

TPP Dispute Resolution: Settlement Mechanism Vs. WTO

Law360, New York (February 1, 2016, 10:45 AM ET) -- Chapter 28 of the Trans-Pacific Partnership Agreement establishes a state-to-state dispute settlement mechanism (DSM) for settling disputes among the 12 TPP parties.[1] The TPP DSM may provide a faster and more transparent forum to resolve state-to-state disputes than that of the World Trade Organization. Moreover, unlike the WTO, the TPP expressly provides for monetary compensation as a remedy. On the other hand, with its well-developed procedures, professional secretariat and an appeal mechanism, the WTO may well remain a forum of choice for those that prize consistency and predictability in dispute resolution.

Comparative Overview of the Key Features of the WTO and TPP DSMs

Table 1 compares key design features of the WTO and TPP DSMs.

Table 1

Area	WTO DSM	TPP DSM
Coverage/Relationship to other DSMs		
Subject matter covered	WTO agreements	TPP agreements (WTO subject areas plus others, including e-commerce, labor and the environment)
Election of DSM under one treaty excludes recourse to others ("fork in the road")	No	Yes
Panel		
Consultations required before panel adjudication	Yes	Yes
Panel composition	By parties/WTO secretariat	By parties/panelists
Specialized panel expertise required	Yes	Yes
Interim review of panel report	Yes	Yes
Appellate review	Yes	No
Timeframe under treaty from panel composition to adoption of Report	9 months (no appeal) 12-13 months (with appeal)	9 months
Secretariat support	Yes	No
Implementation/Remedies		
Compliance review by panel	Yes	Yes
Temporary remedies (compensation through market access and retaliation) pending implementation	Yes	Yes
Express provision for financial compensation	No	Yes
Transparency and Participation		
Requirement for open hearings and public written submissions	No	Yes
Express provision for submission of non-governmental amicus briefs	No	Yes
Venue of panel proceedings	Geneva	Respondent's capital
Other provisions		
Good offices, conciliation mediation, arbitration as alternatives to adjudication	Yes	Yes
Special and differential treatment for developing countries	Yes	No

Table 1 reveals a number of similarities and differences between the TPP and WTO DSMs. We focus on four key areas of difference: timeframes, institutional provisions, transparency/participation and remedies/implementation.

Key Differences in the TPP and WTO DSMs

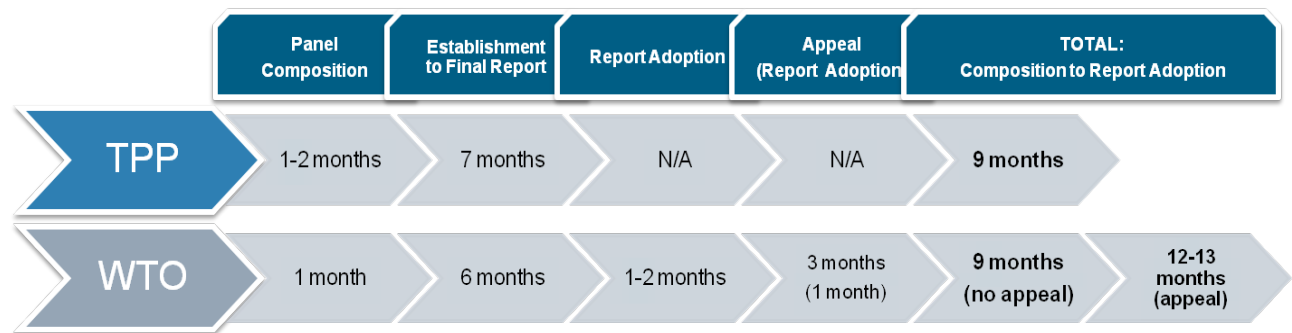
Timeframes for the Adoption of Reports

The anticipated length of proceedings may be an important determinant of the forum in which a complainant chooses to file a dispute. Procedural delay within the WTO DSM has been a

source of considerable frustration for some governments. An expedited process under TPP may, therefore, render it a more attractive forum to settle certain cases.

On paper, the timeframes for dispute settlement under the TPP and WTO DSMs are comparable, as set out in Figure 1.

