

Are the implementation aspects of
dispute resolution under TPP suitable for
achieving the functions of TPP?
(with comparisons with Australian FTAs)
*for IPBA conference Panel: Resolution of
Trade Disputes in TPP and Other FTAs*

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**Do the dispute settlement provisions of TPP help to achieve
the objectives and functions of the agreement:**

- In the absence of trade agreements:
- Governments / politicians tend to maximize their political support by doing what influential sectional interests ask them to do: grant protection from imports and foreign suppliers.
- So frequently many countries land in outcomes where they grant protection and do not cooperate with other countries:

- In relation to each other what is represented in game theory as a Quadrant 4 outcome.

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Trading Nations' Best Economic Outcome

		TN Gov	No 2
		Remain Open	Grant Protection
TN Gov	Remain Open	Quadrant 1 For 1: 1 st best, For 2: 1 st best	Quadrant 3 For 1: 2 nd best, For 2: 3 rd best
No 1	Grant Protection	Quadrant 2 For 1: 3 rd best, For 2: 2 nd best	Quadrant 4 For 1: 4 th best, For 2: 4 th best DOMINANT

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The Function of Trade Agreements

- Trade agreements function to protect citizens from their politicians
- A trade agreement makes it more likely that governments / politicians will choose the Quadrant 1 outcome
- It does so by modifying the political payoffs to governments / politicians:
 - Increasing Political influence of **Exporters (E)**
 - To balance Political Influence of **Import Competing Producers (ICP)**

Trading Nations' Governments' Dilemma (showing **Political** Outcomes for Politicians)

		Trading Nation	Government No 2
		Remain Open	Grant Protection
TN	Remain Open	Quadrant 1 For 1: (-ICP+E), For 2: (-ICP+E)	Quadrant 3 For 1: (-ICP-E), For 2: (+ICP+E)
Gov No 1	Grant Protection	Quadrant 2 For 1: (+ICP+E), For 2: (-ICP-E)	Quadrant 4 For 1: (+ICP-E), For 2: (+ICP-E) DOMINANT

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Getting to Q1 & staying in Q1 depends on:

- How much is gained moving from Q4 to Q1 ('**cooperation differential**') for the relevant duration
- How much would be gained by moving from Q1 to Q2, or Q1 to Q3 ('**defection differential**') for the relevant duration
- What are the consequences of defection?
 - - will a defection be detected? (**transparency**)
 - - is a response likely? (credibility of **threat of retaliation**)
 - - Is there a limit to the number of **repetitions** in the interaction?
 - - What will be the size of the response? Axelrod (1984) proposition that a **tit for tat retaliation** is best for maintaining a Q1 outcome.
- **What about the TPP?** - Does the TPP have the right settings to achieve and maintain Quadrant 1 – to achieve its function of protecting citizens from their politicians?

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The relative sizes of the Political Payoffs from Cooperation & Not Cooperation

- The degree of liberalization achieved is significant
- So **Cooperating** in Q1 involves a substantial incentive to Exporters to support the agreement & substantial incentive to ICP to oppose. It is a compromise leaving some areas of import protection. Politicians will decide if moving from Q4 to Q1 is politically viable for them.
- Will **Non-cooperation** by moving from Q1 to Q2 or Q3 be attractive. This depends on the rest of the rule settings:

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Transparency

- All TPP parties also participate in WTO Trade Policy Review Mechanism
- All are subject to obligations to report to various matters to particular WTO committees
- Additional notification requirements under TPP, eg., the Chapter on Market Access has an obligation to give a notification of import licensing procedures
- Additional consultation obligations under TPP, eg., Chapter on Market Access has obligation to designate a Contact Point and provides for obligations to respond to ad hoc requests

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Retaliation

- When a panel finds a violation
- Respondent fails to eliminate the non-conformity
- Respondent is obliged to try to agree on compensation
- If, within 30 days, parties have not agreed on compensation, then Complainant can give notice it “intends to suspend the application to the responding Party of benefits of equivalent effect
- 30 days later the Complainant can begin suspending benefits.
- (Articles 28.19.1, 28.19.2, 18.19.2bis)

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Is the quantum of retaliation too big?

