The development of the ASEAN trade dispute settlement mechanism : from diplomacy to legalism

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THE DEVELOPMENT OF THE ASEAN TRADE DISPUTE SETTLEMENT MECHANISM: FROM DIPLOMACY TO LEGALISM

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ABSTRACT

In the late twentieth century international trade moved from a political multi-polar system based on the nation-state to a system featuring unified regional trading regimes. An inevitable feature of increased cooperation through bilateral, regional and international arrangements is the emergence of disputes over the interpretation and implementation of the agreed upon commitments. Accordingly, reliable mechanisms for the settlement of trade related disputes have become necessary to ensure the effective and continued functioning of these arrangements. Over the years these dispute settlement mechanisms have evolved from the relatively simple, diplomacy based structures called for in the GATT, to the detailed, legalistic, adjudication based mechanism found in the WTO. Bilateral and regional initiatives, such as NAFTA and MERCOSUR, as well as the EU, have similarly adopted dispute settlement mechanisms which adopt, in varying degrees, legalistic adjudicatory processes. Since 1967 ASEAN has spearheaded the creation of a regional trading bloc in the South East Asian region. As in other trading blocs, this has inevitable led to the need to develop effective and workable dispute settlement mechanisms.

This thesis examines the development of trade dispute settlement mechanisms in ASEAN tracing its development from a model based on pragmatic diplomacy to a legalistic adjudicatory system with particular reference to the ASEAN context. It examines the extent to which the ASEAN context has influenced the content and the adoption of trade dispute settlement mechanisms in the region, as well as the extent to which the recently adopted 2004 Enhanced Protocol on Dispute Settlement can adequately address trade disputes in the region while remaining sensitive and responsive to the ASEAN context.

Based on a comparative examination of dispute settlement mechanisms in other trade agreements, a range of key procedural issues are identified and examined with a view to identifying the prospects and challenges which ASEAN faces in the implementation of its dispute settlement mechanism. The thesis analyses the prospects and challenges of implementation the 2004 Enhanced Protocol on DSM.

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Flowchart

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List of selected abbreviations

AC	ASEAN Community
ACB	ASEAN Compliance Board
ACMB	ASEAN Compliance Monitoring Body
ACP	African Caribbean Pacific
ACT	ASEAN Consultative to Solve Trade and Investment issues
AD/CVD	Anti Dumping/Countervailing Duty
ADF	ASEAN Development Fund
AEC	ASEAN Economic Community
AEM	ASEAN Economic Ministers
AFAS	ASEAN Framework Agreement on Services
AFMM	ASEAN Finance Ministerial Meeting
AFTA	ASEAN Free Trade Area
AHG	ASEAN Head Government
AIA	ASEAN Investment Area
AIC	ASEAN Industrial Complementation Scheme
AICO	ASEAN Industrial Cooperation Scheme
AIJV	ASEAN Industrial Joint Venture
AIP	ASEAN Industrial Project
AMM	ASEAN Ministerial Meeting
ANZERTA	Australia and New Zealand Economic Relations
APT	ASEAN Plus Three
ARF	ASEAN Regional Forum
ASA	Association for Southeast Asia
ASC	ASEAN Standing Committee
ASC	ASEAN Security Community
ASCC	ASEAN Social Cultural Community
ASFOM	ASEAN Senior Finance Official Meeting
BBC	Brand to Brand Complementation
CEP	Closer Economic Partnership
CEPT	Common Effective Preferential Tariff Scheme
CFI	Court of First Instance
CFSP	Common Foreign and Security Policy
CLMV	Cambodia, Laos, Myanmar and Vietnam
CMG	Common Market Group
DSB	Dispute Settlement Body
DSU	Dispute Settlement Understanding/Understanding on Rules & Procedures Governing the Settlement of Dispute
EC	European Community
ECC	Extraordinary Challenge Committee
ECJ	European Court of Justice
ECSC	European Coal and Steel Community
EEC	European Economic Community
EMU	Economic and Monetary Union

EU	European Union
EURATOM	European Atomic Energy Community
FTAA	Free Trade Area of America
GATS	General Agreement on Trade and Services
GATT	General Agreement on Tariffs and Trade
HLTF	High Level Task Force
HPA	Hanoi Plan of Action
IAI	Initiative for ASEAN Integration
ICJ	International Court of Justice
ICSID	International Centre fore the Settlement of Investment Dispute
ITO	International Trade Organization
JHA	Justice and Home Affairs
MAPHILINDO	Malaya, Philippines and Indonesia
MERCOSUR	Mercado Comun de Sur/Common Market of the Southern Cone
MFN	Most Favoured Nation
NAFTA	North American Free Trade Agreement
NGOs	Non-government Organization
OECD	Organization for Economic Cooperation and Development
PTAs	Preferential Trading Arrangement
RIA	Roadmap for the Integration of ASEAN
SEATO	South East Asia Treaty Organization
SEOM	Senior Economic Officials Meeting
SOM	Senior Official Meeting
TAC	Treaty of Amity and Cooperation
UNCITRAL	United Nations Commission on International Trade Law
VAP	Vientiane Action Program
WTO	World Trade Organization

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ASEAN Time Lines

1967	**:** ASEAN was established by the ASEAN Declaration 1967
1976	: The 1st ASEAN Summit (ASEAN signed the Bali Concord I, the Treaty of Amity and Cooperation in Southeast Asia/TAC, and established the Secretariat)
1977	**:** ASEAN issued the ASEAN Preferential Trade Arrangements (PTAs)
1984	**:** Brunei Darussalam is formally admitted as the ASEAN Member
1992	: ASEAN formally agreed to establish AFTA
1995	**:** The signing of ASEAN Framework Agreement on Services (AFAS)
1995	**:** Viet Nam was admitted as a member of ASEAN
1996	**:** The ASEAN leaders signed the ASEAN Industrial Cooperation Scheme (AICO) and the ASEAN Protocol on Dispute Settlement Mechanism (the ASEAN DSM)
1997	**:** ASEAN leaders adopted the ASEAN Vision 2020
1997	**:** Laos and Myanmar were admitted as members of ASEAN
1998	**:** ASEAN adopted the ASEAN Investment Area (AIA)
1997-1999	**:** Asian financial crisis
1999	**:** The ASEAN leaders adopted the Hanoi Plan of Action (HPA) (1999-2004)
1999	**:** Cambodia was admitted as a member of ASEAN
2000	**:** The Initiatives for ASEAN Integration (IAI)
2003	**:** The Roadmap for Integration of ASEAN (RIA)
2003	**:** The 9th ASEAN Summit (the Bali Concord II) The ASEAN Leaders agreed to establish ASEAN Community (AC) comprises of ASEAN Security Community (ASC), ASEAN Economic Community (AEC) and the ASEAN Socio-Cultural Community (ASCC) by the year 2020
2004	: ASEAN adopted the Vientiane Action Programme (VAP/2004-2008)
2004	: ASEAN signed the ASEAN Protocol on Enhanced Dispute Settlement Mechanism (the 2004 Protocol)

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INTRODUCTION

FORMULATION OF THE PROBLEM

The late twentieth century saw a new wave of regionalism sweep the world, as international trade moved from a political multi-polar system based on the nation-state to a system featuring unified regional trading regimes as evidenced in the formation of new trading blocs around globe, such as the European Union (the EU), the North American Free Trade Area (NAFTA), the Mercado Comun del Sur (MERCOSUR), and the Association of South East Asian Nations (ASEAN). This shift followed on from the development of the multilateral trading system beginning in the years following World War II in the form of the General Agreement on Tariffs and Trade (GATT) and culminating in the agreement to establish the World Trade Organization (the WTO) in 1995. But multilateralism has not worked entirely as anticipated, and increased membership and 'consensus' decision-making has slowed progress and stalled the liberalisation process. Thus, many states begin to believe that by entering into regional trade blocs as well as international trade agreements states would be able to increase their competitive advantages as well as their internal and international market share. While the merits of bilateral and regional trade are still being debated, it is clear that these agreements share similar objectives to that of the multilateral system of each other, namely to raise living standards through expanding production and trade in goods and services.

An inevitable feature of increased cooperation through bilateral, regional and international arrangements is the emergence of disputes over the interpretation and implementation of the agreed upon commitments. In particular, disputes have arisen due to conflicting interests, needs, or opinions of participating states. Accordingly, reliable mechanisms for the settlement of trade related disputes have become necessary to ensure the effective and continued functioning of these arrangements. Over the years these dispute settlement mechanisms have evolved from the relatively simple, diplomacy based structures called for in the GATT which consisted of a mere two short paragraphs of treaty

text and failed to provide any procedural guidance in any regard, to the detailed, legalistic, adjudication based mechanism found in the twenty seven articles and four appendices which constitute the WTO Dispute Settlement Understanding (DSU). Recent bilateral and regional initiatives, such as the NAFTA and MERCOSUR, as well as the customs union formed by the member states of the EU, have similarly adopted dispute settlement mechanisms which adopt, in varying degrees, legalistic adjudicatory processes.

For some time, there has also been a move to create a regional trading bloc in the South East Asian region spearheaded under the auspices of ASEAN. From the early days of the establishment of the organisation the Member States have entered into a wide range of agreements designed to promote and liberalise national, intra- and inter-regional trade. Building on earlier informal agreements ASEAN Member States have, to date, adopted several declarations and agreements on trade, including the ASEAN Free Trade Area (AFTA), the ASEAN Framework Agreement on Services (AFAS) and the ASEAN Investment Area (AIA). Importantly, the move to closer economic integration has been heightened by the decision, adopted in 2003, to create an ASEAN Economic Community by 2020.

As in other trading blocs, moves to closer economic integration inevitably meant that ASEAN would need to develop effective and workable dispute settlement mechanisms. In the ASEAN context, the development of these mechanisms has been influenced by a range of historical and cultural factors unique to the region. Traditionally, the emphasis of ASEAN nations has been placed on the need to settle disputes amicably through political and diplomatic processes in a manner consistent with the 'Asian way'. It has been recognised, however, that such an approach may not be feasible or appropriate in the context of a modern, workable international agreement. The need for ASEAN to move beyond these informal dispute settlement mechanisms has been recognised and was articulated by the ASEAN Secretary –General in his 1999 Report where he called upon ASEAN Members to "explore the possibility of undertaking more legally binding agreements to promote cooperation in various fields, such as economic dispute settlement" in order to better "manage the integrated economy and the problems that transcend national

boundaries".[1] Thus, in recent years, ASEAN has moved to adopt an increasingly legalistic, adjudicatory, judicial or quasi-judicial mechanism for the settlement of trade disputes. These efforts culminated in the Protocol on Dispute Settlement Mechanism of 1996[2]; the first formal mechanism for the resolution of trade disputes and later, in 2004, by adoption of the ASEAN Protocol on Enhanced Dispute Settlement Mechanism which is, in all major respects, similar to the WTO DSU. Additionally, the 38th joint communiqué of the ASEAN Economic Ministers, issued at Vientiane on 26 July 2005, supported the effort to 'strengthen the institutional mechanism of ASEAN, including improvement of the existing ASEAN dispute settlement mechanism to ensure the expeditious and legally-binding resolution of any economic disputes.'[3] It further stated that this initiative will 'facilitate the realization of the aspirations of ASEAN as a single market and a single production base in which there is free flow of goods, services and skilled labor, and a freer flow of capital…'[4] This, together with the 2004 Protocol, represents a significant development by ASEAN away from its traditional informal mechanisms to a formal judicial procedure for the resolution of trade disputes. However, it remains to be seen whether ASEAN Members will implement and utilise this procedure as envisaged. It further remains questionable whether ASEAN is, by essentially transplanting the WTO DSU model to dispute settlement, adopting a method and process suitable to the conditions and political situation in the ASEAN.

THE OBJECTIVE OF THE STUDY

The objective of this study is to examine the development of the trade dispute settlement mechanism in ASEAN from its essentially diplomacy-based origins to its recent incarnation as a legalistic adjudicatory process with particular reference to the ASEAN context. In doing so it is intended to examine the extent to which the ASEAN context has

[1] Report of the Secretary-General of ASEAN to the 32nd ASEAN Ministerial Meeting, Singapore, 22-24 July 1999, see < http://www.aseansec.org/3901.htm> at 11/07/2005

[2] The Protocol on Dispute Settlement Mechanism, done at manila, 20 November 1996, text at <http://www.aseansec.org/7813.htm> at 8/03/2005 [hereinafter *the 1996 Protocol*]

[3] Joint Communique of the 38th ASEAN Ministerial Meeting, Vientiane, 26 July 2005, with the theme: toward the harmony, dynamism and integration of ASEAN, text at http://www.aseansec.org/17593 (Accessed 11/08/2005)

[4] Ibid.

influenced the content and the adoption of trade dispute settlement mechanisms in the region, as well as the extent to which the 2004 Protocol can adequately address trade disputes in the region while remaining sensitive and responsive to the ASEAN context.

THE FRAMEWORK FOR ENQUIRY

The framework for the enquiry will be based on three pillars. First, the thesis will examine the development of ASEAN as a regional trade organisation. Second, the thesis will examine the development of trade dispute settlement mechanisms in five other major trade organisations, namely, the (GATT, the WTO, the EU, the North American Free Trade Agreement (NAFTA), and Southern Common Market or Mercado Comun del Sur (MERCOSUR). Particular emphasis will be placed on the examination of the WTO DSU due to the similarity of the ASEAN model with its multilateral equivalent. Importantly, key procedural issues that have arisen in these dispute settlement mechanisms will be examined with a view to relating these experiences to the ASEAN context. Key procedural issues to be explored include: the establishment of permanent or ad hoc panels, the independent of panellists, private and non-governmental rights to appear, the transparency of the dispute settlement mechanism, the presence of binding precedent of the panel decisions, and the enforcement of the decisions. It should be noted that this is not intended to be a comprehensive comparative study of these five mechanisms. Rather, comparative elements will be evaluated with a view to examining their possible application in the ASEAN context. This examination will lay the ground work for the third pillar which is an analysis of the development of a legalistic adjudicatory trade dispute settlement regime in ASEAN and its likely efficacy in and sensitivity to the ASEAN context.

THE OUTLINE AND SCOPE OF THE STUDY

Given the above, this study is divided into three parts containing seven chapters. Part one sets out the history, development, and structure of ASEAN. Chapter one begins with the early history of ASEAN and the formation of the ASEAN identity, including the meaning of South East Asia. It then discusses ASEAN's institutional structure, its decision making processes, and its legal personality. Chapter two examines the development of

ASEAN as a regional economic organization. It discusses the processes of ASEAN economic liberalization from its early days to the most recent phase, the move towards the establishment of the ASEAN Economic Community as one pillar of the proposed ASEAN Community.

Part Two describe and analyses the trade dispute settlement mechanisms in other international economic organizations. Chapter 3 describes the mechanisms that have been adopted in the GATT, the WTO, the EU, NAFTA and MERCOSUR while Chapter 4 analyses the key procedural issues that have arisen in common as between these mechanisms. The categories of issues explored include: the creation of permanent or ad hoc panels; the independence of panel members; private rights to appear before the panels; the precedential value of the decisions; the adoption of decisions; and the enforceability of the decisions.

Part Three consists of the final three chapters which analyze and illustrate the development of the ASEAN trade dispute settlement mechanism from diplomacy to legalism. Chapter 5 examines the early approaches to settling trade disputes in ASEAN, including trade disputes prior AFTA agreement, trade disputes under AFTA Agreement, and the period after the AFTA agreement. It also discusses and assesses the 1996 ASEAN dispute settlement mechanism Protocol. Chapter 6 then analyses the 2004 Protocol. Chapter 7 concludes the thesis with an assessment of the 2004 Protocol and it likely efficacy in the ASEAN context. It examines the 2004 Protocol on the basis of the power-based and rule-based oriented dichotomy and discusses the relevance of the ASEAN context to the implementation of the Protocol. It concludes with a discussion of the potential obstacles to the effective implementation of the Protocol and some suggestions as to how those obstacles may be overcome.

PART I

THE ASEAN CONTEXT

CHAPTER 1 – THE HISTORY, DEVELOPMENT AND STRUCTURE OF ASEAN

1.0 Introduction

The establishment of the Association of South East Asian Nations (ASEAN) in 1967 represented the culmination of a number of attempts to institutionalize international cooperation in the South East Asian Region. Earlier attempts, including the United States sponsored South East Asia Treaty Organization (SEATO),[1] the Association for South East Asia (ASA)[2] and MAPHILINDO (an acronym for its member states, Malaya, the Philippines and Indonesia)[3] were all short lived experiments thanks to conflicts over national borders and political tensions amongst their member states. Despite, these failures, however, South East Asian states were not deterred from their desire to establish a new regional organization through which to represent and protect both their national interests and their national and regional values on the international scene.

In 1966, political conditions in the South East Asian region became ripe for the establishment of a new regional organization. On 8 August 1967 ASEAN came into existence upon the signing, by Indonesia, Malaysia, the Philippines, Singapore and Thailand, of the Bangkok Declaration.[4] Brunei Darussalam joined ASEAN in 1984 with Vietnam becoming its seventh member in 1995 followed by Laos and Myanmar in 1997.[5] The Kingdom of Cambodia became a member of ASEAN on 30 April 1999,[6] bringing to ten the total membership of the Organization. At the time of its establishment, significant conflict existed between a number of ASEAN members. Thus, there were great

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[1] On the history of SEATO, see Monro MacCloskey, *Pacts for Peace: UN, NATO, SEATO, CENTO and OAS,* (1967); for its function and organization, see George Modelski, 'SEATO: Its Function and Organization', in George Modelski (ed), *SEATO: Six Studies,* (1962) 3, 27

[2] On the history of ASA, see Frank Frost, 'Introduction: ASEAN since 1967 – Origins, Evolution and Recent developments', in Alison Broinowski (ed), *ASEAN into the 1990s,* (1990), 1, 4; Michael Haas, *The Asian Way to Peace: A Story of Regional Cooperation,* (1989), 120

[3] On the history of Maphilindo and its organization structure, see Haas, above n 2, 123

[4] The ASEAN declaration, known also as the Bangkok declaration is a brief document containing just five articles. See <http://www.aseansec.org/1212.htm> at 14/05/2001 [hereinafter the ASEAN Declaration]

[5] For the Protocol for the Accession of the Union of Myanmar to ASEAN Agreement, 23 July 1997 see <http://www.aseansec.org/1830.htm> at 24/09/03; For the Protocol for the accession of the Lao People's Democratic Republic to ASEAN Agreement see <http://www.aseansec.org/521.htm> at 24/09/03

[6] Protocol for the Accession of the Kingdom of Cambodia to ASEAN Agreements, Hanoi, Vietnam, 30 April 1999, see <http://www.aseansec.org/2102.htm > at 24/09/03

expectations amongst member states that ASEAN would bring peace to the region. ASEAN has indeed been a successful catalyst in the resolution of numerous conflicts, particularly those over borders, between its member states. However, in the economic sphere, ASEAN's successes have been slower in coming. Early attempts to establish a preferential trade area were halting and it was not until 1992 that the ASEAN Free Trade Area (AFTA) was created. This has been followed by other economic arrangements both between members and with non-member states. The latest economic initiative is the proposed ASEAN Economic Community, the establishment of which has been called for by 2020.[7]

To fully evaluate the emerging system of trade dispute settlement in ASEAN it is useful to have some background of both the cultural and the institutional history and structure of the organization. In particular, central to ASEAN's development and functioning has been the concept of 'ASEAN values', which requires the members of the organization to act and speak as a unified group on the basis of non-binding consensual, collective commitments and to avoid conflict between members by adhering to the principle of non-interference.[8] No examination of ASEAN practice would be complete without at least a cursory understanding of the context in which it operates. Accordingly, this chapter begins with a brief introduction to the early history of South East Asia and the context in which 'ASEAN values', and hence the ASEAN approach, have developed. It then examines the formation and institutional structure of ASEAN.

1.1 The 'South East Asian' Area

1.1.1 Early History

Because of its position on the great trading routes to China and India, for centuries, foreigners have passed through the South East Asian region. European merchants moved

[7] The Declaration of ASEAN Concord II (Bali Concord II), text see <http://www.aseansec.org/15160.htm > at 11/07/2005 [hereinafter Bali Concord II]

[8] This principle is embodied in Art 2(7) of the UN Charter and is considered part of customary international law. The UN Charter codifies the guarantee of sovereign equality of states by prohibiting interference by a state in matters which are essentially within the domestic jurisdiction of any state. Interference is seen as a violation of the sovereignty of a state. Article 2 (7) of the UN Charter states the traditional rule of non interference in the internal matters of states: 'Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state..' This article further stipulated that, 'this principle shall not prejudice the application of enforcement measures under Chapter VII.'; see Ian Brownlie, *Principles of Public International Law*, (1990), 287

oil and other raw materials from the Middle East, Africa and from South East Asia itself, between the Pacific and Indian oceans. The South East Asian region, particularly Indonesia, was also a rich source of spices, gourmet foods, sandalwood medicines and other tropical products. As demand for these goods (especially spices) increased in Europe and prices rose, particularly when the flow of these commodities to the European markets was severely impeded by the advance of the Turks and the fall of Constantinople in 1453, Europe sought to establish direct contact with South East Asia both to ensure supply and achieve a reduction in prices.

The Portuguese were the first to settle in South East Asia, seizing control of the critical port of Malacca in 1511 and becoming the principal merchant of oriental products to Europe. The Dutch with their Vereenigde Oostandische Compagnie (VOC) or the United East India Company, and the English with their East India Company, followed less than a century later. By the late eighteenth century, all South East Asian countries, with the exception of Thailand, had been colonized or had become protectorates of the Western states; the British in Myanmar, Malaysia and Singapore, the Dutch in Indonesia, the French in Laos, Cambodia, and Vietnam, the United States and Spain in the Philippines, and Portugal in East Timor. [9] The complex colonial history of the region resulted in the isolation of these states from each other.[10] The separation caused by this colonial history also resulted in the region being one of the more varied and diversified regions in the world, accommodating fourteen different religions and eighteen formal languages. Moreover, this diversity of background and historical experience had a direct impact on regional integration.

The Japanese occupation of South East Asia from 1942-1945 also impacted upon the developmental history of the region[11] and is widely believed to have been the catalyst for the process of decolonisation throughout the region. While the Japanese interregnum

[9] D.R. SarDesai, *South East Asia; Past &Present*, (1997), 5; see also Kevin YL Tan, 'Comparative Constitutionalisms: The Remaking of Constitutional Orders in Southeast Asia', (2002) 6 *Singapore Journal of International & Comparative Law* 1, 5

[10] For example, the colonial rule had a different orientation in terms of administration, education, trade, currency and shipping, see SarDesai, above n 9, 6

[11] For detailed explanation of Japanese occupation in South East Asia region see, Jan Pluvier, *South East Asia from colonialism to independence*, (1977) and J Singh Jessy, *History of South - South East Asia (1824 – 1965)*, (1985)

temporarily liberated South East Asian countries from colonial rules and exploitation, the occupation also generated a degree of nationalism among South East Asian nations which subsequently led to their independence. Indonesia and Vietnam were the first colonies to proclaim their independence in August 1945, although the Dutch and the French were reluctant to concede their independence until 1949 and 1954 respectively. The United States granted independence to the Philippines in 1946.[12] Meanwhile, independence came to Burma in 1948 and to Malaya in 1957. The other British colonies, Singapore, Sabah and Sarawak joined Malaya in the new federation of Malaysia, but in 1965 Singapore withdrew from the federation to become an independent state.

1.1.2 The meaning of 'South East Asia'

Difficulty sometimes arises as to the exact definition of the region which is here referred to as 'South East Asia'. This nomenclature is currently used to refer to the group of countries bounded by Myanmar, Thailand, Malaysia, Singapore, Brunei, Indonesia, Laos, Cambodia, Vietnam, and the Philippines. The term became popular during the Second World War when the territories were placed under the British South East Asian command of Louis Mountbatten in July 1945.[13] Previously, the term 'Further India' had been used to describe sections of South East Asia, as if all that was to be found beyond the Bay of Bengal was the Indian subcontinent on a smaller scale.[14] The region of South East Asia situated between India and China, was referred to by some writers as 'little China' or 'little India'.[15]

Geographically, South East Asia can be viewed as two separate regions: 'mainland' South East Asia, which includes those countries such as Myanmar, Thailand, Laos, Cambodia, and Vietnam, which lie in the region connected to the mainland of Asia; and 'insular' South East Asia which includes those countries situated 'outside' the mainland

[12] Ten years after the first European coloniser arrived in Southeast Asia in 1511, Spain claimed the Philippines and ruled it for over 300 years until it ceded the territory to the USA in 1898, during World War II, Japan occupied the Philippines and in 1945 the USA regained its possession and granted independence in 1946, see Tan (Comparative Constitutionalism), above n 9, 6

[13] The creation of the Southeast Asia Command (SEAC) was 'a major step in the military and political identification of the region', see Russell H. Fifield, 'The Southeast Asia Command', in K.S. Sandhu, et al, (eds), *The ASEAN Reader*, (1992), 20

[14] M. Osborne, *South East Asia; An Introductory History*, (1997), 4

[15] SarDesai, above n 9, 5

continent, including Malaysia, Singapore, Brunei, Indonesia and the Philippines.[16] The inclusion of Malaysia in the 'insular' group is justified by commentators on the basis of the Malay Peninsula's greater exposure to the sea and its ethnic cultural, religious, and geographical affinities with Sumatra and Java (Indonesia).[17] Compared to the mainland South East Asia, insular South East Asia has been far more exposed to external influences from outside regions, such as, India, Arabia, Persia, China and Europe. As a result, people in this region follow a variety of religions including Islam, Buddhism, and Hinduism. Meanwhile the dominant religion of mainland South East Asia is Buddhism.

1.1.3 The development of a 'South East Asian' identity- the SEATO Years

Regional cooperation in South East Asia began in the mid 1950s when the United States established the South East Asia Treaty Organization (SEATO) as an anti-communist alliance.[18] The Korean War of the 1950s had marked a shift in the focal point of the Cold War, [19] from post-war Europe to East Asia [20] and the exploitation of less developed countries was used by both the US and the USSR as part of their rivalry. The intention of the US was to use SEATO as a barrier against communist expansion in South East Asia.

SEATO was established on 8 September 1954[21] as part of the same strategy that gave birth to the North Atlantic Treaty Organisation (NATO) in Europe.[22] However, there was little similarity between the two organizations. Unlike in Europe, the fear for South East Asia was one of communist subversion rather than a full frontal communist assault.[23]

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[16] Ibid, 6.
[17] Ibid.
[18] In September 1954 representatives of Australia, France, New Zealand, Pakistan, the Philippines, Thailand and the United Kingdom, and the United States signed the South-East collective Defence Treaty in Manila, see MacCloskey, above n 1, 95
[19] The Cold War was the conflict between the West (the US and its North Atlantic Treaty Organization/NATO allies) and the East (the Soviet Union and its Warsaw Pact allies, loosely described as the Eastern Bloc) during the period of 1945- 1990. It was primarily a conflict between the ideologies of communism and capitalism
[20] Korean War from June 25, 1950 to July 27, 1953, was a conflict between communist North and anti-communist South Korea. In reality, the war was also a proxy war between the US and the Soviet Union.
[21] South East Asia Collective Defence Treaty also known as Manila Pact signed on 8 September 1954 as the treaty of the SEATO; the text of the SEATO's Treaty, see Modelski, above n 1, Appendix IV, 180
[22] On April 4, 1949, the Treaty establishing NATO was signed in Washington, and came into force on 24 August 1949 after the deposition of the ratification of all signatory states; the text of the NATO's Treaty, see MacCloskey, above n 1, Appendix II, 173`
[23] Leszek Buszynski, *SEATO: The Failure of an Alliance Strategy*, (1983), p.x (preface)

As the US Secretary of State for Far Eastern Affairs put it in 1955, to most leaders in the region the 'threat of communism [is] of no more than secondary concern and [that] their interests and emotions are centred on such questions as 'colonialism', 'nationalism' and 'neutralism''.[24] It will be recalled that in the 1950s most states in the region were newly independent after more than a century of Western imperial domination. These states opposed colonization and were resistant to 'Yankee imperialism'. Indeed, it was lack of support from Thailand and the Philippines combined with the failure of the Vietnam War and US disengagement from Indochina which led to the eventual dismantling of SEATO in 1977.[25]

US influence was not, however, the only problem for SEATO. Malaya (the former name of Malaysia) did not want to joint SEATO since there was the Anglo-Malayan Defence Agreement (AMDA).[26] Together with the Philippines and Thailand, Malaya then formed a regional economic and social organization in 1959 which led to the formation of the Association of South East Asia (ASA). This body, the main purpose of which was 'to establish effective machinery for friendly consultations, collaboration and mutual assistance in the economic, social, cultural, scientific and administrative fields'[27], had an auspicious start. However, it was dissolved in August 1967 as a result of the conflict between Malaya and the Philippines over the Philippines' claim to Sabah.[28] Nevertheless, the seeds of a regional identity, which eventually developed into ASEAN, had been sown.

In 1967 Indonesia, Thailand, Malaysia, Philippines and Singapore determined to form a totally new regional organization and this intention was supported by the political environment which was conducive for this purpose.[29] The formation of newly independent

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[24] The US Assistant Secretary of State for Far Eastern Affairs, Walter S Robertson, "The US looks at South & South East Asia", *The Dept of State Bulletin,* 22 August 1955, 295; also cited in Russell H Fifield, *The Diplomacy of South East Asia: 1945-1958*,(1958), 74; quoted from Justus M van der Kroef, *The Lives of SEATO*, (1976), 59

[25] Buszynski, above n 23, 28

[26] Haas, above n 2, 120

[27] Quoted from Haas, ibid, 120; Cooperation was envisaged in economic, cultural, educational and scientific fields, including the promotion of Southeast Asian Studies, ibid

[28] Roger Irvine, 'The Formative Years of ASEAN: 1967-1975', in Alison Broinowski (ed), *Understanding ASEAN*, (1982), 9

[29] The birth of ASEAN was direct offshoots of the Indonesian-Malaysian normalization talks in 1966, see Dewi F Anwar, *Indonesia in ASEAN; Foreign Policy and Regionalism*, (1994), 49

states of Malaysia, Singapore and Brunei had been settled and established.[30] Moreover, unlike the previous organizations established in this region, such as SEATO, ASA or Maphilindo, ASEAN was to be a totally new regional association which accommodated the common concerns of the signatory states including a commitment to anti-communism and had an independent character of its own where all members were equal.

1.2. The Formation of ASEAN

1.2.1 The early years

The formation of ASEAN was thus a product of external Cold War factors. This was in stark contra-distinction to events in Europe where the formation of the European Economic Communities was motivated by internal factors and the desire to create an alliance to promote European integration, rebuild Europe's shattered economies, curb nationalistic agendas, and foster the conditions that would prevent future conflict between Western European countries.[31] Rather than seeking to generate internal economic cohesion, ASEAN was founded in response to the threat of communism in Indochina, arising particularly from the escalation of conflict in the former Indo-China, including the Vietnam War and China's 'great proletarian Cultural Revolution'.[32] With the withdrawal of colonial powers in the South East Asian region a power vacuum existed which led non-communist states to fear that communism, already entrenched in Vietnam, Laos, and Cambodia, would spread to the rest of South East Asia. Moreover, the People's Republic of China (PRC) openly supported a number of local communist movements in some South East Asian countries.[33]

The first phase of ASEAN history began in 1966 when, after the fall of the Sukarno government in Indonesia, the new Indonesian government adopted a 'good neighbor'

[30] At that time, Federation of Malaysia was established in 1963, Brunei decided to remain under the British flag for another 20 years, and Singapore was expelled from Malaysia in 1965, see Haas, above n 2, 126
[31] This plan had been drafted by Jean Monnet, a committed federalist who believed that economic co-operation between states was crucial; Monnet insisted on the principle of the High Authority's independence from the member states' governments because his experience as an international civil servant had convinced him that it would be hamstrung if they controlled it too directly, see Stephen Weatherill, *Cases and Materials on EC Law*, (1994), 5
[32] Irvine, above n 28, 15
[33] Gerald Tan, *ASEAN Economic Development and Co-operation*, (1996), 4

foreign policy which saw it ceases its protests against the formation of Malaysia. Indeed, it was the Indonesia-Malaysian normalization talks held under Thai auspices in Bangkok in 1967[34] that ultimately led to the formation of ASEAN.

The initiative for the new regional organisation originated when Indonesia engaged in a diplomatic offensive to promote the proposal with its South East Asian neighbours at the end of 1966.[35] The talks resulted in the establishment of the South East Asian Association for Regional Co-operation (SEAARC), which brought together ideas from both the ASA and MAPHILINDO.[36] However, this was still a modest proposal, without a clearly formulated conceptual framework.[37] Talks continued, and in August 1967, ASEAN was finally established by the foreign ministers of Indonesia, Thailand, the Philippines, Malaysia and Singapore with the signing of the ASEAN Declaration (also known as the Bangkok Declaration 1967).[38]

1.2.2 The Bangkok Declaration, 1967

According to the preamble to the Bangkok Declaration the ASEAN founding states desired to 'establish a firm foundation for common action to promote regional cooperation in South-East Asia in the spirit of equality and partnership and thereby contribute towards peace, progress and prosperity in the region' through fostering 'good understanding, good neighbourliness and meaningful cooperation among the countries of the region already bound together by ties of history and culture'. The preamble expresses the determination of the states to ensure their economic and social stability and peaceful and progressive national development as well as their security from external interference. It underlines the significance of national sovereignty by affirming that 'all foreign bases on member's

[34] Ronald D Palmer and Thomas J Reckford, *Building ASEAN: 20 years of South East Asian Cooperation*, (1987), 5-6; see also Anwar, above n 29, 47-48
[35] Anwar, above n 29, 50-51.
[36] Later on, the name changed into Association of South East Asian Nations (ASEAN) suggested by Adam Malik (former Indonesian Foreign Minister) because the name SEAARC has a bad image as it sounds like 'shark', as it was objected by Thanat Khoman of Thailand (former Foreign Minister). Ibid.
[37] The reason why Indonesia preferred to form a totally new organization, rather than maintaining the existing organizations, at that time, ASA and Maphilindo, was that Maphilindo was established mainly for the Malay 'race' excluded Singapore and Thailand, while ASA was constituted as an extension of SEATO and as a colonial tool which contrary with the *bebas aktif* Indonesian' foreign policy principle and Indonesian' reluctance to become a junior member in ASA, see ibid, 50
[38] ASEAN Declaration, above n 4

territory are temporary and remain only with the express consent and concurrence of the countries concerned and are not intended to be used directly or indirectly to subvert the national independence and freedom of States in the area or prejudice the orderly processes of their national development.'[39] The aims and objectives of ASEAN are then set out as follows:

1. To accelerate the economic growth, social progress and cultural development in the region through joint endeavours in the spirit of equality and partnership in order to strengthen the foundation for a prosperous and peaceful community of South-East Asian Nations;
2. To promote regional peace and stability through abiding respect for justice and the rule of law in the relationship among countries of the region and adherence to the principles of the United Nations Charter;
3. To promote active collaboration and mutual assistance on matters of common interest in the economic, social, cultural, technical, scientific and administrative fields;
4. To provide assistance to each other in the form of training and research facilities in the educational, professional, technical and administrative spheres;
5. To collaborate more effectively for the greater utilization of their agriculture and industries, the expansion of their trade, including the study of the problems of international commodity trade, the improvement of their transportation and communications facilities and the raising of the living standards of their peoples;
6. To promote South-East Asian studies;
7. To maintain close and beneficial cooperation with existing international and regional organizations with similar aims and purposes, and explore all avenues for even closer cooperation among themselves.[40]

Thus ASEAN's aims are both economic and political and include both the promotion of economic collaboration and the promotion of regional peace and stability.

1.2.3. The Bali Summit of 1976

From its inception, ASEAN was established as a relatively informal, de-centralised organisation. Rather than a central secretariat, the Bangkok Declaration called merely for an Annual Meeting of Foreign Ministers, a Standing Committee under the chairmanship of

[39] Ibid, the Preamble
[40] ASEAN Declaration, above n 4, second paragraph

the host state to carry on the work of the Association in between Ministerial meetings, ad hoc and permanent committees of officials and specialists to be established on specific subjects and a National Secretariat in each state. In fact, it was not until 1976 that ASEAN Heads of Government met for the first time in Bali.

The Bali Summit 1976 was the first ASEAN Summit produced three agreements: the Declaration of ASEAN Concord, the Treaty of Amity and Co-operation in Southeast Asia, and the Agreement on the establishment of the ASEAN Secretariat. The most important of these was the Treaty of Amity and Cooperation (TAC) in South East Asia[41] which essentially updated the Bangkok Declaration, reminding members that ASEAN political and security dialogue and cooperation should aim to promote regional peace and stability by enhancing regional resilience. This was to be achieved through cooperation in all fields based on the principles of self-confidence, self reliance, mutual respect, cooperation, and solidarity, which principles were to constitute the foundation for a strong and viable community nation in South East Asia. The TAC also included provisions on the settlement of disputes through appropriate means such as, good offices, mediation, inquiry or conciliation. Reflecting the vision of the Association to include all South East Asian countries as members, the TAC was also open for accession by other states in South East Asia.[42]

The second agreement to come out of the Bali Summit was the Declaration of the ASEAN Concord,[43] which laid down the framework for ASEAN economic, functional and political cooperation. This declaration endorsed in general terms the goal of 'settlement of intra-regional disputes by peaceful means as soon as possible' and 'the early establishment of the Zone of Peace, Freedom and Neutrality' and called for the 'strengthening of political solidarity by promoting the harmonization of views, coordinating positions and, where possible and desirable, taking common action'. This declaration embodied a political view of ASEAN, which had previously been excluded from the Bangkok Declaration.

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[41] Treaty of Amity and Cooperation in Southeast Asia (TAC), text see < http://www.aseansec.org/1217.htm> at 30/08/2005 [hereinafter the TAC]

[42] Ibid, article 18; Later on, TAC had been acceded by other states outside the region, such as India, China, Japan, New Zealand, Russia and Korea,, see also, footnote 174 Chapter 2.

[43] The Declaration of ASEAN Concord, done at Denpasar Bali, Indonesia, 24 February 1976, text see <http://www.aseansec.org/1216.htm > at 30/08/2005 [hereinafter Bali Concord I]

In addition, to the development of the above treaties, the Summit also provided for an increased range of ASEAN ministers (including economic, labor, education, social welfare, health and environment ministers) to be involved in the ASEAN decision making process. Importantly, it also agreed to establish a secretariat by signing the Agreement on the Establishment of the ASEAN Secretariat in Jakarta in 1976.

At the Bali Summit 1976, the Singaporean Prime Minister, Lee Kuan Yew, also proposed that a free trade area be established in the South East Asian region. This proposition was opposed by Indonesia which believed that a free trade area would destroy its domestic market.[44] Other members also rejected the proposition as they believed that 'they suffered from too great a disparity in manufacturing competitiveness'.[45] Ultimately the proposal was rejected on the basis that closer economic cooperation was not a priority for ASEAN at that time. The ASEAN Members, however, finally agreed to form a free trade area in 1992. As will be discussed in Chapter 2 below, the development of a trading block in ASEAN has been a long and tortured affair.

1.3 The ASEAN Profile

ASEAN's ten members range in GDP per capita, from $159 (Myanmar) to $26,480 (Singapore) in 2005 in US Dollars.[46] Members also range, in terms of governance, from fledgling democracy (the Philippines), to economic "tigers" (Singapore and Malaysia), absolute monarchy (Brunei), and developing communist countries (Vietnam and Laos) and to least developed country, military-run (Myanmar). The ASEAN members also are divided into two groups, namely the old members (Brunei Darussalam, Indonesia, Malaysia, the Philippines, Singapore, and Thailand) and the new members (Cambodia, Laos, Myanmar and Vietnam or CLMV countries) between whom which there is a wide gap in economic and social development and liberalization. This is referred to in ASEAN as a 'two-tier

[44] East Asia Analytical Unit, Dept of Foreign Affairs & Trade (DFAT), *ASEAN Free Trade Area: Trading Block or Building Block?* (1994), 27

[45] Sherry M. Stephenson, 'ASEAN and the Multilateral Trading System', (1994) 25 *Law and Policy in International Business*, 439, 441

[46] Meanwhile the GDP of Brunei is US $15,764, Cambodia US $ 317, Indonesia US$ 1,267, Lao US $ 451, Malaysia US $ 4,930, Philippines US $ 1,078, Thailand US $ 2,664, and Vietnam US $ 565, see International Monetary Fund (IMF), World Economic Outlook Database, April 2005, see <http://www.imf.org/external/pubs/ft/weo/2005/01/data/dbginim.cfm> at 16/09/2005

structure'.[47] Moreover, unlike the majority of ASEAN members, Laos and Vietnam are not members of the WTO.[48] Indeed, ASEAN member countries are very diverse in the areas of economic development, politics, culture, language, religion and geographical conditions. They stay together as a group because they have a common goal of striving for economic growth and regional peace and stability. These differences, however, give rise to a number of implications for development of trade integration in the ASEAN region. For example since the economic level of member countries is so diverse, very often trade agreements are arranged in such a way as to suit the capability of each member country. To better understand the differences between the various ASEAN economies, a brief profile of each member state follows.

Brunei Darussalam is a tiny oil-rich Islamic sultanate known chiefly for the astounding wealth of its Sultan, its tax-free, subsidized society, and its GDP income per capita which is far above most other developing countries (in 2005 GDP per head is US$ 15,764). It is a very small country with an area of only 5765 sq km and a population of 322,000. It is a monarchy (one of the oldest continuous monarchies in existence in the world), with its head of state and Prime Minister, the Sultan Sir Hassanal Bolkiah. Its society remains highly stratified and hierarchical, with the Sultan as the absolute monarch and patriarch of the people. The legal system is based on the English Common Law; however for Muslims, Islamic Shari'a law supersedes civil law in a number of areas. Brunei's major products are crude oil and natural gas which account for nearly half of its GDP.

Cambodia, which gained independence from France in 1953, is one of the three former French Indochinese states along with Vietnam and Laos. [49] Cambodia's population of 12 million occupies an area of 181,035 sq km. Its legal system is primarily a civil law mixture of French-influenced codes from the United Nations Transitional Authority in

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[47] Eric Teo Chu Cheow, 'Bali Summit moves ASEAN toward sense of community', *The Japan Times* (Tokyo), 10 October 2003

[48] Cambodia became the WTO's member very recent on 13 October 2004 (as the 148th member) see <http://www.wto.org/english/news_e/news04_e/cambodia_148members_13oct04_e.htm > at 17/02/2005 while Laos and Vietnam still in the process of the WTO's membership, see at <http://www.wto.org/english/news_e/news04_e/laos_28oct04_e.htm> at 17/02/2005 and <http://www.wto.org/english/news_e/news04_e/acc_vietnam_15dec04_e.htm at 17/02/2005

[49] For general information on Cambodia, see< http://www.dfat.gov.au/geo/cambodia/cambodia_brief.html > at 21/10/2003

Cambodia (UNTAC) period, royal decrees, and acts of the legislature, with influences of customary law and remnants of communist legal theory, and an increasing influence of common law in recent years. The country's economic infrastructure was devastated by civil war in the early 1970s, the rule of the Khmer Rouge between 1975 and 1979 and continued civil war in the 1980s. While Cambodia's diplomatic isolation stifled growth in the first half of the 1980s, growth accelerated in the late 1980s with the government's gradual move towards free market economic policies. Growth was propelled even further during 1991-93 by the presence of UNTAC, which did much to boost aggregate demand in the economy. Due to the Asian financial crisis 1997-98, civil violence and political infighting, the Cambodian economy fell dramatically in 1997-98, and between 1999-2003, its GDP grew at a rate of 6-7 percent, but it decreased to 4-4.5 percent in 2004 as a result of uncertainty surrounding the future of garment sectors as its main export.

Indonesia is the largest archipelagic state in the world, occupying a total area of 1,904,000 sq km and with a population of 216 million people. With 87 percent of its population Muslim, it is the biggest Muslim nation in the world. Its legal system is based on Roman Dutch law, although it has been substantially modified by indigenous concepts and by a new criminal procedures code. Its major industries are oil, gas, textiles, timber, coffee, rubber, coal, tin, copper, rice, pepper and palm oil. Following the 1997 Asian financial crisis, Indonesia suffered great political instability with the period of 1998 to 2001 being the most unsettled period of presidency in Indonesian history with three different presidents during this period. While previously elected indirectly by the legislature, the first directly popularly elected president, Susilo Bambang Yudhoyono, was elected as the Indonesia’s sixth president in October 2004. His government is determined to improve economic growth and investment climate to attract more foreign investors to invest in Indonesia, including by improving infrastructure, strengthening the legal framework and enhancing governance.

Laos, officially known as the Lao People's Democratic Republic (Lao PDR) joined ASEAN in 1997. As a Least Developed Country (LDC), it is one of the ten poorest countries in the world and relies heavily on donor assistance. Lao PDR was formed on 2 December 1975 following many years of foreign occupation, civil war and political

instability and prior to that a six-century-old monarchy.[50] The Lao PDR is a one-party, communist state ruled by the Lao People's Revolutionary Party (LPRP). The 10-member Politburo of the LPRP is the key decision-making body. A National Assembly, which is elected by the people from a list of candidates approved by the Party, meets twice a year and is responsible for scrutinising proposed legislation. Laos has the second smallest population of ASEAN members of 5.5 million people who live in an area of 236,000 sq km. Its main products are rice, tobacco, coffee, tin mining, timber, and opium. Its legal system is based on traditional customs, French legal norms and procedures and socialist practice.

Several decades of sustained economic growth and political stability under the 22 year leadership of now former Prime Minister Mahatir Mohammad have made Malaysia one of the most buoyant and wealthy countries in the region . A middle income country, Malaysia has transformed itself rapidly from an agriculture-based economy to one dominated by intermediate manufacturing which now accounts for about 82 per cent of exports, of which 70 per cent are electronic products and the majority of others are chemical and wood products. Malaysia is also the world's leading exporter of palm oil. Malaysia is a constitutional monarchy and a member of the British Commonwealth and its legal system is based on the English common law. The Malaysian economy grew substantially in the last seven years, despite the occurrence of crises in the region, such as the Asian financial crisis and the Severe Acute Respiratory Syndrome (SARS) outbreak, thanks to careful economic planning and management by the Malaysian government,[51] which set privatization as a cornerstone of national development while retaining an emphasis on foreign investment to sustain industrialization.

Myanmar was ruled by Britain from 1885 to 1948. It regained independence on 4 January 1948 after a long period of struggle against colonialism. Since 1962 it has been under the controversial military rule of the State Peace & Development Council (SPDC)

[50] For detailed chronology history of Laos, see Grant Evans, *A Short History of Laos: the land in between*, (2002)

[51] In 1991 the Malaysia government launched Vision 2020 statement to achieve economy status by the year 2020 which the target includes the increasing the GDP eighthold between this period and increasing income per capita by a factor of four, for the detailed of its economic planning and management see <http://www.dfat.gov.au/geo/malaysia/malaysia_brief.html > at3/09/2005)

formerly known as the State Law & Order Restoration Council (SLORC).[52] The controversial issue for Myanmar has long been the detention by the military regime of Aung San Suu Kyi the opposition leader of the National League for Democracy (NLD).[53] The trade boycott introduced by the US in July 2003 in response to her continuing detention has impacted heavily on several of Myanmar's export sectors, particularly, garments and textiles.[54] Although Myanmar is rich in resources, its population lives in abject rural poverty as difficulties such as large public sector debts, a collapsed market exchange rate, poor economic management and rampant inflation remain unresolved. Its major products are rice, pulses, beans, sesame, groundnuts, sugarcane, copper, tin, tungsten, iron, cement, fertilizer, fish and fish products.[55]

A former colony of both Spain and the US, the archipelago of 7,100 islands which makes up the Philippines attained its independence in 1946 after World War II. The Philippine economy is a mixture of agriculture, light industry, and supporting services with its major products being electronics and clothing.[56] The Philippines' economy contracted by more than 10% due to economic recession of 1984-5 and political instability of Aquino administration (1986-1992). However, during the Ramos presidency (1992-98) economic growth rose as a result of a broad range of successful economic reform initiatives intended to spur business growth and foreign investment. Although it suffered again as a result of the

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[52] In May 1990 elections where held with the opposition National League for Democracy (NLD) under the leadership of Aung San Suu Kyi winning. However the military and the SLORC refused to recognize the election result and Aung San Suu Kyi was placed under house arrest from 1989 until 1995 (despite this she was awarded the Nobel Peace Prize in 1991). From 2000 to 2002, she was again placed under house arrest, but later she was put in what Rangoon calls 'protective custody' after a government backed mob attacked her convoy on May 2003

[53] In the Ninth ASEAN Summit in Bali October 2003 ASEAN leaders failed to censure Myanmar to release Suu Kyi, reform its abysmal human rights record and move toward democracy. Instead it put out a statement welcoming a vague blueprint for democracy issued by the Myanmar authority; ASEAN nations have traditionally been reluctant to criticize other members. Burma/Myanmar government, the State Peace and Development Council have recently proposed a road map for Myanmar's political development toward democracy which ASEAN has supported, see 'Myanmar: Difficult road to reconciliation and democracy', *The Jakarta Post*, Jakarta, 9 February 2004; perhaps this is due to increased international pressure and sanctions, particularly after the incident of May, 2003 and the possibility of Myanmar as the chairmanship of ASEAN in 2006 and the inevitable gradual change facing Myanmar, *id.*

[54] In 2002, export to the US made up some 13% of Myanmar total export, bringing revenue of US$ 345 millions, see <http://www.dfat.gov.au/geo/burma/burma_brief.html > at 3/09/2005)

[55] For information on Myanmar see at <http://www.cia.gov/cia/publications/factbook/geos/bm.html > at 7/11/2005

[56] For the Philippines economic overview, see http://www.dfat.gov.au/geo/philippines/philippines_brief.html > at 3/09/2005

Asian financial crisis of 1998, since then the economy has grown. In 2004, it rose dramatically owing to favourable weather conditions, stronger global economic growth and effective government political program interventions. Its exports grew thanks to semiconductor electronic demand worldwide and increasing investment in business process outsourcing and call centres. Its leading exports include electronic microcircuits, finished electronic machinery and garments.

Singapore, originally founded as a British trading colony in 1819, joined Malaysia in 1963 but withdrew two years later and became independent. It is a thriving city-state that has overcome its dearth of natural resources to become one of the juggernaut economies of Asia. Singapore is famous as a champion of hi-tech services. It has become one of the world's most prosperous countries, with strong international trading links as a result of its busy port. Its per capita GDP is the highest among ASEAN members and one of the highest in the world. Moreover, its economy depends heavily on exports, particularly in electronics, chemicals and manufacturing in addition to business and financial services, shipping, construction and tourism. The Singaporean legal system is based on the English common law. Singapore is a republic with a parliamentary system of government the members of which are elected by a general election every five years.[57] In Singapore, the President is the head of state and is elected by Singaporean citizens for a six year term. Meanwhile the Singapore cabinet is led by the Prime Minister who is appointed by the President.

Thailand (formerly known as Siam), is the one South East Asian state which has never experienced foreign rule. It is a democratic constitutional monarchy with Prime Minister Thaksin Shinawatra and head of state King Bhumibol Adulyadej (Rama IX). Historically, a unified Thai Kingdom was established in the mid-14th century. However, a bloodless 'revolution' in 1932 put an end to this absolute monarchy in Siam and since then Thailand has been a constitutional monarchy with a bicameral legislature. Thailand was the hardest hit by the 1998 Asian financial crisis as a result of increased speculative pressure on its currency in 1997. In 1999, Thailand began to recover due to a strengthening in its exports, although it has not completely recovered. Its major products include computers, garments, integrated circuits, gems and jewellery, electronics, and footwear.

[57] For general information on Singapore see
<http://www.dfat.gov.au/geo/singapore/singapore_country_brief.html > at 3/09/2005

Finally, Vietnam is one of the newer ASEAN members. Although Vietnam gained independence from France after World War II, it continued to be ruled by France until 1954 when France was defeated by Communist forces under Ho Chi Minh, who took control of the north. US economic and military aid to South Vietnam grew through the 1960s in an attempt to bolster the government, but US armed forces were withdrawn following a cease-fire agreement in 1973. Two years later North Vietnamese forces overran the south. The Socialist Republic of Vietnam is a one-party communist state in which political power lies with the Communist Party of Vietnam. From an economic point of view, Vietnam is a poor, densely populated country that has had to recover from the ravages of war and the rigidities of a centrally planned economy. Its economy is currently in transition from a pure centrally-planned economy based on agriculture to a socialist market economy. Its major products are rice, coffee, tea, rubber, shoes, food processing, sugar, textiles, and chemicals.

1.4 The Organizational Structure of ASEAN

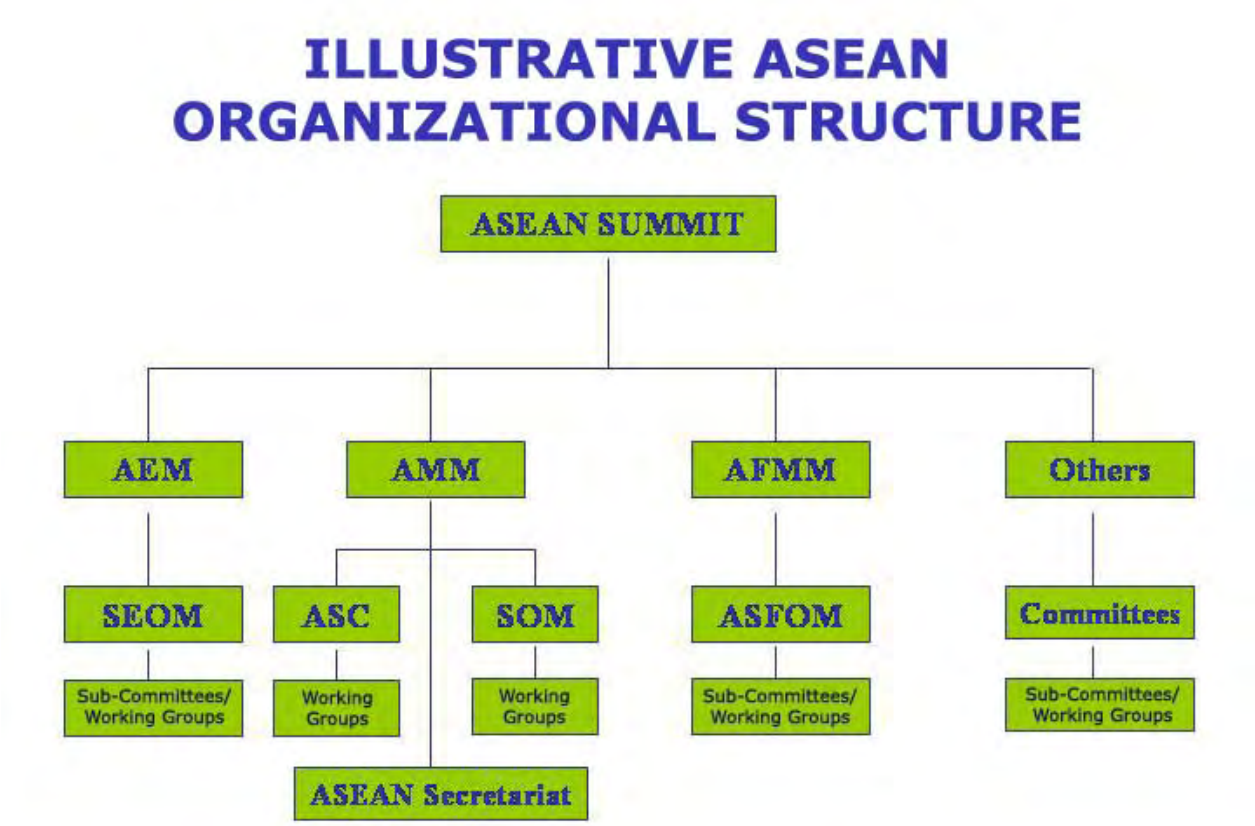

Fig.1: ASEAN Organizational Structure (source: ASEAN Website-September 2005)

AEM	: ASEAN Economic Ministers
AMM	: ASEAN Ministerial Meeting
AFMM	: ASEAN Finance Ministers Meeting
SEOM	: Senior Economic Officials Meeting
ASC	: ASEAN Standing Committee
SOM	: Senior Officials Meeting
ASFOM	: ASEAN Senior Finance Officials Meeting

As illustrated in figure 1 above, ASEAN is a highly decentralized organization composed of several bodies rather than one supranational body.[58] The advantage of this type of structure is that it allows for officials from all different levels of its member countries to become involved in its organization. It also allows for greater flexibility for

[58] See Paul J Davidson, *The Legal Framework for International Economic Relation*, (1997), 19-24; Chng Meng Kng, 'ASEAN's Institution Structure and Economic Cooperation', (1990) 6 *ASEAN Economic Bulletin* 198; Tan (ASEAN Economic), above n 33, 16-22; Frost, above n 2, 19.

changes and adaptation.[59] The disadvantages are that this organizational structure lacks an integrated decision-making structure and suffers from institutional and procedural deficiencies.[60] For example, despite being charged as a body which functions to give political direction, the ASEAN Summit is characterized more accurately as an organizational symbol and signatory of protocols with the actual key decision-making organs in ASEAN being the AMM and the AEMM. The AMM is responsible for political, social, and cultural relations while the AEMM was given full responsibility over all matters pertaining to economic cooperation. In some situations there is an overlap of responsibility between both. For example, the external relationship of ASEAN with its dialogue partners[61] rests with the AMM even though it arguably more properly belongs under the purview of the AEMM. In addition, work in tackling problems and undertaking initiatives flows from the heads of government to ministers to senior officials to regional committees and finally to the ASEAN Secretariat. Together with the use by ASEAN of consultation and consensus at all levels of decision making this process may be highly inefficient. Compounding this, ASEAN currently has more than a hundred committees and subcommittees with frequently changing personnel. This renders decision making an extremely complicated and lengthy process.

