FTA Dispute Settlement Mechanisms – Alternative *Fora* for Trade Disputes: The Case of CETA and EUJEPA

Cornelia Furculita

PhD in Law, Marie Curie Early Stage Researcher,
German University of Administrative Sciences Speyer

Institute of European Law
Birmingham Law School
University of Birmingham
Edgbaston
Birmingham
B15 2TT
United Kingdom

For more information on the IEL, see:
birmingham.ac.uk/IEL

For more information on this Working Paper Series, please contact:
IEL Administrator: iel@contacts.bham.ac.uk

Institute of European Law

Working Papers

Paper:

01-2020

FTA Dispute Settlement Mechanisms – Alternative *Fora* for Trade Disputes: The Case of CETA and EUJEPA*

Furculita Cornelia**

Abstract: This paper investigates whether in the context of the Appellate Body crisis and the more developed FTA norms, the dispute settlement mechanisms contained in EU FTAs, particularly CETA and EUJEPA, could emerge as attractive alternative *fora* for solving trade disputes. The paper will analyze potential substantive and procedural aspects that would shape the answer to the posed question. It will argue that CETA and EUJEPA dispute settlement mechanisms could become partial attractive bilateral alternatives to solve trade disputes between the parties. However, it will also show that there are certain aspects that will act against these mechanisms.

Keywords: WTO, new generation EU FTAs, Appellate Body Crisis, Dispute Settlement, Trade.

1. Introduction

Most free trade agreements ('FTAs') contain rules on interstate dispute settlement,[1] however in practice states have rarely availed themselves of these Dispute Settlement Mechanisms ('DSMs').[2] The WTO DSM, on the other hand, was referred to as the 'crown jewel of the WTO System', because of its often usage by the Member States and productive activity.[3] The WTO DSM is, however, currently undergoing an unprecedented crisis. Since August 2017 the US Administration is blocking any re-appointment and appointment of the Members of the Appellate Body ('AB'), a standing body of seven persons that hears appeals from panel reports in WTO disputes. Since December 2019, when the terms of two other Members expired, the AB has only one Member and is dysfunctional, as it requires a minimum of three Members to hear appeals.

---

* Draft version of the Chapter 'FTA Dispute Settlement Mechanisms – Alternative Fora for Trade Disputes: The Case of CETA and EUJEPA' in Wolfgang Weiss, Cornelia Furculita (eds.) Global Politics and EU Trade Policy: Facing the Challenges to a Multilateral Approach (Springer 2020).

** PhD in Law, Marie Curie Early Stage Researcher, German University of Administrative Sciences Speyer. E-mail: furculita@uni-speyer.de

1 More than 97% of PTAs signed in the 2000s contain means of dispute settlement. (Todd Allee, Manfred Elsig, 'Dispute Settlement Provisions in PTAs: New Data and New Concepts' in Andreas Dür, Manfred Elsig (eds), *Trade Cooperation: The Purpose, Design and Effects of Preferential Trade Agreements* (Cambridge University Press 2015) p. 319, 324.

2 For a list of disputes initiated under regional trade agreements *see* the website of Porges Trade Law <www.porgeslaw.com/rta-disputes/> accessed 24 July 2019

3 Tetyana Payosova, Gary Clyde Hufbauer, Jeffrey J. Schott, 'The Dispute Settlement Crisis in the World Trade Organization: Causes and Cures' (2018) 18-5 PIIE Policy Brief p. 1, 1 <https://piie.com/system/files/documents/pb18-5.pdf> accessed 24 July 2019

In the context of the AB crisis, it is expected that a rise in the use of the FTA DSMs will be noted soon. After consultations with Ukraine, the EU has already requested the establishment of a panel under their trade agreement in a dispute on a wood export ban that it claims to be in violation of an FTA norm equivalent to Art. XI:1 GATT.[4] Moreover, even in case of a fully functioning WTO DSM, with the ongoing WTO negotiations stalemate, the FTAs are the centre of development of new trade rules, potentially enforceable only through FTA DSMs. Anticipating that the FTA DSMs use and importance will increase, it seems the right time to turn the attention towards them. This paper will investigate whether FTA DSMs could emerge as attractive alternative *fora* for solving trade disputes, using the case of CETA[5] and EUJEPA[6]. CETA and EUJEPA were chosen as case studies, since they are representative for the most recent approaches taken by the EU in its trade agreements with respect to interstate dispute settlement. Moreover, all three trading partners: the EU, Canada, and Japan are top active users of the WTO DSM[7] and they also adjudicated numerous disputes between them under the WTO rules.[8] Thus, they often litigate their disputes in an international setting, have vast experience in this respect and would, probably, search for new venues to enforce their rights. This paper anticipates that they could find such new venues in CETA and EUJEPA for the settlement of disputes with FTA parties.[9]

The paper first introduces CETA and EUJEPA DSMs focusing on their similarities with the WTO one. It then looks into their substantive coverage and its influence on shaping these mechanisms as alternative *fora* for trade dispute settlement. Finally, it performs a comparative analysis of procedural aspects of CETA, EUJEPA and WTO DSMs and assesses the implications of the differences. It concludes by evaluating the likelihood that the first two will be perceived as

---

4 European Commission, 'EU Asks for a Panel with Ukraine on Wood Export Ban' (21 June 2019) <http://trade.ec.europa.eu/doclib/press/index.cfm?id=2034> accessed 24 July 2019.

5 Comprehensive Economic and Trade Agreement ('CETA') between Canada, of the one part, and the European Union and its Member States, of the other part [2017] OJ L11/23

6 Agreement between the European Union and Japan for an Economic Partnership ('EUJEPA') [2018] OJ L330/3

7 Based on the available data till 2017, the EU was the second most active user of the WTO DSM, Canada – the third, and Japan – the eighth. (Arie Reich, 'The Effectiveness of the WTO Dispute Settlement System: A Statistical Analysis' (2017) 11 EUI Working Papers p. 1, 5)

8 As of January 2020, Canada was a complainant against the EU in nine disputes and a respondent in six, while Japan was a complainant in one and a respondent in six. 'WTO, Map of Disputes between WTO Members' <https://www.wto.org/english/tratop_e/dispu_e/dispu_maps_e.htm?country_selected=EEC&sense=e> accessed 24 January 2020

9 This could happen while also making efforts to find alternatives within the WTO, as for example, by using appeal arbitration proceedings under Art. 25 of the Dispute Settlement Rules: Understanding on Rules and Procedures Governing the Settlement of Disputes ('DSU'), Marrakesh Agreement Establishing the World Trade Organization, Annex 2, 15 April 1994, 1869 U.N.T.S. 401, 33 I.L.M. 1226 (1994).

attractive alternatives to the WTO DSM. While strictly political considerations could also play a major role, they are outside the scope of this paper that performs a legal analysis of the substantive coverage and procedural aspects of CETA and EUJEPA DSMs.

2. Introducing CETA and EUJEPA DSMs

As in the case of most FTAs that use third-party adjudication,[10] CETA and EUJEPA DSMs are inspired by WTO rules.

