Article

China & WTO Rev. 2022:1; 127-150
http://dx.doi.org/10.14330/cwr.2022.8.1.05
pISSN 2383-8221 • eISSN 2384-4388

CWR
China and WTO Review

The CPTPP Dispute Settlement Mechanism: Is There a Way out of the WTO Crisis or Is This a New Model?

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By the time the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP) entered into force, there had been numerous bilateral and multilateral agreements between the parties regarding its rules on dispute settlement. However, the WTO dispute settlement system currently remains the most requested. The present article provides a comparative analysis of the procedures of dispute settlement under the CPTPP, the WTO DSU, and some RTAs. Among the novelties of the CPTPP mechanism compared to the WTO DSU are that it extends its scope to measures not yet introduced, offers more transparency, including the use of electronic means of communication, simplifies access for third parties, and provides financial compensation as a temporary remedy. Although the authors conclude that many of the CPTPP provisions repeat those of the WTO DSU and other RTAs between the CPTPP partners, there may be a desire to test the CPTPP mechanism in practice due to crises of the WTO Appellate Body.

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All the websites cited in this article were last visited on February 8, 2022.

Keywords: CPTPP, State-to-State Dispute Settlement, Dispute Settlement Understanding, World Trade Organization, Mega-regional Trade Agreements

I. Introduction

State-to-state economic dispute settlement mechanism is one of the most important elements of the global governance system. The Dispute Settlement Understanding (DSU), which constitutes Annex 2 of the WTO Agreement, provides rules undeniably the most effective for settling trade disputes between States. Article 3.2 of the DSU stipulates that: "The dispute settlement system of the WTO is a central element in providing security and predictability to the multilateral trading system." Comparing to the number of cases resolved through international investment arbitration the WTO DSU is more effective system.[1] Andreas F. Lowenfeld called the WTO Dispute Settlement Body (DSB) "the most complete system of international dispute settlement in history."[2] His point of view is still relevant, though there have been significant changes on the international trade stage since then.

The limited progress achieved through the Doha Round of trade negotiations brought the proliferation of free trade agreements, including new types of regional trade agreements called mega-regionals.[3] Mega-regionals cover more countries of different regions and a wider range of trade relations between states than the WTO, which regulate other trade-related aspects such as environmental protection, intellectual property rights, labour, and e-commerce.[4]

The growing number of free trade agreements has led to increase the number of dispute settlement mechanisms. Currently, 353 regional trade agreements (RTAs) in force have been notified to the WTO, most of which contain state-to-state dispute settlement provisions based on the WTO DSU.[5] The Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP) is not an exception. The CPTPP was signed by 11 member States on March 8, 2018 and entered into force on December 30, 2018, followed by its ratification by Australia, Canada, Japan, Mexico, New Zealand, Singapore, and later Vietnam.[6] Actually, CPTPP was resigned after the US's withdrawal from the Trans-Pacific Partnership (TPP-12) in 2017.[7] In spite of the US's withdrawal, 11 remaining partners tried to find new mutually beneficial solutions.[8] They suspended several provisions of the TPP-12 by

creating the CPTPP, which refers to the TPP-12 Agreement *mutatis mutandis*.[9] The CPTPP is a "mega-regionals" as well as RTA. As the "mega-regional agreement" has not yet been codified, however, the WTO rules only refer to RTAs and customs unions (CUs). Therefore, the "mega-regional" characteristics of the CPTPP do not affect the structure of dispute settlements within its framework.

The CPTPP provides two dispute settlement mechanisms: a) dispute settlement between a foreign investor and a host state; and b) state-to-state dispute settlement. These mechanisms are regulated in separate chapters. While the CPTPP has suspended some provisions regulating investment disputes, Chapter 28 on state-to-state disputes has remained untouched.[10] Meanwhile, the CPTPP follows the structure of the WTO DSU and other RTAs with regard to state-to-state dispute settlement. For example, Chapter 28 of the TPP Agreement refers to a 'panel' like the terminology of the WTO DSU.

It is important to mention that the CPTPP partner states' diverse economic development, as well as the numerous bilateral and multilateral trade agreements containing provisions for dispute settlement among them, raise concerns about the future of dispute settlement within the CPTPP framework. Moreover, the complexity of the disputes the WTO panels and Appellate Body have faced in recent years does not put the newly created CPTPP mechanism into scoring position.

On the other side, the WTO Appellate Body faces a crisis for the first time in its 25 years of existence due to the US's blockage of appointments and reappointments of the WTO Appellate Body members.[11] By December 11, 2019, the WTO Appellate Body lost its quorum necessary to hear appeals and on November 30, 2020 the term of the last sitting member finally expired.[12] According to Dr. Deborah Elms the collapse of the WTO Appellate body demonstrates a problem not only with this element, but also in the WTO dispute settlement system and the global trade system as a whole.[13] Considering how long it takes for the WTO participants to solve certain problems (Doha Round is a good example), figuring the way out of the current situation might be challenging. While defining the WTO a "sinking boat," she names CPTPP, RCEP, and the EU "cruise ships" that can be chosen instead of the WTO.[14]

The primary purpose of this research is to analyze the CPTPP's most noteworthy novelties regarding state-to-state dispute settlement, the selection of forum issues, and the importance of institutional support for the successful operation of the

panels. The authors will tackle whether partner states of the CPTPP will choose the mechanisms provided for by the WTO DSU or other RTAs and whether the CPTPP provisions may serve as an example for the WTO reform.