1.4.1 The ASEAN Heads of Government Meeting (ASEAN Summit Meeting)

The Heads of Government Meeting, also known as the ASEAN Summit Meeting, remains undefined, even though it is described as 'the highest authority in ASEAN' empowered 'to lay down directions and initiatives for ASEAN activities.' In addition, the Singapore Declaration of 1992 stated that the ASEAN Head of Government (AHG) shall meet formally every three years with informal meetings in between.[62] This constitutes as the most significant institutional development of ASEAN.[63] In 1976, the AHG had its' first

[59] Kng, above n 58, 272
[60] Muthiah Alagappa, 'Institutional Framework: Recommendations for Change', in K.S Sandhu et al (eds), *The ASEAN Reader*, (1992), 65
[61] For dialogue partners, see section 1.4.7 below
[62] The Singapore Declaration of 1992, 28 January 1992 (one of the agreements resulted from the 4th ASEAN Summit of 1992), see test < http://www.aseansec.org/1396.htm > at 30/08/2005, ¶ 8
[63] This was proposed by a Task Force was launched at the fifteenth AMM on 14 June 1982. For the chronologic detailed of the AHG's evolution, see Anwar, above n 29, 86-87; see also M.C. Abad, 'The

time meeting ever, then in 1987 the AHG agreed to have meeting every three to five years.[64] At least for the last decade, the ASEAN leaders had its' annual informal meetings regularly in between its' formal meetings. The ASEAN Summit now has become the most important event in ASEAN's activities calendar.

The ASEAN Summit does not play a key role in the administration and management of regional cooperation in ASEAN. Indeed, prior to 1992, the Summit was only convened when there were important policy directions to agree upon, or an important agreement to ratify. In almost a quarter of a century since the Association was founded, the ASEAN Heads of Government had only met three times. During the first few years, 'the ASEAN leaders were engaged in a largely rhetorical search, unable to agree on specific long-term economic intentions or to decide on a substantive program for economic cooperation,'[65]and practically nothing was achieved on the economic front. Rather, these years were spent by ASEAN members essentially getting to 'know each other' and to learn to cooperate after at least two hundred years of separation.[66] At the fourth Summit held in Singapore in 1992, however, it was decided to institutionalize and regularize the meetings on a three year schedule with informal meetings being held in between.[67] The ASEAN Summit has now become an annual event and is the most important event in the ASEAN calendar.

1.4.2 Ministerial Level Meetings

Established under the Bangkok Declaration of 1967, the Annual Meetings of ASEAN Foreign Ministers (AMM) represent the highest decision-making body responsible for the formulation of policy guidelines and the coordination of all ASEAN activities. These meetings are convened annually by member states on a rotational basis. The AMM

Association of Southeast Asian Nations: Challenges and Responses', in Michael Wesley (ed), *The Regional Organizations of the Asia-Pacific: Exploring Institutional Change*, (2003), 40,42

[64] Joint Communique the third ASEAN Head of Government Meeting, Manila, 14-15 December 1987, see http://www.aseansec.org/5107.htm > at 30/08/2005

[65] Marjorie L Suriyamongkol, *Politics of ASEAN Economic Co-operation: The case of ASEAN Industrial Projects*, (1988), 53

[66] Amando Castro, 'Economic Cooperation and the Development of an ASEAN Culture', in R P Anand and P V Quisumbing (eds), *ASEAN: Identity Development and Culture*, (1981), 228

[67] See Singapore Declaration 1992, above n 62, ¶ 8

has several committees responsible for special projects within ASEAN.[68] Under those committees there are long lists of sub-committees, working groups and task forces (29 committees of senior officials and 122 technical working groups).[69] AMM committees cover such topics as, Social Development, ASEAN Cooperation in Environment, ASEAN Cooperation in Science and Technology, ASEAN Cooperation on Food, Agriculture and Forestry, Culture and Information. Meanwhile, special projects under supervision of the AMM include the ASEAN Conference on Civil Service Matters, the ASEAN Law Ministerial Meeting, the ASEAN Ministerial Meeting on Trans-national Crime, and the Directors-General on Immigration Consular Meeting.

Since the 1976 Bali Summit, the responsibilities of the AMM have been limited to political, diplomatic and cultural matters with economic matters falling under the jurisdiction of the ASEAN Economic Ministerial Meetings (AEM). The AEM is responsible for the formulation of recommendations on ASEAN economic co-operation; monitoring and reviewing previously agreed projects on economic co-operation, and consultation between member countries on all aspects of ASEAN economic cooperation. Meetings are held every six months and are complimented by the AEM Retreat, which is also attended by the same ministers but in an informal setting. Committees under the AEM include the AFTA Council[70], the Committee on Cooperation in Investment, the Committee on Cooperation in Transport, ASEAN Cooperation in Telecommunication, ASEAN Cooperation in Energy, ASEAN Tourism Cooperation and ASEAN Cooperation in Finance. These permanent committees have a number of sub-committees, working groups and other bodies, who report to them.

The AEM and AMM report jointly to the ASEAN Heads of Government at ASEAN Summits as does the more recently formed ASEAN Finance Ministers' Meeting (AFMM). Preceded by an Informal ASEAN Senior Finance and Central Bank Deputies Meeting (ASROM) held in 1997 in response to the Asian debt crisis,[71] the AFMM was formed in 1998 to discuss the causes of the financial crisis and promote adoption of policies to restore

[68] Committees under the purview of AMM, see < http://www.aseansec.org/14435.htm> at 05/05/03
[69] Overview ASEAN, see < http://www.aseansec.org/64.htm > at 19/02/03
[70] For discussion of the ASEAN Free Trade Area (AFTA) Council see section 3.2.3 (Chapter 3)
[71] Joint Ministerial Statement of the Special AFMM, Kuala Lumpur, 1 December 1997, see, the text at <http://www.aseansec.org/2460.htm > at 7/10/2004

economic and financial stability in the region. The AFMM has produced a number of policies dealing with, *inter alia*, globalization, enhancing the stability and strength of the financial system, promoting flexible exchange rates, providing market-based incentives to improve the allocation of capital and improving information dissemination and corporate governance. In short, the AFMM coordinates regional, co-operative financial initiatives including customs, insurance, taxes, and regional self-help and support mechanisms.

In addition to the AMM, AEM and AFMM, there are a number of other ASEAN Minister's meetings including those on agriculture and forestry, transnational crime, telecommunications, law, health, labor and information.

1.4.3 ASEAN Standing Committee (ASC)

The ASC is the policy arm and organ of coordination between ASEAN and the AMM and the body which carries on the work of the Association in the inter-session between AMMs. The ASC meets every two months and is the principal organ of ASEAN. The ASC is organized in the country where the AMM is to be held and is chaired by that host nation's Foreign Minister. The ASC, which reports directly to the AMM, is comprised of a Chairman, the Secretary-General of ASEAN, and the Directors-General of the ASEAN National Secretariats. As an advisory body to the permanent committees, the ASC reviews the work of the committees with a view to implementing policy guidelines set by the AMM.

In practice, the Directors General of the National ASEAN Secretariats perform the work of the ASC[72] which submits an annual report and recommendations of the various ASEAN committees to the Ministerial Meetings. The ASC also receives reports from a number of special committees which have been set up to deal with ASEAN's relations with non-member states. There are several committees that report to the ASC, namely, the Committee of Science and Technology (COST), the Committee of Social Development (COSD), the Committee on Culture and Information (COCI), the ASEAN Senior Officials on the Environment (ASOEN), the ASEAN Senior Officials on Drug Matters (ASOD) and

[72] The seat of the ASC rotates among members annually which also affect its memberships. As a result, it is not working effectively, as the real standing of the ASC is the ASEAN Directors-General, see Kng, above n 58, 269; essentially the ASC merely rubber-stamps the decisions of the Directors-General, *id.*

the Civil Service Matters-the ASEAN Conference on Civil Service Matters (ACCSM). Meetings of these committees are rotated amongst the ASEAN capitals.

1.4.4 ASEAN Secretariat

The ASEAN Secretariat, established after the Bali Summit of 1976 in Jakarta, is an administrative body with no executive power. It is headed by a Secretary-General who is appointed by the ASEAN Heads of Government with the recommendation of the AMM. The Secretary-General is accorded ministerial status with the mandate to initiate, advise, coordinate and implement ASEAN activities and is responsible to the Summit and the AMM. Originally, the Secretariat was comprised of the Secretary-General and seven other officials nominated by each government. However, the 1992 Singapore Summit agreed to strengthen the Secretariat so that it could more effectively support the Summit's initiatives. The Protocol amending the Agreement on the Establishment of the ASEAN Secretariat, signed at the 25th AMM in Manila in 1992, provided the Secretariat with a new structure and an expanded set of functions and responsibilities to initiate, advice, coordinate and implement ASEAN activities. The Secretariat should function as a coordinating Secretariat to help facilitate effective decision-making within and amongst ASEAN bodies. The Secretariat now consists of four Bureau Directors (one each for economic integration, finance and integration support, external relation and coordination and resources development who assist the Secretary-General and are supported by a number of Deputy Directors.

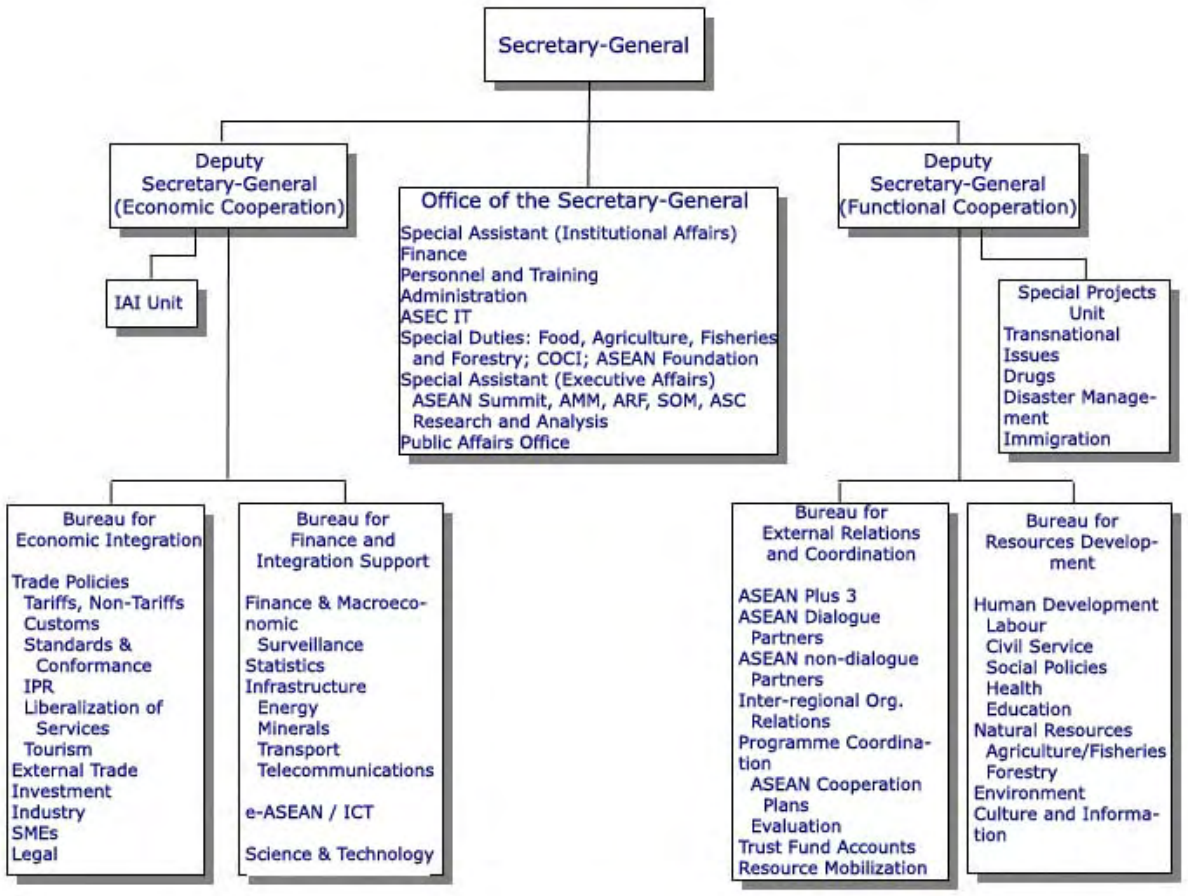

Fig 2. ASEAN Secretariat org structure 1

(Source: ASEAN Website- September 2005)

1.4.5 The ASEAN National Secretariats

A particular feature of the original ASEAN structure established under the Bangkok Declaration are the ASEAN National Secretariats which have been set up in each member country to carry out the day-to-day work of the Association on behalf of that country. A Director General heads each ASEAN National Secretariat. The National Secretariats meet on a formal basis to service the annual or special meetings of foreign ministers, standing committees, and other committees.

1.4.6 Other Organs

A number of other organs and positions are part of the ASEAN structure. The Joint Ministerial Meeting (JMM), established by the 1987 Manila Summit, is comprised of the ASEAN Foreign and Economic Ministers under the joint chairmanship of the AMM and AEM. It meets as and when necessary to facilitate the cross-sectoral coordination of and consultation about ASEAN activities. The Senior Officials Meeting (SOM) is a meeting of senior officials at the Permanent Secretary or equivalent level, from the foreign ministries of each member country. It meets to discuss political matters pertaining to the activities of the AMM. Similarly, the Senior Economic Official Meeting (SEOM) is a meeting of senior officials from economic ministries. Given formal status by the Third Summit in 1987 the SEOM and the SOM meet to discuss all matters relating to ASEAN economic cooperation before they are submitted to the AEM. The Joint Consultative Meeting (JCM) is comprised of SOM, SEOM and ASEAN Director-Generals and conducts inter-sectoral coordination of ASEAN activities at the official level. Each of these meetings is supported by a number of committees which meet on a regular basis, including the Committee on Culture and Information (COCI); the Committee on Social Development (COSD); the Committee on Science and Technology (COST); the ASEAN Senior Officials on the Environment (ASOEN); the ASEAN Senior Officials on Drug Matters (ASOD) and the ASEAN Conference on Civil Service Matters (ACCSM).

1.4.7 ASEAN committees in third countries ('Dialogue Partners')

ASEAN conducts meetings with non-member states outside the region who are referred to as 'Dialogue Partners'. These meetings were initiated after the ASEAN Summit of 1992 established an institutionalized structure for dealing with Western Industrialized Countries that become formal Dialogue Partner of ASEAN. Annual meetings are held with the Foreign Ministers of ASEAN 'Dialogue Partners', currently Australia, Canada, China, the European Union, India, Japan, the Republic of Korea, New Zealand, the Russian Federation, the United States of America, and the United of Nations Development Program. ASEAN also promotes cooperation with Pakistan on certain issues.

The Dialogue Partners are invited to meet with ASEAN at the Post Ministerial Conference (PMC), which is held immediately after the AMM. To further support the conduct of its external relations, ASEAN has established committees composed of heads of diplomatic missions in the following capitals, Brussels, London, Paris, Washington D.C., Tokyo, Canberra, Ottawa, Wellington, Geneva, Seoul, New Delhi, New York, Beijing, Moscow and Islamabad.

ASEAN also maintains contact with other inter-governmental organizations, namely, the Economic Cooperation Organization, the Gulf Cooperation Council, the Rio Group, the South Asian Association for Regional Cooperation, and the South Pacific Forum. Most of the member countries also participate actively in the activities of the Asia Pacific Economic Cooperation (APEC), the Asia-Europe Meeting (ASEM), and the East Asia-Latin America Forum (EALAF).

1.5 Decision making in ASEAN

Decision-making processes are central to the effective functioning of international organizations and both the legitimacy and legality of the decisions they take. Writing in 1965 Jenks stated:

> There is no more difficult problem confronting international organizations today than that of evolving modes of taking important decisions which will command general respect and give such decisions the weight necessary to make them effective in practice. The problem has been a continuing one throughout the history of international organizations and we are still far from having achieved any satisfactory solution of it.[73]

The statement is still true today, especially as regards ASEAN and its decision making processes.

1.5.1 The *musyawarah* and *muafakat*

Decision making processes in ASEAN rely heavily on a minimum of organized rule making and the doctrine of consensus as embodied in the terms *musyawarah* (consultation)

[73] C Wilfred Jenks, 'Unanimity, the Veto, Weighted Voting, Special and Simple Majorities and Consensus as Modes of Decision in International Organizations', in R Y Jennings (ed), *Cambridge Essays in International Law*, (1965),48

and *muafakat* (consensus); not on majority voting. [74] *Musyawarah* describes the process where decisions are made through discussion and consultation, whilst *muafakat* describes the process where consensus is reached. This type of traditional decision making process has been practiced for centuries in village-level political culture in Indonesia and to a lesser degree in Malaysia and the Philippines. As Koentjaraningrat puts it:

> The concept involves the processes that develop general agreement and consensus in village assemblies which emerge as the unanimous decision or *muafakat*. This unanimous decision can be reached by a process in which the majority and the minorities approach each other, by making the necessary readjustments in their respective viewpoints, or by an integration of the contrasting standpoints into a new conceptual synthesis.[75]

The crucial factor in this process is the presence of one or more individuals who by virtue of their leadership are able to bring together varying viewpoints towards a common position acceptable to all.[76] The application of this process has been criticized in the ASEAN context because of concern over a lack of continuity of leadership due to the replacement of many ASEAN leaders in the last decade.

More importantly, however, these two processes exclude the possibility of the majority imposing its views on the minority.[77] This does not mean that disagreements are completely eliminated. However, disagreements rarely occur during the process.[78] Contentious suggestions will be made indirectly or through intermediaries.[79] Parties at meetings place a high value on good will and sacrifice over values such as clear

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[74] For further discussion see e.g., Estrella Solidum, 'An ASEAN Perspective on the Decision-Making Process in the European Community', in Purificacion V Quisumbing and Benjamin B Domingo (eds), *EEC and ASEAN: Two Regional Community Experiences,* (1983), 127-131; Pushpa Thambipillai, 'ASEAN Negotiating Styles: Asset or Hindrance?', in Pushpa Thambipillai and J Saravanamuttu (eds), *ASEAN Negotiations: Two Insights,* (1985), 10-13; Hoang Anh Tuan, 'ASEAN Dispute Management: Implications for Vietnam and an expanded ASEAN', (1996)18 *Contemporary South East Asia* 66; Mely Caballero-Anthony, 'Mechanism of dispute settlement: the ASEAN experience', (1998) 20 *Contemporary Southeast Asia* 38, 40

[75] Koentjaraningrat, "The Village in Indonesia Today", in Koentjaraningrat (ed), *Villages in Indonesia,* (1967), 386-405

[76] Ibid*;* see also, Thambipillai, above n 74, 11

[77] Koentjaraningrat, above n 75, 405

[78] This was found to be the case in Javanese villages. See, N Mulder, *Mysticism and Everyday Life in Contemporary Java*, (1978)

[79] A concept known in the Philippines called *pakikisama* or getting along together with the emphasis on observing correct and smooth interpersonal relations, see, Haas, above n 2, 7 and Thambipillai, above n 74, 26

communication and achievement in order to avoid stressful confrontations. The result is that they agree with what others say and keep their reservations to themselves.[80]

On the surface, *musyawarah* appears to be a simple process which avoids confrontation between parties at a meeting. In reality, the process is not so smooth. It begins with intensive informal and discrete discussions, behind-the scenes, and ends with general consensus among parties. Later, at the more formal meeting, this general consensus becomes the starting point for discussions which usually end in acceptance of a unanimous decision. Reaching consensus can take a long time as; each member must support the decision, at least in principle.[81] However, the bilateral and multilateral relations thereby engendered collectively contribute to solidifying the spirit of togetherness such that when *musyawarah* takes place, the *muafakat* has already been settled elsewhere.

1.5.2 The ASEAN Way: Consensus in ASEAN

In the ASEAN context, the application of *musyawarah* and *muafakat* manifests itself in the requirement that all decisions be reached by consensus. If just one member country disagrees, further negotiations will continue. In these circumstances the next step is typically a protracted effort to reach consensus by overcoming the existing resistance, for instance by finding a compromise. Achieving consensus can often be an arduous process as member countries negotiate from the point of view of their own national interests. Indeed, the decision making process can be a long and frustrating one. Nevertheless, by requiring consensus, ownership of the decisions by and among members is ensured, thereby promoting the effectiveness of decisions and the likelihood of their implementation.

Decision-making processes in ASEAN take place at both the national and regional levels,[82] at both of which consensus are required. At the national level this involves decision making by the staff of the Ministry of Foreign Affairs including all senior officials and the technical officials of the various related sectors of each country, for example, trade, labour, and industry ministries who looks at the specific technical matters concerning

[80] Thambipillai, above n 74, 26
[81] Haas, above n 2, 7
[82] Solidum, above n 74, 128

ASEAN.[83] Clearly, consensus must exist at the national level before a particular matter is adopted and introduced at the regional level. In the ASEAN context, however, there is no single ASEAN policy that emerges from any particular meeting. As Thambipillai puts it:

> What we perceive as an ASEAN policy is actually some form of a synthesis or amalgam of the policies of the different members so that a common stand is projected. Thus the components of the resulting ASEAN policy maintain their identity while encompassing the general thrust, allowing each member to diverge within a certain acceptable boundary. A policy, be it economic or political, once it is decided that it should be pursued collectively, undergoes different stages of formulation and acceptance at the national as well as regional levels.[84]

The size of the country also affects the speed of decision-making. The larger the country, the greater its functions and activities are, which makes it more difficult to agree upon a national policy that is supported by the different sectors.[85] On the other hand, the smaller the country, the less the problems arise, as it is easier for parties to come to an agreement. For example, because of its relatively small size, Singapore appears to have fewer problems in arriving at national positions since it is more cohesive, with smaller groups of people in charge of major sectors. Hence, its priorities are more clearly defined.[86] Effective decision making also depends on the administrative style of different member states.[87] In some states, lower level officials make administrative decisions which are then brought to a higher level for approval. Alternatively, in other states, decisions are made at the top and then sent down to be further studied. The consensus-building process is often slow and tiresome, but it is necessary in order to maintain ASEAN's coherence. By the spirit of consensus and cooperation - referred as ASEAN Way - ASEAN Members have been able to resolve their differences, or at least not to allow them to impede ASEAN cooperation, even when relations among some members have been at low ebb.

At the regional level, consensus must be reached at each level from committee to Ministerial Level. For example, if a committee reaches consensus over a decision, the

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[83] Ibid
[84] Thambipillai, above n 74, 14
[85] Ibid; For instance, a policy of freer trade for a commodity would be discussed inter-departemental and related ministers as a department may say that the commodity needs national protection. Id.
[86] Ibid, 14
[87] Solidum, above n 74, 128

decision must then be affirmed by the respective Ministries and Standing Committees, and then finalized at the annual Minister's Meeting. Thus, before an issue is brought to a regional meeting, it must be discussed, compared and adjustments made by members through all informal channels. This ensures that issues are properly discussed and all possible likelihoods and ramifications considered; the objective being to avoid public disagreement. Thus, this process leads to slow progress to reach final decisions. If an issue is considered likely to be unfavourably received, the issue will be presented in a slightly modified version or disregarded if it is likely to disrupt the cohesiveness of the meeting. In other words, the issues brought to the regional meetings are likely to be those acceptable to all the member countries.[88]

Moreover, the level at which decision making occurs depends on the significance of the issue and the prerogatives given to the negotiators.[89] Sensitive and important issues that affect national interests are handled at the ministerial level, while less important issues are discussed at the committee level. Junior officials only have the authority to look at issues they have already worked on. Furthermore, if consensus is not reached at the committee level, then the parties will refer the decision to the ministerial level. This saves face and avoids difficult situations where the expression of a 'no' would reveal opposition to other parties' ideas and result in embarrassment. By passing on the tasks to higher authority the decision may be postponed but face will be saved and the delay may lead to other accommodations and compromises and the eventual settlement of the matter in question.[90]

ASEAN meetings at all levels arrive at decisions through *mushawarah*. There are no votes and no veto. However, *mushawarah* requires that people must be committed to the results after consensus is reached. It can be said that before people enter a meeting, they must have the intention to come to an agreement, in a sense that everyone involved in the negotiation should have a mental state to agree. This allows everyone to have a sense of ownership of the decision reached. Suffice it to say, ASEAN Members always try to have an element of cohesion in the decision making processes. However, this process is

[88] Bilson Kurus,' The ASEAN Triad: National Interest, Consensus-Seeking, and Economic Co-operation', (1995) 16 *Contemporary South East Asia* 404, 406
[89] Thambipillai, above n 74, 15
[90] Ibid

cumbersome[91] as it involves intensive, informal discussions to gain consensus that becomes the basis of the more formal higher level meetings where further discussions take place until unanimous decisions are reached. Where consensus cannot be reached, members agree to put off a decision, or agree to disagree. Alternatively, proposals can be withdrawn if a dead end appears likely. In the process of reaching consensus, member states can disagree, register objections, stand aside, and not participate, as long as their concerns have already been heard.

The fundamental right of consensus is that all parties have the right to be able to express themselves in their own words and of their own will. The fundamental responsibility of consensus is to assure the right to speak and be heard. Coercion and trade-offs are replaced with creative alternatives and compromise in order to avoid a situation where one party feels that their position on a matter was misunderstood or that they were not listened to. In the case of ASEAN, disagreements, if any, are rarely stated openly. All matters including disagreements are discussed behind the scenes without the glare of publicity. This is different from other international fora and makes ASEAN unique in adopting this process which is intended to 'save face and maintain good relations between the parties'[92] particularly when contentious issues are addressed. In practice, what it means is that the public only ever hears of decisions agreed upon and not the disagreements or alternative positions.

Even in ASEAN, however, it has proved difficult to implement the consensus rule completely since member states often have differing appreciations of issues as a result of the variation in their national interests. Where a state truly believes that a proposal is not the best possible proposal that best meets all needs and concerns, and that it cannot possibly live with the decision, it can block the decision, but only on the grounds that it contradicts

[91] Estrella D. Solidum, "The Role of Certain Sectors in Shaping and Articulating the ASEAN Way", in R.P Anand and P.V. Quisumbing (eds), *ASEAN Identity, Development, and Culture*, (1981), 139, 'If a member is not ready to participate, his participation in the consensus does not oblige him to act on it. All that is needed is his agreement in principle. Some exceptions to this are the cultural projects…and the ASEAN positions in relation to international issues.' Id.

[92] As a result of the consensus principle, conflicts that might result in loss of face can be softened, and a joint responsibility for progress emerges from discussions, see, Haas, above n 2, 7. The'Asian Way' is grounded in the belief that no majority has the right to rule or shame anyone. Ibid. Everyone is entitled to the dignity of their own position and need not lose face. Ibid.

the basic principles of the Association. At this point, the association can still decide to move forward, as a result of the 'ten minus one' formula. Originally introduced as the 'six minus one' formula, the aim of the formula is to allow specific ASEAN programs to proceed with only nine of the nations assenting.[93] This is important because without the ability to move forward, the Association could be effectively stopped by any individual state. The application of this formula is, however, normally limited to economic matters. Another technique introduced by ASEAN known as 'flexible consensus', similarly does not require unanimous agreement among the members states, so long as the final organizational policy does not damage the interests of the dissenting member states.[94] For political issues, however, *muafakat* must be strictly adhered to.[95] Given that political matters relate directly to the sovereignty of member states, it is understandable that agreements relating to these matters should require strict consensus.

In term of consensus, the Recommendations of the High-Level Task Force on ASEAN Economic Integration, adopted at the ASEAN Summit meeting in 2003,[96] recommended that for economic matters, the members should employ consensus, but if there is no consensus, the members can utilize other types of decision making procedures in order to speed up the process of decision-making. [97] It further recommended that the different bodies be charged with the task of resolving different issues. For example, issues of policy should be resolved by AEM/AFTA Council or AIA Council, while technical or operational issues should be resolved by SEOM and the various committees or working groups. By utilizing decision making procedure as recommended, reaching final decision will become much easier and faster. In this respect, practice in ASEAN mirrors that of the

[93] This formula introduced by the former Prime Minister Lee Kuan Yew of Singapore, to allow the other members to proceed with a project even though one member cannot participate, *Far Eastern Economic Review*, 15 March 1984.
[94] Amitav Acharya, '*Multilateralism: Is There an Asia Pacific Way?*, conference paper on *National Strategies in the Asia-Pacific: The Effects of Interacting Trade, Industrial, and Defense Policies'*, Monterey Institute of International Studies, March 1996, p.14 quoted in Shaun Narine, 'ASEAN and the ARF: The limits of the 'ASEAN Way', (1997) 37 *Asian Survey* 959, 961
[95] Caballero-Anthony, above n 74, 40
[96] High Level Task Force on ASEAN Economic Integration annexed to Declaration of ASEAN Concord II (Bali Concord II), see< http://www.aseansec.org/hltf.htm > at 10/10/2003
[97]'Decision-making process by economic bodies to be made by consensus, and where there is no consensus, ASEAN to consider other options with the objective of expediting the decision-making process.' *Ibid.*

WTO which does not require consensus in all cases but also provides for the possibility of a vote if consensus cannot be achieved.[98]

1.5.3 Implementation of decisions

Implementation of decisions in ASEAN proceeds in accordance with the hierarchical structure of the organisation. Decisions adopted by the ASEAN Heads of State usually take the form of a declaration, for example, the Singapore Declaration 1992, the Hanoi Declaration 1998, and the latest, the Bali Declaration 2003. These declarations consist of general provisions on political and security matters, economic, functional cooperation and external relations, and are intended as guidance or directions to other ASEAN institutions underneath. For instance, the Hanoi Declaration 1998 states '[w]e hereby adopt the Hanoi Plan of Action and charge our Ministers and Senior Officials to begin its implementation…'[99]. The institutions below the ASEAN leaders, that is the ASEAN Ministers Meetings, consist of the foreign, economic, finance or others ministers who then sign framework agreements for implementation of the initiatives agreed on in the declarations.

After this point, ASEAN establishes work programs or other schemes to implement the agreements concerned. These programs are generally preceded by research conducted by ASEAN on the particular issues. For example, for economic issues ASEAN established an institution called the Regional Economic Policy Support Facility (REPSF) under the ASEAN and Australia Development Cooperation Program. This body which commenced in March 2002 is basically a funding mechanism.[100] ASEAN then follows by setting up

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[98] Article IX of Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations on Decision making, the text see < http://www.wto.org/english/docs_e/legal_e/03_fa_e.htm > at 12/09/2005; stated that 'The WTO shall continue the practice of decision-making by consensus followed under GATT 1947. Except as otherwise provided, where a decision cannot be arrived at by consensus, the matter at issue shall be decided by voting….' For the decision-making in the WTO, see Claus-Dieter Ehlermann and Lothar Ehring, 'Decision-making in the World Trade Organization', (2005) 8 *Journal International Economic Law*, 51, 55

[99] Hanoi Declaration 1998, see < http://www.aseansec.org/8752.htm > at 21/09/2005

[100] For example, in 2002 ASEAN endorsed several research projects on various issues, such as developing indicators of ASEAN Integration- A Preliminary Survey for a Roadmap, reforming trade in services negotiations under AFAS, liberalizing capital movements in the ASEAN region, etc which once final report completed then would disseminate to the ASEAN institutional authorities, and finally ASEAN will set

Councils or Committees (at working group level) which are then responsible for supervision, coordination and review of the implementation of the schemes or programs.

Implementation of the program is then carried out in each member state. ASEAN agreements, such as ASEAN Ministerial agreements, Ministerial understandings, resolutions and memoranda of understanding are therefore implemented by individual member countries and the implementation of these decisions takes place at the individual state level and is overseen by the ASC and the various council's established pursuant to the agreements. The ASEAN Secretariat monitors the progress of implementation, and reports on this to the relevant ASEAN Ministers Meetings.

The agreements signed by ASEAN Members are regarded as international treaties with like requirements as to ratification and entry into force. ASEAN practice shows that the provisions of the framework agreements often provide that the agreement 'shall enter into force upon the deposit of instruments of ratification or acceptance by all signatory governments with the Secretary-General of ASEAN'.[101] Other framework agreements have similar provisions but with time limitations, for example the framework agreement for AIA (investment) states '…The signatory governments undertake to deposit their instruments of ratification or acceptance within 6 months after the date of signing of this Agreement'. However, some agreements enter into force upon signing, for example, the Agreement on CEPT scheme for AFTA of 1992 and the Framework Agreement on Enhancing ASEAN Economic Cooperation of 1992 stated, 'the agreement shall be effective upon signing'.[102] The manner and time of coming into force of agreements generally depends on the perceived urgency of the particular situation involved.

In terms of the implementation of the agreements, despite a few hiccup ASEAN Members had done quite well. For example, they had lowered tariffs significantly to 2.93 per cent from 12.76 per cent within 10 years (1993-2003) for the older ASEAN Members as the realization of the CEPT scheme of AFTA agreement**.**

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programs or schemes based on these reports, see more detailed see <http://www.aadcp-repsf.org > at 04/11/2004

[101] For example, Basic Agreement on AICO of 1996, and ASEAN Agreement on Services (AFAS) of 1995

[102] For the text of the agreements see < http://www.aseansec.org/5124.htm and http://www.aseansec.org/5125.htm at 20/09/2005

1.6 The legal personality of ASEAN

As a final issue in the examination of the structure of ASEAN it is necessary to consider the Association's legal personality and therefore its concomitant capacity to operate both on the international level and within the territory of its member states. It is well accepted that international organizations can possess both international and domestic legal personality.[103] The question is, therefore, whether ASEAN is an international organization and, if so, the extent to which it possesses legal personality such that it can exercise rights and assume obligations under either international law [104] or the domestic law of member States and possibly non-member States. In other words, whether ASEAN can conclude treaties with other subjects of international law, in relation to, for example, agreements of technical assistance with a certain state and whether it can enter into contracts with other juridical persons, for example an individual or a publishing firm, for the sale of its publications.

Concerning the legal personality of international organizations, three basic approaches exist.[105] The first is the contract or subjective theory approach which holds that the legal personality of international organizations derives from the will of states explicitly attributed to the organization in a constitutive treaty.[106] This theory recognizes international organizations as subject to international law, but restricts their rights and duties to those expressly delegated to them in their constituent instruments. It has been put in the following words:

> International organizations, in contradiction to states, 'do not come into existence on the basis of general international law when certain facts are present, but through an international convention which contains their constitution' and they 'do not possess the full

[103] See Advisory Opinion of 11 April 1949, *Reparation for Injuries Suffered in the Service of the UN*, I.C. J. Rep (1949) 179 [hereinafter *Reparations case*]

[104] I Seidl-Hohenveldern, *Collected Essays on International Investments and on International Organizations*, (1998), 3

[105] For the discussion of these three approaches see, Henry G Schermers & Niels M Blokker, *International Institution Law*, (1995), 978-979; Brownlie, above n 8, 678-681; Frederic L Kirgis, *International Organization in their legal setting*, (1993), 3-54; Chittharanjan F Amerasinghe, *Principles of the Institutional Law of International Organizations*, (2005), 67-100; Philippe Sands and Pierre Klein, *Bowett's law of International Institutions*, (2001), 470-512

[106] Examples for this are provided in Sands and Klein, above n 109, 471, include the 1951 Treaty establishing the ECSC (Art 6), the 1976 Agreement establishing IFAD (Art.10.sect.1), the 1982 UN Convention on the Law of the Sea (for the International Seabed Authority; Art 176), the 1993 Treaty establishing ECOWAS (Art 88, 1) the 1994 COMESA Treaty (Art 186,1) and the 1994 Protocol on the MERCOSUR institutions (Art 34)

> international personality of the state, but only such rights and duties as follow from their constitution' [107]

This theory however is not quite relevant to the growing number of specialized international organizations which have developed since World War Two and which enjoy international legal personality even though they do not have an explicit legal personality in their constituent charters.[108]

The second approach is the objective theory, which takes the view that as long as organizations operate in a sufficiently autonomous manner, they will have a 'will' independent from their creators, such that they are *ipso facto* international legal persons. According to this theory the legal personalities of international organizations do not depend on the intention (subjective will) of the member states, but are 'bestowed upon the organizations by international law'.[109]

The third approach is the implied powers or functional theory which is supported by the majority of commentators. According to this theory, an international organization should enjoy all rights, which it requires to fulfil its purposes, even though those rights are not provided for in the text of its constituent instruments. In other words, this theory argues that the international organizations have a 'derived' legal personality[110] which arises as a result of the status given to them, either explicitly or implicitly by their constitutive document. If an organization exercises its functions through its organs within international legal communities, such as, by concluding treaties, exchanging diplomats, or mobilizing international forces, according to the implied theory, this organization has international legal personality to the extent necessary to perform these functions, even though its constituent instruments do not provide it expressly with such personality. For example, in the *Reparations Case* the International Court of Justice (ICJ) recognized the right of the UN to bring an international claim against Israel although such a right was not mentioned in the Charter. [111] The ICJ observed that the UN has a variety of functions and if it had not been

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[107] Finn Seyersted, 'International Personality of Intergovernmental Organization', (1964) 4 *The Indian Journal of International Law* 1, 1-2
[108] Esa Paasivirta, 'European Union: From an Aggregate of States to a legal Person', (1997) 2 *Hofstra Law & Policy Symposium* 37, 43
[109] Schermers & Blokker, above n.105, 978
[110] Ibid, 979
[111] *Reparations case,* above n 103, 174

endowed with a legal personality of its own it would be impossible for the UN to fulfil those function.[112]

The ICJ found it necessary to affirm the international personality of the UN before going on to consider whether the UN had the capacity to bring an international claim and that personality was based on its function and subsequent practices, which established the UN with a status separate from that of its Members. In the *Reparations* case the ICJ emphasized four main characteristics for international legal personality, namely:

> (1) the legal personality must be indispensable to the achievement of the organization's objective;
> (2) the organization is equipped with organs and has special tasks; and
> (3) the organization itself must be distinct from and independent of its member states;
> (4) the legal personality has been confirmed by its member states in the practice, namely, the existence of legal powers exercisable on the international plane and not solely within the national systems of one or more states. [113]

The legal personality of international institutions under international law therefore depends on their constitutional status, their actual powers and practice[114] which include the capacity to enter into relations with states and other organizations and conclude treaties with them.

However, it should be borne in mind that unlike states, in exercising their rights, international organizations are bound by a principle of functional limitation.[115] As the ICJ noted:

> Whereas a state possesses the totality of international rights and duties recognized by international law an entity such as the Organization must depend upon its purposes and functions as specified or implied in its constituent documents and developed in practice. International organizations cannot undertake purposes other than those established in their constituent charters, nor can they perform functions or exercise powers other than those

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[112] The Court stipulated that,
'It is difficult to see how such a convention could operate except upon the international plane and as between parties possessing international personality …(it)…can only be explained on the basis of the possession of a large measure of international personality and the capacity to operate upon an international plane …what it does mean is that it is a subject of international law and capable of possessing international rights and duties, and that it has the capacity to maintain its rights by international claims'. Ibid, 179

[113] Ibid; see also, Brownlie, above n.8, 679; Paasivirta, above n.108, 45 and Ramses A Wessel, 'Revisiting the International Legal Status of the EU', (2000) 5 *European Foreign Affairs Review* 507, 515

[114] Shaw, *International Law*, 1997, 191

[115] Rama-Montaldo, 'International Legal Personality and Implied Powers of International Organizations', (1970) 44 *British Yearbook of International Law* 111, 141

> provided in their constituent constitutions, unless they are to be implied through the link of necessity. [116]

The Court has put it in the *Reparations* Case:

> Under international law, the Organization must be deemed to have those powers, which though not expressly provided in the Charter, are conferred upon it by necessary implication as being essential to the performance of its duties. [117]

It is generally considered that in order to be regarded as an international organization and to have some personality under international law, an organization must be established by a treaty between States. These States must be members of this organization,[118] and there must be at least one organ with a will of its own, established under international law.

The constituent instrument of an international organization is almost always a treaty, although in some exceptional cases an international organization may be created by the act of one or more existing international organizations.[119] There is evidence, however, in international practice that international agreements to establish international persons need not take the form of a treaty, or indeed be concluded at the governmental level. Some international organizations have been established by conferences without formal treaty, for example, the Colombo Plan Council and the Asian-African Legal Consultative Committee.[120] The World Tourism Organization came into being as a result of governmental acceptances of a statute elaborated in 1970 by its non-governmental predecessor, the International Union of Official Travel Organizations.[121]

Based on this view it may be said that ASEAN is an international organization since its member States created it through an international treaty (the ASEAN Declaration 1967). ASEAN, however, is not a universal international organization. Rather, it is considered as a regional international organization, created by States sharing a common geographic or

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[116] *Reparations case*, above n 103, 180
[117] Ibid, 182
[118] F Morgenstern, *Legal Problems of International Organizations*, (1986), 19
[119] For example, the Global Environment Facility, was established jointly by the World Bank, UNEP and UNDP, see Sand and Klein, above n 105, 127
[120] Morgenstern, above n.118, 21
[121] R Gilmour, 'The World Tourism Organization: International Constitution Law with a Difference', (1971) 18 *Netherlands International Law Review* 275

policy, bond.[122] In this respect ASEAN is similar to other regional international organizations including the Arab League, the British Commonwealth, the Commonwealth of Independent States (CIS), the Conference on Security and Cooperation in Europe (CSCE), the Council of Europe, the European Commission, the European Union (EU), the South American Common Market (MERCOSUR), the North American Free Trade Area (NAFTA), the North Atlantic Treaty Organization (NATO), the Organization of African Unity (OAU), the Organization of American States (OAS), the Organization for Economic Cooperation and Development (OECD), and the Warsaw Pact.[123]

Although the legal status of ASEAN is not explicitly stated in the ASEAN Declaration, it appears to have consolidated in the last decade as the organisation and its members have become more economically integrated. Nevertheless, the question still arises as to whether ASEAN is, in fact, an international organization. Does ASEAN have international personality under the *Reparations Case* test? This question arises because of the text of the Bangkok Declaration which makes no reference to the issue. Rather it affirms the establishment of ASEAN as 'an Association for Regional Cooperation among the countries of South-East Asia'. It further states that 'the Association represents the collective will of the nations of South East Asia to bind themselves together in friendship and cooperation and, through joint efforts and sacrifices, secure for their peoples and for posterity the blessings of peace freedom and prosperity'.

On one reading this Declaration is only a broad statement of aims, principles and purposes and cannot be classified as an international treaty establishing an international organization[124] and therefore provides no basis for legal personality. However, an alternate reading shows that the Declaration states the aims and purposes of the Association and provides a machinery to carry these out. Arguably it therefore creates an entity distinct from its member states, operating independently on an international level, with the purpose of accelerating 'economic growth, social progress and cultural development…to promote

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[122] J E Hickey, 'The Source of International Legal Personality in the 21th Century', (1997) 2 *Hofstra Law & Policy Symposium,* 9

[123] Ibid. However, regional organizations may be classified in several ways, based on the nature or scope of their functions or memberships, or possibly on the degree of eventual integration that it sought, see A LeRoy Bennett, *International Organizations; Principles and Issues*, (1995), 229-263

[124] Castro, above n 66, 226; George T L Shenoy, 'The Emergence of a legal Framework for Economic Policy in ASEAN', (1987) 29 *Malaya Law Review* 117, 119

regional peace and stability…[and] to promote active collaboration and mutual assistance on matters of common interest in the economic, social, cultural, technical, scientific and administrative fields'.[125] Thus, it is arguable that, despite its form, the Bangkok Declaration can be regarded as a treaty establishing an international organization.[126]

The practice within ASEAN has not necessarily made resolution of this issue easy. Throughout its history ASEAN has preferred to adopt an informal approach to its organizational status. Early proposals for a formal constitution were never accepted, [127] a statement by the Council of Ministers that the existing Declarations and subsequent basic documents were adequate to constitute the foundation of the Association being considered sufficient.[128] This lack of rigid structure in its organizational setup and the maintenance of a high level of individual sovereignty have created obstacles for ASEAN as an organization, particularly with regards to its attempts to improve economic co-operation performance. An attempt was made to address these shortcomings at the Bali Summit 1976 with the adoption of the TAC. This Treaty is significant to the development of ASEAN as an organization as it outlines a number of rights and obligations for its member countries. It is interesting to note that new member countries (Vietnam, Laos, Myanmar, and Cambodia) used the vehicle of the TAC[129] rather than the Bangkok Declaration in order to become members of ASEAN. Therefore, it can be said that the foundation of ASEAN lies in both the Declaration and the TAC. In this respect, the ASEAN Declaration and the TAC can be regarded as the constitution of ASEAN. Whether this resolves the issue remains debatable, however, given the fact that the TAC similarly says nothing about legal personality or privileges and immunities of the Association as an organization.

Accepting that ASEAN is an international organization, however, the real question is the extent of its international legal personality. From an objective point of view it might be argued that ASEAN does not *prima facie,* possess international legal personality, because neither the ASEAN Declaration nor the Treaty of Amity and Cooperation in South

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[125] The ASEAN Declaration, above n 4
[126] Davidson, above n 58, 27
[127] P V Quisumbing, "An ASEAN Perspective on the Legal and Institutional Aspects of the Community Emerging Legal Framework of ASEAN", in P V Quisumbing and B B Domingo (eds), *EEC and ASEAN: Two Regional Community Experiences,* (1983), 76
[128] Ibid, 86
[129] History and Evolution of ASEAN < http://www.aseansec.org/history/asn_his2.htm > at 24/09/01

East Asia (TAC)[130] provide for it. Moreover, since ASEAN has adopted consultation and consensus as its *modus operandi*, it could be said that ASEAN's will is not distinct from that of its member countries and that ASEAN does not therefore automatically have its own will. In other words, it could be argued that ASEAN is not an independent organization as its will is still dependent upon the will of its members. However, the criteria of independent will is not a necessary prerequisite to international legal status and its absence should not, *ipso facto* and *ab initio* prevent ASEAN from having an international legal personality.

According to the objective theory of legal personality ASEAN will have international legal personality if it has its own organs and is able to conclude treaties with other international legal persons.[131] It is undeniable that ASEAN has its own organs, tasks and objectives.[132] However, in terms of its treaty-making power with other international legal persons, ASEAN does not have a single institution that acts on its behalf like, for example, the Council for the EU. In all agreements concluded by ASEAN with other international legal persons, each of the ASEAN member states must individually sign them. This indicates that the agreements are concluded in the name of the Member States rather than in the name of ASEAN itself. In other words, the Member States have not delegated their authority to the ASEAN's institutions.

It should be noted that 'the presence or absence of international personality under international law however does not necessarily determine the legal capacity of an international organization under domestic law of member or non-member states.'[133] In terms of their personality under the domestic law of their member states many international organizations contain explicit provisions within their constituent treaties.[134] For example, the UN Charter Article 104 states: 'The Organization shall enjoy in the territory of each of its Members such legal capacity as may be necessary for the exercise of its functions and

[130] The Treaty of Amity and Co-operation (TAC) was developed at the Bali Summit 1976 as the foundation for a more active ASEAN future, and to accommodate for accession by other States in South East Asia and provide a settlement of disputes provisions.
[131] Its organs includes, ASEAN Summit/ASEAN Head of Government Meeting (AHGM), ASEAN Ministerial Meeting (AMM), ASEAN Economic Minister Meeting (AEM), ASEAN Secretariat
[132] See sections 1.2.2 and 1.4 – 1.4.7 above
[133] Kirgis, above n 105, 19
[134] Some the constituent documents of international organizations silent on this issue, for example, the Western European Union, the North Atlantic Treaty Organization and the Council of Europe, see Jan Klabbers, *An Introduction to International Institutional Law*, (2002), 49

the fulfilment of its purposes.' Similarly, Article 282 {ex 171} of the EC Treaty states that '…the Community shall have legal personality'[135] and stipulates that 'in each of the Member States, the Community shall enjoy the most extensive legal capacity accorded to legal persons under their laws….' The EC Treaty then proceeds by giving some illustrations of what this means: the Community 'may, in particular, acquire or dispose of movable and immovable property and may be a party to legal proceedings'. As the European Court of Justice held in *Costa v ENEL*,

> By contrast with ordinary international treaties, the EEC Treaty has created its own legal system which, on the entry into force of the Treaty, became integral part of the legal systems of the Member States… having its own institutions, its own personality, its own legal capacity and capacity of representation on the international plane.[136]

In the ASEAN context, the Agreement between the Government of Indonesia and ASEAN Relating to the Privileges and Immunities of the ASEAN Secretariat of 1979[137] deals with the legal capacity, privileges and immunities of ASEAN within the territory of its member states, i.e., Indonesia, in particular with regard to the fulfilment of ASEAN functions and purposes. This agreement sets forth with greater particularity the organization's capacity, privileges and immunities in domestic law, in this respect, domestic Indonesian law. Pursuant to this agreement, the ASEAN Secretariat, its premises, staff and archives have been given legal capacity, privileges and immunities. For example, the ASEAN Secretariat has juridical capacity, namely, the capacity to conclude contracts; to acquire and dispose of immovable and movable properties; and to institute legal proceedings.[138] The premises and archives of the ASEAN Secretariat shall be inviolable and shall be under the control and authority of the Secretariat-General as provided in the Agreement.[139]

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[135] For the text of EC Treaty (Treaty establishing the European Community) see <http://europa.eu.int/abc/obj/treaties/en/entr6g.htm#Article_210> at 9/09/2005

[136] Case 6/64 (1964) European Court Reports (ECR) 585 at 593

[137] Agreement between the Government of Indonesia and ASEAN Relating to the Privileges and Immunities of the ASEAN Secretariat, 20 January 1979, see < http://www.aseansec.org/1268.htm> at 09/09/2005 [hereinafter the ASEAN Secretariat Agreement]

[138] Ibid Art 2

[139] Ibid Art 3

Authorities of the host state (Indonesia) may not enter the premises, even for the purpose of affecting an arrest or serving a writ, without the consent of the administrative head (in this case, the ASEAN Secretariat General). Furthermore, ASEAN is immune from search, acquisition, confiscation, expropriation and any other form of interference by any action of the executive, administrative, judiciary or legislature. It is also exempt from taxation, customs duties and other levies, prohibitions and restrictions on imports and exports in respect of articles imported or exported by the Secretariat for its officials.[140] Moreover, the Secretary-General and Staff of the Secretariat, whatever their nationality, enjoy within and with respect to the territory of Indonesia: (i) immunity from legal process in respect of acts including words spoken, written or performed by them in their official capacity and in the discharge of their duties; (ii) immunity from seizure of their official baggage.[141] Moreover, they are exempt from taxation on their salary and emoluments paid to them by the Secretariat. To sum up, regardless ASEAN may categorize as an international legal institution, ASEAN to some extent in order to perform its functions clearly has enjoyed that status at least vis a vis its members.

1.7 Conclusion

ASEAN grew out of destabilized circumstances in the South East Asian region. Its member states were very diverse in terms of economic development, religion, language, colonial background and history, culture, politics and geographical conditions. Despite their differences, however, ASEAN Members decided to work together. It is useful when examining ASEAN always to bear in mind that the common underlying rationale for their cooperation was their feelings of insecurity and their desire to achieve and maintain regional peace, stability and prosperity.

Despite, or perhaps because of its sensitive origins, since its inception ASEAN has succeeded in expanding its membership to include all ten states in the South East Asian region. This means, however that ASEAN is no longer a small and simple organization. Rather, its increased membership has become a considerable constraint on its ability to

[140] Ibid Art 5
[141] Ibid Art 8

move rapidly and purposefully in the current changing world. ASEAN has striven to achieve its goals and overcome this obstacle despite difficulties inherent in the political and cultural differences between its members.

The nature of ASEAN as an intergovernmental association with no supranational body has determined, to a great extent, the character of the ASEAN machinery and its evolution. As a result, the function of ASEAN is largely one of regulating inter-state relationships rather than a body with an active role in determining necessary change in the organization. ASEAN machinery employs a highly decentralized organizational structure which has been flexible enough to accommodate the interests of its diverse members. However, as ASEAN seeks to expand its activities into the economic, politic, socio-cultural, environmental, trans-national criminal and resource spheres, this machinery could become less efficient and effective and hamper ASEAN's ability to function as a significant regional organization.

A particular difficulty for ASEAN lies in its reliance on consensus as a decision making process. Slow and time consuming, this process may have served ASEAN well in the past by allowing it to accommodate the diversity of its members, creating a balance between regional and national interests, and accommodating the non-confrontational manner of ASEAN members' culture in pursuing a common agreement. However, the time has come for ASEAN to consider the adoption of other types of decision-making processes, such as majority vote, in order to speed up decision-making processes thereby allowing it to achieve its new goals of moving towards an integrated economic community capable of competing with other major economic blocs.

While ASEAN may not have its own treaty making power, ASEAN is a permanent association of states which has been designated it own functions and objectives and which is equipped with its own organs. ASEAN has adopted agreements on political economic and socio-cultural matters within ASEAN Members and has dealt with trade agreements with some countries. These agreements are legally binding on the parties. In doing so, ASEAN has developed as a prominent political regional institution in the Southeast Asian region. Economic cooperation however has only recently begun to fully develop and remains on the ASEAN agenda. Developments in this area are significant as they constitute a means by which ASEAN's members can reap benefits from ASEAN as regional group.

This chapter has explored the development of ASEAN as a political association. However, following the global trends in the 1990s towards economic integration, ASEAN has also moved towards becoming a regional economic organization. The nature and development of ASEAN as a regional economic organization is examined in the next chapter.

CHAPTER 2 – ASEAN AS A REGIONAL ECONOMIC ORGANIZATION

2.0 Introduction

The Bangkok Declaration of 1967 which gave birth to ASEAN states that 'the Association represents the collective will of the nations of Southeast Asia to bind themselves together in friendship and cooperation and, through joint efforts and sacrifices, secure for their peoples and for posterity the blessings of peace, freedom, and prosperity'.[1] Thus, as discussed in Chapter 1, ASEAN was established with both a peace and security mandate and an economic one. Indeed, for the first two decades of its existence, political and security concerns were its primary agenda. However, since the 1970s, economic cooperation has become ASEAN's first priority with significant steps having been taken to reduce intra-regional barriers to trade and investment flows.