The first stage of the WTO, CETA and EUJEPA DSMs consists of consultations during which parties should attempt to solve their dispute.[11] A mutually agreed solution by the parties is to be preferred during all stages.[12] If consultations fail, the complainant may request the establishment of a panel composed of three arbitrators[13] that will review the facts of the dispute and will make determinations with respect to the compliance of the contested measure with the obligations prescribed by the respective Agreement. After issuing an interim report on which parties can comment and request a review, the panels issue their final reports containing the descriptive parts of facts and law, as well as, the findings and recommendations of the panel.[14] The final panel rulings shall be binding on the parties.[15] In contrast to CETA and EUJEPA, the WTO DSM provides with a possible next stage – that of appeal.[16]

Under the WTO rules, CETA and EUJEPA when the final reports of the panels or Appellate Body (if there is an appeal stage in a WTO dispute) establish that a measure is inconsistent with the agreements, the implementation stage follows, during which the respondent shall bring that measure into conformity.[17] Prompt compliance is preferred.[18] If that is not possible, compliance should take place within a reasonable period of time ('RPT') notified by the respondent or established through means of arbitration in case the complainant disagrees with it.[19] If the

[10] Claude Chase and others, 'Mapping of Dispute Settlement Mechanisms in Regional Trade Agreements – Innovative or Variations on a Theme?' in Rohini Acharya (ed), *Regional Trade Agreements and Multilateral Trading System* (Cambridge University Press 2016) p. 608, 610
[11] DSU, Art. 4; CETA, Art. 29.4; EUJEPA, Art. 21.5
[12] DSU, Art. 3.7; CETA, Art. 29.19; EUJEPA, Art. 21.26
[13] DSU, Art. 6, 8 ('[U]nless the parties to the dispute agree […] to a panel composed of five panelists.'); CETA, Art. 29.6; EUJEPA, Art. 21.7
[14] DSU, Art. 15; CETA, Art. 29.9-29.10; EUJEPA, Art. 21.18-21.19
[15] CETA, Art. 29.10; EUJEPA, Art. 21.15(8)
[16] DSU, Art. 17
[17] DSU, Art. 21; CETA, Art. 29.12-29.15; EUJEPA, Art. 21.20-21.23
[18] DSU, Art. 21.1; CETA, Art. 29.13(1); EUJEPA, Art. 21.20(1)
[19] DSU, Art. 21.3; CETA, Art. 29.13(2); EUJEPA, Art. 21.20(2)

responding party fails to notify any measure taken to comply or the measure taken is still not complying with the final report, the original complainant is entitled to receive compensation or to temporary suspend obligations (to impose 'retaliatory measures').[20] The level of suspension of obligations can be contested by the respondent and decided through arbitration procedures.[21] The respondent should take measures to comply with the report, as a result of which the suspension of obligations or compensation should be terminated.

Thus, the stages of the DSMs contained in WTO, CETA, and EUJEPA are quite similar, however, there are also several important differences.

3. Substantive Coverage Shaping CETA and EUJEPA DSMs as Alternative *Fora* for Trade Disputes

3.1 The Substantive Coverage of the WTO, CETA and EUJEPA DSMs

Both CETA and EUJEPA cover trade related issues that are also regulated by the WTO agreements. They contain chapters on national treatment ('NT') and market access for goods, technical barriers to trade ('TBT'), sanitary and phytosanitary measures ('SPS'), trade remedies, customs and trade facilitation, subsidies, state trading enterprises ('STEs'), trade in services, public procurement, intellectual property, and transparency. They also cover a wide range of 'issues lying outside the current WTO mandate', the so-called WTO-x norms,[22] such as: competition, environment, labor, regulatory cooperation, capital movement, small and medium enterprises ('SMEs'), etc. However, what matters for the purpose of this paper is whether these FTA norms are enforceable and whether the substantive coverage of CETA and EUJEPA DSMs is comparable to the one of the WTO DSM.

Both CETA and EUJEPA establish that unless otherwise provided in the agreement, the dispute settlement chapters apply to 'any dispute between the Parties concerning the interpretation and application of the provisions of this Agreement'.[23] Therefore, only FTA norms can be enforced through these DSMs. The possibility to enforce norms outside FTAs through the bilateral dispute

[20] DSU, Art. 21.5-22; CETA, Art. 29.14; EUJEPA, Art. 21.21-21.22
[21] DSU, Art. 21.6; CETA, Art. 29.14(5)-(6); EUJEPA, Art. 21.22(6)
[22] Henrik Horn, Petros C. Mavroidis, André Sapir, *Beyond the WTO? An Anatomy of EU and US Preferential Trade Agreements* (Bruegel Blueprint Series 2009) p. 1, 4
[23] CETA, Art. 29.2; EUJEPA, Art. 21.2

settlement proceedings, such as WTO norms that are not reproduced or referenced, is excluded.[24] Therefore, CETA and EUJEPA DSMs could become alternatives to the WTO DSM only with respect to FTA norms that regulate the same areas as the WTO does and are covered by the DSM chapters.

Even if CETA and EUJEPA DSMs cover a wide range of issues, they also exclude recourse to inter-state dispute settlement for certain subject matters. They both exclude the following areas from their dispute settlement chapters: trade remedies (anti-dumping and countervailing measures, global safeguards),[25] labor and environment commitments[26] and competition.[27] CETA additionally carves-out subsidies[28] and decisions under the Investment Canada Act,[29] while EUJEPA does so with respect to: certain provisions related to SPS measures,[30] disputes concerning exclusively TBT incorporated provisions,[31] specific subsidies that are not expressly prohibited,[32] cooperation on intellectual property,[33] corporate governance,[34] good regulatory practices and regulatory cooperation,[35] cooperation in agriculture,[36] and SMEs.[37] The areas excluded from the coverage of the analyzed EU FTAs DSMs concern almost all WTO-x areas (except capital movement) with respect to which FTAs are the only forum for enforcement, but also certain areas regulated by the WTO agreements. It is, therefore, clear that CETA and EUJEPA cannot become alternatives to the WTO DSM in respect to them. Hence, an important part of potential disputes will be possible to be brought only to the WTO forum. Disputes on trade remedies and prohibited subsidies, as well as, those on some specific TBT and SPS provisions seem to be left exclusively for the WTO DSM.

---

[24] Stephan W Schill, 'Authority, Legitimacy, and Fragmentation in the (Envisaged) Dispute Settlement Disciplines in Mega-Regionals' in Stefan Griller, Walter Obwexer, Erich Vranes (eds) *Mega-Regional Trade Agreements: CETA, TTIP, and TiSA: New Orientations for EU External Economic Relations* (Oxford University Press 2017) p. 111, 123

[25] CETA, Art. 3.7; EUJEPA, Art. 5.9(2), 5.11(2)

[26] CETA, Art. 23.11, 24.16; EUJEPA, Art. 16.17

[27] CETA, Art. 17.4; EUJEPA, Art. 11.9

[28] CETA, Art. 7.9

[29] CETA, Annex 8-C

[30] EUJEPA, Art. 6.16(1); These EUJEPA provisions concern the risk assessment according to Art. 5 SPS Agreement (Art. 6.6), the arbitrariness or unjustifiability of import procedures (Art. 6.7(4)(b)), publication and communication of processing period of import procedures (Art. 6.7(4)(c)), information requirements for import procedures (Art. 6.7(4)(d)) and equivalence of SPS measures (Art. 6.14)

[31] EUJEPA, Art. 7.3(3)

[32] EUJEPA, Art. 12.10

[33] EUJEPA, Art. 14.52

[34] EUJEPA, Art. 15.7

[35] EUJEPA, Art. 18.19

[36] EUJEPA, Art. 19.8

[37] EUJEPA, Art. 20.4

Still, there are many other areas left for the jurisdiction of CETA and EUJEPA: tariff regulations, the remaining SPS, TBT and subsidies provisions, STEs, customs valuation, services, intellectual property rules not related to cooperation, and public procurement. Consequently, when a dispute arises in respect to these areas, CETA and EUJEPA DSMs could be potential alternatives to the WTO DSMs.

3.2 The Influence of the Competition between Substantive FTAs and WTO Norms

When it comes to areas that are covered by the WTO, CETA, and EUJEPA DSMs, the choice in favor of a forum would be influenced by the competition between substantive WTO and FTAs norms.

