be subject to the consultations stage of dispute settlement, while others enable them to be submitted to an ad hoc panel as well. All RTAs to which Canada is a party explicitly provide for the challenge of proposed measures. Half of them, however, limit this to the possibility of holding consultations concerning a proposed measure. Most RTAs of the United States explicitly specify that a panel may not be established in respect of a proposed measure.[62] RTAs to which ASEAN, China, the EU, Japan, Korea, and Singapore are parties typically do not provide explicitly for a proposed measure to be the subject of a complaint. None of the RTA-DSMs that provide for the challenge of proposed measures actually define the term "proposed measures", and guidance from RTA dispute settlement practice is non-existent.

Almost 40% of RTA-DSMs under the quasi-judicial model (56) provide for non-violation complaints.[63] A tendency of certain WTO members –Canada, Chile, Colombia, Korea, Mexico, Panama and the United States – to provide for non-violation complaints in their RTA-DSMs can be discerned. In contrast, RTAs to which ASEAN, the EU, EFTA and Japan are parties, do not, typically, provide for non-violation complaints.

The provisions defining the jurisdiction of RTA-DSMs classified under the judicial model are considerably different from those defining the jurisdiction of RTA-DSMs under the quasi-judicial model. RTA-DSMs under the judicial model have jurisdiction over claims that a party to the RTA is in breach of its provision. Further, a majority of RTA-DSMs under the judicial model (70%) provide for the review of actions taken by political bodies on the grounds that such actions are unlawful, *ultra vires* or an infringement of the RTA. For example, under the EU system, a claimant may request the annulment of an act adopted by an EU institution, body, office or organization.[64] In some cases, RTA-DSMs under the judicial model have non-contentious jurisdiction, pursuant to which, at the request of RTA members, standing tribunals can issue advisory opinions on issues relating to the interpretation of RTA provisions.[65] All RTA-DSMs under the judicial model endow their standing courts with jurisdiction to issue interpretations of RTA provisions for application by domestic courts.

5.2 Forum-related provisions

In our mapping of dispute settlement provisions, we considered the following types of forum-related provisions: (i) provisions requiring the use of RTA-DSM rules; (ii) provisions requiring the use of WTO-DSM rules; (iii) provisions encouraging (without mandating) the use of RTA-DSM rules; (iv) "fork in the road" provisions that give parties a choice of selecting a forum but foreclose the possibility of using another forum once such selection has been made; and (v) provisions that allow the consecutive, but not simultaneous, use of RTA-DSM and WTO-DSM rules.

We found that 124 RTA-DSMs across all three models of dispute settlement contain forum-related provisions. Most of these RTA-DSMs (92%) are classified under the quasi-judicial model (115 RTAs). Forum-related provisions are also quite prevalent in RTA-DSMs classified under the judicial model, with eight of the ten RTA-DSMs falling under that model containing such provisions. Only 1 RTA-DSM classified under the political/diplomatic model contains a forum-related provision.[66]

With regard to RTA-DSMs classified under the quasi-judicial model, the majority (96) contain "fork in the road" provisions which allow a complainant to choose between the multilateral or the RTA forum, but foreclose recourse to the non-selected forum once the selection has been made. We did not find any RTA-DSM under the quasi-judicial model that requires the exclusive use of RTA-DSM rules for *all* disputes between RTA members. We did find, however, that 7 RTA-DSMs provide for the

[62] US-Chile, US-Peru, US-Colombia, US-Australia, US-Bahrain, US-Israel, US-Morocco, US-Oman, and US-Panama.

[63] Non-violation complaints allow a complaining party to have recourse to RTA dispute settlement in circumstances where a measure of the responding is consistent with the RTA, but, nevertheless, is allegedly nullifying or impairing a benefit under the RTA which a complaining party could reasonably expect to accrue to it.

[64] Article 263 of the TFEU.

[65] CARICOM, COMESA, EAC, ECOWAS, EAEC, EFTA and WAEMU.

[66] Ukraine-Moldova.

exclusive use of RTA-DSM rules when a respondent claims that a dispute relates to certain subject matter, and requests that the dispute be considered under the RTA-DSM. All RTAs to which Canada is a party–with the exception of the Canada-Israel and EFTA-Canada FTAs–provide that when the respondent claims that its measures are taken pursuant to certain environmental and conservation agreements, and requests in writing that the dispute be considered under the RTA-DSM, the complainant may have recourse only to the RTA-DSM. Similar provisions are contained in the Chile-Mexico, and Nicaragua-Chinese Taipei, FTAs. NAFTA Chapter 20 also has such provision, but goes further, applying the same rule to disputes under NAFTA's SPS and "Standards-Related Measures" chapters. Thus, under NAFTA Chapter 20, when a dispute: (i) concerns a measure adopted by a Party to protect its human, animal or plant life or health, or to protect its environment; or (ii) raises factual issues concerning the environment, health, safety, conservation, including directly related scientific matters, a responding party can request that the dispute be considered under the NAFTA-DSM, in which case the NAFTA-DSM applies to the exclusion of all other fora.

In contrast, many RTA-DSMs classified under the quasi-judicial model express a preference for the use of WTO-DSM rules when a dispute relates to certain subject matter. These substantive areas concern SPS issues; TBT issues; and trade remedies. There are at least two ways in which RTA-DSMs express a preference for the WTO-DSM in respect of disputes relating to a particular subject area: First, in a small number of RTAs, there is an explicit provision stating that the WTO-DSM should be used for disputes relating to a particular subject matter. For example, under Article IX.5 of the Canada-Costa Rica FTA, the parties "agree to use the WTO dispute settlement procedures for any formal disputes regarding [SPS] measures." The Honduras-El Salvador-Chinese Taipei FTA contains a similar provision that applies also to disputes regarding TBT measures. Second, and more often than not, these RTAs exclude substantive chapters of the RTA from their dispute settlement chapters, while affirming the parties' rights and obligations under the relevant WTO Agreement, for example, the SPS Agreement, or the TBT Agreement. Thus, in effect, many RTAs foresee the exclusive use of the WTO-DSM by excluding substantive areas from RTA dispute settlement, while re-affirming the parties' rights and obligations under the WTO Agreement.

Interestingly, one RTA-DSM classified under the quasi-judicial model (EU-Chile Economic Integration Agreement) contains a provision requiring the use of WTO-DSM rules in respect of a "violation of an obligation" under the agreement which is "equivalent in substance to an obligation under the WTO", unless the parties agree otherwise.

A small number (5%) of RTA-DSMs classified under the quasi-judicial model contain provisions that allow for the consecutive, but not simultaneous, use of RTA-DSM and WTO-DSM rules. Most of these RTA-DSMs are classified under the quasi-judicial model, and most are recent agreements to which the EU is a party.[67] For example, under Article 224(2) of the EU-CARIFORUM States EPA, when a party has instituted a dispute settlement proceeding either under the RTA-DSM or under the WTO-DSM, it may not institute a dispute settlement proceeding regarding the same measure in the other forum until the first proceeding has ended.

In respect of RTA-DSMs classified under the political/diplomatic model, only one contains a forum-related provision. The Ukraine-Moldova FTA contains a provision that requires the parties to a dispute to first seek a mutually agreed solution, preferably through consultations within a "Working Group" composed of representatives of the parties.[68] If consultations between the disputing parties do not result in a mutually agreed solution, a complainant may then have recourse to the WTO-DSM.[69] Thus, the RTA allows the consecutive but not simultaneous use of the RTA-DSM and the WTO-DSM, and the use of the RTA-DSM is a condition precedent to the use of the WTO-DSM. The other RTA-DSMs classified under the political/diplomatic model do not contain provisions regulating the jurisdictional relationship between RTA dispute settlement and dispute settlement under other fora.

With regard to RTA-DSMs classified under the judicial model, eight out of ten contain a provision requiring the exclusive use of RTA-DSM rules[70], while the two outliers do not contain any provisions that regulate the relationship between RTA dispute settlement and dispute settlement

[67] EU-Bosnia Herzegovina, EU-Cameroon, EU-CARIFORUM States, EU-Côte d'Ivoire, EU-Mexico, EC-Montenegro, EU-Serbia, CEFTA 2006.

[68] Article 30(1) of the Ukraine-Moldova FTA.

[69] Article 30(2) of the Ukraine-Moldova FTA.

[70] Andean Community, CARICOM, COMESA, EAC, EU, CEMAC, ECOWAS, and EAEC.

under other fora.[71] An example of an RTA-DSM following the judicial model that requires the exclusive recourse to RTA-DSM rules is the Andean Community. In this connection, the Treaty establishing the Court of Justice of the Andean Community states that "[t]he Member States shall not submit any dispute arising from the application of the norms that make up Andean Community law to any other tribunal, arbitral system or procedure that differs from those set out in the present Treaty".[72]

There are three RTA-DSMs that go beyond regulating forum choice and that specifically address the issue of the relevance of WTO case law to disputes being heard by ad hoc tribunals established under the RTA. The Korea-EU FTA provides, in this regard, that "[w]here an obligation under this Agreement is identical to an obligation under the WTO Agreement, the arbitration panel shall adopt an interpretation which is consistent with any relevant interpretation established in rulings of the WTO Dispute Settlement Body".[73] As explained further below, the Canada - Colombia FTA explicitly requires arbitral panels to take into account WTO jurisprudence in compliance proceedings. The Ukraine-Moldovan RTA, which falls under the political/diplomatic model, also has an interesting provision on the relationship with WTO law. Article 29 of that Agreement provides that none of its provisions "shall be interpreted and/or applied contrary to rules and principles of the WTO, and in no manner violate the rights and obligations of the Parties, which derive from the status of members of this organization". It then goes on to state that "[i]f there are inconsistencies and differences in the interpretation of the provisions of the present Agreement and the norms of [the] WTO agreements, the norms of the WTO agreements shall be of priority importance".

5.3 Standing

By standing, we mean the question of which persons have a right to avail themselves of the RTA-DSMs and initiate a dispute. As noted earlier, in this paper we have focused on State-to-State dispute settlement mechanisms in RTAs. Thus, the very nature of the inquiry influences the results that we obtain in relation to standing. Nevertheless, we highlight below a few considerations relating to standing that may be useful to keep in mind for comparative purposes.

The vast majority of RTA-DSMs that follow the political and quasi-judicial models do not provide access to private parties. One notable exceptional is NAFTA Chapter 19 proceedings, in which private parties may challenge, before a bi-national arbitral panel, anti-dumping and countervailing determinations adopted by the domestic authorities of Canada, Mexico or the United States. This proceeding replaces domestic judicial review of the determinations. The panel's review is limited to the question of "whether such determination was in accordance with the antidumping or countervailing duty law of the importing Party".[74] Chapter 19-like provisions have not been incorporated in any other RTA to which the NAFTA signatories are parties.

A few standing tribunals under the judicial model establish a very different regime in which supranational institutions and private parties have standing to bring cases. The EU provides an illustration of such regime. The European Commission may bring actions to the ECJ against Member States that it considers have failed to fulfil obligations under EU law. Member States also have standing to challenge measures adopted by other Member States, although in practice these types of cases have been invariably brought by the European Commission.[75] Annulment proceedings challenging the legality of measures taken by EU institutions can be brought by the European Commission and certain other EU institutions. Private individuals can bring annulment cases where the measure directly and adversely affects them as individuals. Private individuals may also bring so-called "direct actions" where they consider that they have suffered damage as a result of the action or inaction of the Community or its staff. The Andean Court of Justice establishes a regime that shares some of the features of the ECJ described above.

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[71] EFTA and WAEMU.

[72] Article 42 of the Treaty establishing the Court of Justice of the Andean Community (own translation). Article 42 by contrast allows Member States of the Andean Community to make use of the Court of Justice in their relations with third countries.

[73] Article 14.16 of the Korea-EU.

[74] NAFTA, Article 1904.

[75] One textbook explains: "In practice, failures to fulfil obligations are settled well before they are brought before the Court. When an action is brought, the Commission is almost invariably the initiator. It is so partly because if a member state is behind the action it is obliged to refer the matter to the Commission in the first instance, and partly because member states are extremely reluctant to engage in direct public confrontation with one another". (N. Nugent, "The Government and Politics of the European Union", 6th edn (Durham: Duke University Press, 2006))

5.4 Pre-adjudication stage – Consultations

All RTA-DSMs that follow the political and quasi-judicial models contain provisions regulating the conduct of consultations. In contrast, a consultations requirement is highly uncommon in respect of RTA-DSMs classified under the judicial model. Among the latter, consultations between disputing parties are explicitly provided for under only the CARICOM and ECOWAS systems.[76]

All RTA-DSMs classified under the political/diplomatic model provide for consultations, either directly between disputing parties, or within the framework of a joint political body established under the RTA. Of the 69 RTA-DSMs which follow the political/diplomatic model, 53 (or 77%) provide for direct consultations between disputing parties, while 16 (or 23%) provide for consultations to be held within the framework of a joint political body established under the RTA. There is, therefore, a preference for consultations to be held directly between disputing parties, rather than within the framework of a political body established under the RTA. That being said, there are two points which are worth noting: First, many of these RTAs are older RTAs which do not establish elaborate institutional structures for their administration. It is thus not surprising that most require direct consultations between disputing parties, rather than consultations within the framework of a joint political body. Second, drawing a bright-line distinction between direct consultations between disputing parties, on the one hand, and consultations within the framework of a joint political body where the RTA is bilateral, on the other hand, might be placing a premium on form, rather than on substance. Indeed, it is not clear what the substantial distinction between the two is, particularly in the light of the fact that joint political bodies are composed of representatives of the disputing parties.

A mere 10% of RTA-DSMs that follow the political model specify a timeframe within which consultations must be held. Where a timeframe is specified, it typically ranges from 15 days to three months. The absence of a timeframe for the holding of consultations in the vast majority of these RTA-DSMs can be explained by the fact that there is generally no next step in the adjudication process. As described below, the deadline for the consultations stage under the quasi-judicial model tends to be framed as the minimum amount of time that must elapse before the complaining party is allowed to proceed to the next step of the adjudication process.

With regard to RTA-DSMs classified under the quasi-judicial model, all make a request for consultations by a complaining party a prerequisite for the referral of a dispute to an ad hoc tribunal. The timeframes for the holding of bilateral consultations range from 30 days to six months, but, under the vast majority of RTAs, the disputing parties may modify these timeframes by mutual agreement. The specification of a relatively short timeframe for the holding of consultations (30-45 days) is typical of RTAs to which Canada and Chile are parties. On the other hand, a timeframe of 60 days for the holding of consultations is very prevalent among RTAs to which ASEAN, the United States, Japan and the EU are parties.[77] The longest timeframes for the holding of consultations are specified in RTAs to which EFTA is a party, with many of these agreements specifying a timeframe of 90 days, and a lesser number of these agreements specifying an even longer timeframe of 6 months.

Finally, many RTA-DSMs classified under the quasi-judicial model provide for the intervention of political bodies, either in addition to, or in lieu of, direct consultations between disputing parties, and, in some instances, as a pre-requisite for the establishment of an ad hoc panel.[78]

[76] In respect of the CARICOM system, owing to a degree of ambiguity in the text of the Revised Treaty of Chaguaramas, it is somewhat unclear whether consultations are a prerequisite for the referral of a dispute between CARICOM members to the Caribbean Court of Justice. This apparent ambiguity is compounded by an absence of judicial guidance on the issue which, in turn, stems from the absence to date of government-to-government disputes under the CARICOM system. On the other hand, it would appear that Article 76 of the Treaty of ECOWAS makes consultations a prerequisite for the referral of a dispute to the standing tribunal of the ECOWAS system.

[77] In the case of the United States and ASEAN, the 60-day timeframe for consultations is, across the RTAs to which they are parties, virtually uniform. A notable exception in the case of the United States is NAFTA, which specifies a timeframe of 30-45 days for the holding of consultations. In the case of Japan, there is some variation among the RTAs to which it is a party, but the 60-day timeframe is most prevalent. Similarly, in the case of the EU, there is a certain degree of variation, particularly among older RTAs to which the EU is a party. That being said, more recent EU RTAs all specify a 60-day timeframe for the holding of consultations between disputing parties.

[78] As further explained in subsection 5.10 below.

5.5 Formal adjudication stage – Composition of adjudicatory bodies

5.5.1 Ad hoc panels

Ad hoc panels are composed on a case-by-case basis to resolve disputes between RTA members. A common feature of virtually all RTA-DSMs classified under the quasi-judicial model is that they specify that ad hoc panels shall be composed of three panellists. We have, however, found a few exceptions which require ad hoc panels to be composed of five panellists: NAFTA Chapter 20; Canada-Chile FTA; Colombia-Mexico FTA; Chile-Mexico FTA; and Costa Rica-Mexico FTA. We discuss below the use of rosters in the panel composition process, the specific procedures for panel composition across RTA-DSMs, and, finally, the related issue of default mechanisms for panel composition and the potential for paralysis of the dispute settlement process at the panel composition stage.

Many RTA-DSMs classified under the quasi-judicial model provide for the establishment of rosters. A roster is a list of prospective panellists that is established under the RTA for the purpose of facilitating panel composition. The term "roster" is not used consistently across RTAs. Thus, in some instances, RTAs refer to the establishment of an "indicative list", a "reserve list" or a "contingent list". For ease of reference, we use the term "roster" in this paper to describe any list of prospective panellists which is established under an RTA.

RTAs to which the United States is a party, and recent RTAs to which the EU is a party, typically provide for the use of rosters in the panel selection process. In contrast, we found that the use of rosters is not typical of RTAs to which Japan, EFTA, ASEAN and China are parties. Rosters are often required to be composed of nationals of RTA members, as well as non-nationals.[79] Many RTAs that establish rosters allow parties to, in the first instance, appoint individuals as panellists whose names are not included on the roster, but specify that panellists must be selected by lot from the roster in circumstances where disputing parties are unwilling or unable to agree on the selection of panellists. The most recent RTAs to which the United States and the EU are parties adopt this approach.[80] Thus, these RTAs envisage a roster serving, primarily, a contingency function in circumstances where disputing parties are unable or unwilling to agree on the selection of panellists in the first instance.