Mirroring regional economic integration developments elsewhere in the world, all of which present significant opportunities to bestow prosperity on their regions, in 2003, ASEAN leaders adopted the Bali Concord II in which they called for the establishment of the ASEAN Community (AC) by the year 2020. The Community will consist of three pillars relating to security, socio-cultural and economic matters. The third pillar, the ASEAN Economic Community (AEC), is intended to go beyond a mere free trade area to create a truly single market and production base, somewhat similar to the European Union (EU), which will be characterized by a freer flow of goods, services, investment and skilled labour.[2]

This chapter examines the complicated and seemingly tortuous path taken by ASEAN in the economic sphere from the early days of its preferential trading agreements

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[1] The ASEAN Declaration 1967, text see < http://www.aseansec.org/1212.htm> at 24/08/2005

[2] The Declaration of ASEAN Concord II (Bali Concord II), Section B.1 and B.3, see <http://www.aseansec.org/15160.htm > at 11/07/2005[hereinafter Bali Concord II] see also, 'ASEAN Seals Historic Bali Concord II', *Bernama*, 7 October 2003

to the establishment of the ASEAN Free Trade Area (AFTA) and other ASEAN economic initiatives and agreements through to the proposals for the establishment of the AEC.

2.1. The Beginnings of Trade Liberalization in ASEAN

2.1.1 The Bali Concord I 1976

In 1975 the political situation in the region encouraged the ASEAN leaders to take a more active approach to regional economic co-operation[3] as it was felt that a strong economy would prevent the region from succumbing to the local communist insurgency movement.[4] Moreover, during the early 1970s a number of studies had been conducted by outside consultants including the United Nations, the Economic Commission for Asia and the Far East (ECAFE) sponsored by the Asian Development Bank, UNDP and UNIDO, the Asian Industrial Development Council (AIDC) and the Ford motor Company.[5] These studies produced theoretical overviews and made recommendations with respect to the reorientation and adjustment of development strategies away from import substitution in order to promote economic growth.[6] For instance, the UN team which was organized at the request of ASEAN examined the scope of economic cooperation for ASEAN and identified possible ways and means for more concrete cooperation action.[7] These led to awareness that ASEAN needed concrete achievements if it were to be taken seriously. In February 1976, ASEAN leaders held the first Summit (the Bali Summit I), the objective of which was to portray an image of ASEAN as an organization with a clear purpose and economic direction.

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[3] In 1975 the three Indochinese states, Cambodia, Vietnam and Laos became communist that galvanized ASEAN member countries into action to fostering regional cooperation, see Khaw Guat Hoon, 'The Evolution of ASEAN: 1967-1975', in K.S Sandhu et al (eds), *The ASEAN Reader*, (1992), 40-1

[4] S Tiwari, 'Legal Implications of the ASEAN Free Trade Area', (1994) *Singapore Journal Legal Studies* 218, 221

[5] For the detailed reports of these studies, see Marjorie L Suriyamongkol, *Politics of ASEAN Economic Co-operation: The case of ASEAN Industrial Projects, (*1988), 57-69

[6] Ibid, 71

[7] This team headed by G. Kansu, so the report was called as Kansu report in which the scope and techniques of regional economic cooperation for ASEAN were adopted at the Bali Summit I of 1976, see United Nations Industrial Development Organization (UNIDO), *Regional Industrial Co-operation: Experiences and Perspective of ASEAN and the ANDEAN Pact,* (1986), 19

This First ASEAN Summit provided further impetus toward economic cooperation by adopting the Declaration of ASEAN Concord.[8] The Declaration provided for expanded cooperation in the economic co-operations in four major fields. [9] First, the ASEAN governments agreed to carry out co-operation in basic commodities, particularly food and energy. They also agreed to establish large-scale industrial plants that could utilize materials available within the member countries themselves and which would contribute to an increase in food production and help to create employment opportunities. In respect of intra-ASEAN trade the Declaration stated that 'Member States shall cooperate in the fields of trade in order to promote development…' and 'Member States shall progress towards the establishment of preferential trading arrangements as a long term objective on a basis deemed to be at any particular time appropriate through rounds of negotiations subject to the unanimous agreement of member states.'[10] Thus, in this Declaration ASEAN leaders expressly committed themselves to trade liberalization through preferential trading arrangements.[11]

The Declaration further stated that intra-ASEAN trade must be facilitated by co-operation in basic commodities and ASEAN industrial projects. The Member States also agreed to accelerate joint efforts to improve access to markets outside ASEAN for their raw materials and finished products and to set up common approaches and actions in dealing with regional groupings and individual economic powers. Finally, they also agreed to cooperate in the field of technology and production methods in order to increase production and to improve the quality of export products. The Summit also established the meeting of ASEAN Economic Ministers as the highest institution charged with implementing economic cooperation programs. As follow up to the Bali Concord I, ASEAN concluded a number of economic agreements, which are discussed in the following sections. This discussion would give general overview of the background of early economic cooperation in ASEAN and to show the gradual economic steps that adopted by ASEAN so far.

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[8] The Declaration of ASEAN Concord I, see text < http://www.aseansec.org/1649.htm> at 12/09/2005)[hereinafter the Bali Concord I]
[9] Ibid, Section. B
[10] Ibid section B.3.(ii)
[11] The Preferential Trading Arrangements Agreement signed by the ASEAN Economic Ministers in Manila in February 1977, see text < http://www.aseansec.org/2348.htm> at 12/09/2005 [hereinafter the PTAs Agreement]; for the discussion on PTAs, see section 2.1.3 below

2.1.2 ASEAN Industrial Project, the ASEAN Industrial Complementation Scheme and the ASEAN Industrial Joint Venture

The first economic schemes introduced by ASEAN to promote regional integration were the ASEAN Industrial Project (AIP) of 1976, the ASEAN Industrial Complementation Scheme (AIC) of 1981 (also called the Brand to Brand Complementation (BBC)), and the ASEAN Industrial Joint Venture (AIJV) of 1983.

The purpose of the AIP was to assign large-scale government-initiated industrial projects to a different location in each member country. It was envisaged that each member would host at least one such project serving the entire ASEAN market. The host would hold 60 per cent of the project's equity, with the balance shared by the other countries. The objective was to maximize economies of scale and comparative advantage. There were five ASEAN Industrial Projects, namely Nitrogenous Fertilizer projects in Indonesia and Malaysia,[12] Phosphatic Fertilizer project (Philippines),[13] Rock Salt-Soda Ash (Thailand),[14] Diesel Engines (Singapore).[15] The choice of the five industries was based on national preferences that had been expressed prior to the Bali Summit I.

This scheme was of limited success due to the vagueness of the Basic Agreement on AIPS in dealing with issues such as duplication of products between regional and national products. In addition, both ASEAN Member states and the private sector were reluctant to support the scheme because no feasibility studies had been carried out for the financial, technical and operational phases of implementation.[16] Of the five projects proposed under the AIPS scheme, only two were ever implemented.[17] Indeed the implementation of the AIPS scheme required direct political intervention from the ASEAN leaders[18] because of the 'interlocking difficulties' it suffered from which affected its technical and economic

[12] For the Nitrogenous Fertilizer projects in Indonesia and Malaysia, see Suriyamongkol, above n 5, 133-9
[13] For the detailed discussion of this project, see ibid, 139-144,
[14] The detailed explanation of the Rock Salt-Soda Ash see ibid, 145-9
[15] For the Diesel Engines project in Singapore, see ibid, 150-2
[16] Yoshi Kodama, 'Asia Pacific Region: APEC and ASEAN', (1996)30 *The International Lawyer* 366, 371
[17] Only Indonesian and Malaysian urea projects had been implemented, see George T L Shenoy, 'The Emergence of a legal Framework for Economic Policy in ASEAN', (1987) 29 *Malaya Law Review* 117,119, Singapore was obliged to give up the project due to the market considerations of the other members, while Thailand had withdrawn this project due to high cost to implement the project, the Philippines likewise decided to abandon the project as it said that the project was not feasible, see Suriyamongkol, above n 5, 200
[18] Ibid, 160-1

viability due to the absence of financing and technological know-how agreements. There was also no clear division of authority between ASEAN Economic Ministers and the Foreign Ministers on decision making. Finally, the issue of duplication of products remained unresolved.

The plan under the AIC scheme was to allocate different stages of horizontally integrated industries to different ASEAN countries, with the intension of reaping the benefit of specialization and economies of scale. The scheme was assisted by the ASEAN Chamber of Commerce and Industry (ASEAN-CCI)[19] which identified and promoted projects to which ASEAN then gave privileged treatment.[20] In 1983 the first project under this scheme, which involved the production and distribution of automotive parts and components was launched.[21] This first attempt had little impact on intra-ASEAN trade due to a lack of compatibility between countries' production facilities.[22] The second effort focused on the production of particular brands in the automotive sector or brand to brand complementation (BBC). This scheme was widened to include non-automotive products in 1991. This scheme involved a number of Japanese and European auto companies to whom incentives were provided to encourage relocation of domestic production capacity to lower-cost ASEAN countries.[23] However, even this scheme only accounted for a small percentage, i.e., one percent of the total intra-ASEAN trade.[24]

The AIJV program was designed to foster joint ventures in small-scale industries through the incentive of tariff preferences and the encouragement of joint ventures with

[19] ASEAN-CCI is an interaction between the private sectors that represented by the collective of national chambers of commerce from each ASEAN Members, such as, KADIN (Indonesia), NCCI (Malaysia), PCCI (Philippines), SFCCI (Singapore) and JSCCIB (Thailand) and ASEAN, see ibid, 242, see also UNIDO, above n 7, 30; It has an institutional structure designed to facilitate its effective interaction with official ASEAN organs and ensure its participation in the various ASEAN programmes, see at <http://www.aseansec.org/12063.htm> at 13/09/2005, its working group on trade industrial cooperation meet regularly to formulate proposals to enhance ASEAN economic cooperation, ibid.

[20] Kodama, above n 16, 371

[21] See Dewi F Anwar, *Indonesia in ASEAN; Foreign Policy and Regionalism*, (1994), 77 and John P. Goyer, 'ASEAN Free Trade Area: Making the Region more Investment Competitive', *International Executive Reports*, 15 April 1996,11

[22] Goyer, above n 21, 11

[23] This effort however was deficient in that not all ASEAN members participated in this project. Indonesia did not join in because it wanted to protect its domestic automotive industry and market whereas Brunei and Singapore had no domestic automotive industries. Ibid, 12.

[24] Deborah A Haas, 'Out of Others' Shadows: ASEAN Moves Toward Greater Regional Cooperation in the Face of the EC and NAFTA', (1994) 9 *American University Journal of International Law & Policy*, 809,817

foreign companies. The capital for these projects must be owned by the citizens of two or more ASEAN countries and that at least 51 per cent of the shares must be owned by ASEAN citizens except when: (i) the countries participating in a particular AIJV agreed to different rules; (ii) 50 per cent or over of the AIJV products were already produced or to be produced by another member.

However, these economic schemes achieved little success thanks to the nature of ASEAN mechanisms which did not consider the potential for conflict between national regional economic interests and decision making procedures. The requirement of consent by all ASEAN Members, in regional context, in rendered achievement of compromise difficult, and the radical differences in the development status of the member states has always limited ASEAN to moving only as fast as its slowest member.[25] This means, the developed ASEAN members, such as Singapore and Thailand which are open to globalization had to adjust their pace to suit other ASEAN Members' progress. This was further complicated by the fact that each ASEAN member followed its own economic philosophies and economic strategies. For example, Singapore pursued a liberal, outward-oriented trade strategy, while Indonesia and the Philippines employed highly protective, import-substituting strategies, at least until the late 1980s. Additionally, the implementation of regional industrial arrangements in the ASEAN member states was influenced by political and social preoccupations to the detriment of private economic activity. The majority of industrial schemes, such as the allocation of resources and the setting-up of plants, were founded on purely political concerns, [26] and were therefore seldom economically viable.[27]

In these early days, ASEAN Members tended to ignore regional interests. For example, in its approach toward ASEAN industrial cooperation, Indonesia was more concerned with its national trade than with intra-ASEAN trade.[28] In this respect, Indonesia needed to boost its industry but the country did not really need an ASEAN market because

[25] Narongchai Akrasanee and David Stifel, 'The Political Economy of ASEAN Economic Cooperation', *TDRI Quarterly Review*, September 1992, 4
[26] For example, the projects ignored the market support for the end products as ASEAN Members already had this kind of industries, such as, the automotive industries, see Anwar, above n 21, 78
[27] Kodama, above n 16, 371, another example, under the PTA rule of origin, products must contain at least 50 percent ASEAN content to qualify for preferential treatment, was constituted as not economically, ibid
[28] Anwar, above n 21, 102

it had already a sufficient domestic market for its fledgling industries.[29] It was therefore not surprising that these initiatives failed. Moreover, ASEAN countries had traditionally conducted most of their trade with countries outside the South East Asian region rather than with their ASEAN counterparts.[30] Exports to and imports from outside the region outweighed intra-regional trade. Even in the mid 1990s, direct foreign investment from US, Japanese and European multinationals flowed into the ASEAN region, making ASEAN more integrated with the rest of the world through industrial country markets, than with the regional ASEAN market. Each ASEAN member simply continued to pursue their independent trade and investment policies of expanded external trade and investment in the region and ASEAN did not play any role in this process.[31] As a consequence, there was considerable economic stagnancy in the early years of the development of the Association.

Moreover, the ASEAN schemes were only supplementary to national projects as similar projects already existed in national members. For example, in the case of the ASEAN urea plants Indonesia already had a plan to set up such project in Aceh. Also, in the case of the AIC and AIJV projects for the production of automotive components, Indonesia already had a well-developed automotive import-substitution industry where the output products of these projects were absorbed by the protected domestic Indonesian market. Accordingly, these ASEAN projects were 'an ASEAN endeavour in little more than name'.[32]

2.1.3 ASEAN Preferential Trading Arrangements Agreement 1977

The first real step towards the establishment of an ASEAN regional trading block was taken with the introduction, in 1977, of Preferential Trading Arrangements (PTAs) aimed at expanding intra-ASEAN trade through tariff reduction.[33] Achievement of trade liberalization among member states was to be done through the implementation of five

[29] Ibid
[30] In 1990, export to the outside region was eighty-two percent of total ASEAN export while import from the outside region in the same year made up nearly eighty-six percent, see Sherry M. Stephenson, 'ASEAN and the Multilateral Trading System', (1994) 25 *Law and Policy in International Business,* 439, 444
[31] Ibid, 446
[32] Anwar, above n 21, 102
[33] The Preferential Trade Arrangements Agreement was signed by the ASEAN Foreign Ministers on 24 February 1977 in Manila and came into force in 1978, see the PTAs Agreement, above n 11, Article 17

measures[34] designed to complement the products in industrial cooperation and cooperation in basic commodities, particularly food and energy. These measures included the granting of tariff preferences, long-term quantity contracts, preferential terms for the financing of imports, preferential procurement by government entities, and the liberalization of non-tariff barriers on a preferential basis. Of these measures, the extension of tariff preferences has been the most widely implemented.[35]

The PTA Agreement covered many products, including basic commodities such as rice and crude oil. It also covered products of the ASEAN Industrial Projects; products of the expansion of intra-ASEAN trade; and other products of interest to member countries. The Agreement enabled member states to grant preferential tariff rates to one another on a selective basis such that Members received preferential access to each other's market. The arrangement was in effect derogation from the principle of Most Favored Nation (MFN) [36] enshrined in the multilateral trading system.[37] However, this Arrangement was permitted

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[34] Ibid, Article 3

[35] Shenoy, above n 17, 119

[36] All Contracting Parties to GATT apply MFN treatment to one another under Article I of GATT. Most Favored Nation treatment is one of the two basic principles of the WTO agreement (another one is the national treatments), which essentially means non-discriminatory treatment amongst members. This treatment ensures equal competitive opportunity among members. See, Bhagirath Lal Das, *An Introduction to the WTO Agreements*, (1998), 11-12

[37] General Most-Favored-Nation treatment as provided in Article I of GATT 1947, see text at http://www.wto.org/english/docs_e/legal_e/gatt47_01_e.htm (Accessed 12/09/2005)
Article I stated that
1. With respect to customs duties and charges of any kind imposed on or in connection with importation or exportation or imposed on the international transfer of payments for imports or exports, and with respect to the method of levying such duties and charges, and with respect to all rules and formalities in connection with importation and exportation …any advantage, favor, privilege or immunity granted by any contracting party to any product originating in or destined for any other country shall be accorded immediately and unconditionally to the like product originating in or destined for the territories of all other contracting parties'.
2. The provisions of paragraph 1 of this Article shall not require the elimination of any preferences in respect of import duties or charges which do not exceed the levels provided for in paragraph 4 of this Article and which fall within the following descriptions:
(a) …
3. The provisions of paragraph 1 shall not apply to preferences between the countries formerly a part of the Ottoman Empire and …
4. The margin of preference on any product in respect of which a preference is permitted under paragraph 2 of this Article but is not specifically set forth as a maximum margin of preference in th appropriate Schedule annexed to this Agreement shall not exceed:
(a) in respect of duties or charges on any product described in such Schedule, the difference between the most-favored-nation and preferential rates provided for therein; if no preferential rate is provided for, the preferential rate shall for the purposes of this paragraph be taken to be that in force on April 10, 1947, and if no most-favored-nation rate is provided for, the margin shall not exceed the difference between the most-favored nation and preferential rates existing on April 10, 1947;

under the Enabling Clause[38] of the GATT 'Contracting Parties' which allowed derogations to the MFN (non-discrimination) in favor of developing countries (in particular article 2 (c)).[39] Hence, the ASEAN PTAs Agreement was notified and adopted by the Contracting Parties to the GATT under the Enabling Clause on 29 January 1979.[40]

Between 1978 and 1992, however, the value of intra-ASEAN trade under the ASEAN PTA was fairly limited. The main reason for this was excessive bureaucratic procedures coupled with a lack of political will amongst members which impeded the implementation of the above schemes. For instance, the system allowed member countries to exclude goods from the agreement resulting in only a small percentage of intra-ASEAN trade being covered by the agreement by the mid-1980s.[41] As a consequence of the extreme flexibility granted in the ASEAN PTA, there was widespread abuse of the exclusion list. Ultimately, the PTA excluded the vast majority of essential products and was 'limited … to

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(b) in respect of duties or charges on any product not described in the appropriate Schedule, the difference between the most-favored-nation and preferential rates existing on April 10, 1947 …

[38]The text on the enabling clause was adopted as a decision by the contracting parties to the GATT as a result of the Tokyo Round Multilateral Trade Negotiations; See, differential and more favourable treatment, reciprocity and fuller participation of developing countries (Decision of 28 November 1979, L/4903) see <http://www.wto.org/english/tratop_e/region_e/regenb_e.htm > at 13/11/01; This decision provided that the preferential treatment of developing countries would no longer be inconsistent with the MFN clause which is the basic rule for the regulation of trade relations among members. This clause was a compromise between developing countries and developed countries concerned with permanent deviation of the MFN treatment in favour of developing countries through a decision made by the contracting parties. It was approved as an autonomous and internationally agreed upon act of the contracting parties, see, Abdulqawi A Yusuf, 'Differential and More favourable Treatment: The GATT Enabling Clause', (1980)14 (6) *Journal of World Trade Law* 488, 489

[39] The decision of 28 November 1979 (L/4903) reads as follows:

1. Notwithstanding the provision of Article 1 of the General Agreement, contracting parties may accord differential and more favorable treatment to developing countries, without according such treatment to other Contracting Parties.
2. The provisions of paragraph 1 apply to the following: …

(c) Regional or global arrangements entered into amongst less-developed contracting parties for the mutual reduction or elimination of tariffs and, in accordance with criteria or conditions which may be prescribed by the Contracting Parties, for the mutual reduction or elimination of non-tariff measures, on products imported from one another.

[40] GATT Basic Instruments and Selected Documents (BISD) 1979, see also Agreement notified under the Enabling Clause,<http://www.wto.org/english/tratop_e/region_e/not_en_e.htm> at 13/11/01or (L/4768)

[41] Some countries excluded products under the PTA, in order to protect their domestic industries. It was reported that only 2-5 per cent of intra-ASEAN trade was covered by PTA, "Pinpointing snags to ASEAN trade," *Far Eastern Economic Review*, 15 March 1984, 66; See also, Gerald Tan, *ASEAN Economic Development and Co-operation*, (1996), 140-1; Paul Bowles and Brian Maclean, 'Understanding trade bloc formation: the case of the ASEAN Free Trade Area', (1996) 3 *Review of International Political Economy*, 321, 322

a rather absurd free trade in snowplows and other South East Asia non-essentials'.[42] In other words, the flexibilities of the ASEAN PTA coupled with the lack of commitment of the political leaders of the member states to liberalize trade within the community led to preferential treatment on goods of no interest or use to ASEAN traders and consumers.

In addition, the PTA Agreement was not a very effective instrument for increasing intra-regional trade because, with the exception of Singapore, most ASEAN countries were competitive rather than complementary in their economic structure. This means, as they produced similar products for markets outside region, instead of collaborated they competed in gaining trade benefits from international market. For example, they were majority exporters of primary products whose markets were outside ASEAN, and were importers of manufactured goods from countries outside ASEAN.[43] Only a few products were actually traded among ASEAN countries under the PTA. Despite the ASEAN Members' efforts to improve the scheme by amending the tariff preferences under the PTA in 1987,[44] and by implementing a package of measures,[45] this scheme still contributed only a small percentage to the intra-ASEAN trade.

The early attempts at economic cooperation in ASEAN therefore failed to increase the total intra-ASEAN trade, a necessary prerequisite to ASEAN functioning as an integrated economic bloc.

2.1.4. Formation of the ASEAN Free Trade Area (AFTA)

In 1992, in an effort to improve its intra-regional trade as well as to increase its competitive power, ASEAN took a critical step by establishing the ASEAN Free Trade Area (AFTA). The primary motive behind the formation of the AFTA was largely defensive as ASEAN realised that, as an economic group, it was being marginalized in an

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[42] Peter Kenevan and Andrew Winden,' Flexible Free Trade Area: The ASEAN Free Trade Area', (1993) 34 *Harvard International Law Journal* 224, 228

[43] Tan, above n 41, 141

[44] See the Protocol on Improvements on Extension of Tariff Preferences under the ASEAN Preferential trading Arrangements, Manila 15 December 1987, see< http://www.aseansec.org/2354.htm> at 13/09/2005

[45] See Manila Declaration, Philippines, 15 December 1987, see <http://www.aseansec.org/1669.htm> at 13/09/2005; these measures included to reduce the number of items of exclusion list of the member countries, deepen of the margin of preference in the PTA, to loose the content requirement in the rule of origin on case by case basis, see ibid, point 7

increasingly regionalized world economy.[46] The unification of the European market in the form of the European Union ('EU'), which took effect at the beginning of 1993,[47] and the expansion of the Canadian – American Free Trade Agreement to include Mexico in the form of the North American Free Trade Area (NAFTA)[48] led to a belief that a larger portion of world investment would be diverted to North America and Western Europe. ASEAN began to worry that its markets might start to appear less attractive in the eyes of foreign investors.[49] The formation of a free trade area was also seen as a viable response to the slow progress of trade liberalization under the ASEAN PTAs as well as a vehicle to maintain and improve ASEAN's ability to compete with other major competitors, such as NAFTA, the EU, Japan and China.

The AFTA agreement was signed in 1992 with the aim of eliminating intra-regional tariffs, attracting direct foreign investment and improving the efficiency and competitiveness of local manufacturing in all ASEAN countries.[50] With the advent of the AFTA, it was expected that people in ASEAN countries would benefit from lower prices, and higher quality products. The growth in ASEAN trade was also expected to increase the number of jobs, improve the quality of products and encourage local companies to become truly competitive in the regional and global markets.

The AFTA system was developed through a series of three documents. The first of these documents, the Singapore Declaration,[51] summarizes the agreements reached by the ASEAN heads of government on matters of politics, external relations and economic

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[46] John Ravenhill, 'Economic Cooperation in South East Asia: Changing incentives', (1995) 35 *Asian Survey* 850, 852

[47] Treaty on EU, done at Maastricht February 7, 1992 and entered into force November 1, 1993 (commonly referred as the Maastricht Treaty), For the text of EC Treaty (Treaty establishing the European Community) see <http://europa.eu.int/abc/obj/treaties/en/entr6g.htm#Article_210> at 9/09/2005 or 31 *I L M* 247 (1992)

[48] North American Free Trade Agreement between the Government of the United State, the Government of Canada and the Government of the United Mexican States, December 17, 1992, at 32 *ILM* 289 (1993) (preamble to chapter 10), 32 *ILM* 605 (1993) (chapter 10 to Errata table) reprinted in in Ralph H. Folsom, Michael W. Gordon and John A. Spanogle, Jr (eds), *Handbook of NAFTA Dispute Settlement*, (1998)

[49] Haas, above n 24, 811

[50] Questions and answers on the CEPT, see < http://www.aseansec.org/10282.htm> at 16/09/2005; it stated: "The ultimate objective of AFTA is to increase ASEAN's competitive edge as a production base geared for the world market…. As the cost of competitiveness of manufacturing industries in ASEAN is enhanced and with the larger size of the market, investors can enjoy economies of scale in production; In this manner, ASEAN hopes to attract more foreign direct investment into the region". [hereinafter Q & A on CEPT]

[51] Singapore Declaration of 1992, Jan 28, 1992, see <http://www.aseansec.org/1396.htm> 10/05/01or 31 I.L.M 498 (1992) [hereinafter the Singapore Declaration of 1992]

integration. The Declaration outlines a broad program for economic integration encompassing the needs of the various ASEAN members. The AFTA is one aspect of a larger scheme of economic cooperation described in the second document, the Framework Agreement on Enhancing ASEAN Economic Cooperation (Framework Agreement).[52] AFTA is implemented primarily through the provisions of a third document entitled the Agreement on the Common Effective Preferential Tariff Scheme (CEPT-AFTA Agreement).[53] This CEPT-AFTA scheme is the main mechanism for the AFTA. However, for products that are not covered by this scheme, the PTA Agreement or other agreement to be agreed upon, may be used.[54]

There are two main tariff reduction programs under the CEPT-AFTA scheme: the fast track and the normal track.[55] The fast track was applied in the first instance to the fifteen product groups agreed to at the Fourth ASEAN Summit in 1992 for accelerated tariff reductions. These fifteen product categories include pulp, textiles, vegetable oils, chemicals, pharmaceuticals, fertilizers, plastics, leather, rubber, cement, glass and ceramics, gems and jewellery, electronics and lastly furniture. Meanwhile the normal track program covers all other products included in the CEPT which is divided into two stages: first, items with tariffs currently more than 20 percent shall be reduced to 20 % within five to eight years and to between 0-5 percent within seven years thereafter; second, items with tariffs below 20% shall be reduced to between 0-5 percent within ten years.[56]

AFTA is monitored by a ministerial level council, the AFTA Council, established by the CEPT-AFTA Agreement[57] in conjunction with the ASEAN Secretariat. Each ASEAN State has equal representation on the AFTA Council, which is charged with, "supervising, coordinating, and reviewing the implementation" of the agreement. It is assisted in the performance of these functions by the Senior Economic Officials Meeting

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[52] Framework Agreement on Enhancing ASEAN Economic Cooperation, Jan.28, 1992, see <http://www.asensec.org/12374.htm> at 10/05/01 or 31 I.L.M. 506, 508 [hereinafter *AFTA Framework Agrement]*

[53] Agreement on the Common Effective Preferential Tariff Scheme for the ASEAN Free Trade Area, Jan.28, 1992, see <http://www.aseansec.org/12375.htm> at 10/05/01 or 31 I.L.M. 513 (1992) [hereinafter *CEPT-AFTA Agreement*]

[54] AFTA Framework Agreement, above n 52, Article 2.2

[55] See *Q & A on CEPT*, above n 50

[56] Ibid

[57] See *CEPT-AFTA Agreement*, above n 53, art.7 ¶ 1

(SEOM) and the ASEAN Secretariat. The ASEAN Secretariat is primarily responsible for coordinating and monitoring the implementation of the Agreement.[58]

The central goal of the AFTA is the intra-ASEAN liberalization of trade through the implementation of a common system of preferential tariffs. There are several provisions in the CEPT-AFTA Agreement, however, that may give opportunities to the member states to opt-out and declare exceptions to the tariff reduction scheme. For example, Article 2(3) of the Agreement provides a member state with a temporary exclusion at the specific product level if that member state is not ready to include the product in its CEPT scheme. Further the Agreement states, 'for specific products, which are sensitive to a member state, pursuant to article 1 (3) of the Framework Agreement on Enhancing ASEAN Economic Cooperation, a member state may exclude such products from the CEPT Scheme, subject to a waiver of any concession herein provided for such products'. The exclusions may be temporary or permanent. For example, Malaysia indicated that it would continue to exclude its vehicles and spare parts from the list of products under AFTA until January 2005, two years after the 2003 AFTA began.[59] In other words, CEPT scheme allows the members to opt out products for which the members are not yet ready to slash tariffs.[60] In this case, Malaysia did not wish to reduce its tariff for its automotive units until 2005 as it wanted to protect its local auto industry. However, Malaysia finally agreed to reduce its tariff in these items.[61]

Historically, the percentage of intra-ASEAN trade has been relatively modest, with intra-regional trade accounting for 24 per cent of trade in 1965 and the same percentage in

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[58] Ibid

[59] Kuala Lumpur regards the continued success of the local auto industry as crucial and intends to protect its automobile market, 'Tariff Troubles: Exemption requests are undermining AFTA', *Asia Week* 1 September 2000, 51

[60] The CEPT provides options for the ASEAN Members to exclude their products in three instances; (a) temporary exclusion list (this is for products for which the members are not yet ready to slash tariffs); (b) sensitive agricultural products (covers unprocessed agricultural goods which are given a longer time frame for integration into the free trade area; and (c) general exception (for products that are permanently excluded from CEPT for reason of national security, moral an health hazards and articles of artistic, historic and archaeological value, see Q & A on CEPT, above n 50

[61] It was reported that 'the implementation of the CEPT-AFTA Scheme was significantly boosted in January 2004 when Malaysia announced its tariff reduction for completely built up (CBUs) and completely knocked down (CKDs) automotive units to gradually meet its CEPT commitment', that is one year earlier than schedule, see AFTA overview, see <http://www.aseansec.org/12022.htm> at 16/09/2005 [hereinafter *AFTA overview*]; Malaysia has previously been allowed to defer the transfer of 218 tariff lines of CBUs and CKDs until 1 January 2005. Ibid.

1995.[62] While AFTA has successfully reduced tariff barriers (below 5%) in the region, the preferences under AFTA have not significantly boosted intra-regional trade. However, by 2000, 36 per cent of exports from ASEAN members were to other ASEAN nations. While this figure has risen, it is still far lower than the EU's 63 percent.[63] ASEAN's trade outside the region (particularly with Europe and North America) continues to outweigh regional trading patterns. Nevertheless, ASEAN has made significant progress in the lowering its intra-regional tariffs through the CEPT Scheme for AFTA.

Initially the time frame for achieving the free trade area was set at fifteen years, from 1 January 1993 to 1 January 2008. However, in September 1994, the ASEAN Economic Ministers (AEM) reduced the time frame from fifteen to ten years, so that a full free-trade area with tariffs of zero to five percent would be realized by the year 2003. In addition it was agreed to include unprocessed agricultural goods, which were originally excluded from the agreement.[64] However, at the sixth ASEAN Summit in 1998 under the pressure of the Asian financial crisis[65] ASEAN leaders agreed to hasten the implementation of the AFTA. A target date of 2002 was set for the original ASEAN members.

Although ASEAN Members were unable to meet this target date, it was reported in 2003, that more than 99 percent of the products in the CEPT Inclusion List (IL) of ASEAN-6 (Brunei Darussalam, Indonesia, Malaysia, the Philippines, Singapore and Thailand) had been brought down to the 0-5 percent tariff range.[66] The new ASEAN Members had also moved 80 per cent of their products into their respective ILs in which about 66 percent of these items have tariffs of 0-5 percent rates. Vietnam, Laos, Myanmar and Cambodia set the deadlines to bring down preferential tariffs of products in their ILs to no more than 5

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[62] Ross Garnaut, 'ASEAN and the Regionalization and Globalization of World trade', (1998) 14 *ASEAN Economic Bulletin* 210, 215-223

[63] Jason Booth, 'Car makers have big plans for Southeast Asian Free Trade accord' , *The Wall Street Journal*, 2 April 2002

[64]Reducing time frame for AFTA from 15 years to 10 years frame, see Protocol to amend the Framework Agreement on Enhancing ASEAN Economic Cooperation (1995), see <http://www.aseansec.org/12464.htm> at 15/09/2005 and Article 2, Protocol to amend the Agreement on the Common Effective Preferential Tariff Scheme for the AFTA (1995) stipulated that 'This Agreement shall apply to all manufactured products including capital goods, and agricultural products.', see http://www.aseansec.org/12466.htm>15/09/2005; initially under CEPT-AFTA Agreement, AFTA covered all manufactured products – including capital goods, processed agricultural products, and those products failing outside definition of agricultural products as set out in this Agreement. Agricultural products shall be excluded from the CEPT scheme. Ibid.

[65] See Statement on bold measures, 6th ASEAN Summit, 16 Dec 1998, see http://www.aseansec.org/8756.htm >at 7/11/2005; For the explanation of the Asian financial crisis, see section 2.2.1. below

[66] *AFTA overview*, above n 61

percent by 2006, 2008, 2008 and 2010 respectively.[67] These target dates likely were set to suit the capability of these members as they joined ASEAN quite recently.

After ten years of implementation, AFTA has therefore been implemented at least in the ASEAN-6.[68] Moreover, since January 2002, the region has adopted the ASEAN Integrated System of Preferences Scheme whereby preferential tariffs are offered to the newer members by the older members on a voluntary and bilateral basis based on products proposed by the CLMV countries.[69] This approach should speed the progress of economic integration in the region.

It may be true that the full implementation of AFTA would create an integrated market and generate long-term economic stability in this region. However, while ASEAN's primary concern with the AFTA may have been to reduce tariffs, the barriers to intra-ASEAN trade are not limited to tariff matters but also include non-tariff barriers, such as restrictions on foreign investment, product standardization and the hygiene and safety regulations that vary from country to country. Moreover, there are other technical issues besides tariff and non-tariff barriers that require clarification, for example, rules of origin and dumping.[70] Thus, mere elimination of tariff barriers will never be sufficient for the economic integration of the ASEAN region. Harmonization of product standards, rapid customs clearance, and technical regulations are still needed for greater economic integration. Nevertheless, the AFTA agreement represented a very visible statement of ASEAN's resolve on the issue of economic cooperation; a resolve which has continued.

2.1.5. The ASEAN Industrial Cooperation Scheme (AICO)

In 1996 ASEAN launched the ASEAN Industrial Cooperation Scheme (AICO) which superseded the AIJV and AIC Schemes.[71] ASEAN leaders realized that to tackle new challenges and capture opportunities posed by the ever changing world economic

[67] Ibid.
[68] The 17th Meeting of the AFTA Council, 1 September 2003, Phnom Penh, Cambodia, see <http://www.aseansec.org/15071.htm> at 14/09/2005
[69] ASEAN: Narrowing the Development Gap, *ASEAN Knowledge Kit*, May 2005 [hereinafter ASEAN Knowledge Kit]
[70] Jeffrey A Kaplan, 'ASEAN's Rubicon: A Dispute Settlement Mechanism for AFTA', (1996) 14 *Pacific Basin Law Journal*, 173
[71] Basic Agreement on the ASEAN Industrial Cooperation Scheme, done at Singapore, 27 April 1996, <http://www.aseansec.org/2466.htm> at 10/06/2004 [hereinafter Agreement AICO]

environment, ASEAN would have to adjust its programs to keep them up to date. Changes in the global economic landscape, such as the conclusion of the Uruguay Round in 1995, the implementation of the WTO commitments by ASEAN Members, and the implementation of the CEPT Scheme for AFTA also contributed to the need for change. To maintain the attractiveness of ASEAN as an investment region and a premier global production base, ASEAN needed to form a new industrial scheme which offered tariff and non-tariff incentives.[72] AICO basically lifted the tariff barriers between ASEAN countries.

The objectives of AICO include increasing ASEAN industrial production, forming a closer ASEAN integration, increasing investment from ASEAN and non-ASEAN sources as well as increasing intra-ASEAN trade, improving economies scale of production and scope, enhancing the technology base, encouraging internationally competitive ASEAN industries, and industrial complementation. It is intended to operate under the principles of mutual benefit and equitable incentives; it utilizes simplified and uniform applications and administrative procedures. This scheme is also private sector driven which encourages private sector participation. Moreover, this scheme is based on the CEPT Scheme for AFTA to promote investment from technology-based industries and enhance value added activities.[73]

Under the AICO, goods produced and traded between companies operating in two or more ASEAN countries enjoy full AFTA treatment immediately, that is, 0 to 5 percent tariffs. Basically, the AICO scheme promotes joint manufacturing industrial activities between ASEAN-based companies. By applying this measure, AICO products are given a head start on non-AICO products. While the AICO final products - the final output of a specific AICO arrangement - have unlimited market access in participating countries, the intermediate products and raw materials of AICO enjoy a 0 to 5 percent preferential tariff if they are imported as inputs in the manufacture of AICO final products. To date, this scheme has attracted manufacturers from third countries, such as Japan, to invest and take advantage of the particular strengths of each ASEAN country. To date, 63 AICO

[72] ASEAN Industrial Cooperation Scheme, the text see < http://www.aseansec.org/7971.htm> at 16/09/2005 [hereinafter AIC scheme]
[73] Ibid.

arrangements are operating and generating more than US$700 million in trade transactions a year.[74]

2.1.6 The ASEAN Investment Area (AIA)

Another step in the region's economic cooperation was the signing of the ASEAN Investment Area Agreement on 7 October 1998.[75] The objective of the Agreement is the establishment of the ASEAN Investment Area (AIA), which is intended to lead to the free movement of capital in the form of foreign direct investment (FDI).[76] The program for the AIA follows the logic of economic integration by removing investment barriers and facilitating economic flow into the region. The Framework Agreement on the AIA which is binding on ASEAN members is now in force and a ministerial-level ASEAN Investment Area Council (AIA Council) has been established to oversee the agreement's implementation. [77] The AIA promotes the inflow of direct investment into and within ASEAN by making the region an open, liberal and competitive area of investment. The core of the AIA program involves greater investment liberalization and facilitation in ASEAN manufacturing and agriculture, fishery, forestry and mining sectors and services related to these sectors.

Under this Agreement, ASEAN members are obliged among other things, to: implement measures and programs on a fair and mutually beneficial basis; implement measures to ensure transparency and consistency in the application and interpretation of their investment laws, regulations, and administrative procedures in order to create and maintain a predictable investment regime in ASEAN; provide facilitation and promotion

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[74] Economic Integration, <http://www.aseansec.org/13635.htm> at 27/10/03 [hereinafter Economic Integration]

[75] Framework Agreement on the ASEAN Investment Area (AIA), see <http://www.aseansec.org/7994.htm> at 20/09/2005 [hereinafter Framework Agreement on AIA]

[76] The AIA shall be an area where: (i) there is a coordinated ASEAN investment cooperation programme that will generate increased investment from ASEAN and non-ASEAN sources; (ii) national treatment is extended to ASEAN investor by 2010, and to all investor by 2020, subject to the exceptions provided by the Agreement, (iii) all industries are opened for investment to ASEAN investors by 2010 and to all investors by 2020 subject to the exceptions provided by the Agreement, (iv) the business sector has a larger role in the cooperation efforts in relation to investments and related activities in ASEAN and, (v) there is freer flow of capital, skilled labour and professionals, and technology amongst Member States, *ibid*, Art 4

[77] The Framework Agreement on the AIA was signed on 7 October 1998 and as this agreement said that it shall enter into force within 6 month after the date of signing of the agreement, i.e., April 1999 it entered into force, see i*bid*; The AIA Council assisted by the ASEAN Coordinating Committee on Investment. Ibid.

and liberalization processes to support a more liberal and transparent investment environment; undertake measures to enhance the attractiveness of the investment environment; and to ensure observance of the provisions of the Agreement by regional and local government and authorities within their territories. In implementing their obligations under the Agreement, ASEAN Members should undertake the joint development and implementation of programs as specified in Schedules I, II and III attached to the Agreement which cover cooperation and facilitation programs, promotion and awareness programs and liberalization programs respectively.

Each Member State is obliged to open immediately all its industries for investment by ASEAN investors and immediately accord no less favorable treatment than it accords to its own investors and investments (national treatment) in respect of all industries and measures affecting investment including but not limited to the admission, establishment, acquisition, expansion, management, operation and disposition of investment, treatment. Accordingly, current and potential investors can benefit from the AIA Agreement if they are qualified as ASEAN investors. As ASEAN investors, they have better access to industries and economic sectors offered by the ASEAN members. They also receive national treatment and greater transparency, including easy access to information and awareness of investment opportunities. ASEAN Members would construct more liberal and competitive investment regime so that the ASEAN investors get lower transaction costs.

The privileges offered by the AIA Agreement on investment market access and the granting of national treatment are, however, subject to exemptions, namely, the Temporary Exclusion List (TEL), Sensitive List (SL) and General Exception List (GEL).[78] The AIA agreement has now expanded to cover manufacturing, agriculture, mining, forestry and fishery sectors, and services incidental to these sectors.[79] The end date for phasing out the TEL for the manufacturing sector, with the exception of Cambodia, Laos and Viet Nam,

[78] TEL contains industries and investment measures that are temporarily closed to investment and not granted national treatment, but will be phased out within specific timeframes, SL covers industries and investment measures that are not subject to phasing out, but will be reviewed by the AIA Council in 2003 and thereafter at subsequent intervals, and GEL consists of industries and investment measures that cannot be opened up for investment or granted national treatment because of reasons of national security, public morals, public health or environmental protection, see *Handbook on investment in ASEAN* <http://www.aseansec.org/8024.htm > at 20/09/2005

[79] See Investment, at <http://www.aseansec.org/7984.htm > at 7/11/2005 [hereinafter Investment]

was in 2003. This date line is likely fulfilled as on 1 January 2003 these countries opened up more industries and granted more investment measures to foreign investment by phasing in the list of sectors and investment measures in the TEL.[80] For Cambodia, Laos and Vietnam the end date for the TEL for the manufacturing sector will be in 2010. Meanwhile the end-dates for phasing out the TEL for agriculture, fishery, forestry and mining and services to the five sectors would be 2010 for ASEAN-6[81] and Cambodia, 2013 for Vietnam and 2015 for Lao PDR and Myanmar. The ASEAN Investment Area Council (the AIA Council) will review the TEL every two years and the SL at regular intervals to ensure that the objectives of the AIA Agreement are met. Regular reviews have been done by the AIA Council, to date, it had its' eight meeting on 27 September 2005 reviewed the development of the AIA during past years.[82]

The AIA promotes the inflow of direct investment into and within ASEAN by making the region an open, liberal and competitive investment area and granting national treatment to ASEAN investors.[83] This initiative has attracted direct foreign investment (FDI) flows into the region as a major source of finance for economic development. The annual rate of FDI flows to the ASEAN region was 40 percent on average between 1990 and 1997 with Malaysia, Myanmar and Vietnam having more than 50 percent FDI composition.[84]

ASEAN members continue to undertake measures individually and collectively to further liberalize investment regimes in order to provide competitive and attractive investment environments.[85] These measures include a hundred percent foreign-equity ownership in high tech manufacturing and export-oriented industries (Brunei Darussalam, Malaysia, Thailand and Indonesia), a hundred percent foreign-equity ownership in

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[80] Ibid
[81] ASEAN-6 is the older ASEAN Members which comprise Brunei Darussalam, Indonesia, the Philippines, Singapore, Thailand and Malaysia
[82] Joint Media Statement of 8th AIA Council Meeting, Vientiane, Laos, 27 September 2005, < http://www.aseansec.org/17757.htm > at 7/11/2005
[83] An ASEAN investor is defined as one who meets the nationality or equity requirement of the member country where the investment is made, see Economic Integration, above n 74; this means a firm owned by a multinational enterprise with an investment project in a host country that meets the nationality or equity requirement will get the same privileges under the AIA as a national of that host country, ibid.
[84] ASEAN Investment Area (AIA): An Update, <http://www.aseansec.org/10892.htm> at 10/06/2004 [hereinafter AIA an update]
[85] Ibid.

wholesale and retail trading companies and a hundred percent foreign-equity ownership for listed Indonesian banks (Indonesia). Other measures include a duty exemption on imported capital goods required by promoted investment project (Lao), the possibility to own land with limited exceptions (Malaysia), a three-year corporate tax exemption to investment projects in all sectors and the privilege of duty-free import on raw materials to all industrial investments for the first three years of cooperation (Myanmar). Still others include opening the retail and distribution sectors as well as domestic private construction sectors to foreign equity (Philippines), offering a business cost-reduction package and extending a 30 % corporate investment tax allowance on a liberal basis to industrial projects and to selective service industries (Singapore). Finally, Vietnam has allowed duty exemptions for imported capital goods for all projects, on the importation of raw materials for production in encouraged investments and for projects located in mountainous or remote regions for the first five years of operation.[86]

2.1.7. The ASEAN Framework Agreement on Services (AFAS)

To further cross border cooperation and supplement and complement the liberalization of trade in the region, ASEAN has also established the ASEAN Framework Agreement on Services (AFAS) adopted at the 5th ASEAN Summit in 1995. [87] This agreement aims to establish a free trade area in services among ASEAN Members through mobilization of the private sector in order to improve the efficiency and competitiveness of the service industries in ASEAN member states. The member states are to strengthen and enhance existing cooperation efforts in this sector through 'establishing or improving infrastructural facilities, joint production, marketing, and purchasing arrangements, research development and exchange information'.[88]

Moreover, under AFAS the Member States are to enter into negotiations on measures affecting trade in specific service sectors which negotiations should be directed toward achieving commitments which are beyond those inscribed in each Member States'

[86] Ibid
[87] ASEAN Framework Agreement on Services, text at < http://www.aseansec.org/6628.htm > at 21/09/2005 [hereinafter *AFAS*]
[88] Ibid. Article II.2

schedule of specific commitments under the General Agreement on Trade in Service (GATS) and for which Member States shall accord preferential treatment to one another on a MFN basis. In other words, through AFAS, ASEAN should liberalize trade in services in the region by expanding the depth and scope of liberalization beyond those under taken by Member States under GATS.[89]

ASEAN Members have held a number of negotiations to achieve the objective of AFAS. Each negotiation has produced a package of commitments that each ASEAN Member has agreed to on economic sector/sub-sector and mode of supply. Three negotiations have already been concluded and have produced four packages signed by the AEM which provide for the details of commitments from each ASEAN Member to the others. [90] The first package was implemented from 1996 to 1998. The second package was issued in 1999, and the third in 2001, while the latest, the fourth package, was issued in 2004 and was implemented on 31 March 2005. Pursuant to this package, ASEAN also issued a number of annexes relating to implementation of the fourth package.[91] In these annexes, each ASEAN Member provides their horizontal commitments schedules of specific commitments and the list of Most Favored Nation Exemptions.[92] So far AFAS has promoted services in the following sectors: air transport, business services, construction, financial services, maritime transport; telecommunication and tourism.[93]

In 2003, a Protocol to amend the AFAS was issued which in particular revised Article IV of AFAS relating to negotiations on measures affecting trade in specific service sectors. [94] By considering Article II paragraph 1 of AFAS that stated, '…two or more Member States may proceed first if other Member States are not ready to implement these

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[89] Ibid, Art. I.(c)
[90] Services: ASEAN is an important market of trade in services, <http://www.aseansec.org/8205.htm at 21/09/2005 [Services: ASEAN is important market]
[91] See Annexes to the Protocol to implement the fourth package of horizontal commitment under the AFAS, text at <http://www.aseansec.org/16900.htm > at 7/09/2005)
[92] Ibid
[93] Services: ASEAN is important market, above n 90
[94] The Protocol to amend the AFAS, Phnom Penh, Cambodia, 2 September 2003, see <http://www.aseansec.org/AFAS_Amendment_Protocol.pdf > at 7/09/2005)[hereinafter *the Protocol to amend the AFAS*]; Article IV of AFAS is about negotiation of specific commitments which stated, inter alia, 'Member States shall enter into negotiations on measures affecting trade in specific service sectors. Such negotiations shall be directed toward achieving commitments…', ibid, para.1; It further stated: 'Each Member State shall set out in a schedule the specific commitment it shall undertake under paragraph 1', ibid, para.2

arrangements'[95] (the ASEAN-X formula),[96] the Protocol provides that this formula should also apply to Article IV of AFAS. It added Article IV *bis*, which provided that '…two or more Member States may conduct negotiations and agree to liberalize trade in service for specific sectors and sub-sectors…'[97] By utilizing this formula, liberalization in services in ASEAN could be expedited as the ASEAN Members that are ready can proceed first with the service liberation process. It also stated that it should enter into force on 31 December 2004. Thus, this formula was implemented for the fourth package commitment of AFAS and a protocol on implementation has been issued. [98]

2.2 Development of the ASEAN Economic Region

2.2.1 The Asian financial crisis

It is now a matter of historical record that, in the period between 1980 to1996, Singapore, Thailand, Indonesia and Malaysia became the primary industrialized countries in the South East Asian region, reaching the same levels of economic growth enjoyed by Japan, Korea, Hong Kong, Taiwan and China.[99] Their economic development became known as the 'Asian economic miracle' best illustrated by 'the flying geese pattern of economic development' in which Japan was the leading goose.[100] Hong Kong, Taiwan, Singapore and Korea all followed Japan in their economic success, followed then by Indonesia, Thailand, Malaysia and the Philippines and finally, China. Admittedly, Singapore, Thailand, Indonesia and Malaysia, achieved their economic success through trade liberalization of their national economies rather than through economic cooperation

[95] See *AFAS*, above n 87, Article II para.1.
[96] The ASEAN-X formula is a parameter which allow, among other things, two or more member countries to move ahead with service liberalization, and the others to join in at a later date when they are ready, see the 34th AEM Meeting, 12 Sept 2002, < http://www.aseansec.org/12548.htm > at 7/11/2005
[97] *The Protocol to amend the AFAS*, above n 94, Art II
[98] Protocol to implement the fourth package of commitments under AFAS, < http://www.aseansec.org/16891.htm > at 7/11/2005; It should enter into force no later than 31 March 2005.
[99] The GDP per capita for Indonesia, Malaysia, Singapore and Thailand in 1996 (in US dollars) was 1266, 4764, 25511, and 3037 respectively, with GDP annual percentage was 8, 10, 8.2 and 5.9 respectively compare to GDP annual percentage of China, Hong Kong, Japan and Korea was 9.6, 4.3, 3.6, and 7 respectively, see at World Economic Outlook Database, see <http://www.imf.org/external/pubs/ft/weo/2005/01/data/dbginim.cfm > at 16/09/2005
[100] Abdel M Agami, The role that foreign acquisitions of Asian Companies played in the recovery of the Asian Financial Crisis, (2002) 10 *Multinational Business Review* Vol 20

under the ASEAN framework. Indeed, the key success of their economic growth rested on export-led growth mechanisms by which, for many years they exported oil, minerals, and other natural resources to Japan, Australia, New Zealand, the US and other developed countries. However, as the saying goes 'what goes up must come down' and the Asian miracle proved to be short-lived.

For several years before the outbreak of the crisis, those Asian countries hit hardest by the crisis, Indonesia, Korea, Malaysia, Philippines and Thailand enjoyed an enormous inflow of foreign capital, mostly from the private sector. Most of this capital came as loans from private creditors such as commercial banks and non-bank creditors.[101] Economic actors in these countries found that they could borrow money at low interest rates overseas in dollars more cheaply than they could at home in their national currencies because their currencies were pegged to the US dollar so there was no exchange rate risk and no need to hedge the loans. At the same time, ongoing economic reforms and financial liberation had made developing countries more attractive to overseas investors thanks to their higher interest rates.

As the US dollar became stronger in 1995 relative to the Japanese yen, so, too, did the Indonesian rupiah, the Korean won, the Malaysian ringgit, the Philippine peso and the Thai baht. This eventually caused their goods to become expensive, decreased exports, increased imports, increased their current account deficits, and slowed their growth.[102] These conditions, together with extreme mismanagement, particularly in the weak and unsound banking sector and financial system, as well as corruption and over-expenditure of capital inflow gained from developed countries and multinational financial institutions, led to a dramatic reversal of foreign capital inflows from the region in 1997and left Thailand, Indonesia, the Philippines, Malaysia and Korea with crashed economies and massive debt. Indeed, the crisis started when these countries began to lose investor confidence, for instance, in the late of 1996 foreign investors began to move their money out of Thailand

[101] These capital inflows tripled in just two years from US $25.8 billion in 1994 to $83.5 billion in 1996, see Suk H Kim and Mahfuzul Haque, 'The Asian financial crisis of 1997: causes an policy responses', (2002) 10 *Multinational Business Review*, 30
[102] Ibid.

because they worried about Thailand's ability to repay.[103] In the following year 1997 saw the reversal of these private capital flows of $105 billion from these five countries.[104]

This crisis transformed the 'Asian miracle' into the 'Asian meltdown' and led to economic, social, and political problems in each of these countries. For instance, according to the government's income and expenditure survey, the number of Filipinos earning less than US$276 a year- the minimum standard needed to meet basic living needs in the Philippines- rose from 27 million in 1997 to 31 million (39.4% of the population) within three years of the beginning of the crisis.[105] Moreover, it also increased the number of Thais living on or below the poverty line by two million.[106] In Malaysia, the poverty level rose from 6.1% in 1997 to 8.1% in 1999,[107] while in Indonesia, the number of people living below the poverty line (people who are earning US$2 a day) increased from 22.5 million (11.2% of the population) to 118.5 million (60.6%) in 1997,[108] causing massive social unrest throughout the country and the downfall of the President of 32 years, President Suharto, in 1998. This financial crisis which started in the early 1997 in Thailand had a devastating impact on the economies of ASEAN countries the effects of which are still being felt.

The Asian financial crisis was proof, if proof was needed, that the economic world has become increasingly integrated. The greater integration of emerging market countries with international capital markets has brought problems as well as benefits for recipients. On the one hand access to foreign funds helped to finance economic development; on the other hand, this has rendered recipients, in this case developing countries, more vulnerable to the effects of capital flow reversals or financial panic whether due to bad policies or

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[103] Ibid.

[104] Jong H Park, 'Globalisation of financial markets and the Asian Crisis: Some lessons for Third World developing countries', *Journal Third World Studies*, 1 October 2002; this reversal represented 'the greatest reversal of private capital flows ever recorded in the world economy and represented as 'the most significant geo-financial adjustment to date in the relatively new era of globally integrated capital market', ibid. This was aggravated by the panic decisions of resident East Asian investors to suddenly withdraw funds from their own financial institutions, which turned 'what could have been a sharp, yet orderly, correction of asset prices into a full blown financial crisis', see Tony Makin, 'The Great East Asian Capital Flow Reversal: Reasons, Responses and Ramifications' (1999) *The World Economy* 407, 411

[105] Roel Landingin, 'International Economy: Land where the rich get richer and the poor get nowhere', *Financial Times*, 8 August 2002

[106] 'World Bank says Thailand must grasp opportunity to reform', *Agence France-Presse*, 31 May 2002

[107] 'Addressing urban face of poverty' *The New Straits Times*, 15 December 2002

[108] Walden Belo, 'The insecurity of Asia's financial crisis', *Peace Review*, September 1999 (Vol.11, Iss.3)

speculation. In this context, if a certain region experiences economic crisis, it will affect other parts of the world. From the ASEAN point of view, what one individual member state does with its economy or politics, will almost certainly affect its neighbors. For example, in July 1997 in order to halt the massive depreciation of its currency (bath), the Thai government tried to maintain the pegged exchange rate by selling its reserve of US dollars and other hard currencies until it ran out of US dollars and other hard currencies.[109] As a result the bath plunged further losing 35 per cent of its value in November 1997. Once the Thai bath crashed, the other currencies in the region tumbled like dominos due to the fact that these countries had encountered similar problems.