- Art 28.19.5 Respondent can ask for the Panel to be reconvened to determine if the level of benefits proposed to be suspended is manifestly excessive
- If the panel determines that the level of benefits proposed to be suspended is manifestly excessive, it shall determine the level of benefits it considers to be of equivalent effect
- Complainant must delay the suspension until 30 days after the reconvened panel’s determination

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Manifestly excessive v equivalent

- Under *WTO, Chile-Aust FTA, ANZ-ASEAN FTA, JAEPA* – review panel would consider whether the proposed suspension is in excess of the level of Nullification or Impairment.
- Advantage of limiting retaliation to equivalence is that politicians are assured that in the event that situation arises where a violation is a ‘domestic political imperative’, then retaliation cannot be punitive.
- The only Australian FTA with same ‘manifestly excessive’ rule is in the *Aust-US FTA*.
- Harder to prove that the proposed suspension is manifestly excessive than to prove it is in excess of the level of N&I.
- Makes it more likely a situation of punitive retaliation might arise (favours complainant over respondent)
- Since politicians entering into the agreement cannot be assured politicians that a violation imperative in domestic politics will not incur punitive retaliation, politicians may arrive at a negotiated Quadrant 1 that contains less liberalization / more protection – particularly in sectors expected to be politically sensitive.

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Is the quantum of retaliation big enough?

- Worth considering two points:
- Can the complainant choose the nature of the obligations to be suspended?
- If the violation affects more than one Party, can all of the affected Parties retaliate?

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Can the complainant choose the subject matter of the retaliation?

- If the Complainant chooses to suspend benefits in the same subject matter as the non-conformity, then the rules do not constraint the Complainants choice of the subject matter of the suspension. (Art 28.19.4)
- (same rule as in WTO DSU Article 22)
- (where same subject matter means:
 - All goods,
 - All Financial services under Ch11
 - All services other than financial services; and
 - Each separate section in the IP Ch18)

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Can the complainant choose retaliation in a different subject matter?

- Art 28.19.4 the Complainant can choose to suspend benefits in a different subject matter, if the complainant takes into account:
 - The trade in the good, services or subject matter and the importance of such trade to the Complainant;[corresponds to DSU 22.3(d)(i)]
 - The broader economic elements related to the N&I and the broader economic consequences of the suspension of benefits; [corresponds to DSU 22.3(d)(ii)]
- And concludes that “it considers that it is not practicable or effective to suspend benefits in the same subject matter. And that the circumstances are serious enough”. [corresponds to DSU 22.3(c)].
- Respondent can ask for Panel to be reconvened to consider whether the procedures of para 4 have been complied with, and if not, the Panel can decide the extent to which the Complainant can suspend benefits in each subject matter.

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that cross-retaliation would not be practical and effective

Reviewing **procedure** v reviewing **substance**

- Under TPP, is the arbitrator limited to reviewing whether the Complainant has followed the procedure of taking relevant matters into account?
- Under JAEP, the arbitrator reviews the substantive question of whether it is not practical or effective to suspend obligations in the same sector as the breach
- But TPP approach is same as under *Aust-US FTA*, *Aust-NZ-ASEAN FTA*, similar wording as WTO *DSU* art 22.3
- More freedom for Complainant to choose the subject of retaliation which
 - makes it more likely that Respondent will choose to comply and return to Quadrant 1 outcome;
 - If respondent does not comply, makes it less likely that the Respondents continuing violation worsens the political welfare of the Complainant government..

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Can all affected parties retaliate?

- Art 28.5.3 does allow for additional parties to participate in consultations
- Art 28.7.1 only the party that requested consultations under 28.1 (not any other party that joined in the consultations) can request establishment of the Panel
- Nothing to stop multiple parties from requesting consultations under 28.1 with the same Respondent about the same matter – then each of them can request establishment of the Panel.
- Art 28.7.6 where another party requests establishment of a panel regarding the same matter, a single panel should be established to examine such complaints whenever feasible.
- Art 28.13 says that a 3rd party that is not a “disputing Party” can participate in the DS process and hearings
- Art 28.19 the Respondent has an obligation to enter in negotiations for compensation with only the complaining parties and it is only the complaining party or parties that can suspend obligations in retaliation .
- So provisions do facilitate joint complaints and joint threats of retaliation.
- Which would help limit situations in which the level of retaliation is too low to prevent the Respondent from achieving a net political gain from their violation.