In some circumstances, the means by which a roster is required to be established may render an RTA-DSM vulnerable to paralysis at the panel composition stage. In this regard, under some RTA-DSMs, the inclusion of names on the roster requires the consent of all parties to the RTA. This may prove problematic where the RTA sets a floor in relation to the number of prospective panellists a roster should contain. If RTA members are unable to agree on the composition of the roster, and the RTA does not allow for the use of one that is incomplete, the RTA-DSM can be paralyzed at the panel composition stage. There is, in this regard, anecdotal evidence of problems with panel selection in NAFTA resulting from incomplete rosters.[81] We have found a few RTA-DSMs that attempt to mitigate the problem, either by removing the consensus requirement in respect of the inclusion of names on a roster, or by explicitly providing that an incomplete roster may be used for the selection of panellists. Two recent RTAs to which the United States is a party–US-Colombia and US-Peru–adopt the latter approach.[82]

All RTA-DSMs classified under the quasi-judicial model contain rules and procedures regulating the panel composition process. However, there is some degree of variation with regard to the selection procedures to be used for panel composition. A constant across most RTA-DSMs is that the

[79] In most instances, it is required that the chair of the panel be an individual who is a non-national of the disputing parties.

[80] Korea-US and US-Panama. These RTAs allow parties to select individuals who are not on the roster, but these individuals can be subject to a peremptory challenge, unlike individuals whose names are included on the roster. The roster also serves a contingency function in that, where panellists have not been selected by the parties in the first instance, panellists shall be selected by lot from the roster. With regard to recent RTAs to which the EU is a party, these agreements allow the parties to agree on the composition of a panel, but in circumstances where the parties have not agreed on all three panellists, the remaining panellists are to be selected by lot from the "list of arbitrators" established under these agreements: EU-Eastern and Southern African States, EU-Republic of Korea, EU-Cameroon, EU-Côte d'Ivoire, EU-Papua New Guinea/Fiji, EU-Bosnia and Herzegovina, EU-CARIFORUM States. Unlike the RTAs to which the United States is a party, RTAs to which the EU is a party do not provide for the peremptory challenge of panellists whose names are not on the roster.

[81] D. Gantz, "The United States and NAFTA Dispute Settlement: Ambivalence, Frustration and Occasional Defiance", Arizona Legal Studies Discussion Paper 06-16, University of Arizona, 1 at 29.

[82] The Colombia-Northern Triangle (El Salvador, Guatemala, Honduras) FTA also adopts this approach.

selection of panellists rests, in the first instance, in the hands of disputing parties. The most common approach is for each disputing party to select one panellist, and the disputing parties agree on the selection of the third panellist who, typically, serves as the chair of the panel.[83] There are some nuances. Under some RTAs, the parties agree on the chair first, before each disputing party selects one panellist.[84] Moreover, some very recent RTAs to which the EU is a party require the disputing parties to, in the first instance, consult and seek to agree on the selection of all three panellists. Further, some RTAs provide for each disputing party to select one panellist each, and for the two selected panellists to then appoint a third panellist who serves as the chair of the panel.[85]

As noted above, under most RTA-DSMs, the selection of panellists rests, in the first instance, in the hands of disputing parties. Most of these RTA-DSMs also contain a default mechanism for panel composition that applies in circumstances where disputing parties have failed to select panellists. The existence of such default mechanisms is essential for attenuating the potential for paralysis of the dispute settlement process at the panel composition stage. We discuss this issue below.

5.5.1.1 Automaticity of panel composition

The notion of "automaticity", in relation to the composition of an ad hoc adjudicatory panel refers, essentially, to the extent to which the composition of a panel can proceed without being blocked or paralyzed by the actions or omissions of a party to a dispute. It is submitted that the characterization of a panel composition process as "automatic" depends on two factors: (i) the existence of a default mechanism for panel selection in the event that the parties have failed to select or appoint panellists; and (ii) the effectiveness of that default mechanism. In our mapping of the panel selection provisions of RTA-DSMs classified under the quasi-judicial model, we found the following default mechanisms for panel selection to be the most prevalent: (i) selection by lot; and (ii) selection by a designated appointing authority.

5.5.1.1.1 Selection by lot

Many RTA-DSMs require panellists to be selected by lot in circumstances where the disputing parties have failed to appoint panellists. Selection by lot, in this context, means choosing panellists at random from a larger pool of candidates. Under some RTA-DSMs, panellists are selected by lot from a roster, while, under others, panellists are selected by lot from a pool of candidates nominated by the disputing parties for a particular dispute. RTAs to which the United States is a party, and recent RTAs to which the EU is a party, are examples of RTAs that require panellists to be selected by lot from the roster of prospective panellists established under the RTA. On the other hand, recent RTAs to which Canada is a party are examples of RTAs that require panellists to be selected by lot from a pool of candidates nominated by the disputing parties for a particular dispute. In this regard, the Canada-Colombia FTA requires each disputing party to appoint a panellist, and to propose up to four candidates to serve as the chair of the panel. If the disputing parties fail to appoint a panellist, or fail to agree on the chair of the panel, the missing panellist(s) and/or the missing chair of the panel, is selected by lot from the pool of candidates proposed by the disputing parties.

5.5.1.1.2 Selection by a designated appointing authority

Another default mechanism provided for in some RTA-DSMs requires a designated authority to appoint panellists when disputing parties have failed to compose a panel. In some cases, the designated appointing authority is internal to the RTA system. Thus, for example, most of the recent RTAs to which the EU is a party require the chairperson of a political body, namely, the joint committee established under the RTA, to select panellists by lot from a roster. At least 50 RTAs, however, designate an appointing authority that is external to the RTA system. In this connection, we found that 25 RTAs designate the WTO Director-General; 7 RTAs designate the Secretary General of the Permanent Court of Arbitration; 13 RTAs designate the President of the International Court of Justice; and 5 RTAs designate other authorities. Most of the RTA-DSMs that identify the WTO Director-General as the default selection authority are agreements to which ASEAN, China, EFTA, Japan, and Singapore are parties.

[83] As noted earlier, some RTAs establish rosters to facilitate the panel selection process.

[84] For example, Guatemala-Chinese Taipei, Panama-Chinese Taipei, Nicaragua-Chinese Taipei, and Honduras-El Salvador-Chinese Taipei.

[85] For example, Turkey-Jordan, EFTA-Turkey, EFTA-Serbia, EFTA-Montenegro, and EFTA-Albania.

5.5.1.2 Assessing the automaticity of panel composition

RTA-DSMs that do not establish any default mechanism for panel composition are the most vulnerable to paralysis at the panel composition stage. Many RTA-DSMs do, however, establish such default mechanisms that seek to attenuate the potential for paralysis of the dispute settlement process at the panel composition stage.

The effectiveness of selection by lot may turn on whether or not the responding party has any control over this procedure. In cases where a respondent is able to claim the power to select by lot, this default mechanism could be significantly weakened. In this regard, we have found that some RTA-DSMs either do not specify which disputing party is responsible for selecting a panellist by lot, or specify that "the parties" shall select a panellist by lot where the parties have failed to select panellists within a specified time frame. In contrast, other RTAs give the power of selecting by lot to the chair of a joint committee established under the RTA, who shall make the selection in the presence of the disputing parties. This approach would appear to be less susceptible to paralysis because the respondent is not given a controlling role in the process.

In theory, a default mechanism for panel composition that relies on a designated third party appointing authority can be effective in ensuring that the ad hoc panel process is not paralyzed at the panel composition stage. This is because a neutral third party is empowered to appoint panellists where disputing parties are having difficulty in selecting panellists themselves. Thus, the failure of disputing parties to select panellists need not result in a stalemate. That being said, the effectiveness of this default mechanism might turn on the extent to which a third party appointing authority is bound by an obligation under the RTA to appoint panellists. This may be problematic in cases where the appointing authority is external to the RTA system and there is no binding relationship, expressed through a formal understanding or agreement, between the third party appointing authority and the RTA system. Thus, for example, it is not obvious that the WTO Director-General is under a binding legal obligation to appoint panellists to an ad hoc panel established under an RTA-DSM.

5.5.2 Standing courts

In some standing courts established under the judicial model, the number of judges that compose them corresponds to the number of member States of the RTA. In this connection, there are five courts for which the number of judges corresponds to the number of States that have accepted their jurisdiction.[86]

With regard to the procedures for appointing judges to courts established by the RTA-DSMs classified under the judicial model, a constant among virtually all is that judges are appointed by the member States which are parties to the RTA. The sole exception is the Caribbean Court of Justice (CCJ), in respect of which the Regional Judicial and Legal Services Commission (RJLSC)–an independent body endowed with its own juridical personality under the CCJ's constituent treaty–is charged with the function of appointing judges. CARICOM member States do not nominate prospective judges for the consideration of the RJLSC. Rather, the RJLSC advertises judicial vacancies widely, and suitable candidates apply directly to the RJLSC. The RJLSC is composed of the President of the CCJ, together with 10 individuals representing a broad spectrum of interests across the Caribbean region.[87] Heads of Government of CARICOM member States play a role only in the selection of the CCJ's President who is appointed by a three-quarters majority vote of member States, acting on the recommendation of the RJLSC. All other judges are appointed by an unqualified majority of RJLSC

[86] Andean Court of Justice, European Court of Justice, Court of Justice of CEMAC, EFTA Court, and WAEMU Court of Justice.

[87] Article V(1) of the Agreement Establishing the CCJ sets forth the composition of the RJLSC. The RJLSC shall comprise: (a) The President who shall be the Chairman of the Commission; (b) two persons nominated jointly by the Organisation of the Commonwealth Caribbean Bar Association (OCCBA) and the Organisation of Eastern Caribbean States (OECS) Bar Association; (c) one chairman of the Judicial Services Commission of a Contracting Party selected in rotation in the English alphabetical order for a period of three years; (d) the Chairman of a Public Service Commission of a Contracting Party selected in rotation in the reverse English alphabetical order for a period of three years; (e) two persons from civil society nominated jointly by the Secretary General of the Community and the Director General of the OECS for a period of three years following consultations with regional and non-governmental organisations; (f) two distinguished jurists nominated jointly by the Dean of the Faculty of Law of the University of the West Indies, the Deans of the Faculties of Law of any of the Contracting Parties and the Chairman of the Council of Legal Education; and (g) two persons nominated jointly by the Bar or Law Associations of the Contracting Parties.

members, with no role being played by the Governments of CARICOM member States.[88] This approach to the selection of judges has been described as a feature setting the CCJ apart from most other international courts.[89] Moreover, it has been argued that this selection process ensures the judicial independence of judges.[90]

In the EU system, although the governments of EU member States are ultimately responsible for appointing judges to the ECJ, "a panel" is required, prior to the appointment of judges, to give an opinion on the suitability of candidates to perform the duties of a judge. This panel, unlike the RJLSC under the CARICOM system, does not exercise a direct function of appointment, but is merely required to give an opinion on the suitability of candidates. The panel is composed of seven persons chosen from among former members of the Court of Justice and the General Court[91], members of national supreme courts and lawyers of recognised competence, one of whom shall be proposed by the European Parliament.[92]

5.5.3 Qualifications of ad hoc panellists and judges

A surprising 46 RTA-DSMs employing the quasi-judicial model do not specify any qualifications for ad hoc panellists. Most of these are older RTAs to which EFTA, the EU, Israel, and Turkey are parties. 101 RTA-DSMs classified under the quasi-judicial model (68%) specify qualifications for ad hoc panellists, and all RTA-DSMs classified under the judicial model specify qualifications for judges of standing courts.

In respect of the technical competence of ad hoc panellists, the typical provision found in the vast majority of RTA-DSMs specifies that all arbitrators shall have "expertise or experience in law, international trade, other matters covered by [the RTA], or the resolution of disputes arising under international trade agreements." Virtually all such RTA-DSMs classified under the quasi-judicial model that specify the qualifications of prospective panellists envisage a panel being composed not only of persons with a legal or international trade background, but also of persons with specialized knowledge of the subject matter of the dispute, or of the matters regulated by the RTA more generally. A more broadly worded provision found in most RTAs to which Japan is a party provides that arbitrators should have "relevant technical or legal expertise".

Interestingly, one RTA, in setting forth the qualifications of prospective panellists, refers explicitly to WTO-related technical competencies. The New Zealand-Singapore FTA provides that arbitrators appointed to an ad hoc tribunal may include "persons who have served on or presented a case to a WTO panel, served in the Secretariat of the WTO, taught or published on international trade law or policy, or served as a senior trade policy official of a Member of the WTO."[93]

With regard to qualifications relating to the personal attributes or character of prospective ad hoc panellists, the vast majority of RTA-DSMs under the quasi-judicial model require panellists to possess certain virtues. These include: objectivity, reliability, sound judgement, independence and impartiality.

All RTA-DSMs classified under the judicial model specify the qualifications which prospective judges of standing courts should hold. In respect of the technical competence of judges, the vast majority of RTA-DSMs classified under the judicial model require a prospective judge to possess the qualifications required to hold the highest judicial office of the Member State of which he/she is a national. Thus, these RTA-DSMs typically envisage jurists, or persons recognized as being qualified to hold the highest judicial offices in their countries, exercising the judicial function under an RTA.

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[88] Note that Article IV(11) of the Agreement establishing the CCJ provides that the RJLSC may consult with associations' representatives of the legal profession and with other bodies and individuals that it considers appropriate.

[89] See R. Mackenzie, C. Romano, Y. Shany, and P. Sands, "The Manual on International Courts and Tribunals" (Oxford University Press, 2010) 281; and P. Dayle, "Caribbean Court of Justice: A Model for International Courts?" (The Guardian UK, 10 September 2010), available at: <http://www.guardian.co.uk/law/2010/sep/10/caribbean-court-judges-selection>

[90] K. Malleson, "Promoting Judicial Independence in the International Courts: Lessons From the Caribbean" (2009) 58(3) *International and Comparative Law Quarterly* 671.

[91] Previously known as the Court of First Instance (CFI).

[92] Article 255 of the TFEU.

[93] Article 61(5) of the New Zealand-Singapore.

Moreover, these RTA-DSMs do not typically require judges of the standing courts established thereunder to have specialized knowledge of a particular subject matter regulated by an RTA. The notable exceptions are the Caribbean Court of Justice (CCJ), and the Court of Justice of the Economic Community of Central African States (CEMAC). With regard to the CCJ, at least three of the judges of the CCJ are required to "possess expertise in international law, including international trade law." Moreover, prospective judges of the CCJ can also be persons engaged in the practice or teaching of law for a period amounting in the aggregate to not less than fifteen years in a CARICOM member State, in some part of the Commonwealth, or "in a State exercising civil law jurisprudence common to Contracting parties". With regard to the Court of Justice of the CEMAC, prospective judges must be persons qualified to hold the highest judicial office in their countries, or persons who have at least 15 years' experience as a lawyer, or university professor of law or economics.

In sum, there is a fundamental distinction between the quasi-judicial model, on the one hand, and the judicial model, on the other hand, in respect of the qualifications required of adjudicators. For the most part, judges of standing courts are expected to be professional jurists who have exercised a judicial function in the States of which they are nationals. Moreover, RTA-DSMs classified under the judicial model do not typically require prospective judges to have specialized knowledge of the matters regulated by an RTA. In contrast, panellists serving on an ad hoc panel need not be jurists, or even persons with formal legal qualifications – with the exception of arbitrators appointed under the DSM of the CACM.[94]

5.5.4 Nationality requirements

The nationality of adjudicators may raise questions concerning the traditional requirements of impartiality, independence and neutrality in dispute settlement. The issue is perhaps even more pertinent in the context of ad hoc arbitration since arbitrators appointed on ad hoc basis do not enjoy the degree of institutional independence that adjudicators of standing courts enjoy.[95]

RTA-DSMs classified under the quasi-judicial model contain both permissive and prohibitive nationality requirements. These RTA-DSMs permit nationals of member States to serve on an ad hoc panel, but prohibit nationals from being selected as the chair of the panel. Thus, these agreements seem to contemplate an ad hoc panel being composed of two persons who are nationals of each disputing party, and a chair who is a non-national of the disputing parties.

We found only five RTA-DSMs classified under the quasi-judicial model that do not allow any nationals of the disputing parties to serve on an ad hoc panel: ASEAN-Australia-New Zealand FTA; ASEAN FTA (AFTA); Canada-Colombia FTA; and Canada-Peru FTA. In contrast, we found 36 RTA-DSMs that allow nationals to serve on an ad hoc panel, including as chair of the panel. Many of these are older RTAs signed by the EU.

Only three RTA-DSMs classified under the judicial model – the European Union, the Andean Community and ECOWAS – expressly state that judges shall be nationals of member States.[96] While the other RTA-DSMs under the judicial model do not *expressly* preclude non-nationals from serving as judges of standing courts, they are, in practice, composed of nationals of member States only. This may be the result of the procedures through which judges are appointed. In this connection, with the exception of the Caribbean Court of Justice, the judges of all other courts established by RTA-DSMs classified under the judicial model are nominated by member States. This arguably heightens the likelihood that only nationals of member States will be nominated as judges.

[94] Article XXVI of the General Treaty on Central American Economic Integration establishes that "[f]or the purpose of constituting the arbitration tribunal, each Contracting Party shall propose to the General Secretariat of the Organization of Central American States the names of three magistrates from its Supreme Court of Justice." The member States of the CACM are: Costa Rica, El Salvador, Guatemala, Honduras, and Nicaragua.

[95] On the issue of nationality requirements and ad hoc arbitration, see generally, I. Lee, "Practice and Predicament: The Nationality of the International Arbitrator" (2007) 31(3) *Fordham International Law Journal* 603.

[96] Article 19.2 of the Treaty of the European Union states that: "[t]he Court of Justice shall consist of one judge from each Member State".

5.5.5 Interim review

The interim review stage of the dispute settlement process entails an adjudicating body issuing a preliminary version of its report to the disputing parties on which they can provide comments.