The FTAs contain norms that incorporate or reproduce WTO norms – so-called 'WTO equal' norms. The use of FTA DSMs for disputes on these norms will be mainly affected by other considerations than substantive ones, such as procedural considerations, because the substantive norms governing the dispute will have similar contents. 'WTO-plus' norms, on the other hand, are FTA norms 'which come under the current mandate of the WTO, where the parties undertake bilateral commitments going beyond those they have accepted at the multilateral level'.[38] Thus, if a dispute concerns a violation of WTO-plus norms, the FTA parties would have to initiate proceedings in FTAs *fora*, in order to enforce the WTO-plus norms contained in the FTAs rather than the corresponding WTO norms. In these cases, FTA DSMs will emerge not as alternatives, but as the only available *fora*, as the WTO DSM does not cover them. Even though the issue whether non-WTO law can be applied or otherwise be relevant in WTO disputes remains unsettled, it is generally agreed that the WTO panels and AB have no jurisdiction to rule that a non-WTO norm, such as an FTA one, has been violated.[39] Art. 1.1 of the DSU clearly provides that it shall apply only to disputes brought pursuant to consultations and dispute settlement provisions of the covered agreements. Thus, even though the question whether FTA norms could serve as justifications or defenses for a WTO breach remains open, the WTO panels and AB clearly cannot enforce FTA norms. Yet, there could be measures that would be simultaneously violating WTO and WTO-plus or WTO-x norms or the WTO-plus and WTO-x norm would be violated along other WTO norms. In such cases, CETA and EUJEPA would not only be offering potential

[38] Horn, Mavroidis, Sapir *supra* note 22 p. 4

[39] *See* Lorand Bartels, 'Applicable Law in WTO Dispute Settlement Proceedings' (2001) 35(3) Journal of World Trade p. 499, 502-503; Joost Pauwelyn, 'How to Win a World Trade Organization Dispute Based on Non-World Trade Organization Law? Questions of Jurisdiction and Merits' (2003) 37(6) Journal of World Trade p. 997, 1000

alternative DSMs to hear claims on the same measures, but also DSMs which would apply more favorable norms from the complainant's perspective. The usage of CETA and EUJEPA DSMs, even in these cases, would still be contingent upon procedural aspects, as states could perceive these mechanisms as not offering the necessary features in order to be used for the settlement of their disputes.

4. Procedural Aspects

Even though WTO, CETA and EUJEPA DSMs are similarly designed, they are still different. Besides being necessary to answer the question posed by the present paper, this section is also relevant for the general functioning of these DSMs with respect to all areas and disputes, including those on WTO-x and WTO-plus with respect to which the FTA DSMs are the only available *fora* for enforcement.

4.1 Absence of Co-complainants and Third-Parties in CETA and EUJEPA Proceedings

Important differences in proceedings stem from the fact that WTO is a multilateral organization, while CETA and EUJEPA are bilateral agreements.

WTO DSM allows other WTO Members to join a dispute as co-complaints by filing parallel claims within the same dispute,[40] or as third-parties without directly confronting the respondent but expressing their interest and position in the dispute.[41] Thus, Members can form a common front and exercise pressure together in a dispute. Additionally, by using the multilateral proceedings, parties could establish a *de facto* precedent to be used in future disputes. Nevertheless, while 'absent cogent reasons, an adjudicatory body will resolve the same legal question in the same way in a subsequent case',[42] the final report would still have binding force only for the dispute between the parties.[43] It could also be in the interest of the defendant to adjudicate the dispute at the multilateral level where it can act simultaneously against multiple complainants, avoiding the need of going through a series of proceedings under the rules of

[40] DSU, Art. 9(2)
[41] DSU, Art. 10.2
[42] Appellate Body Report, *United States – Final Anti-Dumping Measures on Stainless Steel from Mexico*, WT/DS344/AB/R, 30 April 2008, [160]
[43] Appellate Body Report, *Japan – Taxes on Alcoholic Beverages*, WTO/DS8/AB/R, 4 October 1996, 14

different FTAs.[44] CETA and EUJEPA, however, offer proceedings in which only FTA parties can participate.

Having to adjudicate the same measure in different *fora*, going through multiple proceedings, and not having the possibility to put the same pressure, could be a significant disadvantage of bilateral DSMs. Therefore, CETA and EUJEPA DSMs cannot become full alternatives to the WTO DSM, but only with respect to bilateral dispute settlement.

4.2 Timeframes under CETA and EUJEPA DSMs

The expected length of the proceedings could be a determining factor when deciding to use a DSM. The expeditiousness of proceedings becomes especially critical when the nullification or impairment of the benefits increase very fast as time passes, as in the case of perishable goods.[45]

The WTO dispute settlement proceedings generally last longer than the FTAs ones. From consultations to the issuing of panel report it should take up to fifteen months and if there is an appeal – eighteen months. The issue in case of the WTO proceedings, however, is not the timeframes as set in the DSU, but the fact that they are not respected. The WTO disputes now take more than the double of the DSU's envisaged eighteen months for procedures with an appeal stage.[46] One of the main criticisms brought by the US administration in the context of the AB crisis is that the appellate stage regularly takes longer than the prescribed period of ninety days.[47]

The proceedings under CETA and EUJEPA, from consultations till the issuance of the panel report should take about eight months and, respectively – nine months.[48] Thus, the timeframes established for the EU FTAs under analysis should be almost twice shorter than the ones described under the DSU that in practice last even longer. It is, nevertheless, hard to say what would be the actual duration of the procedures under CETA and EUJEPA DSMs, as they were never applied in practice and the deadlines were not tested in actual cases.[49] Moreover, the procedures within WTO

---

[44] Joost Pauwelyn, 'Going Global, Regional, or Both? Dispute Settlement in the Southern African Development Community (SADC) and Overlaps with the WTO and Other Jurisdictions' (2004) 13 Minnesota Journal of Global Trade Minnesota Journal of Global Trade p. 231, 250

[45] Fernando Pierola, Gary Horlick, 'WTO Dispute Settlement and Dispute Settlement in the "North-South" Agreements of the Americas: Considerations for Choice of Forum' (2007) 41(5) Journal of World Trade p. 885, 895

[46] Amy Porges, 'Designing Common but Differentiated Rules for Regional Trade Disputes' [2018] ICTSD RTA Exchange Issue Paper p. 1, 6

[47] DSU, Art. 17.5

[48] Calculated by summing up the terms prescribed by CETA, Art. 29.6(1), 29.7(2)-(4). 29.9-29.10 and EUJEPA, Art. 21.5, 21.8(2)-(3), 21.18-21.19

[49] Chase and others *supra* note 10 p. 610; Céline Todeschini-Marthe, 'Dispute Settlement Mechanisms Under Free Trade Agreements and the WTO: Stakes, Issues and Practical Considerations: A Question of Choice?' (2018) 13(9) Global Trade and Customs Journal p. 387, 402

take also longer because of the presence of an appeal stage. Even though this stage adds to the length of the proceedings, it is linked to some advantages.[50] The lengthier procedures within WTO are also associated with good quality, as a good report requires more time.[51]

The shorter envisaged timeframes of the proceedings under CETA and EUJEPA could be an attractive characteristic. If the complainant is looking for speedier procedures and this is an essential aspect, then the DSMs under CETA and EUJEPA could be an appealing alternative to the WTO DSM, provided the timeframes are actually respected. If, however, FTA parties would be looking for a system that provides with the advantages associated with an appeal stage, despite the shorter deadlines, they could consider CETA and EUJEPA DSMs as not being attractive alternatives.

4.3 The Panel Selection Process

Not only the timeframes of the procedures under the WTO, CETA and EUJEPA DSMs are different, but also the selection processes of the panels. The way the panels are selected could ensure that the procedures would not be delayed or blocked by one party, impairing the access to dispute settlement procedures enshrined in the treaties.