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Additional Threshold for Imposing Retaliation – Monetary Payments

- Art 28.19.6 Complainant cannot suspend benefits if the Respondent says it will pay a monetary assessment:
 - Of 50% of the level of benefits that the Complainant has proposed to suspend
 - (or if there has been an adjudication of the level of benefits), then 50% of the level determined)
- This can only delay the right to retaliate for 12 months unless the complainant agrees to extend the period.

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Only 1 of Australia's FTAs has a monetary payment provision

- Aust-US FTA has a similar provision – not in any other Aust FTA.
- That retaliation cannot be implemented if Respondent makes an annual payment
- Aust-US FTA does not put a time limit on utilization of this provision.
- TPP only allows retaliation to be delayed in this way for up to 12 months.
- Was it a point of compromise? Does it matter in practice? (eg. practical outcome in WTO cases in which cash has been paid to forestall retaliation: *US- Homestyle copyright exemption, US Cotton*)
- Respondent can always offer money to delay the Complainant's retaliation.
- But this provision means that in the first year the Complainant cannot reject the request to delay retaliation offer if the monetary payment offered by the Respondent is 50% of the level of N&I.

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Is the retaliation delayed for too long? OR Is Complainant allowed to retaliate too early?

- Time periods are similar to WTO – some slightly shorter
- Panel deliberation 150 days cf 9 months under WTO
- And no steps in the TPP process for appeals.

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Institutional Set up

- The TPP does not create an international organization
- Ch 27 creates a Trans Pacific Partnership Commission – making decisions by consensus – makes the Rules of Procedure for Dispute Settlement
- The TPP does not create a secretariat nor does it provide for budgetting or financial contributions
- Under 27.2(d) The TPP Commission has power to “make arrangements for implementing this Agreement “.
- Parties must create a roster of Panel Chairs – but if Parties cannot, then TPPC can establish the roster of Panel Chairs
- Requests to establish a panel are directed to the other Party – the establishment occurs under 28.7.5
- To compose a panel – each party nominates a panellist; there is no rule that a Panellist cannot be a national of a disputing Party
- To choose the Chair – either the Parties agree, the 2 panellists agree or two parties can agree on an independent person to choose the Chair or can agree on a random selection of the Chair: Art 27.9.2
- The Panel report is submitted to the Parties who are required to make it public

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Who pays for the Panel?

- The TPP does not say that the Commission will provide secretarial assistance to the Panellists
- Art 27.1 "Each party shall:
- (a) designate an office to provide administrative assistance to a panel established under Chapter 28 (Dispute Settlement) for a proceeding in which it is a disputing Party and to perform such other related functions as the Commission may direct ...
- 27.2 Each Party shall be responsible for the operation and costs of its designated office.
- Under Art 28.10 Panellists shall:
- (c) be independent of, and not be affiliated with or take instructions from, any Party:
- But, in practice, each Panellist is dependent for the supply of administrative assistance upon employees of the governments of the disputing Parties.
- And may be most dependent upon the assistance from person employed by the government which spends the most money on staffing its designated office.
- Administrative assistance = assistance with legal research and drafting of the report
- Neither Ch27 or Ch28 say who should pay for the expenses of the Panellists. The Panellist may be dependent for payment of per diem or reimbursement of disbursements upon one or more of the disputing Parties.

- Slides available from
- www.williamstradelaw.com

Slides 3 to 6 sourced from:

- Brett G. Williams, “Innovative Mechanisms for Resolving or Avoiding Inter-State Trade Disputes in an Asia-Pacific Regional Free Trade Agreement” (2011) *Australian International Law Journal* 141-154. Available at SSRN: <http://ssrn.com/abstract=1989962>
- Based on the original idea from Kenneth Abbott, “The Trading Nation’s Dilemma: The Functions of the Law of International Trade” (1985) 26(2) *Harvard International Law Journal* 501-532. Available at SSRN: <http://ssrn.com/abstract=1402962>