II. Scope of the CPTPP Mechanism

First, the CPTPP *per se* regulates more areas of trade relations than the WTO agreements. In this regard, the scope of the CPTPP mechanism is broad covering such disputes as environmental protection, e-commerce, labour, and other areas. Under the regulations of Article 28.3.1, the TPP Agreement expands the scope of the mechanism to disputes arising from the mere intention of a party to introduce a specific measure.[15] Following this provision, a party can initiate a dispute at the earliest avoiding the increase of harmed industry's losses, caused by the respondent country's unlawful acts, as well as the legal costs of the proceedings. The WTO dispute settlement practice reflects these expenses. For example, the legal costs of long-running trade dispute and its numerous counterclaims within the WTO[16] were reported to be more than USD 100 million in 2019.[17]

However, this provision is not unique in RTAs where the CPTPP parties take part simultaneously. Disputes under the United States-Mexico-Canada Agreement (USMCA), which replaced the North American Free Trade Agreement (NAFTA) with two CPTPP members, can be initiated in cases where one party only proposed a certain measure to be implemented, but it has not yet been in effect.[18] In contrast to the WTO dispute settlement mechanism, whose jurisdiction extends to disputes arising under all agreements covered, the provisions of some CPTPP chapters cannot be the subject of a dispute.[19] For example, this applies to exceptions made by the CPTPP parties under Chapter 20, "Environment." In general, the complainant can challenge the respondent's measures within the framework of this chapter, only if the complainant's environmental legislation on the subject of dispute fully complies with the rules established by the CPTPP.[20] The provisions of Chapter 19 'Labor [*sic*]' may be the subject of a dispute, but only after consultations between the parties following Article 19.5. Under Chapter 12, "Temporary Entry for Business Persons," parties can have recourse to the dispute settlement mechanism regarding refusal to grant temporary entry in only two cases: if "(a) the matter

involves a pattern of practice; and (b) the business persons affected have exhausted all available administrative remedies regarding the particular matter."[21]

However, several chapters of the CPTPP, many of which are new among those included in the traditional RTAs, do not grant a right to partner states to use the dispute settlement mechanism. For example, the provisions of Chapter 16 "Competition Policy," Chapter 21 "Cooperation and Capacity Building," Chapter 22 "Competitiveness and Business Facilitation," Chapter 23 "Development," Chapter 24 "Small and Medium-sized Enterprises," and Chapter 25 "Regulatory Coherence" cannot become the subject of a dispute between parties to the CPTPP. Such exclusion impedes the implementation of provisions outlined in these chapters when the party's practices cannot be challenged.

III. The Dispute Settlement Mechanism of the CPTPP: A Comparison with the WTO DSU and other RTAs

All CPTPP members are parties to the WTO. According to Article 1.1 of the TPP Agreement, the parties have created a free trade area under Article XXVI of the General Agreement on Tariffs and Trade (GATT 1994) and Article V of the General Agreement on Trade in Services (GATS). In addition, the CPTPP parties recognise the need to comply with their rights and obligations under other international agreements to which they are parties, including the WTO Agreement.[22] To a certain extent, panel's decisions under the CPTPP should also comply with the reports delivered by the WTO panels and Appellate Body.[23] The text of the TPP makes roughly 60 references to the WTO dispute settlement mechanism.

Reports delivered by the WTO's DSB are essential to its system. While reports of the WTO panels and Appellate Body are legally binding only parties to the dispute, they nevertheless provide an interpretation of the WTO rules which are applied to other trade disputes under the WTO and thus can serve as a source of the WTO law.[24]

Georgiy Velyaminov noted that the interpretation of previously made decisions and recommendations as a source of law refers to the concept of 'precedent,' which is not inherent in decision-making under the DSU framework, where precedent

is not applied as a law but as a right.[25] He also maintained that under the DSU framework, precedent can only denote "logical and comparative support ... in making decisions ... on similar disputes."[26] In the case of the *United States-Final Anti-Dumping Measures on Stainless Steel from Mexico*, the WTO Appellate Body reaffirmed the importance of using previous jurisprudence to avoid conflicting verdicts.[27] Thus, previous decisions by the WTO panels and Appellate Body are *de facto* used as precedent when deciding on disputes.[28]

In this manner, the Panel and Appellate Body reports delivered under the WTO DSU serve as a source of law in the CPTPP Agreement. Article 28.12 of the TPP Agreement provides that the panels established under the agreement should consider the previous practices of panels and Appellate Body under the WTO DSU if a dispute arises from any provision of the Marrakesh Agreement incorporated into the text of the CPTPP. This rule prevents inconsistencies in panels' decisions under the CPTPP and the WTO, helping the international trade system remain stable and predictable.[29] Simultaneously, the findings, determinations, and recommendations of the WTO panels and Appellate Body should not diminish or expand the rights and obligations of participating countries under the CPTPP Agreement.[30]

The CPTPP must set up the conditions for regulating relations with other RTAs and the WTO when these RTAs or the WTO judicial authorities require the CPTPP partner states to violate their obligations under the CPTPP. Accordingly, Article 29.1 (4) of the TPP Agreement establishes:

> Nothing in this Agreement shall be construed to prevent a Party from taking action, including maintaining or increasing a customs duty, that is authorised by the Dispute Settlement Body of the WTO or is taken as a result of a decision by a dispute settlement panel under a free trade agreement to which the Party taking action and the Party against which the action is taken are party.[31]

The CPTPP partner states can invoke this provision successfully to suspend concessions in situations when its opponent delays the execution or refuses to comply with the decision delivered by the WTO panel or Appellate Body or by any judicial body of another RTA.

IV. The Conflict of Jurisdiction

A conflict of jurisdiction arises when a dispute "can be brought entirely or partly before two or more different courts or tribunals."[32] Typically, the problem occurs when either RTAs repeat the WTO provisions or the obligations stated in RTAs reaffirm those under the WTO (for example, obligations concerning the application of safeguard measures).[33] Keeping in mind that most RTAs are based on provisions in the WTO agreements, the proliferation of RTAs establishing dispute settlement mechanisms may cause a conflict of jurisdiction, undermining its successful implementation. The correct use of RTA jurisdictional clauses may solve the problem by imposing restrictions on using different dispute settlement forums in parallel or sequentially.

A. Proliferation of RTAs Incorporating Dispute Settlement Provisions

The Asia-Pacific region is characterised by active trade liberalisation through the integration of multilateral and bilateral agreements. The most noteworthy events throughout the past 20 years were the creation of the ASEAN Free Trade Area (AFTA), ASEAN +3 Agreements including China, Japan and Korea, ASEAN-Australia-New Zealand Free Trade Area (AANZFTA), and the Regional Comprehensive Economic Partnership (RCEP).