2.2.2 The ASEAN Vision 2020 [110]

In December 1997, to halt the crisis and promote a trade-based recovery and relieve the pressure on the affected economies to obtain hard currency, ASEAN leaders made a commitment to encourage intra-regional trade in local currencies at their informal Summit in Kuala Lumpur.[111] At the December 1998 Hanoi Summit the ASEAN leaders made a commitment to press ahead with trade liberalization in the AFTA by eliminating protection for most goods three years before the 2003 deadline.[112] ASEAN Finance Ministers also held meetings with other institutions including one with the Central Bank Deputies of ASEAN Members in Manila in November 1997 at which they discussed the regional response to the financial crisis. This resulted in the establishment of an 'ASEAN Surveillance Process' intended as a regional economic monitoring mechanism to analyse capital flows and maintain joint surveillance of the operation of ASEAN economies' banking systems and macroeconomic indicators in order to provide an early warning mechanism of financial turmoil.[113] The purpose of the Surveillance Process, which is based

[109] Thai government took this policy, instead of devaluing its currency due to national pressure as there was a succession of short-lived coalition governments and a general election to be conducted in November 1997, see Agami, above n 100 (citation omitted)
[110] ASEAN Vision 2020, see at <http://www.aseansec.org/2357.htm> at 19/12/2003
[111] Joint Ministerial Statement, Special ASEAN Finance Ministers Meeting, Kuala Lumpur, December 1997
[112] Statement on bold measure, see at <http://www.aseansec.org/8756.htm> at 12/09/2005 [hereinafter Statement on bold measure]
[113] Terms of Understanding on the Establishment of the ASEAN Surveillance Process, Washington DC, USA, 4 October 1998 at <http://www.aseansec.org/7879.htm> at 20/09/2005

on a peer review process, is to prevent future crises.[114] An important aspect of the Surveillance Process is to provide recommendations on possible actions that can be taken at the country and/or regional level. This was the institutional innovation created by ASEAN in dealing with the financial crises. ASEAN finance ministers would conduct periodic 'peer reviews' of the economies of member countries, to ensure the transparency of monetary and fiscal conditions throughout the region. Periodic analyses of macroeconomic trends in the region would raise early warning signals of any recurrence of the sudden, massive and simultaneous pullout of foreign portfolio capital that caused crises.[115]

Another part of the response to the Asian debt crisis was the adoption in 1997 of the ASEAN Vision 2020 which establishes the basis for and nature of future cooperation and integration expected to be achieved among the members, described in the 'vision' as 'a concert of South East Asian nations, outward looking, living in peace, stability and prosperity, bonded together in partnerships in dynamic development, and in a community of caring societies'. The ASEAN Vision 2020 consists of a future-oriented mid-term plan, setting the outlook for achieving regional development and affluence through regional cooperation. It presents a vision for comprehensive regional cooperation in areas including economic cooperation, politics/security and culture. In short, it sets out a broad vision for ASEAN in the year 2020, with a series of plans of action and goals to be drawn up later.

The 'Vision' calls for the realization, by 2020, of a peaceful and stable South East Asia 'where each nation is at peace with itself and where the causes for conflict have been eliminated through abiding respect for justice and the rule of law and through the strengthening of national and regional resilience'. It envisions a region where territorial and other disputes are resolved by peaceful means and enshrines the TAC as a binding code of conduct for ASEAN governments and peoples. Its vision as a community of caring societies proposes that by 2020 all ASEAN countries would be conscious of their historical and cultural ties, bound by a common regional identity and their respective national identities at the same time. It envisions that member states will be governed with the

[114] Joint Press statement of the 30th AEM, Makati, Philippines, 8 October 1998, see <http://www.aseansec.org/6133.htm>at 20/09/2005

[115] The first peer review released in 1999, see Joint Ministerial Statement of the 3rd AFMM, Hanoi, Viet Nam, 20 March 1999 at <http://www.aseansec.org/2271.htm> at 20/09/2005 and the last peer review was conducted in April 2004 (the ninth Peer Review) see Finance Cooperation, at <http://www.aseansec.org/7870.htm> at 20/09/2005

consent and greater participation of their nationals. In order to enable ASEAN to realize this, the Vision recognises the need to develop and strengthen ASEAN's institutions and mechanisms including the ASEAN Secretariat.

With respect to further and better economic development, the Vision calls for an ASEAN Partnership in Dynamic Development aimed at forging closer economic integration within the region. Recognizing that to create a stable prosperous and highly competitive ASEAN Economic Region there would need to be a free flow of goods, services, investments, capital, and equitable economic development and reduced poverty and socio-economic disparities, the Vision notes that ASEAN will need to develop policies to maintain regional macroeconomic and financial stability, advance economic integration, accelerate the free flow of professional and other services, and accelerate the development of science and technology including information technology. The ASEAN Vision 2020 is a declaration of ASEAN Members' commitment for the future of ASEAN cooperation in 2020. In other words, all actions of ASEAN through 2020 are to be guided by the ASEAN Vision 2020 together with its plans of actions.[116] This Vision guided the declaration of Bali Concord II that will establish the ASEAN Communities by 2020.[117] Thus, it is ASEAN's response to the crisis that has introduced new directions and challenges to ASEAN's commitment to economic cooperation.

2.2.3 The Hanoi Plan of Action (HPA) (1997-2004) and its succeeding plans

2.2.3.1 The Hanoi Plan of Action

The first in the series of plans of action adopted to progress the realization of the ASEAN Vision 2020, the Hanoi Plan of Action (HPA), [118] was adopted in 1997. Reflecting on ASEAN's history and success over the past 30 years and pointing to the need for a future-oriented approach in order to address the then present economic crisis, the HPA laid down specific steps and measures to be taken during the years 1997-2004 in order to

[116] To date, two plan of actions had been adopted, the Hanoi Plan of Action or HPA (1999-2004) and its succeeding plans of action (the Initiative for ASEAN Integration or IAI and the Roadmap for the Integration of ASEAN or RIA) and the Vientiane Action Program or VAP (2004-2008) as the successor of HAP, for the discussion of these two plans, see section 2.4.2 below

[117] For the discussion on the ASEAN Community, see section 2.4.1 below

[118] Hanoi Plan of Action, see at <http://www.aseansec.org/2011.htm> at 19/12/03 [hereinafter HPA]

strengthen macroeconomic and financial cooperation, advance economic integration and promote social, science & technology and information technology infrastructure as well as human resources development. In addition, it focused on enhancing the relationships between dialogue partners[119] and organizations.

The HPA recognized the need to address the economic situation in the region after the crisis, and to implement initiatives to hasten economic recovery and address the social impact of the global economic and financial crisis. In order to avoid future disturbances it called for the maintenance of regional macroeconomic and financial stability, strengthening of financial systems, promotion of liberalisation of the financial services sector, intensification of cooperation in money, tax and insurance matters, and development of ASEAN capital markets. The HPA also called for acceleration of implementation of the AFTA, as well as enhanced trade facilitation in customs by simplifying customs procedures, harmonizing product standards, and establishing other trade facilitation activities.

Ten detailed points in the HPA include strengthening macroeconomic and financial cooperation, enhancing greater economic integration, developing information technology infrastructure, promoting social development and addressing the social impact of the financial and economic crisis, protecting the environment and promoting sustainable development, strengthening regional peace and security and improving ASEAN's structures and mechanisms. In this last respect the HPA called for a review of ASEAN's overall organizational structure with a view to improving its efficiency and effectiveness. It specifically proposed to review the role, functions and capacity of the ASEAN Secretariat to meet the increasing demands of ASEAN and to support the implementation of the HPA.

The implementation of the HPA covers social development, monetary and financial integration, and the role of ASEAN Secretariat in supporting the HPA. ASEAN has conducted several initiatives to address the social impacts of the crisis, such as the ASEAN Action Plan on Social Safety Nets (adopted by informal meeting of ASEAN Minister of Rural development and Poverty Eradication in December 1998), and the ASEAN plan of

[119] For the dialogue partners see section 1.4.7 (Chapter I)

action on rural development and poverty eradication (adopted in October 1997).[120] The implementation of these action plans had been reported 'proceeded well with the assistance of AusAID and the UNDP.'[121] Monetary and financial integration in the region has also been progressing well with GDP growth having increased from 4.5 percent in 2002 to 5 per cent in 2003. [122] There has also been an increase in stock prices representing the gradual return of foreign investment to the region.[123] Moreover, in May 1999 the ASEAN Secretariat held the ASEAN Development Cooperation Forum (ADCF) which brought together the ASEAN Dialogue Partners,[124] international agencies, foundations and other interested parties to consider support for the implementation of the HPA. As a result AusAid contributed funding for poverty eradication and the UNDP and ASEAN signed a program document on 'Support to monitor and facilitate ASEAN Economic recovery'.

2.2.3.2 The Vientiane Action Program (VAP) of 2004

The HPA was succeeded in 2004 by the Vientiane Action Program (VAP) signed by ASEAN leaders in November 2004.[125] VAP is the six-year plan (2004-2010) with the theme '*Toward shared prosperity and destiny in an integrated, peaceful and caring ASEAN community'* to realize the medium-term goals of ASEAN community focusing on deepening regional integration and narrowing the development gap between the old and the new ASEAN members. ASEAN leaders agreed to establish an ASEAN Development Fund (ADF) to support the implementation of the VAP and future action programs called upon ASEAN dialogue partners, other countries and regional and international organizations to support the implementation of VAP.

In the area of investment, VAP provides for intensifying the implementation of the ASEAN Investment Area (AIA) in terms of liberalization, facilitation and promotion to

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[120] ASEAN Cooperation on social recovery and opportunities of collaboration with dialogue partners/international agencies, see <http://www.aseansec.org/8480.htm> at 20/09/2005
[121] Social Development, see < http://www.aseansec.org/9765.htm> at 20/09/2005
[122] Finance Cooperation, see <http://www.aseansec.org/7870.htm> at 20/09/2005
[123] See statistics of FDI in ASEAN, sixth edition, 2004, see <http://www.aseansec.org/17215.htm> at 20/09/2005
[124] ASEAN Dialogue Partners, see section 1.4.7 (Chapter 1)
[125] The Vientiane Action Program (VAP) adopted by ASEAN Leaders 29 November 2004, at 10th ASEAN Summit, Vientiane, Laos, the text see <http://www.aseansec.org/VAP-10th%20ASEAN%20Summit.pdf> at 19/09/2005 [hereinafter VAP]

retain its competitiveness. VAP also reiterates ASEAN Members' commitment to strengthen efforts to narrow the development gap in ASEAN by building upon existing initiatives such as the IAI, the Roadmap for Integration of ASEAN, Hanoi Declaration on Narrowing Development Gap for Closer ASEAN Integration of 2001 and the Vientiane Declaration on Enhancing Economic Cooperation and Integration among CLMV Countries of 2004.[126]

2.2.3.3 The Initiative for ASEAN Integration (IAI)

One program that comes under the HPA is the Initiative for ASEAN Integration (IAI) program which was launched in November 2000 with the intention of narrowing and closing the development gap between the older six ASEAN members and the newer members of Cambodia, Laos, Myanmar, and Vietnam (CLMV).[127] Because of the wide disparity between its members, reducing and closing entirely the economic gap between its members is one of the greatest challenges facing ASEAN. Only when this gap is reduced or removed can the dream of an integrated economic community be accomplished and true socio-economic stability can be achieved.

There are currently 85 projects under the IAI umbrella which focus on four areas: infrastructure development, human resource development, information and communication technology and the promotion of regional economic integration in CLMV countries which are coordinated by Cambodia, Laos, Myanmar and Vietnam respectively.[128] The IAI involves the development of legal, institutional, regulatory frameworks, and technical capabilities and capacities of CLMV countries. The IAI has both economic and strategic benefits because improved economic circumstances in these countries would enable them to provide business complementarities and opportunities to the investors. When they would become developed countries and then economically would be integrated to ASEAN, this

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[126] For the programme areas and measures on goals and strategies for narrowing the development gap, see, ibid, Annex 4

[127] Hanoi Declaration on Narrowing Development Gap for closer ASEAN Integration, 23 July 2001, see <http://www.aseansec.org/934.htm at 20/09/2005 [hereinafter *Hanoi Declaration on Narrowing*], see also, Bridging the Development Gap among members of ASEAN, see <http://www.aseansec.org/14683.htm> at 20/09/2005; see also, '36th ASEAN Day', *Manila Bulletin*, 8 August 2003

[128] ASEAN Knowledge Kit, above n 69, 4 ; for the detailed of progress of work plan projects of IAI, see <http://www.aseansec.org/pdf/IAI-Article.pdf> at 20/09/2005

would improve ASEAN's collective negotiation vis-à-vis ASEAN's major trading partners in terms of market access, technology transfer and foreign investment.[129] To narrow the gap in the level of development among Member States and to reduce poverty and socio-economic disparities in the region, ASEAN continues to support the implementation and further development of growth areas.[130] To this end, ASEAN has also adopted the Hanoi Declaration on Narrowing the Development Gap for Closer ASEAN Integration[131] and the Vientiane Declaration on Enhancing Economic Cooperation and Integrating among Cambodia, Laos, Myanmar and Viet Nam.[132]

2.2.3.4 The Roadmap for the Integration of ASEAN (RIA)

Building further on the ASEAN Vision 2020, in August 2003 the ASEAN Finance Ministers met in Manila for their annual talks and agreed on a roadmap for the integration of their financial markets that would serve as a cornerstone for an ASEAN common market by 2020.[133] The Roadmap includes steps to be taken to develop, liberalize, and integrate the region's capital markets for a freer flow of goods, services, and capital and is scheduled for approval by the ASEAN leaders in October in 2003.

According to this Roadmap, capital market integration is to be carried out in a two-pronged approach.[134] The first prong involves institutional capacity-building processes to reinforce the legal and regulatory framework, market infrastructure for trading, clearance, settlement procedures, investor education, and the adoption of international standards. The second prong focuses on initiatives to foster market integration in the region such as in the areas of training networks, development of products and market linkages, and harmonization of capital market standards.

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[129] *ASEAN Knowledge Kit*, above n 69, 7
[130] Growth Areas in the region are Brunei Darussalam-Indonesia-Malaysia-Philippines East ASEAN Growth Area (BIMP-EAGA), Indonesia-Malaysia-Singapore Growth Triangle (IMS-GT), Indonesia-Malaysia-Thailand Growth Triangle (IMT-GT), and the inter-state areas along the West-East Corridor (WEC) of the Mekong Basin in Vietnam, Laos, Cambodia and North-eastern Thailand within the ASEAN Mekong Basin Development Cooperation Scheme, see <http://www.aseansec.org/7950.htm> at 21/09/2005
[131] *The Hanoi Declaration on Narrowing*, above n 127
[132] The Vientiane Declaration on Enhancing Economic Cooperation and Integration among CLMV of 28 November 2004, see <http://www.aseansec.org/16631.htm> at 21/09/2005
[133] Joint Ministerial Statement the 7th ASEAN Finance Minsters' Meeting (AFMM), 6-7 August 2003, <http://www.aseansec.org/15029.htm> at 21/09/2005
[134] Ibid.

Achievement of a single market is seen as an ideal choice for ASEAN due to the fact that if the financial market works effectively in this region, capital will flow and lower the cost of accessing capital for companies. This process will in turn support entrepreneurs and help promote technology and innovation, while risks will be more effectively matched and spread between countries to increase financial stability.[135] Accordingly, the Roadmap also includes rules on trade and investment and an attempt to reduce red tape by establishing a single common testing procedure to allow producers to move goods between countries in a faster and more efficient manner.[136]

The Roadmap calls for eleven "priority" sectors to be identified for early integration. These sectors are to be prepared by countries designated to coordinate accelerated integration which include the wood-based and automotive industries (Indonesia), rubber-based and textile/apparel industries (Malaysia), agro-based and fisheries industries (Myanmar), e-ASEAN and healthcare industries (Singapore), electronics industries (Philippines), and the airline and tourism industries (Thailand). These sectors include 1400 products, about 13 per cent of the estimated 11,000 products traded within the region. The abolition of tariffs in these eleven industry sectors is part of ASEAN's attempt to establish an ASEAN economic community for the purpose of developing competitive advantages. Individual sector will go beyond the normal measures such as zero tariffs, harmonisation of products standards, faster customs clearance and more simplified customs procedures.

As of August 2004, with the integration of eighty per cent of priority sectors complete, ASEAN had made considerable progress in implementing the Roadmap.[137] Common measures toward achieving integration across all of the sectors have been drafted while specific measures for certain sectors are still under discussion. Regarding the common measures, the Roadmap calls for the acceleration of tariff cuts (to zero) on products from ten sectors by 2007 for its more developed members, while for those less-developed members, the CLMV will remove tariffs by 2012.[138] Initially, ASEAN agreed to

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[135] 'A Roadmap to a single ASEAN market', *Manila Bulletin*, 22 August 2003 [hereinafter Roadmap]
[136] 'ASEAN signs integration plan for priority sectors', *The Jakarta Post*, 4 September 2004 [hereinafter *The ASEAN signs integration*]
[137] 'Progress made toward full-scale integration of Asian trading partners', *Bangkok Post*, 13 August 2004
[138] *The ASEAN signs integration*, above n 136

speed up the liberalization process for those eleven priority sectors. Air travel, however has been temporarily excluded from the liberalization process and will be considered separately by the ASEAN transportation ministers at a latter time. This decision has actually been considered by some senior officials as a positive one because some of these ministers had previously indicated that four of the eleven sectors – agriculture, fisheries, wood and air travel- would be excluded from integration because of 'complicated problems' include the vast number of products within the sectors and large number of workers involved.[139]

Another significant measure agreed has been the adjustment of the existing rules of origin regulations[140] to encourage members to buy more raw materials in the region.[141] A number of other measures such as the electronic processing of trade documents and the ASEAN single window[142] have also been considered as these would ensure the expeditious clearance of imports through the single submission of data, single data processing and single decision-making for the release of goods.[143] With respect to those more 'sensitive' products, ASEAN ministers have agreed to exclude certain products (about fifteen per cent of total products in each sector) from the liberalization process.[144]

The final draft of the roadmap for these eleven priority sectors was agreed by the signing of ASEAN Framework Agreement for the Integration of Priority Sectors by ASEAN leaders in November 2004.[145] By signing this Framework Agreement the ASEAN Members agreed to accelerate the integration of 11 priority sectors that had been selected on the basis of comparative advantage in natural resource endowments, labour skills and cost competitiveness, and value-added contribution to ASEAN's economy.[146] Attached to the Framework Agreement are 11 ASEAN Sectoral Integration Protocols[147] reaffirming

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[139] Ibid.
[140] Rule of Origin, see <http://www.aseansec.org/17293.pdf> at 21/09/2005
[141] Under the current rules of origin regulations, for exporters to enjoy lower tariffs of between zero and 5 percent under AFTA, 40 percent of the content must be sourced locally, see *the Roadmap*, above n 135
[142] ASEAN single window is an integrated single data processing for clearance of imports purposes for all ASEAN Members
[143] 'ASEAN aims for single production base to attract more FDI', *Bernama*, 7 June 2004
[144] *The ASEAN signs integration*, above n 136
[145] ASEAN Framework Agreement for the Integration of Priority Sectors, Vientiane, 29 Nov 2004, see <http://www.aseansec.org/16660.htm> at 21/09/2005 [hereinafter the Framework Agreement for Priority Sectors]
[146] Media Release: ASEAN accelerates integration of Priority sectors, <http://www.aseansec.org/16621.htm> at 21/09/2005
[147] The Framework Agreement for Priority Sectors, above n 145, Art 21

ASEAN's commitment to fast track the integration toward the ASEAN Economic Community (AEC) that is to be established by 2020. Attached to each Protocol is a roadmap which forms the basis for economic integration of each of the priority sectors.[148]

The Framework Agreement provides for the liberalisation of trade in goods, trade in services and investments and sets up clear time lines for each product.[149] It has been agreed that ASEAN Members should promote trade and investment facilitation which include rules of origin, customs procedures, standards and conformance, logistic services, facilitation of travel in ASEAN and movement of business persons, experts, professionals, skilled labour and talents. The Framework Agreement also covers other areas for integration such as intellectual property rights, industrial complementation among ASEAN manufacturers and human resource development. The Economic Ministers are responsible for ASEAN economic integration, with the assistance of the SEOM that is to 'oversee monitor and/or coordinate the implementation of this Framework Agreement'. Any disputes which arise from this Framework Agreement are to be referred to the ASEAN Protocol on Enhanced Dispute Settlement Mechanism of 2004.[150]

2.3 Free Trade Agreements with external countries

Since the Asian economic crisis, ASEAN has sought to establish trade agreements with external countries as well as other regional trade blocs in order to boost its devastated economies. ASEAN has attempted to negotiate free trade area agreements with its trade partners, namely, China, India, Japan and CER Countries (comprises Australia and New Zealand).[151] The initial trade meetings between ASEAN and these countries have been concluded. ASEAN has negotiated separate free trade agreements with China[152] (to be

[148] These roadmaps aim to enhance the competitiveness of ASEAN, strengthen regional integration effort through liberalisation, facilitation and promotion measures, and promote private sector participation. Ibid

[149] For example, the time date the liberalisation for trade in goods for ASEAN-6 is 2007, the new ASEAN Members is 2012; For trade in services for the priority sectors the agreed time date is 2010 while for investment for ASEAN-6 is 2010, 2013 for Vietnam and 2015 for Cambodia, Laos and Myanmar, see the Framework Agreement for Priority sectors, above n 145, Arts.4-6

[150] The ASEAN Protocol on Enhanced Dispute Settlement Mechanism of 2004, see <http://www.aseansec.org/16754.htm> at 21/09/2005; for detailed discussion on this, see chapter 5

[151] Australia New Zealand Closer Economic Relations (ANZERTA or CER) trade agreement was come into effect on 1 January 1983, see <http://www.dfat.gov.au/geo/new_zealand/anz_cer/anz_cer.html> at 8/11/2005

[152] Framework Agreement on Comprehensive economic cooperation between the ASEAN and the People's Republic of China, see <http://dtn.moc.go.th/web/8/55/176/framage.pdf.?G_id> at 05/09/03

implemented by 2010), Japan[153] (to be implemented by 2012) and India (to be implemented by 2011).[154]

China and ASEAN signed the Framework Agreement on Comprehensive Economic Cooperation on 4 November 2002 at Phnom Penh, and this agreement came into force in July 2003. This agreement was amended a year later by the Protocol to Amend the Framework Agreement on ASEAN-China Comprehensive Economic Cooperation.[155] This agreement will serve as a foundation for establishing an ASEAN-China Free Trade Area (FTA) by 2010 for the older ASEAN members and 2015 for the newer members with flexibility on sensitive commodities.[156] ASEAN and China also signed the Agreement on Dispute Settlement Mechanism for the Framework Agreement on Comprehensive Economic Cooperation in 2004[157] to resolve disputes that arise in the implementation of the Framework Agreement.

ASEAN is also negotiating to form a free trade area with Australia and New Zealand Economic Closer Economic Relations (ANZERTA or CER countries). In 1999, ASEAN and CER Ministers agreed to establish a High Level Task Force to explore the feasibility of an AFTA-CER free trade area by 2010. In September 2001 at their 6th annual consultations in Hanoi, Vietnam, ASEAN Free Trade Area-Closer Economic Relations (AFTA-CER) Ministers adopted a framework for the Closer Economic Partnership (CEP) rather than an AFTA-CER free trade agreement.[158] This framework provides a formal and structured approach to promoting trade, investment and regional economic integration. It

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[153] The Framework for Comprehensive Economic Partnership between ASEAN and Japan, 8 October 2003, <http://www.aseansec.org/15274.htm> at 21/09/2005

[154] Framework Agreement on Comprehensive economic cooperation between the ASEAN and India, 8 October 2003, see <http://www.aseansec.org/15278.htm> at 21/09/2005

[155] The Protocol to amend the Framework Agreement on Comprehensive economic cooperation between the ASEAN and the People's Republic of China, 6 October 2003, see <http://www.aseansec.org/15157.htm> at 21/09/2005

[156] *The Saigon Times Daily*, 17 September 2002; The 10 ASEAN and China will make up the mega internal market- more than 1.7 billion people; a combined GDP of more than US$2 trillion and total trade of over US$1.2 trillion;This deal is in ASEAN's best interests as trade between the ASEAN and China is on track; The ten ASEAN countries enjoyed a trade volume of US$41.6 billion with China in 2001, a 53% increase from US$27.2 billion in 1999, ibid.

[157] The Agreement on DSM of the Framework Agreement on Comprehensive Economic Cooperation between ASEAN and China, see <http://www.aseansec.org/16635.htm> at 21/09/2005

[158] The AFTA-CER Closer Economic Partnership (CEP) was the first cross regional engagement for ASEAN as regional grouping, see <http://www.aseansec.org/16576.htm> at 21/09/2003; In the process of accelerating the CEP projects and activities, the AFTA-CER Business Council was established which provided business view the area of cooperation under the CEP. Ibid.

addresses areas affecting trade and investment between ASEAN and Australia/New Zealand, including tariff and non-tariff issues, customs cooperation, electronic commerce and other economic issues.[159] In 2004, AFTA-CER Ministers agreed to propose to their leaders to commence negotiations on free trade area. The negotiations talks were to have commenced in 2005 and been concluded in 2 years but not, however, yet commenced.[160]

In early 2002, ASEAN countries hoped to boost their troubled economies by creating a giant East Asian Free Trade zone linking ASEAN 10 with the three Northeast Asian states – China, South Korea and Japan. This proposed free trade agreement is called as the ASEAN plus Three (APT) and, with the economic strength of the participants, has the ability to become dominated economic bloc in East Asia. The APT is the latest manifestation of the evolutionary development of East Asian regional cooperation which started in the 1970s.[161] The APT is also a reflection of intensified competitive regionalism in other parts of the world, such as the US effort to expand NAFTA into a Free Trade Area of the Americas (FTAA),[162] and EU expansion.[163]

2.4 Towards an ASEAN Economic Community

2.4.1 The Bali Concord II of 2003

At the ninth ASEAN summit, which took place in Bali in October 2003, ASEAN leaders took the very significant step of signing the Declaration of ASEAN Concord II (or

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[159] For AFTA-CER Closer Economic Partnership, see < http://www.dfat.gov.au/cer_afta/index.html> at 8/11/2005

[160] ASEAN sets Australia, "NZ trade deal talks for 2005," *Dow Jones & Company, Inc,* 5 September 2005

[161] Richard Stubbs, 'ASEAN Plus Three; Emerging East Asian Regionalism?' (2002) 3 *Asian Survey,* 441; The evolution began in 1970 as the Asian common market proposed by South Korea and in 1988 as the Asian Network suggested by Japan; then in 1990s as the East Asian Economic Caucus (EAEC) initiated by the Malaysian Prime Minister. The latest initiative gained fierce opposition from the US and Australian governments who argued that this proposal would hamper the development of APEC and divide the world into regional lines. Ibid.

[162] The Free Trade Area of America (FTAA) covers 34 nations in the Western Hemisphere, the negotiations is still in process, for the progress of negotiations, see <http://www.ftaa-alca.org/View_e.asp> at 21/09/2005; In addition, the current Bush administration signed free trade area agreement with Australia on 18 May 2004, and was pursued negotiation on free trade area agreements with Bahrain, five nations in Central America, five nations in Southern Africa and Jordan, Egypt, Saudi Arabia, Israel, see US Dept of State <http://usinfo.state.gov/regional/nea/summit/text2003/0509bushfta.htm> at 16/09/03

[163] The single currency for the EU Members, the Euro, has been commenced since 1 January 2002, see <http://www.europa.eu.int/abc/12lessons/index7_en.htm> at 21/09/2003; the fifth enlargement of the EU took place in 1 May 2004 and it now becomes 25 members, ibid; see n 186 and accompanying text.

so called Bali Concord II named after the Declaration of the Bali Concord which was declared at the first ASEAN Summit held in Bali in 1976[164]) in which they pledged to achieve an ASEAN Community 'for the purpose of ensuring durable peace, stability and shared prosperity in the region' by the year 2020 as outlined in the ASEAN Vision 2020.[165] The ASEAN Community is a response to recent crises in the region, namely the 1997-1998 financial crisis, SARS and terrorist attacks in the region, and is seen as an attempt to regain credibility from its economic partners. Once established, the AEC will rest on the three pillars: the 'ASEAN Security Community (ASC)'; the 'ASEAN Socio-Cultural Community (ASCC)'; and the 'ASEAN Economic Community (AEC)'.[166] The ASC, which is not intended as a military bloc or defence pact, will take ASEAN's political and security cooperation to a higher plane. The AEC is intended to realize the end-goal of economic integration in ASEAN, while the ASCC will ensure that ASEAN's workforce will be prepared for and benefit from economic integration by investing more resources for basic and higher education, training, science and technology development, job creation and social protection.

The Bali Concord II also stressed the fundamental importance of adhering to the principle of non-interference and consensus in ASEAN cooperation and that the regional body remain bonded together in a partnership of dynamic development and of a caring community. Hence the Bali Concord II marks the beginning of the transformation of ASEAN from an inter-governmental framework into a 'community framework' similar, in some respects, to the EU. Before examining the proposals for the AEC, the relative novelty of the AC concept militates in favour of the inclusion of a brief description of the other pillars as well.

2.4.2 The ASEAN Security Community (ASC)

In the area of security, the ASC embodies the aspiration of member countries to achieve peace, stability, democracy and prosperity. It is based on the principle of

[164] For the discussion of the Bali Concord I see section 1.2.3. in Chapter 1
[165] See Declaration of ASEAN Concord II (Bali Concord II) 2003, <http://www.aseansec.org/15160.htm> at 10/10/2003, para 1 [hereinafter Bali Concord II]
[166] Ibid, section A, B, and C

comprehensive security which acknowledges the strong interdependencies of the political, economic and social life in the region.[167] It covers proposed programs and measures in shaping and sharing of regional norms. The ASC is concerned with conflict prevention, conflict resolution and post-conflict peace building.

The idea of the ASC was initially put forward by Indonesia as a means of strengthening regional capacities to counter terrorism, trafficking in human and other trans-national crimes and of ensuring that the region remains free of all weapons of mass destruction.[168] According to the Indonesian proposal:

> [I]n the long term, a sustainable economic community can only be guaranteed by the creation of a security community. Conversely, a security community will not last without a strong foundation of mutual interest generated by an economic community' …Thus, an economic community that is also a security community enjoys tremendous synergy. It would therefore be highly advisable for the Association to strive to become an ASEAN Community, in which economic integration and cooperative security are essentially linked.[169]

The notion of an ASC has only become more relevant in the aftermath of the Bali bombings in 2002 and 2005 and the terrorist attacks in other parts of the region since September 11, 2001. Thus, ASEAN high-level officials discussed this proposal and put forward recommendations for the establishment of the ASC to the ASEAN leaders in October 2003 at their annual summit.

The ASC is envisaged as bringing ASEAN's political and security cooperation to a higher plane to ensure that countries in the region live in peace with one another and with the world at large, in a just, democratic and harmonious environment. Members have agreed to rely on peaceful settlement processes for intra-regional differences and to maintain their security as fundamentally linked to one another and bound by geographic location, common vision and objectives. Members have also agreed that ASEAN shall abide by the United Nations Charter and other principles of international law and uphold the ASEAN principles of non-interference, consensus-based decision-making, national and

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[167] For the programme areas and measures of ASC, see VAP, above n 125, Annex 1
[168] 'ASEAN moving toward all-round integration', *Xinhua News Agency*, 28 June 2003
[169] 'Indonesia Proposes ASEAN Security Community', *LKBN Antara*, as quoted in Asia Pulse Pte Ltd, 16 June 2003 [hereinafter Indonesia's proposal]

regional resilience, respect for national sovereignty, the renunciation of the threat or the use of force and the peaceful settlement of differences and disputes.

The ASC recognizes the sovereign right of member countries to pursue their individual foreign policies and defence arrangements, taking into account the strong interconnections between political, economic and social realities. The ASC also subscribes to the principle of comprehensive security which is in line with the political, economic, social and cultural aspects of the ASEAN Vision 2020 rather than subscribing to a defence pact, military alliance or a joint foreign policy. Under the ASC, the members continue to promote regional solidarity and cooperation whilst exercising their rights to lead an existence free from outside interference into their internal affairs.

The vision of the ASC is to strengthen national and regional capacities by utilizing existing institutions and mechanisms within ASEAN to counter terrorism, drug trafficking, human trafficking and other trans-national crimes and to ensure that the region remains free of all weapons of mass destruction. It will involve maritime cooperation and cooperation in the fight against terrorism. However military cooperation, alliances and defence pacts are excluded under the ASC.

In agreeing to the creation of the ASC, ASEAN members reaffirmed the TAC as the key code of conduct for states in the region and the ASEAN Regional Forum (ARF)[170] as the primary forum for enhancing political and security cooperation. They have also increased the role of ASEAN in furthering cooperation in the ARF. In addition, the High Council of the TAC will become the principal organ of the ASC. The TAC has thus become a benchmark treaty for promoting peace and security in the Asia Pacific which countries both in and around the region acknowledge as a basis for their engagement. Several countries around the region such as India, China, Japan, New Zealand had acceded to the TAC.[171] Australia, however, while having declared its intention to accede to the

[170] The ASEAN Regional Forum (ARF) was established in 1993, is a multilateral consultative forum for Asia Pacific states designed to promote preventive diplomacy and build confidence for the members on security issues. Shaun Narine, 'ASEAN and the ARF: The limits of the 'ASEAN Way', (1997) 37 *Asian Survey* 959; Michael Antolik, 'The ARF: the spirit of Constructive Engagement', (1994) 16 *Contemporary Southeast Asia* 117, see also 'Fresh impetus for an Asian Security Community', *Straits Times*, 26 November 2003

[171] Instrument of accession for India see <http://www.aseansec.org/15282.htm> ; for China see <http://www.aseansec.org/15271.htm> ; for Japan, see <http://www.aseansec.org/16235.htm> ; for New Zealand see <http://www.aseansec.org/17612.htm > at 22/09/2005

TAC,[172] has still not done so.[173] Nevertheless, in the tenth ASEAN Summit, in November 2004, Russian Federation and Republic of Korea acceded to TAC.[174] In essence, then, the core of the ASC concept is that ASEAN will adopt non-coercive means of resolving conflicts regionally and will create an ASEAN security community by 2020. Importantly, driving the plan is an understanding of the strong linkages between economics and security.

2.4.3 The ASEAN Socio-Cultural Community (ASCC)

The ASCC is inextricably linked with the economic and security pillars of ASEAN and is concerned with managing the social impact of economic integration by promoting environmental sustainability and an ASEAN identity.[175] Health, food security and safety, education, women and youth are among others included in the program of ASCC.

The creation of the ASCC was proposed by the Philippines Government. At a meeting held on the sidelines of the 59th Session of the United Nations General Assembly on 5 October 2004, the foreign ministers and heads of delegations of ASEAN member states approved the Plan of Action for the ASCC.[176] This initiative was based on the assumption that the community must be built on a social agenda because poverty and inequality can undermine the full potentials of economic integration.[177] The ASCC responds to the goal set by the ASEAN Vision 2020 for a South East Asia, bonded in partnership as a community of caring societies and one of the goals of the 1976 Declaration

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[172] Declaration of intention to accede to TAC by Australia, 28 July 2005, see <http://www.aseansec.org/17624.htm > at 22/09/2005

[173] It should be noted that Australia reluctance to sign TAC, see 'ASEAN insists Australia, New Zealand sign non-aggression pact', *Channel news Asia*, 27 November 2004, see <http://www.channelnewsasia.com/stories/afp_asiapacific/view/119305/1/.html > at 1/11/2005; Australia argued that acceding to the TAC might temper Australia's plan, based on PM Howard comments, to launch pre-emptive strikes if terrorists in neighbouring nations were planning to attack Australia. Ibid. Moreover, as TAC also, among other things, calls its signatory countries not to interfere in each other's internal affair which can be regarded as impediment for Australia to sign TAC. At this point, if Australia signed it, it would prevent Australia to criticise ASEAN, in particular, the implementation of human rights and related issues, see Ross Peake, 'Australia's Howard wants to have the cake and eat it too', *Khaleej Times Online*, 29 November 2004

[174] Instrument of Accession to TAC by Russian Federation, http://www.aseansec.org/16638.htm and by the Republic of Korea, http://www.aseansec.org/16622.htm > at 8/11/2005; see also 'South Korea, Russia accede to ASEAN peace pact, Australia not', *Manila Bulletin online*, 28 Nov 2004

[175] For the programme areas and measures of ASCC, see VAP, above n 125, Annex 3

[176] Press Release, the Philippines Department of Foreign Affairs, 24 September 2004, see <http://www.dfa.gov.ph/news/pr/pr2004/sep/pr596.htm> at 9/11/2004 [hereinafter Press Release]

[177] Ibid

of ASEAN Concord I which was to foster cooperation in relation to social development, including the involvement of all sectors of society, particularly women, young people and local communities and raising the standard of living for disadvantaged and rural people.

The need for an ASCC is clear given that the region is home to 500 million people and has various problems associated with population growth, education, unemployment, prevention of infectious diseases, environmental degradation and trans-boundary pollution. The ASCC also aims to ensure that ASEAN's workforce will be prepared for and benefit from economic integration by investing more resources into higher education, training, science and technology development, job creation and social protection.[178] It also aims to preserve and promote ASEAN's diverse cultural heritage by nurturing talent and promoting interaction among ASEAN scholars, writers, artists and media practitioners, fostering regional identity and cultivating people's awareness of ASEAN. One of the main aims of the ASCC is to encourage members to work together in preventing and controlling the spread of infectious diseases (such as HIV/AIDS and SARS) and to support joint regional actions that increase the affordability of medicines.

In short, the intention of the ASCC is to deal with social and cultural problems arising in the region that can result in 'great losses to the ASEAN economy and security'.[179] ASEAN members believe that a reduction in poverty and disease and adequate health care will enhance the security of the ASEAN community.

2.4.4 The ASEAN Economy Community (AEC)

More germane to our discussion here, however, are the proposals to establish the third pillar of the AC, the ASEAN Economic Community, or AEC. Although something of a natural progression from the various declarations, visions, roadmaps and so on already articulated by ASEAN member states, the need for the AEC appears to have taken on new urgency since China became a member of the WTO in December 2002, vastly increasing that country's appeal as a cheap manufacturing destination. It is also apparent that the AEC

[178] Salbiah Said and Openg Onn, 'ASEAN Seals Historic Bali Concord II' *Bernama* (Kuala Lumpur), 7 October 2003

[179] A statement of director-general for Asia, Pacific and Africa at the Indonesian foreign ministry, Makarim Wibisono, 'Historic step toward regional integration', *China Daily*, 8 October 2003

is the region's response to the volatile global situation, calling for market integration after the breakdown of WTO negotiations at Cancun in 2003.[180] ASEAN realises that it must look beyond its free trade area, as today's global market is no longer characterised by tariffs and tariff protection issues since these are being removed in the global and regional liberalization processes.

In addition, ASEAN has come under the intensified pressures of competitive regionalism from other parts of the world, such as the US with its effort to expand NAFTA into a Free Trade Area of the Americas (FTAA)[181] which would cover 34 nations in the Western Hemisphere. The proposed FTAA, the negotiations for which were launched in 1998 and are in their final stages [182]is expected to create an economic region of US$13 trillion with nearly 800 million people[183] but this has been the subject of lots of protest. Apart from this, the US has successfully concluded negotiations on free trade area with Australia.[184] It has also pursued free trade deals with Bahrain, five nations in Central America, five nations in Southern Africa and lastly with countries in the Middle East, including, Jordan, Egypt, Saudi Arabia, and Israel.

Moreover, competitive pressures have also arisen as a result of the introduction by the EU of a single European currency in 2002[185] and EU enlargement which has seen the number of states in the EU expand from 15 to 25 states in 2004 with a projected membership of 27 including Bulgaria and Romania by 2007.[186] This development may change the balance of power between Asia and the West. Thus, ASEAN has to develop a

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[180] 'ASEAN must speed up integration to stay competitive: Goh', *Agence France Presse*, 6 October 2003, see also Cancun Ministerial Conference, <http://www.wto.org/english/thewto_e/minist_e/min03_e/min03_e.htm> 21/09/2005

[181] See US Dept of State, <http://usinfo.state.gov/regional/nea/summit/text2003/0509bushfta.htm> at 16/09/03

[182] In November 2003 the countries had agreed on third draft of agreement, deadlines were fixed for the conclusion of the FTAA Agreement, for the progress of the negotiations, see < http://www.ftaa-alca.org/View_e.asp#PROGRESS > at 5/12/2005

[183] 'ASEAN undertaking study to boost competitiveness', *Business Times*, 17 June 2003

[184] The Australia – US Free Trade Area (AUSFTA) agreement was signed on 24 May 2004 and enter into force 1 January 2005, see Department of Foreign Affairs and Trade <http://www.dfat.gov.au/trade/negotiations/us.html > at 8/11/2005; see also Office of the US Trade Representative, Australia FTA <http://www.ustr.gov/Trade_Agreements/Bilateral/Australia_FTA/Section_Index.html > at 8/11/2005

[185] The single currency for the EU Members, the Euro, has been commenced since 1 January 2002, see <http://www.europa.eu.int/abc/12lessons/index7_en.htm> at 21/09/2003

[186] The fifth enlargement of the EU took place in 1 May 2004 and it now becomes 25 members, ibid; It also considers the possible membership of Croatia and Turkey, ibid.

new *modus operandi* in order to maintain its comparative advantage to compete with other existing and emerging economic blocs.

The idea for the AEC was first proposed by Singapore's Prime Minister Goh Chok Tong at the ASEAN Summit in 2002. Following this, business consultants McKinsey & Co conducted a study on the region's competitiveness and discussed the possibility of there being an ASEAN economic community by 2020, which would lead to ASEAN becoming one single market free of tariffs and restrictions. [187] A number of ASEAN members were concerned that these proposals would oblige them to consider further economic liberalization. Vietnam was concerned that the proposal might widen the economic gap between the old and new members.[188] Nevertheless, based on this study the ASEAN economic ministers asked the high-level economic officials to consider the recommendations of the study and the AEC initiatives.[189] The officials reported their findings to the ministers in September 2003 and after consultation with several ASEAN institutions (including the Institute of South East Asian Studies (ISEAS), the ASEAN Institutes of Strategic and International Studies (ASEAN-ISIS)[190] and the ASEAN Secretariat), the ASEAN Business Advisory Council and the European Commission, the AEC proposal was included in the Bali Concord Declaration as one of its three pillars.

In the Bali Concord II, ASEAN leaders declared that 'ASEAN is committed to deepening and broadening its internal economic integration and linkages with the world economy to realise an ASEAN Economic Community through a bold, pragmatic and unified strategy'.[191] To move towards the AEC ASEAN shall, *inter alia*:

> institute new mechanisms and measures to strengthen the implementation of its existing economic initiatives including ASEAN Free Trade Area (AFTA); ASEAN Framework Agreement on Services (AFAS) and ASEAN Investment Area (AIA); accelerate regional integration in the priority sectors; facilitate movement of business persons, skilled labour and talents; and strengthen the institutional mechanisms of ASEAN, including the

[187] 'Time for ASEAN to Integrate its Economies', *The Asian Wall Street Journal*, 1 September 2003 [hereinafter *Time for ASEAN*]
[188] Ibid
[189] The study recommended: 'ASEAN countries eliminate tariff and non-tariff barriers in goods, remove non-tariff barriers for services, liberalize regional capital flows with a focus on microeconomic investment policies and establish greater mobility for skilled labour in the region', ibid
[190] Proposal from these institutions, see, 'Realizing the ASEAN Economic Community by 2020: ISEAS and ASEAN-ISIS Approaches', *ASEAN Economic Bulletin*, 1December 2003
[191] Bali Concord II, above n 165

improvement of the existing ASEAN Dispute Mechanism to ensure expeditious and legally binding resolution of any economic disputes.[192]

The aim of the AEC will be to boost ASEAN competitiveness, improve the ASEAN investment environment and narrow and close the development gap between ASEAN members. It will create a single market and production base duplicating the European-style economic integration of the 1970s with the intention of achieving a freer flow of goods, services, investment and capital. Its main goal is to create a stable, prosperous and highly competitive ASEAN economic region. It is also believed that deepening ASEAN economic integration through the establishment of the AEC will have profound implications for ASEAN's institutions and practices as well, for instance, in matters pertaining to the enforceability of and compliance with ASEAN agreements, the settlement of disputes, the coordination of national policies, the mandate and capacity of the ASEAN Secretariat, and the resources available for ASEAN use.

Although each of the three pillars are equally important for the development of ASEAN as regional community, the AEC is perhaps the most significant as it brings with it the integration of the economic community and subsequent economic benefits. As a result, the AEC Action Plan[193] identifies eleven sectors including integration- wood-based products, automotive, rubber-based products, textiles, apparel, agro-based products, fisheries, electronics, e-ASEAN, health-care, and air travel and tourism as a priority. These sectors are similar to those that were outlined in RIA of 2003.[194] These sectors, however, co-extensive with the ranged products covered under AFTA.[195] This means that ASEAN addresses several products under different schemes. Accordingly, implementation of the AEC will improve the integration of economic cooperation in ASEAN as more products will become tariff-free goods.

Each member country will coordinate the region-wide integration of the various sectors in their own appointed way. This will include combining the economic strengths of

[192] Ibid
[193] The Action of plan of the AEC is detailed in the Vientiane Action Plan, see VAP, above n 125, Annex 2
[194] See the explanation of RIA, section II.2.3.4. above
[195] The 15 products under AFTA agreement of 1992 were pulp, textiles, vegetable oils, chemicals, pharmaceuticals, fertilizers, plastics, leather, rubber, cement, glass and ceramics, gems and jewellery, electronics and lastly furniture, see also, the discussion on AFTA at section 2.1.4. above

ASEAN member nations for regional advantage, facilitating and promoting intra-ASEAN investment, improving conditions to attract and retain manufacturing activity in the region, promoting and outsourcing programmes within ASEAN, and promoting the development of 'ASEAN made' products. The Action Plan also outlines steps to integrate the service sector, facilitate the mobility of businessmen and tourists within the region and introduce new measures to strengthen ASEAN institutions.

One such measure calls for the establishment by the end of 2004 of an effective system to ensure proper implementation of all economic agreements and the speedy resolution of disputes. It was reported that as at September 2004, progress had been made as part of finalizing an enhanced and effective dispute settlement system in ASEAN[196] and in November 2004, the Protocol on Enhanced Dispute Settlement was signed.[197]

The first step to achieving an integrated economic community, will involve ASEAN implementing the recommendations of the High Level Task Force on ASEAN Economic Integration (HLTF) which were annexed to the Bali Concord II.[198] The HLTF recommended that current economic cooperative initiatives be expedited, that new initiatives and measures be developed and that the ASEAN institutional structure and outreach be strengthened. The HLTF also recommended the development of infrastructure and technical cooperation for CLMV countries. In addition, it recommended that a review take place one year after the implementation of the recommendations and that the Secretary General of ASEAN should submit annual progress reports on the implementation of the recommendations to the ASEAN Ministerial Meeting (AEM).

With respect to the strengthening of ASEAN institutions, the HTLF recommended that the decision-making process be stream-lined, and that policy issues be resolved by the AEM, the AFTA Council or the AIA Council, while technical and operational issues are resolved by the SEOM and the various committees or working groups. It has also

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[196] Three units, (1) a legal unit, (2) an consultative mechanism (ASEAN Consultation to Solve Trade and Investment Issues or ACT, and (3) an ASEAN Compliance Body (ACB) were established, see the 36th ASEAN Economic Ministers Meeting joint media statement, 3 September 2004, <http://www.aseansec.org/16378.htm> at 30/11/2004

[197] ASEAN Protocol on Enhanced Dispute Settlement Mechanism, done at Vientiane, Laos, 29 Nov 2004, the text see <http://www.aseansec.org/16754.htm> at 22/09/2005; for the discussion of this Protocol see chapter 5

[198] The HLTF is an annex of the Bali Concord II, see <http://www.aseansec.org/hltf.htm> at 22/09/2005 [hereinafter the HLTF]

reaffirmed the AEM as the coordinator of all ASEAN Economic integration and cooperation issues. These recommendations would make clear the responsibility of certain bodies in ASEAN and will prevent the overlap of responsibilities amongst various institutions. The HLTF also recommended that new methods be found to facilitate consensus as a decision-making process. However, cognizant of the difficulties of implementing a consensus based system, the HLTF recommended that with respect to decisions concerning economic socio cultural issues, if consensus cannot be achieved then other decision-making processes, such as majority vote, can be averted to in order to speed up the decision-making process.

2.4.5 The deadline for the establishment of the ASEAN Community

Pursuant to the Bali Concord II, establishment of the ASEAN Community is to be effected by 2020. However, some members, in particular Singapore and Thailand, consider this deadline to be too long and wish to see the AEC achieved by an earlier date.[199] To that end they have proposed target dates of 2015 and 2012, respectively. These dates are clearly relevant to the ASEAN-China Free Trade Agreement deadline of 2010 and the ASEAN – Japan trade agreement in 2012. Ideally, ASEAN should have a community in place first before it deals with other countries. Only if internal cooperation among ASEAN members is already solid will problems be avoided in forming free trade areas with other countries.

The region's business community has also urged ASEAN leaders to strive for more rapid integration of economies. Nevertheless, it is very unlikely that this idea will receive support from ASEAN members due to the fact that they have numerous domestic political problems that need addressing. Indonesia, for example is not yet ready due to domestic political instability resulting from the frequent changing of its presidents and its continuing troublesome economy which has not yet recovered from the 1997 financial crisis. In one hand, this situation constitutes as a normal process in a democracy, on the other hand, it likely would raise inconsistencies policy in all sectors as the changing of president in Indonesia also means change the national policy. Also, for Indonesia, national

[199] 'ASEAN ministers differ on target date for economic community', *ASEAN Economic News*,14 October 2003

circumstances should be in a stable condition before it moves into regional scope. Cambodia is still recovering from decades of brutal civil war and is almost totally dependant upon foreign aid.[200] Suffice it to say, the policy preferences and standpoints of each ASEAN Member make the establishment of an ASEAN Community difficult.

In fact, the HLTF[201] did recommend a number of rolling deadlines for economic cooperation. For example, the HLTF set out that the final improvement of trade in goods (including rule of origin, customs, and standards) should be finished by the end of 2004, trade in service should be achieved earlier than 2010 (some items by 2008), investment by 2004 and Intellectual Property Rights and related issues of enforcement by 2004. However, recognizing that not all member states would be able to meet these deadlines, it further recommended that the implementation of economic cooperation between member countries should be flexible.[202] Under the HLTF recommendations, member states that are ready to implement specific sectors would be allowed to proceed first. In line with this, the adoption of a *"2+x" approach* to ASEAN economic integration beside the existing "ASEAN-x" formula was suggested.[203] The *"2+x" approach*, proposes that two countries that are ready to cooperate on specific sectors can work together first, allowing other member countries to follow when they are ready. By applying this formula, ASEAN would be able to move faster to compete with other economic groupings to encourage foreign direct investment flows in the region.

It has been argued, however, that this approach might be used by particular member states as an excuse not to participate in certain sectors. In other words, member states would have a chance to protect pet industries by stating that they are not ready to implement certain sectors. In reality, not all members will have the same level of development. In this respect, those less developed and weaker members may need more time to adjust their internal markets and in doing this, they will gradually accept this

[200] See < http://www.cia.gov/cia/publications/factbook/geos/cb.html#Econ >at 10/11/2005
[201] See HLTF, above n 198
[202] Ibid
[203] An example of the application of this formula, ASEAN Economic Ministers (AEM) agreed to sign the Protocol to amend the ASEAN Framework Agreement on Services that would enable the application of the ASEAN minus X formula in the implementation of member countries' services commitments by which countries that are ready to liberalise a certain service sector may proceed to do so without having to extend concessions to on-participating countries, see, 'AEM Approves recommendations of the HLTF to formalise AEC', *Bernama*, 3 September 2003

reform. It is very likely that Singapore and Thailand will be the pioneers of the AEC due to the fact that they are ready and able to liberalise their markets.

ASEAN however, recognises that not all ASEAN members can meet the recommended deadline, so implementation of the arrangement will be flexible to allow countries that are ready to carry on first. This is probably the best solution in order to overcome those differences between ASEAN members.

2.5 Conclusion

This chapter has examined the move towards economic integration in the ASEAN region which, despite a healthy level of rhetoric, does not yet appear to have been very successful. The lack of success of the PTAs did, however, lead eventually to the adoption of the AFTA which, despite its shortcomings, represents a visible test of ASEAN's resolve on the issue of economic cooperation. The proposed AEC represents the possible culmination of the processes of economic integration begun in the 1970s which have evolved from the abolition of trade barriers on industrial goods to the inclusion of unprocessed agricultural products (from 'narrow' to 'broad') and the elimination of all import duties for products under the priority sectors by 2007 for the ASEAN-6 members and by 2012 for the new ASEAN members.

The agreement to form the proposed AEC is a major step for ASEAN as it will place ASEAN in a more promising position to compete more effectively in the global economy. The proposed AEC is a more progressive model than that of PTAs as it brings with it the integration of the economic community and subsequent economic benefits which will improve the integration of economic cooperation in ASEAN as more products will become tariff-free goods.

The road toward the formation of the AEC will not be easy as there are major problems among ASEAN countries. Indeed, with respect to the target date for the establishment of the AEC, disagreement has already emerged among ASEAN Members.

Moreover, experience shows that creating a free trade area in this region has proved to be complicated, let alone an AEC. ASEAN has adopted several trade agreements in the last decade aimed at making the ASEAN region more competitive and raising its profile in

the world. Nevertheless, despite the fact that most of the ASEAN Members are developing countries and could benefit from trade liberalization and other ASEAN initiatives, Member States have been less than supportive of ASEAN achieving its full potential.

Each ASEAN Member has its own different state interests, policy preferences and standpoints, so that conflicts remain inevitable and it is becoming obvious that the road toward the establishment of the ASEAN Community will not be smooth. With all these circumstances, trade disputes are predicted and will become more intense. This situation is not unique to ASEAN, but has occurred in other regional economic groupings as well where, regardless of the form of economic integration followed, dispute settlement mechanisms have been adopted. Similarly, ASEAN also needs a trade dispute settlement mechanism which will necessarily be different in form and fact from the traditional ASEAN mechanism of consensus. In Part II this thesis describes and examines the dispute settlement mechanisms in other regional and global economic organizations for the resolution of trade disputes. Part III of the thesis will return to a consideration of these issues in the ASEAN context.

PART II

INTERNATIONAL SETTLEMENT OF TRADE DISPUTES

CHAPTER 3 – DISPUTE SETTLEMENT MECHANISMS IN OTHER MAJOR ECONOMIC ORGANIZATIONS [1]

3.0 Introduction

All but three nations[2] in the world, developed and developing countries alike, have concluded trade agreements creating free trade areas or customs unions amongst themselves.[3] The proliferation of these economic groupings, particularly in the last decade, is a phenomenon that can be ascribed to countries wanting to harmonise the diversities between their national economic policies yet still safeguard their ability to individually pursue outward-oriented development policies.[4] To mutually benefit from these trade arrangements and promote greater economic cooperation, contracting nations have to agree to liberalise their economies by reducing or eliminating trade-distorting policies and practices amongst themselves, such as tariffs and non-tariff barriers.

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[1] The terms 'organisations' here, not included the GATT as it is an agreement. For the purpose of the writing of this thesis, the GATT is included in this discussion as it was the predecessor of WTO; by this way it will give a complete illustration of the development of dispute settlement mechanism from GATT into the WTO as this development also occurs in ASEAN dispute settlement mechanism.

[2] They are Hong Kong, the Republic of Korea and Japan, see WTO, *World Trade Organization Annual Report*, (1996), 38

[3] For a good definition of free trade area (FTA) and customs unions (CU), see Bryan Mercurio, 'Should Australia continue negotiating bilateral free trade agreements? A practical analysis', (2004) 27 (3) *University of New South Wales Law Journal* 667, 667; 'An FTA is an agreement between two countries or amongst groups of counties aimed at a policy of non-intervention by the state in trade between their nations.' Id. 'Tariffs and non-tariff barriers to trade are removed or lowered, whilst each country maintains its own commercial policy towards countries that are not part of the FTA.' Id. 'The key feature of an FTA is its discriminations in favour of the interests of the members of the agreement resulting in businesses in the member countries securing preferred access to the markets of other members over business from non-members.' Id. 'Modern FTAs however rarely lower or remove barriers on all goods and services, and members can often still use protections, such as anti-dumping actions, against the other members.' Id. 'In contrast, a custom union is an FTA in which members apply a common external tariff on goods imported from non-member countries.' Id. 'However, even members of the European Union customs union can use competition policies to restrict trade from other members, and certain sectors, most notably agriculture, are excluded from its ambit.' Id.