At the WTO level, the nominations for the panels are made by the WTO Secretariat[52] that maintains a list of indicative names from which it may draw candidates[53] or it can consider other names.[54] The proposed nominations by the secretariat shall not be opposed by the parties to the dispute except for 'compelling reasons'.[55] If, however, parties are opposing and cannot agree on the composition of the panel within twenty days from the establishment of the panel, at the request of any party, the Director-General, consulting the Chairman of the Dispute Settlement Body ('DSB')[56] and the Chairman of the relevant Council or Committee, appoints the panelists considered most appropriate.[57] Therefore, the DSU provides a quasi-automatic selection process

---

[50] *See infra* Section 4.4 The Absence of an Appeal Stage under CETA and EUJEPA DSMs
[51] Pauwelyn, *supra* note 44 p. 258
[52] DSU, Art. 8.6
[53] DSU, Art. 8.4
[54] WTO Secretariat, 'The Stages in a Typical WTO Dispute' in *A Handbook on the WTO Dispute Settlement System* (2nd edn, Cambridge University Press 2017) p. 49, 72
[55] DSU, Art. 8.6
[56] The procedures under the DSU are administered by the Dispute Settlement Body ('DSB') – a political body, composed of representatives of all the Members. According to Art. IV:3, Marrakesh Agreement Establishing the World Trade Organization, 15 April 1994, 1867 U.N.T.S. 14, 33 I.L.M. 1143 (1994): 'The General Council shall convene as appropriate to discharge the responsibilities of the Dispute Settlement Body provided for in the Dispute Settlement Understanding.'
[57] DSU, Art. 8.7

that ensures that a responding party will not be able to block or delay the entire procedures. The AB is a standing body, therefore there is no risk that a party will block its composition for a specific dispute. However, this system is prone to a different kind of problem, that of the appointment and reappointment of AB Members – a problem that can be currently noted and that provides the relevant context for the current analysis.

Similar to WTO panels, the panels in CETA and EUJEPA are composed on an *ad-hoc* basis, but there is no similar authority to the WTO Secretariat to nominate the panelists. Parties should, first, attempt to reach an agreement on the panel composition within ten days.[58] Under both agreements the Joint Committees ('JCs') at their first meetings should establish a list of individuals (at least fifteen for CETA, and at least nine for EUJEPA) to serve as arbitrators composed of three sub-lists: two for each party and one for individuals to serve as chairpersons that are non-nationals of either party.[59] The JCs under CETA and EUJEPA are co-chaired by representatives of each party responsible for trade at the highest level, or their respective delegates.[60]

In case parties cannot reach an agreement on the panel composition, both CETA and EUJEPA DSMs provide further rules. In CETA either party can request the Chair of the JC or his delegate to draw the three arbitrators by lot from the respective sub-lists of arbitrators, as soon as possible and normally within five days. The success of the selection by lot procedures also hinges upon who is the authority that performs it. Where the respondent can claim the power for this selection, this default mechanism could be seriously weakened.[61] Since in CETA, the Chair is held by representatives of both parties, it establishes that in case one of the co-chairs did not accept to participate within five days of the request to select the arbitrators, one of the chairpersons can perform the selection by lot alone.[62] The question arises what does 'not accept to participate' means, is there a need of a formal acknowledgment or mere silence would suffice.[63] Since the agreement prescribes the term of five working days, mere silence seems to be enough to proceed

[58] CETA, Art. 29.7(2); EUJEPA, Art. 21.8(2)
[59] CETA, Art. 29.8; EUJEPA, Art. 21.9
[60] CETA, Art. 26.1(1); EUJEPA, Art. 22.1(3)
[61] Chase and others *supra* note 10 645
[62] CETA, Art. 29.7(4)
[63] Simon Lester, Inu Manak, Andrej Arpas, 'Access to Trade Justice: Fixing NAFTA's Flawed State-to-State Dispute Settlement Process' (2019) 18(1) World Trade Review p. 63, 74

to the selection by lot done by only one of them. Therefore, the co-chair from the respondent will not cause undesirable delays to the process of selection by lot of arbitrators.

EUJEPA, on the other hand, provides that if there is no agreement, each party shall select within five days one arbitrator from their own sub-lists that will not act as chairpersons. If they fail to do so, the co-chair of the JC from the complaining party will select an arbitrator from the sub-list of the party that failed to appoint an arbitrator in another five days. If the parties fail to agree on the chairperson, within five days the co-chair from the complainant will select the chairperson by lot from the sub-list of chairpersons.[64] Since the authority selecting by lot in EUJEPA is the co-chair of the JC from the complainant, this ensures that the selection will not be under threat of delays caused by the respondent.[65]

The procedures described above are the ones followed in case there is a list from which names can be drawn by lot. However, it is well possible that the parties will not be able to agree on the lists or that the lists would be incomplete.[66] NAFTA represents an example of an FTA in which without a roster of panelists, the responding party can object any proposed arbitrator and block the entire procedures.[67] CETA provides that if there is no list or if it does not contain sufficient names, the arbitrators should be drawn by lot from the arbitrators that were proposed by one or both parties.[68] As long as the complainant has proposed its own arbitrators and they are still available, the composition of the panel is theoretically ensured. It is, nonetheless, not clear from which sub-list the nominated arbitrators and chairpersons should be selected, who shall perform the selection and within which deadline. Because of the provisions' ambiguity the panel selection could be significantly delayed. It also does not give preference to the arbitrators proposed by both parties over those proposed by only one party. Thus, a panel could be composed only of arbitrators proposed by a single party, even though there were candidates proposed by both of them, which would raise concerns about the impartiality of the panel.

EUJEPA provides with a more sophisticated mechanism for panel selection in case the lists are not established or contain less names than required. If the chairpersons sub-list has: (i) two individuals agreed by the parties - the co-chair of the JC from the complainant shall select by lot

64 EUJEPA, Art. 21.8(3)-(4)
65 Lester, Manak, Arpas *supra* note 63 p. 75
66 As of January 2020, there are no published lists of arbitrators established under CETA and EUJEPA rules.
67 David A. Gantz, 'The United States and NAFTA Dispute Settlement: Ambivalence, Frustration and Occasional Defiance' (2009) 06-16 Arizona Legal Studies Discussion Paper p. 356, 387
68 CETA, Art. 29.7(6)

within five days a chairperson from them; (ii) one individual agreed - that individual shall act as chairperson; (iii) no individual agreed – the co-chair of the JC from the complainant shall select by lot within five days from individuals that were proposed by one party at the time of establishing.[69] The selection of other arbitrators follows a similar procedure with the difference that in case there are at least two or one individuals agreed on the arbitrators sub-lists, the parties are first allowed to choose within five days from these names and if they do not choose, the procedures as described for the selection by lot of chairpersons applies *mutatis mutandis*.[70] Thus, EUJEPA provides with clear steps to be followed for the particular cases in which the sub-list for chairpersons and then for other arbitrators are not established avoiding potential confusion with respect to which sub-list should be used in the process. Additionally, it clearly establishes the authority performing the potential selections by lot and the deadlines for the procedures and always gives preference to the names agreed by both parties. If there are no names agreed by both parties, the panel could be formed by arbitrators proposed only by one party. Yet, this would only happen, if the other party assumed this risk by not proposing its own candidates. Furthermore, EUJEPA provides an extra guarantee – if an individual formally proposed is no longer available, a new individual can be proposed.[71]

CETA and EUJEPA DSMs arrange for the panels to be composed even if parties do not reach an agreement and if there are no lists of arbitrators. Therefore, a complainant looking at CETA and EUJEPA DSMs as possible alternatives to the WTO DSM, should not be worried that the procedures will not pass the stage of panel composition, as it happened in NAFTA. Nevertheless, the panel selection procedures under CETA could raise some concerns regarding the arbitrators' independence. Furthermore, if the arbitrators' list is not established under this agreement, the panel composition could be considerably delayed, this being a possible reason for reluctance against the use of CETA DSM.