As mentioned above, the CPTPP differs not only in its broad coverage of regulated trade and non-trade relations, but also in diverse economic development levels of partner countries as well as the large number of bilateral and multilateral agreements between parties. For example, apart from the CPTPP, Australia has bilateral free trade agreements (FTAs) with other CPTPP partners, including Chile, Peru, Malaysia, New Zealand, Singapore, and Japan, and participates in all of the mentioned above regional multilateral FTAs. Furthermore, all of the mentioned agreements contain state-to-state dispute settlement provisions.

Despite the absence of an officially published text of the TPP Agreement in 2013, A. Mitchell and J. Munro drew attention to the possible low demand for the TPP dispute settlement mechanism due to numerous bilateral and multilateral FTAs between partner countries of the future CPTPP Agreement.[34] For example, CPTPP partners that are the ASEAN members - Malaysia, Vietnam, Singapore and Brunei- may adopt the mechanism provided in a series of Dispute Resolution Protocols such

as the 2004 ASEAN Protocol on Enhanced Dispute Settlement Mechanism (2004 ASEAN Protocol) and more generally the 2010 Protocol to the ASEAN Charter on Dispute Settlement Mechanisms (2010 ASEAN Protocol).[35]

Nevertheless, in practice, the ASEAN members choose negotiations or external mechanisms-typically, the WTO DSU - for trade dispute settlement over the ASEAN protocol mechanisms. In 2008, for instance, the Philippines and Thailand brought their dispute over Thai fiscal and customs measures affecting cigarette exportation from the Philippines before the WTO DSB, instead of the AFTA dispute settlement mechanism based on the 2004 ASEAN Protocol.[36] Another example is the dispute between Vietnam and Indonesia brought before the WTO DSB in 2015 concerning a safeguard measure imposed by Indonesia on imports of certain flat-rolled iron or steel products.[37] To date, the AFTA dispute settlement mechanism have never been invoked.

B. Jurisdictional Clauses

The possible appearance of a conflict between jurisdictions of the WTO DSU and RTA dispute settlement procedures, as well as between RTA procedures, is a serious challenge in connection with a growing number of RTAs establishing state-to-state dispute settlement procedures.

The WTO DSU does not contain provisions on the prioritisation of the WTO mechanism over RTA mechanisms. Attempts have been made within the framework of the RTAs to create conditions under which disputing parties would not have the opportunity to submit a complaint to various judicial authorities in parallel or sequentially if either party is dissatisfied with the original decision. In other words, most of the current RTAs contain a jurisdictional clause that varies in its conditions depending on the intentions of parties to the agreement. As many academic literatures have discussed conflicting jurisdictions,[38] we will discuss only the most common jurisdictional clauses before continuing with the clause chosen by the CPTPP partners.

The first type of jurisdictional clause provides exclusive jurisdiction to a specific forum, typically established within the RTA or the WTO DSU. This rule may be found in rather a few trade agreements, primarily in those establishing permanent tribunals as courts of first instance,[39] for example, in the Treaty on the Functioning of the European Union (TFEU)[40] and the Caribbean Community and Common

Market (CARICOM).[41] The second one allows parties to choose a forum depending on the case. Within some RTAs, this rule is amplified to allow disputing parties to resort to consecutive, but not simultaneous, use of a different mechanism once the first proceeding has ended.[42] The third type of jurisdictional clause is Article 28.4 of the TPP Agreement which provides the option to choose a forum for dispute settlement: the CPTPP Agreement, the WTO DSU, or a mechanism by another Agreement to which the nation is a party.

Nevertheless, having initiated a dispute under the mechanism of an agreement to which the CPTPP partner country is a party, the mechanism selected shall be used to the exclusion of another, and the claimant cannot submit the dispute for parallel or consecutive consideration within another forum.[43] In other words, the CPTPP establishes the so-called "fork in the road" clause, meaning that once the parties select a forum, they are not permitted to resort to another forum. This approach helps eliminate the possibility of re-litigating a dispute, thereby avoiding two different decisions on the same issue.[44]

The "fork in the road" clause is the most common among the "choice of forum" provisions of RTAs, as providing less freedom to the disputing states seems the most effective method of preventing conflicts of jurisdiction. In the Asia-Pacific region, this clause can be found in the USMCA,[45] the RCEP,[46] and FTAs between Australia and Malaysia[47] and between Japan and Chile.[48] The "fork in the road" formula reflects the concerns of parties to an agreement that a dispute on the same issue might be adjudicated in parallel or sequentially.[49] These concerns relate to the following features:

1. the finality and certainty of rulings since a different tribunal may revise the first ruling, which, among other things, can lead to a situation where the dispute will keep being unresolved and will create new disputes;

2. the potential for double jeopardy or double compensation that can be challenging especially for developing countries; and

3. the stability, security, and predictability of dispute settlement-the central notions, as expressed in Article 3.2 of the DSU WTO-can be compromised due to different adjudications on the same issue.

However, D. McRae[50] questions the effectiveness of the formula chosen by the CPTPP partner countries, because there are no other instruments to enforce the use of only one mechanism in exclusion of the other within the CPTPP.[51] In addition, the WTO Appellate Body in *Mexico - Tax Measures on Soft Drinks and Other Beverages* ruled that the right of a WTO member to initiate a dispute under the WTO cannot be limited by the provisions of other agreements.[52] Thus, the initiation of the same dispute in parallel under the CPTPP and the WTO may constitute a violation by the country of its obligations under the CPTPP, but would not limit its right to continue consideration of this dispute within the WTO.

Despite the practice of settling issues within the WTO Appellate Body, as already mentioned, the WTO does not contain a provision concerning its supremacy over other agreements, and the WTO panels and Appellate Body will thus deal with issues on a case-by-case basis. We cannot exclude the possibility of the WTO's refusal to accept for consideration that a dispute already initiated within the framework of the CPTPP. However, the CPTPP covers a broader scope of trade relations than the WTO and RTAs, so that certain disputes can only be submitted within the CPTPP mechanism.