[4] The vast majority of WTO members are parties to one or more Regional Trading Arrangements (RTAs); Currently, 250 RTAs have been notified to the GATT/WTO and more than half of it, 179 RTAs are in force (up to 8 July 2005) see, http://www.wto.org/english/tratop_e/region_e/eif.e.xls at 12/11/2005; By the end of 2005, it is estimated that the total number of RTAs will be approximately around 300. Id.

In the typical style of treaty framing, most trade agreements are lengthy and wordy documents consisting of general terms which could be interpreted differently. Consequently, interpretive problems, such as vagueness and ambiguity, inevitably arise in the implementation of these agreements and lead to disputes among Member States. Moreover, disputes are a natural consequence of implementation by sovereign states seeking to maximise their own advantages while providing minimal benefits to others under the agreements. When this occurs, Member States usually bring such disputes to the relevant trade organizations to be resolved. The existence and, more importantly, the *modus operandi* of dispute settlement mechanisms within these trade organizations have therefore become crucial to resolving these disputes.

The traditional approach to dispute settlement in the world trading system was power oriented. However, since the 1940s there has been a gradual evolution away from a power based system to a rule based system which institutionalizes legalistic adjudication mechanisms. Originally evidenced in the GATT dispute settlement mechanism this evolution has also manifested itself in other regional trading system. Rule-oriented dispute settlement procedures have become significant in providing orderly methods to properly resolve disputes relating to the application of the agreements. The creation of reliable dispute settlement mechanisms has thus been essential to ensuring a secure and predictable trading arrangement which meets the expectations of the Member States.

The purpose of this chapter is to illustrate common systems and procedures that are utilized in the dispute resolution mechanisms of five major trading organisations, namely the European Community (EC), the General Agreement of Trade Tariffs (GATT), and its successor the World Trade Organization (WTO), the North American Free Trade Agreement (NAFTA), and Southern Common Market or Mercado Comun del Sur (MERCOSUR). Of these five international intergovernmental organisations, the first four have been chosen as examples of organisations that have resolved trade disputes effectively. MERCOSUR has been included in this study because, as is the case with ASEAN, its Member States are developing states

The dispute resolution systems of each of these organisations will be analysed in terms of their structure; the type of panel or court system in operation, particularly whether a permanent or ad hoc system is in place; the independence of the panellists or judicial

officers; the rights of private parties to appear before the panel or court; as well as the precedential value, adoption and enforceability of decisions made by the dispute settlement body. This discussion will provide the basis for a comparative examination, in later chapters, of the mechanisms that have been adopted by ASEAN.

3.1 The European Community (EC)[5]

3.1.1 Brief Introduction to the organisation and its goals

The European Union (EU) is the latest name for the organization that has been known as the European Economic Community or European Community (EC).[6] It is a supranational union of 25 European member states.[7] The EC history began with three interrelated but separate treaties: the Treaty establishing the European Coal and Steel Community (ECSC by 1951 Treaty of Paris)[8] Atomic Energy Community (Euratom, 1957)[9] and the European Economic Community (EEC by 1957 Treaty of Rome).[10]

In 1967 the institutions of the three communities of 1954 and 1957 merged to form the European Community (EC) and in 1992 the Member States signed the Maastricht

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[5] Up to 1 May 2004, ten countries joined the EU making it a custom union of 25 member states. Within 2007-2015 it should see further enlargement of the EU. In December 2005 the EU will start admission talks with Croatia and Turkey if certain conditions are met, see <http://www.europa.eu.int/abc/12lessons/index3_en.htm> at 16/11/2005

[6] The EU grew out of a concern over the peaceful use of coal and steel resources in Europe in the following the end of the World War II, which saw these two industries as vital parts of both economic and military rebuilding. Paul Craig and Grainne de Burca, *EU Law: Text, Cases, and Materials*, (3rd ed 2003), 8-9; The merged of these two industries under 'High Authority', was believed would end 'the ancient rivalry and enmity between French and Germans.' Id.

[7] Many said that 'the EU is not an international organisation at all since its powers are so much greater than the general run of such organizations', see Trevor C. Hartley, *European Union Law in a Global Context: Text, Cases and Materials*, (2004), 1 [hereinafter Hartley text and cases]; The term 'supranational' organization is 'to indicate that it does not merely operate in relations between States, but has power over them.' Id.

[8] Treaty of Paris establishing the ECSC, 18 April 1951, 261 UNTS 140; see, http://www.europa.eu.int/abc/obj/treaties/en/entoc29.htm> at 13/11/2005, the ECSC dealt with regulation of coal and steel industries with a limited life-span of fifty years, and expired in 2002. Craig and de Burca, above n 6, 9, this was first significant step toward European integration by establishing a supranational authority whose independent institutions had the power to bind its constituent member states. Id.

[9] Treaty establishing the European Atomic Energy Community, 25 March 1957, 298 UNTS 167, see also, http://europa.eu.int/abc/obj/treaties/en/entoc38.htm> at 13/11/2005, Euratom was directed at research and development of atomic energy.

[10] Treaty of Rome establishing the European Economic Community, 25 March 1957, 298 UNTS 11, see also http://europa.eu.int/abc/obj/treaties/en/entoc05.htm > at 13/11/2005; this Treaty is known as Treaty of Rome or The EC Treaty [hereinafter the EC Treaty] the EEC concerned with the economic cooperation towards the formation of common market

Treaty[11] to establish a 'European Union'. The ECSC was finally terminated in 2002 while the EC (previously the EEC) and Euratom still exist as of today.

The EU Treaty dealt with the Member States' commitments to full economic and monetary union, brought about the institutional change in the EU[12] and the European Economic Community (EEC) Treaty was officially renamed the European Community (EC) Treaty. In terms of institutional change, the EU Treaty established what are known as the 'three pillars' of the EU. The first pillar, the central one, is the European Community (the EC, ECSC and Euratom collectively) which represents all of the institutional structure and scope of operations including the new Economic and Monetary Union (the EMU). The new pillars, the lateral ones, are not based on supranational competences as the previous one, but in the cooperation among the governments. The second pillar is therefore the Common Foreign and Security Policy (CFSP) and the third pillar refers to Justice and Home Affairs (JHA).[13] The EU continues to improve its institutional structure and consolidate its treaties as its membership grows.[14]

The task of the EC as enunciated in Article 2 of EC Treaty is "to promote throughout the Community a harmonious development of economic activities, a continuous and balanced expansion, an increased stability, an accelerated raising of the standard of living and closer relations between the States belonging to it."[15] Meanwhile, the main broad aims and principles of the EU's common market and economic and monetary union, as expressed in Article B[16] of the EU Treaty and Article 2 of the EC Treaty, are to promote solidarity between the European Community (EC), harmonious and balanced development, closeness to the citizen, respect for national identities and for human rights, as well as to

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[11] Maastricht Treaty or Treaty on European Union, see < http://europa.eu.int/en/record/mt/top.html> at 13/11/2005 [hereinafter the EU Treaty]

[12] The three pillars structure for what was henceforth to be the European Union (EU), see Craig and de Burca, above n 6, 22.

[13] Ibid, 23; by 1993 the EU Treaty was in force. It should be noted that the EU is the European Community comprises three pillars, while the EC is the first pillar of the EU. These two terms often used interchangeable.

[14] In 1997, the Treaty of Amsterdam has been signed and enter into force in 1999, it amended and renumbered the EU and EC Treaties, see <http://europa.eu.int/abc/treaties/index_en.htm> at 14/11/2005; In 2001, the EU Members signed Treaty of Nice which dealt mostly with reforming the institutional structure so that the Union could function efficiently after the enlargement to 25 Members States. Id.

[15] The EC Treaty, above n 10, Art 2

[16] The EU Treaty, above n 11, Art B

safeguard the *acquis communautaire* [17]- the body of Community law built up over the years- through the implementation of the common policies. In order to achieve these objectives, five institutions have been established: the European Parliament, the European Council, the European Commission (the Commission), the European Court of Justice (ECJ), and a Court of Auditors.[18]

3.1.2 The EC dispute settlement system

Community law must be implemented as effectively as possible in all of the Member States to gain the maximum of benefits of the EC's goals. It is clear that the effectiveness of community law would be undermined by the absence of effective sanctions and remedies for breach of Community law. To that end the European Court of Justice (ECJ) [19] has been established to determine disputes amongst the Member States which include trade disputes and to provide opinions or preliminary rulings on matters arising out of the implementation of the articles of the treaties and derivative legislation. For the purposes of this thesis discussion is limited to the jurisdictional the ECJ in respect of trade disputes.

The main function of the ECJ is thus to ensure that EC law is complied with and that the treaties are interpreted and applied correctly by other EC institutions as well as by the Member States.[20] Suits are brought either by the European Commission[21] or a Member

[17] For the detail of the *Acquis Communautaire,* see C Delcourt, 'The *Acquis Communautaire:* Has the concept had its day?' (2001) 38 *Common Market Law Review,* 829

[18] Under the terms of the Merger Treaty 1965 (which came into effect 1967) the essentially similar sets of institutions were merged to form a single institutional framework consisting of four Community institutions, namely, the European Parliament, the Council, the Commission and the Court of Justice. And then the EU Treaty added the fifth organ, the Court of Auditors. These five organs now comprise the formal Community institutions as stipulated in Article 7 {ex Art 4}of EC Treaty, see Craig and de Burca, above n 6, 24

[19] The ECJ was established by the Treaty of Paris, which instituted the European Coal and Steel community 1951, with its seat in Luxembourg, see Renaud Dehausse, *The European Court of Justice: the Politics of Judicial Integration*, (1998), 5; Following the creation of the EEC and EURATOM by the Treaty of Rome 1957, it was decided that a single court would deal with legal disputes arising under all three Communities. Id. Its proper name is the Court of Justice of the European Communities sometimes referred to as 'the European Court' which should not be confused with the European Court of Human Rights, which established under the European Convention on Human Rights and is not an institution of the EU, see also Derrick Wyatt and Alan Dashwood, assisted by Anthony Arnull, *Wyatt and Dashwood's European Community Law,* (1993), 191

[20] The EC Treaty, above n 10, Art.220 {ex 164} of the EC Treaty

State.[22] In order for the ECJ to perform its duties, the EC Treaty has equipped the Court with a series of specific powers, including the power to declare that a Member State has failed to fulfil its obligation under the treaty.[23] The Member State concerned is required by Art 228 (1) {ex 171 (1)} of the EC Treaty 'to take the necessary measures to comply with the judgment of the Court of Justice'.[24] And if it fails to do so, it exposes it self to further proceedings under art 228 (2) {ex 171 (2)} which may result in the imposition of a financial penalty.[25]

3.1.3 Permanent vs. ad hoc panels

The ECJ has been established as a permanent court[26] and it is the EC's 'Supreme Court' to which the Court of First Instance (CFI)[27] is attached. The ECJ serves as the judicial branch over the European Economic Community (EEC), the European Coal and Steel Community (ECSC) and the European Atomic Energy Community (EURATOM) although it mostly assists the former rather than the latter two.[28]

The ECJ is made up of one judge from each Member State[29] and is assisted by Advocates General.[30] These individuals are appointed by the joint agreement of the

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[21] The EC Treaty, above n 10, Art 226 {ex 169} of the EC Treaty; the procedure laid down in this article falls into two distinct phases, the administrative phase (or pre-litigation procedure) and the judicial phase, for further explanation see Wyatt and Dashwood, above n 19, 212-7

[22] The EC Treaty, above n 10, Art 227 {ex 170}of the EC Treaty

[23] The Court, however, has no power to tell the Member State in question what it must do to remedy the breach or to quash any national measure which it may have found unlawful, see Wyatt and Dashwood, above n 19, 217

[24] The EC Treaty, above n 10, Art 228 (1) {ex 171(1)}

[25] Ibid. Art 228 (2) {ex 171 (1)}

[26] Under a panel system, a panel is established upon the request of the disputing parties, for example, as is the case in the DSU-WTO (DSU Art.6), the 1996 Protocol of ASEAN (art 5), and NAFTA (art. 2008, ¶.1)

[27] The CFI was 'attached to the Court of Justice' by the Single European Act 1986 (art 225 {ex 168a} the EC Treaty and was established in 1989 for the purpose of relieving some of the ECJ's burden, including the staff cases, see Craig and de Burca, above n 6, 90-1; CFI deals with most of the administrative disputes hitherto brought before the ECJ. *Id.* Decisions given by the CFI may be subject to a right of appeal to the ECJ on points of law only, see the EC Treaty, above n 10, Art 225 {ex 168a}

[28] In 1995, 4024 cases had been given on the EEC Treaty, compared with the 359 on the ECSC Treaty and the 19 on the Euratom Treaty, *General Report of Activities of the EC*, 1990-95, quoting Dehousse, above n 19, 6

[29] The EC Treaty, above n 10, Art 221{ex 165}; at present, the ECJ is composed of 15 judges regardless the latest 2004 enlargement.

[30] The EC Treaty, above n 10, Art 222 {ex 166}; The Advocate General are appointed in the same way as judges and have the same tenure, see Hartley text and cases, above n 7, 78; The task of the Advocate General, one of whom is assigned to each case before the Court, is to present an independent and impartial written opinion after the parties have concluded their submissions, which sets out his or her understanding of the law

governments of the Member States[31] for a term of six years, after which they may be reappointed for one or two further periods of three years.[32] Every three years there is a partial replacement of these judges as well as Advocates-General in accordance with the conditions laid down in the Statute of the Court of Justice.[33] This process ensures the consistency and continuing of the function of the institution.

The ECJ has its own statute and rules of procedure which are based on the Statute of the International Court of Justice.[34] A Protocol on the Statute of the Court (the Statute) is annexed to the Treaties and is an integral part of them, having been accorded the same legal status. The Statute lays down rules on the members of the Court and the broad contours of its organization and procedure in more detail than would have been convenient in the body of the respective treaties. The Statute was implemented and supplemented by a single set of Rules of Procedure adopted by the Court with the unanimous approval of the Council.[35] The Statutes of the Court were modified in 1988 in the light of the establishment of the CFI which has its own rules of procedure.

The ECJ is sub-divided into six Chambers in order to cope with the workload of the Court.[36] While these Chambers deal with the greater part of cases that appear before the Court, [37] the most important cases are still reserved for the full court, of which the quorum is nine.[38] The decision whether to assign a case to a Chamber and, if so, whether to a three-

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applicable to the case and his or her recommendations as to how the case ought to be decided: see Craig and de Burca, above n 6, 88; This opinion, although not binding on the Court, is generally very influential and in the great majority of cases, has been followed by the Court. *Id.*

[31] The EC Treaty, above n 10, Art 223 {ex 167}

[32] Hartley text and cases, above n 7, 77

[33] Ibid

[34] Jurgen Schwarze, 'Origins of the European Courts' Statutes and Rules of Procedure' in Richard Plender (ed), *European Courts Practice and Precedents*, (1997), 4

[35] The Rules of Procedure have themselves been supplemented by Supplementary Rules and Instructions to the Registrar, see K. P. E Lasok, *The European Court of Justice: Practice and Procedure*, (1994), 3-8

[36] The term 'Chamber' is used in the texts to translate the French '*Chambre'* as indicating a division or section of the court, consists of three or five judges, see L Neville Brown and Tom Kennedy, *The Court of Justice of the European Communities*, (2000), 20; it is not identical with the English term 'chambers' as suggesting a hearing in camera or in the private room of the judge or judges. *Id*

[37] They are two Chambers consisting of five judges each and four Chambers of three judges each, see ibid, 39; one judge in each Chamber is designated as President of that Chamber. The advocates general are not attached to any particular Chamber. *Id.*

[38] In practice it is rare for the so-called *grand-plenum* of fifteen judges to be assembled and usually, the *petit plenum* of eleven judges will deal with the cases: see Anthony Arnull, *The European Union and its Court of Justice*, (1999), 11; The formation assembled in question is principally determined by the difficulty or importance of the proceedings. *Id*.

judge or five-judge chamber, is made by the Court after its consideration of the preliminary report by the judge-rapporteur and the opinion of the Advocate-General.[39]

3.1.4 Independence of judicial officers

The members of the ECJ are, in the interests of equality, appointed not by the Council but 'by the common accord of the Governments of the Member States'.[40] The EC Treaty states that the independence of the ECJ's judges is "beyond doubt" and that they "possess the qualifications required for appointment to the highest judicial office in their respective countries or who are jurisconsults of recognized competence"[41] (the latter qualification allowing for the appointment of academic lawyers).

Although the strict law of the EC Treaty does not require the composition of judges and advocates general to be based according to their nationality, in practice each Member State nominates one of its own nationals as a judge. After the signing of Treaty of Nice, this practice was become formalized with Article 221 {ex 165} of the EC Treaty as amended by Treaty of Nice providing that there is one judge per Member State.[42]

The independence of the candidates is a first and paramount consideration and requirement in order to counter any notion that judges are representatives of their own Member State or government which has nominated them.[43] This principle together with the secrecy of the Court's deliberations would appear to be 'adequate safeguards against the risk of biased judgments from judges pressured to give advantage to their own country'.[44] Moreover, when a judge is assigned as reporting judge to a case, there is an unwritten rule practiced whereupon the Court will take care to ensure that the judge is not a national of the

[39] Rules of Procedure of the Court of Justice of the European Communities, Art 95 (2), [hereinafter Rules of Procedure of ECJ]; For a reprinted of the texts of this document, see Lasok, above n 35, 647-678
[40] The EC Treaty, above n 10, Arts 223 {ex 167} and Art 214 (2) {ex 158} of the EC Treaty; On the other hand, the Commission may be collectively dismissed by the Parliament and individual members of the Commission face compulsory retirement by the Court if they no longer meet the conditions for performing their duties or have been guilty of serious misconduct.
[41] The EC Treaty, above n 10, Art 223 {ex Art 167} of EC Treaty, Art 32 (b) ECSC, and Art 139 Euratom
[42] The EC Treaty, above n 10, Art 221 {ex 165} of EC Treaty; Before the Treaty of Nice came into force, there was no express rule to this effect, but this was normally what happened in practice, Hurtley text and cases, above n 7, 77; In the past, an additional judge was selected by the five large Member States in order to avoid an even number, see Craig and de Burca, above n 6, 88; From now on the number of judge will be restricted to the number of Member States. Id.
[43] Brown and Kennedy, above n 36, 49
[44] Ibid.

Member State whose interests are at stake.[45] These mechanisms circumvent any pressure that springs from patriotic loyalty which could cause judges to take care of the interests of their respective home-states rather than of the demands of Community law.[46]

Before taking up office, a judge swears to perform his or her duties impartially and conscientiously and to preserve the secrecy of the Court's deliberations.[47] While in office, judges are neither permitted to hold any political or administrative (governmental) office nor engage in any occupation, gainful or not, unless exemption is granted by the Council by a two-third majority.[48] They are also not to acquire or retain, directly or indirectly, any interest in any business related to coal and steel during their term of office and three years after ceasing to hold office. Even after they have ceased to hold office, judges are required to behave with integrity and discretion with regards to the acceptance of appointments or benefits.[49] These provisions work to ensure that the judges of the ECJ remain independent and free from any interests which could interfere with the impartiality of their decisions.

3.1.5 Private party rights to appear

The system of the EC Treaty enables private parties, i.e. individuals, companies, unincorporated associations etc., to challenge illegal, invalid or unfair EC administrative actions. Such rights however, are not given to allow private parties to challenge regulations or directives.[50] Even so, private parties are only allowed to challenge administrative actions which are, in substance if not in form, decisions which are either addressed to them or are of direct and individual concern to them. [51] The class of people able to claim standing on

[45] A reporting judge or a *juge rapporteur* is a judge who functions not only as the internal liaison officer to the Court for a particular case but also externally: Hjalte Rasmussen, *The European Court of Justice*, (1998), 64; The tasks include preparing the case's so called *rapport d'audience*, which is produced before the oral hearing of the case and sums up the contents of the written briefs presented up until that moment, and being responsible for writing drafts and final version of the judgment, whether or not he or she shares or participated in the majority opinion of the outcome of the case. *Id.*
[46] Ibid.
[47] The Rule of Procedure of ECJ, above n 39; see also Article 3 and Article 2 Protocol on the Statute of the Court of Justice for ECSC and Euratom [hereinafter the Protocol on the Statute]; For a reproduction of the texts of this documents see Lasok, above n 35, 625-643
[48] The Protocol on the Statute, above n 47, Article 4
[49] Ibid
[50] For the detailed discussion see A Albors-Llorens, *Private Parties in European Community Law*, (1996)
[51] Grainne De Burca and J H H Weiler, *The European Court of Justice*, (2001), 21

the latter ground was further limited by the Court in *Plaumann*[52] to only persons who are affected by the decision either because of certain attributes peculiar to them or because of circumstances which differentiate them from all other persons and because of these factors alone they are individually distinguishable just as in the case of a person with standing on the former ground.

One of the powers of ECJ is also to give preliminary rulings to references from national courts of the Member States.[53] When a national court in any case encounters a question of Community law which needs to be resolved before judgment for the case can be given, it can refer the issue to the ECJ which, in turn, will deliver an answer (known as a preliminary ruling) to the referred question. This system, in effect, gives individuals the power to raise matters before the ECJ via reference from the national courts[54] and any preliminary ruling rendered by the ECJ has the status of interpreted Community law which the national court must apply to the facts of the case.[55]

Under Article 230{ex 173} of the EC Treaty, the ECJ has the jurisdiction to review the legality of Community acts[56] and to order sanctions in the situation where a Community institution has refused to adopt the Community act or its aim legislation or regulation concerned although it was legally bound to do so.[57] Member States, Community institutions and individuals can bring actions before the Court against any institution of the Community that has failed to address any act other than a recommendation or an opinion, provided certain conditions are met.[58] Through innovative interpretations of the Treaty, the Court has

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[52] Case 25/62, *Plaumann* v *Commission* [1963] ECR 106

[53] The EC Treaty, above n 10, Art 234 (ex 177) EC Treaty, the ECJ has jurisdiction to give preliminary rulings concerning: (a) the interpretation of this Treaty; (b) the validity and interpretation of acts of the institutions of the Community and of the ECJ; (c) the interpretation of the statutes of bodies established by an act of the Council, where those statutes so provide. Id.

[54] John Collier and Vaughan Lowe, *The Settlement of Disputes in International Law: Institutions and Procedures*, (1999),106

[55] See Wyatt and Dashwood, above n 19, 265

[56] The range of reviewable acts covers regulations, decisions, and directives which are listed in Art 249 EC Treaty, see Craig and de Burca, above n 6, 483; The ECJ has held that this list is not exhaustive, and the other acts which are sui generis can also be reviewed, provided that they have binding force or produce legal effects. Id. The four different reasons for acts of the institutions that can be challenged are: (i) the lack of competence; (ii) infringement of an essential procedural requirement; (iii) infringement of the treaty or of any rule of law relating to its application; and (iv) the misuse of powers: see Brown and Kennedy, above n 36, 50

[57] The EC Treaty, above n 10, Art 232 {ex 175}of the EC Treaty

[58] Private persons, unlike the institutions with special standing, can only take annulment actions in concrete disputes and under relatively strictly defined conditions, namely those who are directly and individually

provided more room for political actors, be they national governments or European institutions, to pursue policy objectives within the legal sphere. At the same time, the Court has also provided private actors with both incentives and instruments to use this judicial avenue whenever the application of Community law was more favourable to their interests than national regulations.

3.1.6 The precedential value of decisions

In continental legal theory, there is no principle of *stare decisis* and a court decision, even of a supreme court, is only binding on the case at issue and not on future situations.[59] Conversely, in English common law legal theory, the doctrine of precedent has the effect of requiring a judge, in a case of similar facts or issues, to follow a previous decision of the court or a superior court even though, given a free hand, the judge might have preferred not to do so.[60] Interestingly, while the ECJ, does not in theory regard itself as bound by its previous decisions,[61] the Court has in practice followed its previous decisions in almost all the cases that have come before it.[62]

The ECJ does however depart from previous decisions where it thinks it necessary in order to develop a particular doctrine or overrule an earlier decision.[63] For example, in *Keck and Mithouard* [64] - a case concerning the scope of Article 28 of the EC Treaty, the ECJ departed from previous case law, although it declined to specify which decisions were 'overruled'.[65] In this case the ECJ found that the Court had not maintained the consistent

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affected by those measures, see the EC Treaty, above n 10 , Art 230 {ex 173}; see also, Dehausse, above n 19, 26

[59] Henry G Schermers and Denis F Waelbroeck, *Judicial Protection in the European Union*, (2001), 134; Courts are to apply the law and not to make it. Id. When rules are required for general application, they should be made by the legislature. Id.

[60] For the detailed explanation of the doctrine of precedent, Rupert Cross and J W Harris, *Precedent in English Law*; see also, Arnull, above n 38, 528

[61] Brown and Kennedy, above n 36, 369-373

[62] T C Hartley, *The Foundations of European Community Law*, (1998), 75 [hereinafter Hartley foundation]

[63] Brown and Kennedy, above n 36, 371

[64] *Keck and Mithouard* case, Joined cases C-267/91 and C-268//91 [1993] ECR I-6097(a case related to the free movement of goods) [hereinafter *Keck and Mithouard* case] This case concerned two references from a French criminal court about the compatibility with Community law of the French prohibition of resale at loss. The accused managers, Messrs. Keck and Mithouard, argued that this prohibition contradicted Article 30 and other EC Treaty provisions.

[65] See Arnull, above n 38, 531; the Court stated 'contrary to what has previously been decided' that certain types of national legislation which may appear to hinder imports were non the less compatible with the

application of Article 28 {ex 30} of the EC Treay, and the Court concluded 'contrary to what has previously been decided' that certain types of national legislation which might appear to hinder import were none the less compatible with the Treaty.[66] In contrast, in *Brown v Rentokil*,[67] the Court expressly overruled its ruling in previous case.[68] Unlike the decision in *Keck*, the decision in *Brown* was 'a decisive step which left the legal position relatively clear.'[69] In *Merck*,[70] however, the Court refused to depart from the rule of the previous case, *Merck and* v *Stephar and Exler* ,[71] even though the Advocate General advised the Court not to refer to. *Merck* dealt with the question of the circumstances in which patent rights were to be considered exhausted. The Court concluded that 'it had struck the right balance in that case between the principle of the free movement of goods and the interests of patentees.'[72] These examples illustrate that the ECJ does not apply a strict rule of precedent.

3.1.7 The adoption of decisions

The ECJ gives a single collective judgment signed by all the judges who took part in the deliberations. Dissenting judgments are not permitted and if the Court should find itself divided, a majority view must be determined by vote and this view will then emerge as the judgment of the Court.[73] The public therefore has no way of knowing whether the Court's judgments are unanimous or were decided by a majority. The ECJ judgments are collegiate representing the single and final ruling of all of the judges hearing the case.

Treaty, id; see also Norbert Reich, "The 'November Revolution' of the European Court of Justice: *Keck, Meng* and *Audi* Revisited", (1994) 31 *Common Market Law Review*, 459, 460. The French court referred only in general terms to the fact that only traders not producers were bound by this prohibition, and that French shopping centres might be disadvantage in frontier areas compare with for example, their German competitors where no such prohibition existed, and as far as intra Community trade was concerned, did not make clear how far the French regulation restricted directly or indirectly, actually or potentially to intra-Community trade. Id.

[66] Arnull, above n 38, 531

[67] Case C-394/96 [1998] ECR I-4185, a case on the protection conferred by the Equal Treatment Directive on female employees who fall ill as a result of pregnancy, see also ibid, 532

[68] *Larsson v Fotex Supermarked*, case C-400/95 [1997] ECR I-2757

[69] Arnull, above n 38, 532

[70] *Merck and Others* v *Primecrown and Others* and *Beecham and Europharm*, joined cases C-267/95 and C-268/95 [1996] ECR I-6285, see also, Arnull, ibid.

[71] Case 187/80 [1981] ECR 2063

[72] Arnull, above n 38, 532

[73] RP ECJ 27 (8) and (5); RP-CFI 33 (3) and (5)

In any event, the decision can be taken only if:

(i) there is quorum (where seven judges for the full court, three judges for the chambers; if it is found that there is no quorum, the sitting is adjourned by the President until there is one;

(ii) an uneven number of judges participates in the deliberations and votes; if there is an even number of judges, the most junior judge abstains from taking part in the deliberations (unless he or she is the judge-rapporteur, in which case the duty to abstain falls on the judge immediately senior to him or her; and

(iii) only those judges present at the oral proceedings (if any) take part in the deliberations; if one of the judges dies or is otherwise absent and must be replaced by another judge, who did not attend the hearing or the delivery of the advocate general's opinion, in order to maintain a quorum or restore the uneven number of judges required, the oral procedure must be recommenced.[74]

It is argued that the effective delivery[75] of the judgement also affects the bindingness of the judgments and thereby determines the rights and duties of the parties as proceedings can then be commenced for its enforcement. The Court's judgments are binding from the date of their delivery, which is the time when the operative part is read out in open court.[76] In contrast to judgments, the position regarding the delivery of other decisions of the Court is unclear. Orders, however, are binding when made.[77]

3.1.8 The enforceability of decisions

The conditions for the enforcement of the ECJ's judgments have been set out in the EC Treaty which states that the enforcement is to be governed by the rules of civil procedure in force in the Member State in whose territory the judgment is executed and to be carried out by the national authority designated for this purpose.[78] Article 226 {ex 169} of the Treaty provides that the Commission can bring proceedings before the ECJ against any Member State that fails to fulfil its obligation under the Treaty.[79]

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[74] Lasok, above n 35, 490

[75] Either reading out the entire judgment in open court or giving notice to the parties could affect the effective delivery of the judgments, ibid, 492

[76] Ibid, 534

[77] Ibid

[78] Ibid

[79] The EC Treaty, above n 10, Article 226 (ex 169) states: 'If the Commission considers that a Member State has failed to fulfil an obligation under this Treaty, it shall deliver a reasoned opinion on the matter after giving the State concerned the opportunity to submit its observations. If the State concerned does not comply with

Several phases must, however, first be exhausted by the Commission before it can do so. This begins with the delivery of a warning letter to the Member State stating its alleged breach and inviting comments. If this does not settle the matter, the Commission then invites the State to formally submit its observations on the alleged breach. If the Commission is not satisfied by the explanation given by the State, it will then deliver a reasoned opinion holding that the State concerned has breached Community law and ordering it to correct the breach.[80] If the State refuses to comply the Commission is then entitled to bring the matter before the ECJ for the Court's judgment.

A corresponding power has also been granted to Member States by Article 227 {ex 170} of the EC Treaty where any Member State can bring an action against another Member State before the ECJ if the latter has failed to fulfil its Community obligations. Actions of this kind, however, have rarely been used and are generally avoided in practice as they involve direct confrontation between Member States as litigants. [81] The initiation of suits is thus usually left to the Commission.[82]

Article 226 {ex 169} has therefore proved to be an important weapon for ensuring compliance by the Member States with their Treaty obligations. However, even so, the Court has recognized that it is up to the discretion of the Commission whether or not to invoke it. In this way, there is a balance between ensuring respect by the Commission for the procedural requirements laid down in the Treaty[83] and promoting compliance by the Member State with their community obligations.[84] As the Commission procedurally has the power to bring the State that breaches the Community law to the ECJ, this acts as a strong incentive for the compliance of the Member State.

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the opinion within the period laid down by the Commission, the latter may bring the matter before the Court of Justice.'

[80] See Brown and Kennedy, above n 36, 117; in practice, a high percentage of the cases terminate at this stage. Id.

[81] Up to 1999, only one case was concerned with this action, Case 141/78 *France v United Kingdom* [1979] ECR 2923, see Arnull, above 38, 22

[82] Brown and Kennedy, above n 36,125

[83] The Commission has issued guidance on the application of Art 228 (ex 171) for instance, its Memorandum on Applying Art 171 of the EC Treaty, OJ 1996 C242/6; Method of Calculating the Penalty Payments Provided for Pursuant to Art 171 of the EC Treaty, OJ 1997 C63/2; the Commission right to propose the imposition of sanctions, written question E-3278/98, OJ 1999 C 135/182, quoting Arnull, above n 38, 29

[84] This power is only exercisable upon application by the Commission which must specify the amount of the financial sanction it considers appropriate, see Arnull, above n 38, 30

It is clear that the Court deals with cases which involve sovereign Member States that may thus have national sovereignty implications, in particular with respect to the enforcement. Articles 226 {ex 169} and 227 {ex 170} rulings of the ECJ were therefore originally purely declaratory and the Court could neither impose any sanctions nor annul any national measures. Member States were simply required by Article 228 {ex 171} of the Treaty to take steps that were necessary to correct the breach and comply with the Court's judgment based on goodwill.

With the addition of a second paragraph to Article 228 {ex 171}, however, further proceedings may now be brought against Member States which refuse to comply with the Court's judgment and the Court also now enjoys the power to impose financial sanctions on Member States which have infringed their Community obligations.[85] The ECJ had imposed a financial penalty in *Commission of the European Communities v. Hellenic Republic*,[86] where Greece failed to implement all necessary measures in accordance with an EC Directive thereby failing to fulfil its obligation under Article 228 {ex 171} of the EC Treaty.[87] The Court instructed a penalty payment of € 20,000 (US$18,000) for each day of delay in implementing the measures necessary to comply with the judgment from the day of the decision until compliance.[88]

Although not specifically provided for in the EC Treaty, the ECJ by inference from Article 5 of the EC Treaty [89] has introduced the principle of supremacy. According to this principle, in situations of conflict between national law and Community law, the former must give way to the latter. Community Law therefore prevails. In this way Community

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[85] If the Commission considers that the Member State concerned has not taken such measures within the time period laid down by the Commission, it may bring the case before the ECJ and specify the amount of lump sum or penalty payment which it considers appropriate in the circumstances to be paid by the State concerned (Article 228 (ex 171)) EC Treaty, Arnull, above n 38, 30

[86] Case C-387/97, Court of Justice of the EC, Page I-5047, 2000 ECJ CELEX LEXIS 2906 (4 July 2000) (Directives 75/442/EEC)

[87] Bryan Mercurio, 'Improving Dispute Settlement in the World Trade Organisation: The Dispute Settlement Understanding Review – Making it Work?' (2004) 38 (5) *Journal of World Trade* 795, 842

[88] Ibid. This penalty is ordered to Greece in order to comply with a previous Court decision regarding the discharge of toxic waste into the Kouroupitos River on Crete, see "Brussels puts a bit of stick about ECJ imposes unprecedented fine on EU Member State", 9/00 *Business without borders* 30 (col.1) *Corporate Legal Times*, Vol 10 (106), September 2000, available in *WESTLAW*.

[89] The EC Treaty, above n 10, Article 5 stated: "Member States shall take all appropriate measures, whether general or particular to ensure fulfilment of the obligations arising out of this Treaty or resulting form action taken by the institutions of the Community. They shall facilitate the achievement of the Community's tasks. They shall abstain from any measure which could jeopardize the attainment of the objectives of this Treaty"

law can be uniformly applied and interpreted throughout all jurisdictions of the Member States. Pursuant to Article 234 {ex 177} of the EC Treaty, the ECJ is also able to effectively dictate how domestic courts must interpret and implement Community law. In *Simmenthal*, [90] the Court laid down the rule that every national court has an obligation to not only apply Community law in the face of any conflicting national law, but to also set aside the conflicting national law even though the national court may lack (or has expressly been denied) jurisdiction to do so under domestic law.

As national courts are not to apply any national regulation that could impede the immediate applicability or effectiveness of Community law, many Member States have had to change their national legislation to reflect consistency with Community law. For example, the French Constitution was amended in 1992 pursuant to a decision of the French Constitutional Council, in order to give effect to changes made by the Maastricht Treaty.[91] In 1999, the French Constitution was again revised pursuant to a decision of the French Constitutional Council in order to facilitate the ratification of the Amsterdam Treaty.[92] Thus, the ECJ has very significant power to ensure the uniformity of application of Community law. In this respect the EC differs significantly from traditional intergovernmental organizations.

3.2 The General Agreement on Tariffs and Trade (GATT) [93]

3.2.1 Brief introduction to the organisation and its goals

The GATT was the predecessor of the WTO and laid the foundation for the development of the sophisticated dispute settlement mechanism now found in that organisation and discussed in section 3.3 below.

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[90] 106/77, *Amministrazione Delle Finanze Dello Stato* v *Simmenthal SPA*, [1978] ECR 629; [1978] 3 CMLR 263, see also Simon Bronitt, Fiona Burns and David Kinley, *Principles of European Community Law: Commentary and Materials*, (1995), 107; This conflicting national law may continue to apply in any situation which is not covered by a conflicting provision of community law, Craig and de Burca, above n 6, 275

[91] Craig and de Burca, above n 6, 288; this resulted in the insertion of Article 88 – 3 into the Constitution concerning the right to vote and stand in municipal elections. Id.

[92] Ibid.

[93] The General Agreement on Tariffs and Trade opened for signature Oct 30, 1947, reprinted in IV GATT, Basic Instruments and Selected Documents, BISD, 1-78 (1969) [hereinafter GATT 1947]

GATT history began when in 1946 the UN Economic and Social Council adopted a resolution calling for the formation of an International Trade Organisation (ITO). During a series of negotiations arrived at establishing the ITO, states discussed: (1) the draft of an ITO charter; (2) prepare chain of schedules of tariff reductions and (3) prepare a multilateral treaty containing general principles of trade, namely, the General Agreement on Tariffs and Trade (GATT).[94] Originally intended as the ITO Charter's Commercial Policy Chapter,[95] it was planned that the results of the GATT negotiations could be incorporated in the ITO.

By the end of 1947 negotiations on tariff reduction had been completed and states were eager to enjoy the benefits of free trade without waiting for the formal establishment of the ITO. Protocol of Provisional Application[96] to apply GATT without waiting the final negotiations to form the ITO was adopted.[97] This Protocol provided that GATT apply 'provisionally on and after January 1, 1948'. As an interim measure, it was to adopt a multinational trade agreement that would regulate international trade until the ITO could take over. The ITO Charter, however, never entered into force because the US Congress did not approve its ratification. Thus, the ITO never could into existence. Eventually, GATT became the default agreement governing international trade.[98]

The GATT was an international system which not only provided the first legal framework of rules and procedures governing international trade and trade relations but which also articulated the legal rights and obligations of its sovereign member countries (referred to as Contracting Parties). Given the fact of the fragility of the agreements as it concerned with tariffs and involved with sovereign nations, the agreement 'precluded anything quite so firm.'[99] It can be said that GATT's legal underpinnings are weak.[100] It is argued that GATT provisions are basically nonbinding. The GATT provisions laid out in

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[94] Mitsuo Matsushita, Thomas J. Schoenbaum and Petros C. Mavroidis, *The World Trade Organization: Law, Practice, and Policy*, (2003), 2
[95] Robert E Hudec, *Essays on the Nature of International Trade Law*, (1999), 22 [hereinafter Hudec essay]
[96] Protocol of Provisional Application to the GATT, 30 October 1947, 55 U.N.T.S. 308
[97] Matsushita, Schoenbaum, and Mavroidis, above n 94, 3
[98] See Philip M. Nichols, 'GATT Doctrine', (1996) 36 *Virginia Journal International Law* 379,390;The nations signing the GATT were: Australia, Belgium, Brazil, Burma, Canada, Ceylon, Chile, China, Cuba, Czechoslovakia, France, India, Lebanon, Luxembourg, the Netherlands, New Zealand, Norway, Pakistan, Southern Rhodesia, Syria, South Africa, the United Kingdom, and the United States.
[99] Hudec essay, above n 95, 20
[100] Ibid, 44-51

the original GATT 1947 agreement was a diplomatic model where the power of the contracting parties ruled on the validity and interpretation of GATT rules.

The goal of the GATT was to pursue the "substantial reduction of tariffs and other barriers to trade" as well as the "elimination of discriminatory treatment in international commerce"[101] among themselves. These trade and economic endeavours were to be conducted toward the broad ideological objectives of raising the standards of living, ensuring full employment and growth of real income and effective demand, developing effective use of resources and expanding the production and exchange of goods.[102] Thus, the GATT aimed to reduce protectionist actions, such as high tariffs, that had contributed to the Great Depression and World War II and to promote the liberalisation of international trade.

The Contracting Parties were governments which applied the Agreement, either as original contracting parties of the 1947 GATT, or which had acceded to it thereafter. Each Contracting Party was required to taking such reasonable measures as was available to it to ensure that regional and local authorities within its territory observed the Agreement. The GATT, however, dealt only with trade in goods[103] and to this end, Article II of the GATT, apart from prohibiting the Contracting Parties from imposing any import restrictions other than tariffs, also limited the extent of tariffs that could be imposed.[104]

3.2.2 The GATT dispute settlement system

As the drafters of the GATT had not envisaged the permanent implementation of the provisional agreement which later ensued, it was perhaps no surprise that the GATT's dispute settlement mechanisms were somewhat simple and basic.[105] The provisions that governed general dispute settlement were set out in Articles XXII[106] and XXIII[107] of the

[101] The GATT, the preamble, see http://www.wto.org/english/docs_e/legal_e/gatt47_01_e.htm > at 13/11/2005
[102] Ibid.
[103] While GATT 1994 covers among other matters: trade in services and some aspects of foreign direct investment and intellectual property rights, agreement on agriculture and textiles.
[104] John H Jackson, *The World Trading System*, Cambridge: the MIT Press, (1997), 118-9 [hereinafter the Jackson World Trading]
[105] Ibid,112
[106] Article XXII of GATT provides:

GATT and could be invoked by any GATT Member State. These provisions were silent on procedural formalities and provided only a basic outline of the authority and rights of Member States.[108] At best, they have been described as 'the most primitive mechanism for interpreting and enforcing [the GATT] provisions'[109] and 'too succinct to establish clear dispute settlement procedures'.[110]

These provisions, however, did serve as the primary mechanisms of the GATT's dispute settlement system which evolved over time to incorporate the customary practice from procedural experience and knowledge gleaned from cases that arose. [111] Some of these

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1. Each CONTRACTING PARTY shall accord sympathetic consideration to, and shall afford adequate opportunity for consultation regarding, such representations as may be made by another contracting party with respect to any matter affecting the operation of this Agreement.
2. The CONTRACTING PARTY may, at the request of a contracting party consult with any contracting party or parties in respect of any matter for which it has not been possible to find a satisfactory solution under paragraph 1

See GATT 1947, above n 93, Article XXII

[107] Article XXIII says:

1. If any CONTRACTING PARTY should consider that any benefit accruing to it …under this Agreement is being nullified or impaired … as the result of
a. the failure of another CONTRACTING PARTY to carry out its obligations under this Agreement, or
b. the application by another CONTRACTING PARTY of any measure, whether or not it conflicts with the provisions of this Agreement, or
c. the existence of any other situation, the CONTRACTING PARTY may, with a view to the satisfactory adjustment of the matter, make written representations of proposals to the other contracting party or parties which it considers to be concerned. Any contracting party thus approached shall give sympathetic consideration to the representations or proposals made to it
2. If no satisfactory adjustment is effected between the contracting parties concerned within a reasonable time …, the matter may be referred to the CONTRACTING PARTIES. The CONTRACTING PARTIES shall promptly investigate any matter so referred to them and shall make appropriate recommendations to the contracting parties which they consider to be concerned, or give a ruling on the matter, as appropriate … If the CONTRACTING PARTIES consider that the circumstances are serious enough to justify such action, they may authorize a contracting party or parties to suspend the application to any contracting party or parties of such concessions or other obligations under this Agreement as they determine to be appropriate in the circumstances. If the application to any contracting party of any concession or other obligation is in fact suspended, that contracting party shall then be free… to give written notice to the Executive Secretary to the CONTRACTING PARTIES of its intention to withdraw from this Agreement.

see GATT 1947, above 93, Article XXIII

[108] Taunya McLarty, 'GATT Dispute Settlement: Sacrificing Diplomacy for Efficiency in the Multilateral Trading System?', (1994) 9 *Florida Journal of International Law* 241,258

[109]Curtis Reitz, 'Enforcement of the General Agreement on Tariffs and Trade', (1996) 17 *University of Philadelphia Journal of International Economic Law*, 555, 560

[110]Norio Komuro, 'The WTO Dispute Settlement Mechanism: Coverage and Procedures of the WTO Understanding', (1995) 25 *Journal World Trade* 5,16

[111] See Oliver Long, *Law and Its Limitations in the GATT Multilateral Trade System*, (1985), 73. See also Jackson world trading, above n 104, 115

practices were even codified in the Decisions and subsequent Understandings [112] negotiated between the Contracting Parties in GATT history.

The objective of GATT's dispute settlement was to secure a "positive solution" to the dispute and preferably one that was "mutually acceptable" to the parties to the dispute.[113] In reaching these prompt solutions, parties were required to exhaust such means as necessary, such as consultations, conciliation, good offices or mediation, before bringing the dispute to the Contracting Parties.[114] Only when these attempts failed could a complaining party bring a complaint under Article XXIII for the Contracting Parties to investigate and make recommendations or give rulings.[115] The Contracting Parties would then create a working party, known as a panel, to preside over the dispute concerned.

The GATT dispute settlement mechanism was designed to accommodate two types of disputes that could arise among the GATT Member States, namely, (i) claims by one party that another had violated the provisions of the GATT; and (ii) objections by one party to practices of another which although were not prohibited by the GATT, had nonetheless an adverse effect on the objecting party.[116] The principal mechanism for dealing with these problems was diplomatic consultation. To that end GATT utilized non-adjudicative mechanisms to solve disputes such as consultation, conciliation, good offices and mediation. In later years the GATT mechanisms developed into the rule-based mechanism

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[112] Decisions and Understanding are provisions as a result of negotiations among the contracting parties of GATT, which codified as procedures of GATT; For example, *Procedures under Article XXIII* (Decision of 5 April 1966) BISD 14S/18 1966 [hereinafter 1966 Procedures](laying down special procedures, including time limits for settling disputes between a developing and a developed GATT contracting parties); *Understanding Regarding Notification, Consultation, Dispute Settlement and Surveillance* (adopted on 28 November 1979) BISD 26S/210 (1980) [hereinafter 1979 Understanding] (including an agreed description of the customary practice of GATT panels, at 215); *Dispute Settlement Procedures* in *Ministerial Declaration*, adopted on Nov.29 1982, BISD 29S/13 (1983) [hereinafter 1982 Ministerial Declaration]; *Dispute Settlement Procedures*, adopted Nov.30, 1984, BISD 31S/9 (1985) [hereinafter 1984 Procedures]; and *Improvement to the GATT Dispute Settlement Rules and Procedures*, Decision of 12 April 1989, BISD 36S/61(1990), see Rosine M Plank-Brumback, 'Constructing an Effective Dispute Settlement System: Relevant Experiences in the GATT and WTO', 1998 (c1997); For comprehensive history and analysis of the GATT legal system see Robert E Hudec, *The GATT Legal System and World Trade Diplomacy*, (1975) [hereinafter Hudec GATT Legal system] and Robert E Hudec, *Enforcing International Trade Law: the Evolution of the Modern GATT Legal System*, (1993) [hereinafter Hudec Enforcing]

[113] Long, above n 111, 73

[114] Ibid, 73-74

[115] GATT 1947, above n 93, Article XXIII.2

[116] William J. Davey, 'Dispute Settlement in GATT', (1987) 11 *Fordham International Law Journal* 51, 67; John H Jackson, *World Trade Law and the Law of GATT*, (1969), 169-71 [hereinafter Jackson World Trade Law]

embodied in the Dispute Settlement Understanding (DSU) of the WTO. It is relevant to note that it is precisely this type of transformation which will be endorsed in ASEAN context to be discussed in Chapter 5 and 6.

3.2.3 Permanent vs. ad hoc panels

The GATT dispute settlement procedures evolved quite remarkably over the nearly 50 years of the GATT's existence. In the early years, disputes were generally taken up by diplomatic procedures, i.e. at a meeting of all the Contracting Parties, [117] and resolved with a simple ruling from the chairperson for that session of the Contracting Parties.[118] Later, the disputes were brought to 'inter-sessional committees'[119] comprised of subsidiary bodies and working groups[120] which had been delegated the task of exercising tribunal functions.[121] Since the early 1950s, panels of experts,[122] each comprising of three or five experts,[123] were employed and this became the usual procedure for resolving disputes.

The function of a panel was to make "an objective assessment of the matter before it, including an objective assessment of the facts of the case and the applicability of and conformity with the General Agreement"[124] and, if so requested, "other such findings" that would assist the Contracting Parties in making the necessary recommendations or in giving rulings.[125]

With regards to the appointment of panel members, these persons were drawn from permanent delegations to GATT as well as from government officials connected with the

[117] Jackson world trade law, above n 116, 115; Nichols, above n 98,393; The spelling of the name 'CONTRACTING PARTIES' in capitals was to be the sole indication of a collective entity and refers to all Contracting Parties acting jointly under Article XXV:1 exercise the functions of a tribunal, see Kenneth W Dam, *The GATT Law and International Economic Organization*, (1970), 351
[118] Hudec GATT legal system, above n 112 , 75-76
[119] Jackson world trade law, above n 116,115
[120] Small negotiating bodies comprised of the disputing countries, interested parties and a small number of neutral countries. Ibid.
[121] Hudec GATT legal system, above n 112,78
[122] A working party differs from a panel insofar as the former is composed of representatives of individual contracting parties whereas the latter is composed of individuals chosen in their personal capacities and for their personal qualities, Jackson world trade law, above n 116,116; Dam, above n 117, 365
[123] Jackson world trade law, above n 116, 116; the panels are composed of three to five persons as "agreed upon by the parties concerned and approved by the GATT Council" and the panel's members, "preferably governmental, usually selected from the permanent delegations" to the GATT and "expected to act impartially without instructions from their governments", see also the 1979 Understanding, above n 112
[124] The 1979 Understanding, above n 112 ¶.16
[125] Ibid

work of GATT. According to the 1979 Understanding, the Director-General was to maintain an informal indicative list of governmental and non-governmental persons who were qualified in the fields of trade relations, economic development or other matters covered by the GATT.[126]

Under the GATT, a positive consensus in the GATT Council was required before a dispute could be referred to a panel. This meant that there had to be no objection from any contracting party, including the parties to the dispute, to such a referral. Not surprisingly, actions were easily blocked by the respondent parties to disputes. Moreover, a party could alternatively block the setting up of a panel by raising the argument under Article XXIII:2 that "bilateral consultations had not yet been terminated".[127] In 1989, these defects were overcome with the introduction of the reverse or negative consensus rule for the establishment of a panel. Under this practice, a panel was established by the Council unless there was a consensus by the Contracting Parties not to do so.[128]

3.2.4 The independence of panellists

In early GATT history, disputes were referred to a so-called Working Party, a small group of countries, comprised of the parties to the dispute, a number of interested parties and those who so-called 'neutrals'.[129] Later, the Working Party changed into 'a modified form of third-party adjudication' when the number of neutrals exceeded the number of interest parties.[130] At this time the GATT third-party experts were governmental or non-governmental persons[131] appointed and proposed by the Director General to the GATT council. A roster of qualified individuals built on nominations from Member Governments was created.

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[126] Ibid
[127] Plank Brumback, , above n 112, 31 quoting the GATT Analytical Index 1995
[128] The 1989 Decision, above n 112
[129] Joost Pauwelyn, 'The Transformation of World Trade', (2005) 104 *Michigan Law Review* 1, 19
[130] With the trend setter of this model was *the Australian Subsidy case* (complaint by Chile), Report adopted by the CONTRACTING PARTIES, Australia-Subsidy on Ammonium Sulphate (Apr 3, 1950) GATT B.I.S.D (2d Supp, 188 (1952), see ibid.
[131] Plank-Brumback, above n 112, 34; In some cases, non-governmental individuals who were citizens of the disputing parties were selected as panellists by an agreement between the parties. Id.

Nominations and selections were made based on an expert's personal qualifications, special knowledge and assurance of independence.[132] Although the persons were proposed by the Director General and not by the parties to the dispute, the Director General did hold extensive consultations with the parties concerning the composition of this body. The Director General would then subsequently propose a whole panel to the GATT Council for approval. Eventually, this third party body transformed into 'panels' consisted of neutral countries; this composition was changed where the members of this body gradually were composed of individuals who performed in their individual capacity.[133] The transformation was thus made to the use of independent panellists.

Panel members were to act in their own independent capacities rather than as representatives of their respective countries or to merely carrying out a function assigned to their delegations.[134] They were to consider themselves as having the authority of and exercising the functions of dispassionate neutral mediators to decide matters fairly and impartially.[135] The chairman of a panel was selected by the chairman of the Contracting Parties and was normally a senior official with long experience in GATT affairs. None of the panel members could be nationals of any of the parties to the dispute.

Although panels were generally responsible for setting up their own working methods, suggested working procedures based on customary practice were also drawn up by the Secretariat for their guidance.[136] Panels deliberated *in camera* and arrived at their own conclusions based on the written submissions and oral arguments presented by the parties to the dispute as well as on any other information they considered relevant, including expert opinion. There was no *ex parte* contact between panels and any of the parties to the dispute.

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[132] Plank-Brumback, above n 112, 33
[133] Pauwelyn, above n 129, 20
[134] "Panel members would serve in their individual capacities and not as government representative…", the 1979 Understanding, above n 112
[135] Pierre Pescatore, 'The GATT Dispute Settlement Mechanism', (1993) 27 *Journal of World Trade* 5, 6
[136] *GATT Dispute Settlement System* (note by the Secretariat), GATT Doc.MTN.GNG/NG13/W/4 (June 10, 1987), at 44-49, quoting Plank-Brumback, above n 112, 13

3.2.5 Private party rights to appear

The GATT did not expressly provide for any rights to any private parties to sue other private parties. Since Member States alone had rights and obligations under the covered agreements, it followed accordingly that only their respective governments had standing to request formal consultations and dispute settlement.[137] Private citizens thus did not have any standing to bring complaints in the GATT.[138]

The absence of provision for the private parties to be involved in the GATT dispute settlement mechanism has correlated with the nature of the GATT agreement as an intergovernmental agreement. In addition, GATT has no clear procedural mechanism for disputes among the contracting parties, let alone for private parties.

3.2.6 The precedential value of decisions

GATT panel decisions never had any formal precedential value.[139] In the words of one of the foremost authorities on the GATT, John H. Jackson, concerning the doctrine of precedent in the GATT:

> It should …be understood that the international legal system does not embrace the common law jurisprudence that prevails in the United States which calls for courts to operate under a stricter "precedent" or "stare decisis" rule. Most nations in the world do not have stare decisis as part of their legal systems, and international law also does not. This means that technically a GATT panel report is not strict precedent, although there is certainly some tendency for subsequent GATT panels to follow what they deem to be the "wisdom" of prior panel reports. Nevertheless, a GATT panel has the option not to follow a previous panel report, as has occurred in several cases. In addition, although an adopted panel report will generally provide an international law obligation for the participants in the dispute to follow the report, the GATT Contracting Parties acting in a Council or the Ministerial Conference, can make interpretive rulings or other resolutions which would depart from that GATT panel ruling, or even establish a waiver to relieve a particular obligation.[140]

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[137] Ibid, 24

[138] Jackson world trade law, above n 116,187-89

[139] C O'Neal Taylor, 'The Limit of Economic Power: Section 301 and the World Trade Organization Dispute Settlement System', (1997) 30 *Vanderbilt Journal of Transnationals Law* 209,307; Like most international law, GATT law follows no theory of stare decisis. Id (citation omitted) [hereinafter Taylor section 301]

[140] Testimony by John H Jackson before the U.S. Senate Finance Committee Hearing, March 23, 1994 on the Uruguay Round Implementing Legislation, reprinted in (1994) 6 *World Trade & Arbitration Materials* 125, 132-33

Under GATT, panel reports had no binding effect unless and until they were adopted by the Contracting Parties.[141] Unadopted panel reports had no binding effect whatsoever. Panel reports that were approved by the GATT Council through adoption were themselves only legally binding on the parties to the dispute for that particular case. They had no binding effect on future panels or future disputes. Practice has shown, however, that panels often referred to previous panel reports, both adopted and unadopted, for guidance.[142]

3.2.7 The adoption of decisions

Panel reports became part of GATT "law" after their adoption by the GATT Contracting Parties. The Contracting Parties could adopt panel reports at the monthly GATT Council session or at a formal GATT Contracting Parties session. In the early years of the GATT, panel reports were adopted by majority vote, pursuant to Article XXV: 4 of GATT.[143]

From the 1950s, however, panel reports were only adopted by consensus.[144] The latter procedure enabled any contracting party, including the losing party, to block the adoption. In 1982, the Contracting Parties agreed that "obstruction in the process of dispute settlement shall be avoided"[145] but this in itself failed to prevent the blocking or delaying of the adoption of panel reports. If a report was not adopted, the Contracting Parties had no legal obligation to implement the panel's recommendations and there would also be no official publication of the report. It was reported that in 8 of 12 cases, in the period from 1950 to 1987 the panel reports were not adopted.[146] In other words, more than half of the panel reports were not adopted constituting a significant rejection the panel function by the

[141] It should be noted that panel reports were not adopted by the Council until 1981 and even then, only subject to certain qualifications, see Davey, above n 116,64
[142] Plank-Brumback, above n 112, 42
[143] Art. XXV:4 provides that, "except as otherwise provided for in this Agreement, decisions of the Contracting Parties shall be taken by a majority of the votes cast," see GATT 1947, above n 93
[144] It began in 1955, when there had been general trend in GATT to utilized consensus as decision making processes which gradually legalized and extracted from the political process, see Pauwelyn, above n 129, 22, the crucial decision on dispute settlement mechanism was also decided by consensus, such as the establishment of the panels and the adoption of the panel rulings, id.
[145] *The 1982 Ministerial Declaration*, above n 112,16
[146] See Rosine Plank, 'An Unofficial Description of How a GATT Panel works and does not', (1987) *Journal of International Arbitration* 53, 102;

parties to the disputes. It could also be regarded as an indication of the less of confidence by the Contracting Parties on the system which did not guarantee fairness and unbiased outcomes.

