

ZOOM IN

The question:

Is the settlement of trade disputes under Regional Trade Agreements undermining the WTO dispute settlement mechanism and the integrity of the world trading system?

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The number of Regional Trade Agreements (RTAs) has increased sharply since the 1990s. As of April 2015, the WTO had received some 612 notifications of RTAs. This situation leads to two parallel phenomena. From the point of view of the substantive trade rules, it generates what has been called the ‘spaghetti bowl’, ie a mass of RTAs establishing preferential commitments as between the WTO member states that are parties to them, thus undermining the non-discrimination principle. From a different perspective, which forms the focus of this Zoom-in, regionalism also leads to a situation of concurrent dispute settlement mechanisms (DSMs), given that most RTAs provide for specific adjudication of disputes arising from their application.

Although the risks connected to the rise of regionalism and the proliferation of DSMs have been widely debated in the past, the issue is nonetheless becoming increasingly problematic, due to the negotiation, conclusion and entry into force of the so-called ‘mega-regionals’, such as the Comprehensive Trade and Economic Agreement (CETA), the Transatlantic Trade and Investment Partnership (TTIP), the Trans-Pacific Partnership (TTP), the Trade in Services Agreement (TISA), and the Regional Comprehensive Economic Partnership (RCEP). These agreements, as well as the newly negotiated Economic Partnership Agreements of the European Union, are likely to institutionalize *ad hoc* DSMs for the disputes arising in their respective fields of application. Since they generally overlap *ratione materiae* with the WTO covered agreements, potential conflicts of jurisdiction between the respective DSMs might arise.

RTAs usually address these concerns through differing techniques: some provide for the exclusive and compulsory jurisdiction of their DSMs; others allow the requesting party to exercise a limited choice of forum while still others establish that the WTO dispute settlement bodies have exclusive jurisdiction. Moreover, often they aim to avoid parallel or successive proceedings by providing for ‘fork-in-the-road’ clauses. Finally, in order to mitigate the risk of substantive fragmentation resulting from conflicting decisions, some RTAs defer to the WTO interpretation of overlapping substantive rules.

Notwithstanding these techniques, parallel proceedings before competing DSMs have arisen and are likely to arise in the future, with the risk of conflicting decisions. This raises complex questions of coordination with the WTO, as demonstrated by its jurisprudence.

In light of the foregoing, we have asked Gabrielle Marceau and Luiz Eduardo Salles to address the following questions: once a parallel proceeding is initiated before a regional DSM, may or should the WTO refrain from exercising its adjudicative powers, in order to neutralize potential conflicts of jurisdiction? Should it take the decisions adopted by the regional DSMs into account and what legal value should it ascribe to them? Should regional DSMs be considered as the most appropriate *fora* to adjudicate disputes arising from RTAs? Alternatively, is the WTO the proper forum to maintain the consistency of international trade law? Can the WTO and the regional DSMs’ conflicts of jurisdiction be coordinated in accordance with any general principles of law? What clauses can guarantee the most efficient coordination between WTO and regional DSMs? And, as a general assessment, will the rise of regionalism and the proliferation of DSMs either lead to forum shopping and fragmentation of international trade law, or will they contribute to the development of a uniform interpretation capable of preserving the integrity of the WTO system of law?