V. Institutional Support

In the last decade, partly due to the emergence of new technologies, the development of markets, and public concern for sustainable development, disputes between the WTO member states have become much more complex. This complexity is demonstrated by novel interpretations of provisions and facts underlying disputes.[53] As shown in practice, institutional support within the organisation plays a substantial role in dispute settlement. The WTO Secretariat forms an integral part of the whole WTO system. Composed of independent international officials, The WTO Secretariat provides technical and professional support to the DSB and administrative and legal support to the WTO panels in resolving disputes between the WTO member States.[54]

Unlike the WTO, as the CPTPP is not an organisation, it does not establish a Director-General or a secretariat or a headquarters. Instead, the central body of the CPTPP is the TPP Commission,[55] which includes ministers or other high-ranking

officials of partner countries. The functions of the TTP Commission in relation to the CPTPP dispute settlement mechanism are limited to the Rules of Procedure for CPTPP panels, and the revision or constitution of a new Roster of Panel Chairs and Party Specific Lists every three years.[56]

In terms of providing support to the CPTPP panels, each party to the Partnership establishes a representative office. However, each representative office only provides support to the CPTPP panels created to settle disputes between countries they represent.[57] The WTO and the CPTPP panels are not permanent bodies; their members are elected for each dispute. Under Article 28.15 of the TPP Agreement, the panel may request information or technical support from any person or organisation at its discretion, but only with the disputing parties' prior consent. Furthermore, the disputing parties can comment on any information received by the panel under this article. Each panel member may also hire one assistant to conduct research, translation, interpretation, and other tasks if the parties to the dispute agree that the panellist should be permitted to do so due to the exceptionality of the circumstances.[58] The parties should fund this assistance, which leads to the significant increase of the cost and can be burdensome for some partner states.[59] The panel may be forced to conduct a complex legal investigation with limited technical support. Such limited support may prolong the time to consider parties' applications. Despite the strong qualifications of elected judges, it may compromise the quality of rulings.

Meanwhile, to justify the CPTPP mechanism, the above-mentioned support of the WTO Secretariat for its panels and Appellate Body does not always keep up with the DSU timetable. A recent example is *Russia - Commercial Vehicles*.[60] The EU brought this case before the WTO DSB in response to Russia's imposition of anti-dumping duties on light commercial vehicles originating in Germany and Italy pursuant to Decision No. 113 of the Board of the Eurasian Economic Commission dated May 14, 2013.[61] On December 18, 2015, the panel convened first. However, almost six months later, on June 11, 2015, the chairman of the panel informed the DSB of a delay in the delivery of the report due to a lack of qualified lawyers in the Secretariat. As a result, the panel's report was finally circulated two years later, in early 2017, despite the WTO DSU's maximum period of nine months for the panel to deliver its report from the time it is composed.[62] This is not the only case in which the deadline for a decision has been extended, but one of the benchmark cases given

the important role played by the WTO Secretariat.

A similar situation developed while the Appellate Body considered it subsequently, which informed that it was impossible to reach a decision within the timeframe set by the WTO DSU.[63] The Appellate Body cited the number and complexity of issues raised, problems with translation services provided by the WTO Secretariat, and a lack of staff at the Secretariat of the Appellate Body as reasons for the delay.[64] Problems connected to the lack of institutional support within the framework of the CPTPP may also arise during the composition of the CPTPP panels. There is a high probability of disagreement between parties to a dispute regarding the appointment of a third panellist. Within the WTO, the Director General is authorized to compose the panel, when it is impossible to reach an agreement among disputing parties, as was done in *Russia-Commercial Vehicles*. This WTO practice has become widespread in recent years.[65]

VI. Transparency of the Dispute Settlement Process

Transparency is a fundamental issue for dispute settlement in both domestic and international court. It is important for the parties interested in national economic development and promotion of trade liberalization, as well as the producers and consumers concerned about features such as, but not limited to, income stability, safety and compliance with environmental norms. There are two points of view within the WTO on the transparency of proceedings. Developed countries favour greater transparency, especially concerning amicus curiae briefs. In contrast, developing WTO members firmly oppose the consideration of *amicus curiae* briefs by the panel or the Appellate Body, as they might serve the interests of developed countries.[66] One of the most significant achievements of the CPTPP mechanism lies in its transparency at all stages of dispute settlement. Hereby, we will discuss how the CPTPP differs from the WTO in enabling third-party participation in disputes and the possibility of submitting amicus curiae briefs, and analyse the novelties introduced by the CPTPP to address modern developments.

A. Third-Party Access

Article 28.14 of the TPP Agreement provides broad conditions for third parties interested in a dispute. With prior written notification to disputing parties, third parties may attend all hearings, submit written statements, present their opinion orally to the CPTPP panels, and receive written statements from disputing parties. The WTO mechanism, by contrast, imposes restrictions on third parties while the panels and Appellate Body consider a dispute. Third parties' rights are limited to participation in the first stages of dispute settlement: they can receive the first written submissions from the parties and present their opinions orally at the first hearing.[67]

In each dispute, the panel can, at its discretion, expand the rights of third parties,[68] so that their rights during the Appellate Body's consideration of a dispute are more extensive. In this vein, third parties can receive all written statements by the parties, submit their written statements, and participate in oral hearings before the Appellate Body. Granting broad participation rights to third parties throughout the dispute resolution process is critical to the procedure's transparency (e.g., in consideration of the developing countries' views), but this may have drawbacks. Due to a lack of clearly established restrictions on the number of written applications submitted by a third party, for example, the CPTPP panels can have trouble complying with established timeframes.

The risks for the dispute settlement process connected with third-party participation in proceedings have been expressed by the former South African Permanent Representative to the WTO, Xavier Carim. He pointed out logistical and organisational issues, taking an example of the *Australia - Tobacco Plain Packaging* case that involved 33 to 36 third parties in different disputes.[69]

B. Amicus Curiae Submissions

The CPTPP does not directly mention the term "amicus curiae." Instead, Chapter 28 of the TPP Agreement regulates the procedure for submitting written statements from non-governmental organisations. Unlike the WTO, where the panel is required in each case to develop a procedure for the submission of amicus curiae statements by non-governmental organisations, the CPTPP panel shall consider requests from non-governmental organisations located within the territory of the disputing parties to submit views that may be critical in assessing the parties' arguments.[70] The WTO

DSU does not regulate taking such applications into account. Rather, the procedure is, to a great extent, based on the previous decision-making practice by the WTO panels and Appellate Body. Nevertheless, due to its broad powers to control this process, namely, the creation of rules of procedure, the Appellate Body retains its right to consider 'unsolicited' opinions that it deems relevant to a dispute.[71]