An interim review stage is a common feature of RTA-DSMs classified under the quasi-judicial model; it is not a feature of RTA-DSMs classified under the judicial model. Approximately 60% of RTA-DSMs classified under the quasi-judicial model provide for an interim review stage in the dispute settlement process. Of the 56 RTA-DSMs which do not provide for an interim review stage, 17 are agreements to which the EU is a party, while 13 are agreements to which EFTA is a party. EU practice is mixed. While some of the most recent RTAs to which the EU is a party provide for an interim review stage[97], other recent RTAs to which it is a party do not.[98] Many RTA-DSMs with an interim review stage explicitly set forth a time frame within which an ad hoc panel must issue its interim report. Indeed, of the 91 RTA-DSMs that provide for an interim review stage, only five do not specify a timeframe within which an ad hoc panel should issue its interim report.[99] The timeframe specified in RTA-DSMs for the issuance of a panel's interim report ranges from 90 to 180 days, with most (73%) specifying a timeframe of 90 days.

5.5.6 Timeframes – Duration of the adjudicatory process

The majority of RTA-DSMs classified under the quasi-judicial model specify timeframes within which the adjudicatory process should be concluded. Most (125 of 147) specify a timeframe for the issuance of a panel's final report.[100] Of the 22 RTA-DSMs that do not specify such a timeframe, 50% are agreements to which the EU is a party, while 32% are agreements to which Turkey is a party. Most of these agreements to which the EU is a party are older RTAs. More recent RTAs to which the EU is a party specify the timeframe within which a panel is required to issue its final report. The timeframe for the issuance of a panel's final report varies across RTA-DSMs from 60 days to 225 days from the date on which the panel is composed. The most common timeframe specified for the issuance of a panel's final report is 120 days. This timeframe is specified in approximately 70 RTA-DSMs, and is prevalent in most RTAs to which the following countries/institutions are parties: ASEAN, Canada, Chile, China, Colombia, Japan, Korea, Mexico, New Zealand, Panama, Peru, and Thailand. The longest specified timeframe of 225 days is found in five agreements, all of which are RTAs to which the United States is a party.[101] Having said that, the two most recent RTAs to which the United States is a party provide for a timeframe of 150 days.[102] This might possibly be indicative of a shift in the practice of the United States in the direction of shorter timeframes for the issuance of a panel's final report.

36 RTA-DSMs classified under the quasi-judicial model provide for an expedited panel procedure in cases of "urgency". Urgent matters are often defined non-exhaustively as "including" those relating to perishable goods. Most RTAs to which ASEAN, Chile, China, the EU, Mexico, and Peru are parties provide for an expedited panel procedure in cases of urgency. In contrast, RTAs to which Canada, EFTA, Japan, Korea, Panama, Singapore, Turkey, the United States, and India are parties do not, usually, provide for an expedited panel procedure in cases of urgency. The timeframe for the adjudicatory process in cases of urgency is almost invariably half of the timeframe that applies in regular cases.

5.5.7 Appellate review

Appellate review is not a typical feature of RTA-DSMs or, indeed, of international dispute settlement generally. The RTA-DSMs classified under the quasi-judicial model that feature appellate review are: MERCOSUR, SADC[103], and ASEAN. In all three, the appellate review function, unlike the first instance dispute settlement function, is exercised by a standing body. Moreover, under all three systems of appellate review, appeals are limited to issues of law and legal interpretation. Thus, these

[97] EU-Korea and EU-Cameroon.
[98] EU–Eastern and Southern African States interim EPA and EU-Serbia.
[99] ASEAN-China, China-Singapore, India-Singapore, Thailand-Australia, and Thailand-New Zealand.
[100] In some cases, this time period is counted from the date of the panel's establishment while, in others, the time period is counted from the date of issuance of the panel's interim report.
[101] Korea-US, US-Australia, US-Bahrain, US-Morocco, and US-Oman.
[102] US-Colombia and US-Panama.
[103] At the time of writing, SADC's tribunal has been disbanded.

standing appellate bodies have a limited mandate that does not encompass making factual determinations. Notwithstanding this limited mandate, none has been conferred with a power of remand.

MERCOSUR's Permanent Tribunal of Review (PTR)[104] is composed of five arbitrators and their alternates, bringing its complement of adjudicators to a total of ten. Each MERCOSUR Member State designates an arbitrator for a term of two years, and this term is renewable twice. The fifth arbitrator is appointed by mutual agreement among MERCOSUR's membership for a term of three years, and this term is not renewable unless all MERCOSUR members agree otherwise. The PTR sits as a division of three for disputes involving two parties, or as a division of five if there are more than two parties to a dispute. Interestingly, the disputing parties can agree to elect the PTR as the sole adjudicating body for the settlement of their dispute, in which case the PTR will have the same competence as an ad hoc arbitral panel, and no appeal of its decision is possible.[105]

ASEAN's appellate review mechanism was established by the 2004 "ASEAN Protocol on Enhanced Dispute Settlement Mechanism". This Protocol, in Article 12, establishes an Appellate Body which is composed of 7 persons, 3 of whom serve on any one case. At the time of writing, the Appellate Body's full complement of 7 persons had not been appointed. Article 12 of the Protocol mirrors Article 17 of the DSU in every respect. The appellate review mechanism of the ASEAN-DSM is almost identical to that of the WTO.

The SADC tribunal was established in 1992 but was not composed until 2005. The tribunal has many different types of jurisdictions. With respect to trade disputes, the tribunal has an appellate jurisdiction pursuant to which it hears appeals in respect of legal findings and conclusions of ad hoc panels established under SADC's trade protocol. This appellate review function of the tribunal was established in 2007 by the Protocol on the Tribunal and Rules of Procedure Thereof. The Tribunal is composed of 10 persons, 3 of whom serve on any one case.

In addition, two RTA-DSMs classified under the judicial model have some form of appellate jurisdiction. The European Court of Justice may hear appeals against judgments and orders of the General Court.[106] Appeals must be limited to points of law. In exceptional circumstances, the European Court of Justice can review decisions of the General Court on appeals against decisions of the European Union Civil Service Tribunal. Following amendments to the Treaty establishing the East African Community in 2006 and 2007, the East African Court of Justice was reconstituted to have two divisions: a First Instance Division and an Appellate Division. The Court's First Instance Division has jurisdiction to determine any matter before the Court in accordance with the Treaty Establishing the East African Community, subject to a right of appeal to the Appellate Division.[107] The Appellate Division's mandate is limited to "points of law"; "grounds of lack of jurisdiction"; and "procedural irregularity".[108]

5.6 Post adjudication stage – Clarification and implementation

5.6.1 Clarification procedures

Clarification procedures allow for disputing parties to request an adjudicating body that has issued a ruling in respect of the dispute to clarify the meaning of specific aspects of its ruling. Such procedures differ from interim review procedures both substantively and temporally. They can be triggered only after the issuance of a final ruling, and do not permit an adjudicating body to alter substantively its ruling in the light of views expressed by the parties. Clarification procedures are provided for in a small percentage of the RTA-DSMs classified under the quasi-judicial model (18%), while a larger percentage of RTA-DSMs classified under the judicial model (60%) provide for such procedures. Under the quasi-judicial model, many, but not all, of the RTA-DSMs that provide for a clarification procedure are agreements to which EFTA is a party.[109] Interestingly, in the case of RTA-

[104] The PTR was established by the Protocol of Olivos, which entered into force in 2004.
[105] Articles 23 *et seq*. of the Protocol of Olivos.
[106] Article 256 of the Treaty on the Functioning of the European Union.
[107] Article 23 of the Treaty Establishing the East African Community.
[108] Article 35 A of the Treaty Establishing the East African Community.
[109] Aside from the EFTA RTA-DSMs, the following RTA-DSMs include clarification procedures: Canada-Colombia, Canada-Peru, CEFTA 2006, China-Costa Rica, EU-Eastern and Southern African States, Korea-ASEAN, MERCOSUR, Peru-China, Peru-Singapore, Peru-Mexico, and Turkey-Jordan.

DSMs to which EFTA is a party, clarification procedures are not explicitly provided for in the text of the agreements. Rather, these procedures exist through the incorporation by reference of the Permanent Court of Arbitration Optional Rules for Arbitrating Disputes between Two States. There is some correlation between RTA-DSMs that do not have an interim review stage, and RTA-DSMs that provide for clarification procedures. In this regard, of the 26 RTA-DSMs that provide for clarification procedures, 17 of them do not have an interim review stage. Thus, it appears that clarification procedures are, more often than not, in lieu of, rather than in addition to, an interim review stage.

We note that 1 out of the 3 RTA-DSMs classified under the quasi-judicial model that have appellate review mechanisms provide for clarification procedures. In this connection, MERCOSUR provides for a clarification procedure which applies to the reports of ad hoc panels, as well as its Permanent Tribunal of Review.

5.6.2 Implementation

An important determinant of the effectiveness of a dispute settlement system is the extent to which a complainant can have a decision enforced against a recalcitrant respondent. In considering the design and functioning of RTA-DSMs, it is necessary to consider the extent to which RTA-DSMs specify procedures for the implementation of decisions rendered by adjudicating bodies under the quasi-judicial and judicial models, and for settlements negotiated between disputing parties under the political model. Thus, in this subsection, we consider the extent to which RTA-DSMs contain provisions regulating: (i) the time-period for the implementation of rulings of adjudicating bodies, and of settlements negotiated by disputing parties; and (ii) the review of any measures taken by a respondent to implement the rulings of an adjudicating body, or to implement the terms of a negotiated settlement with a complainant.

5.6.2.1 Time-periods for implementation

As explained further below, only 25 of the 69 RTA-DSMs that follow the political/diplomatic model specify remedies to which an injured party may have recourse in circumstances where the parties fail to reach a negotiated settlement through direct consultations between disputing parties, or through the intervention of a political body established under the RTA. These remedies are not precisely specified, and usually involve the affected party taking "appropriate measures"[110], sometimes further described as "safeguard" measures.[111] Most of these RTA-DSMs do not provide for a timeframe within which a negotiated settlement must be implemented before a party may apply "appropriate measures" in response to the RTA-inconsistent measure(s).[112] A few require a certain period of time to elapse before appropriate measures may be applied. In some cases, the period is 1 month[113], while in others the period specified is 3 months.[114] The absence of time-periods for implementation, or special procedures through which that timeframe may be determined, might perhaps be considered as consistent with the tenor of the political/diplomatic model of dispute settlement, more generally.

There is a high degree of variation among RTA-DSMs classified under the quasi-judicial model in respect of the time periods for the implementation of rulings that are rendered by ad hoc tribunals. The vast majority of RTA-DSMs allow disputing parties to agree, in the first instance, on the time period for implementation of a panel's rulings. However, a small number of such RTA-DSMs (11%) provide for the time-period for implementation to be included in the panel's report on the substantive merits of a dispute. A larger number of RTA-DSMs classified under the quasi-judicial model (37%) provide for a special arbitral procedure through which the time period for implementation can be determined, in the event that the disputing parties do not agree on a timeframe for implementation.

In respect of the RTA-DSMs that provide for the time period for implementation to be included in the final report of the panel, most of these are agreements to which Chile, Mexico, Central America, Panama, Peru, and Chinese Taipei, are parties. In some instances, this is a mandatory requirement

[110] See subsection 5.7 below.
[111] See e.g. EFTA-Turkey and EU-Iceland.
[112] See e.g. EU-Syria, EU-Switzerland-Liechtenstein, EU-Norway, EU-Iceland, EU-FYROM, EU-Croatia, EU-Albania, and Melanesian Spearhead Group (MSG).
[113] See e.g. Turkey-Croatia, Turkey-Albania, Turkey-FYROM, and Turkey-Montenegro.
[114] See e.g. EFTA-Turkey, Turkey-Bosnia and Herzegovina, EU-Faroe Islands, Russian Federation-Serbia, and Faroe Islands-Norway.

imposed on panels while, in others, a panel may include this time-period in its report if it requested to do so by the disputing parties.

As regards RTA-DSMs that establish arbitral procedures for determining the period of time required for implementation, virtually all of these provide that, to the extent possible, the arbitral panel shall be composed of the same panellists that composed the original adjudicatory panel in the underlying dispute. There is a high degree of variation among these RTA-DSMs in relation to the timeframes applicable to the conduct of these procedures. A small number (6) do not specify when this procedure should commence.[115] Thus, disputing parties may, in principle, negotiate for an extended period of time on the timeframe for implementation. In these circumstances, the complaining party can, however, determine when a stalemate has been reached, and trigger the arbitral procedure for determining the time-period for implementation. More often than not, however, these RTA-DSMs specify when procedures for determining the timeframe for implementation should commence and end.[116] Generally, the timeframes for the commencement of these procedures range from within 20 - 50 days after the original panel has issued its ruling on the substantive merits of the dispute to the disputing parties. A few DSMs of RTAs to which Japan is a party require the respondent to notify the complainant of a reasonable period of time for implementation, and if the complainant disagrees with the respondent's proposal, the parties must engage in consultations, as a pre-requisite for arbitral proceedings on the reasonable period of time for implementation.[117] Under these RTA-DSMs, the timeframe for the commencement of the arbitral procedure ranges from within 20-30 days after the respondent receives the request for consultations.

Among RTA-DSMs that follow the quasi-judicial model, the duration of arbitral proceedings concerning the reasonable period of time for implementation can be as short as 15 days, or as long as 90 days, after referral of the matter to the panel. Between these two extremes, most RTA-DSMs require panels to issue their awards within timeframes ranging from 30 - 60 days.

Although 37% of RTA-DSMs classified under the quasi-judicial model provide for a special arbitral procedure for determining the timeframe required for implementation, only a small number (13) stipulate guidance on what this timeframe should be.[118] Thus, under the vast majority of RTA-DSMs that follow the quasi-judicial model, the panel has unfettered discretion to determine how much time the respondent should be granted, based on the particular circumstances of each case. In a few instances guidelines are prescribed in either quantitative or qualitative terms. There is some variation among RTA-DSMs that specify a quantitative guideline. Most specify guidelines of 15 months[119], and 12 months.[120] We also found one RTA-DSM that specifies a guideline of only 30 days[121], and another RTA-DSM that specifies a guideline of 6 months.[122] A small number of RTA-DSMs (6) specify the guideline for the implementation period in qualitative terms.[123] The vast majority of these are recent agreements to which the EU is a party. Thus, for example, the EU-CARIFORUM States EPA specifies that the arbitral tribunal shall take into account: (i) the length of time that it will normally take the respondent to adopt comparable legislative or administrative measure to those which it identifies as being necessary to secure compliance; and (ii) demonstrable capacity constraints which may affect the adoption of the measures necessary for implementation of the panel's rulings and recommendations.

[115] ASEAN-India, EFTA-Korea, EFTA-Mexico, EFTA-Singapore, India-Korea, and Korea-Singapore.

[116] ASEAN-Australia-New Zealand, ASEAN-China, ASEAN-Japan, Australia-Chile, Brunei Darussalam-Japan, Canada-Costa Rica, Chile-China, Chile-Japan, China-Costa Rica, China-New Zealand, China-Singapore, EFTA-Albania, EFTA-Chile, EFTA-Hong Kong, China, EU-Bosnia and Herzegovina, EU-Cameroon, EU-CARIFORUM States, EU-Chile, EU-Côte d'Ivoire, EU-Mexico, EU-Montenegro, EU-Papua New Guinea/Fiji, EU-Korea, EU-Serbia, Hong Kong, China-New Zealand, India-Singapore, Japan-Indonesia, Japan-Malaysia, Japan-Mexico, Japan-Peru, Japan-Philippines, Japan-Singapore, Japan-Switzerland, Japan-Thailand, Japan-Viet Nam, Jordan-Singapore, Korea-ASEAN, Panama-Chile, and Peru-Chile.

[117] Japan-Indonesia, Japan-Malaysia, Japan-Philippines, Japan-Singapore, and Japan-Switzerland.

[118] ASEAN-Australia-New Zealand, Canada-Costa Rica, Chile-Mexico, Colombia-Northern Triangle, Hong Kong-New Zealand, Japan-Peru, Japan-Singapore, EU-Cameroon, EU-CARIFORUM States, EU-Côte d'Ivoire, EU-Papua New Guinea/Fiji, New Zealand-Singapore, and Panama-Chinese Taipei.

[119] ASEAN-Australia-New Zealand, Canada-Costa Rica, and Japan-Peru.

[120] Hong Kong, China-New Zealand, and Japan-Singapore.

[121] Chile-Mexico.

[122] Colombia-Northern Triangle (El Salvador, Guatemala, Honduras).

[123] EU-Cameroon, EU-CARIFORUM States, EU-Côte d'Ivoire, and EU-Papua New Guinea/Fiji.

A significant proportion of RTA-DSMs classified under the quasi-judicial model (52%) provide neither for the time-period for implementation to be prescribed in the panel's report on the substantive merits, nor for a special arbitral procedure through which the time-period for implementation can be determined. However, in approximately 24% of RTA-DSMs classified under the quasi-judicial model, the time-period for implementation is either explicitly stated, or can be inferred from the time-period that must elapse before a complainant may have recourse to temporary remedies in respect of the respondent's non-compliance. For example, under the majority of RTAs to which the United States is a party, there is no stated timeframe for compliance, neither is there a special arbitration procedure through which this may be determined. Nevertheless, if compliance satisfactory to the complaining party does not occur within 45 days, the disputing parties are expected to enter into negotiations "with a view to developing mutually acceptable compensation".[124] Other RTA-DSMs explicitly specify timeframes for implementation that range from 30 days to 15 months.[125] Generally, these timeframes apply unless the parties agree otherwise. Because these RTA-DSMs, either explicitly or implicitly, set a timeframe for the implementation of the rulings of an ad hoc panel, the need for a panel to determine and include such a timeframe in its report on the substantive merits, or for a separate arbitral procedure to determine a timeframe for implementation, would appear to be obviated.

5.6.2.2 Compliance review

Compliance review procedures enable a disputing party to request the adjudicating body to review the consistency of implementation measures adopted by a respondent.

Some RTA-DSMs frame compliance review as involving an assessment of the consistency of the implementing measure with provisions of the RTA generally. For example, Article 212 of the EU-CARIFORUM EPA states that "[i]n the event that there is disagreement between the Parties concerning the compatibility of any measure notified under paragraph 1, with the provisions of this Agreement, the complaining Party may request in writing the arbitration panel to rule on the matter." In other cases, the compliance review is framed as an assessment of the consistency with the findings of the ad-hoc adjudication body. Thus, for example, Article 21.16 of the Colombia-US FTA provides that the respondent party may request a compliance review if it considers that "it has eliminated the non-conformity or the nullification or impairment that the panel has found."