4.4 The Absence of an Appeal Stage under CETA and EUJEPA DSMs

WTO proceedings offer the possibility to have an appellate stage during which the AB hears the appeals of panel reports (yet, since December 2019, due to the insufficient number of AB Members, divisions to hear appeals cannot be established, but parties could make use of interim

[69] EUJEPA, Art. 21.8(5)(a)
[70] EUJEPA, Art. 21.8(5)(b)
[71] EUJEPA, Art. 21.8(5)(a)(iii)

appeal arbitration arrangements signed under Art. 25 of the DSU to replicate the appeal procedures as close as possible). Neither CETA, nor EUJEPA provide with a second stage during which appeals of panel reports could be heard.

There are certain advantages that are associated with the presence of an appeal stage. It offers the opportunity to correct potential mistakes from panel reports.[72] Furthermore, knowing that the reports will be under the AB's scrutiny, incentivizes the panels to issue better quality reports that are drafted more carefully.[73] The proceedings that go through an appellate review also ensure more coherence in the rendered decisions. The AB usually follows its own case law, this bringing more certainty, predictability, and stability to the system.[74]

There are also drawbacks that states could see in the presence of an appellate stage. Besides the lengthier proceedings caused by the appeal, more coherence means less control. States that want to retain more control over dispute settlement, might be reticent to choose a system that, sometimes against their will, develops its own jurisprudence and follows it.[75] *Ad-hoc* panels not subject to an appeal conducted by a standing body, are less prone to developing a consistent jurisprudence that does not have the support of the parties. The US criticizes the AB for its acquired independence and allegedly going beyond its mandate by *inter alia* offering overreaching interpretations, making *obiter dicta*, *de novo* reviews and establishing precedents.[76]

In the context of some concerns about particular AB approaches, the more controllable FTA DSMs without an appellate stage might seem more appealing for some states and a desirable alternative to the WTO DSM. While others – concerned about the certainty, predictability, and the quality of reports, could perceive CETA and EUJEPA DSMs as not offering the same level of guarantees to become actual alternatives.

4.5 Administrative and Legal Support provided by Secretariats

---

[72] Jennifer Hillman, 'Dispute Settlement Mechanism' in Jeffrey J. Schott, Cathleen Cimino-Isaacs (eds) 'Assessing the Trans-Pacific Partnership' vol 2 (2016) 16-4 PIIE Briefing p. 101, 102; Todeschini-Marthe *supra* note 49 p. 401
[73] Pauwelyn, *supra* note 44 p. 260
[74] Pierola, Horlick *supra* note 45 p. 899
[75] Schill *supra* note 24 p. 119
[76] WTO, DSB Meeting, 'Statements by the United States at the Meeting of the WTO Dispute Settlement Body Geneva', 27 August 2018 <https://geneva.usmission.gov/wp-content/uploads/sites/290/Aug27.DSB_.Stmt_.as-delivered.fin_.public.pdf> accessed 24 July 2019; Office of the United States Trade Representative, The President's 2018 Trade Policy Agenda p. 1, 22-28 <https://ustr.gov/sites/default/files/files/Press/Reports/2018/AR/2018%20Annual%20Report%20I.pdf> accessed 24 July 2019

Another important factor that could be decisive for the potential rise of FTA DSMs as attractive alternatives to the WTO DSM is the presence or absence of administrative and legal support provided by secretariats to the adjudicating bodies.

Both WTO panels and the AB benefit from the support of secretariats. The WTO Secretariat has the responsibility to assist panels on legal, historical, and procedural aspects, as well as to provide secretarial and technical support.[77] The AB benefits from the administrative and legal support offered by the AB Secretariat.[78] Secretariats offer administrative support with technical and secretarial work, such as: document exchanging and management, roster coordination, translation and interpretation services, information services, and capacity building.[79] Panelists are part-timers appointed to deal with single disputes. They might not have the time, knowledge or capacity to engage in all the details of the case,[80] while the AB has to deal with multiple complex cases under the strain of short deadlines. These Secretariats are comprised of well-experienced staff that can also provide with legal support that entails research and drafting assistance to ensure that the legal and factual arguments are adequately developed and that high quality reports are issued in a timely manner.[81] They also ensure that cases are solved in a consistent and predictable manner across time.[82] Too much consistency could, however, make states reluctant to entrust the secretariats with extensive authority, as they could develop and promote the perpetuation of jurisprudence of *ad-hoc* panels without having the support of the parties. Moreover, having secretariats involves high financial expenditures,[83] hence it might not seem worth investing in secretariats for DSMs that only seldom deal with cases.

The DSM established by CETA does not stipulate that panels can benefit from any kind of support offered by an entity similar to the WTO and AB Secretariats. The parties could attribute to the absence of secretariats a significant importance and be more hesitant about seeing CETA

---

77 DSU, Art. 27.1
78 DSU, Art. 17.7
79 Amelia Porges, 'Dispute Settlement' in Jean-Pierre Chauffor, Jean – Christophe Maur (eds) *Preferential Trade Agreement Policies for Development: A Handbook* (World Bank 2011) p. 467, 479
80 James Flett, 'Referring PTA Disputes to the WTO Dispute Settlement System' in Andreas Dür, Manfred Elsig, *Trade Cooperation: The Purpose, Design and Effects of Preferential Trade Agreements* (Cambridge University Press 2015) p. 555, 558
81 William J. Davey, 'Dispute Settlement in the WTO and RTAs: A Comment' in Lorand Bartels, Federico Ortino (eds) *Regional Trade Agreements and the WTO Legal System* (Oxford University Press 2006) p. 343, 354; Pierola, Horlick *supra* note 45 p. 898; Todeschini-Marthe *supra* note 49 p. 402
82 Davey *supra* note 81 p. 355; Robert McDougall, 'Regional Trade Agreement Dispute Settlement Mechanisms: Modes, Challenges and Options for Effective Dispute Resolution' [2018] RTA Exchange Issue Paper p. 1, 9
83 Chase and others *supra* note 10 p. 676

DSM as a real alternative to the WTO dispute settlement. The absence of the legal support, nonetheless, could be a positive aspect, if the parties are bothered by the considerable authority that a secretariat could gain.

EUJEPA, on the other hand, has a very innovative norm. It provides that 'the Parties may agree to jointly entrust an external body with providing support for certain administrative tasks for the dispute settlement procedure.'[84] This norm entitles parties to agree to outsource the administration of the disputes to already established bodies. This would make possible to benefit from part of the advantages that secretariats entail and avoid the burdensome financial costs that permanent secretariats necessitate. Yet, the agreement seems to envisage the possibility to have only administrative and no legal support from an external body. This could be a signal that parties, themselves, preferred a system that would indirectly allow 'greater interpretative divergence'.[85] It is unpredictable yet, whether EUJEPA parties would make use of an external body for administrative assistance at all, whether this will happen on a regular basis or whether the same external body would be used in all the instances. The parties could make use of the WTO Secretariat itself, though in this case at least consensus among all WTO Members would be required and this is highly improbable to happen given the difficulty to arrive at a consensus, or other bodies could be used, such as the Permanent Court of Arbitration (PCA) or the International Court of Arbitration of the International Chamber of Commerce .[86] Using the support of already established courts could be beneficial, as it would mean also using the established authority of these bodies.[87] How the provision contained in EUJEPA on external assistance would be used (if ever used) in practice remains to be seen.