Ronald S. Soto, Permanent Representative of Costa Rica to the WTO, called such statements 'unsolicited' in his report, which also delineates differences in the views of developing and developed countries on such statements.[72] As the CPTPP partner countries, Japan and Malaysia have repeatedly opposed amicus curiae briefs to the WTO. Japan has stated that WTO member countries should determine the procedure for considering amicus curiae briefs through amending the WTO DSU.[73] The presentation of amicus curiae briefs and their use by the panels and Appellate Body in the decision-making process is controversial. On the one hand, the body exercising justice should have the right to receive complete information on the dispute, because such submissions can contribute to consideration of the dispute not only from the perspective of its direct participants, but from that of other interest groups who may convey different facts from those presented by the parties.[74] On the other side, as Astrid Wiik points out, because there are no special agreements establishing ethics or professional duties for amici curiae, they bear no liability for submitting possibly wrong facts on the matter.[75]

Amicus curiae submissions can cause problems for developing countries, because they often do not possess the same institutional and legal resources as developed countries. Amicus curiae briefs within the framework of the WTO can neither reference legal issues and requirements not cited in disputing parties' statements (in such cases, they are rejected), nor be used to release the disputing party from its burden of proof. Nevertheless, neither the WTO nor the CPTPP limits the number of such submissions, which, in the case of the CPTPP, may pose an even greater burden on the panel.

C. Transparency of Proceedings

Under the CPTPP, all hearings are open to the public unless parties to the dispute agree otherwise.[76] Each party to a dispute within the framework of the CPTPP must take all possible measures to quickly release its written statements in English to the public domain, written versions of oral statements, and written answers to questions

asked by the CPTPP panel during the proceeding, unless parties to the dispute agree otherwise or when such information is confidential. The Rules of Procedure under Chapter 28 of the CPTPP clarify the transparency of meetings, indicating that the meeting can be broadcasted via electronic communication to facilitate access.[77] Furthermore, the panels can use electronic means of communication such as videoconferencing while carrying out their work.[78] The CPTPP demonstrates its focus on compliance with modern realities, treating scientific and technological progress as integral. This focus is noticeably distinguished from the WTO procedure in which all hearings are closed to the public unless parties to the dispute agree otherwise.[79] At the request of disputing parties, there are precedents when the panels and Appellate Body have held open sessions.[80] However, public hearings within the WTO do not imply an online broadcast and attending open hearings of a dispute requires physical presence in Geneva.

The introduction of electronic means at different stages of a dispute settlement is an important innovation. Broadcasting allows civil society to attend and study proceedings regardless of their financial and physical limitation. The Covid-19 pandemic brings a possibility of broadcasting proceedings for panels to use videoconferencing. While countries close their borders and impose national lockdowns, the use of videoconferencing could be the only way to continue work and make decision. This issue was also raised at the WTO DSB on December 18, 2020, where some WTO members expressed their intention to discuss virtual panel hearings to ensure prompt settlement of disputes.[81]

VII. Temporary Measures for the Withdrawal of the Inconsistent Measure

The enforcement of recommendations and rulings as determined by judicial bodies within bilateral and multilateral trade agreements, including the WTO, remains a significant issue in the multilateral trade system. The injured party to a dispute must rely on the good faith of the wrong-doing party or use coercive measures, which often involve restricting imports and thus negatively impacting its own economy. In terms of losses incurred, the most indicative case of this issue is *EC - Hormones*[82] in which, by 2009, the EU suffered losses valued at USD 250 million per year

from countermeasures applied by the US and Canada.[83] Developing countries can experience this loss more significantly in cases requiring the suspension of concessions towards developed countries.

Both the CPTPP and the WTO mechanisms compensate for damages suffered or for the suspension of concessions as temporary protective measures against non-performance of the violating party within a reasonable time. Concerning the suspension of concessions, the CPTPP remains relatively consistent with the rules established under Article 22.3 of the WTO DSU. Under Article 22 of the WTO DSU, compensation is voluntary usually involving reducing tariffs by the party in breach of its obligations rather than paying a monetary refund. For example, lowering duties on any product of interest to the claimant's export can serve as compensation. Including this provision on financial compensation in the WTO DSU was raised several times during the Doha Round, but has not been developed further.[84]

In turn, the CPTPP provides financial compensation to the injured party in the amount of half of the value lost as a result of the unfair practice of the other party to the dispute.[85] This amount can also be made as a contribution to a special fund established by the parties to the dispute for further trade liberalisation between them by removing trade barriers or to help the party to the dispute fulfil its obligations under the CPTPP.

The provision on the payment of monetary compensation is not novel for economic associations that regulate dispute settlements between their parties. Most often, the terms of monetary compensation can be found in RTAs to which the US is a party. Over the past decade, a similar provision was included in the trade agreement between the European Union, Colombia, and Peru[86] and the economic partnership between Japan and Mongolia.[87] Thus, the CPTPP is currently the only trade agreement among its partner states that provides financial compensation. This CPTPP provision differs from the WTO dispute resolution system in that the DSU does not regulate conditions for financial compensation. As the possibility of receiving financial compensation increases, developing countries are willing to use the CPTPP mechanism instead of the WTO since such a measure seems to provide a more tangible gain than a mere "symbolic victory at the WTO."[88]

VIII. Conclusion

Chapter 28 of the TPP Agreement does not offer a completely new mechanism for state-to-state dispute settlement. Instead, it is based on the mechanism provided for by the WTO DSU, including provisions on the use of reports of the WTO panels and Appellate Body. Furthermore, the mechanism within the CPTPP appears rather week, for example, in terms of the lack of institutional support to the panels. Due to the exemptions under the CPTPP Agreement, moreover, several provisions cannot become the subject of a dispute between partner countries.

Still, the CPTPP regulates the areas of trade not covered by the Marrakesh Agreement, such as e-commerce, environmental protection, and labour, which cannot be resolved under the WTO DSU. In addition, the CPTPP mechanism extends to disputes when there is a mere intention by the partner country to introduce certain measures in violation of its obligations under the CPTPP. In the latter case, partner countries will have no choice but to initiate a dispute under Chapter 28 of the TPP Agreement.