The Canada-Colombia FTA draws on WTO jurisprudence in regard to the scope of compliance proceedings. Under Article 2115, a party may request that the arbitral panel be reconvened to make a determination with respect to "any disagreement as to the existence or consistency with this Agreement of measures taken to comply with the determinations or recommendations of the previously established panel". A footnote to that provision adds that "[i]n interpreting the terms 'the existence or consistency with' and 'measures taken to comply', a compliance panel established under this paragraph shall take into account relevant jurisprudence under the WTO Understanding on Rules and Procedures for the Settlement of Disputes".

RTA-DSMs that follow the political/diplomatic model of dispute settlement do not contain special procedures through which it may be determined whether a disputing party has complied with a negotiated settlement, and thus, whether the application of "appropriate measures" to remedy an RTA-inconsistent measure should be precluded or withdrawn. That being said, and as explained below, a small number of RTA-DSMs that follow the political/diplomatic model of dispute settlement require that "appropriate measures" taken to remedy an RTA-inconsistent measure be the subject of regular consultations within the joint committee established by the RTA with a view to their relaxation, or abolition, when their maintenance is no longer justified.[126] Typically, these are RTAs to which Turkey is party. While this might not be a considered to be a compliance review procedure *stricto sensu*, it is a means through which a disputing party may seek the withdrawal of appropriate measures that have been applied against it.

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[124] US-Australia, US-Bahrain, US-Chile, US-Colombia, US-Morocco, US-Oman, US-Panama, US-Peru, US-Singapore, CAFTA-DR-United States, and Korea-US. Under NAFTA Chapter 20, the complaining party may begin suspending concessions if the disputing parties are unable to reach a mutually satisfactory solution within 30 days from the circulation of a panel's report in the underlying dispute.

[125] ASEAN Free Trade Area (AFTA), Canada-EFTA, Canada-Israel, Canada-Peru, Chile-Central America, Colombia-Mexico, EU-South Africa, Guatemala-Chinese Taipei, Honduras-El Salvador-Chinese Taipei, MERCOSUR-India, Mexico-Northern Triangle, New-Zealand-Singapore, Nicaragua-Chinese Taipei, Pakistan-China, Pakistan-Malaysia, Panama-Peru, and Peru-Mexico.

[126] See *infra*, subsection 5.7.

Under the quasi-judicial model RTA-DSMs, compliance review procedures may take place either before a complainant has recourse to temporary remedies in respect of the non-compliance of the respondent (pre-retaliation), after a complainant has had recourse to such temporary remedies (post-retaliation), or both. It would appear that the objective of such procedures depends on whether they occur prior, or subsequent to, a complainant's recourse to temporary remedies. Where a compliance review procedure occurs prior to the complainant's use of temporary remedies for non-compliance, such procedures condition the right of a complainant to have recourse to such remedies on a finding by a panel that a respondent has failed to comply with the rulings of a panel on the substantive merits of the dispute. In contrast, compliance review procedures that occur after the complainant has had recourse to temporary remedies for non-compliance are meant to determine whether these temporary remedies should remain in place, in the light of measures taken by a respondent to implement the rulings of a panel.

64% of RTA-DSMs classified under the quasi-judicial model provide for compliance review procedures. These RTA-DSMs envisage that the same ad hoc panel that adjudicated on the substantive merits of the underlying dispute will administer compliance review procedures. Approximately 13% of RTA-DSMs that follow the quasi-judicial model provide only for pre-retaliation compliance review[127]; 5% provide only for post-retaliation compliance review[128]; and 46% provide for both pre-retaliation and post-retaliation compliance review.[129] The vast majority of the 46% of RTA-DSMs under the quasi-judicial model that do not provide for compliance review procedures do not contain any provisions regulating the implementation stage of dispute settlement more generally.

Among RTA-DSMs that follow the quasi-judicial model, there is some degree of variation in respect of the timeframes applicable to the conduct of compliance review procedures. With regard to the timeframes for pre-retaliation compliance review, at one extreme, the timeframe is as short as 15 days from the date of the initiation of the compliance procedure[130], and, at the other extreme, the timeframe can be as long as 120 days from the date of the initiation of the compliance procedure.[131] Between these two extremes, RTA-DSMs prescribe timeframes of 30, 45, 60, and 90 days, with the vast majority of RTA-DSMs specifying a timeframe of 60 days.[132] In contrast, the timeframes for post-retaliation compliance review range from 15 days to 90 days, with most RTA-DSMs prescribing a timeframe of 45-60 days. When both pre-retaliation and post-retaliation compliance review procedures are provided for, the timeframe applicable to the former is almost invariably longer than the timeframe applicable to the latter. For example, under the majority of RTAs to which the United States is a party, the timeframe of a compliance review procedure prior to a complainant's use of temporary remedies for non-compliance is 120 days, while the timeframe of a compliance review subsequent to the complainant's application of such remedies is 90 days.

[127] ASEAN-China, ASEAN-India, ASEAN-Japan, ASEAN Free Trade Area (AFTA), Australia-Chile, Brunei Darussalam-Japan, Canada-Colombia, Canada-EFTA, Canada-Peru, Chile-India, Chile-Japan, China-Singapore, India-Malaysia, Korea-Singapore, Pakistan-Malaysia, Panama-Singapore, Singapore-Australia, and Turkey-Chile.

[128] Costa Rica-Mexico, EFTA-Korea, Japan-Switzerland, Jordan-Singapore, Pakistan-China, Panama-Peru, and Peru-Mexico.

[129] CAFTA-DR-United States, Chile-China, Chile-Colombia, Chile-Central America, China-Costa Rica, China-New Zealand, Colombia-Mexico, Colombia-Northern Triangle, EFTA-Albania, EFTA-Chile, EFTA-Colombia, EFTA-Hong Kong, China, EFTA-Montenegro, EFTA-Mexico, EFTA-Peru, EFTA-Serbia, EFTA-Singapore, EFTA-Ukraine, EU-Bosnia and Herzegovina, EU-Cameroon, EU-CARIFORUM States, EU-Chile, EU-Côte d'Ivoire, EU-Mexico, EU-Montenegro, EU-Papua New Guinea/Fiji, EU-Korea, EU-Serbia, Guatemala-Chinese Taipei, Honduras-El Salvador-Chinese Taipei, Hong Kong, China-New Zealand, India-Korea, India-Japan, India-Singapore, Japan-Indonesia, Japan-Malaysia, Japan-Mexico, Japan-Peru, Japan-Philippines, Japan-Singapore, Japan-Thailand, Japan-Viet Nam, Korea-US, Korea-ASEAN, New Zealand-Malaysia, Nicaragua-Chinese Taipei, Panama-Chile, Panama-Central America, Panama-Chinese Taipei, Peru-China, Peru-Singapore, Peru-Chile, Thailand-Australia, Thailand-New Zealand, Trans-Pacific SEP, US-Australia, US-Bahrain, US-Chile, US-Colombia, US-Morocco, US-Oman, US-Panama, US-Peru, and US-Singapore.

[130] India-Singapore.

[131] ASEAN-Australia-New Zealand, CAFTA-DR-United States, Canada-Colombia, Canada-Peru, Korea-US, US-Australia, US-Bahrain, US-Chile, US-Colombia, US-Morocco, US-Oman, US-Panama, US-Peru, and US-Singapore.

[132] ASEAN-China, ASEAN-India, ASEAN-Japan, ASEAN Free Trade Area (AFTA), Australia-Chile, Brunei Darussalam-Japan, Chile-China, Chile-Colombia, Chile-India, Chile-Japan, China-New Zealand, China-Singapore, EFTA-Mexico, EFTA-Singapore, EU-Mexico, India-Japan, India-Malaysia, Japan-Indonesia, Japan-Malaysia, Japan-Peru, Japan-Philippines, Japan-Singapore, Japan-Thailand, Japan-Viet Nam, Panama-Chile, Peru-China, Peru-Singapore, Peru-Chile, Singapore-Australia, Trans-Pacific SEP, and Turkey-Chile.

An interesting feature of a small number of RTA-DSMs is that the ad hoc panel that adjudicated on the substantive merits of an underlying dispute can, on its own motion, initiate a compliance review procedure after the expiry of the time-period for the implementation of its rulings, and before the complainant can have recourse to temporary remedies for non-compliance.[133] Most of these RTAs are RTAs to which Chinese Taipei is a party. Thus, for example, under the Panama-Chinese Taipei FTA, the respondent must inform the panel and the complaining member of any measures taken to comply with the panel's ruling within 5 days of the expiration of the time period for implementation. The panel must then, on its own motion, determine whether compliance has been achieved within 30 days after the expiration of the time period for implementation. The complaining party may have recourse to temporary remedies for non-compliance only after the panel has determined that the respondent's implementing measures have not achieved compliance with its rulings on the substantive merits of the underlying dispute.[134]

5.7 Remedies

In this section, we examine the approach of RTA-DSMs to the issue of remedies. We consider the issue of remedies at two distinct phases of the dispute settlement process. First, we consider the extent to which RTA-DSMs provide for interim remedies, that is, remedies to preserve the rights of the aggrieved party pending a decision by an adjudicating body on the substantive merits of the dispute. Second, we examine the issue of remedies subsequent to a decision being rendered by an adjudicating body on the substantive merits of a dispute.

Interim or provisional measures are a standard feature of all RTA-DSMs classified under the judicial model. Only a small number of RTA-DSMs classified under the quasi-judicial model provide for provisional measures (approximately 16%).[135] Most of these RTA-DSMs are agreements to which EFTA is a party, and the possibility of having recourse to these measures stems from the incorporation by reference of the Permanent Court of Arbitration Optional Rules for Arbitrating Disputes between Two States.

Only 25 of the 69 RTA-DSMs classified under the political/diplomatic model specify remedies to which an injured party may have recourse where the parties do not reach a negotiated settlement or the respondent party has failed to comply with a negotiated settlement that has been reached through direct consultations between disputing parties, or through the intervention of a political body established under the RTA. In some RTAs, the remedy is often not precisely specified, and usually involves the affected party taking "appropriate measures". In some cases, there are no explicit limitations on the form, extent or duration of these measures.[136] In contrast, other RTAs such as those to which the EU and Turkey are parties usually place limitations on the measures that an injured party can take. In this regard, the RTAs to which the EU is a party typically state that the measures chosen should "least disturb the functioning of the agreement." Further, such measures are to be the subject of consultations between the parties if the party against whom these measures are to be taken so requests.[137] RTAs to which Turkey is a party contain more stringent limitations. These RTAs limit the application of "appropriate measures" in four ways: (i) the "appropriate measures" taken must be notified to the joint committee established under the RTA; (ii) the "appropriate measures" taken shall be restricted with regard to their extent and duration; (iii) priority must be given to those

[133] Guatemala-Chinese Taipei, Honduras-El Salvador-Chinese Taipei, Nicaragua-Chinese Taipei, Panama-Chinese Taipei, Chile-Central America, and Panama-Central America.

[134] Article 19.17(4) of the Panama-Chinese Taipei.

[135] CEFTA 2006, EFTA-Albania, EFTA-Croatia, EFTA-Egypt, EFTA-Lebanon, EFTA-Montenegro, EFTA-SACU, EFTA-Serbia, EFTA-Tunisia, EFTA-Ukraine, EU-Bosnia and Herzegovina, EU and Southern African States interim EPA, EU-Montenegro, EU-Algeria, MERCOSUR, Turkey-Georgia, Turkey-Israel, Turkey-Palestinian Authority, Turkey-Syria, and Turkey-Tunisia.

[136] See e.g. Russian Federation-Serbia, Melanesian Spearhead Group (MSG), Faroe Islands-Norway, EFTA-Turkey, and ECO. In respect of those RTA-DSMs classified under the political/diplomatic model that do not place explicit limitations on the "appropriate measures" that an injured party can take to remedy non-compliance, an interesting and open question is whether such measures are, nevertheless, subject to the limitations applicable to countermeasures under customary international law. The International Law Commission's (ILC) Articles on *Responsibility of States for Internationally Wrongful Acts* (ILC Articles) contain, in Chapter II thereof, limitations on the application of countermeasures. While it is open to debate which parts of the ILC Articles constitute "codification" (*lex lata*), and which parts "progressive development" (*lex ferenda*), it might be argued that, at a minimum, customary international law encompasses the principles of proportionality and necessity. In the result, the application of "appropriate measures" by an RTA member would be circumscribed by these principles.

[137] EU-Syria, EU-Switzerland-Liechtenstein, EU-Norway, EU-Iceland, EU-Macedonia, EU-Faroe Islands, EU-Croatia, and EU-Albania.

measures that will least disturb the functioning of the RTA; and (iv) the measures shall be the subject of regular consultations within the joint committee established by the RTA with a view to their relaxation, or abolition, when their maintenance is no longer justified. Similar conditions are found in the Ukraine-Moldova and Ukraine-Macedonian RTAs.

Most RTA-DSMs that follow the quasi-judicial model specify the temporary remedies of compensation, and retaliation in the form of the suspension of negotiated concessions under the RTA. More particularly, we found that 85 RTAs specify compensation[138]; 107 specify retaliation in the form of suspending concessions under the RTA[139]; and 88 specify cross-retaliation, that is, the possibility of suspending concessions in a different sector than the sector that has been affected by an RTA-inconsistent measure.[140]

A feature of RTAs to which the United States is a party is the possibility of a responding party providing financial compensation as an alternative to the suspension of concessions by the complaining party. This type of remedy is innovative because, in the trade context, compensation has traditionally been understood to mean the offering of a market access or other trade benefit by the responding party, rather than the offering of compensation in monetary terms. In other words, the respondent who is not in compliance with its obligations reduces trade barriers equivalent to the amount of harm suffered through its measures. Certainly, this has been the understanding of "compensation" as a temporary remedy in the WTO system.[141] An issue that might make financial compensation difficult for parties to agree on is the question of how such compensation is to be calculated. In this regard, most RTAs to which the United States is a party provide for the respondent to offer the complainant an annual "monetary assessment" that is typically set at half of the level of concessions that the complainant would otherwise be entitled to suspend.

Most RTA-DSMs that specify retaliation in the form of suspension of concessions also specify cross-retaliation, that is, the suspension of concessions under a different sector than the sector that has been affected by an RTA-inconsistent measure. This is particularly important for so-called North-South RTAs since market asymmetries may make retaliation under the affected sector difficult or impracticable for a developing country complainant.[142] It should be noted that under the vast majority of RTA-DSMs, the right of a complainant to retaliate by suspending negotiated concessions under an RTA is circumscribed by certain principles that regulate the form and level concessions to be suspended. First, with regard to the form of concessions to be suspended, cross-retaliation – where it is provided for – should only be resorted to in circumstances where it is impracticable for the complainant to suspend concessions in the same sector that has been affected by an RTA-inconsistent measure. Second, with regard to the level of concessions to be suspended, a complainant's suspension of concessions must be proportional to the harm caused by the respondent's RTA-inconsistent measure.[143]

There are also RTA-DSMs that follow the quasi-judicial model that do not specify the particular remedies that a complainant can have recourse to in the event that the respondent fails to comply

[138] See e.g. ASEAN-India, ASEAN-Japan, ASEAN (AFTA), Australia-Chile, Canada-Chile, Canada-Colombia, Canada-Costa Rica, Canada-Peru, Chile-China, Chile-Colombia, China-Costa Rica, China-New Zealand, China-Singapore, EFTA-Albania, EFTA-Chile, EFTA-Colombia, EFTA-Mexico, EFTA-Peru, EU-Cameroon, EU-CARIFORUM States, EU-Chile, EU-Eastern and Southern African States interim EPA, EU-Korea, India-Singapore, India-Japan, India-Malaysia, Japan-Mexico, Japan-Peru, Japan-Thailand, Korea-Singapore, Korea-Chile, US-Australia, US-Bahrain, US-Colombia, and US-Panama.

[139] See e.g. ASEAN-India, ASEAN-Japan, Australia-Chile, CAFTA-DR-United States, Canada-Chile, Canada-Colombia, Canada-EFTA, Chile-China, Chile-Central America, Chile-Mexico, China-New Zealand, China-Singapore, Colombia-Mexico, Costa Rica-Mexico, EFTA-Albania, EFTA-Chile, EFTA-Colombia, EU-Bosnia and Herzegovina, EU-Lebanon, EU-Mexico, EU-Montenegro, EU-Korea, India-Malaysia, Japan-Indonesia, Japan-Malaysia, Japan-Mexico, Japan-Philippines, Japan-Singapore, Korea-US, Korea-Chile, US-Australia, US-Chile, and US-Oman.

[140] See e.g. ASEAN-Australia-New Zealand, ASEAN-China., ASEAN–India, Australia–Chile, Canada–Chile, Canada–Colombia, Canada–Peru, Chile–Mexico, Chile–India, EFTA-Hong Kong, China, EFTA-Singapore, EFTA-Ukraine, Singapore-Australia, Thailand-Australia, Thailand-New Zealand, Israel-Mexico, and India-Malaysia.

[141] See WTO Secretariat, *supra*, fn 9.

[142] On the issue of cross-retaliation and developing countries, see L. Spadano, "Cross-Agreement Retaliation in the WTO Dispute Settlement System: An Important Enforcement Mechanism for Developing Countries?" (2008) 7(3) *World Trade Review* 511.

[143] See subsection 5.7.2.

with the rulings and recommendations of an ad hoc panel.[144] The majority of these agreements are RTAs to which EFTA is a party. These RTAs place an obligation on the party found to be in breach of its RTA commitments to comply with the ruling of an ad hoc panel. This lack of regulation at the post-adjudication stage is striking, particularly because these agreements envisage the settlement of disputes through a legalistic procedure. In other words, although all these RTAs provide a complainant with a right of access to a third party adjudicatory process, which is not conditioned on the consent of the respondent–they do not specify the means by which the result of that process might be enforced. It might be argued that the absence of treaty regulation with regard to remedies for non-compliance leaves open the possibility that an RTA member could have recourse to countermeasures under customary international law with a view to inducing compliance with the ruling of an ad hoc panel.