To conclude, CETA and EUJEPA DSMs do not provide with internal or external bodies to offer *legal* support to the panels. Still, this might not affect their emergence as attractive alternatives to the WTO DSM, as parties might even consider this an advantage. Moreover, in contrast to CETA, EUJEPA provides the possibility to have administrative support. Thus, this DSM model could be perceived as a balanced way of ensuring that panels benefit from administrative support, while not empowering another body with too much interpretative power.

---

[84] EUJEPA, Art. 21.25(2)
[85] Geraldo Vidigal, 'Making Regional Dispute Settlement Attractive: The "Court of Arbitration" Option' (RTA Exchange, ICTSD 2018) <www.ictsd.org/opinion/making-regional-dispute-settlement-attractive-the-> accessed 24 July 2019
[86] Ibid
[87] Ibid

4.6 Transparency and Openness of the Proceedings

The level of transparency in CETA, EUJEPA and WTO proceedings is another difference between them. Transparency is gaining more and more attention, given the civil society's increased interest in and scrutiny of international trade policy.

The level of transparency in WTO varies depending on different stages of the proceedings. Consultations,[88] parties' submissions,[89] as well as panel and AB hearings are closed by default.[90] The publicity of consultations could imperil the amicable resolution of the disputes,[91] therefore their confidentiality is not raising concerns. The confidentiality of submissions was, however, criticized especially by those who would have liked to submit *amici curiae* briefs, but had no access to submissions in order to know how to supplement the advanced arguments.[92] The closed hearings at both panel and AB levels have been the subject of active debates. The issue proved to be controversial among Member States.[93] In the end WTO panels and AB relied on Art. 18.2 of the DSU according to which parties have the right to disclose to the public their statements, to reach the conclusion that subject to the agreement of the parties, hearings can be public.[94] Even though there were several cases in which parties opted for public hearings, the general rule is still that hearings take place behind closed doors. Moreover, even when the hearings are open, they 'are broadcast, sometimes even days after the actual hearing takes place, in a room at the WTO headquarters'.[95]

As well as under WTO rules, consultations shall be confidential under CETA and EUJEPA.[96] Submissions, on the other hand, are to be made public.[97] Moreover, the general rule is that hearings are public, unless parties agree otherwise or the submissions contain confidential information.[98]

---

88 DSU, Art. 4.6
89 DSU, Art. 18.2; Unless Members decide to individually release their submissions.
90 WTO, AB, Working Procedures for Appellate Review, WT/AB/WP/6, 16 August 2010, Appendix 3, para 2; DSU, Art. 17.10
91 Gabrielle Marceau, Mikella Hurley, 'Transparency and Public Participation in the WTO: A Report Card on WTO Transparency Mechanisms' (2012) 4 (1) Trade, Law and Development p. 19, 25
92 Ibid p. 26
93 Lothar Ehring, 'Public Access to Dispute Settlement Hearings in the World Trade Organization' (2008) 11(4) Journal of International Economic Law p. 1021, 1022
94 Panel Report, *Canada – Continued Suspension of Obligations in the EC – Hormones Dispute (US – Continued Suspension)*, WT/DS321/R, 31 March 2008, [7.38-7.52]; Appellate Body Report, *US – Continued Suspension*, WT/DS321/AB/R, 16 October 2008, Annex IV
95 WTO, 'Farewell speech of Appellate Body Member Ricardo Ramírez-Hernández' 28 May 2018 <www.wto.org/english/tratop_e/dispu_e/ricardoramirezfarwellspeech_e.htm> accessed 24 July 2019
96 CETA, Art. 29.4(6); EUJEPA, Art. 21.5(6)
97 CETA, Annex 29-A Rules of Procedure for Arbitration, para 38; EUJEPA, Art. 21.15(3)
98 CETA, Annex 29-A Rules of Procedure for Arbitration, para 38; EUJEPA, Art. 21.15(1)

Therefore, CETA and EUJEPA provide with more transparency than the WTO does. Publicity of proceedings allows representatives of civil society to see the manner in which they take place, that parties are given the opportunity to represent their interest and that panelists are mindful of the interests at stake. This can help with building more trust and credibility in the systems, which subsequently also strengthens their legitimacy.[99] Moreover, a complainant that brings a case on a political sensitive issue could seek support from the civil society. Of course, there can be cases in which parties might want to avoid publicity, but in such cases, they can decide by mutual agreement to have closed hearings.

Closely related to the issue of transparency is the possibility of *amicus* briefs submissions during the proceedings. The question of *amicus* briefs submitted by non-parties to the disputes in WTO proceedings turned to be a contentious issue,[100] especially because it raised fears that the AB overreached its mandate and was involved in law-making when admitted such possibility.[101] Neither the DSU, nor the Working Procedures for Appellate Review specifically address this issue. The AB, however, interpreted the DSU rules as entitling panels and AB to consider and, eventually, accept *amicus* briefs.[102] Yet, in practice very few were considered and even fewer were accepted.[103] On the other hand, both CETA and EUJEPA expressly allow the submission of *amicus curiae* briefs by non-governmental entities, natural or legal persons that are established in either party.[104] It is not yet clear if in practice the panels established in CETA and EUJEPA will actually take into account *amicus curiae* brief. Nevertheless, the express regulation of the submission of *amici* is to be appreciated, since it can be considered a lesson learned from the WTO that lacks

[99] Ehring *supra* note 93 p. 1024
[100] Theresa Squatrito, 'Amicus Curiae Briefs in the WTO DSM: Good or Bad News for Non-State Actor Involvement?' (2018) 17(1) World Trade Review p. 65, 65-66
[101] Robert Howse, 'The World Trade Organization 20 Years On: Global Governance by Judiciary' (2016) 27(1) European Journal of International Law p. 9, 40
[102] Appellate Body Report, *United States – Import Prohibition of Certain Shrimp and Shrimp Products (US – Shrimp)*, WT/DS58/AB/R, 12 October 1998, [106-108]; Appellate Body Report, *United States – Imposition of Countervailing Duties on Certain Hot-Rolled Lead and Bismuth Carbon Steel Products Originating in the United Kingdom (US – Lead and Bismuth II)* WT/DS138/AB/R, 10 May 2000, [41]
[103] From 1998, when amicus were first recognized to 2014: 'In total, there have been 98 amicus submissions representing 148 actors. [...] Sixteen amicus submissions have formally been accepted and considered by panels. It is especially rare for the AB to consider an amicus brief. In fact, the AB has only found one amicus to merit consideration.' (Squatrito *supra* note 100 p. 71-74)
[104] CETA, Annex 29-A Rules of Procedure for Arbitration, para 43; EUJEPA, Art. 21.17(3). However, only 'unless the Parties agree otherwise' according to the Rules of Procedure of a Panel (Decision No 1/2019 of 10 April 2019 of the Joint Committee of the EU-Japan EPA [2019/1035]), para. 38

such an express provision. Openness of the procedures would be especially appreciated by the civil society whose view would be known to the panels.[105]

Therefore, the increased levels of transparency and openness score in favor of considering CETA and EUJEPA DSMs as potential alternatives to the WTO DSM, especially if parties want to obtain the support of the civil society for international dispute settlement.

4.7 Implementation Stage

4.7.1 Temporary Remedies in Case of Non-Compliance

While the implementation stages in CETA and EUJEPA are very similar to those prescribed by the DSU, there are also some differences that could influence their emergence as potential attractive alternatives for solving trade disputes between the parties.