3.2.8 The enforceability of decisions

Panels were to deliver their recommendations and findings without undue delay and once adopted, these recommendations and findings became those of the collective body of the Contracting Parties. If a respondent party's measures were found to be in breach of the obligations under GATT and the finding of nullification and impairment was adopted, the first objective of the Contracting Parties was to secure the withdrawal of those measures. [147] If the measures were withdrawn, no further action was required of the infringing party. If immediate withdrawal of the measures were considered impractical, the offending party was required to provide compensation as a temporary measure. The GATT, however, did not contain any provision imposing an obligation on infringing parties to provide compensation for any past trade damage. [148]

Moreover, in some cases under GATT, infringing parties could avoid implementing the recommendations of panel reports and still be confident that such avoidance would not produce any adverse trade consequences.[149] The implementation of recommendations or rulings could be raised in the General Council by any Member State at any time after the adoption of the panel report.[150] Under the 1979 Understanding[151], the General Council would conduct surveillance to determine whether or not an infringing party had actually implemented a panel report. After the adoption of the panel rulings, the party who raised the complaint could place the matter on the agenda of the future Council meetings to put pressure on the party concerned to comply with the ruling.[152] In a number of cases, the Contracting Parties such as the United States and the EC had taken retaliatory and counter-

[147] The 1979 Understanding, above n 112
[148] Plank-Brumback, above n 112, 52
[149] Plank, above n 146, 90
[150] The 1989 Decision, above n 112, ¶ I.2
[151] The 1979 Understanding, above n 112
[152] Plank, above n 146, 90

retaliatory measures in respect of panel reports that had not been adopted.[153] The General Council in the early years of GATT, however, had not authorised any retaliation,[154] except in one case[155], because 'each side would block the other in the Council' and it was in any event very rare for the Contracting Parties to seek retaliatory measures.[156]

3.3 The World Trade Organization (WTO)

3.3.1 Brief introduction to the organisation and its goals

The WTO came into being in 1995 and is the successor to the GATT. The WTO currently has more than 148 countries members.[157] The WTO agreement was developed through a series of trade negotiations or rounds held under the GATT.[158] The current WTO rules were the outcome of the Uruguay Round (1986-1994) which included a major revision of the original GATT.

The WTO's objectives, as stated in the Preamble to the 1994 Marrakesh Agreement Establishing the WTO is

> to develop an integrated, more viable and durable multilateral trading system encompassing the General Agreement on Tariffs and Trade, the results of past trade liberalization efforts, and all of the results of the Uruguay Round of Multilateral Trade Negotiations[159]

The Agreement further states that the function of the WTO is to

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[153] Ibid; the case examples, such as, the US complaint against EC subsidies on wheat flour and pasta, and the US complaint against the EC treatment of imports of citrus products from certain Mediterranean countries (1985, L/5776), id

[154] Taylor section 301, above n 139, 309

[155] In 1952, the General Council authorized Netherlands at its request to impose a quota on imports of wheat flour from the United States, see Plank, above n 146, 92; John H. Jackson, 'Governmental Dispute in International Trade Relations: A proposal in the context of GATT', (1979) 13 *Journal World Trade Law* 1, 5; this was as a response to the United States' quotas placed on dairy products.

[156] Plank, above n 146, 92

[157] Some nation countries still under negotiation process to become the WTO members, http://www.wto.org/english/thewto_e/whatis_e/whatis_e.htm > at 13/11/2005

[158] The names of the round/negotiations are based on the name of the place where the negotiations took place or the name of person who initiated the negotiation. There were eight rounds under GATT, namely, Geneva (1947), Annecy (1949), Torquay (1950), Geneva (1956), Dillon (1960-61), Kennedy (1962-67), Tokyo (1973-79), Uruguay (1986-94), see Matsushita, Schoenbaum, and Mavroidis, above n 94, 6, sort of this negotiation also held after the formation of the WTO, in this case the WTO Ministerial conferences which have been held a number of times, in Singapore (1996), Geneva (1998), Seattle (1999), Doha (2001), Cancun (2003), and the next one will be in Hong Kong in December 2005

[159] The Marakesh Agreement establishing the WTO, see < http://www.wto.org/english/docs_e/legal_e/04-wto.doc >at 15/11/2005 [hereinafter the Marakesh Agreement]

> provide the forum for negotiations among its Members concerning their multilateral trade relations in matters dealt with under the agreements in the Annexes to this Agreement…. also provide a forum for further negotiations among its Members concerning their multilateral trade relations, and a framework for the implementation of the results of such negotiations, as may be decided by the Ministerial Conference.[160]

To this end, the Agreement stipulates that the WTO is responsible for the running of the dispute settlement mechanism under the Understanding on Rules and Procedures Governing the Settlement of Disputes, commonly referred to as the Dispute Settlement Understanding and abbreviated as "DSU".[161]

The DSU[162] is a significant outcome of the Uruguay Round embodied as annex 2 of the WTO Agreement which sets out the rules and procedures of the dispute settlement mechanism in the WTO. It consists of 27 detailed articles and 4 appendixes. The DSU replaces the previous framework for dispute settlement in the international trading system which was constituted from Article XXII and Article XXIII of the GATT.[163] The DSU constitutes a central pillar of the WTO system.

3.3.2 The WTO dispute settlement system

As noted, the DSU supersedes the previous GATT dispute settlement mechanism. The WTO Members may now seek proper enforcement of the covered agreements through a WTO panel. The panels produce rulings or recommendations which parties to the disputes must observe. The DSU sets out in detail the procedure and the timetable which must be followed in a dispute and makes the dispute settlement mechanism more transparent and predictable. Panel recommendations are to be adopted by the Dispute Settlement Body (DSB) which is comprised of Contracting Parties, unless the DSB aggress by consensus not to do so (negative consensus).[164] This approach makes it virtually impossible for any one a group of members to block the adoption of the panel rulings. Another important innovation

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[160] Ibid, Article III (2)
[161] Ibid, Article III (3)
[162] Understanding on Rules and Procedures governing the settlement of disputes, see WTO Secretariat, *The WTO Dispute Settlement Procedures: A Collection of the Relevant Legal Texts*, (2001) or see <http://www.wto.org/english/tratop_e/dispu_e/dsu_e.htm> at 15/11/2005 [hereinafter the DSU]
[163] For the discussion of this articles, see section 3.2.2. above
[164] See also notes 204-5 below

of the DSU is the creation of a standing Appellate Body.[165] Overall, the DSU approach marks the development of a truly legalistic adjudicative mechanism which represents a significant improvement over the previous GATT system.

The aim of the WTO as set out in Article 3.7 of the DSU, is to secure "positive" solutions to disputes with preference to those that are "mutually acceptable" to the parties to the disputes and "consistent with the covered agreement".[166] Article 3.2 of the DSU also states that the overarching objective of the dispute settlement system is to provide security and predictability to the multilateral trading system.[167]

The WTO dispute settlement mechanism is primarily intended not to pass judgment but to settle disputes through consultations where possible.[168] As affirmed by Article 3.4 of the DSU, any recommendations or rulings made by the Dispute Settlement Body (DSB) should be "aimed at achieving a satisfactory settlement of the matter" according to the rights and obligations under the DSU and covered agreements."[169]

3.3.3 Permanent vs. ad hoc panels

The WTO operates a panel system where quasi-judicial bodies akin to tribunals are placed in charge of adjudicating disputes between Members States in the first instance. Known as panels, these bodies are normally composed of three, and in exceptional cases five, experts selected on an ad hoc basis from the nominations proposed by the Secretariat to the parties to the dispute. [170] There is thus no permanent panel in existence at the WTO; instead, a different panel is composed for each dispute.

A panel is established when consultations have failed and the complaining party or parties requests the establishment of a panel to adjudicate on the dispute. The request may be made by the complainant(s) at any time after 60 days of receipt by the respondent of the request for consultations. Earlier requests for a panel's establishment may also be made

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[165] The DSU, above n 162, Art 17; the Appellate Body shall hear appeals from panel cases, it is composed of seven persons, three of whom shall serve on any one case; they shall serve in rotation, id.
[166]The DSU, above n 162, Art 3.7
[167] Ibid, Art 3.2
[168] See settle dispute through consultation, see <http://www.wto.org/english/thewto_e/whatis_e/tif_e/dispt_e.htm> at 7/02/05
[169] The DSU, above n 162, Art 3.4
[170] Ibid, Art.8.6

where either the respondent has failed to respect the deadline in responding to the request for consultations or where the consulting parties jointly state that consultations have failed to settle the dispute.[171] The content of the request is crucial to defining and limiting the scope of the dispute and the extent of the panel's jurisdiction.[172] The request will also set out the standard terms of reference which then serves as the panel's mandate and delimits its examination of the matter.[173]

The principal function of WTO panels, as with the predecessor GATT panels, is to assist the DSB, which is the successor to the GATT Council or Committee, in discharging its responsibility.[174] A panel will conduct internal deliberations in reviewing matters in order to reach their conclusions as to the outcome of the dispute. Article 11 of the DSU mandates the panel to makes objective assessments of the relevant factual questions and legal issues in order to assess the conformity of the challenged measure(s) with the covered agreement invoked by the complainant. Similar to GATT, the working procedures of the DSB dictate that the panels meet in closed sessions; the deliberations are confidential and the public have no access to the panel process. Moreover, the panel report is drafted in the absence of the parties and any material received remains confidential. Opinions expressed in panel reports by individual panellists remain anonymous. Panels are prohibited from communicating with any of the individual parties to the dispute except in the presence of the other party or parties.

Panels then issue findings which set out the panel's reasoning in support of its final conclusions as to whether the complainants' claim should be upheld or rejected.[175] The findings are usually very detailed and specific legal discussions. Although individually panellists are given the right to express their separate opinion in the panel report, they must

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[171] Ibid, Art 4.7

[172] See at http://www.wto.org/english/tratop_e/dispu_e/disp_settlement_cbt_e/c6s3p3_e.htm (Accessed 16/07/2004) [hereinafter *Settlement System of DSU*]; The object of the panel's review is only the measure or measures identified in the request and the panel will review the dispute only in light of the provisions cited in the complainant's request. Id. The panel also has the function of informing the respondent and third parties of the basis for the complaint. Id.

[173] The DSU, above n 162, Art.7.1

[174] Reitz, above n 109, 581

[175] The scope of a panel's mandate is defined by the initial complaint and the legal claims contained in the complaint/request for a panel of the complaining party as this becomes the panel terms of reference, ibid.

do so anonymously.[176] When the process is finished, panel reports are circulated to all WTO Members and become public documents.

3.3.4 The independence of panellists

Concerning the independence of panellists, the DSU states that 'panel members should be selected with a view to ensuring the independence of the members ..'.[177] Independence of the panellists is necessary in order to maintain the impartiality and integrity of the panel proceedings as well as the panels' recommendations.

In addition, the panellists are subject to Rules of Conduct [178] which are brought to their attention at the time they[179] are asked about their availability to serve. Under those rules, they are required to

> be independent and impartial, shall avoid direct or indirect conflicts of interest and shall respect the confidentiality of proceedings of bodies pursuant to the dispute settlement mechanism, so that through the observance of such standards of conduct the integrity and impartiality of the mechanism are preserved.[180]

Furthermore the nominated panellists are required to disclose any information that they may have which may affect their independence in rendering decisions.[181] In addition, they are also obliged to adhere strictly to the DSU, disclose any interest, relationship and matter that have the relevant to an assessment of their independence, and maintain their performance by avoiding conflicts of interest related to the subject matter of the proceedings.[182] The panellists are to maintain confidentiality of the subject matter of a dispute and should not delegate their responsibility to any other person.[183]

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[176] The DSU, above n 162, Art 14.3
[177] The DSU, above n 162, Art 8.2
[178] *Rules of Conduct for the Understanding on Rules and Procedures Governing the Settlement of Disputes*, WTO Doc. WT/DSB/RC/1, 11 Dec 1996; It reprinted in WTO Secretariat, *The WTO Dispute Settlement Procedures: A Collection of the Relevant Legal Texts*, (2001), 79-87 [hereinafter *Rules of Conduct*]
[179] The WTO Rules of Conduct uses a term 'covered person' for each person who covered by the Rules of Conduct who, inter alia, serving a panel, on the Standing Appellate Body, as an arbitrator as an expert participating in the dispute settlement mechanism pursuant to the DSU, for the detailed explanation, see *Rules of Conduct*, s IV, ¶ 1, ibid
[180] Ibid, s II par 1
[181] Ibid, s VI par 2
[182] Ibid, s III, par 1
[183] Ibid, s III par 2

The Rules of Conduct also stipulate that the panellists should carry out 'self-disclosure' requirements.[184] For this purpose, the WTO Secretariat provides an illustrative list of information to be disclosed which includes inter alia, financial interests, business interests, and property interests relevant to the dispute in question.[185] The confidentiality of the disclosure is to be maintained by all persons involved in the proceedings, such as the Chair of the DSB, the Secretariat, parties to the dispute and other individuals, even after the proceedings have concluded.[186] Likewise, panellists are to maintain the confidentiality of information acquired during deliberations and proceedings; and they must not use them for their individual benefit.[187] Panellists are also required to refrain from making statement on issues related to the proceedings until the panel or the Appellate Body report has been released.

Member States are prohibited from giving panellists any instruction or seeking to influence them with regards to any matter before the panel.[188] Member States, however, may provide evidence of a material violation of the obligation of independence or the avoidance of conflicts of interest, to the parties to the dispute in the interest of maintaining the impartiality of the mechanism.[189] This matter must then be resolved as soon as possible so as not hamper the completion of the proceedings.

3.3.5 Private party rights to appear

Only the Member Governments of the WTO are allowed to initiate and participate in disputes either as parties to the dispute or as third parties to the dispute. The WTO Secretariat, observer countries, regional or local governments as well as international organisations, such as NGOs, have no standing to initiate dispute settlement proceedings regardless of whether they may have a general interest in a matter.[190] It follows then that private individuals or companies do not have direct access to the WTO dispute settlement

[184] Ibid, s VI
[185] Ibid, Annex 2, financial interests (e.g., investments, loans, shares, interests, other debts); business interest (e.g., directorship, or other contractual interests), ibid.
[186] Ibid, s VI par 6
[187] Ibid, s VII par 1
[188] The DSU, above n 162, Art 8.9
[189] The Rules of Conduct, above n 178, s VIII, par 1
[190] *The Settlement System of DSU*, above n 172

system, even though they may be the ones who are most directly and adversely affected by the measures that allegedly violate the WTO Agreement. WTO Member Governments may, however, adopt national legislation permitting private parties to petition their respective governments to bring a case on their behalf.[191]

In current WTO practice, however, a pattern has emerged which suggests a move away from a purely governmental focus.[192] In recent landmark decisions, the WTO has not only decided that Member States have a right to include private, non-governmental employees in their trade delegations before the WTO[193] but, as discussed further in Chapter 4, has also acknowledged the right of private individual or organizations to submit *amicus* briefs in support of their positions in international trade disputes to which they are not a party.[194]

3.3.6 The precedential value of decisions

The principle of *stare decisis* does not currently play a formal role in international trade law or in WTO findings.[195] The rulings and conclusions set out in WTO panel reports are binding only on the dispute at issue and on the parties involved in the particular dispute.[196] Panels do, however, regularly refer to and follow prior panel reports, including those of panels operating under the GATT, for guidance in making their recommendations.[197] This practice, which ensures consistency in decisions concerning treaty interpretation, was explicitly encouraged in the Agreement Establishing the WTO, which requires the WTO to "be guided by the decisions, procedures and customary

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[191] For example, sections 301 et seq. of the United States Trade Act of 1974 or the Trade Barriers Regulation of the European Communities, see ibid.
[192] Michael Laidhold, 'Private Party Access to the WTO: Do Recent Development in International Trade Dispute Resolution Really Give Private Organizations a Voice in the WTO?', (1999) *Transnational Lawyer*, 427, 428
[193] See *European Communities- Regime for the Importation, Sale and Distribution of Bananas*-Recourse to Arbitration by the European Communities Under Art. 22.6 of the DSU, WTO Doc. WT/DS27//ARB (Apr 9, 1999) see also, Laidhold, above n 192, 428
[194] See *the United States-Import Prohibition of Certain Shrimp and Shrimp Products*, WTO Appellate Body, WT/DS58/AB/R (Oct 12, 1998), holding that amicus briefs may now be sent directly to the WTO without attachment to members' submissions, see Laidhold, above n 192, 428
[195] See Raj Bhala, 'The Myth About Stare Decisis in International Trade Law', (1999) 14 *American University International Law Review* 845, 850
[196] Taylor section 301, above n 139, 307
[197] Bhala, above n 195, 871

practices followed by the Contracting Parties to GATT 1947 and the bodies established in the framework of GATT 1947."[198] As it will be discussed in Chapter 4, while not *de jure stare decisis* the practice evidence impact an acceptance of a *de facto* doctrine of *stare decisis* in WTO decisions.

3.3.7 The adoption of decisions

As under the GATT, panel reports and, in the case of appeals, Appellate Body reports have no binding effect on the parties to the dispute unless and until they are adopted by the Contracting Parties.[199] A final report issued by a panel or the Appellate Body is submitted to the DSB to be adopted or rejected.[200] To facilitate the adoption of reports and overcome the problems encountered in the earlier GATT processes, the DSB has been equipped with what is known as the negative consensus rule.[201] This rule is considered to be the most important innovation of the DSU as it precludes blocking of the dispute settlement process at any stage, thus making the process virtually automatic.[202] The negative, inverted, or reversed consensus means 'in order to reject a report of a panel or of the appellate body, all DSB members including those who agree with, and have an interest in its findings as well as the winning party have to agree.[203] The DSB is obliged to adopt a report unless there is a consensus by all Member States present at the relevant DSB meeting against such adoption. Since all the Member States in the DSB including the winning party should agree unanimously with the rejection of a report, rejection of a report is virtually impossible and it has not yet occurred in WTO practice.[204] To date, the DSB has adopted all the panel and Appellate Body reports submitted to it.

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[198] The Marrakesh Agreement, above n 159, art XVI.1
[199] A panel report is adopted by the DSB unless it is appealed or the DSB decides by consensus not to adopt it, the DSU, above n 162, Art 16.4
[200] Ibid, Art 17.4
[201] The DSU, art 17.14 stated: 'an Appellate Body report shall be adopted by the DSB and unconditionally accepted by the parties to the dispute unless the DSB decides by consensus not to adopt the Appellate Body report…' ibid.
[202] Claudio Cocuzza and Andrea Forabosco, 'Are States Relinquishing Their Sovereign Rights? The GATT Dispute Settlement Process in a Globalized Economy', (1996) 4 *Tulane Journal of International & Comparative Law* 161, 181
[203] Kim van Der Borght, 'Book review and Note: Dispute Settlement in the WTO', (2000) 94 *American Journal of International Law* 427, note 16
[204] *The Settlement System of the DSU,* above n 172

3.3.8 The enforceability of decisions

Once a panel decision has been adopted, the losing party is given a 'reasonable period of time' to implement the panel's recommendations and rulings and to bring inconsistent measures into conformity with its obligations under WTO.[205] To date, reasonable period of time, has ranged between six to fifteen months, if awarded by arbitrators, and between four to eighteen months if agreed to between the parties to the dispute themselves.[206] While the implementation of recommendations has sometimes been agreed to between the parties[207] on occasion it has been necessary for the complainant state to resort to the further stages of binding arbitration to ensure implementation.[208]

Prompt compliance with the recommendations or rulings of the DSB is essential in order to ensure the effective resolution of disputes (Article 21.1 DSU). Despite this Member States often claim that they cannot immediately comply with the DSB's recommendations and rulings. To this end the DSB is involved in every aspect of the implementation process. It is the DSB's responsibility to supervise the implementation of panel or Appellate Body reports (Article 2 of the DSU) and this item remains on the DSB's agenda until it is resolved.[209] The DSB keeps close surveillance on the implementation of the recommendations or rulings it has adopted, by reviewing the written progress reports on implementation provided by the Member concerned, even in cases where compensation has been provided or where concessions or other obligations have been suspended but the offending measure has not yet been brought into conformity with WTO law. The DSB thus stays notified of all plans relating to the implementation of a panel's recommendations, including their preferred form or other recognised alternative, such as, the mutually agreed

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[205] For the detailed discussion of the term 'reasonable period', see Bryan Mercurio, 'Dispute Settlement in the WTO: Questioning the 'Security' and 'Predictability' of the Implementation Phase of the DSU?', in Ross P Buckley (ed), *The World and The Doha Round: The Changing Face of World Trade*, (2003), 115-143

[206] Ibid.

[207] The DSU, above n 162, Article 21.3 b stated: ' …if it is impracticable to comply with the recommendations and rulings, the Member concerned shall have reasonable period of time in which to do so'. And Article 21.3.b, stated, 'a period of time mutually agreed by the parties to the dispute …'.

[208] Ibid, Article 21.3.c provides the implementation of the reports through binding arbitration, it stated: 'a period of time determined through binding arbitration within 90 days after the adoption …' id.

[209] For example, the *EC-Bananas III* dispute has been on the DSB agenda for years and opened every regular DSB meeting during that time; *EC-Bananas III* , WT/DS27RW/EEC and Corr 1, 12 April 1999, DSR 1999:II, 783 or WT/DS27/AB/R adopted 25 Sept 1997, DSR 1997:II, 591

compensation or the suspension of concession by any party to the dispute.[210] Sanctions can be imposed against an offending Member State that has failed to implement an approved panel recommendation within the reasonable period of time. [211] The complaining party can seek authorization for retaliation, where the WTO authorizes a contracting party to suspend favourable trade concessions to another party in retaliation for the latter's failure to bring its measure into conformity with the WTO.[212]

Respondent parties often attempt to comply with a panel's findings against them by abolishing their offending measure(s) and by issuing a new regulation or law in its place. The complainant, however, may take the view that this action does not represent compliance with the ruling. In the event of such a situation, the parties involved can then request the 'compliance' panel procedure under Article 21.5 of the DSU. The 'compliance' panel's task is to consider the new measure in its totality, including its consistency with the WTO covered agreements.[213]

3.4 North American Free Trade Agreement (NAFTA) [214]

3.4.1 Brief introduction of the organisation and its goals

The North American Free Trade Agreement (NAFTA) which entered into force Jan.1, 1994, was designed to establish a free trade area that eliminated trade barriers without establishing a common external tariff among its three signatories: the United States of America, Canada and the United Mexican State (Mexico).[215] The aims of NAFTA

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[210] The DSU, above n 162, Art 22.1 and 2
[211] Ibid, art 22.2
[212] Daniel C K Chow, 'New Era of Legalism for Dispute Settlement Under the WTO', (2001) 16 *Ohio State Journal on Dispute Resolution* 447, 458
[213] Appellate Body Report, *Canada-Aircraft* (Art.21.5 – Brazil), ¶¶ 40-41; Appellate Body Report, US-Shrimp (Art. 21.5-Malaysia), ¶¶ 85-87
[214]North American Free Trade Agreement, Dec. 17, 1992, Can-Mex-U.S., 32 I.L.M. 289, 297 (containing chs 1-9); & 32 I.L.M. 605 (containing chs 10-22) (entered into force Jan.1, 1994); information on NAFTA can be found at <http://www.sice.oas.org/trad/nafta/naftatce.asp> at 5/05/03; the text of NAFTA is reprinted in Ralph H Folsom, Michael W Gordon and John A Spanogle, *Handbook of NAFTA Dispute Settlement*, (1998), Part III [hereinafter NAFTA]
[215] NAFTA began as the US-Canada Free Trade Agreement, see US-Canada Free Trade Agreement (CUSFTA), Jan.2, 1985; 27 *ILM* 281; see also Marcia J Staff and Christine W Lewis, 'Arbitration Under NAFTA chapter 11: Past Present and Future', (2003) 25 *Houston Journal of International Law* 301, 302; The US also had an agreement with Mexico to form a US-Mexico trade agreement. Ibid. Canada joined the process, and the negotiations yielded NAFTA. Ibid.

include not only the elimination of trade barriers in the form of tariffs, but also the promotion of fair competition, an increase in investment opportunities, to provide protection for intellectual property rights, to create procedures for implementing and enforcing NAFTA, and to establish a framework for further co-operation.[216]

3.4.2 The NAFTA dispute settlement system

Under NAFTA, a four-track dispute resolution mechanism has been established which has been described as a "relatively complex set of distinct dispute resolution structures".[217] These four separate dispute resolution systems are designed to tackle the four different types of disputes that can arise among Member States concerning the NAFTA. They comprise:

(i) Chapter 11 Subchapter B's international arbitration for claims by investors against Member Parties for violation of investment obligations;

(ii) Chapter 19 bi-national panels which determine domestic antidumping and countervailing challenges brought by Member Parties on behalf of their respective exporters or importers;

(iii) Chapter 20 general State-to-State dispute settlement mechanism which resolves general interpretation and application disputes; and

(iv) Rules established by the North American Labour and Environment Cooperation Agreements to resolve disputes related to environment and labour-trade matters.[218]

Each of these mechanisms differs in purpose. The purpose of the Chapter 11 system, as set up in Article 1115 of NAFTA, is to resolve complaints between the investor and the host state in investment disputes and to ensure equal treatment among the investors. Meanwhile, the Chapter 19 mechanism is designed to ensure impartial application by

[216] See *NAFTA*, above 214, Arts. 101-02; the agreement however covers areas that not only relate to trade in goods but which also relate to the "non-clasiccal" areas of trade such as investments, telecommunications and intellectual property rights. Id.

[217] David Lopez, 'Dispute Resolution under NAFTA: Lessons from the Early Experience', (1997) 32 *Texas International Law Journal*, 163,165

[218] See North American Agreement on Labor Cooperation, Sept 14, 1993, Can-Mex-US, 39 I.L.M 1499 and North American Agreement on Environment Cooperation, Sept 14, 1993, Can-Mex-US, 32 I.L.M. 1480

Member Parties of their respective antidumping and countervailing duty laws and a binding and speedy resolution that will benefit the exporters of the Member Parties.[219] The Chapter 20 system aims at solving disputes on the general agreement itself, including its interpretation or application, and is perhaps the most important of the dispute resolution systems of the NAFTA.[220] The fourth system aims to resolve disputes related to environment and labour-trade matters. Given the subject matter of disputes dealt with under this fourth system, further discussion of it is omitted from this thesis.[221] Rather, this thesis will focus on the first three NAFTA dispute resolution systems.

3.4.3 Permanent vs. ad hoc panels

Chapter 11 complaints are resolved based on the arbitration rules of the United Nations Commission on International Trade Law (UNCITRAL) and the International Centre for the Settlement of Investment Disputes (ICSID).[222] The Tribunal is usually comprised of three arbitrators, with each disputing party appointing one arbitrator and the third arbitrator appointed by the agreement of both disputing parties (Article 1123 NAFTA). This third arbitrator has the status of presiding arbitrator and as such cannot be a national of either disputing party. [223]

Where the parties are unable to appoint an arbitrator themselves or are unable to agree on the presiding arbitrator, the Secretary-General of NAFTA serves as the appointing authority with the discretion to appoint any of the arbitrator(s) required to meet a full

[219] NAFTA, above n 214, p D4-6; Chapter 19 of NAFTA remains substantively unchanged from that of the chapter 19 of the Canada-US FTA, Ibid.
[220] Since it is the process for settling disputes for nearly all areas except the matters related to subsidies and dumping as well as investment; see Michael Wallace Gordon, 'NAFTA Dispute Panels: Structure and Procedure', see in Ralph H Folsom, Michael W Gordon and John A Spanogle, eds, *Handbook of NAFTA Dispute Settlement*, loose leaf, (1998), above n 214, p 2-7 C.1; were Chapter 19's dispute resolution provisions eliminated, Chapter 20 would be left as the principal interpretive process for most disputes. Id.
[221] For the discussion on NAFTA labour and environmental disputes, see Lopez, above n 217; Jack I Garvey, 'Trade law and quality of life- dispute resolution under the NAFTA side accords on labour and environment', (1995) 89 *American Journal of International Law* 439; Patricia Isela Hansen, 'Dispute settlement in the NAFTA and beyond', (2005) 40 *Texas International Law Journal* 417; William D Merritt, 'A Practical guide to dispute resolution under NAFTA', (1995) 5 *NAFTA: Law & Business Review of the Americas* 169
[222] *NAFTA*, above n 214, Art.1120
[223] This is the usual composition of a tribunal except in the case of a Tribunal for consolidation matters or unless the disputing parties otherwise agree.

Tribunal.[224] Presiding arbitrators are, however, to be appointed from the ICSID Panel of Arbitrators, which is a roster of arbitrators who are appointed by consensus without regard to nationality, experienced in international law and investment matters and who meet the qualifications of the ICSID Convention, the Additional Facility Rules of ICSID as well as the UNCITRAL Arbitration Rules.

With regard to Chapter 20, disputes are handled by the Free Trade Commission ('FTC'), which is a newly created institution comprised of ministerial-level representatives of the three NAFTA Member States which are each aided with administrative assistance from a Secretariat. The Commission is charged with resolving disputes, supervising the implementation of NAFTA and monitoring the work of the various NAFTA committees and working groups.[225] In any Chapter 20 dispute, the complaining party must first take steps to formally request consultations with the respondent party. If the consultation phase does not lead to the resolution of the dispute, the parties can then request that an arbitral panel be set up thirty days after the Commission's meeting.[226] A Chapter 20 panel consists of five arbitrators drawn from a pre-formed roster of thirty individuals who have expertise in law, international trade or in the resolution of disputes arising under international trade agreements.[227]

In Chapter 19 antidumping and countervailing duty disputes, if dumping has occurred and has injured a domestic industry, no preliminaries are required and a complaining party may straightaway request in writing that the matter to be referred to a bi-

[224] *NAFTA*, above n 214, Art 1124 (1,2); for the presiding arbitrator the Secretary-General shall appoint from the roster of presiding arbitrators, i.e., a roster of 45 presiding arbitrators established by the Parties on the date of entry into force of NAFTA, see id, Art 1124 (3,4)

[225] The Free Trade Commission is a commission comprising cabinet-level representatives of the Parties or their designees, ibid, Art 2001.1; the Commission shall 'supervise the implementation of the Agreement, oversee its further elaboration, resolve disputes that may arise regarding its interpretation or application, supervise the work of all committees and working group established under this Agreement, consider any other matter that may affect the operation of this Agreement', ibid, Art 2001.2

[226] Ibid, Article 2008 (1);The Free Trade Commission is a commission comprising cabinet-level representatives of the Parties or their designees, id, Art 2001.1; the Commission shall 'supervise the implementation of the Agreement, oversee its further elaboration, resolve disputes that may arise regarding its interpretation or application, supervise the work of all committees and working group established under this Agreement, consider any other matter that may affect the operation of this Agreement', id, Art 2001.2

[227] Ibid, Annex 2009.2 (1) and 2011, see also Lopez, above n 217, 168; The terms of reference for a panel is to: "to examine, in the light of the relevant provisions of the Agreement, the matter referred to the Commission (as set out in the request for a Commission meeting) and to make findings, determinations and recommendations….", this term of reference is subject to the agreement of the disputant, see NAFTA, above n 214, Art 2012.3

national panel (Article 1903 (1) NAFTA).[228] This arbitral panel will then review the antidumping or countervailing duty of the respondent party to determine if it was in accordance with the antidumping or countervailing duty law of the importing Party.[229]
The bi-national panel consists of 5 individuals selected from a panel roster established and maintained by the Parties.[230] The roster contains at minimum 75 candidates with each party providing at least 25 of their own nationals.

The candidates are, to the "fullest extent practicable", to be judges and former judges chosen on the basis of objectivity, reliability, sound judgement and general familiarity with international trade law.[231] In general, panellists are selected for a particular case within 60 days of the request for a panel review. Each party that is involved appoints two panellists from the roster and has the right to exercise four confidential peremptory challenges to panellists proposed by the other party. By the 55th day after the request for the panel review, the parties involved must agree between themselves on the fifth panellist. If a party fails to appoint a panellist or if the parties fail to agree on the fifth panellist, that panellist will be selected by lot. This approach will prevent the delay in formatting the panels.

3.4.4 The independence of panellists

The NAFTA Parties have established a Code of Conduct[232] to ensure that proceedings are conducted with integrity and impartiality.[233] This Code of Conduct applies to Chapter 19 and Chapter 20 panellists, as well as individuals not on a panel or committee

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[228] There are no consultations or Free Trade Commission review like Chapter 20's dispute resolution mechanism, since Chapter 19 cases are, in essence, "appeals of prior rulings by a government agency that dumping has occurred and has injured a domestic industry, see Lopez, above n 217, 168
[229] *NAFTA*, above n 214, Art 1904 (2)
[230] The rules for establishing the roster are in Annex 1901.2, see ibid, Annex 1901.2.
[231] Ibid, Annex 1901.2 (a); Judges or former judges are preferred as it is believed that they would conduct more reliable review than practitioners which suit with the US law, see Gordon, above 240, p D-2; see also F Amanda DeBusk and Michael A Meyer, 'Antidumping and Countervailing Duty Disputes: Comparisons between the NAFTA and the WTO Agreement', (1995) 1 *NAFTA: Law & Business Review American* 31, 51
[232] The *NAFTA Code of Conduct for Proceedings Under Chapters 19 and 20*, entry into force Jan. 1, 1994 available in Ralph H Folsom, Michael W Gordon and John A Spanogle, eds, *Handbook of NAFTA Dispute Settlement*, loose leaf, above n 214, p D6- (1-7) [hereinafter the *NAFTA Code of Conduct*]
[233] *NAFTA*, above n 214, Art 1909

roster but who are under consideration for appointment to a panel or committee.[234] Panellists so far are nationals of the Parties and this has worked well as there have been no instances of parties claiming bias of conflict.

According to the Code of Conduct, every candidate of a panel, whether a current or former member must "avoid impropriety" or "the appearance of impropriety" and must observe "high standards of conduct".[235] In order to maintain the candidate's independence or impartiality, the code requires candidates to disclose "any interest, relationship or matter" that is likely to affect their neutrality or create a reasonable concern of bias in the proceedings. Candidates have to complete an Initial Disclosure Statement provided by Secretariat before they are approved as panellists but the obligation to disclose is a continuing duty, meaning that panel or committee members have to make all reasonable efforts to become aware of any interests, relationships or matters that could arise during any stage of the proceedings.[236] Panel members are also required to act in a fair manner and to avoid any actions that could affect his or her performance of duties, such as motivations of self-interest, outside pressures, political considerations, public clamour, patriotism or fear of criticism. They are also warned not to incur any obligation or to accept any benefit, whether directly or indirectly, that would in any way interfere or appear to interfere with the proper performance of their duties.[237]

Chapter 19, however does allow the establishment of an extraordinary challenge committee, if the involved Party does not believe that the panel process has operated properly, when it argues that a panel member was "guilty of gross misconduct, bias, or a serious conflict interest" or the panel decision "seriously departed from a fundamental rule of procedure" or the panel did not apply the appropriate standard of review, which all or a part of these actions has affected the panel's decision and threatened the integrity of the binational panel review process, an Extraordinary Challenge Committee (ECC) may be established.[238]

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[234] *The NAFTA Code of Conduct*, above n 232, Summary, p D6-1
[235] Ibid, Part I
[236] Ibid, Part II C
[237] Ibid, Part IV A, B, C
[238] *NAFTA*, above n 214, Art 1904 (13) and Annex 1904 (13); this Committee composed of three members selected from a 15-person roster comprised of judges or former judges of federal judicial court of the US or a judicial court of superior jurisdiction of Canada, or a federal judicial court of Mexico, Ibid; Each Party shall

3.4.5 Private party rights to appear

NAFTA provisions permit private investors to take governments to binding arbitration over violations of their treaty obligations.[239] Under Chapter 11-B of NAFTA, investors of a NAFTA Party have standing to submit a claim for arbitration on the grounds that another NAFTA Party has breached its obligations either under Article 1503(2) concerning State Enterprises or Article 1502(3)(a) concerning Monopolies and State Enterprises.

An investor may submit the claim on his or her own behalf or on behalf of an enterprise if a monopoly has acted in a manner inconsistent with the Party's obligations under Chapter 11 Section A.[240] If a suit is brought on behalf of an enterprise, a claim may also be brought for loss or damage incurred that can be attributed to the breach.[241] A timeline applies, however, for private parties to enforce their rights and no claim can be submitted if three years have elapsed from the date on which the investor first knew, or should have known, of the alleged breach and the resulting damage.[242]

Chapter 19 also provides private parties with rights of access albeit only indirectly. Under this chapter, although domestic investigating authorities of importing Parties may conduct judicial review of the anti-dumping and countervailing duty matters, the final determinations are to be determined by bi-national panels.[243] What is crucial, however, is that while it is a NAFTA Party who has standing to request a panel review, that Party can only do so if a private party has first requested that the Party do so (Article 1904(5) NAFTA)."[244] In short, the initiation of the process depends on private parties who must

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name five persons to this roster, Id; Each involved Party shall select one member from this roster and the involved Parties shall decide by lot which of them shall select the third member form the roster. Id.

[239] Noemi Gal-Or, 'Private Party Direct Access: A Comparison of the NAFTA and the EU Disciplines', (1998) 1 *B.C. International & Comparative Law Review* 21, 27

[240] *NAFTA*, above n 214, Chapter 11, Article 1101, Section A on Scope and Coverage of Investment

[241] Ibid, Arts 1116 (1) and 1117 (1)

[242] Ibid, Arts 1116 (2) and 1117 (2)

[243] Ibid, Art 1904 (1) which stated "…each Party shall replace judicial review of final antidumping and countervailing duty determinations with binational panel review";

[244] Ibid, Art 1904 (5); see also Gal-or, above n 239, 31; "Party" with capital letter refers to the three NAFTA Parties (Canada, the US and Mexico), while "party" with lowercase means a natural person or an enterprise, see *NAFTA*, above n 214, Art 201

serve a Notice of Intent to Commence Judicial Review on the Secretariats of the involved NAFTA Member nations as well as on all persons listed on the service list.[245]

On the other hand, as Chapter 20 concerns state-to state disputes, private parties are excluded from any direct access or initiation of process.[246] Section C of Chapter 20, however, contains three articles which address private commercial dispute settlement. Under these provisions, individuals who claim that another Party has violated the Agreement can lobby their respective government to raise the claim before the Commission and to request the establishment of a panel.[247] Although private parties have no standing to bring claims, they are encouraged to "use arbitration and other means of alternative dispute resolution (ADR) to resolve commercial disputes among themselves."[248] NAFTA Member Parties are required not only to facilitate appropriate arbitration procedures that will ensure the observance of these provisions but to also recognise and enforce the arbitral awards of such disputes. Member Parties, however, are not to utilize their domestic law against another Party to argue that a measure of the other Party is inconsistent with NAFTA.[249] In term of amicus brief, NAFTA begun to accept amicus from organisation for investor-state arbitration disputes (Chapter 11).[250] It has been approved by the NAFTA Parties and also agreed to use specific procedures for the acceptance of amicus briefs.[251]

3.4.6 The precedential value of decisions

The concept of *stare decisis* does not formally exist in the NAFTA system.[252] Under Chapter 20, the arbitral panel issues a report recommending a solution and the disputing

[245] *NAFTA 1904 Panel Rules*, in Ralph H Folsom, Michael W Gordon and John A Spanogle, eds, *Handbook of NAFTA Dispute Settlement*, loose leaf, (1998), above n 214, Rule 33 (1) (a); an "interested person" means a person who, pursuant to the laws of the country in which a final determination was made, would be entitled to appear and be represented in a judicial review of the final determination, Ibid.
[246] *NAFTA*, above n 214, Art 2021; It stated that "No Party may provide for a right of action under its domestic law against any other Party on the ground that a measure of another Party is inconsistent with this Agreement".
[247] Gal-Or, above n 239, 33
[248] *NAFTA*, above n 214, Art 2022 (1)
[249] Ibid, Art 2021
[250] Hansen, above n 221, 421
[251] See Statement of the Free Trade Commission on non-disputing party participation, <http://www.state.gov/documents/organization/38791.pdf >at 16/11/2005, see also, Hansen, ibid.
[252] Cherie O'Neil Taylor, 'Dispute Resolution as A Catalyst for Economic Integration and An Agent for Deepening Integration: NAFTA and MERCOSUR?', (1997) 17 *Northwestern Journal International Law & Business* 850, 896 [hereinafter Taylor dispute resolution]

Parties have to agree on a resolution of the dispute which conforms with the panel's determinations and recommendations. Their Secretariats must then be notified of their agreed resolution.[253] The panel's final decision is not binding in the sense that it has no direct effect on national domestic law and neither federal nor state governments are bound by the findings or recommendations.[254]

By contrast, decisions of Chapter 19 bi-national panels are binding on the disputing parties and directly affect the domestic laws of the countries concerned.[255] However, because there is no review from panel decisions,[256] the decisions have no precedential value with any binding effect on other bi-national panels or on the domestic courts of the Parties.[257] Appeal from a panel's decision can only be made to the ECC and not to a domestic court.[258]

A Chapter 11 arbitral award is binding only on the disputing parties in that particular case and a disputing party has to comply with the award "without delay".[259] Article 1135 (4) NAFTA stipulates for each Party to undertake the enforcement in of an award in its territory should be undertaken by each Party. If a Party fails to abide by or comply with the terms of the final award, a NAFTA Chapter 20 panel may be established.[260] The limited binding nature of NAFTA decisions provides no avenue for the adoption of a formal use of precedent. The possibility, however, if an informal invocation

[253] *NAFTA*, above n 214, Art 2018 (1)
[254] David A Gantz, 'Dispute Settlement Under the NAFTA and WTO: Choice of Forum Opportunities and Risks for the NAFTA Parties', (1999)14 *American University International Law Review*, 1025,1043; the final reports of the panels are not binding on future disputes, because "under accepted doctrines of international law, stare decisis or the common-law concept of precedent' does not apply," see Arun Venkataraman, 'Binational Panels and Multilateral Negotiations: A two-track Approach to Limiting Contingent Protection', (1999) 37 *Columbia Journal Transnational Law* 533, 599
[255] *NAFTA*, above n 214, Art 1904 (9); "directly applicable" generally means that no domestic legislation is necessary to apply this law directly to citizens of that country, see also Kristin L Oelstrom, 'A Treaty for the future: The Dispute Settlement Mechanism of the NAFTA', (1994) 25 *Law & Policy International Business* 783, 792
[256] *NAFTA*, above n 214, Art 1904 (11)
[257] Gabriel Cavazos Villanueva and Luis F Martinez Serna, 'Private Parties in the NAFTA Dispute Settlement Mechanism: the Mexican Experience', (2003) 17 *Tulane Law Review* 1017,1021
[258] *NAFTA*, above n 214, Art 1904 (13)
[259] Ibid, Art 1136 (1 & 2)
[260] Ibid, Art 1135 (5), the Commission shall establish a panel under Article 2008 (for an Arbitral panel) which the requesting party may seek in such proceedings that the failure to comply with the final award is inconsistent with the obligation of NAFTA and a recommendation that the party abide with the final award,

of precedent, still arises should NAFTA tribunals refer to earlier decisions for guidance matters of legal principle and treaty interpretation.

3.4.7 The adoption of decisions

Under Chapter 19, a panel's decision is made by majority vote based on all the members of that panel.[261] A written decision is then issued by the panel which includes the panellists' reasons as well as dissenting or concurring opinions, if any. The panel's decision is binding on the Parties involved with respect to that particular matter before that panel.[262] According to Article 1904.11 of NAFTA, no Party can legislate to allow for appeals from panel decisions to be made to that Party's domestic courts. If an offending Party should deny the binding force of a panel's decision, the complainant Party as the first party could request consultation with the importing Party.[263]

Chapter 20 disputes are overseen by the FTC and in the event that attempts to reach a mutual agreement fail, a Party can refer the matter in question to the FTC. The FTC is then required to establish a nonbinding arbitral panel consisting of five members.[264] The arbitration process, which includes the panel's hearings, deliberations, initial report as well as all the disputing Parties' written submissions to and communications with the panel, is confidential.[265] The panel presents a final report, together with any separate opinions on matters where no unanimous agreement was reached, to the disputing Parties within 30 days after the presentation of the initial report, unless the disputing Parties agree otherwise.[266] The identity of any panellist who writes a separate opinion is not, however, permitted to be disclosed.[267]

[261] Ibid, Annex 1901.2 (5);
[262] Ibid, Art 1904 (9)
[263] Ibid, Art 1905 (1)
[264] Ibid, Art 2008 (1)
[265] Ibid, Art 2012 (1.b)
[266] Ibid, Art 2017 (1)
[267] Ibid, Art 2017 (2)

3.4.8 The enforceability of decisions

The NAFTA does not create any legislative or judicial institutions and subsequently, the FTC, which consists of cabinet level representatives of the Parties or their designees, is the institutional infrastructure responsible for supervising the implementation of the agreement (Article 2001 of NAFTA). The FTC's other functions include supervising the further development of the NAFTA as well as the resolution of disputes related to the interpretation or application of the Agreement (Article 2001 (1) of NAFTA).

Chapter 20 imposes two types of sanctions for the non-implementation of final reports: (i) the removal of the offending measure together with compensation provided to the affected member country, although not to the affected private party, and (ii) retaliation.[268] If the disputing Parties fail to agree to resolve the dispute under the first avenue, Chapter 20 provides recourse to the second wherein the complainant Party can retaliate through the suspension of benefits that has been afforded to the offending Party.[269] Ideally, the benefits suspended should relate to the same sector from which the dispute arose,[270] but the complaining Party is itself not restricted from suspending benefits afforded in other or even all sectors.[271]

Neither additional provisions in NAFTA nor the avenue of appellate review for the complainant Party are present to provide for the monitoring of the implementation of panel decisions. Generally, therefore the parties to the dispute are responsible to ensure that appropriate action is taken by the offending Party to comply with the agreed-upon solution or final report.[272] Alternatively, in particular with respect to disputes under Chapter 11, a disputing investor can seek enforcement of the award under the ICSID Convention, the United National Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the New York Convention) or the Inter-American Convention on International Commercial Arbitration. The scant implementation provisions as well as lack of judicial review to limit the enforceability of NAFTA panel decisions as it has been demonstrated by

[268] Horacio A Grigera Naon, 'Sovereignty and Regionalism', (1997) 27 *Law & Policy International Business,* 1073,1165
[269] *NAFTA*, above n 214, Art 2019
[270] Ibid, Article 2019.2 (a)
[271] Ibid, Article 2019.2 (b)
[272] Naon, above n 268, 1165

the longest trade war *softwood lumber* [273]dispute between the US and Canada and *Cross-Border Trucking* dispute (the US v. Mexico).[274] However, they are helped by the fact that the parties need to stay together as members of NAFTA.

3.5 The Mercado Comun del Sur or Common Market of the Southern Cone (MERCOSUR)

3.5.1 Brief introduction to the organisation and its goals

MERCOSUR was created in March 1990 by the Treaty of Asuncion[275] for the purpose of establishing a common market that allowed for the "free circulation of goods, services and production factors" among its four signatories - Argentina, Brazil, Paraguay, and Uruguay. According to the treaty, by the end of December 1994, there was to be established among the Member States an external common tariff, a common commercial policy regarding other states or groups of states, a coordination of positions in international and regional commercial economic forums, a coordination of macroeconomic and sectorial policies as well as a commitment by the Member States to harmonize their legislations.[276]

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[273] This case had raging since the mid-1980s- what may be called the "Lumber War" is 'the longest and messiest trade war Canada and the US have ever had', Zsolt K Bessko, 'CFTA-NAFTA Dispute Resolution on the rocks? The softwood Lumber case', (1995) 15 *Journal of Law & Commerce* 335 (quotation omitted); see also James Graham, 'Re-evaluation of the Dispute Resolution mechanism in the Canada-US Free Trade Agreement: The Softwood Lumber dispute', (1996) 28 *Case Western Reserve Journal of International Law* 473; This case was also brought under the DSU, the US-Final Dumping Determination on Softwood Lumber from Canada, WTO Doc. WT/DS264/R (Report of the Panel), adopted as modified by the Appellate Body Aug 31, 2004; This case involves countervailing Duty (CVD) issues, on whether Canada illegally subsidized softwood lumber exports. In November 2005, the WTO-article 21.5 Arbitration Panel report (compliance arbitration), concluded that the US has implemented the decision of panel and the DSB to bring it measure into conformity with its obligation under the AD&SCM Agreement, see WTO Doc. WT/DS277/RW, 15 November 2005

[274] Cross-Border Trucking Services (US v. Mex), Arbitral Panel Established Pursuant to Chapter 20 of the NAFTA, No. USA-Mex-98-2008-01 (2001), see <http://www.nafta-sec-alena.org/app/DocRepository/1/Dispute/english/NAFTA_Chapter_20/USA/ub98010e.pdf > at 4/12/2005; This case is another important example of the compliance the parties to the panel decision in NAFTA, after almost 4 years the US still not to comply with the NAFTA Panel decision ruled that 'NAFTA required the US to allow Mexican trucks to operate in U.S territory, see Hansen, above n 221, 419; Bush administration sought to implement the panel decision but there was a lawsuit to the Federal Court to block this measure on an alleged failure to comply with federal statutory requirements. Id. Even after the Supreme Court decided to allow the implementation of NAFTA Panel decision, but a new policy has not yet been implemented. Id.

[275] Treaty of Asuncion, Mar. 26, 1991, art 1, 30 *I.L.M.* 1041, 1044; This Treaty contains five Annexes, id, at 1050-1061; In order, these annexes deal with trade liberalization programme, general rules of Origin, Settlement of Disputes, Safeguard Clauses and Working Groups of the Common Market Group, id.[hereinafter *Treaty of Asuncion*]

[276] Ibid, Art 1

According to the Protocol of Ouro Preto which came into force in 1995[277], the institutional structure of MERCOSUR comprises the following organs: (1) The Council of the Common Market (CCM); (2) The Common Market Group (CMG); (3) The MERCOSUR Trade Commission (MTC); (4) The Joint Parliamentary Commission (JPC); (5) The Economic-Social Consultative Forum (ESCF); (6) The MERCOSUR Administrative Secretariat (MAS).

3.5.2 The MERCOSUR dispute settlement system

The MERCOSUR dispute settlement mechanism has developed gradually and progressively through the adoption of a number of Protocols which have gradually moved towards a permanent adjudicative mechanism. Each of these Protocols has been transitional in nature, intended to operate for a limited period of time. [278]

The legal instruments establishing the dispute settlement mechanism in MERCOSUR include

(i) Annex III of Treaty of Asuncion, the first legal instrument on the topic of dispute settlement, contained only three paragraphs that constructed a very elementary procedure.[279] The provisions had been intended as a temporary [280] dispute settlement structure for use during the transition period;[281]

(ii) The 1991 Brasilia Protocol for the Settlement of Disputes[282] which, however, was only intended as another transitional dispute settlement

[277] Additional Protocol to the Treaty of Asuncion on the Institutional Structure of MERCOSUR ("Protocol of Ouro Preto"), date of signature, 17 December 1994, entry into force, 15 December 1995, see, (1995) 34 *International Legal Materials* 1244,

[278] This technique also applied to the MERCOSUR legal framework, see Ricardo Olivera Garcia, 'Dispute Resolution Regulation and Experiences in MERCOSUR: the Recent Olivos Protocol', (2002) 8 *Law & Business Review of the Americas* 535, 538

[279] *Treaty of Asuncion*, above n 275, Annex III, at 1059

[280] Ibid, Annex III, para 2 and para 3 indicate that this provision on dispute settlement was intended for the transition period, that is, before the State Parties adopt a permanent dispute settlement system with the stated deadline is, before Dec 31, 1994, id

[281] From November 29, 1991-February 10, 2004 (between entry into force of the Treaty of Asuncion and date of entry into force Protocol Olivos)

[282] Protocol of Brasilia For the Settlement of Disputes, 36 *I.L.M*. 691 (1997); Protocol of Brasilia came into force on 22 April 1993 after it was ratified by the fourth MERCOSUR member state; [hereinafter *Protocol of Brasilia*]

system to replace the Treaty of Asuncion's temporary system in April 1993. [283] It was intended to terminate when a permanent dispute settlement procedure for the common market was set up;[284] and

(iii) The 2002 Protocol of Olivos,[285] which came into force in 2004 and replaces the Brasilia Protocol. The Protocol of Olivos sets up a permanent dispute settlement system for MERCOSUR;[286]

(iv) In addition to the Protocol of Olivos, investment disputes are covered by the 1994 Protocol of Colonia for the Promotion and Reciprocal Protection of Investments and the 1994 Protocol of Buenos Aires for the Promotion and Protection of Investments Coming from non-MERCOSUR State Parties.[287] Under these protocols, both the inter-regional as well as third state investors have acquired access to the regime's dispute settlement mechanisms.

MERCOSUR's dispute resolution procedures and institutions are therefore set forth in the Brasilia and Olivos Protocols. Disputes that arise among the Member Countries concerning the interpretation, application or non-fulfilment of the provisions of the Treaty of Asuncion or any of its Protocols, Council Decisions and Common Market Group Resolutions ('Group Resolutions') are subject to the dispute resolution procedures outlined in these two Protocols.[288]

Under the Olivos Protocol, Member Parties are also allowed to refer disputes to the dispute settlement system of the WTO or other trade organizations in which the party

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[283] Ibid, Art 34 stated: "This Protocol shall remain in force until the entry into force of the Permanent System of Dispute Settlement for the Common Market provided for in paragraph 3 of Annex III of the Treaty of Asuncion"; see also, Taylor, above n 252, 859

[284] Article 34 of Brasilia Protocol reads that "this protocol *shall remain in force until the entry into force of the Permanent System of Dispute Settlement* for the Common Market provided for in paragraph 3 of Annex III of the Treaty of Asuncion (emphasis added), see Protocol of Brasilia, above n 281, Art 34;

[285] The Olivos Protocol for the Settlement of Disputes in MERCOSUR, done February 18, 2002, 42 *I.L.M.*2 (2003)[hereinafter *Protocol of Olivos*]

[286] As the Olivos Protocol entered into force, 10 February 2004, the Protocol of Brasilia therefore was ceased on that date.

[287] Protocol Colonia and Buenos Aires are available at <http://www.sice.oas.org/trade/mrcsrs/decisions/an1194e.asp> at 30/07/2004

[288] *Protocol of Brasilia*, above n 282, Art 1; *Protocol of Olivos*, above n 285, Art 1.1

concerned is a participant.[289] However, "Once a dispute settlement procedure has begun, none of the parties may request the use of the mechanism established in the other fora…".[290] Thus, the selection of one forum excludes the option to choose another forum.