The vast majority of RTA-DSMs classified under the judicial model are silent on the question of remedies for non-compliance with the rulings of their standing courts. While all of the RTA-DSMs employing the judicial model state that the judgments of their courts are binding and shall be implemented by the relevant Member State, only four explicitly provide a means through which these judgments can be enforced. Three of these RTA-DSMs empower their courts to impose sanctions on Member State that has failed to comply with their rulings.[145] For example, in the EU system, the ECJ may impose penalty payments or lump sums on a Member State that fails to comply with its judgment.[146] This procedure is not initiated directly by a complainant member State, but rather by the European Commission which must also give its view on the actual amount to be paid by the Member State concerned.[147][148] The Andean Court of Justice's judgments may be enforced through the suspension of concessions to a respondent. Concessions may be suspended not only by a complainant in the underlying dispute, but, in addition, by any other Member State of the Andean Community.[149] No other RTA-DSM classified under the judicial model provides for this type of remedy.

In the case of the Andean Community, private parties can use the judgement of the Andean Court of Justice to seek damages from the Member State that took the illegal measure. A judgement of failure to fulfil obligations issued by the Andean Court of Justice against a Member States "constitutes legal and sufficient title for a private party to request a domestic judge compensation for damages and other harm".[150]

5.7.1 Relationship between compliance review procedures and temporary remedies for non-compliance

It seems fair to say that, in circumstances where a respondent has adopted measures that it took in good faith to implement the rulings of an adjudicating body, the complainant should be precluded from applying temporary remedies for non-compliance until such time as it has been determined, through a compliance review procedure under the RTA, that the implementing measures adopted by the respondent have not achieved compliance with the rulings rendered in the underlying dispute. Seen in this light, a compliance review procedure can serve to forestall an unwarranted application of temporary remedies by the complainant. However, the ability of a compliance review procedure to have this "preventive" effect depends on the extent to which its relationship with the procedures for the application of temporary remedies for non-compliance is clearly defined. In other

[144] CACM, CEFTA, EFTA-Croatia, EFTA-Egypt, EFTA-FYROM, EFTA-Israel, EFTA-Jordan, EFTA-Lebanon, EFTA-Morocco, EFTA-Palestine, EFTA-SACU, EFTA-Tunisia, Egypt-Turkey, EU-Eastern and Southern African States interim EPA, EU-San Marino, SACU, SADC, Turkey-Jordan, US-Israel, and US-Jordan.

[145] CEMAC, EU, and COMESA.

[146] Bronckers and Baetens have suggested that the financial compliance inducements in the EU could serve as a model for incorporating financial remedies into WTO dispute settlement. (Marco Bronckers and Freya Baetens, "Reconsidering Financial Remedies in WTO Dispute Settlement", 16(2) *Journal of International Economic Law* 281-311.

[147] See Article 260 of the TFEU (ex Article 228).

[148] Article 41 of the ATJ Treaty and Article 91 of the ATJ Statute.

[149] Article 27 of the ATJ treaty provides: "Were the Court to decide that the Member Country has not complied with its obligations, the country at fault would be compelled to take the necessary steps to execute the judgment within a period of no more than ninety days after notification. If that Member Country fails to fulfil the obligation stated in the previous paragraph, the Court, summarily and after hearing the opinion of the General Secretariat, shall establish the limits within which the claimant country or any other Member Country may restrict or suspend, in whole or in part, the benefits obtained by the Member Country at fault under the Cartagena Agreement. and after hearing the opinion of the General Secretariat, shall establish the limits within which the claimant country or any other Member Country may restrict or suspend, in whole or in part, the benefits obtained by the Member Country at fault under the Cartagena Agreement."

[150] Article 30 of the Treaty Establishing the Andean Court of Justice.

words, the compliance review procedure, and the complainant's right to apply temporary remedies in respect of the respondent's non-compliance, must be properly sequenced to preclude a complainant from applying such remedies while a compliance review procedure is pending. While the point may seem fairly obvious, "sequencing" has been a matter of discussion in the WTO since the DSU came into force in 1995. The issue concerns in particular the relationship between Article 21.5 and Article 22.2 of the DSU. In short, the issue is whether the complainant is entitled to request authorization to suspend concessions before a panel (and the Appellate Body) has established, pursuant to Article 21.5 of the DSU, that there has been a failure to comply with rulings and recommendations of the DSB.[151]

We sought to determine whether, and to what extent, RTA-DSMs that contain compliance review procedures clearly define the sequential relationship between these procedures, on the one hand, and procedures for the application of temporary remedies for non-compliance, on the other hand. We found that approximately 74 RTA-DSMs that follow the quasi-judicial model have dealt with the "sequencing issue" by not allowing a complainant to suspend concessions before a compliance review procedure is completed. In other words, the ability of a complainant to retaliate is contingent upon a finding that the respondent has not complied with the rulings of the ad hoc panel in the underlying dispute.[152]

For example, under recent RTAs to which the EU is a party, the sequencing problem is avoided by setting out a sequential relationship between the compliance review procedure, negotiations on compensation for the respondent's non-compliance, and, finally, the application of "appropriate measures" by the complainant to remedy temporarily the respondent's failure to implement the panel's rulings in the underlying dispute. Negotiations on compensation can be initiated only if a panel has found that implementing measures adopted by the respondent have not achieved compliance with the panel's rulings in the underlying dispute, and the complainant may adopt appropriate measures to remedy temporarily the respondent's non-compliance only if negotiations on compensation are unsuccessful. In the result, a complaining party's access to temporary remedies for non-compliance is contingent on the outcome of the compliance review procedure.[153]

5.7.2 Procedures for challenging the form and amount of retaliation

As noted above, 107 RTA-DSMs that follow the quasi-judicial model specify retaliation in the form of suspension of concessions under the RTA, and 88 specify cross-retaliation. These remedies are typically circumscribed by certain principles governing the form and amount of concessions to be suspended as a temporary remedy for the respondent's failure to implement the rulings of an ad hoc panel in the underlying dispute. All RTA-DSMs falling within the quasi-judicial model that provide for this type of temporary remedy require that the complainant suspend concessions equivalent in effect to the nullification or impairment caused by the impugned measure. Different formulations are used across RTA-DSMs, but the prescription of equivalence is similar. Thus, under RTAs to which the United States is a party, "the complainant may suspend the application to the other party of benefits of equivalent effect" while under RTAs to which Japan is a party, the suspension of concessions by a complainant must be "restricted to the same level of nullification or impairment that is attributable to the failure to comply with the award". This requirement of equivalence highlights that in international trade dispute settlement, temporary remedies typically are not punitive in nature, but rather, are meant to rebalance, pending full compliance, the negotiated balance of concessions disturbed by an RTA-inconsistent measure.

Certain RTA-DSMs also make the principles governing retaliation legally enforceable against a complainant by establishing procedures through which a respondent can challenge the form and amount of concessions that have been suspended by a complainant, or that a complainant proposes to suspend. We found that approximately 68% of RTA-DSMs classified under the quasi-judicial model establish a special arbitral procedure through which a respondent can challenge the suspension of

[151] See WTO Secretariat, *supra*, fn 9, pp. 85-86.

[152] For example, Article 10(1)of Chapter 16 of the Singapore-Australia, Article 19.17(4) of the Panama-the Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu, Article 21.16(2) of the US-Colombia, Article 20.14(2) of the Korea-Singapore, and Article 123 of the Japan-Vietnam.

[153] See e.g. Articles 212-213 of the EU-CARIFORUM States EPA.

concessions applied, or proposed to be applied, by the complainant.[154] These RTA-DSMs, almost invariably, envisage a procedure administered by the original panel that considered the substantive merits of the underlying dispute. These procedures can be initiated either before[155] or after[156] the suspension of concessions by a complainant. In the former case, the challenge is to the form or level of concessions that the complainant *proposes* to suspend, while in the latter case, the challenge is to the form or level of concessions that the complainant has *actually* suspended.

The timeframes applicable to the conduct of arbitral procedures concerning the form and level of retaliation range from 30 days - 120 days from the date of the referral of the matter to the panel, with most RTA-DSMs specifying a timeframe of 60 days.[157]

5.7.3 Consolidation of arbitral procedures at the implementation stage of RTA dispute settlement

We have outlined above three types of arbitral procedures that exist at the implementation stage of dispute settlement under some of the RTA-DSMs that follow the quasi-judicial model. These arbitral procedures concern: the determination of the time period for implementation of a panel's rulings; the assessment of whether the respondent has complied with a panel's rulings; and whether the form or level of concessions that a complainant has suspended, or proposes to suspend, as a temporary remedy for the respondent's non-compliance with a panel's rulings, is in conformity with the principles circumscribing the suspension of concessions under the RTA. These arbitral procedures, more often than not, are separate procedures with distinct mandates or objectives, notwithstanding the fact that, almost invariably, they are all administered by the original panel that considered the substantive merits of the underlying dispute.

An innovation that we have found under a small number of RTA-DSMs that follow the quasi-judicial model is the consolidation of arbitral procedures at the implementation stage, by merging some, or all, of the arbitral procedures outlined above.

First, we have found that under a few RTA-DSMs, a panel may, in a single procedure, determine whether a respondent has complied with the rulings of the original panel, and also assess whether the level of concessions that the complainant proposes to suspend are excessive. Thus, under

[154] ASEAN-Australia-New Zealand, ASEAN–India, ASEAN–Japan, ASEAN Free Trade Area (AFTA), Australia–Chile, Brunei Darussalam–Japan, CAFTA-DR-US, Canada–Chile, Canada-Colombia, Canada-Costa Rica, Canada-EFTA, Canada-Israel, Canada-Peru, Chile-China, Chile-Colombia, Chile-Central America, Chile-India, Chile-Japan, Chile-Mexico, China-Costa Rica, China-New Zealand, Colombia-Mexico, Colombia-Northern Triangle, Costa Rica-Mexico, EFTA-Albania, EFTA-Chile, EFTA-Colombia, EFTA-Hong Kong, China, Dominican Republic-Central America, EFTA-Korea, EFTA-Montenegro, EFTA-Mexico, EFTA-Peru, EFTA-Serbia, EFTA-Singapore, EFTA-Ukraine, EU-Bosnia and Herzegovina, EU-Chile, EU-Mexico, EU-Montenegro, EU-Korea, EU-Serbia, Guatemala-Chinese Taipei, Honduras-El Salvador-Chinese Taipei, Hong Kong, China-New Zealand, India-Korea, India-Japan, Israel-Mexico, Japan-Indonesia, Japan-Malaysia, Japan-Mexico, Japan-Peru, Japan-Philippines, Japan-Singapore, Japan-Switzerland, Japan-Thailand, Japan-Vietnam, Jordan Singapore, Korea-US, Korea-ASEAN, Korea-Chile, Korea-Singapore, MERCOSUR-India, Mexico-Northern Triangle, Mexico-Nicaragua, NAFTA, New Zealand-Malaysia, Nicaragua-Chinese Taipei, Pakistan-China, Pakistan-Malaysia, Panama-Chile, Panama-Costa Rica, Panama-Central America, Panama-Singapore, Panama-Chinese Taipei, Panama-Peru, Peru-China, Peru-Singapore, Peru-Chile, Peru-Mexico, Thailand-Australia, Thailand-New Zealand, Trans-Pacific SEP, Turkey-Chile, US-Australia, US-Bahrain, US-Chile, US-Colombia, US-Morocco, US-Oman, US-Panama, US-Peru, and US-Singapore.

[155] CAFTA-DR-United States, EFTA-Albania, EFTA-Chile, EFTA-Colombia, EFTA-Hong Kong, China, EFTA-Korea, EFTA-Montenegro, EFTA-Mexico, EFTA-Peru, EFTA-Serbia, EFTA-Singapore, EFTA-Ukraine, EU-Bosnia and Herzegovina, EU-Chile, EU-Mexico, EU-Montenegro, EU-Korea, EU-Serbia, Japan-Switzerland, Jordan-Singapore, Korea-United States, Pakistan-Malaysia, Panama-Chile, Panama-Singapore, Peru-Chile, Turkey-Chile, US-Australia, US-Bahrain, US-Chile, US-Colombia, US-Morocco, US-Oman, US-Panama, US-Peru, and US-Singapore.

[156] Chile-Colombia, Chile-Central America, Chile-Mexico, Colombia-Mexico, Colombia-Northern Triangle, Costa Rica-Mexico, Dominican Republic-Central America, Hong Kong-New Zealand, India-Korea, Israel-Mexico, Korea-Chile, Korea-Singapore, MERCOSUR-India, Mexico-Northern Triangle, Mexico-Nicaragua, NAFTA, New Zealand-Malaysia, Nicaragua-Chinese Taipei, Pakistan-China, Panama-Central America, Panama-Chinese Taipei, Panama-Peru, Peru-China, and Peru-Mexico.

[157] Turkey-Chile, Trans-Pacific SEP, Peru-Mexico, Peru-Singapore, Peru-China, Panama-Peru, Panama-Central America, Pakistan-China, Nicaragua-Chinese Taipei, NAFTA, Mexico-Nicaragua, Mexico-Northern Triangle, Korea-Chile, Japan-Viet Nam, Japan-Thailand, Japan-Switzerland, Japan-Singapore, Japan-Philippines, Japan-Peru, Japan-Malaysia, Japan-Indonesia, Israel-Mexico, India-Japan, Dominican Republic-Central America, Costa Rica-Mexico, Colombia-Mexico, China-New Zealand, China-Costa Rica, Chile-Central America, Chile-Mexico, Chile-Japan, Chile-India, Chile-Central America, Chile-Colombia, Chile-china, Canada-Israel, Canada-EFTA, Canada-Chile, Brunei Darussalam-Japan, Australia-Chile, ASEAN Free Trade Area (AFTA), ASEAN-Japan, and ASEAN-India.

Article 21.11(3) of the US-Australia FTA, a respondent may request that a panel be established to review one or both of these issues. Similar provisions are found in the majority of other RTAs to which the United States is a party. Second, we have found that under two RTAs to which Chile is a party, the implementation phase of the dispute settlement process begins with the respondent notifying the complainant of the specific measures it intends to adopt in order to comply with the original panel's ruling; a reasonable period of time for implementation; and a "concrete proposal" of temporary compensation pending full implementation of the specific measures required to comply with the ruling of the original panel. Subsequent to this notification, the complaining party may request the original panel to assess the reasonable period of time for implementation; the conformity of the respondent's proposed implementing measures with the ruling in the underlying dispute; and the suitability of the respondent's proposed temporary compensation pending full implementation of the panel's ruling in the underlying dispute.[158]

A related innovation that we have found, particularly in agreements to which the United States is a party, is that any additional adjudicatory phases at the implementation stage are driven by the respondent party. At the WTO, the respondent Member is generally the party that requests an arbitration to examine the adequacy of the suspension of concessions under Article 22.6 of the DSU. The complaining party is generally the party that initiates compliance review procedures under Article 21.5 of the DSU when it considers that the respondent has failed to comply with the DSB's rulings and recommendations.[159] In some agreements to which the United States is a party, the respondent party must initiate proceedings both if it (i) considers that the level of benefits that the other party has proposed to be suspended is manifestly excessive, and (ii) it has eliminated the non-conformity or the nullification or impairment that the panel has found.[160] If the respondent party does not request the panel to review either matter, the complaining party is allowed to proceed with the suspension of concessions. Placing the onus on the respondent party to initiate compliance proceedings may be simply the practical consequence of consolidating the proceedings to assess the level of suspension of concessions and the compliance review. It could also reflect a desire to increase the enforceability of the agreement.

5.8 Transparency

Our mapping exercise revealed that, under the quasi-judicial model, 28 RTA-DSMs explicitly provide for the acceptance of *amicus curiae* briefs; 43 RTA-DSMs explicitly provide for public oral hearings and/or the publication of disputing parties' written submissions; and 34 RTA-DSMs explicitly require the submission of non-confidential summaries in cases where information submitted by disputing parties is classified as confidential.[161] In contrast, we found that no RTA-DSM classified under the judicial model has procedures for the submission and acceptance of *amicus curiae* briefs. We note, however, that some RTA-DSMs classified under the judicial model allow natural or juridical persons to participate in the proceedings as interveners.[162] All RTA-DSMs classified under the judicial model provide for public proceedings (in respect of oral hearings and/or written submissions).

5.9 Third parties

All RTA-DSMs classified under the judicial model provide for third party participation, that is, participation by a member of the RTA which is neither a complainant nor respondent in the dispute. 28% of RTA-DSMs classified under the quasi-judicial model provide for third party participation in the panel process, and nearly all such provisions are found in plurilateral agreements.[163] The reason for this low figure can be attributed to the fact that most of the RTAs classified under the quasi-judicial

[158] See Articles 96(3) and (4) of the EFTA-Chile FTA, and Articles 188(3) and (4) of the EU-Chile FTA.

[159] We note that, in *US / Canada – Continued Suspension*, the Appellate Body held that a respondent Member is not precluded from initiating Article 21.5 compliance proceedings. (Appellate Body Reports, *US / Canada – Continued Suspension*, para. 368)

[160] See, for example, US - Oman, US - Morocco, US - Singapore and US - Colombia.

[161] Increased transparency in dispute settlement has been an explicit negotiating objective of the United States. See, for example, section 2102(b)(5)(B) of the 2002 Trade Act.

[162] See, for example, chapter 4 of the Rules of Procedure of the ECJ and Article 72 of the Statute of the Andean Court of Justice.

[163] Surprisingly, three are RTA-DSMs contained in bilateral agreements: Colombia-Mexico, US-Colombia, and US-Peru. This could be explained by the fact that Colombia and Mexico, along with Venezuela, used to form part of the Group of Three before Venezuela withdrew from it in 2006 (see http://www.sice.oas.org/trade/go3/g3indice.asp), and by the fact that the Colombia-US and Peru-US FTA negotiations grew out of a regional effort in 2004 to produce a US-Andean free trade agreement.

model are bilateral agreements. There are, however, a few plurilateral agreements, namely, CACM, MERCOSUR, SADC, and SACU that do not provide for third party participation.

5.10 Participation of political bodies

Most RTAs establish political bodies that are charged with the overall administration of the agreement. These bodies may be composed at the ministerial level, a lower level, or both. To varying degrees, such bodies play a role, either directly or indirectly, in dispute settlement.