CETA and EUJEPA contain additional grounds for recourse to trade remedies by the complainant at an earlier stage which provide more flexibility for the complainant. Under CETA rules in case the respondent initially fails to notify its intention to comply within twenty days after the receipt of the final panel report, even without establishing a RPT, the complainant can have recourse to temporary remedies.[106] Under EUJEPA rules, if the respondent notifies that it is impracticable to comply within the RPT, without waiting for its expiry the complainant can make use of trade remedies.[107] Therefore, the rules of CETA and EUJEPA could be perceived more advantageous from the perspective of the complainant that can pressure the respondent into compliance sooner.

CETA and EUJEPA offer the same temporary remedies to induce compliance as the DSU.[108] Compensation is a remedy that in practice under the DSU has been rarely used.[109] It is generally understood to refer only to trade concessions and benefits and not monetary payments.[110] Introducing monetary compensations as alternative remedies has been advocated by some

[105] Astrid Wiik, *Amicus Curiae before International Courts and Tribunals* (4 vol Successful Dispute Resolution, Nomos, Hart Publishing 2018)
[106] CETA, Art. 29.14(1)(a)
[107] EUJEPA, Art. 15.15(1)
[108] CETA, Art. 29.14(1); EUJEPA, Art. 21.22(2).
[109] Bryan Mercurio, 'Why Compensation Cannot Replace Trade Retaliation in the WTO Dispute Settlement Understanding' (2009) 8(2) World Trade Review p. 315, 324.
[110] Ibid p. 328.

scholars[111] and Members.[112] EUJEPA seems to allow the use of monetary payments, as it offers another additional remedy: 'any alternative arrangement'.[113] This alternative remedy is formulated broad enough to encompass any possible arrangement that parties agree on, including on monetary compensation. Therefore, under EUJEPA parties have more remedies to choose from to induce compliance

If the complainant makes use of suspension of obligations, similar to the DSU, CETA and EUJEPA establish that it shall be at a level equivalent to the nullification or impairment caused by the violation.[114] The level of nullification and impairment under CETA rules shall be calculated starting from the date of notification of the final report to the Parties.[115] Thus, CETA provides with partial retrospective effects of retaliation, unlike the DSU under which remedies are only of a prospective nature.[116] While under CETA the suspension of obligations does not have effects of reparation and is still meant to be used only to induce compliance, it may incentivise parties to comply more promptly and deter foot dragging in compliance with the final ruling. CETA and EUJEPA also contain qualitative requirements for the suspension of obligations. However, unlike the DSU, they provide that the suspension of obligations shall be applied to any sector that is covered by the dispute settlement chapters.[117] Therefore, the qualitative requirements are flexible and do not require that retaliation be first applied in the same sector as in which the violation was found. This allows parties to always suspend obligations from a sector that they might think could pressure more the respondent to comply.

Based on the analysis performed in this section it can be concluded that the system of the trade remedies found in CETA and EUJEPA could help induce compliance more effectively than the trade remedies available at the WTO level. Therefore, from this perspective CETA and EUJEPA DSMs could be perceived as attractive alternatives for the WTO DSM.

4.7.2 'Sequencing' and Compliance Post Retaliation Issues

---

[111] Arwel Davies, 'Reviewing Dispute Settlement at the World Trade Organization: A Time to Reconsider the Role/s of Compensation?' (2006) 1 (5) World Trade Review p. 31, 40; Marco Bronckers, Freya Baetens, 'Reconsidering Financial Remedies in WTO Dispute Settlement' (2013) 16 (2) Journal of International Economic Law p. 281

[112] DSB, Contribution of Ecuador to the Improvement of the Dispute Settlement Understanding of the WTO, TN/DS/W/9, 8 July 2002; DSB, Proposal by Mexico: Improvements and Clarifications of the Dispute Settlement Understanding, TN/DS/W/91, 16 July 2007

[113] EUJEPA, Art. 21.22(1)

[114] CETA, Art. 29.14(3); EUJEPA, Art. 21.22(4)(a))

[115] CETA, Art. 29.14(1)

[116] Bronckers, Baetens *supra* note 111 p. 289

[117] CETA, Art. 29.14(3); EUJEPA, Art. 21.22(4)(b)

The implementation procedures under the DSU are facing two issues: sequencing and compliance post retaliation. The DSB has to grant authorization for retaliation within thirty days of the expiry of the RPT, while the compliance procedures should take ninety days.[118] These timeframes would require the DSB to authorize retaliation before the failure to implement compliance measures would have been decided. In practice states started to sign *ad-hoc* voluntary agreements to establish that compliance procedures are to take place first.[119] These voluntary agreements, however, do not remedy the contradictive text of the DSU. CETA and EUJEPA do not provide with any conflicting timeframes. Moreover, one of the reasons for imposing remedies in these agreements is the presence of the panel ruling issued in compliance proceedings.[120] Therefore, compliance proceedings clearly shall take place always before applying temporary compliance remedies.

Another issue at the implementation stage in WTO proceedings, is that the DSU does not provide any procedure for reviewing the measures taken by the respondent after remedies were imposed, in case parties cannot reach an agreement on the compliance of those measures.[121] Dealing with this issue in practice, the AB established that even though the DSU does not establish procedures to be followed in case of disagreement over compliance after retaliation, this does not mean that members need to stay passive, but they need to use the existent compliance measures that are mentioned in the DSU for the purpose to establish compliance before retaliation.[122] While the DSU does not expressly deal with the matter of compliance review post-retaliation, both CETA and EUJEPA specifically regulate this situation. They provide that in case the parties do not reach an agreement on the consistency of the measures taken to comply with the final report after remedies were imposed, a panel shall rule on this matter.[123]

Therefore, CETA and EUJEPA DSMs are better drafted than the WTO DSM, as they avoid the sequencing problem and are more developed with respect to the compliance proceeding during

---

118 DSU, Art. 22(6)
119 Simon Lester, Bryan Mercurio, Arwel Davies, World Trade Law: Text, Materials and Commentary (3rd edn, Hart Publishing 2018) p. 168.
120 CETA, Art. 29.14(1); EUJEPA, Art. 21.22(1)
121 Peter van den Bossche, Werner Zdouc, *The Law and Policy of World Trade Organization: Text, Cases and Materials* (4th edn, Oxford University Press 2017) p. 291
122 Appellate Body Report, *Canada – Continued Suspension of Obligations in the EC – Hormones Dispute (Canada – Continued Suspension)*, WT/DS321/AB/R, 16 October 2008 [345]
123 CETA, Art. 29.15; JEEPA, Art. 21.23

post-retaliation phase. Parties could see this as an advantage when considering whether to use them as alternative *fora* for trade dispute settlement.

5. Conclusion

This paper investigated whether CETA and EUJEPA DSMs could emerge as attractive alternative *fora* for solving trade disputes. It first introduced WTO, CETA and EU Japan DSMs to the reader, by briefly describing them and their similarities.

It then proceeded to analyze the substantive coverage of CETA and EUJEPA DSMs and how it shapes them as possible alternatives. It concluded that from a substantive perspective, CETA and EUJEPA DSMs could become alternatives to the WTO DSM with respect to many trade related issues, but not all of them. Moreover, in some instances the substantive considerations could score in favor of the use of CETA and EUJEPA DSMs as alternatives or could make them not mere alternatives, but the only options for enforcement.

With respect to areas in which FTA DSMs could become alternatives, the procedural aspects would also play a major role. From a procedural perspective, the paper argued that CETA and EUJEPA DSMs could be alternatives only for bilateral dispute settlement. The panel composition processes under these agreements are designed in a way to ensure that they cannot be blocked by one party, however proceedings under CETA raise concerns with respect to arbitrators' independence and could be prone to delays in case the lists of arbitrators are not established. CETA and EUJEPA DSMs could be especially attractive for states looking for speedier proceedings and more control over the dispute settlement. There are indications that parties could want more control over the dispute settlement. EUJEPA DSM, notably, strikes a balance between benefitting from administrative support and not delegating too much authority to an external body. CETA and EUJEPA DSMs could also receive the support of the civil society, because of their increased levels of transparency. Furthermore, the available temporary remedies at the implementation stage could serve as strong tools to induce compliance. Lastly, CETA and EUJEPA have more developed rules on implementation than the WTO DSM when it comes to the sequencing issue and compliance post-retaliation, which scores in favor of perceiving them as possible alternatives.