3.5.3 Permanent vs. ad hoc panels

Parties to a dispute are to first attempt to settle their dispute through direct negotiations.[291] When this fails, any of the parties involved may submit the dispute to the Common Market Group ('the Group' or 'CMG') for resolution[292] If any of the parties reject the Group's recommendations, the State involved can request for arbitration proceedings before an Ad Hoc Arbitration Panel. [293]

The ad hoc arbitration panel consists of three arbitrators selected from a list kept by the Administrative Secretariat of the MERCOSUR. The States involved in the dispute appoint one arbitrator each and together choose the third arbitrator as the presiding arbitrator.[294] The presiding arbitrator and his alternate arbitrators cannot be nationals of either of the States involved in the dispute.[295] In cases where the States involved fail to appoint the third arbitrator, the Administrative Secretariat of MERCOSUR will appoint the arbitrator by drawing from a consolidated list of potential third arbitrators.[296]

The Protocol of Olivos also establishes a Permanent Review Court whose jurisdiction is limited to dealing with the legal issues in the dispute and the legal interpretations set out in the award of the Ad Hoc Arbitration Court.[297] A decision of this court is final, binding and prevails over any decision of the Ad Hoc Arbitration Court.[298] Under the Protocol of Olivos, the parties to a dispute that has not been resolved by

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[289] *Protocol of Olivos*, above 285, Art 1.2
[290] Ibid.
[291] Ibid, Art 4
[292] *Protocol of Brasilia*, above n 282, Art 4.1; *Protocol of Olivos*, above n 285, Art 6; The Common Market Group (CMG) is the executive organ of MERCOSUR comprise of four members and four alternates for each country, appointed by their respective governments, who must included representatives of the Ministries of Foreign Affairs, the Ministries of the Economy (or their equivalents) and the Central Banks. The CMG shall be coordinated by the Ministers of Foreign Affairs, see the Protocol Ouro Preto, above n 277, Art 1
[293] *Protocol of Brasilia*, above n 282, Art 9; *Protocol of Olivos*, above n 285, Art 10
[294] *Protocol of Olivos*, above n 285, Art 10.3 (i) and Art 11.2 (iii)
[295] Ibid, Art 10.3 (i)
[296] Ibid, Art 10.3 (ii)
[297] Ibid, art 17 (1,2)
[298] Ibid, art 22 (2)

negotiations also have direct access to the Permanent Review Court. The dispute can be referred directly to the Court without going through the Group or the Ad Hoc Arbitration Panel.[299] In this case, the decisions of the court are final and binding.

In a dispute involving only two State Parties, the Permanent Review Court will be comprised of three arbitrators, two of whom are nationals of each of the States involved and the third chosen by the Director of the Administrative Secretariat as the presiding arbitrator.[300] Meanwhile, in a dispute involving more than two State Parties, the Permanent Review Court is comprised of five arbitrators.[301] Four of these arbitrators are each appointed by each State Party for a two year period which can be renewed for another two consecutive period at a maximum.[302] The fifth arbitrator is unanimously appointed by the State Parties from a pre-submitted list of eight candidates[303] for a three year non-renewable period.[304] If a consensus is not possible, the Director of the Administrative Secretariat then selects the fifth arbitrator from the list by draw.

3.5.4 The independence of panellists

The panellists in MERCOSUR arbitral tribunals i.e., the ad hoc Arbitration Court and the Permanent Review Court, are jurists of recognized competence with regard to trade and economic matters.[305] In order to maintain the independence of the Tribunal, the presiding arbitrator and his or her alternate cannot be citizens of the disputing parties, even in the case where the appointment is by the Administrative Secretariat.[306] Where parties were failed to choose the third arbitrator, the Administrative Secretariat will do so by draw from the roster, excluding arbitrators from disputing countries. The exclusion of the disputing countries' arbitrators aims to preserve the impartiality of the arbitrators as well as the decisions.

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[299] Ibid, Art 23
[300] Ibid, Art 20.1
[301] Ibid, Art 20.2; the State Parties may agree to define other criteria for the operation of the Court, id, Art 20.3
[302] Ibid, art 18 (2)
[303] The list includes eight members; each of the State Parties shall propose two members that have to be nationals of one of the MERCOSUR countries, ibid, art 18 (3)
[304] Ibid, art 18 (3). The fifth arbitrator is chosen at least three month before the end of the predecessor's term.
[305] *The Protocol of Brasilia*, above n 282, art 13.2
[306] *The Protocol of Olivos*, above n 285, Art 10.3 (i)

3.5.5 Private party rights to appear

MERCOSUR provides for the settlement of disputes between its Member Countries as well as between private individuals, whether natural or legal persons.[307] An individual can submit a claim against a State Party for adopting or applying measures[308] that breach MERCOSUR provisions[309] and if that individual has been affected by that State Party's actions. The claim should be put to the National Section of the Common Market Group (CMG)[310] of the country in which that private party resides or has its business headquarters.

If the differences are not resolved, the private party can then refer the dispute to the MERCOSUR Trade Commission[311] which will deliver a ruling based on a consensus. If a consensus cannot be reached, the dispute will be referred back to the CMG for a decision, or ultimately, to the ad hoc Arbitration Panel.

The National Section of the Common Market Group of the claimant's country will then consult with the National Section of the Common Market Group of the alleged infringing country to find a solution.[312] If this effort fails, the National Section of the Common Market Group of the claimant's country will present the claim to the MERCOSUR Common Market Group, and the Group will then call upon a group of experts to issue a decision.[313] The group of experts are to unanimously decide upon the

[307] *The Protocol of Brasilia*, above n 282, Ch. V; *the Protocol Olivos*, above n 285, Ch XI
[308] The inconsistent measures, for instance, restrictive trade measures, discriminatory measures, measures against the free market or measures.
[309] In this case if the State Party's actions breach of the Treaty of Asuncion, its related accords, Council decisions, Group Resolutions or Trade Commission Directives, see *Protocol Olivos*, above n 285, Art 39
[310] The National Sections of the Common Market Group (CMG) originating with the State Parties or private parties…(that) fall within its jurisdiction', *The Protocol of Ouro Preto*, above n 277, art 21; the main task of this body is 'to ensure the application of common trade policy instruments with respect to intra-regional trade and that with the outside world'. Ibid; see also, Thomas A O'Keefe, 'Dispute Resolution in MERCOSUR', (2002) 3 *Journal of World Investment* 507, 511
[311] The MERCOSUR Trade Commission is a new institutional body created by the Protocol of Ouro Preto and which authorized to 'consider the complaints presented by the National Sections of the Common Market Group' and the main task of this body is 'to ensure the application of common trade policy instruments with respect to intra-regional trade and that with the outside world', see the Protocol Ouro Preto, above n 277, Art 16, see also, O'Keefe, above n 310, 511
[312] *The Protocol Olivos*, above n 285, Art 40.1
[313] Ibid, Art 41, and 42.2

admissibility of the claim, and if it is found that a breach has occurred, it can ask the breaching State Party to adopt corrective steps or annul the measures in question.[314]

If a unanimous opinion cannot be achieved, the matter is then referred back to the Group which will immediately declare the proceedings closed.[315] The State Party, however, can still bring the matter under the procedure provided in Chapters IV and VI of the Olivos Protocol which relate to direct negotiations and the Ad Hoc Arbitration Panel.

3.5.6 The precedential value of decisions

A MERCOSUR arbitration panel has jurisdiction over and can issue binding decisions concerning the MERCOSUR treaty, associated agreements and legislation.[316] Each tribunal is itself to serve for the individual case and is under no obligation to follow or take into account any other arbitrator's reasoning or interpretation.[317] There is no guarantee that the same tribunal will be reappointed for another case or even for a similar case. It is more likely that there is also no assurance of the uniformity in interpreting the meaning or intent of the MERCOSUR norm.

Moreover, the case practice shows that there have only been three arbitrators from the list who have served more than once.[318] This leads to the real possibility of arbitrators rendering inconsistent decisions. There are no clear rules of procedure which the arbitrators can use as direction and guidance in deciding the case. As a result, 'they create their own rules of procedure and have great discretion about what law they will apply and how they will do so.'[319] While a number of awards have been issued under the system it is doubtful whether this creates 'an intelligible body of jurisprudence' which can be used by the future arbitrators as well as the parties.[320] It certainly does not evidence either *a de jure* or *a de facto* attempt to follow precedent.

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[314] Ibid, Art 44.1 (i)
[315] Ibid, Art 44.2
[316] Taylor dispute resolution, above n 252, 897
[317] Rafael A. Porrata-Doria, Jr, 'MERCOSUR: the Common Market of the Twenty-First Century?', (2004) 32 *Georgia Journal International & Comparative Law* 1, 2004, 23, quoted Lista de Arbitros at http://www.mercosur.org.uy/espanol/snor/varios/lista_de_arbitros.htm
[318] Ibid, 23
[319] Ibid.
[320] To date, there have been nine arbitration awards, see ibid.

3.5.7 The adoption of the decisions

The awards of the Ad Hoc Arbitration Panel and the Permanent Review Court are adopted by through majority vote.[321] Although the awards for the disputes are published, the reasons for any dissenting votes of the arbitrators are not specified and the voting procedure as well as all the discussions carried out remain confidential at all times.[322] From the time of their notification, the awards of the Ad Hoc Arbitration Court are firm, final and binding on the States involved in the dispute, unless an appeal has been made to the Permanent Review Court.[323] Meanwhile, the awards of the Permanent Review Court are binding and are not subject to appeal.[324]

State Parties are allowed to request, from the competent Court, clarification of awards and the manner in which the awards have to be enforced. [325] The competent court then decides the matter within fifteen days or longer, if necessary, from the time of the request. There are, however, no provisions in either the Brasilia or Olivos Protocols by which arbitral rulings can be taken to the domestic courts or made part of the law of a State Party.[326]

3.5.8 The enforceability of decisions

Awards of both the ad hoc arbitration panels and the Permanent Review Court have to be enforced in accordance with the terms and time period set forth therein.[327] The State Party responsible for enforcing the award has to inform the other Party to the dispute, as well as the Group through the Administrative Secretariat, of the measures it will be taking.[328]

If the State Party benefiting from the award considers that the measures taken do not comply with the award, it can take the matter to the Ad Hoc Arbitration Panel or the

[321] *Protocol of Olivos*, above n 284, Art 25
[322] Ibid, Art 25
[323] Ibid, Art 26
[324] Ibid, Art 26.2
[325] Ibid, Art 28.1
[326] Taylor dispute resolution, above n 252, p 897
[327] *The Protocol of Olivos*, above n 284, Art 29.1
[328] Ibid, Art 29.3

Permanent Review Court[329] which will then decide on the differences within thirty days from the date on which it was informed of the situation. If the Party responsible for correcting its measures does not comply with the arbitral decision, the complainant Party can apply temporary compensatory measures, such as the suspension of concessions, in order to force compliance.[330]

The compensatory measures taken should relate to the same sector or sectors affected by the offending measures but if this is considered impracticable, the complainant Party can interrupt the concessions given in another sector. If the State Party bound to enforce the award considers that the compensatory measures imposed are excessive, it may request for decision on the matter from either the Ad Hoc Arbitration Panel or the Permanent Review Court, as the case may be, and the State Party which has adopted the compensatory measures must then adapt those measures to the decision made by the court.[331] This compensatory measures award is the sole remedy available to a successful party in a dispute.

3.6 Conclusion

The main aims of dispute resolution mechanisms are generally to interpret the rights and obligations of Member Parties as embedded in the respective trade agreements and to secure positive resolution of disputes which will be acceptable to the disputing parties. By settling disputes satisfactorily, the integrity of the trading regimes is preserved. As we have seen, major trade organisations utilize different types of mechanisms to resolve their disputes. These differences reflect the level of economic integration being sought by the participating countries in each organisation. The higher the level of the trade liberalization and the economic and political integration desired, the more rigid the mechanism they chose.

As we have seen, international trade dispute settlement mechanisms differ from dispute settlement mechanisms on the national level and are constrained by the requirement of sovereignty. Thus flexibility and consensual mechanisms such as consultations,

[329] Ibid, Art 30.1
[330] Ibid, Art 31.1
[331] Ibid, Art 32.2 & 3

negotiation, conciliation and diplomatic compromise, remain the central features of the various international systems.

However, it has been recognized that a purely consensual model is inadequate to deal with the diverse interests of states and the competing values at stake in trade disputes. Therefore, major international trade arrangements have developed more adjudicatory dispute settlement mechanisms. These mechanisms have introduced a range of innovative steps such as, the introduction of panel proceedings and standing appellate bodies, empowered to issue binding awards, the requirements of independent of panellists, the provisions of access by private parties to the dispute settlement mechanisms, and the introduction of measures designed to ensure the enforcement of rulings.

Nevertheless, the spectre of state sovereignty continues to impede the international dispute settlement arena. In particular, stronger enforcement mechanisms are still needed to ensure implementation of decisions and rulings rendered by the various bodies. In this respect, and in order to maintain support for trade liberalization moves, it is crucial that States have confidence and trust in the operation of the dispute settlement mechanisms. Before turning to the development of the mechanism in ASEAN context the next chapter therefore analyses the key procedural issues that have arisen in the implementation of international trade dispute settlement mechanisms.

CHAPTER 4 – KEY PROCEDURAL ISSUES OF DISPUTE SETTLEMENT MECHANISMS: TOWARDS A RELIABLE MECHANISM

4.0 Introduction

The dispute settlement mechanisms utilized in major trade organizations were described in Chapter 3. As was seen there, these mechanisms include both diplomatic and adjudicatory processes. Diplomatic mechanisms include consultation, good offices, conciliation and mediation. The purpose of providing these processes is to encourage Member States to resolve their disputes in the most efficacious and mutually acceptable manner.[1] Adjudicatory mechanisms, however, have become increasingly necessary to resolve disputes between Member States by applying the relevant treaty rules consistently to all. As was seen in Chapter 3 these mechanisms are a central feature of the EU, WTO, NAFTA and MERCOSUR systems.

The significance and pervasiveness of these mechanisms has, however, given rise to concerns relating to the transparency of proceedings as well as the enforceability of decisions given by dispute resolution panels, courts or committees. Pressures have also developed on these dispute resolution mechanisms to preserve their impartiality and objectivity in order that Member States can continue to place confidence in the mechanisms' ability to resolve disputes fairly. To that end, revision of older dispute settlement mechanisms has become necessary to ensure their continued suitability in the constantly evolving environment of international trade. This is not an easy matter, however, with even the WTO having failed, to date, to succeed in completing a review of its DSU

[1] For example in the WTO DSU it says that 'the aim of the dispute settlement mechanism is to secure a positive solution to a dispute. A solution mutually acceptable to the parties to a dispute and consistent with the covered agreements is clearly to be preferred', see Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU), reprinted in The WTO Secretariat, *The WTO Dispute Settlement Procedures*, (2nd ed, 2001), Art 3.7 [hereinafter the DSU]

which was called for in 1994 and scheduled to be completed by 1998.[2] In other systems, too, there has been a need to address inadequate procedural provisions.

A number of key procedural issues have arisen that are central to the effective functioning of trade dispute settlement mechanisms. The purpose of this chapter is to more closely examine these issues in a comparative context. The chapter begins with an examination of the diplomatic processes and then turns to an examination of the adjudicatory processes with particular reference to the issues relating to the advantages and disadvantages of ad hoc and permanent panels, the qualifications and independence of panellists, transparency, the rights of private litigants, the precedential value of panel decisions, the desirability of appellate review and the adoption and enforceability of panel decisions.

In this discussion, the WTO dispute settlement mechanism will be mainly utilised as a benchmark for comparison given the fact that it has brought about a unique judicialisation of international trade disputes, while the dispute settlement mechanisms of the other trade organisations will be mentioned where applicable. The purpose of this analysis is to demonstrate how these procedures resolve trade disputes among sovereign Member States without undermining the system of the organization as a whole. In doing so, this chapter will assess advantages and disadvantages of the various procedures discussed.

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[2] See Decision on the Application and Review of the Understanding on Rules and Procedures Governing the Settlement of Disputes, Apr. 15, 1994, 33 *I.L.M.*1125,1259 or <http://www.wto.org/english/docs_e/legal_e/53-ddsu.pdf >21/11/2005 [hereinafter the DSU Review]; This decision stated: "the Ministerial Conference to complete a full review of dispute settlement rules and procedures under the WTO within four years … and to take a decision … whether to continue, modify or terminate such dispute settlement rules and procedures."; The DSB started the review in late 1997 and held series of informal discussions on several identified proposals and issues, although many felt that improvement should be made to the DSU, but the DSB could not reach a consensus on the result of the review. This deadline has been extended see DSB Meeting, "Extension of the Deadline for Review of the DSU," WT/DSB/M/52 (8 Dec 1998) (3 Feb 1999); Then Ministerial Declaration (Doha Declarations) of 2001, paragraph 30 mandated negotiations and states to continue the work and should be concluded no later than May 2003, see http://www.wto.org/english/thewto_e/minist_e/min01_e/mindecl_e.htm#dispute > at 21/11/2005; Again on 24 July 2003, acknowledged that the DSB needed more time, the deadline has been extended by one year, to May 2004; the DSU Review however has not been successfully concluded, then the DSU Review negotiations are continuing without a deadline, see http://www.wto.org/english/tratop_e/dispu_e/dispu_e.htm#negotiations >at 21/11/2005; the Doha Ministerial Declaration has mandated (in paragraph 47), that negotiations on the DSU review will not be part of the single undertaking, i.e., that they will not be tied to the overall success or failure of the other negotiations mandated by the Declaration. Id; for the reasons for the failure of Members to conclude the Review, see Bryan Mercurio, 'Improving Dispute Settlement in the World Trade Organization: the Dispute Settlement Understanding Review-making it work?', (2004) 38 (5) *Journal World Trade*, 795, 845-50

4.1 Diplomatic dispute settlement processes

In some cases and for some parties to a dispute adjudicative methods may not be a preferred approach. Indeed, there may well be times when the involvement of an independent person unrelated to the parties to the disputes can help the parties to find a mutually agreed solution. This is particularly the case in Asia where states have a historical preference for diplomatic as opposed to adjudicatory processes. These countries believe that these methods provide flexibility and the more responsive to the needs of political reality and state sovereignty.

4.1.1 Consultation

Consultation is a form of negotiation that allows parties to a dispute to hold direct discussions with each other with the aim of reaching a mutually agreeable settlement. In some dispute settlement systems [3] this phase has been *prescribed* as the first stage to comprehensively resolve disputes. In the WTO context, consultation plays a prominent part. Unlike good offices, conciliation and mediation that are optional, consultation is mandatory prerequisite for the parties to the disputes before they move to the panel phase. This means, the parties to the dispute are not allowed to request the establishment of a panel before the consultation stage is exhausted. Apart from the view that consultation may be less significant than the panel stage, the parties to the dispute should take the consultation phase seriously. The DSU requires Member States to, 'undertake(s) to accord sympathetic consideration to and afford adequate opportunity for consultation…'[4] Since the DSU clearly stipulates a preference for '…a solution mutually acceptable to the parties …'[5] it follows that all member states must not only conduct consultations as the first step in settling their disputes, but should engage in the process with a serious intent.

[3] See *NAFTA*, Arts 1118, 1907, 2006; *GATT*, Arts XXII:1, XXIII:1 or XXXVII:2 ; *the DSU*, Art 4; *MERCOSUR*, The Asuncion Treaty, Annex III.1, The Protocol of Brasilia, art 2, The Olivos Protocol, Art 4 and 5; *ASEAN*, the 1996 Protocol, Art 2, the Enhanced Protocol, Art 3
[4] The DSU, above n 1, Art 4.2
[5] Ibid, Art 3.7

The consultation process is designed to give disputing parties the opportunity to fully understand the factual situation and legal claims involved in a dispute.[6] With clarification of issues and positions, it is expected that parties will be encouraged to settle matters quickly and bilaterally through compromise rather than drag the dispute through formal proceedings and face the possibility of an adverse ruling being made against them.[7] The consultation phase is also crucial for parties to collect relevant and accurate information which can later be used to assist them, should negotiations fail, in presenting their case to the panel.[8] The panel process itself may be considerably expedited if opposing views have been refined and significant facts and legal arguments have been revealed in advance.[9]

The success of the consultation phase in advancing settlements is, however, essentially dependent on the goodwill and sincerity of the disputing parties and there are many who regard consultation as a mere "way station" to the instigation of formal proceedings.[10] In the WTO, the consultation phase is compulsory and involves a great deal of diplomacy at the highest levels of government, both prior to and after the formal consultation meeting is held. Consultations must take place regardless of the fact that the parties may have already exhausted informal consultations without coming any closer to

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[6] Bernard M Hoekman and Michael M Kostecki, *The Political Economy of the World Trading System: WTO and Beyond*, (2001), 76; Under the GATT system that totally relies on the cooperation between the parties, the respondent can normally be expected to take a constructive approach to the consultations, for instance, it was expected that the respondent would provide information, engage in an exchange of legal arguments, and offer a compromise solution, see Frieder Roessler, 'Comment on a WTO Permanent Panel Body', (2003) 6 *Journal of International Economic Law* 230, 231; under this system it was therefore reasonable to impose on the complainant the obligation to exhaust all possibilities of a bilateral settlement before initiating a panel system. Id.

[7] Under the WTO system, consultations are likely become a formality prerequisite to a process leading to a ruling rather than a media for exchanging opinion, legal arguments and facts between parties, Roessler, above n 6, 232; It had happened because the respondent believed all information given in consultations stage could be used against it in the next proceedings. Id; In some cases, the respondent refused to give any replies to questions in writing and failed to give any legal justification for the measure concerned, and argued that 'the panel process is available to settle such issues'. Id.

[8] Panel report, *Korea-Taxes on Alcoholic Beverages*, WT/DS/75/R, WT/DS84/R, adopted 17 February 1999, as modified by the Appellate Body Report, WT/DS75/AB/R, WT/DS84/AB/R, DSR 1999:I, 44, ¶ 10.23; David Palmeter and Petros C Mavroidis, *Dispute Settlement in the World Trade Organization: Practice and Procedure*,(2004), 87

[9] Olin L Wethington, 'Commentary on the Consultation Mechanism under the WTO Dispute Settlement Understanding during its first five years', (2000) 31 *Law & Policy of International Business*, 583, 583

[10] Kim Van der Borght, 'The Review of the WTO Understanding on Dispute Settlement: Some Reflections on the Current Debate', (1999) 14 *American University of International Law Review* 1223, 1234

reaching settlement.[11] As such, many parties have come to view the process simply as a mere formality to be endured while waiting for the DSU's Article 4.7 sixty-day period to expire before they are entitled to request the establishment of a panel.[12]

Consultations are, however, not necessary in achieving a mutually agreed solution. In the WTO's first ten years of operation, although the success rate of the consultation process was then steadily declining,[13] three panel reports were circulated which stated that the parties to the respective disputes had reached mutually agreed solutions.[14] Despite this fact, it should be noted that the parties to the dispute are obliged to exhaust this stage before they go through the next stage, the panel phase.

During the 1998-1999 DSU Review, a proposal was put forward for the consultation process to be shortened and the time saved to be allocated to the panel process.[15] This proposal had the effect of affirming what many WTO parties already suspected consultation to be a mere 'procedural formality' in the dispute settlement procedure [16] with panel proceedings inevitable for the final resolution of disputes.[17]

While the final decision on this proposal is not clear, in *Korea-Alcoholic Beverages* case, Korea claimed that the complaining parties violated Articles 3.3, 3.7 and 4.5 of the DSU by not engaging in consultations in good faith to reach a mutually agreed solution, so that there had been no adequate of consultation. In response to this claim the panel cited the reasons in *Bananas III* [18] where it was stated:

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[11] Palmeter and Mavroidis, above n 8, 87
[12] Van der Borght, above n 10, 1234
[13] Wethington, above n 9, 587; the number of consultation request was decline, for instance, for the second five years of WTO (1999-2004) a total 127 requests, involving 94 disputes, as opposed to 185 requests in the first five years (1995-1999) involving 125 disputes, see William J Davey, 'The WTO Dispute Settlement System: the First Ten Years', (2005) 8 (1) *Journal of International Economic Law* 17, 24 [hereinafter *Davey-WTO first ten years*]
[14] Kara Leitner and Simon Lester, 'WTO Dispute Settlement 1995-2004: A Statistical Analysis', (2005) 8 (1) *Journal of International Economic Law* 231, 237; two reports in the *EC-Scallps* (1996) dispute and one in the *EC-Butter* (1999) dispute. Id.
[15] This was proposed by the United States, see Preliminary Views of the United States regarding Review of the DSU, ¶.6 (Oct 29, 1998), see Christopher Parlin, 'Operation of Consultations, Deterrence and Mediation', (2000) 31 *Law & Policy International Business* 565, 571
[16] Ibid.
[17] Wethington, above n 9, 588
[18] WTO Panel Report on European Communities-Regime for Importation, Sale and Distribution of Bananas, WT/DS27/R/ECU (May 22, 1997)

> Consultations are … a matter reserved for the parties. The DSB is not involved; no panel is involved; and the consultations are held in the absence of the Secretariat. While a mutually agreed solution is to be preferred, in some cases it is not possible for parties to agree upon one. In those cases, it is our view that the function of a panel is only to ascertain that the consultations, if required, were in fact held …' [19]

In sum, consultations are the exclusive right of the parties to the dispute. As long as they have been requested and some form of consultation held, the adequacy of the consultation will not be questioned.

4.1.2 Good offices, conciliation and mediation

Good offices, conciliation and mediation are also devices aimed to provide a prompt and effective settlement for trade disputes. The DSU and other organizations discussed provide good offices, conciliation and mediation.[20] These methods are offered to the parties to a dispute on a voluntarily basis. In contrast to consultation, these methods require the unanimous agreement of the parties to the dispute. The parties may choose them if they agreed to do so and the Director General of the WTO may, acting in an *ex officio* capacity, offer good offices, conciliation or mediation with the view to assisting Members to settle a dispute.

The parties may initiate and terminate these any time. Subject to the parties' agreement, these methods may continue while the panel process proceeds.[21] In the WTO context, it has been suggested that there is an important role for mediation in settling disputes within the current system in the WTO. It has been proposed to insert mediation, as an "interests-based" procedure, into the existing system of a "power-based" (consultations) and a "rights-based" (panels) procedure.[22] It is believed that mediation would overcome

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[19] See WTO Analytical Index: Dispute Settlement Understanding: Understanding on Rules and Procedures Governing the Settlement of Dispute, see <http://www.wto.org/english/res_e/booksp_e/analytic_index_e/dsu_02_e.htm > at 20/11/2005 [hereinafter *WTO Analytical Index*]

[20]The DSU, above n 1, Art 5.1; GATT, Art XXII, NAFTA, Art 2007, the North American Free Trade Agreement, Dispute Resolution Provisions of the NAFTA, January 1, 1994 (NAFTA), reprinted in Ralph H Folsom, Michael W Gordon, and John A Spanogle, *Handbook of NAFTA Dispute Settlement*, (1998)[hereinafter NAFTA]

[21] The DSU, above n 1, Art 5.5

[22] Hansel T. Pham, 'Developing Countries and the WTO: the need for more mediation in the DSU', (2004) 9 *Harvard Negotiation Law Review* 376 (citation omitted)

some of the problems involving the participation of developing countries in the WTO dispute settlement mechanism, such as, the rigid and costly panel system and the unequal bargaining position in consultations.[23] However, to date only one case has gone to mediation; the 2002 dispute between Thailand, Philippines and the EU involving canned tuna.[24] Nevertheless, mediation remains good option for Member States who do not wish to bring their disputes through the consultation or panel system although it is recognized that solutions achieved through this process are not binding on the parties.[25]

4.2 Adjudication Dispute Settlement Processes

Adjudicatory processes are those that include the establishment of panels for the determination of a dispute on the basis of legal and rule based criteria.

4.2.1 Ad hoc vs. Permanent Panels

The first issue that arises is whether panels should be established *ad hoc* for each dispute or whether a permanent panel is more desirable. To understand the position of states with respect to this issue it is necessary to examine the advantages and disadvantages of each system.

All the international trade organisations under discussion, except for the European Union, utilize panel systems in resolving trade disputes among their Member States.[26] The panel system has become the best choice of method due to its suitability for use in international disputes where the disputants are sovereign countries. In this system the

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[23] Ibid.

[24] Ibid, 378; Thailand and Philippines based on the 2000 Cotonou Partnership Agreement were allowed to export canned tuna to the EU with tariff free. The EU however imposed 24 percent tariffs to the canned tuna from these two countries. Thailand and the Philippines demanded to eliminate this tariff. After unsuccessful consultations, they asked the Director General to assist in solving their dispute through mediation. *Id.* And finally, the EU after several discussions, agreed to reduce the tariff. *Id*. In the GATT history, three cases had been mediated referred to the Director General, see Rosine Plank, 'An Unofficial Description on How a GATT Panel Works and Does Not', (1987) *Journal International Arbitration* 53, 61

[25] Ernst-Ulrich Petersmann, *The GATT/WTO Dispute Settlement System: International Law, International Organizations and Dispute Settlement,* (1998), 69

[26] For example, GATT, Art XXIII:2 ('the Contracting Parties shall promptly investigate any matter…referred to them'. This in practice referred to working parties or panels); *The DSU,* Art 6; NAFTA, above n 20 Annex 1901.2 and art 2008; *The Olivos Protocol of MERCOSUR,* Ch 6; ASEAN, Art 5 of 1996 and art 5 of Enhanced Protocols

panellists are appointed by the parties to the disputes where they have control over the panel in terms of panellist selection and timing. The states also show a special confidence in the panellists of their choice.

The panel procedure is rooted in inter-state arbitral practice where panels are only established upon request by the disputing parties who are empowered to select both the panellists and the panellist procedures.[27] In a traditional arbitration case, the two States that are involved in a dispute must first try to agree on a panel or on a sole arbitrator; if they cannot they each appoint a member of the panel and those members attempt to agree on a third member (as the chairman); if agreement cannot be reached on the third arbitrator, the parties look to an appointing authority, designated in the arbitration agreement, who appoints the third member.[28] The procedure for appointing *ad hoc* panels permits the parties to choose virtually anyone as a panellist, in some cases there is no list of panellists designated in advance. The parties then rely on these third party *ad hoc* panellists to resolve the dispute through hearing the parties' arguments and delivering a judgment.[29] The panel is then dissolved upon the completion of the proceedings.[30]

Despite their success in resolving disputes, however, there are numerous shortcomings in the use of *ad hoc* panels.[31] One concern raised with respect to the use of *ad hoc* panels relates to the issue of democratic participation and politicization of the dispute settlement system. After the transition from the GATT to the WTO system, when the

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[27] Van der Borght, above n 10, 1238; The 1907 Hague Convention stated that "International arbitration has for its object the settlement of disputes between States by Judges of their own choice," see Convention for the Pacific Settlement of International Disputes, Oct 18, 1907, Art 37

[28] For a sole arbitrator, the appointing authority will be called upon once the time allowed for the parties to agree on a designation has expired; in the case of five-member panels, each party will appoint two members, who will then try to agree on a fifth member, see, e.g., Arbitration Rules of the United Nations Commission on International Trade Law, Art.5-8 (UNCITRAL); International Chamber of Commerce, Rules of Arbitration, Art. 3-6 (1988); the traditional ad-hoc arbitration among states however has decreased significantly since World Word II, only 43 compared to 178 cases for the period 1945-1990 and 1900-1945 respectively, see Petersmann, above n 25, 60; only 2 cases were submitted to the Permanent Court of Arbitration at the Hague after 1945, compared with 23 cases during the first half of the 20th century. Id.

[29] See generally J. G. Merrils, *International Dispute Settlement*, (1998)

[30] *The DSU*, above n 1, art 6.1; NAFTA, above n 20, arts 1901.2, 2008.2; MERCOSUR, the Protocol of Brasilia, art 8, the Olivos Protocol, art 10; ASEAN, 1996 Protocol, art 5, Enhanced Protocol, art 5

[31] William J. Davey, 'A Permanent Panel Body for WTO Dispute Settlement: Desirable or Practical', in Daniel L M Kennedy and James D Southwick (eds), *The Political Economy of International Trade Law*, (2002), 496, [hereinafter *Davey: A Permanent Panel Body*], Proposals and ideas to introduce permanent panellists are submitted to the DSU Review includes the reform of recruitment, composition, and structure of the panel which would alter the relationship of dispute settlement with the political diplomatic process. Id. The proposal was set forth in TN/DS/W/1 and TN/DS/W/7 and proposed by the European Communities.

system became rule-oriented and the adoption of the panel decisions became automatic and the parties could not block the adoption of the panel decisions, finding panellists became a more difficult process as Member States had become extremely selective in their choice of panellists, only appointing those whom they perceived was likely to be favourable to their position and win the case.[32] Background checks were conducted and disputing parties tended to avoid appointing panellists who had ruled against them in a previous case.[33]

Furthermore, although the panellists could be selected from current or former governmental officials, academics, published practitioners and former Secretariat officials as codified practice, the selection criteria had been toughened.[34] Because the supply of these potential panellists was stagnant and could not match demand[35] individuals who qualified as panellists were forced to serve on numerous panels leading to even greater inefficiencies due to increased and possibly conflicting workloads. [36]

Mechanisms have now been implemented to combat this problem. In the WTO, the Secretariat proposes the members of any panel from the Indicative List it maintains and the parties to the dispute can only refuse an appointment if they have compelling reasons to do so.[37] While this has implications for the issue of the autonomy of the parties in the selection of panellists which have not been lost of Member States, this does at least ensure greater efficiency in the establishment of panels and can be seen as a half-way house towards the establishment of permanent panels,

Finally, a number of practical problems arise from the use of *ad hoc* panels, for example, these panels consist mostly of panellists who each have other full-time employment, typically as government officials. Because panellists experience difficulty in

[32] Ibid, 501, the willingness to accept panellists proposed by the WTO Secretariat was decreased significantly. Id. The parties preferred to accept the Director-General appointment. Id.
[33] Ibid, 503
[34] Ibid, 500
[35] Ibid, 500-503
[36] For example, two Hong Kong individuals have chaired nine panels between them, one Czech panellist has served five times, and one Egyptian panellist has served four times, see ibid, 500. It has been more difficult for the future panels as Austria, Finland and Sweden joined the EC in 1995 which reduced the availability of former sources of panellists as the EC is involved in most cases as a party or third party or nationals of parties which are usually excluded from panels. Id.
[37] The DSU, above n 1, art 8.4, 8.6; for the same reason, NAFTA Members agreed to establish rosters of panellists, see NAFTA Code of Conduct for Proceedings under chapter 19 and 20, reprinted in Ralph H Folsom, Michael W Gordon, and John A Spanogle, *Handbook of NAFTA Dispute Settlement*, (1998), D6-1[hereinafter *NAFTA Code of Conduct*]

meeting conflicting time commitments, scheduling problems constantly arise, leading to significant delays in the overall panel proceedings.[38] Differences in time zones are another practical problem that adds to the difficulty in arranging deliberations for ad hoc panellists from different parts of the world.[39]

In addition, geographically dispersed panellists are also burdened with the obligation to travel from their home country to the WTO Secretariat in Geneva. The strain of long trips and the constraints of time work together in making these panellists less likely to have sufficient time and energy to be fully prepared in advance for substantive meetings with disputing parties.[40] Panellists are often driven to ignore deadlines for issuing their reports resulting to the delay of the adoptions of the panel decisions.[41]

These inherent deficiencies impose a large burden on WTO resources as substantial support is required from the legal officers of the WTO Secretariat in the coordination of deliberations and the last minute issuance of reports.[42] In any event, despite these potential shortcomings, the performance of the *ad hoc* WTO panels has been good compared to previous GATT system or other international institutions[43], although there is still room for improvement.

Given the shortcomings associated with the use of *ad hoc* panels, the question rises as to the suitability and the likelihood of establishment of permanent panels. In 1998, due to the difficulties faced in finding qualified panellists due to nationality restrictions, concerns as to the increased workload placed on the few qualified panellists and further concerns as to the lack of experienced panellists to deal with complex cases,[44] the EC suggested a permanent panellist system for the WTO dispute settlement mechanism.[45] The EC proposed

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[38] Seung Wha Chang, 'Comment on a WTO Permanent Panel Body', (2003) 6 *Journal of International Economic Law* 187, 220

[39] Ibid; For example, a panellist is from North America and the other is from East Asia, so that impossible to have a conference call which suit all panellists. Id.

[40] Ibid.

[41] Ibid; in some cases, where scientific issues involved the panel would delay the deadline rather to produce inaccurate and poor decisions.

[42] Ibid.

[43] Ibid, 220

[44] European Communities, 'Contribution of the European Communities and its Member States to the Improvement of the WTO Dispute Settlement Understanding', TN/DS/W/1 (13 March 2002) [hereinafter the *Contribution of the EC*], Section I. A

[45] Ibid; see also, European Communities Reply to India's Questions, TN/DS/W/1 (30 May 2002) [hereinafter *EC Reply to India*]

the establishment of permanent panels with 15 to 24 permanent panellists in full employment and completely independent from any governmental affiliation.[46] It was suggested that the disputing parties' autonomy in determining the composition of panels should be removed and that control be given to the Director-General to appoint panellists on a random basis within five days following the DSB decision to establish a panel. The EC's suggestions were basically identical to the current method of selection employed by the Appellate Body.[47]

The establishment of a permanent panel body as proposed has a number of advantages. It would, first of all, save time with the elimination of unnecessary delays caused by time constraints faced by *ad hoc* panellists as paid professional panellists would be able to devote their time fully for panel proceedings without having to travel back and forth, experiencing time differences or having to balance the workload of other full-time employment.[48] Secondly, since the panellists would have more opportunity to be more extensively involved in the panel process, they would develop both substantive and procedural expertise in the dispute settlement system.[49] Thirdly, panellists would also benefit from the frequent interaction and experience of working together which in turn helps foster long-term and good working relationships.[50] All these factors would translate into a speeding up of the panel process, higher quality of panel reports and a shorter time for the delivery of rulings.

The ability of full-time panellists to operate with short notice and within a tight timeframe would also alleviate some responsibility from the WTO Secretariat especially in the arrangement of procedural innovations, such as preliminary rulings or provisional relief and post panel proceedings, such as the remand procedure, Article 21.5 proceedings or

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[46] *The Contribution of the EC*, above n 44, Section I. B

[47] The WTO Appellate Body is a permanent court, consists of seven members who serve four year terms, with the option of a one-time renewal, see the DSU, above n 1, Arts 17.1, 17.2. Three of the seven may serve on any one dispute in rotation. Id.

[48] Current data shows that most panels have been composed by the WTO Director-General with the overall process taking on average more than two months, William J Davey, 'Mini-Symposium on the desirability of a WTO Permanent Panel Body', (2003) 6 *Journal of International Economic Law,* 175, 178 [hereinafter, *Davey mini symposium*]

[49] Ibid, 179

[50] See *Davey: A Permanent Panel Body,* above n 31, 508

arbitrations.[51] It is believed that a permanent panel body would most likely be comprised of a high geographical diversity of persons, particularly those from developing countries.[52]

Such a permanent mechanism, however, would mean that panellists could not be recruited from all WTO Member States. Although some Member States are not opposed to this, concerns have been expressed as to the costs of such a system[53] and there are those who doubt the necessity and desirability of such permanent panels.[54] Many Member States have become accustomed to the current quasi-judicial dispute settlement system, and it is feared that a change could lead to a system that would add to or modify the obligations of the Members States as have been agreed to in WTO Agreement or in other words, it may conduct judicial activism or "make law."[55] Apart from that, permanent panels more likely would develop a consistent jurisprudence over time than panels.

The proposal to form a permanent panel in the WTO is not likely come to fruition. Instead, another proposal has been launched for a roster-type of arrangement, somewhat similar to the Appellate Body procedure, for designating the membership of the panels.[56] This is "a combination of roster and ad hoc appointments".[57] The roster, however, would not need "100% staffing" of the panels. Rather, at least one member from the roster would be on each panel (even in a peak case load period). In order to have a list of qualified personal, it has been suggested to have a small non-political body to assist the DSB in finalizing the roster.[58] Regardless of whether this proposal could overcome the shortcoming of the *ad hoc* panel system, it is only one among a number of proposals, and the WTO dispute settlement mechanism retains its current system of use of *ad hoc* panels.

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[51] *Davey mini symposium*, above n 48, 180
[52] Ibid, 181
[53] The view of Hong Kong., see Mercurio, above n 2, 812 (quotation omitted)
[54] India and other developing countries were concerned with the feasibility of the proposal related to the argument that a permanent panel would produce qualified reports and geographical diversity of panellists in a poll system, see ibid, 812 (quotation omitted)
[55] The DSU, above n 1, Art.3.2 and Art 19.2; see also, Mercurio, above n 2, 813
[56] WTO Secretariat, *The Future of the WTO: Addressing Institutional Challenges in the New Millennium*, (2004), point 257, 57 [hereinafter *the future of WTO*]
[57] Ibid.
[58] Ibid.

4.2.2 Qualifications of panellists

The panel procedures of major trade organizations stipulate for panels to be composed of qualified experts in order that panel decisions not only be the product of sound and astute reasoning but be also seen as judicious and thus respected and accepted by all Member States. In the WTO, individual panellists, whether governmental or non-governmental persons[59] are required to have a sufficiently diverse background with a wide spectrum of experience with the WTO Agreement, previous panels or predecessor agreements who to be considered as competent to examine the rights and obligations of Member States.[60] Panellists who need not necessarily be lawyers are also required to have expertise in the specific issue under dispute and in a dispute involving a developing country and a developed country, at least one member of the Panel is to be a national of a developing country if the developing country party to the dispute requests so.

NAFTA's Chapter 20 is similar to the WTO in that there is no preference for panellists to be lawyers. The thirty persons in the Chapter 20 standing roster can either have experience in law, international trade or other matters covered by the NAFTA or experience with dispute resolution arising under any international trade agreements.[61] On the other hand, Chapter 19 of NAFTA imposes a prerequisite on its bi-national panels to have legal experience and Chapter 19 panellists are to be composed of lawyers and to the largest extent possible, of judges or former judges.[62] This preference is rational in light of the fact that Chapter 19 represents the NAFTA mechanism that replaces the national judicial review of its Member States.[63]

Moreover, while in theory it may be assumed that parties will prefer to appoint as their panellists persons who are experts on trade and related issues, actual practice does not

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[59] The DSU, above n 1, art 8.1, including persons who have served on or presented a case to a panel, served as a representative of a Member or of a contracting party to GATT 1947 or as a representative to the Council or Committee of any covered agreement or its predecessor agreement, or in the Secretariat, taught or published on international trade law or policy, or served as a senior trade policy official of a Member. Id.

[60] The DSU, above n 1, art 8.2, NAFTA declares similar provisions, art 2010, NAFTA, above n 20; see also Palmeter and Mavroidis, above n 8, 105

[61] NAFTA, above n 20, 2009.2 (a)

[62] NAFTA, above n 20, Annex 1901.2:1

[63] NAFTA, above n 20, Article 1904:1 establishes the binational panel review mechanism as an alternative to domestic judicial review: if parties wish to appeal an adverse finding by the administrative agency in each state, they now have the option to take their case to an adjudicative panel composed of decision makers from the states on opposing sides of the dispute, ibid, Art 1904:1, Annex 1901:2 (1 &2)

align with that assumption. The selection of panellists appears to be influenced less by expertise than by other factors such as the nationality of the panellist, whether the panellist has made an unfavourable ruling against the Member State in a past case, the trade relations between the parties' countries and the panellist's country, the products produced by the panellist's country as well as the position taken by the panellist's country on certain issues.[64] The practice within the WTO indicates that more than one potential panellist proposed by the Secretariat has been rejected by one of the parties.[65] Under the WTO, when the parties to the dispute fail to agree on the composition of the panel, one of them can request the WTO Director-General to appoint the panellists.[66] In fact, the number of the panellists appointed by the Director-General has increased in recent years.[67]

In addition, while it has been argued that the production of qualified and meaningful reports requires the selection of panellists having an expertise in the issue of concern or prior experience in negotiating the relevant agreement, [68] this view is misleading. In practice, many cases involve the perusal of more than one covered agreement and although expertise in the particular subject of the dispute or experience in the negotiations of a trade agreement are factors that do give panellists a wider perspective in their observation of disputes, these are not the only factors that affect the quality of the reports being issued. A range of factors, including lack of knowledge of the rules of treaty interpretation may be involved.[69] In this respect, beside the availability of time, money, and labour on both the part of the WTO and of the panellists, legal training of panellists in the rules of treaty interpretation and the interpretation of the covered agreements and related issues could improve the quality of reports.[70]

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[64] Roessler, above n 6, 233

[65] 'For whatever reason there has been a reduced willingness to accept panellists proposed by the WTO Secretariat', see *Davey: A Permanent Panel Body*, above n 31, 500; Roessler, above n 6, 233

[66] The DSU, above n 1, Art 8.7

[67] John Jackson, William J Davey, and Allan O Sykes, *Legal Problems of International Economic Relations: Cases, Materials, and Texts*, (2001), 315; Davey desirable, above n 31 , 501

[68] Chang, above n 38, 188

[69] As it has been demonstrated in the Appellate Body of WTO experience, see, ibid, 223

[70] "There have been much greater need for panellists to have some background in law", *Davey desirable*, above n 31, 508; "Also a greater need for a specific aspect of legal skills, i.e., judicial skills such as evaluation of evidence and fact finding." Id.

4.2.3 The independence of panellists

Another challenge to trade dispute settlement mechanisms lies in the issue of the independence of panellists. In order to maintain the impartiality, independence and integrity of the panels and their decisions, the dispute settlement mechanisms should guarantee that the panellists are independent and free from any potentially conflicting interests.[71] This is important not only because the panellists are chosen by the parties to the dispute, but also State Members permit their officials to serve as panellists.[72] Therefore, it may be possible that the parties to the dispute may not be free from conflicts of interest which result in biased panel decisions. In preventing conflicts of interest, the WTO DSU excludes citizens of members whose governments are parties or third parties to the dispute from being panellists in the dispute, unless the parties agree.[73] Moreover, "the panellists should serve in their individual capacities not as government representatives, nor representative of any organization." [74] Also, the WTO Members prohibit instructing or influencing the panellists with regard to matters before a panel.[75] Provisions of this sort simply reflect the overarching need for dispute settlement mechanisms to be at best, impartial, but more importantly, to be perceived as impartial in order to be respected by the parties to the dispute and supported by all Contracting Parties.

In an attempt to ensure the independence of panellists and obtain impartial decisions, it is required that panellists decide cases in their individual capacities.[76] In NAFTA, the Member States have established a roster of individuals who can serve on panels and any challenges to the appointment of panellists are prohibited for any reason other than the conflict of interest or disclosure issues as set out in the NAFTA special Code

[71] See section 3.3.4 (Chapter 3)
[72] The DSU, above n 1, Art 8.8
[73] Ibid, Art.8.3
[74] Ibid, Art 8.9
[75] Ibid.
[76] The Treaty of Rome establishing the European Economic Community, 25 March 1957, 298 U.N. T.S 11, see http://europa.eu.int/abc/obj/treaties/en/entoc05.htm > at 13/11/2005 [hereinafter The EC Treaty], Art 167 {ex 223}; the DSU, above n 1, Art 8.2; NAFTA, above n 20, art 2011.1, In NAFTA, the disputing parties must first attempt to agree on a panel chair, who may be a citizen of any country. If the parties cannot agree on the panel chair within fifteen days, the party may choose an individual that is not one of its own citizens as panel chair and it chosen by lot.

of Conduct.[77] Moreover, each party can exercise a peremptory challenge against any proposed panellist within fifteen days after the proposal is made.[78]

So long as none of the panellists are nationals of any of the parties or third parties to the dispute, the disputing Member States have no control over the composition of the panel selection process.[79] Despite the national connection prohibition and the provision for panellists to act autonomously, there are no guarantees against unbiased decisions and panellists remain open to influence by potential conflicts of interests and functions.[80]
For example, it is not uncommon for panellists to have preconceived, prejudicial feelings concerning certain disputants based on country status, i.e. there has been a tendency for panellists to reserve more respect for disputants that are major and prominent trade countries over those who pale in comparison.[81] Moreover, it is argued that nothing in the dispute resolution mechanisms safeguards against possible systemic conflicts, where individuals involved in negotiating trade agreements later serve as panellists interpreting them.[82] It is true that there is possible systemic conflict, but so far there has never been an accusation of bias on this matter.

Conflicts of interest like those mentioned above more likely exist in theory only. Member States, in practice, have already been given an opportunity to screen the resumes and track records of proposed members of a panel and if doubts exist as to their objectivity and impartiality, objections may be raised.[83] Some reliance has also been placed on the continuing disclosure obligations of panellists[84] concerning any financial, professional, employment, family or other interests as well as any statements or publications by them

[77] NAFTA Code of Conduct, above 37
[78] NAFTA, above n 20, art 2011.3; see also Patricia Isela Hansen, 'Judicialization and Globalization in the North American Free Trade Agreement', (2003) 38 *Texas International Law Journal* 489, 491
[79] The DSU, above n 1, Art 8.3, but it is possible that the panellists are nationals of the parties or third parties in dispute if they agreed
[80] See David M. Schwarz, 'WTO Dispute Resolution Panels: Failing to Protect Against Conflicts of Interest', (1995) 10 *American Journal of International Law & Policy* 955, 969; *Davey desirable,* above n 31, 509
[81] Amelia Porges, 'Settling WTO Dispute: What do litigation models tell us?' (2003) 19 *Ohio State Journal on Dispute Resolution* 141, 172
[82] See *Dave: A permanent Panel Body,* above n 31, 509
[83] Ibid, 510
[84] See Annex II of *the Working Procedures for Appellate Review of WTO* (on the *Rules of Conduct for the Understanding on Rules and Procedures Governing the Settlement of Disputes*), WT/AB/WP/5, 4 January 2005; this document replaced the *Working Procedures for Appellate Review* circulated 1 May 2003, and it applied to appeals initiated after 1 January 2005 [hereinafter *Working Procedures for Appellate Review of WTO*]

that contain personal opinions on issues relevant to the dispute.[85] While this, itself, creates perhaps only a modest measure of protection, the parties to a dispute are usually encouraged to choose panellists known for their objectively and lack of bias. The neutral panellists, in this respect are, those whose the decisions "take into account the rights and interests of the Members of the WTO that are not involved in the dispute."[86]

4.3 The Issue of Transparency

Transparency is an important aspect of any national or international legal system and is related to fair processes which depend upon the freedom of information and open government. The more transparent and accountable dispute resolutions process the more confidence its Member States tend to place in the system's ability to resolve disputes fairly.[87] The issue of transparency manifests itself in a number of ways ranging from the transparency of procedures within the relevant organisation to the transparency of decisions and decision making processes in dispute settlement mechanisms. Indeed, transparency may mean different things in different organisational contexts.

4.3.1 Transparency in trade organisations

A first consideration relates to the transparency of processes within the relevant organisation itself. When a state joins an international organization or signs a trade agreement, this arrangement is legally binding on the state concerned. This agreement in fact directly or indirectly affects the rights and economic welfare of civil society in the state, such as, producers, consumers, traders, and ordinary citizens. The civil society, however, lacks information on the organization. Indeed, sometimes it has no familiarity what soever with the aims and operation of the organization. Accordingly, better access to information on the organization can lead to the democratization of the system. For this

[85] Ibid, on the Illustrative List of Information to be disclosed
[86] Roessler, above n 6, 234
[87] Andrea K Schneider, 'Democracy and Dispute Resolution: Individual Rights in International Trade Organizations', (1998) 19 *University of Pennsylvania Journal of International. Economic Law* 587, 594 (citations omitted)[hereinafter Schneider democracy]

reason, attempts have been made to transform the organisation's operations to become transparent.

In the WTO, the General Council at its meeting on 18 July 1996 adopted procedures for the circulation and de-restriction of WTO documents whereupon major documents were made publicly available within 6 – 12 weeks after being issued instead of the previous 8-9 months.[88] In the WTO context, transparency is mainly concerned with the right to be informed. The 2001 Doha Ministerial Declaration has its' objective to "promote a better public understanding of the WTO" and to make "WTO's operations more transparent, including through more effective and prompt dissemination of information." [89] Since then the WTO has been pursuing increased transparency.

In 2002, the WTO General Council decided that all official WTO documents are available to the public upon circulation unless a government has indicated that it wishes the document to remain restricted.[90] This period of restriction is, however, only temporary and the document will remain restricted until the first consideration by the relevant body [91] or 60 days after the date it was supposed to be circulated, whichever comes earlier. The Member State concerned can repeatedly renew its request for restriction, under which the document will remain restricted for a further period of 30 days per request.[92] There are five types of documents that are subject to restriction: (i) a Member State's own submission at its request; (ii) Secretariat documents if any WTO body concerned so decides; (iii) minutes of meetings; (iv) accession working party documents; and (v) documents relating to renegotiations of schedules.

Apart from having the advantage of the negative consensus rule over its predecessor GATT in the adoption of reports, the WTO has also been able to increase its transparency through capitalising on the advent of the Internet to circulate panel and Appellate Body reports as well as to post news on recent developments, such as requests for consultations, the current calendar of WTO meetings and the establishment of panels. Documents,

[88] The WTO General Council: WTO Doc. WT/L/160/Rev.1
[89] The Doha Ministerial Declaration, paragraph 10, WT/MIN (01)/DEC/1, 20 November 2001
[90] WTO Doc. WT/L/452, 16 May 2002, Procedures for the Circulation and De-restriction of WTO Documents, Decision of 14 May 2002; an official WTO document shall be any document submitted by Member or prepared by the Secretariat to be issued in any WTO document series, id.
[91] The relevant body in this case is the WTO Secretariat
[92] See at http://www.wto.org/english/forums_e/ngo_e/derestr_explane_e.htm (Accessed 1/05/2005)

including Trade Policy Reviews, are downloadable on a timely basis and most are usually available in the three major languages of English, French and Spanish.

4.3.2 Transparency in panel proceedings

When a state is involved in a trade dispute with another state, the dispute settlement process is confidential until the final verdict is concluded. The NAFTA, the WTO and its predecessor GATT provide that hearings, deliberations, initial reports and all written submissions to and communications with the panels remain confidential.[93] Only the decision and reasoning became public information in the form of a final report. In NAFTA, this is published fifteen days after the final report had been submitted to the Commission.[94] In GATT, the report was not published until it was adopted by the GATT Council.