Approximately 60% of the RTA-DSMs classified under the quasi-judicial model provide for a dispute to be referred to a political body for resolution. This may be either in addition to, or in lieu of, direct consultations between disputing parties. Moreover, under most RTA-DSMs that fall within the quasi-judicial model, this stage of the dispute settlement process is mandatory in the sense of being a prerequisite for the establishment of an ad hoc panel, while in others, it is not. All RTAs to which the United States is a party provide for the intervention of political bodies in addition to direct consultations between disputing parties, and as a pre-requisite to the referral of a dispute to an ad hoc panel.[164] A preference for the direct intervention of political bodies, either as an alternative to, or pre-requisite for, the referral of a dispute to an ad hoc tribunal is also evident in RTAs signed by: Chile, EFTA, Turkey, Panama, and Mexico.

In contrast, there has been a discernible shift in EU practice. All RTAs to which the EU is a party that entered into force prior to November 2008 provide for the intervention of political bodies–in lieu of direct consultations between disputing parties–as a pre-requisite for the referral of a dispute to a panel.[165] With one exception, however, all RTAs that entered into force as from November 2008 do not provide for the direct intervention of political bodies in the dispute settlement process.[166] A similar trend of not providing for the direct intervention of political bodies in the dispute settlement process can be discerned in relation to RTAs to which the following countries/institutions are parties: ASEAN, Australia, Canada, and Japan.

It is not clear to what extent referral to a political body is different from direct consultations between disputing parties. In some ways, the distinction appears to be one of form and not of substance. RTAs which provide only for direct consultations between disputing parties may not be so different from RTAs which provide for the intervention of a political body, either in addition to, or in lieu of, direct consultations. Under both, the aim is to find a mutually acceptable solution without having to refer a dispute to a third party adjudicator. Moreover, because joint political bodies are composed of representatives of the disputing parties, it is not clear that disputing parties, particularly in the context of a bilateral RTA, stand a better chance of reaching a mutually acceptable solution with the intervention of a political body, compared to direct negotiations between themselves.

Some RTA-DSMs classified under the quasi-judicial model provide for political bodies to participate in the dispute settlement process by exercising formal, supervisory functions, which may include: being formally notified of consultations and/or panel requests, final reports of panels, implementing measures taken to comply with panel rulings, and retaliatory measures taken to remedy non-compliance with panel rulings; playing a role in the panel selection process; adopting the rules of procedure to be used by ad hoc panels; and establishing the amount of remuneration and expenses to be paid to panellists. RTAs to which the United States is a party typically do not provide for much oversight by political bodies except, in some cases, to establish the amount of remuneration and expenses to be paid to panellists[167], adopt the rules of procedure to be used by panels[168], and assist in the collection and disbursement of monetary compensation, as an alternative remedy to the

[164] CAFTA-DR, US-Australia, US-Bahrain, US-Chile, US-Colombia, US-Israel, US-Jordan, US-Morocco, US-Oman, US-Panama, US-Peru, US-Singapore, Korea-US, and NAFTA.

[165] EU-Andorra, EU-Algeria, EU-Bosnia and Herzegovina, EU-Chile, EU-Egypt, EU-Israel, EU-Jordan, EU-Lebanon, EU-Mexico, EU-Montenegro, EU-Morocco, EU-Palestinian Authority, EU-San Marion, EU-South Africa, EU-Tunisia, EU-Turkey, and EU-Serbia.

[166] EU-Cameroon, EU-CARIFORUM States, EU-Cote d'Ivoire, EU-Eastern and Southern African States, EU-Papua New Guinea/Fiji, and EU-Korea. The exception is EU-Serbia.

[167] US-Australia, US-Chile, US-Colombia, and Korea-US.

[168] US-Chile, US-Jordan, US-Panama, NAFTA, CAFTA-DR. Note that many RTAs of the US specify that "the Parties", rather than joint political bodies, shall adopt model rules of procedure to be used by ad hoc panels: US-Australia, US-Bahrain, US-Colombia, US-Morocco, US-Korea, US-Oman, US-Peru, US-Singapore. The US-Israel is the single RTA to which the United States is a party that specifies that "the panel shall adopt its own rules of procedure."

suspension of concessions for non-compliance with a panel's ruling.[169] RTAs to which Canada is a party vary with regard to the level of formal oversight by political bodies of RTA dispute settlement. These RTAs provide for political bodies to exercise some of the following functions: adopting model rules of procedure for the panel process[170]; adopting codes of conduct for panellists[171]; establishing the amount of remuneration and expenses to be paid to panellists[172]; establishing original panels[173]; establishing compliance review panels[174]; and taking delivery of panel reports[175]. The RTAs to which China and Japan are parties typically have very little or no formal oversight by political bodies in the dispute settlement process.

With regard to EU practice, one can discern a trend towards providing for a fair amount of oversight of the dispute settlement process by political bodies. In older RTAs, the supervisory role of political bodies in dispute settlement is limited, generally, to the selection of a third "arbitrator" after the disputing parties have each selected an arbitrator.[176] In contrast, recent RTAs of the EU provide for political bodies to be notified of: consultations and panel requests, final reports of panels, the period of time within which a respondent will take to comply with a panel's rulings, implementing measures taken to comply with a panel's rulings, and retaliatory measures taken to temporarily remedy non-compliance with a panel's rulings.[177] Some of these RTAs also provide for their political bodies to play a role in the selection of panellists where disputing parties are unable to agree on the composition of a panel, and, also, to establish and maintain a roster of arbitrators to facilitate panel composition. There has, thus, been a trend toward more formal supervision of the dispute settlement process by political bodies in RTAs to which the EU is a party.

The ASEAN Free Trade Association (AFTA) provides for the Senior Economic Officials Meeting (SEOM) to establish dispute settlement panels; adopt panel and Appellate Body reports; maintain surveillance of implementation of rulings; and authorize retaliation in cases of non-compliance. These roles would seem to mirror the roles of the DSB in the WTO DSM. RTAs between ASEAN and other parties typically do not provide for formal oversight by political bodies of the dispute settlement process.

Thirty per cent of the RTA-DSMs classified under the judicial model provide for some type of direct participation of political bodies in dispute settlement. Under the CARICOM system, the Conference of Heads of Government "may consider and resolve disputes between Member States".[178] Similarly, in the EFTA system, a member State may bring any matter concerning the interpretation or application of the EFTA convention before the Council with a view to finding an acceptable solution.[179] Lastly, under the EU system, the European Council may, under certain circumstances, determine the existence or risk of a serious breach by a member State of the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities.[180]

5.11 Participation of administrative bodies/secretariats

Administrative bodies/secretariats can play an important support role in dispute settlement. The issue of adequate infrastructure and support for dispute settlement has been highlighted by Porges, who notes that dispute settlement may require "management of document exchanges and hearings; coordination of any roster; secretarial, translation, and interpretation services; provision or rental of a place to hold hearings; research and drafting assistance to adjudicators; payment of panellist fees and

[169] US-Australia, CAFTA-DR, US-Chile, US-Colombia, US-Korea, US-Morocco, US-Panama, US-Peru, and US-Singapore.
[170] Canada-Chile, Canada-Colombia, Canada-Costa Rica, Canada-Israel, Canada-Peru, EFTA-Canada, and NAFTA.
[171] Canada-Chile, Canada-Colombia, Canada-Costa Rica, Canada-Peru, EFTA-Canada, and NAFTA.
[172] Chile-Canada, Israel-Canada, EFTA-Canada, and NAFTA.
[173] Canada-Israel.
[174] Canada-Chile.
[175] Canada-Israel.
[176] EU-Andorra, EU-Israel, EU-Jordan, EU-Lebanon, EU-Morocco, EU-Palestinian Authority, EU-San Marino, EU-Tunisia, and EU-Algeria.
[177] EU-Bosnia and Herzegovina, EU-CARIFORUM States, EU-Cameroon, EU-Côte d'Ivoire, EU-Korea, EU-Papua New Guinea/Fiji, and EU-Serbia.
[178] Article 12(8) of the Revised Treaty of Chaguaramas.
[179] Article 47 of the Convention Establishing the European Free Trade Association.
[180] Article 7 of the Treaty on European Union.

expenses; information services; and capacity building."[181] At the same time, establishing and maintaining a secretariat entails significant financial resources which countries may be reluctant to commit to a bilateral RTA.

Very few RTAs with DSMs classified under the quasi-judicial model establish a secretariat with a clearly delineated function of providing support to ad hoc dispute settlement panels. A few agreements do require each RTA member to designate "contact points" or a "liaison office" in their respective territories for the purpose of facilitating RTA-related communication between the parties. In the context of a dispute, it would appear that such offices merely serve as focal points for all dispute-related documentation. RTAs to which ASEAN[182] and Japan are parties are representative of such agreements. RTAs to which the United States is a party provide that each party shall "designate an office that shall provide administrative assistance to panels."[183] On the other hand, recent RTAs to which the EU is a party do not establish administrative bodies to support RTA dispute settlement.[184]

There are a few plurilateral RTAs that establish secretariats with more clearly defined supporting roles in RTA dispute settlement. The RTA that most clearly articulates the functions of its secretariat in relation to dispute settlement is ASEAN. In this regard, Article 19 of ASEAN's 2004 Protocol on Enhanced Dispute Settlement Mechanism tracks closely some of the language of Article 27 of the DSU, and states that the ASEAN Secretariat shall have the responsibility of: (i) assisting panels and the Appellate Body, especially on legal, historical and the procedural aspects of the matters dealt with, and of providing secretarial and technical support; (ii) assisting the Senior Economic Officials Meeting (SEOM) to monitor and maintain surveillance of the implementation of findings and recommendations of the panel and Appellate Body reports adopted by it; and (iii) being the focal point to receive all documentations in relation to disputes. Other notable examples of secretariats that play a supporting role in RTA dispute settlement are the MERCOSUR Administrative Secretariat, which supports MERCOSUR dispute settlement; and the national sections of the NAFTA Secretariat, which provide support for dispute settlement under NAFTA Chapters 19 and 20.

The majority of RTA-DSMs classified under the judicial model provide for their standing courts to be provided with legal and administrative support. For example, in the Andean Community system, the Andean Court of Justice is to be given "all of the necessary facilities for the proper fulfilment of its functions". Moreover, the Court is required to "appoint its necessary Secretary and the necessary personnel to perform its duties".[185] Similarly, in the CARICOM system, the Caribbean Court of Justice shall be staffed with a Registrar, Deputy Registrars and "other officials and employees of the Court as the Commission may consider necessary."[186] Thus, RTA-DSMs classified under the judicial model generally provide for a greater degree of legal and administrative support for the standing courts which they establish, compared to the level of support to panels established under RTA-DSMs classified under the quasi-judicial model. This is not surprising in the light of the fundamental difference between the two models of dispute settlement. In this connection, where dispute settlement is conducted by a standing tribunal, the tribunal and its associated secretariat have a standing budget process that involves substantial contributions by the parties.[187]

5.12 Special and differential treatment

Generally speaking, special and differential treatment (SDT) provisions recognize the asymmetrical nature of agreements between countries with different levels of development. Such provisions aim to afford certain flexibilities to developing countries that take into account their special development, financial and trade needs.

We examined whether the RTAs in our dataset contained SDT provisions within their dispute settlement chapters. We found only 5 RTAs that do – all classified under the quasi-judicial model. Of these RTA-DSMs, only one contains a provision that is explicitly dedicated to "special and differential

[181] Porges, *supra*, fn 22, at 479.
[182] With the exception of the ASEAN (AFTA) which, in Article 19 of its 2004 Protocol on Enhanced Dispute Settlement Mechanism, sets forth responsibilities of the ASEAN Secretariat in relation to dispute settlement.
[183] See e.g. Korea-US, US-Colombia, US-Panama, and US-Peru.
[184] EU-Cameroon, EU-CARIFORUM States, EU-Cote d'Ivoire, EU-Eastern and Southern African States, EU-Papua New Guinea/Fiji, and EU-Korea.
[185] Articles 12 and 14 of the Treaty Creating the Court of Justice of the Cartagena Agreement.
[186] Article XXVII of the Treaty Establishing the Caribbean Court of Justice.
[187] Porges, *supra*, fn 22, at 479.

treatment". Article 18 of Chapter 17 of the ASEAN-Australia-New Zealand FTA falls under the rubric "Special and Differential Treatment Involving Newer ASEAN Member States". Article 18(1) provides that "at all stages" of dispute settlement procedures involving newer ASEAN member States, "particular sympathetic consideration shall be given to the special situation of newer ASEAN Member States". Further, the provision requires the parties to exercise "due restraint" in raising matters under the dispute settlement procedures involving a least-developed country Party. Where a dispute involving a "newer ASEAN Member State" is referred to a panel, Article 18(2) requires the panel to indicate explicitly in its report "the form in which account has been taken" of relevant provisions on SDT under the FTA which have been raised by the newer ASEAN Member State in the course of dispute settlement procedures.

The four other RTA-DSMs classified under the quasi-judicial model with SDT provisions in their dispute settlement chapters are agreements to which the EU is a party. All of these agreements are economic partnership agreements with countries within the African, Caribbean and Pacific (ACP) group.[188] The SDT provisions in these agreements apply only at the implementation stage of dispute settlement. More specifically, these provisions apply only in respect of the application by the EU of temporary remedies for non-compliance, in circumstances where the respondent has failed to implement the rulings and recommendations of a panel on the substantive merits of a dispute. For example, Article 58 (4) of the EU-Papua New Guinea/Fiji EPA provides that the EU shall exercise "due restraint" in adopting "appropriate measures" to remedy temporarily a respondent's non-compliance, "in particular, where the failure to comply … stems from capacity constraints."

5.13 Costs

The operation of dispute settlement systems requires a commitment of financial resources. The costs associated with the operation of dispute settlement mechanisms vary by RTA-DSM model. RTA-DSMs with a high degree of institutionalisation – characterized by permanent adjudicating bodies and/or administrative secretariats – typically require an ongoing financial commitment on the part of RTA parties. In contrast, the costs associated with an RTA-DSM that relies on ad hoc panels – without institutionalised administrative support – to resolve disputes are triggered only by the composition of such panels in response to specific disputes.

RTA-DSMs classified under the political model do not typically contain provisions that address explicitly the issue of how the financial costs associated with the use of dispute settlement procedures are to be determined or apportioned between RTA parties. According to Porges, where dispute settlement is conducted through a political body, each side supports its own diplomatic efforts.

With regard to RTA-DSMs classified under the quasi-judicial model, we found that the predominant approach requires disputing parties to share the costs associated with the use of ad hoc panel procedures. We found that approximately 59% of the RTA-DSMs classified under the quasi-judicial model provide for the tribunal expenses, including the remuneration of panellists, to be borne equally between disputing parties. We also found a small number (9) of RTA-DSMs under the quasi-judicial model that provide for an ad hoc panel to allocate the costs of a dispute settlement procedure in different shares under certain circumstances. Virtually all of these RTA-DSMs are agreements to which EFTA is a party.[189] For example, under the EFTA-Colombia FTA, the remuneration of panellists and the administrative costs of oral hearings, including interpretation, shall be borne by the disputing parties in equal shares. A panel may, however, decide that the costs be distributed differently taking into account, *inter alia*, "the particulars of the case and other circumstances that may be deemed relevant."[190] Under the Honduras-El Salvador-Chinese Taipei FTA, the joint commission establishes the remuneration and expenses to be paid to panellists, "their assistants and experts". The remuneration of panellists, their assistants and experts, their travel and lodging expenses, and general expenses of the panel shall be borne by disputing parties in equal shares. However, "the level of development of the Parties shall be taken into account."[191]

Where dispute settlement is conducted by a standing tribunal, the standing tribunal and its associated secretariat will have a standing budget process that involves substantial contributions by

[188] EU-CARIFORUM States, EU-Côte d'Ivoire, EU-Cameroon, and EU-Papua New Guinea/Fiji.

[189] EFTA-Albania, EFTA-Colombia, EFTA-Lebanon, EFTA-Peru, EFTA-SACU, EFTA-Serbia, EFTA-Ukraine, Honduras-El Salvador-Chinese Taipei, and ASEAN.

[190] Article 12.11(2)(h) of the EFTA-Colombia FTA.

[191] Annex 14.03(2) of the Honduras-El Salvador-Chinese Taipei FTA.

the parties to support their activities.[192] In terms of the direct costs to disputing parties in litigating a claim, some standing tribunals have the authority to order one of the parties in the dispute to pay the costs of the other party.[193]

We have found two innovative approaches to the financing of dispute settlement mechanisms under the quasi-judicial model and the judicial model. First, under the ASEAN FTA - classified under the quasi-judicial model - the 2004 "ASEAN Protocol on Enhanced Dispute Settlement Mechanism" establishes an "ASEAN DSM Fund". The ASEAN DSM fund is used to meet the expenses of panels, the ASEAN Appellate Body and any related administration costs of the ASEAN Secretariat. The fund operates as a "revolving fund", separate from the ASEAN Secretariat's regular budget. The initial sum for the fund is contributed equally by all ASEAN Member States. Any "drawdown" from the fund shall be replenished by the parties to the dispute. Panels and the Appellate Body, as part of their findings and recommendations in a particular dispute, must deal with the issue of expenses to be borne by the parties to the dispute, including third parties, to replenish the ASEAN DSM Fund. Panels and the Appellate Body may apportion the expenses "in the manner appropriate to the particular case".[194]

Second, the Caribbean Court of Justice – classified under the judicial model – is "unlike any other international court in the way its operational expenses are covered".[195] A trust fund, administered by an independent Board of Trustees, drawn primarily from the private sector and civil society, has been established and capitalized in the sum of US$100 million, so as to enable the recurrent expenditure of the Court to be financed by income from the fund. The purpose of the trust fund is "to provide the resources necessary to finance the biennial capital and operating budget of the Court and the Commission in perpetuity".[196]

The Caribbean Court of Justice is the only RTA-DSM that we have identified that has filing fees. It has a detailed schedule that sets forth filing fees for, *inter alia*, applications to initiate a dispute (originating application), applications to intervene, the filing of a defence to a claim, and applications for an advisory opinion.[197]

6 MANY RTA-DSMS, FEW CASES

The number of RTA-DSMs has been increasing rapidly. Yet, the number of RTA-DSMs that have been active is very small.[198] Only the ECJ, EFTA, MERCOSUR, the Andean Community, and the CACM show significant activity.[199] We note that all five of these RTA-DSMs are plurilateral. Three are RTA-DSMs classified under the judicial model and the other two are quasi-judicial.

