Regulating Jurisdictional Competition of Dispute Settlement Procedures between the WTO and RTAs

- Focusing on Forum Choice Clauses -

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1. Growing Trend toward Regional Economic Integration and Multilayered "Rule of Law"

- Juridification of dispute settlement procedures: The trend has been spreading from the WTO to RTAs

- Overlapping substantive norms between the WTO and RTAs: Many RTAs rules are in fact based on the WTO Agreement

1. Growing Trend toward Regional Economic Integration and Multilayered "Rule of Law"

Example 1: Different but (almost) identical in substance

GATT Article III, Paragraph 2

"The products of the territory of any contracting party imported into the territory of any other contracting party shall not be subject, directly or indirectly, to internal taxes or other internal charges of any kind in excess of those applied, directly or indirectly, to like domestic products. Moreover, no contracting party shall otherwise apply internal taxes or other internal charges to imported or domestic products in a manner contrary to the principles set forth in paragraph 1."

EU-Mexico FTA Article 13, Paragraph 1

"The imported products of the territory of the other Party shall not be subject, either directly or indirectly, to internal taxes or other internal charges of any kind in excess of those applied, directly or indirectly, to like domestic products. Moreover, the Parties shall not otherwise apply internal taxes or other internal charges so as to afford protection to domestic production."

1. Growing Trend toward Regional Economic Integration and Multilayered "Rule of Law"

Example 2: Reference to and incorporation of relevant WTO provisions

Japan-Singapore EPA Article 13

"Each party shall accord national treatment to the goods of the other Party in accordance with the Article III of GATT 1994."

NAFTA Article 2101

"…GATT Article XX and its interpretative notes, or any equivalent provision of a successor agreement to which all Parties are party, are incorporated into and made part of this Agreement."

1. Growing Trend toward Regional Economic Integration and Multilayered "Rule of Law"

- Problem: A single dispute may be simultaneously or subsequently referred to an RTA jurisdiction and the WTO jurisdiction.

⇒ Inconsistent adjudications would result in entangled solutions to the specific dispute.

Accumulation of different interpretations of the similar or s ubstantially same rules would impair the integrity of the WTO law.

2. Types of Forum Choice Clauses

1. First forum first

- Either of an RTA or the WTO under which proceedings have been initiated first has exclusive jurisdiction.

  ⇒ Exclusion of reference to any other forum

  Example: NAFTA Article 2005, Paragraph 6
  "Once dispute settlement procedures have been initiated under Article 2007 or dispute settlement proceedings have been initiated under the GATT, the forum selected shall be used to the exclusion of the other…"

- Recognition of *res judicata*

  ⇒ Exclusion of judgment of any subsequent forum

  Examples: MERCOSUR Olivos Protocol Article 26; CACM FTA Agreement Article XXVI

2. Types of Forum Choice Clauses

2. RTA comes first

- Overarching priority: None
- Partial priority: Observable in some agreements, primarily concerning environmental issues

Example: NAFTA Article 2005, Paragraph 3

"In any dispute referred to in paragraph 1 where the responding Party claims that its action is subject to Article 104 (Relation to Environmental and Conservation Agreements) and requests in writing that the matter be considered under this Agreement, the complaining Party may, in respect of that matter, thereafter have recourse to dispute settlement procedures solely under this Agreement."

⇒ Other examples include: Canada-Chile FTA Article N-05, Paragraph 2; Chile-Mexico FTA Article 18-03, Paragraph 3; Canada-Costa Rica Article XIII.6, Paragraph 2

2. Types of Forum Choice Clauses

3. WTO comes first

- Overarching priority

  Example: EC-Chile FTA Article 189, Paragraph 4 (c)
  "Unless the Parties otherwise agree, when a Party seeks redress of a violation of an obligation under this Part of the Agreement which is equivalent in substance to an obligation under the WTO, it shall have recourse to the relevant rules and procedures of the WTO Agreement, which apply notwithstanding the provisions of this Agreement. "

- Partial priority: WTO to have priority in major areas such as AD and services

  Examples: EC-Mexico FTA Article 41, Paragraph 2;
  Canada-Costa Rica FTA Article VIII.6, Paragraph 1;
  U.S.-Jordan FTA Article 17

2. Types of Forum Choice Clauses

4. No priority adjustments

- No judicial decision: Simple, political dispute settlement procedures only or no procedure at all

  Examples: Network of bilateral agreements between EC and other countries (particularly with non-EC European countries and African countries); Agreements between/among African countries; Agreements between/among CIS countries (former Soviet Union); ANCERTA, GCC, etc.

- Highly juridified but with no forum choice clause

  Examples: EC and EEA (EFTA Court); Africa (COMESA, SADC, ECOWAS, EAC, CEMAC, WAEMU, etc.); SAFTA, India-Singapore EPA; CARICOM

- Explicit and affirmative declaration of no adjustment: Expressly provide that parties' rights to recourse to the WTO dispute settlement procedures are not prejudged

  Examples: Singapore-New Zealand EPA Article 58; EC-South Africa TDCA Article 104, Paragraph 10; EC-Mexico FTA Article 47 (only positional relationship between proceedings under the FTA and those under the WTO are defined)

3. Limitation of Priority Adjustment Mechanism under RTAs

1. First forum first

- It is impossible to entirely prevent a WTO dispute settlement procedure from proceeding.

  ⇒ WTO members have the right to seek a ruling from the WTO (DSU Article 23)
  A WTO panel is mandated to make "an objective assessment," i.e., exercise jurisdiction (DSU Article 11)
  (WTO Appellate Body report on *Mexico-Soft Drink Tax* [DS308])

- It is difficult to determine the sameness of a dispute referred to a first forum and one referred to a second forum.

3. Limitation of Priority Adjustment Mechanism under RTAs

Example 1: Japan-Singapore EPA Article 139, Paragraph 3

"Notwithstanding paragraph 2 above, once a dispute settlement procedure has been initiated under this Chapter of under any other international agreement to which the Parties are parties with respect to a particular dispute, that procedure shall be used to the exclusion of any other procedure for that particular dispute."
(Also, provisions of Japan-Mexico EPA Article 151(2), Japan-Malaysia EPA Article 145 (3), Japan-Philippines EPA Article 149 (2) are identical or similar in substance.)

⇒ Is a "dispute" considered the same as a particular dispute if identical in facts, or is it necessary to be identical both in facts and claims?
The latter case implies the possibility of duplication cannot be precluded (because a violation of the WTO and a violation of an RTA constitute different claims)

Example 2: FTAA Third Draft Agreement Chapter XXIII, Article 8.2

"Once a Party has initiated dispute settlement proceedings under this Agreement or the Understanding [or a regional agreement], that Party shall not initiate dispute settlement proceedings in any other fora with respect to the same [claim on] [actual or proposed] [measure] [or] [matter]."

3. Limitation of Priority Adjustment Mechanism under RTAs

2. No priority adjustment

- Separate sets of interpretations of substantive rights and obligations under the WTO will accumulate under RTAs, particularly, highly juridified ones.

Example: African region

⇒ Competition between the WTO and the network of juridified RTAs

4. WTO First as Practical Solution

- Conclusion: The WTO should be the first forum of dispute resolution in principle, with RTAs serving as a forum for ruling on matters concerning WTO-plus provisions.

Because: 1) there is little room for the WTO to refrain from exercising its jurisdiction;

2) the WTO dispute settlement mechanism is more effective than most of those of under RTAs; and

3) no effective alternative mechanism is available.

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