Given the large number of bilateral and multilateral trade agreements in place between CPTPP partner countries at the time of signing the TPP Agreement, the partners were unable to develop a mechanism other than "fork on the road" clause to avoid potential conflicts of jurisdictions in terms of limiting parallel or sequential consideration of disputes between partner states. As noted above, the rule is neither strict, nor enforced by any other conditions, so that it allows disputing parties to re-litigate the dispute within the WTO mechanism.

Due to the current crisis of the WTO Appellate Body, various studies have suggested that the WTO members who also participate in RTAs may opt for the RTA-established dispute settlement mechanisms rather than the DSU. Two disputes have already been initiated by the EU within the Free Trade Agreement with Korea and the Association Agreement with Ukraine, even though both disputes could be submitted to the WTO.[89] The CPTPP should increase transparency at all stages of proceedings and expand access to third parties and amicus curiae briefs, although the latter continues to be criticised by developing country members of the WTO. In addition, the CPTPP innovates its proceedings such as electronic broadcasting and videoconferencing, which are not provided for by the WTO DSU. The CPTPP also provides financial compensation to the injured party which may become an

essential element of the mechanism, as it might help specific industries that suffered losses due to either the measures introduced by the disputing state or the duration of a dispute.

Even the novel issues introduced by the CPTPP are not absolutely new at their core, as they were already discussed within the WTO through different stages of its existence. However, their inclusion in an RTA (CPTPP) may signify that parties are ready to use them in practice. The lack of practice of these innovative approaches within the CPTPP mechanism to date makes it difficult to decide whether the CPTPP will succeed.

Received: Dec. 15, 2021
Modified: Jan. 15, 2022
Accepted: Feb. 15, 2022

References

1. Arie Reich, *The Effectiveness of the WTO Dispute Settlement System: A Statistical* Analysis 1 (European University Institute Working Paper LAW 2017/11), https://cadmus.eui.eu/bitstream/handle/1814/47045/LAW_2017_11.pdf.
2. Andreas F. Lowenfeld, International Economic Law 150 (2002).
3. *See, e.g.*, Regional Comprehensive Economic Partnership, EU-Canada Comprehensive Economic and Trade Agreement, and Transatlantic Trade and Investment Partnership.
4. Renata R. Muratova, *Megaregionalism as a New Form of Interstate Economic Cooperation: The Trans-Pacific Partnership*, 132 Eurasian L. J. 28-31 (2019).
5. As of 9 January 2022, WTO, Regional Trade Agreements - Fact and Figures, http://rtais.wto.org/UI/PublicMaintainRTAHome.aspx.
6. As of February 9, 2022, ratification by the governments of Brunei Darussalam, Chile and Malaysia is expected.
7. The Office of the United States Trade Representative has addressed that the United States has formally withdrawn from the TPP Agreement on January 30, 2017, https://ustr.gov/sites/default/files/files/Press/Releases/1-30-17%20USTR%20Letter%20to%20TPP%20Depositary.pdf.

8. Rochelle C. Dreyfuss, *Harmonization: Top down, Bottom Up-and Now Sideways? The Impact of the IP Provisions of Megaregional Agreements on Third Party States*, *in* Megaregulation Contested: Global Economic Ordering after TPP 364 (Benedict Kingsbury et al. eds., 2019).
9. Comprehensive and Progressive Agreement for Trans-Pacific Partnership, art. 1.1. To clarify, 'CPTPP' denotes the official agreement as a whole of its 11 parties, while 'TPP' refers to the TPP Agreement, including main provisions on the regulation of trade relations between CPTPP parties as an essential part of the CPTPP and reference in accordance with Article 1.1 of the CPTPP.
10. Dmitry K. Labin & Renata R. Muratova, *New Approaches to the Balance between Investor Protection and the Right to Regulate within Mega-regional Agreements*, 4 Moscow J. Int'l L. 54-63 (2018).
11. Chad P. Bown & Soumaya Keynes, *Why Trump Shot the Sheriffs: The End of WTO Dispute Settlement 1.0*, 20-4 (PIIE Working Paper, 2020), https://www.piie.com/system/files/documents/wp20-4.pdf.
12. WTO, Dispute Settlement: Appellate Body, https://www.wto.org/english/tratop_e/dispu_e/appellate_body_e.htm.
13. Deborah Elms, The Titanic Has Hit the Iceberg: Global Trade In Profound Trouble (Nov. 14, 2019), http://asiantradecentre.org/talkingtrade/the-titanic-has-hit-the-iceberg-global-trade-in-profound-trouble.
14. *Id*.
15. TTP art. 28.3. ¶1(b).
16. Panel Report, *European Communities and Certain Member States-Measures Affecting Trade in Large Civil Aircraft - Recourse to article 21.5 of the DSU by the European Union,* WTO Doc. WT/DS316/RW2 (adopted Dec. 2, 2019).
17. Ruth Green, *WTO ruling on Airbus-Boeing dispute exacerbates US-EU trade tensions*, IBA Global Voice of the Legal Profession (Nov. 29, 2019), https://www.ibanet.org/Article/NewDetail.aspx?ArticleUid=52340B86-3C0D-4976-AF61-48A3BEACA04F.
18. United States-Mexico-Canada Agreement (signed on 30 November 2019; entered into force 1 July 2020) [hereinafter USMCA], Art. 31.2(b).
19. *See, e.g.*, exceptions made by the CPTPP parties under Chapter 20, 'Environment.'
20. TPP art. 20.23.3.
21. *Id*. art. 12.10.
22. *Id*. art. 1.2.1.
23. *Id*. art. 28.12.3.
24. Ilia V. Rachkov, World Trade Organization: Law and Institutions: Textbook 17-8 (2019).
25. Georgiy M. Velyaminov, National and International Law [Pravo nacional'noe I mezhdunarodnoe] 161 (2017).