The remaining RTA-DSMs show little, if any, activity. Most disputes under NAFTA have been conducted under Chapter 19 (review of antidumping and countervailing measures by binational panels) or Chapter 11 (investor-State). To date there have been only 3 cases brought under chapter 20 of NAFTA.[200] There has only been 1 dispute under any bilateral RTA to which the United States is a party, namely, a dispute under the CAFTA-Dominican Republic RTA in which the United States

[192] Porges, *supra*, fn 22, at 479.

[193] See, for example, Article 90 of the Statute of the Andean Court of Justice and Chapter 5 of the EFTA Court's Rules of Procedure.

[194] Articles 14 and 17 of the 2004 ASEAN Protocol on Enhanced Dispute Settlement Mechanism.

[195] R. Mackenzie, C. Romano, Y. Shany, and P. Sands, *supra*, fn 89, at 288.

[196] Article III of the Revised Agreement Establishing the Caribbean Court of Justice Trust Fund.

[197] Schedule 1 to the Caribbean Court of Justice (Original Jurisdiction Rules).

[198] We recognize that there are limits as to what can be said about the level of activity in RTA-DSMs because of information deficiencies. We are not aware of a centralized database of information about disputes conducted under RTA-DSMs. We are not aware of a centralized database of information about disputes conducted under RTA-DSMs. The difficulty is compounded by the fact that in some cases the information may not be publicly available, as when parties to an RTA-DSM consult on matters confidentiality. The United Nations Economic Commission for Latin American and the Caribbean (UNECLAC) has established an integrated database of trade disputes for Latin America and the Caribbean, available at: <http://idatd.eclac.cl/controversias/index_en.jsp>

[199] Information about the cases initiated under these RTA-DSMs may be found at:
http://idatd.eclac.cl/controversias/index_en.jsp;
http://www.mercosur.int/t_generic.jsp?contentid=375&site=1&channel=secretaria&seccion=6;
http://www.tribunalandino.org.ec/sitetjca/index.php; http://www.eftacourt.int/

[200] *Tariffs applied by Canada to certain US-origin agricultural products*, final report, 2 December 1996; *US safeguard action taken on broom-corn brooms from Mexico*, final report, 30 January 1998; and *Cross-border trucking services*, final report, 6 February 2001.
See http://www.nafta-sec-alena.org/en/DecisionsAndReports.aspx?x=312.

requested consultations regarding the Government of Guatemala's apparent failure to enforce its labour laws.[201]

Under the CARICOM system of dispute settlement, 4 disputes have been recorded since the inauguration of the Caribbean Court of Justice (CCJ) in 2005. These 4 disputes have all been initiated by private individuals and companies with special leave of the CCJ under Article 222 of the Revised Treaty of Chaguaramas. Prior to the establishment of the CCJ, it was possible for trade disputes to have been referred to an ad hoc tribunal, but to our knowledge, this had never occurred since CARICOM's establishment in 1973.

Based on public sources, we have been able to identify 4 initiated under ALADI.[202] It is our understanding that there have not been any disputes initiated under RTAs signed by the EU. Moreover, we understand that there has not been any activity under the ASEAN dispute settlement mechanism. Our research so far has not revealed any disputes formally initiated under RTAs signed by other WTO Members.

The situation described above is paradoxical. There are many RTA-DSMs, but few are used. Why is this case?

We note that the effectiveness of a dispute settlement mechanism cannot be discounted merely because it is not active. A dispute settlement mechanism that shows little or no activity may be effectively deterring parties from violating their obligations.[203] However, this does not fully respond to the question posed above. The reason for this is that there have been disputes between RTA partners. Rather than being brought to the RTA-DSM, some of these disputes have been brought to the WTO.[204]

The World Trade Report 2011 (WTR 2011) found that WTO Members "continue to use the WTO dispute settlement system to resolve disagreements with their RTA partners".[205] The WTR 2011 also contained a number of interesting findings based on data spanning the period 1995-2010. We highlight some of these findings below:

- 82 of the 443 disputes brought to the WTO up to 2010 were between complainant and respondent Members who at the time were RTA partners.
- Disputes between RTA partners represent 19% of all disputes. The ratio is higher where the complainant is a developing country (28%) than where it is a developed country (13%).
- The largest share of the disputes between RTA partners brought to the WTO is made up of disputes between parties to NAFTA, but there also have been WTO disputes between WTO Members that are partners in other RTAs.
- The share of disputes between RTA partners that advance to the panel stage (45%) is very close to the overall average, indicating that a dispute between RTA partners is just as likely to be settled at the consultations stage as a dispute between non-RTA partners.
- The most frequently cited agreements in disputes between RTA partners are the GATT 1994, the Anti-Dumping Agreement, the SCM Agreement, the Agreement on Safeguards, and the Agreement on Agriculture.
- Subsidy and safeguards disputes make up a larger share of disputes between RTA partners than of overall disputes, while disputes between RTA partners involving the GATT 1994, represent a lower share of the overall number.[206]

[201] Consultations were requested in 2010. According to recent press reports, the United States and Guatemala appear to have reached a settlement in this matter. (See "U.S., Guatemala Find Middle Ground in Deal to Settle CAFTA Labor Case", *Inside US Trade*, 18 April 2013)

[202] Bolivia-Chile (vegetable oil); MERCOSUR-Chile (vegetable oil); Colombia-Chile (sugar); and Mexico-Peru (computers).

[203] The expectation that a dispute settlement mechanism would be included in the agreement could also have been effective in terms of generating the credibility necessary for parties to negotiate commitments in the first place.

[204] Only two of the most active RTA-DSMs--the ECJ and the Andean Community--include a provision requiring the exclusive use of RTA-DSM rules.

[205] WTO Secretariat, *supra*, fn 2, p. 15.

[206] Ibid., pp. 175-177.

We have not sought to determine in this paper how many of the disputes brought to the WTO by RTA partners could have been brought to the RTA-DSM. As noted earlier, some RTA's exclude certain subjects from their dispute settlement mechanism. Thus, some of the disputes brought to the WTO by RTA partners may involve issues that are not covered by their respective RTA-DSM. Another possibility is that a dispute brought to the WTO involves parties to an RTA-DSM classified under the political model. In such cases, the reason the dispute may have been brought to the WTO instead of to the RTA-DSM is the former's higher enforceability. Having said that, a cursory examination of recent disputes brought to the WTO suggests that some of them could have been brought to quasi-judicial RTA-DSMs.[207]

Academic literature has sought to rationalize why RTA partners may choose to have recourse to WTO-DSM rules in preference to RTA-DSM rules. According to Porges, some possible explanations for the continued use of WTO dispute settlement by RTA partners are: the WTO's "familiar institutions" and "unblockable" dispute settlement procedures; the possibility to suspend MFN tariffs and other WTO obligations (particularly where the RTA's margin of preference is low); the broader pool of neutral panellists; the broader issue scope of the WTO; the possibility of forming alliances and the alleviated power imbalance in the WTO as compared to RTAs; access to assistance from the Advisory Centre on WTO Law (ACWL)[208]; the multilateral surveillance process; the institutionalized framework for taking countermeasures; and the fact that the cost of WTO dispute settlement is included in a Member's annual assessment, while in most RTAs, the parties pay panellists, or pay for the cost of the tribunal.[209]

Van den Bossche and Lewis attribute the frequent recourse to WTO-DSM rules by RTA partners in preference to RTA-DSM rules to: the contrast in experience and legitimacy between the WTO, and new and untested RTAs; the fact that the WTO has built up a body of decisions that, although not formally binding beyond the parties to the dispute, do ensure predictability of jurisprudence; the existence of appellate review under the WTO-DSM; and the fact that the WTO-DSM is supported by experienced secretariat staff.[210]

Davey's explanation for the infrequent use of RTA-DSMs appears to be based on a theory of relative reputational costs of non-compliance with WTO rulings, on the one hand, and with RTA rulings, on the other hand. According to Davey, the WTO offers a more legitimate result–a result that is more likely to be accepted by the parties and complied with than the results of RTA dispute settlement. He explains that while failure to comply with an RTA dispute settlement ruling is an irritant in bilateral relations, a failure to comply with a WTO ruling is not only a bilateral irritant, but has multilateral consequences.[211]

Busch explains the choice between dispute settlement under RTAs and under the WTO through a theory based on legal precedent. Busch argues that, for a given measure(s), some countries prefer to set a precedent that bears only on a subset of their trade relations; some prefer to set a precedent that bears on all their trade relations; and some prefer not to set a precedent at all. Thus, the key to forum shopping is not simply which institution is likely to come closest to the complainant's ideal ruling against the defendant, but where the resulting precedent will be more useful in the future, enabling the complainant to bring litigation against other members, rather than helping other members to bring litigation against the complainant.[212]

Finally, Leal-Arcas, using NAFTA Chapter 20 dispute settlement and WTO dispute settlement as a case study, argues that where forum shopping is possible, there are no set, determinative factors

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[207] We refer, for example, to *US – COOL*, *US – Tuna II (Mexico)*, and *Thailand – Cigarettes*.

[208] The ACWL was established in 2001 pursuant to the Agreement Establishing the ACWL as an organisation independent of the WTO. The ACWL gives free legal advice and training on WTO law and provides support in WTO dispute settlement proceedings at discounted rates. These services are available to the developing country Members of the ACWL (30 at present) and to LDCs that are Members of the WTO or are in the process of acceding to the WTO (43 at present).

[209] Porges, *supra*, fn 22, at 492.

[210] P. Van den Bossche and M. Lewis, "What to Do When Disagreement Strikes? The Complexity of Dispute Settlement under Trade Agreements" in S. Frankel and M. Lewis (eds.) *Trade Agreements at the Crossroads* (Routledge, 2012) (forthcoming).

[211] W. Davey, "Dispute Settlement in the WTO and RTAs: A Comment" in L. Bartels and F. Ortino (eds.) *Regional Trade Agreements and the WTO Legal System* (Oxford University Press, 2006) 343.

[212] M. Busch, "Overlapping Institutions, Forum Shopping, and Dispute Settlement in International Trade" (2007) 61(4) *International Organization* 735.

that dictate the proper forum for any particular dispute, despite the differences in complexity of the rules. Thus, each dispute has to be dealt with on a case-by-case basis, and in each case, the RTA complainant will choose the forum in which it calculates it has the best chance of winning, and of compelling the respondent to change or remove its injurious measures.[213]

7 CONCLUSIONS

We have sought in this paper to make an empirical contribution to the study of the design and functioning of RTA-DSMs. With this objective in mind, we classified a dataset of 226 RTA-DSMs in accordance with three models of dispute settlement, namely, political/diplomatic, quasi-judicial, and judicial. Moreover, we undertook a detailed mapping of their dispute settlement provisions.

The majority of RTAs in our dataset (65%) have adopted the quasi-judicial model of dispute settlement. The prevalence of RTAs using this model of dispute settlement has been growing for a number of years. It is rather exceptional for more recent RTAs to opt for the political/diplomatic or judicial models of dispute settlement.

To the extent that RTA parties are choosing the quasi-judicial model over the political/diplomatic model, they are indicating a preference for more "legalistic" dispute settlement procedures. At the same time, RTA parties seem reluctant to move beyond the degree of "legalism" provided by the quasi-judicial adjudication model.

The quasi-judicial model employed in the majority of the RTAs examined is an arbitration-type mechanism. Proceedings are party-driven and a clear preference is given to arrangements agreed by the parties to the dispute. Panels are established to resolve a particular dispute and are dissolved once they have issued their reports. There is little, and in some cases no, institutional framework established to support RTA-DSMs based on the quasi-judicial model.

With three exceptions, quasi-judicial RTA-DSMs provide for a single ad hoc adjudicatory stage. In other words, the vast majority of RTA-DSMs that have adopted the quasi-judicial model do not include an appellate stage. Only SADC, MERCOSUR and ASEAN provide for an appellate stage, and in MERCOSUR and ASEAN this was introduced only recently. The preference for a single stage of adjudication could derive from several considerations. It could be a reflection of the limited degree of "legalism" of the quasi-judicial model. It could also reflect a preference for the arbitration-like character of ad hoc adjudication. Or it could have more practical explanations having to do with a desire not to extend the duration of proceedings or recognition of the financial resources required to fund an appellate stage, particularly if it is a permanent body.

Quasi-judicial DSMs incorporated into RTAs resemble in many respects the panel process of the WTO DSU. In this regard, most RTA-DSMs that follow the quasi-judicial model – in particular those which entered into force in the post-1995 period – are structurally similar to the WTO-DSM, to the extent that they contain provisions concerning consultations; conduct of panel proceedings; implementation of panel rulings; compliance; and remedies.

Departures from the panel procedures set out in the DSU are relatively limited. As discussed in section 5, few RTA-DSMs using the quasi-judicial model introduce significant changes to the panel process envisaged in the WTO DSU nor is there an indication that there is widespread adoption by RTA parties of the proposals tabled in the DSU reform negotiations currently underway in the WTO. Our survey, moreover, suggests that most RTA-DSMs are not being designed with a higher level of enforceability in mind as compared to the WTO DSU.

It would appear that much of the RTA-DSMs negotiators' attention has been devoted to panel selection. Indeed, the possibility that the panel selection process could be blocked seems to have been an abiding concern. This concern probably stemmed from anecdotal evidence of problems with panel selection in NAFTA.[214] RTA parties have adopted various formulae to try to ensure the automaticity of the panel selection process. These include selection by lot, shifting the choice of panellists to the other party where one party refuses to appoint a panellist, or giving the choice to a

[213] R. Leal-Arcas, "Comparative Analysis of NAFTA's Chapter 20 and the WTO's Dispute Settlement Understanding" (2011) 8(3) *Transnational Dispute Management* 1.

[214] See Gantz, *supra*, fn 81.

person outside the RTA, such as the Secretary-General of the Permanent Court of Arbitration. Under the DSU, panellists are selected by agreement of the parties or, when the parties fail to agree, by the WTO Director-General. This has ensured the automaticity of panel composition.

A number of RTA-DSMs that follow the quasi-judicial model have addressed specific implementation-related issues that have arisen in WTO dispute settlement. A vexing issue that has attracted the attention of academics and negotiators alike in WTO dispute settlement is the so-called "sequencing issue", which describes the lack of clarity in the DSU on the relationship between Article 21.5, dealing with compliance disputes, and Article 22, dealing with retaliation in the form of the suspension of concessions. As a result of this lack of clarity, the argument has been made that a complainant could suspend concessions while a compliance review procedure is ongoing.[215] As a result, the complainant would unilaterally determine the consistency of a compliance measure with a respondent's WTO obligations, in seeming contravention of Article 23 of the DSU. Many recent RTA-DSMs which follow the quasi-judicial model have sought to address this issue by expressly making the suspension of concessions contingent on a finding by a panel that the respondent has not complied with the rulings rendered by a panel in original proceedings. Another issue that many RTA-DSMs under the quasi-judicial model have sought to address is an issue that arose in *US – Continued Suspension*[216] and *Canada – Continued Suspension*[217], namely, whether a respondent could initiate, at the post-retaliation stage, compliance review proceedings under Article 21.5 of the DSU. These RTA-DSMs contain specific procedures through which a respondent can claim that it has complied with panel rulings and recommendations, and initiate a compliance review procedure with a view to having the suspension of concessions by the complainant withdrawn.

There is also evidence of efforts being made to streamline the implementation stage. For example, some RTA-DSMs consolidate the proceedings to assess (i) whether the level of concessions proposed to be suspended by the complainant is excessive and (ii) whether the measures taken by the respondent party fail to comply with rulings of the ad hoc panel into one single proceeding. Whereas in the WTO, these two procedural instances are separate proceedings conducted under Articles 22.6 and 21.5 of the DSU, respectively. In some cases, the consolidation of the proceedings means that the onus of initiating the proceedings falls only on the respondent Member, whereas in the WTO, Article 21.5 proceedings are generally initiated by the complaining party. Another approach we have identified is one in which the implementation phase of the dispute settlement process begins with the respondent notifying the complainant of the specific measures it intends to adopt in order to comply with the original panel's ruling; a reasonable period of time for implementation; and a "concrete proposal" of temporary compensation pending full implementation of the specific measures required to comply with the ruling of the original panel. Subsequent to this notification, the complaining party may request the original panel to assess the reasonable period of time for implementation; the conformity of the respondent's proposed implementing measures with the ruling in the underlying dispute; and the suitability of the respondent's proposed temporary compensation pending full implementation of the panel's ruling in the underlying dispute. Furthermore, in a small number of RTA-DSMs, the ad hoc panel that adjudicated on the substantive merits of an underlying dispute can, on its own motion, initiate a compliance review procedure after the expiry of the time-period for the implementation of its rulings, and before the complainant can have recourse to temporary remedies for non-compliance.

Another area where negotiators' focus is discernible is remedies. In this area, attempts have been made to go beyond the remedy regime of the WTO DSU. First, a few RTA-DSMs that follow the quasi-judicial model, and all RTA-DSMs that follow the judicial model, provide for the possibility of provisional measures to avoid irreparable harm pending a judgment on the merits of a dispute. Neither panels nor the Appellate Body are empowered to order provisional measures under the DSU, although this possibility has been mooted in the context of DSU reform.[218]

Second, a small number of RTA-DSMs that follow the quasi-judicial model – mainly RTAs to which the United States is a party – provide for financial compensation as a temporary remedy for non-compliance with the rulings and recommendations of a panel. This goes beyond the concept of

[215] This issue was first raised in the *EC – Bananas III* dispute. Since then, WTO Members have sought to address this lacuna in the DSU on an ad hoc basis by concluding bilateral procedural agreements between themselves.

[216] WT/DS320.

[217] WT/DS321.