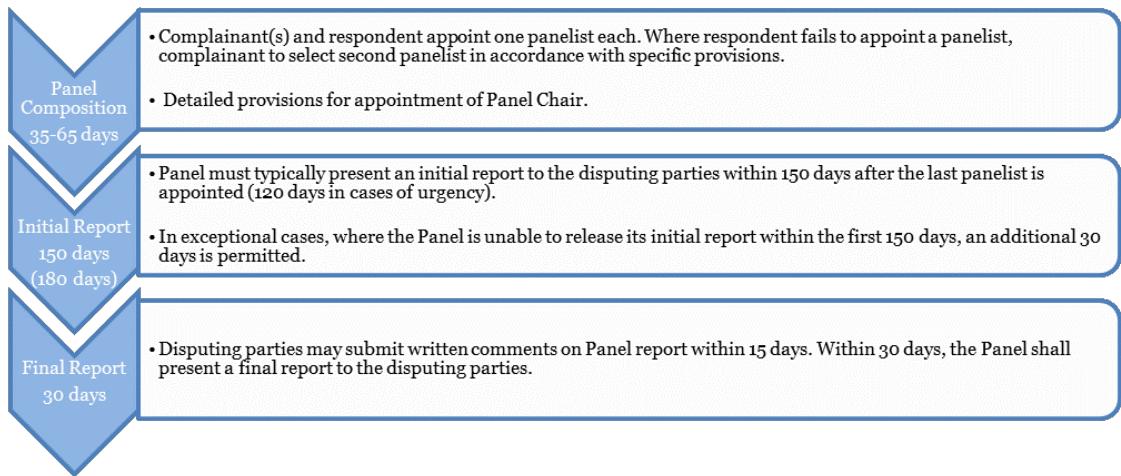
Figure 1



The absence of an appellate procedure under the TPP should lead to a more expeditious conclusion of a case, compared to the WTO, where two-thirds of cases are appealed. Further, in recent cases, the time taken in practice at the WTO between panel establishment and the adoption of a report is, on average, 16 months in cases where there is no appeal and 21 months where there is an appeal. It therefore remains to be seen whether practice under the TPP will adhere more closely to the timetable prescribed under the agreement than it has under the WTO. If it does, the process will be considerably speedier than at the WTO.

Detailed provisions governing key procedural phases of TPP proceedings may assist in ensuring that the tight deadlines laid down in the agreement, as described in Figure 2, are met.

Figure 2



Institutional Support

The institutional support that exists for the WTO DSM, including a professional secretariat and standing Appellate Body, is a key feature underpinning the relative predictability and success of the WTO DSM. Where a complainant has a choice of forum, this may provide a reason for selecting WTO dispute settlement over the TPP DSM, particularly where claims are based on an “orthodox” understanding of disputed provisions.

Unlike the WTO system in which panels are assisted by a team of secretariat lawyers, the individuals appointed to TPP panels will be expected to shoulder a considerable burden in delivering their reports themselves. TPP panels are to be supported by national administrative offices, and although there is no explicit provision for administrative costs and panelist fees in the TPP, these will likely need to be borne by the disputing parties. In this way, TPP dispute settlement may be relatively more costly than WTO dispute settlement, since the WTO general budget provides for secretariat costs and honoraria for panelists.

Clearly, the TPP framework will be the only framework available for resolving disputes involving rights and obligations that are additional to those provided for under the WTO agreements. Furthermore, complainants with novel or unorthodox claims, or those who wish to relitigate issues already addressed in the WTO context, may favor the new TPP forum. The TPP drafters, however, have sought to mitigate the risks of divergence between TPP and WTO jurisprudence by ensuring that panelists have specialized trade expertise, and by requiring that TPP panels take into account relevant WTO jurisprudence in their decisions.

Transparency and Participation

The TPP DSM contains a number of provisions that aim to ensure that it is publicly accessible and transparent. These provisions may help legitimize outcomes of TPP dispute proceedings and instill confidence in the TPP more generally.

The TPP crystallizes and expands on some of the practices that have evolved under the WTO DSM in response to criticisms by civil society of lack of transparency. For instance, unlike at the WTO where panels have had to develop procedures to allow nongovernmental entities to file amicus briefs, the TPP DSM specifically requires panels to consider requests to submit briefs from nongovernmental entities located in the territory of a disputing party. Moreover, under the TPP DSM, subject to the disputing parties’ agreement otherwise, disputing parties are obliged to have open hearings and must make public their written submission, save where there are issues relating to the confidentiality of information. In contrast, WTO hearings are open only if disputing parties so agree and there is no requirement to make submissions public.

Participation in the TPP DSM is also enhanced because third parties (i.e., TPP parties other than the disputing parties) are allowed to participate at the consultations phase of a dispute, without the consent of the respondent, which is required at the WTO. TPP third parties also enjoy the right to participate at all stages of the panel proceedings, as compared to the situation in the WTO where their participation is limited to the initial round of submissions and hearings unless “enhanced” rights are sought and granted.

Implementation: Remedies and Procedures for Review

At the implementation stage, where findings of nonconformity have been made, both the TPP and WTO DSMs provide for a reasonable period of time for respondent compliance, temporary

remedies for a complainant and rules governing the review of measures taken to comply.

However, there are key differences: the TPP DSM expands the temporary remedies available to the successful complainant and addresses major procedural shortcomings at the implementation stage of WTO proceedings.

The TPP and WTO offer temporary remedies to a complainant following the expiration of a reasonable period of time granted to a respondent to implement findings. Although both provide for compensation (typically through offers of market access by the respondent) and suspension of negotiated concessions (otherwise known as “retaliation,”) a respondent under the TPP may, in lieu of retaliation, provide financial compensation at half the level of concessions that the complainant would otherwise be entitled to suspend. While this is not an entirely novel feature for Free Trade Agreements, it marks an important difference compared with the WTO DSM, where financial compensation is not specified in the text of the treaty and is rare in practice.

The TPP DSM also makes two improvements to the WTO system as regards the procedures at the implementation phase. First, the TPP DSM clarifies the sequence of steps for the review of compliance measures taken by the responding party and the application of the temporary remedies. The ambiguity regarding this sequence in the legal text of the WTO DSM led to some controversy in the past and has resulted in the adoption of ad hoc sequencing agreements between WTO disputing parties that reach this stage of dispute settlement.

Second, whereas the WTO DSM provides for separate proceedings to review compliance, on the one hand, and the form and level of retaliation, on the other, under the TPP DSM the two processes are consolidated. Thus, a decision can be taken by the same panel, in a single proceeding, on whether the inconsistency has been eliminated, and where this is not the case, the level of concessions that can be suspended.

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[1] The TPP parties are: Australia, Brunei, Canada, Chile, Japan, Malaysia, Mexico, New Zealand, Peru, Singapore, the United States and Vietnam. All are WTO Members.