26. *Id*.
27. Appellate Body Report, *United States-Final Anti-Dumping Measures on Stainless Steel from Mexico*, WTO Doc. WT/DS344/AB/R (adopted May 20, 2008), at 145-62.
28. Andrew D. Mitchell & James Munro, *State-State Dispute Settlement under the Trans-Pacific Partnership Agreement*, *in* Trade Liberalisation and International Co-operation: A Legal Analysis of the Trans-Pacific Partnership Agreement 156-78 (Tania Voon ed., 2013).
29. Marina Trunk-Fedorova, *Dispute Settlement under Free Trade Agreements: An Alternative to the Mechanism of the World Trade Organization?*, 3 Mezhdunarodnoe Pravosudie 102-13 (2019).
30. TPP art. 28.12.3.
31. *Id*. art. 29.1(4).
32. Tim Graewert, *Conflicting Laws and Jurisdictions in the Dispute Settlement Process of the Regional Trade Agreements and the WTO*, 287(1) Contemp. Asia Arb. J. 290 (2008).
33. Vladimir Bublik & Anna Gubareva, *The Conflict of Jurisdiction within Global and Regional Dispute Resolution Systems*, 5 Electronic Supplement to the Russian Juridical J. 113 (2018).
34. Mitchell & Munro, *supra* note 28, at 157.
35. Lisa Toohey, *Dispute Settlement in the TPP and the WTO: Which Way Will Asian TPP Members Turn?*, *in* Paradigm Shift in International Economic Law Rule-Making, Economics, Law, and Institutions in Asia-Pacific 87-104 (J. Chaisse, H. Gao & Chang-Fa Lo eds., 2017).
36. Panel Report, *Thailand - Customs and Fiscal Measures on Cigarettes from the Philippines*, WTO Doc. WT/DS371/R (adopted July 15, 2011).
37. Appellate Body Report, *Indonesia - Safeguard on Certain Iron or Steel Products*, WTO Doc. WT/DS490/AB/R (Chinese Taipei), WT/DS496/AB/R (Viet Nam) (adopted Aug. 15, 2018). At its meeting on October 28, 2015, the DSB decided that the panel established at the request of Chinese Taipei in DS490 would also examine the dispute in DS496 initiated by Viet Nam according to Article 9.1 of the DSU. *See* DSB, Minutes of Meeting, WTO Doc. WT/DSB/M/369 (adopted Jan. 20, 2016). On October 16, 2017, Chinese Taipei, Viet Nam, and Indonesia each filed an appellee's submission. Following the single Panel Report for both disputes, there was only one Appellate Report adopted concerning both disputes. *See* Panel Report, *Indonesia - Safeguard on Certain Iron or Steel Products*, WTO Doc. WT/DS490/R (Chinese Taipei), WT/DS496/R (Viet Nam) (adopted Aug. 18, 2017).
38. Cornelia Furculita, *Fork-in-the-Road Clauses in the New EU FTAs: Addressing Conflicts of Jurisdictions with the WTO Dispute Settlement Mechanism* (Centre for the Law of EU External Relations Working Paper, 2019); Jennifer Hillman, *Conflicts between Dispute Settlement Mechanisms in Regional Trade Agreements and the WTO-What Should the WTO Do?*, 42 Cornell Int'l L. J. 193 (2009); Kyung Kwak & Gabrielle Marceau, *Overlaps*

and Conflicts of Jurisdiction between the World Trade Organization and Regional Trade Agreements, *in* Regional Trade Agreements and the WTO Legal System 465-524 (L. Bartels & F. Ortino eds., 2006).

39. Claude Chase, Alan Yanovich, Jo-Ann Crawford & Pamela Ugaz, *Mapping of Dispute Settlement Mechanisms in Regional Trade Agreements-Innovative or Variations on a Theme?* 22-3 (Economic Research and Statistics Division of the World Trade Organization, 22 Staff Working Paper ERSD-2013-07 (2013), https://www.wto-ilibrary.org/content/papers/25189808/150.
40. The Treaty on the Functioning of the European Union, art. 344.
41. The Caribbean Community and Common Market (1973), art. XXVIII of Protocol IX (Article 211 of the Revised Treaty).
42. Economic Partnership Agreement between the CARIFORUM States, of the one part, and the European Community and its Member States, of the other part, Official J. the Eur. Union (Oct. 30 2008), art. 222(2).
43. TPP art. 28.4.2.
44. Mitchell & Munro, *supra* note 28, at 166.
45. Agreement between the United States of America, the United Mexican States, and Canada (signed 30 November 2018; entered into force 1 July 2020), art. 31.3.1.
46. Regional Comprehensive Economic Partnership Agreement, art. 19.5.1.
47. Malaysia-Australia Free Trade Agreement (MAFTA) (Mar. 30, 2012), art. 20.5.
48. Japan-Chile Economic Partnership Agreement (Jan. 19, 2015), art. 176.2.
49. Joost Pauwelyn & Luiz E. Salles, *Forum Shopping Before International Tribunals: (Real) Concerns, (Im)Possible Solutions*, 42 Cornell Int'l L. J. 81-3 (2009).
50. Donald McRae, *State-to-State Dispute Settlement in Megaregionals*, *in* Megaregulation Contested: Global Economic Ordering after TPP 752 (Benedict Kingsbury et al. eds., 2019).
51. *E.g*. NAFTA art. 2005.
52. Appellate Body Report, *Mexico-Tax Measures on Soft Drinks and Other Beverages,* WTO Doc. WT/DS308/AB/R (adopted Mar. 6, 2006).
53. Debra Steger, *Strengthening the WTO Dispute Settlement System: Establishment of Dispute Tribunal*, *in* The Future and the WTO: Confronting the Challenges. A Collection of Short Essays 112-8 (R. Meléndez-Ortiz, Ch. Bellmann & M. Rodriguez Mendoza eds., ICTSD Programme on Global Economic Policy and Institutions, 2012), https://www.ictsd.org/sites/default/files/research/2012/07/the-future-and-the-wto-confronting-the-challenges.pdf.
54. Rachkov, *supra* note 24, at 38-9.
55. TPP ch. 27.
56. *Id*. art. 27.2.1(f) & (g).
57. *Id*. art. 27.6.