To conclude, the substantive considerations, expeditiousness, more control given to the parties, increased transparency, as well as, stronger and more developed compliance rules could make the DSMs contained in EUJEPA and CETA (provided that the list of arbitrators are established)

attractive alternative *fora* for solving trade disputes between FTA parties concerning areas covered by the dispute settlement chapters. Nevertheless, these DSMs cannot be full alternatives, as they have no multilateral character and do not have the same scope of coverage as the WTO DSM. Moreover, if FTA parties would be more inclined towards DSMs that offer more coherence, predictability and, potentially, better quality reports, CETA and EUJEPA DSMs could be less attractive alternatives.

References

Allee T, Elsig M (2015) Dispute Settlement Provisions in PTAs: New Data and New Concepts. In: Dür A, Elsig M (eds) Trade Cooperation: The Purpose, Design and Effects of Preferential Trade Agreements, Cambridge University Press, Cambridge, pp. 319-355.

Bartels L (2001) Applicable Law in WTO Dispute Settlement Proceedings, 35 Journal of World Trade, pp. 499-519.

Bronckers M, Baetens F (2013) Reconsidering Financial Remedies in WTO Dispute Settlement, 16 Journal of International Economic Law, pp. 281–311.

Chase C and others (2016) Mapping of Dispute Settlement Mechanisms in Regional Trade Agreements – Innovative or Variations on a Theme?. In: Acharya R (ed) Regional Trade Agreements and Multilateral Trading System, Cambridge University Press, Cambridge, pp. 608-702.

Davey W J (2006) Dispute Settlement in the WTO and RTAs: A Comment. In: Bartels L, Ortino F (eds) Regional Trade Agreements and the WTO Legal System, Oxford University Press, Cambridge, pp. 343-359.

Davies A (2006) Reviewing Dispute Settlement at the World Trade Organization: A Time to Reconsider the Role/s of Compensation?, 5 World Trade Review, pp. 31-67.

Ehring L (2008) Public Access to Dispute Settlement Hearings in the World Trade Organization, 11 Journal of International Economic Law, pp. 1021–1034.

Flett J (2015) Referring PTA Disputes to the WTO Dispute Settlement System. In: Dür A, Elsig M (eds) Trade Cooperation: The Purpose, Design and Effects of Preferential Trade Agreements, Cambridge University Press, Cambridge, pp. 555-580.

Gantz D A (2009) The United States and NAFTA Dispute Settlement: Ambivalence, Frustration and Occasional Defiance, Arizona Legal Studies Discussion Paper No. 06-16, pp. 356-396.

Hillman J (2016) Dispute Settlement Mechanism. In: Schott J J, Cimino-Isaacs C (eds) Assessing the Trans-Pacific Partnership, 16-4 PIIE Briefing, pp. 101-115. Available at: https://www.piie.com/system/files/documents/piieb16-4.pdf

Horn H, Mavroidis P C, Sapir A (2009) Beyond the WTO? An Anatomy of EU and US Preferential Trade Agreements, Bruegel Blueprint Series, Brussels.

Howse R (2016) The World Trade Organization 20 Years On: Global Governance by Judiciary, 27 European Journal of International Law, pp. 9-77.

Lester S, Mercurio B, Davies A (2018) World Trade Law: Text, Materials and Commentary, 3rd edn, Hart Publishing, Oxford.

Lester S, Manak I, Arpas A (2019) Access to Trade Justice: Fixing NAFTA's Flawed State-to-State Dispute Settlement Process, 18 World Trade Review, pp. 63-79.

Marceau G, Hurley M (2012) Transparency and Public Participation in the WTO: A Report Card on WTO Transparency Mechanisms, 4 Trade, Law and Development, pp. 19-44.

McDougall R (2018) Regional Trade Agreement Dispute Settlement Mechanisms: Modes, Challenges and Options for Effective Dispute Resolution, RTA Exchange Issue Paper, Geneva.

Mercurio B (2009) Why Compensation Cannot Replace Trade Retaliation in the WTO Dispute Settlement Understanding, 8 World Trade Review, pp. 315-338.

Pauwelyn J (2003) How to Win a World Trade Organization Dispute Based on Non-World Trade Organization Law? Questions of Jurisdiction and Merits, 37 Journal of World Trade, pp. 997-1030.

Pauwelyn J (2004) Going Global, Regional, or Both? Dispute Settlement in the Southern African Development Community (SADC) and Overlaps with the WTO and Other Jurisdictions, 13 Minnesota Journal of Global Trade Minnesota Journal of Global Trade, pp. 231-303.

Payosova T, Hufbauer G C, Schott J J (2018) The Dispute Settlement Crisis in the World Trade Organization: Causes and Cures 18-5 PIIE Policy Brief 1. Available at: https://piie.com/system/files/documents/pb18-5.pdf

Pierola F, Horlick G (2007) WTO Dispute Settlement and Dispute Settlement in the "North-South" Agreements of the Americas: Considerations for Choice of Forum, 41 Journal of World Trade pp. 855–908

Porges A (2011) Dispute Settlement. In: Chauffor, J-P, Maur J-C (eds) Preferential Trade Agreement Policies for Development: A Handbook, World Bank Group Publications, Washington, pp. 467-503.

Porges A (2018) Designing Common but Differentiated Rules for Regional Trade Disputes, ICTSD RTA Exchange Issue Paper, Geneva.

Schill S W (2017) Authority, Legitimacy, and Fragmentation in the (Envisaged) Dispute Settlement Disciplines in Mega-Regionals. In: Griller S, Obwexer W, Vranes E (eds) Mega-Regional Trade Agreements: CETA, TTIP, and TiSA: New Orientations for EU External Economic Relations, Oxford University Press, Oxford, pp. 111-151.

Squatrito T (2018) Amicus Curiae Briefs in the WTO DSM: Good or Bad News for Non-State Actor Involvement?, 17 World Trade Review, pp. 65-89.

Todeschini-Marthe (2018) Dispute Settlement Mechanisms Under Free Trade Agreements and the WTO: Stakes, Issues and Practical Considerations: A Question of Choice?, 13 Global Trade and Customs Journal pp. 387–403.

van den Bossche P, Zdouc W (2017) The Law and Policy of World Trade Organization: Text, Cases and Materials, Oxford University Press, Oxford.

Vidigal G (2018) Making Regional Dispute Settlement Attractive: The "Court of Arbitration" Option, RTA Exchange, ICTSD. Available at: www.ictsd.org/opinion/making-regional-dispute-settlement-attractive-the-

Wiik A (2018) Amicus Curiae before International Courts and Tribunals, Nomos/Hart Publishing, Heidelberg.

WTO Secretariat (2017) The Stages in a Typical WTO Dispute. In: A Handbook on the WTO Dispute Settlement System, Cambridge University Press, Cambridge.

This IEL Working Paper represents research conducted within the Horizon 2020 Marie Skłodowska-Curie Innovative Training Network 'EU Trade and Investment Policy (EUTIP)' https://eutip.eu/ funded by the European Union and led from the Institute of European Law at the University of Birmingham. It was also published as EUTIP Working Paper 01/2020.

This project has received funding from the European Union's Horizon 2020 research and innovation programme under the **Marie Skłodowska-Curie grant agreement No 721916**