[218] See Communication from Mexico, Amendments to the Understanding on Rules and Procedures Governing the Settlement of Disputes, proposed text by Mexico, TN/DS/W/40, at 2-3.

compensation in the WTO context, where compensation does not mean monetary payment, but rather the offering of a trade benefit that is equivalent to the benefit that the respondent has nullified or impaired through its offending measure.[219] That said, the concept of financial compensation has often been raised throughout the history of the GATT/WTO.[220] A number of systemic and practical factors appear to render financial compensation problematic in the multilateral context. These include: (i) the fact that financial compensation does not remove a WTO inconsistency and, thus, does not achieve the re-balancing effect of full implementation; and (ii) administering financial compensation on a most favoured nation (MFN) basis creates practical problems for its administration.[221] Financial compensation may enlarge the possibility for "efficient breach", the appropriateness of which is highly contested in the WTO context.[222]

Some RTA parties also seem to have placed particular focus on improving transparency. As noted in subsection 4.8, a number of RTA-DSMs *mandate* considerably more transparency than the DSU.[223] Interestingly, some of the RTAs that *mandate* increased transparency in dispute settlement include developing-country WTO Members who have not been among the proponents of increased transparency in WTO dispute settlement. Such RTAs are almost always with a developed country WTO Member that has advocated for increased transparency in WTO dispute settlement. We can think of two possible explanations for the apparent inconsistency of positions taken by some countries in relation to increased transparency in dispute settlement in the WTO and under RTAs. First, it could be a reflection of power asymmetries. Second, it may reflect the fact that some of these developing-country WTO Members do not really object to increased transparency, but are rather using the issue as leverage to obtain other concessions, or insist that such transparency be introduced by negotiation and rule-making rather than by judicial decisions.

There is little evidence that special and differential treatment is being incorporated into RTA-DSMs between developed and developing countries. Special and differential treatment in the context of dispute settlement is provided only in a handful of the RTA-DSMs surveyed.

The issue of potential overlap of jurisdictions between RTA-DSMs and the WTO-DSM seems to be receiving greater attention from negotiators and a majority of recent RTA-DSMs include explicit provisions that seek to regulate the matter.

Very few RTA-DSMs entirely close off access to WTO dispute settlement procedures. Many, instead, leave the choice of forum to the party initiating a dispute, through "fork in the road" provisions. Such provisions allow a complainant to choose between the multilateral or the RTA forum, but foreclose the possibility of using another forum once a selection has been made. "Fork in the road" rules, to the extent that they are respected by RTA members, may minimize the potential for jurisdictional conflict by creating an irreversible choice between the RTA system and the WTO system. It is, however, still not entirely clear what effect a "fork in the road" would have in a WTO proceeding.[224]

In addition, a significant number of RTA-DSMs that follow the quasi-judicial model close off access to RTA dispute settlement in respect of certain issues, while reaffirming the parties' rights and obligations under the WTO Agreement. These areas are typically SPS, TBT and trade remedies. Thus,

[219] However, see fn 9 above.

[220] For a history, see B. Mercurio, "Why Compensation Cannot Replace Trade Retaliation in the WTO Dispute Settlement Understanding" (2009) 8(2) *World Trade Review* 315, at 328-329. See also M. Bronckers and N. van den Broek, "Financial Compensation in the WTO – Improving the Remedies of WTO Dispute Settlement" (2005) 8(1) *Journal of International Economic Law* 101.

[221] In accordance with Article 22.1 of the DSU, compensation must be consistent with the covered agreements, including the MFN principle enshrined therein.

[222] Bronckers and Baetens advocate incorporating financial remedies in the WTO, while at the same time rejecting the appropriateness of "efficient breach" in the context of WTO dispute settlement. See fn 146. For a discussion of the arguments in favour and against "efficient breach", see A.O. Sykes, "The Dispute Settlement Mechanism: Ensuring Compliance?" in Amrita Narlikar, Martin Daunton, and Robert M. Stern (eds.), The Oxford Handbook on the World Trade Organization (Oxford University Press, 2012), pp. 560-586.

[223] Porges, *supra*, fn 22, at 486.

[224] The issue of the relationship between RTAs and WTO dispute settlement has arisen in a few disputes to date. (See Panel Report, *Argentina – Poultry*, paras. 7.17-7.42; and Appellate Body Report, *Mexico – Taxes on Soft Drinks*, paras. 40-57) In *Mexico – Taxes on Soft Drinks*, the Appellate Body held that a WTO panel with jurisdiction could not decline to exercise that jurisdiction in the absence of some legal impediment. The Appellate Body, however, did not express a view as to what could constitute such a legal impediment.

in respect of certain substantive areas of trade regulation, RTA members appear to be expressing a clear preference for WTO dispute settlement rules.

A very small number of RTA-DSMs contain additional provisions concerning the relationship with the WTO dispute settlement system. The Korea-EU FTA provides an interesting example of negotiators seeking to address the relevance of WTO case law. It includes a provision that requires the RTA arbitration panel to adopt an interpretation that is consistent with any relevant interpretation established in rulings of the WTO DSB, in circumstances where the obligation under the Korea-EU FTA is identical to an obligation under the WTO Agreement.[225] The Colombia-Canada FTA requires arbitral panels to take account of WTO jurisprudence when interpreting the provision that establishes compliance proceedings. Should such provisions become standard practice in RTA-DSM design, this may augur well for fostering coherence between RTA and WTO dispute settlement through the medium of WTO jurisprudence.

With regard to the timeframes of the adjudicatory process, one can discern a concerted attempt being made – particularly in more recent RTA-DSMs that follow the quasi-judicial model – to provide for a shorter panel procedure than the WTO panel procedure. The timeframe established for the adjudicatory process under a significant number RTA-DSMs is shorter than the timeframe of the WTO panel process established by the DSU.[226] These shorter deadlines may prove to be overly ambitious. In this regard, it has been noted that, thus far, NAFTA panel proceedings have taken well in excess of the prescribed time.[227]

We note that one of the most striking differences between RTA-DSMs and the WTO dispute settlement system is the institutional aspect. The DSU gives the DSB a central role in dispute settlement. The DSB has the authority to establish dispute settlement panels; adopt panel and Appellate Body reports, maintain surveillance of implementation of rulings; and authorize retaliation in cases of non-compliance. These functions are not mere formalities. In fact, the DSB is the only institution created under the WTO Agreement that can *authorize* the various stages of the WTO dispute settlement process. In this role, the DSB, essentially, clothes these various stages with a legal status and effect. It also gives "multilateral backing" to the actions it authorizes.

Moreover, administrative bodies/secretariats generally do not play a large role in the administration of RTA dispute settlement. In most instances, it would appear that RTAs envisage a secretariat serving merely as a focal point to facilitate communication between RTA members. And even where RTAs establish secretariats with more clearly delineated dispute settlement functions, their role appears to be more limited when compared to the role which the WTO Secretariat and the Appellate Body Secretariat play in dispute settlement. The WTO Secretariat is an autonomous entity upon which the DSU confers specific responsibilities in relation to dispute settlement, namely: (i) assisting panels, especially on legal, historical and procedural aspects of the matters dealt with, and of providing secretarial and technical support; (ii) providing assistance in respect of dispute settlement to WTO Members, and in particular developing country Members; and (iii) building capacity in WTO Members in the area of WTO dispute settlement.[228] In the context of the WTO's appellate review mechanism, Article 17.6 of the DSU establishes that the responsibility of the Appellate Body Secretariat is to provide appropriate administrative and legal support to Appellate Body Members.

Finally, this paper has noted that, while the number of RTA-DSMs has been increasing rapidly, the vast majority of RTA-DSMs do not appear to have been used. In some cases, RTA partners have brought to the WTO disputes that could have been brought to the RTA-DSM. Section 6 discussed various explanations that have been put forward for the preference for the WTO DSM. These include considerations relating to the multilateral nature of the WTO (multilateral surveillance and the ability to form coalitions), perceptions about the greater legitimacy and credibility of the WTO dispute settlement mechanism, the institutional support provided by the WTO Secretariat, and more practical considerations such as costs.

[225] See *supra*, subsection 5.2.

[226] Article 12.9 of the DSU establishes a ceiling of nine months for the issuance of a panel's report.

[227] Porges, *supra*, fn 22, at 481. Under NAFTA's Chapter 20 (State-State disputes), an arbitral panel is required to submit and initial report 90 days from that panel's composition (Article 2016(2)); and a final report within 30 days of the issuance of the panel's initial report (Article 2017(1)).

[228] Article 27 of the DSU.

ANNEX

TAXONOMY OF RTA-DSMs

RTA	Political Model	Quasi-judicial Model	Judicial Model	Year of Entry into Force
Andean Community			X	1988
Armenia - Kazakhstan	X			2001
Armenia - Moldova	X			1995
Armenia - Russian Federation	X			1993
Armenia - Turkmenistan	X			1996
Armenia - Ukraine	X			1996
ASEAN - Australia - New Zealand		X		2010
ASEAN - China		X		2005
ASEAN - India		X		2010
ASEAN - Japan		X		2008
ASEAN Free Trade Area (AFTA)		X		1992
Asia Pacific Trade Agreement (APTA)	X			1976
Australia - Chile		X		2009
Australia - New Zealand (ANZCERTA)	X			1983
Australia - Papua New Guinea (PATCRA)	X			1977
Brunei Darussalam - Japan		X		2008
Central American Common Market (CACM)		X		1961
Dominican Republic - Central America - United States Free Trade Agreement (CAFTA-DR)		X		1997
Canada - Chile		X		1997
Canada - Colombia		X		2011
Canada - Costa Rica		X		2002
Canada - EFTA		X		2009
Canada - Israel		X		1997
Canada - Peru		X		2009
Caribbean Community and Common Market (CARICOM)			X	1973
Central European Free Trade Agreement (CEFTA) 2006		X		2007
Economic and Monetary Community of Central Africa (CEMAC)			X	
Chile - China		X		2006
Chile - Colombia		X		2009
Chile - Costa Rica		X		2002
Chile - El Salvador		X		2002
Chile - India		X		2007
Chile - Japan		X		2007
Chile - Mexico		X		1999
Chile - Central America (Chile - Guatemala/Honduras)		X		2008
China - Costa Rica		X		2011

RTA	Political Model	Quasi-judicial Model	Judicial Model	Year of Entry into Force
China - Hong Kong, China	X			2003
China - Macao, China	X			2003
China - New Zealand		X		2008
China - Singapore		X		2009
Commonwealth of Independent States (CIS)	X			1994
Colombia - Mexico		X		1995
Colombia - Northern Triangle		X		2009
Common Market for Eastern and Southern Africa (COMESA)			X	1994
Common Economic Zone	X			2004
Costa Rica - Mexico		X		1995
Dominican Republic - Central America		X		2001
East African Community (EAC)			X	2000
EU - Albania	X			2006
EU - Algeria		X		2005
EU - Andorra		X		1991
EU - Bosnia and Herzegovina		X		2008
EU - Cameroon		X		2009
EU - CARIFORUM States EPA		X		2008
EU - Chile		X		2003
EU - Côte d'Ivoire		X		2009
EU - Croatia	X			2002
EU - Egypt		X		2004
EU - Faroe Islands	X			1997
EU - Former Yugoslav Republic of Macedonia (FYROM)	X			2001
EU - Iceland	X			1973
EU - Israel		X		2000
EU - Jordan		X		2002
EU - Lebanon		X		2003
EU - Mexico		X		2000
EU - Montenegro		X		2008
EU - Morocco		X		2000
EU - Norway	X			1973
EU - Palestinian Authority		X		1997
EU - South Africa		X		2000
EU - Switzerland - Liechtenstein	X			1973
EU - Syria	X			1977
EU - Tunisia		X		1998
EU - Turkey		X		1996
EU Treaty of Rome			X	1958
Economic Cooperation Organization (ECO)	X			1992

RTA	Political Model	Quasi-judicial Model	Judicial Model	Year of Entry into Force
Economic Community of West African States (ECOWAS)			X	1993
EU - Serbia		X		2010
EFTA - Albania		X		2010
EFTA - Chile		X		2004
EFTA - Colombia		X		2011
EFTA - Croatia		X		2002
EFTA - Egypt		X		2007
EFTA - FYROM		X		2002
EFTA - Hong Kong, China		X		2012
EFTA - Israel		X		1993
EFTA - Jordan		X		2002
EFTA - Republic of Korea		X		2006
EFTA - Lebanon		X		2007
EFTA - Montenegro		X		2012
EFTA - Mexico		X		2001
EFTA - Morocco		X		1999
EFTA - Palestinian Authority		X		1999
EFTA - Peru		X		2011
EFTA - SACU		X		2008
EFTA - Serbia		X		2010
EFTA - Singapore		X		2003
EFTA - Tunisia		X		2005
EFTA - Turkey	X			1992
EFTA - Ukraine		X		2012
EFTA (Stockholm Convention) (G)			X	1960
Egypt - Turkey		X		2007
EU - San Marino		X		2002
Eurasian Economic Community (EAEU)			X	1997
European Union - Eastern and Southern African States		X		2012
European Union - Pacific States (Republic of Fiji Islands & Independent State of Papua New Guinea)		X		2009
European Union - Republic of Korea		X		2011
Faroe Islands - Norway	X			1993
Faroe Islands - Switzerland	X			1995
Georgia - Armenia	X			1998
Georgia - Azerbaijan	X			1996
Georgia - Kazakhstan	X			1999
Georgia - Russian Federation	X			1994
Georgia - Turkmenistan	X			2000
Georgia - Ukraine	X			1996

RTA	Political Model	Quasi-judicial Model	Judicial Model	Year of Entry into Force
Guatemala - The Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu		X		2006
Gulf Cooperation Council (GCC)	X			2003
Honduras - El Salvador - The Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu		X		2008
Hong Kong, China - New Zealand		X		2011
Iceland - Faroe Islands	X			2006
India - Afghanistan	X			2003
India - Bhutan	X			2006
India - Japan		X		2011
India - Republic of Korea		X		2010
India - Malaysia		X		2011
India - Nepal	X			2009
India - Singapore		X		2005
India - Sri Lanka	X			2001
Israel - Mexico		X		2000
Japan - Indonesia		X		2008
Japan - Malaysia		X		2006
Japan - Mexico		X		2005
Japan - Peru		X		2012
Japan - Philippines		X		2008
Japan - Singapore		X		2002
Japan - Switzerland		X		2009
Japan - Thailand		X		2007
Japan - Viet Nam		X		2009
Jordan - Singapore		X		2005
Republic of Korea - US		X		2012
Republic of Korea - ASEAN		X		2010
Republic of Korea - Chile		X		2004
Republic of Korea - Singapore		X		2006
Kyrgyz Republic - Armenia	X			1995
Kyrgyz Republic - Kazakhstan	X			1995
Kyrgyz Republic - Moldova	X			1996
Kyrgyz Republic - Russian Federation	X			1993
Kyrgyz Republic - Ukraine	X			1998
Kyrgyz Republic - Uzbekistan	X			1998
Latin American Integration Association (LAIA)	X			1981
Lao - Thailand	X			1991
Melanesian Spearhead Group (MSG)	X			1994
MERCOSUR - India		X		2009
MERCOSUR (G)		X		1991
Mexico - El Salvador		X		2001

RTA	Political Model	Quasi-judicial Model	Judicial Model	Year of Entry into Force
Mexico - Guatemala		X		2001
Mexico - Honduras		X		2001
Mexico - Nicaragua		X		1998
NAFTA		X		1994
New Zealand - Malaysia		X		2010
New Zealand - Singapore		X		2001
Nicaragua - the Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu		X		2008
Pakistan - China		X		2007
Pakistan - Malaysia		X		2008
Pakistan - Sri Lanka	X			2005
Panama - Chile		X		2008
Panama - Costa Rica		X		2008
Panama - El Salvador		X		2003
Panama - Honduras		X		2009
Panama - Singapore		X		2006
Panama - the Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu		X		2004
Panama-Peru		X		2012
Pan - Arab Free Trade Area (PAFTA)	X			1998
Peru - China		X		2010
Peru - Singapore		X		2009
Peru - Chile		X		2009
Peru - Mexico		X		2012
Pacific Island Countries Trade Agreement (PICTA)		X		2003
Republic of Turkey - Hashemite Kingdom of Jordan		X		2011
Republic of Turkey - Republic of Chile		X		2011
Russian Federation - Republic of Azerbaijan	X			1993
Russian Federation - Republic of Belarus	X			1993
Russian Federation - Republic of Moldova	X			1993
Russian Federation - Serbia	X			2006
Russian Federation - Republic of Tajikistan	X			1993
Southern African Customs Union (SACU)		X		2004
Southern African Development Community (SADC)		X		2000
South Asian Free Trade Agreement (SAFTA)	X			2006
South Asian Preferential Trade Arrangement (SAPTA)	X			1995
Singapore - Australia		X		2003
Thailand - Australia		X		2005
Thailand - New Zealand		X		2005
Trans-Pacific Strategic Economic Partnership (SEP)		X		2006
Turkey - Albania	X			2008

RTA	Political Model	Quasi-judicial Model	Judicial Model	Year of Entry into Force
Turkey - Bosnia and Herzegovina	X			2003
Turkey - Croatia	X			2003
Turkey - FYROM	X			2000
Turkey - Georgia		X		2008
Turkey - Israel		X		1997
Turkey - Montenegro	X			2010
Turkey - Morocco		X		2006
Turkey - Palestinian Authority		X		2005
Turkey - Serbia	X			2010
Turkey - Syria		X		2007
Turkey - Tunisia		X		2005
Ukraine - Azerbaijan	X			1996
Ukraine - Belarus	X			2006
Ukraine - FYROM	X			2001
Ukraine - Kazakhstan	X			1998
Ukraine - Moldova	X			2005
Ukraine - Russian Federation	X			1994
Ukraine - Tajikistan	X			2002
Ukraine - Uzbekistan	X			1996
Ukraine - Turkmenistan	X			1995
US - Australia		X		2005
US - Bahrain		X		2006
US - Chile		X		2004
US - Colombia		X		2012
US - Israel		X		1985
US - Jordan		X		2001
US - Morocco		X		2006
US - Oman		X		2009
US - Panama		X		2012
US - Peru		X		2009
US - Singapore		X		2004
West African Economic and Monetary Union (WAEMU)			X	2000
TOTAL	**69**	**147**	**10**	