58. Rules of Procedure under Chapter 28 (Dispute Settlement) of the Comprehensive and progressive agreement for Trans-Pacific Partnership, Annex to CPTPP/COM/2019/D003, Rule 94.
59. *Id*. Rule 91.
60. Panel Report, *Russia - Anti-Dumping Duties on Light Commercial Vehicles from Germany and Italy*, WTO Doc. WT/DS479/R (adopted Apr. 9, 2018), https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds479_e.htm.
61. The Eurasian Economic Commission (EEC) is the permanent regulatory body of the Eurasian Economic Union between Armenia, Belorussia, Kazakhstan, Kirgizia and Russia (Agreement was signed on 29 May 2014; entered into force on 1 January 2015).
62. DSU art. 12.9.
63. *Russia-Anti-Dumping Duties on Light Commercial Vehicles from Germany and Italy*, Communication from the Appellate Body dated 13 April 2017, WT/DS479/8, https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=q:/WT/DS/479-8.pdf&Open=True.
64. *Id*.
65. Rachkov, *supra* note 24, at 70.
66. Nicola Charwat, *Who Participates As Amicus Curiae in World Trade Organisation Dispute Settlement and Why?*, N.Z. U. L. Rev. 27 (2016), https://ssrn.com/abstract=3021553. *See also* Claudia F. Brühwiler, *Amicus curiae in the WTO Dispute Settlement Procedure: A Developing Country's Foe? 60* Aussenwirtschaft 347-96 (2005).
67. DSU art. 10.3.
68. *Id*. art. 12.1.
69. Since 2012 there had been complaints brought by Cuba (DS458), the Dominican Republic (DS441), Honduras (DS435), Indonesia (DS467) and Ukraine (DS434) regarding Australia's plain packaging law. The Panel Reports were issued in the form of a single document constituting four separate Panel Reports: WT/DS435/R, WT/DS441/R, WT/DS458/R and WT/DS467/R. *See* Panel Reports, *Australia-Certain Measures Concerning Trademarks, Geographical Indications and Other Plain Packaging Requirements Applicable to Tobacco Products and Packaging,* WTO Doc. WT/DS435/R, WT/DS441/R, WT/DS458/R, WT/DS467/R (adopted June 28,2018). By Note made by the Secretariat the authority for the establishment of the Panel in case of Ukraine lapsed as of 30 May 2016. *See* Note by the Secretariat, *Australia-Certain Measures Concerning Trademarks and Other Plain Packaging Requirements Applicable to Tobacco Products and Packaging,* WTO Doc. WT/DS434/17 (adopted June 30, 2016). The latest Appellate reports were issued on June 9, 2020 in the form of single document for the cases brought by Honduras and the Dominican Republic: Appellate Body Reports, *Australia-Certain Measures Concerning Trademarks, Geographical Indications and Other Plain Packaging Requirements Applicable to Tobacco Products and Packaging*, WTO Doc. WT/DS435/AB/R, WT/DS441/AB/R (adopted June 9, 2020).

70. DSU art. 17.9.
71. Appellate Body Report, *United States - Imposition of Countervailing Duties on Certain Hot-Rolled Lead and Bismuth Carbon Steel Products Originating in the United Kingdom*, WTO Doc. WT/DS138/AB/R (adopted June 7, 2000), ¶ 43.
72. Special Session of the Dispute Settlement Body: Report by the Chairman, Ambassador Ronald Saborio Soto (Costa-Rica), WTO Doc No. TN/DS/26 (Jan. 30, 2015), at 7, https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=q:/TN/DS/26.pdf&Open=True.
73. Panel Report, *United States - Import Prohibition of Certain Shrimp and Shrimp Product,* WTO Doc. WT/DS58/R (adopted May 15, 1998), ¶ 7.7; Japan Trade Policy Review Minutes of the Meeting Addendum, WTO Doc. WT/TPR/M/310/Add. 1 (adopted June 17, 2015).
74. In *EC-Sardines,* the WTO Appellate Body accepted the *amicus curiae* brief submitted by Morocco. Besides factual information that was not considered, in that brief, Morocco put forward legal arguments related to Article 2.1 of the TBT Agreement and to GATT 1994 that caught the WTO Appellate Body interest. In its final report, however, the Appellate Body found unnecessary to make a finding under Article 2.1 of the TBT Agreement in the light of its decision that EC Regulation was not consistent with Article 2.4 of the TBT Agreement. *See* Report of the Appellate Body, *EC-Sardines*, WTO Doc. WT/ DS231/AB/R (adopted Oct. 23, 2002), ¶¶ 169, 170, 313 & 314.
75. Astrid Wiik, Amicus Curiae before International Courts and Tribunals 432 (2018).
76. TPP art. 28.12(b).
77. Rules of Procedure under Chapter 28 of the CPTPP, footnote 5 to Rule 50.
78. *Id*. Rule 36.
79. DSU, App'x 3, second paragraph, first sentence and art. 12.1.
80. *See*, *e.g*., Panel Report, *Canada - Continued Suspension of Obligations in the EC- Hormones Dispute,* WTO Doc. WT/DS321/R (adopted Mar. 31, 2008), ¶ 1.6.
81. WTO, Members Pledge Flexible Arrangements in WTO Dispute Proceedings during Covid Pandemic, WTO 2020 News, https://www.wto.org/english/news_e/news20_e/dsb_18dec20_e.htm.
82. Panel Report, *European Communities - Measures Concerning Meat and Meat Products (Hormones)*, WTO Doc. WT/DS26/R (US) & WT/DS48/R (Canada) (adopted Feb. 13, 1998).
83. Liudmila P. Anufrieva, WTO Law: Theory and Practice of Application [Pravo WTO: Teoriya i Practica Primeneniya] 504 (2016).
84. *See*, *e.g.*, DSB, Contribution of Ecuador to the Improvement of the Dispute Settlement Understanding of the WTO, at 5, WTO Doc. TN/DS/W/9 (July 8, 2002); Proposal by Mexico: Improvements and Clarifications of the Dispute Settlement Understanding, at 2, WTO Doc. TN/DS/W/91 (July 16, 2007).
85. TPP art. 28.20.7.
86. Trade agreement between the European Union and its member states, of the one part, and

Colombia and Peru, of the other part (signed on 26 June 2012; entered into force on 1 March 2013), art. 310.3.

87. Japan-Mongolia Economic Partnership Agreement (EPA) (signed on 10 February 2015; entered into force on 7 June 2016), art. 16.11.3.
88. Toohey, *supra* note 35, at 101.
89. Trunk-Fedorova, *supra* note 29.