In the WTO context, the United States has suggested that significant improvements could be made to increase transparency of the panel process in order to "strengthen public confidence in trade agreements" which would in turn "enhance support for the results of dispute settlement."[95] In particular, in the field of international relations, States no longer dominate as the major players and as the influence of private actors, such as multinational corporations, NGOs and even individuals, on the creation, implementation and enforcement of international norms continues to rise, further pressure has been mounted for transparency to be increased.[96] These calls for transparency were made against a backdrop of sensitive legal disputes relating to the interface between trade regulation and environmental policy, the decision-making processes of which many felt had not been conducted with as much openness as they should have been. In the WTO, the NGOs have demanded to participate in

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[93] The DSU, above n 1, Art 4.6, 14 and 18; NAFTA, above n 20, Art 2012.1 (b); It should be noted however that in the WTO, in the very recent it was a significant development on the panel proceeding as it has been open to the public for the first time. WTO, *"WTO opens panel proceeding to public for the first time"*, 12 September 2005, see http://www.wto.org/english/news_e/news05_e/openpanel_12sep_e.htm >22/11/2005, see section. 5.6.4 and accompanying text below

[94] NAFTA, above n 20, Art 2017.4

[95] See John A Ragosta, 'Unmasking the WTO- Access to the DSB System: Can the WTO DSB Live up to the Moniker "World Trade Court?', (2000) 31 *Law & Policy International Business* 739,752 (citation omitted)

[96] Philip R Trimble, 'Globalization, International Institutions and the Erosion of national Sovereignty and Democracy', (1997) 59 *Michigan Law Review* 1944, 1946, "In the past, international law concerned itself mostly with states and official intergovernmental relations. Now it increasingly concerns itself with private persons, including multinational corporations, as well as governments, and it deals with subjects that traditionally were treated as purely domestic matters". Id.

the panel process. After going through several controversies, the NGOs' contributions drew international attention in the *US - Shrimp/Turtle*.[97]

Two major areas that are the subject of the dispute settlement transparency reforms concern the confidentiality of proceedings and the admission of *amicus briefs*. The latter topic will be addressed in the next section (section 4.4.3). With regards to the former, although information dissemination and availability is quite efficient in that panel and Appellate Body reports are published on the WTO website immediately after their distribution to all Member States, the fact remains that opinions expressed in reports by the panellists are anonymous, drafted without the presence of the parties, and the deliberations are kept confidential.[98]

It is this cloak of secrecy that gives rise to complaints and unwarranted suspicions concerning the lack of transparency, particularly from NGOs. The dilemma that thus ensues is for a balance to be struck between two competing ideals; on the one hand, for a closed system that will undermine popular support, and on the other, for a transparent system that might give the public access but at the cost of jeopardising the independence of the panellists to serve in their own individual capacities.[99]

This issue also on concern in other fora; the NAFTA dispute settlement mechanism also provides that all submissions, hearings, panel deliberations, and initial reports are to be kept confidential.[100] Unless the Commission decides otherwise, the final panel decisions are permitted to be published within specific time limits, including separate opinions of panellists.[101] However, the identity of panellists who write separate opinions remains confidential.[102] This provision aims to shield the dissenting panellists from any positive or

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[97] Mercurio, above n 2, 801; e.g., *US-Shrimp/Turtle, United States- Import Prohibition of Certain Shrimp and Shrimp Products*, WT/DS58/R; See WTO Panel Report, *US-Shrimp/Turtle*, WT/DS58/AB/RW (15 may 1998); WTO Appellate Body Report, *US-Shrimp/Turtle*, WT/DS58/AB/R (6 November 1998); WTO Article 21.5 Panel Report, *US – Shrimp/Turtle* Recourse to Article 21.5 of the DSU by Malaysia, WT/DS58/RW (15 June 2001); WTO Article 21.5 Appellate Body Report, *US – Shrimp/Turtle* Recourse to Article 21.5 of the DSU by Malaysia, WT/DS58/RW (21 November 2001)

[98] The DSU, above n 1, Arts.4, 14, 17.11, and 18

[99] Steve Charnovitz, 'Participation of Nongovernmental Organizations in the World Trade Organization', (1996) 17 *Pennsylvania Journal of International .Economic Law* 331, 351

[100] NAFTA, above n 20, Art 2012, § 1 (b)

[101] Ibid, Art. 2016

[102] Ibid, Art 2017

negative reaction from government members.[103] This view may be right, but keeping the dissenting panellists secret could encourage panellist to produce irresponsible reports and this in turn could also reduce the quality of the panel decisions.

4.3.3 Transparency and the parties' submissions

The practice in the WTO and other fora is that all written submissions from the parties to dispute are kept confidential; they are for the panel proceedings purposes only. The decision to disclose the submissions to the public or keep them confidential is on the parties themselves.

The written submissions of the parties to the dispute are deposited with the Secretariat for immediate transmission to the panel and to the other party or parties to the dispute. Under the DSU, these submissions are to remain confidential and their contents are not circulated to the other Members States not involved in this dispute. [104] Nothing in the DSU, however, precludes a party to the dispute from making disclosing statements to the public concerning its own position. [105] This practice is common in many other fora; in fact, the US law mandates that the US government release its submissions including oral statements, written submissions in panel proceedings as well as appeal proceedings.[106] The Australian government follows the US path and mandates that written submissions are disclosed to public.[107]

The United States has proposed that the contents of written submissions that are not designated as confidential by the party submitting them be made public at the time they are filed.[108] The suggestion, however, did not meet with much approval on the basis that non-

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[103] Sidney Picker, 'NAFTA Chapter twenty- Reflection on Party to Party Dispute Resolutions', (1997) 14 *Arizona Journal of International and Comparative Law*, 465, 469

[104] The DSU, above n 1, arts 18 (2), "Members shall treat as confidential information submitted by another Member to the panel… which that Member has designated as confidential."

[105] Ibid, arts 18 (2) and App.3, para.3

[106] To view of these written submissions, see the website the office of the US Trade Representative, at www.ustr.gov

[107] The written submissions can be viewed at the website the Department of Foreign Affairs and Trade Australian Government <http://www.dfat.gov.au/trade/negotiations/disputes/wto_disputes-US_AD.html > at 22/11/2005

[108] WTO Doc. TN/DS/W/13, at 2

confidential summaries of submissions were 'often untimely or too brief to be useful'. [109] It was also noted that in practice, a number of Member States already currently prepared such summaries voluntarily.[110]

The main argument against making written submissions available to the public is premised on the government-to-government nature of disputes in the WTO. Since the WTO is simply a negotiating forum for nations of the world, many take the view that little reason exists for private individuals, especially businesses to be involved in the dispute settlement.[111] This view is not completely true given the fact that the outcome of WTO trade disputes affected the lives of individuals as well as business interests in all Member States. While WTO rulings are binding on the Member States, they often impute obligations on non-state actors, most particularly, the business people.

Making written submissions available to the public is another method of opening up proceedings to increase transparency of the dispute settlement process.[112] Many Member States, particularly those which are developing countries, however, oppose this proposal in fear of "trials by media" and undue public pressure that could prevent proper resolution of disputes.[113] On the other end of the spectrum, those advancing the cause of increased transparency in proceedings claim that keeping the status quo will only give rise to a suspicious public and undermine the WTO's legitimacy.

4.3.4 Transparency and public meetings

In WTO dispute settlement, the parties to a dispute generally meet at least twice during the panel process. In those meetings, the parties deliver oral statements of which written versions are submitted at the time (or shortly thereafter) the oral statements are

[109] William J. Davey, 'Proposals for Improving the Working Procedures of WTO Dispute Settlement Panels', in Federico Ortino and Ernst-Ulrich Petersmann, *The WTO Dispute Settlement System: 1995-2003*, (2004), 20 [hereinafter Davey proposal]
[110] Ibid
[111] Ibid
[112] Ibid
[113] Heinz Hauser and Thomas A. Zimmermann, 'The Challenge of Reforming the WTO Dispute Settlement Understanding', (2003) 38 *Intereconomics*, 241-245

made.[114] At those meetings, the panellists are also free to question the parties either orally or in writing and the parties may themselves put written questions to each other.

Most national and international tribunal proceedings are open to the public although on some occasions, certain international tribunals, such as the ICJ and ECJ, conduct closed hearings on their own motion or at the request of the disputing parties.[115] The US has proposed that WTO panel meetings be made open to the public and that the public be allowed to observe not only substantive panel meetings but also Appellate Body and arbitration meetings.[116] Only meetings of proceedings which deal with confidential information, such as business confidential information or law enforcement methods, are to remain closed.

It should be noted that under the WTO, the panels shall meet in closed session.[117] The parties to the dispute however can request the panel proceeding open to public. The parties to the *Hormones* dispute[118], the US, Canada and the EC, requested that the meeting with the panel be opened to members of the public. The panel granted this request in August 2005, but the panel's meeting with third parties will remain closed. The US attempts to allow the public to observe the panel proceedings finally succeed as in September 2005 the WTO decided to open its panel meeting for the first time to the public.[119] By opening up the panel proceeding, the WTO has moved to the increased transparency of its organization operational as mandated by the Doha Declaration 2001.

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[114] This is the formalized of the GATT practice by the DSU, as stated at Appendix 3, para. 9 of DSU: "The parties to the dispute and any third party invited to present its views …shall make available to the panel a written version of their oral statements, see the DSU, above n 1, App.3. para. 9

[115] Davey proposal, above n 109, 21

[116] WTO Doc. TN/DS/W/13, Communication from the United States, 22 August 2002. Arbitration in this context includes arbitration under Articles 21.3 (c), 22.6 and 25 of the DSU.

[117] The DSU, above n 1, Appendix 3, para.2 on working procedures

[118] The *Hormones* case, WTO Doc. WT/DS320/8 and WT/DS321/8, 2 August 2005; the case is the EC's dispute against the US and Canada. In 1998, the WTO panel ruled against the EC's ban on hormones treated beef allowing its trading partners to impose sanction on EC imports to compensate for lost beef trade. In response to the panel ruling, the EC revised its relevant regulations but kept the ban in place. In 2004, the EC asked the WTO to rule that continued US and Canada sanctions related to the beef hormones ruling were illegal. After consultations failed, the panel for this case was established on 17 February 2005.

[119] WTO, "*WTO opens panel proceeding to public for the first time"*, 12 September 2005, see http://www.wto.org/english/news_e/news05_e/openpanel_12sep_e.htm >22/11/2005,

4.4 Participation of private individuals

Another transparency issue related to the practice of the panel proceedings is the participation of non-state actors. Dispute settlement regimes differ in the identity of the parties entitled to bring cases and complaints. Basically, under international law only the Member governments can bring disputes in the system, private individuals or companies do not have direct access to the dispute settlement system. However, recently the regimes have evolved to include the participation of non-state actors. This section will elaborate on the participation of private parties in the dispute settlement system as counsel, as litigant, as *amicus* and as third party intervenor.

4.4.1 As counsel

As it was said earlier, as international law only concerned with disputes among and between states therefore only states can initiate to bring disputes to the international tribunals. Regardless the fact that private parties are the primary players conducting international trade, they do not have a right to bring disputes before international tribunals. The recent practice showed that the national governments have brought disputes before the international tribunals on behalf of their private parties.

One method by which private parties can participate in the WTO is as counsel in panel proceedings. For example, in the *EC-Bananas* [120]case in 1997, which addressed the legality of the EU's preferential treatment of bananas imported from ACP states[121] under the WTO provisions, the request of Saint Lucia for representation by two private legal advisers was refused by the panel in this case. Saint Lucia then wrote to the Appellate Body with a similar request and argued that "as a matter customary international law, a sovereign's right to decide whom it may accredit as officials and members of its delegation

[120] WTO Appellate Body Report, European Communities-Regime for the Importation, Sale and Distribution of Bananas, WT/DS27/AB/R, ¶ 10 (Sept. 9, 1997) [hereinafter *EC-Bananas*]

[121] ACP states are the African, Caribbean and Pacific States which are signatories to the Lome Convention of 1989 with the EC; according to the EC Regulation 404/93, twelve states have traditionally exported bananas to the Europe: Cote D'Ivoire, Cameroon, Suriname, Somalia, Jamaica, Saint Lucia, St Vincent and the Grenadines, Dominica, Belize, Cape Verde, Grenada, and Madagascar, see Michael Laidhold,'Private Party Access to the WTO: Do Recent Developments in International Trade Dispute Resolution Really Give Private Organizations a Voice in the WTO?', (1999) 5 *Transnational Lawyer* 427, 435

cannot be limited."[122] It further claimed that the DSU and the Working Procedures of Appellate Review are silent in this issue.

In *EC-Bananas* the Appellate Body concluded that Member States had a right to include private, non-governmental employees in their trade delegations before the WTO after finding that "nothing in the WTO Agreement, DSU, Working Procedures, customary international law or the prevailing practice in international tribunals prevented a Member State from determining the composition of its delegation in appeal proceedings"[123] or "specifies who can represent a government in making its representations before the Appellate Body."[124] This decision permitted private counsel before the Appellate Body oral hearings only, not including before the panel level.[125] However, since the *EC-Bananas* case, at least two panel decisions have reportedly allowed private counsel to participate in oral hearings.[126]

In 1998 the *Indonesia-Auto Case*, [127] the panel further affirmed this decision but in relation to panel proceedings. The panel stated that

> We conclude that it is for the Government of Indonesia to nominate the members of its delegation to meetings of this Panel, and we find no provision in the WTO Agreement or DSU, including the standard rules of procedures included therein, which prevents a WTO member from determining the composition of its delegation to WTO panel meetings. Nor does past practice in GATT and WTO dispute settlement point us in a different conclusion in this case.[128]

This decision has supported the reality that state governments, in particular developing countries need private legal counsel for their battles before the international tribunals. Apart from that, the inclusion of private legal counsel has contributed to the WTO dispute settlement process.

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[122] This argument was supported by Canada and Jamaica, see, ibid.
[123] *EC-Bananas*, above n 120, ¶ 10 (Sept. 9, 1997)
[124] Ibid, ¶ 12
[125] Laidhold, above n 121, 436
[126] Ibid, they were *Indonesia-Autos* and *Bananas III*
[127] WTO Panel Report, Indonesia-Certain Measures Affecting the Automobile Industry, WT/DS54/R, WT/DS55/R, WT/DS59/R, WT/DS64/R, (July 2, 1998)
[128] Ibid, ¶ 14.1

4.4.2 As litigant

The most important avenue of participation for private parties is, however, as litigant in cases before dispute settlement bodies. A right of participation as litigant is not, however, guaranteed. Most trade agreements and their organisations have their origins in and operate within the traditional concepts of international law and diplomacy, that is, only concerning relationships among and between sovereign parties. The GATT, and now the WTO are no exceptions to the rule. Thus, the provisions in both predecessor and successor multilateral systems could and can only be utilised and applied by and to Member Governments.

As private parties are denied direct access to the dispute resolution system, the only avenue for them to have their concerns taken into account is through lobbying their government to begin proceedings against another Member State for measures inconsistent with the agreement. This indirect access is, however, not uniformly provided by all Member States and only governments which have established administrative procedures of this sort give this advantage to private parties.[129] In practice, Member States that do have these procedures in place have generally been willing to bring disputes on behalf of their private national entities.[130] Nevertheless, it must be borne in mind that the decision to start, litigate or settle trade disputes still remains with the Member Government and not with private parties.[131]

This type of State standing with private actors allowed only behind the scenes appears to be clearly favoured by major WTO Member States in order that they may

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[129] Andrea Kupfer Schneider, 'Unfriendly Actions: The *Amicus* Brief Battle at the WTO', (2001) 7 *Widener Law Symposium Journal* 87, 92 [hereinafter *Schneider unfriendly action*]; For example, Section 301 allows an individual to petition the United States government to initiate trade dispute resolution. *Id.* Under section 302 a party can petition the United States Trade Representative (USTR) to investigate a foreign government's policies or practices that are suspected to be hindering trade. *Id.* Another example, the EU has a procedure whereby private actors can request the EU take action against those governments violating free trade agreements. *Id.* See also Council Regulation 3286/94, 1994 O.J. (L 349) 71 [on Trade Barriers Regulation]. *Id.* (Quotation omitted)

[130] See, for example, United States-Anti Dumping Duty on DRAMs of One Megabit or Above From Korea, WT/DS99/R. South Korea brought an action before the WTO on behalf of South Korean producers of DRAMS (Dynamic Random Access Memory chips) including Hyundai electronics Industries and LG Semicon; European Communities-Regime for the Importation, Sale and Distribution of Bananas, the United States brought an action before the WTO on behalf of US banana growers including Chiquita Brands Int'l, Inc, see Laidhold, above n 121, 429

[131] *Schneider unfriendly action*, above 129, 92

reserve their political prerogative in whether or not to pursue a certain case.[132] The *Helms-Burton Case* [133] is perhaps one such example where political strategy played a determining role in resolving disputes. The case involved the US enactment of the Helms-Burton Act ("the Act") which effectively imposed unilateral economic sanctions on Cuba. The EC challenged the Act's validity and has alleged that *the Helms-Burton Act* violated the US obligation under GATT, in particular, Art I, III, V, XI and XII. Eventually, the US and EC reached an understanding in which the EC not only agreed to withdraw the claim but also promised to make efforts to promote democracy in Cuba in return for the US Administration permanently waiving Title III of the Act that related to the suing of European companies that had invested in expropriated assets in Cuba.[134]

In contrast, the EC system, does allow private parties[135] to have direct access to the international dispute resolution system and private parties have standing to bring suits against a Member State or other national entity before the ECJ in order to protect their interests.[136] The drawback, however, is that actions of this sort are limited to those regarding the implementation of EC regulations and decisions.[137] Private parties can be represented by their Member States after a preliminary reference from the national court

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[132] Ibid, 95

[133] The *Helms-Burton Case, The US-The Cuban Liberty and Democratic Solidarity Act*, WT/DS38/2/Corr.1 (Oct.14, 1996)

[134] The Helms-Burton Act or Cuban Liberty and Democratic Solidarty Act of 1996, Pub.L.No.104-14, 110 Stat. 785 (1996) was designed to discourage foreign investment in Cuba and to hasten the demise of Fidel Castro's communist regime, see Natalie Maniaci, 'The Helms-Burton Act is the U.S Shooting Itself in the foot', (1998) 35 *San Diego Law Review* 897, while the US argued that the Act is a foreign policy, the EC challenge the Act to the WTO. Id. This eventually led to the 'understanding' between the U.S and the EC, in which the EC suspended its WTO claim while the US agreed to develop principles of conflicting jurisdiction (i.e., to protect EC companies from penalties). Id.

[135] Article 230 {ex 173 (4)} of the EC Treaty, above n 76, which states: "any natural or legal person may… institute proceedings against a decision addressed to that person or against a decision, which although in the form of a regulation or a decision addressed to another person, is of direct and individual concern to the former"

[136] See Grainne de Burca and J H H Weiler, *The European Court of Justice*, (2001), 21

[137] The first paragraph of the Article 230 {ex 173 (1)} of the EC Treaty refers to acts "The Court of Justice shall review the legality of acts adopted jointly by ….other than recommendations and opinions", the EC Treaty, above n 76, art 173 (1); It should be note that according Article 249 {ex 189} list of five measures that the Community institutions can adopts are :regulations, directives, decisions, recommendations, and opinion; Therefore, the private participation to challenge the implementation of acts is not including directives, recommendations and opinion, so this is a drawback of this provision.

has been filed with the ECJ.[138] Both Member States as well as the involved private parties have the right to submit written and oral observations to the ECJ independently.

In NAFTA, the extent of admissible private party participation depends on the type of proceedings being instigated. Under Chapter 20 the right to invoke the general dispute settlement provisions belongs only to Member States even though there may be members of the public with more direct interests at stake, such as affected companies. Any direct access private parties may have to any remedies is confined to those afforded in the jurisdiction of each respective NAFTA signatory.[139] In short, under Chapter 20, private citizens have no standing to initiate proceedings and still even less capacity to participate in the system and obtain remedies.

On the other hand, under Chapter 19's Antidumping/ Countervailing Duty (AD/CVD) dispute resolution provisions,[140] private parties have indirect access to the bi-national panel reviews. Although only Member States have standing to request a panel review for final determination for their countries, they can only do so at the petition of a private party.[141] The initiation of any dispute is thus dependent on an interested private party who will also be entitled to appear and be present at the judicial review.[142] Moreover, Chapter 19 panels are permitted to seek information from "any person or body" that they deem appropriate or request a written report from a "scientific review board" on scientific matters. [143] While this provision opens a further window of opportunity for private parties to participate in the dispute resolution, its operation is, however, conditional upon the agreement of the parties to the dispute.[144]

NAFTA's Chapter 11 affords the most rights for private party participation among the NAFTA dispute resolution mechanisms, although this is not too surprising since Chapter 11 is concerned with investment disputes between private investors and host states.

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[138] The EC Treaty, above n 76, Article 177
[139] Noemi Gal-Or, 'Private Party Direct Access: A Comparison of the NAFTA and the EU Disciplines', (1998) 21 *Boston College International & Comparative Law Review* 1, 21
[140] Ibid, 31
[141] NAFTA, above n 20, Art 1904.5
[142] According to rule 33.1 of the NAFTA Rules of Procedure for Article 1904 Binational Panel Review, any person interested in AD/CVD proceedings may serve a Notice of Intent to Commence Judicial Review on the involved Secretariat and all other persons involved in the final determination proceedings, see NAFTA Code of Conduct, above n 37, rule 33.1.
[143] NAFTA, above n 20, Art 2014
[144] Ibid, Art 2015

Under this chapter, private parties have a direct right of access to binding arbitration[145] and a Member Party's failure to comply with its obligations is considered as enough cause of action for a private party to have standing to file a claim.[146]

4.4.3 As amicus curiae

The concept of *amicus curiae*[147]or 'friend-of-the-court' has evolved from its 14th century definition of a person who, though not a party to the litigation, serves as an impartial assistant to the judiciary, providing advice and information to a mistaken or doubtful court.[148] In the international legal sphere today, the issue of *amicus* status is still in debate as to whether it should be granted to private parties and, if so, whether it should be granted to a range of different actors.[149]

In the WTO, while there are no specific provisions on the subject of *amicus curiae*, the Appellate Body in the *US – Shrimp-Turtle Case* [150] acknowledged the right of private individuals or organizations to submit *amicus* briefs supporting their positions in international trade disputes to which they are not a party.[151] In this case, unsolicited *amicus curiae* briefs had been submitted by NGOs both to the panel and to the Appellate Body.[152] The panel had rejected all the *amicus* briefs on the basis that "accepting non-requested information from non-governmental sources would be, in our opinion, incompatible with

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[145] Chapter 11: Section B of NAFTA. Private parties or investors can pursue private arbitration according to the ICSID Convention, the Additional Facility Rules of ICSID Convention, or the UNCITRAL arbitral rules. NAFTA, above n 20, Chapter 11, Art 1120

[146] Section A of Chapter eleven, while Section B is its dispute resolution component, see NAFTA, above n 26; For the list of possible causes of action, see Gal-Or, above n 139, 27

[147] It is often shortened to *amicus*, see *Black's Law Dictionary*, (7th ed, 1999)

[148] Michael K Lowman, 'The Litigation *Amicus Curiae*: when does the party begin after the friend leave?' (1992) 41 *American University Law Review* 1243, 1244: *Amicus curiae* were traditionally defines as "a person who is not a party to a lawsuit but who petitions the court or is requested by the court to file a brief in the action because that person has a strong interest in the subject matter". Id.

[149] Its role had maximized and adapted which allowed litigating *amicus curiae*, possessing abilities beyond mere brief writing, to participate in matters before the courts, maintain justice and judicial integrity. The *Amici curiae* status has surpassed the traditional bonds of its common law ancestor, as the *amici* performed various roles, normally reserved for party participants engage in oral argument, introduce physical evident, and examine witnesses, ibid, 1245

[150] WTO Appellate Body Report, *US-Shrimp/Turtle*, WT/DS58/AB/R (6 November 1998) [hereinafter *the Shrimp-AB Report*]

[151] Ibid, ¶ 108, it found that WTO panels have authority under the WTO Agreement to accept *amicus* participation at their discretion

[152] Padideh Ala'i, 'Judicial Lobbying at the WTO: The Debate over the use of *Amicus Curiae* Briefs and the U.S Experience', (2000) 24 *Fordham International Law Journal* 62, 69

the provisions of the DSU as currently applied."[153] The Appellate Body, however, reversed this decision, despite protests from many Member States,[154] ruling that a panel had the "discretionary authority either to accept and consider or to reject information and advice submitted to it, whether requested by a panel or not."[155] This was the first time it was ruled that panels possessed the authority to decide whether or not to accept amicus briefs.

In the later case of *US – Lead and Bismuth Carbon Steel*,[156] the Appellate Body affirmed the position it had taken in *US-Shrimp-Turtle*, this time also ruling that receiving *amicus* submissions was a prerogative extended to the Appellate Body. The Appellate Body stipulated that as long as it acted consistently with the provisions of the DSU and the covered agreements, it had the "legal authority to decide whether or not to accept and consider any information" that it believed to be 'pertinent and useful' in an appeal."[157] It followed from these two rulings that both panels and the Appellate Body had the power and discretion to receive *amicus* briefs submitted by NGOs that are attached to a member's submission. There is no obligation for the panel or Appellate Body to accept an *amicus* brief, but each panel has legal right to accept it.[158]

No formal procedures, however, had been established for determining when and how such submissions should be made or accepted. In the two cases mentioned above, the *amicus* briefs had either been solicited by and attached to the arguments submitted by the respective Member Governments that were parties to the dispute or had been sent, unsolicited, by interested outside groups. The decision by panels and the Appellate Body whether or not to accept *amicus* briefs was decided on a case-by-case basis.[159]

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[153] The Shrimp-AB Report, above n 150, ¶ 96
[154] Schneider unfriendly action, above n 129, 96
[155] The Shrimp-AB Report, above n 150, ¶ 108
[156] WTO Appellate Body Report, *United States-Imposition of Countervailing Duties on Certain Hot-Rolled Lead and Bismuth Carbon Steel Products Originating in the United Kingdom*, WT/DS138/AB/R (10 May 2000) [hereinafter *US-Lead and Bismuth Carbon Steel*]
[157] Ibid, ¶ 39
[158] Article 13 of the DSU stated: "Each panel shall have the right to seek information and technical advice from any individual or body which it deem appropriate …", see the DSU, above n 1, Art 13
[159] In the Special General Council meeting, a background note prepared by WTO Secretariat noted that unsolicited amicus briefs have been submitted in eight WTO panel cases, see Daniel Pruzin, 'WTO: WTO Appellate Body under Fire for Move to Accept amicus curiae briefs from NGOs', 17 *International Trade Report* (BNA) (30 November 2000), 1805; in two cases, the *amicus* briefs were not considered at all, in the 'shrimp-turtle' case the Appellate Body reversed the panel's original decision that *amicus* briefs were not allowed under the WTO rules. *Id*. In other four cases where the *amicus* briefs were accepted, two of those accepted were *amicus* briefs that were incorporated into the parties' submissions but not on those filed

Then, in the case of *EC – Asbestos,* numerous unsolicited *amicus* submissions began to pour in from public interest groups that were closely monitoring the case.[160] As the Appellate Body had to make its decisions on a tight timeframe,[161] it formulated and issued an Additional Working Procedure "in the interests of fairness and orderly procedure".[162] This procedure outlined the route that had to be followed by private parties intending to submit *amicus* briefs.[163]

Any person, natural or legal, other than a party or third party to the dispute, who wished to file a written brief with the Appellate Body had to first make an application within a specific deadline to obtain leave in advance to do so.[164] The application had to show why the brief was desirable in the "interests of achieving a satisfactory settlement of the matter at issue" and indicate how the applicant's contribution to resolving the dispute was distinct and not likely to be repetitive of what had already been submitted by a party or third party to the dispute.[165]

The Appellate Body's action in issuing the Additional Working Procedure met with conflicting reactions. At Egypt's request, a special WTO General Council meeting (became known as the Uruguay Round) was held immediately[166] at which a large majority of Members States criticized the Appellate Body for the procedures concerned, taking the

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separately, while in one case the *amicus* brief was accepted but the Appellate Body did not take its arguments into account in reaching its decision. *Id. Amicus* curiae were rejected in two cases, while only one case to date has a panel relied on the arguments in an independently filed *amicus* brief ("*Australia-Import Prohibition on Salmon from Canada*" for compliance panel ruling, where the panel found the arguments in the *brief* have a direct bearing on a claim raised by one of the parties. *Id*.

[160] While the Panel of this case had received five *amicus* submissions (of which two were taken into account), the Appellate Body received eleven timely applications (and six untimely ones) from environmental NGOs, victims rights groups, the chemical trade industry, professional health societies, and academics, *European Communities-Measures Affecting Asbestos and Asbestos-Containing Products,* Appellate Body Report, (12 March 2001), WTO Doc. WT/DS135/AB/R, ¶ ¶ 55-57 [hereinafter *the Asbestos Appellate Body Report*]

[161] The DSU, above n 1, arts 17.5 and 17.12

[162] Appellate Body Communications, European Communities – Measure affecting asbestos and asbestos-containing products, (8 November 2000) WTO Doc. WT/DS135/9, [hereinafter *the Additional Procedures*]

[163] Ibid, art 1; It should be noted that the Appellate Body has decided to adopt this procedure for the purposes of this appeal only. While Rule 16 (1) of the Working Procedure for Appellate Review stipulated that: "In the interests of fairness and orderly procedure in the conduct of an appeal, where a procedural question arises that is not covered by these Rules, a division may adopt an appropriate procedure for the purpose of that appeal only, provided that it is not inconsistent with the DSU, the other covered agreements and these Rules…"

[164] Ibid, art 2

[165] Ibid.

[166] The meeting took place on 22 November 2000. The Asbestos Appellate Body Report, above n 160, ¶ 52.3 (f); For a detailed account of the WTO Meeting Minutes, see WTO General Council, General Council's Minutes of Meeting, WTO Doc. WT/GC/M/60, 23 January 2001 [hereinafter *the WTO General Council's Minutes*]

view that the Appellate Body had exceeded its authority under the DSU.[167] The Member States maintained that the matter was one that belonged to the arena of collective decisions of the WTO Members States and that the Appellate Body's mandate was restricted to appeals that dealt with issues of law and legal interpretation.[168]

In criticizing the Appellate Body a range of arguments were raised. First, it was pointed out that under the DSU, Member States which had not claimed third party rights in panel proceedings could not automatically become third parties before the Appellate Body.[169] The third parties themselves would only have the opportunity to be heard and make written submissions to the Appellate Body providing they had notified the DSB of their substantial interest in the appeal matter.[170] Under the Additional Working Procedure, however, interested persons who were neither Member States nor third parties entitled to file a notification to the DSB could file a written brief and have their briefs accepted.[171] The Members States concluded that to allow the Appellate Body to accept this type of *amicus* submission would, in effect, give to outsiders such as NGOs, more rights to participate in dispute proceedings than those granted to the Members States themselves.[172]

Moreover, the original landmark case, the *US – Shrimp Turtle*, had ruled that only panels and not the Appellate Body were authorized to accept non-requested documents.[173] The rationale behind this was in recognition of the fact that panellists were most often international trade lawyers or officials who, although they had been chosen based on their trade expertise, were not necessarily knowledgeable in other areas, such as environment or health concerns, which in recent times had become major aspects of disputes and added to the complexity of the cases. With this in mind, allowing panels to accept *amicus* briefs was

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[167] *Ibid*, ¶ ¶ 12, 39, 42
[168] The DSU, above n 1, art 17.6 maintained that "An appeal shall be limited to issues of law covered in the panel report and legal interpretations developed by the panel, see also The WTO General Council's Minutes, above n 166, ¶ 37 (It was the view of India)
[169] The DSU, above n 1, art 17.4 maintains that only "…third parties which have notified the DSB of a substantial interest in the matter…may make written submissions to, and be given an opportunity to be heard by, the Appellate Body".
[170] The DSU, above n 1, art 17.4
[171] Pruzin, above n 159, 1806
[172] Ibid, 1805; In this special meeting, twenty four WTO Member governments criticized the Appellate Body (with four of those governments speaking for a larger groups of countries, e.g., the informal Group of Developing Countries, ANDEAN, ASEAN, etc), four governments did not criticise the Appellate Body (Australia, the EC, Norway and the U.S), and only one of those (i.e., the United States) endorsed the Appellate Body's action; see also the *WTO General Council's Minutes*, above n 166
[173] *Ibid*, ¶ 45

considered by some to be justifiable as they would, from time to time, require further assistance and technical expertise in order to make better informed decisions, especially in multifaceted cases.[174] However, while *amicus* submissions were potentially of great assistance to panels in reaching decisions, the argument put against this was that panels already had a right, under certain conditions, to seek information and technical advice from any individual or body deemed appropriate pursuant to Article 13 of the DSU.[175] Expert review groups that were sought to give these opinions had certain standing under the authority of the panel [176] while the acceptance of *amicus* submissions would only enable interested persons with no standing to circumvent the system to get their views noted.

It was also pointed out that if *amicus* submissions were accepted, a WTO Member State which was not a party or third party to the dispute could also file *amicus* briefs to have its view heard before the Appellate Body. Such a situation would, however, be in direct contradiction of the provisions of the DSU[177] and such a suggestion could not be pursued without there first being an amendment to the provisions.[178] As a representative of one Member State remarked: "not all Members would be particularly pleased at the prospect of having to characterise itself as something other than a member just for getting the privileges which non-members are being given by the Appellate Body."[179]

Moreover, there were fears that allowing NGOs to submit *amicus* briefs would have the effect of opening up the WTO to trade lobbyists. Member States consisting of developing countries were particularly widely critical of the Additional Procedure which they described as "the Western effort to inscribe intrusive labour and environmental standards into the rule-book as an effort to neutralize their [developing countries] comparative advantage in world trade."[180] These Member States asserted that the

[174] *Ibid.*
[175] The DSU, above n 1, art 13.1
[176] The DSU, above n 1, Appendix 4
[177] The question of providing for the possibility of *amicus curiae* briefs had been discussed in the Informal Group on Institutional Issues established during the Uruguay Round; see *The WTO General Council's Minutes*, above 166, ¶ 38; and the proposal had not been accepted by majority members. Ibid.
[178] Ibid; ¶ 12
[179] Ibid, the view of India representative, see also, Pruzin, above n 159, 1806
[180] Ala'i, above n 152, 72

participation of NGOs in the WTO dispute settlement system would only serve to muddy the waters of an already politically difficult world trade process.[181]

Other arguments put forward against *amicus* submissions were that (i) the dispute settlement system of limited resources would be overburdened;[182] and (ii) the opportunity would arise for non-State actors to influence the Appellate Body's decisions in favour of developed country Member States.

These arguments were, however, not well founded. With respect to the first, based on observations of the practice of municipal courts, for any one dispute, only a few *amicus* briefs are submitted and most of them are usually rejected on ground of lack of relevance.[183] Perhaps, one feels that NGOs arguments as *amici* contribute little value to resolving the dispute. In fact, in some WTO cases, NGOs have participated in distributing information on the issue concerned, such as environmental issues, agricultural bio-technology, genetic modified foods (GMOs), and other issues that broadening knowledge and participation of the public to the problems.

When adopting the Additional Procedure [184] for the acceptance of *amicus* briefs the Appellate Body in *EC-Asbestos* reaffirmed its decision in *US- Bismuth Carbon Steel* and relied on rule 16 (1) of the Working Procedure[185] that it was for "in the interest of fairness and orderly procedure."[186] The Additional Procedure provides that "any person, whether natural or legal, other than a party or a third party to this dispute, wishing to file a written brief with the Appellate Body, must apply for leave to file such a brief from the Appellate Body by noon on Thursday, 16 November 2000." [187] Thus, to be able to submit *amicus*

[181] Jared B Cawley, 'Friend of the Court: How the WTO Justifies the Acceptance of the Amicus Curiae Brief from Non-Governmental Organizations', (2004) 23 *Penn State International Law Review* 47, 75
[182] Robert Howse, 'Membership and its Privileges: the WTO, Civil Society, and the *Amicus* Brief Controversy', (2003) 9 *European Law Journal* 496, 504
[183] Ibid, 504
[184] *The Additional Procedures*, above n 162; It stated that "The Additional Procedure Adopted under rule 16(1) of Working Procedures for Appellate Review"
[185] Working Procedures for Appellate Review, WT/AB/WP/3, 28 February 1997, reprinted in The WTO Secretariat, *The WTO Dispute Settlement Procedures*, (2nd ed, 2001), 88 [hereinafter *the Appellate Review Working Procedures*]
[186] Ibid, rule 16.1
[187] *The Additional Procedures*, above n 162, ¶ 2

briefs, according the Additional Procedure, one should have an application for leave and such leave had been granted.[188]

With respect to the second, the view was put forward by some developing country Member States who felt that *amicus* participation by NGOs would lead to developed country Member States having multiple actors supporting their position in a single dispute which in turn would diminish the position taken by the developing country. This presumption was based on the fact that the only NGOs which had the necessary labour skills, funds and international reach to closely follow and participate in a WTO case, with or without the disputing party's willingness to attach their submissions to its arguments, were based in developed countries, such as the US and Europe. This was, however, an inaccurate generalisation because the reality is that in most disputes, it is the NGOs themselves who have opposed the developed country's position and promoted the developing countries positions, for example in *US-Hormones* [189] and *Brazil – Patens*.[190] In the former case, NGOs in Europe have taken positions radically different from their government's policy on genetically modified foods (GMF), whereas in the later case, they have distributed information on TRIPS Agreements. By distributing information, NGOs have assisted public access to information about the issues concerned.

With such overwhelming opposition and after much careful deliberation at the Uruguay Round, the Additional Working Procedure that had been proposed by the Appellate Body was rejected.[191] Member States felt that to allow the proposition to succeed would be to allow the Appellate Body the power to change the DSU procedure as well as the rights and obligations of WTO Members States – all of which were actions considered

[188] Mercurio, above n 2, 802
[189] US-Hormones (EC Measures Concerning Meat and Meat Products/Hormones); Complainants: the US and Canada, respondent: the EC; the dispute concerned with an EC ban on imports of beef from cows treated with hormones for growth-promotion purposes, allegedly for human health reasons. The US and Canada claimed that there was no evidence of adverse effects on human health, see Panel Report WTO Doc. WT/DS26/R/USA, 18 August 1997
[190] Brazil-Measures Affecting Patent Protection, see, WTO Doc. G/L/385, IP/D/23, WT/DS199/1, Complaint by the US in respect of those provisions of Brazil's 1996 industrial property law (Law No.9 279 of 14 May 1996, effective May 1997) which established a local working requirement for the enjoy ability of exclusive patent rights; the US claimed that Brazil had infringed its obligation under Art 27 and 28 of the TRIPS Agreement and Art III of the GATT 1994, id.
[191] The WTO General Council's Minutes, above n 166, ¶ 38

to strike at the heart of the intergovernmental nature of the WTO.[192] The WTO had always been concerned with trade issues and relations between governments who were representatives of their State either because of their election by the people or because of their status as the people's sovereign and it was clear that any changes to this rule was unwelcomed.[193] The Appellate Body was accused of pre-empting the rights of the WTO Membership, compromising the character of the WTO and pandering to NGOs.[194]

In retrospect, it is arguable that the Appellate Body should have left the issue of *amicus curiae* to just that which had been decided in *US – Shrimp Turtle* and *US – Lead and Bismuth Carbon Steel*, which allowed panels and the Appellate Body the flexibility to ignore or to take into account any *amicus* briefs as they pleased. [195] Instead, by formulating the Additional Working Procedure for the *EC – Asbestos* case, the Appellate Body unnecessarily incensed the antagonism of the Member States and risked its judicial appearance and legitimacy. What would have been better was for the Appellate Body to have left it to the WTO to develop the general criteria and clear *amicus curiae* procedure for both the panel and Appellate Body levels in order to improve the overall quality of the dispute settlement process. However, in the negotiation process of the DSU Review there was no proposal on *amicus curiae* so the issue was left unresolved.[196]

Undeterred, however, the Appellate Body again ruled in favour of accepting *amicus* briefs in the case of *EC – Sardines*.[197] In that case the Appellate Body accepted *amicus* briefs submitted by the Kingdom of Morocco, a Member State, that was not a participant in the dispute either as a party or third party.[198] The appellant, Peru, challenged the admissibility of those briefs. The Appellate Body ruled that it had the authority to consider *amicus* briefs and that acceptance of them was a "matter of discretion" to be exercised on a "case-by-case basis."[199] It referred to and upheld the earlier decision of *US – Lead and*

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[192] Ibid.
[193] Cawley, above n 181, 75
[194] Howse, above n 182, 505
[195] Ibid.
[196] The issues on *amicus* briefs were not included in the Balas Draft, see Mercurio, above n 2, 806
[197] *European Communities-Trade Description of Sardines*, Report of the Appellate Body, WTO Doc. WT/DS231/AB/R, 6 September 2002 [hereinafter *Sardines* case]
[198] Two *amicus curiae* briefs accepted by the Appellate Body, from private individual and Marocco, see *Sardines* case, ibid, ¶ 153
[199] *Ibid*, ¶ 167

Bismuth Carbon Steel in which the Appellate Body had found that nothing in the DSU or the Working Procedures[200] specifically prohibited the acceptance and consideration of submissions and briefs from sources other than the parties and third parties in an appeal.[201]

In *EC – Sardines*, the Appellate Body further maintained that in ruling so, it did not distinguish between, on the one hand, submissions from WTO Members States that were not parties or third parties in a particular appeal, and on the other hand, submissions from non-WTO Members State.[202] Although the other *amicus* briefs that had been submitted were ultimately rejected for lack of assistance in deciding the appeal,[203] the Appellate Body had introduced a novel concept that had not been addressed in previous rulings, namely that *amicus* briefs could be submitted not only by Member States who were not a party or third party to the dispute but also by non-Member States.[204] The *amicus* briefs acceptances still remain controversy and desperately need to be resolved by the WTO Members immediately otherwise it would undermine the whole WTO system.

In the EU context, the ECJ does not generally allow for the admission of *amicus* briefs although, as noted in section 4.4.4 below, third party intervention is allowed in certain cases pursuant to Article 40 of the ECJ Statute. The admission of amicus briefs has, however, been addresses in NAFTA. With regard to Chapter 11 of NAFTA, seeing that the provisions in the chapter and the UNCITRAL Arbitration Rules[205] neither expressly prohibited nor encouraged the acceptance of amicus submissions, the Tribunal in the *Methanex Case*[206] decided that amicus curiae submissions were to be accepted by the Tribunal. The Tribunal cited the reasoning in the WTO cases of *US – Shrimp Turtle* and *US – Lead and Bismuth* with approval [207] and concluded that the Chapter 11 dispute settlement

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[200] The Appellate Body Working Procedure, above n 185
[201] *US-Lead and Bismuth Carbon Steel*, above n 156
[202] *Sardines* case, above n 197, ¶ 163
[203] The Appellate Body asserted that Marocco's brief contains mainly factual information, ibid, ¶ 169; But there is no reason at all for the rejection of the other brief from individual. Id.
[204] Howse, above n 182, 507
[205] Under NAFTA, the disputing investor may submit the claim to arbitration under, inter alia, the ICSID Convention, the additional facility rules of ICSID, and the UNCITRAL Arbitration Rules, see NAFTA, above n 20, Art 1120.1
[206] *Methanex Corporation* v *United States of America*, Decision of the Tribunal on Petitions from Third Persons to Intervene as 'Amicus Curiae' (2001) § 39, at US Dept. of State http://www.state.gov/documents/organization/6039.pdf (Accessed 26/04/2005) [hereinafter NAFTA Methanex decision]
[207] Howse, above n 182, 507

system "could benefit from being perceived as more open or transparent; or conversely be harmed if seen as unduly secretive."[208]

Similarly, in the *UPS Case*,[209] the Tribunal held that amicus curiae brief applications were consistent with Article 1133 of NAFTA concerning the ability of the Tribunal to seek independent expert advice on specialized factual matters. The Tribunal further concluded that its authority to accept amicus briefs was appropriate so long as such participation did not affect the rights of the disputing parties.[210] Interestingly, the Tribunal also proposed the controversial Additional Working Procedure that the Appellate Body had formulated in *EC – Asbestos* as a model for amicus curiae applications under NAFTA.[211]

While the treatment of amicus briefs varies in the different international tribunals discussed above, the common underlying theme that is shared is that no clear provisions or working procedures on amicus curiae exist for these panels or courts. Since the respective treaties neither expressly provides for nor prohibits these situations, most panels and courts have taken matters into their own hands and decided upon the issue based on their discretion. All of the amicus curiae related issues and its controversies could undermine the efficiency, transparency and reliability of the dispute settlement regimes. *Amicus* briefs by non-state parties are important for the democratization of the mechanisms; it gives opportunities for non-state entities to guard the trade agreements as they are directly affected by any illegal measures of government Members.

Perhaps a better model of *amicus* curiae can be found in the practice of the Inter-American Court of Human Rights, which has been described as having the most extensive *amicus* practice and from which the above-mentioned international tribunals could draw some lessons.[212] The Statute of the Inter-American Court on Human Rights provides that "the hearing shall be public."[213] It further stipulates that "the Court shall deliberate in

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[208] NAFTA Methanex decision, above n 206, § 49
[209] United Parcel Service of America Inc. v Government of Canada, Arbitration Under Chapter 11 of the NAFTA, Decision of the Tribunal on Petitions for Intervention and Participation as Amici Curiae, 17 October 2001[hereinafter NAFTA UPS decision]
[210] Ibid, § 61
[211] Howse, above n 182, 506
[212] Dinah Shelton, 'The Participation of Nongovernmental Organizations in International Judicial Proceedings', (1994) 88 *American Journal of International Law* 611, 638
[213] Statute of the Inter-American on Human Rights, O.A.S Res 448 (IX-0/79), OAS Off Rec OEA/Ser.P/IX.0.2/80, Vol 1 at 98, Annual Report of the Inter-American Court of HR, OEA/Ser.L/V.III.3 doc

private. Its deliberations shall remain secret, unless the Court decides otherwise."[214] Also, "the decisions, judgements and opinions of the Court shall be delivered in public session…."[215] Moreover, the Court's of rules of procedure in taking evidence provide that the Court allows the acceptance of third-party information, to "[O]btain, on its own motion, any evidence it considers helpful. In particular, it may hear as a witness, expert witness, or in any other capacity, any person whose evidence, statement or opinion it deems to be relevant" and "invite the parties to provide any evidence at their disposal or any explanation or statement that, in its opinion, may be useful." [216] Also, it can make a request to "any entity, office, organ or authority of its choice to obtain information, express an opinion, or deliver a report or pronouncement on any given point."[217] In practice, the Court has formally noted the briefs in each opinion it has issued and accepted nearly all briefs filed.[218]

4.4.4 As third party intervenor

The opportunities of third party involvement in the legal proceedings in international tribunals appear to be increasing. Another type of third party involvement in the mechanism is as an intervenor. The concept of an intervenor is based upon someone showing to the Court a discernable interest in the outcome of the case and if found, indeed, to have such an interest, he or she will be granted a certain standing before the Court. The intervenors can be individuals or states.

It should be noted that in the contentious cases heard by the ICJ, or other international tribunals, 'standing' is provided only to States.[219] Private party intervenors, however, usually NGOs, may gain standing as parties in certain circumstances and in same tribunals. Private parties have the right to initiate disputes in some international tribunals,

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13 corr.1 at 16 (1980), reprinted in Basic Documents Pertaining to HR in the Inter-American System, OEA/Ser.L.V/II.82 doc.6 rev.1 at 133 (1992), Art 24.1, "unless the Court, in exceptional circumstances, decides otherwise."

[214] Ibid, Art 24.2.

[215] Ibid, Art 24.3

[216] The Rules of Procedure of the Inter American Court of Human Rights, of in effect January 1, 1997, Art 44 (1); see http://www1.umn.edu/humanrts/iachr/rule1-97.htm > at 24/11/2005

[217] Ibid.

[218] Shelton, above n 212, 639

[219] Statute of the ICJ, Art 34.1, see < http://www.globelaw.com/icjstat.htm> at 23/11/2005 [hereinafter *the ICJ statute*]

such as the Inter-American Court of Human Rights,[220] and the International Centre for the Settlement of Investment Disputes (ICSID) Tribunal for firms.[221]

It should be noted that when private individuals are involved as either parties or intervenors in the certain disputes, they are granted 'standing'. This is different from the situation of *amici*, where they do not gain 'standing' and their involvement in the dispute is at the discretion of the Tribunal. The practice of the International Court of Justice (ICJ) shows that states can be involved in a dispute as intervenor.[222] Article 62 of Statute of the ICJ states that "Should a state consider that it has an interest of a legal nature which may be affected by the decision in the case; it may submit a request to the Court to be permitted to intervene. It shall be for the Court to decide upon this request."[223] Thus, a state as an intervenor only needs to demonstrate that its legal interests could be affected by the decision; but it is not necessary "to have a jurisdictional link exist between the intervenor and the dispute concerned before the ICJ." [224] Despite the fact that the intervenors have a certain standing, however, they have fewer procedural rights than the other parties.

Third party intervention is also provided for in the WTO. Article 10(2) of the DSU, provides for third parties to be granted rights to be heard by and present written submissions to the panel if they have been found to have a 'substantial interest' in a matter before the panel.[225] The written submissions of third parties shall be given to the parties to the dispute and shall be reflected in the panel report; conversely, third parties shall receive the submissions of the parties to the dispute to the first meeting of the panel.[226] If a third party afterwards "considers that a measure already the subject of a panel proceeding nullifies and impairs benefits accruing to it under any covered agreement, that Member may

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[220] See note 213 above and accompanying text

[221] Gabrielle Marceau and Matthew Stilwell, 'Practical Suggestions for Amicus Curiae briefs before WTO adjudicating bodies', (2001) *Journal of International Economic Law* 155, 164

[222] See, Christin Chinkin, *Third Parties in International Law* (1993); Shabtai Rosenne, *Intervention in the International Court of Justice* (1993); D.W. Greig, 'Third Party rights and Intervention before the ICJ', (1992) 32 *Virginia Journal of International Law* 285

[223] *The ICJ Statute*, above n 219, Art 62.1 and 62.2,

[224] Land, Island and Maritime Frontier Dispute (*El Sal. V. Hond.;* Nicar., intervening), 1992 *ICJ* 351 ¶ ¶ 421-24 (Sept.11); in this case, Nicaragua as the intervenor, id.

[225] The DSU, above n 1, Art 10.2; However, this intervention by third party in the panel proceedings is different with the joining of a third party in consultations initiated by the parties to dispute (Art 4 (11) of the DSU). The latter, third party shall have 'a substantial trade interest' in the consultations and the consulting parties must give their consent, while the former does not need consent of the parties of the panel proceedings.

[226] Ibid, Art 10.3

have recourse to normal dispute settlement procedures and such a dispute shall be referred to the original panel whenever possible."[227]

Meanwhile, Article 40 of the European Court of Justice (ECJ) Statute[228], which provides for third party intervention, is not to be equated with an *amicus curiae* provision but it is rather more akin to the WTO's third party intervention provision. As with Article 10(2) of the DSU, Article 40's purpose is to enable a third party to protect an interest that may be affected by the result of the case but the interest concerned must meet the definition of one that is "direct, concrete and specific".[229] The intervention is itself restricted to cases that do not concern disputes between Member States, between institutions of the Communities or between Member States and institutions of the Communities.[230]

A third person would thus only have the same rights as Member States and institutions of the Communities in cases involving private party challenges to acts or omissions of institutions of the Communities and this right is granted only if a certain degree of interest in the outcome of the case is established. [231] The submissions that can be made in the application to intervene are themselves limited to "supporting the form of order sought by one of the parties".[232] As such, and in practice, third party corporations and trade associations will provide their intervention briefs to the Member State which is the party to the dispute whose side they support to be included as part of that disputing party's submissions.[233]

The participation of third individuals in the international tribunals constitutes a controversy as generally only states can bring disputes before the international courts. Private person's participation in international courts is necessary because they are the

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[227] Ibid, Art 10.4
[228] The Statute of the ECJ, Art 40 stated: (1) "Member States and institutions of the Communities may intervene in cases before the Court"; (2) the same right shall be open to any other person establishing an interest in the result of any case submitted to the Court, save in cases between Member States, between institutions of the Communities or between Member States and institutions of the Communities.", see The Statute of European of Court of Justice (15 June2004) http://curia.eu.int/en/instit/txtdocfr/txtsenvigueur/statut.pdf >at 27/04/2005 [hereinafter the ECJ Statute]
[229] Shelton, above n 212, 630
[230] The ECJ Statute, above n 228, Art 40
[231] Ibid
[232] Ibid, Art 40.4
[233] Shelton, above n 212, 630, e.g. the Italian National Union of Consumers, the Federation of European Bearing Manufacturers Associations, the Consultative Committee of the Bars and Law Societies of the European Communities, and the European Council of Chemical Manufacturers' Federation. Id.

primary player of international trade who have great interest in the decisions of the Courts as these decisions may affect their business operations. If their access to the dispute process is denied, it would decrease not only their confidence in the WTO but also in the legitimacy of the WTO as the final arbiter of international trade. Apart from that reason, and considering the significant input that the third party individuals may contribute to the process of the dispute resolution, it is not bad idea to provide a comprehensible procedure for the participation of the third party in the system.

4.5 The Precedential effect of decisions

4.5.1 *Stare decisis* and the Doctrine of Precedence

The debate continues whether panels or courts in the dispute settlement mechanisms of some major regional trade organisations should follow the decisions and rulings of previous panels or courts. One difficulty in implementing such a common law doctrine is that trade organisations are often comprised of countries with divergent legal systems, i.e. a mixture of common law systems and civil law systems. For example, in NAFTA, both the United States and Canada are common law jurisdictions while the third signatory, Mexico, operates a civil law system. Similarly, in the WTO, the Member States are an assortment of civil law and common law jurisdictions. The debate is characterised as a debate over the application of the doctrine of precedence, or the doctrine of *stare decisis*.

Civil law systems are governed by codes and statutes which are applied and interpreted by the courts.[234] Judicial precedent is not recognised as an independent source of law. Conversely, in common law systems, the rule of precedent or *stare decisis* is the distinguishing feature that governs judicial decision-making.[235] *Stare decisis* originates from medieval England and is believed to be the soul of English common law. The legal term literally means "to stand by things decided-and not to disturb settled points"[236] and it is necessary for a court to follow earlier judicial decisions when the same points arise again

[234] Dana T. Blakmore, 'Eradicating the Long Standing Existence of a no-precedent Rule in International Trade Law- Looking Toward Stare Decisis in WTO Dispute Settlement', (2004) 29 *North Carolina Journal of International Law & Commercial Regulation.* 487, 496
[235] Ibid, 495
[236] *Black's Law Dictionary*, (7th ed, 1999)

in litigation. The term has also been interpreted as *stare rationibus decisis* which mean to "keep to the *rationes decidendi* of past cases" and courts generally have to also follow the legal reasoning of earlier courts.[237]

Under the *stare decisis* principle, decisions or principles of law that emerge from decided cases form binding rules of law in the same court or in courts of lower rank regarding subsequent cases where the point in controversy or the relevant facts are substantially similar to those of the previously decided cases.[238] While lower courts must strictly adhere to the decisions and rulings of previous and superior courts (vertical precedent), appellate courts consider their own precedents to be 'defeasible' in face of convincing reasons (horizontal *stare decisis*).[239]

Two competing schools of thought exist in relation to the *stare decisis* doctrine, one espousing the strict approach and the other, the liberal approach. The former insists that courts are bound without exception by both the previous decisions of the same court and those of all higher courts while the latter maintains that courts should have greater flexibility not only to be able to take into account societal innovations and legal progressions but also to be able to override erroneous decision-making in following previous decisions

Theoretical differences may exist between the doctrine of *stare decisis* and the doctrine of precedence. The term 'precedent' can be defined as a prior binding decision, or a consistent group of binding decisions of higher courts of the same jurisdiction which represent a model for subsequent decisions.[240] The system of precedent has been summarised as affecting a judge in a case in the following three ways: (i) it authorises him or her to consider previous decisions as part of the general legal material from which the law may be ascertained; (ii) it may obligate him or her to decide the case in the same way as a previous case unless he or she can give a good reason for not doing so; or still yet, (iii) it may obligate him or her to decide it in the same way as the previous case even if he or

[237] Rupert Cross and J. W. Harris, *Precedent in English Law*, (1991), 100
[238] Mei-Fei Kuo and Kai Wang, 'When is an innovation in order?: Justice Bader Ruth Ginsburg and *Stare Decisis*', (1998) 20 *University of Hawaii Law Review* 835, 838
[239] Blakmore, above n 234, 496
[240] Francesco G. Mazzotta, 'Precedents in Italian Law', (2000) 9 *MSU-DCL Journal of International Law* 121, 122

she can give a good reason for not doing so.[241] Nevertheless, the two terms are generally used interchangeably as is done here.

4.5.2 Precedential effect of decisions

Despite over a hundred trade disputes having been resolved by GATT dispute settlement panels between 1947 and 1994,[242] and over 300 cases having been resolved by WTO dispute resolution system since the implementation of the DSU in 1995,[243] the precedential effect of WTO panel decisions remains a topic for debate. So far the focus of discussions on this matter relates to whether or not the doctrine of precedence exists within WTO adjudication – the answer to which has important ramifications for the WTO, particularly with respect to its consistency and legitimacy.[244] Theoretically, because the WTO operates within the sphere of international law, it should be a non-precedential and non-*stare decisis* system because there is no hierarchy in international courts. But the fact that the doctrine of precedent does not apply *de jure* does not necessarily mean that it does not exist *de facto*.[245] The pattern that has emerged in practice in international tribunals is that while formally the decisions have no precedential effect,[246] they appear to be treated as though they do have such value.[247] While WTO law does not officially incorporate the formal doctrine of precedence,[248] panels and the Appellate Body regularly refer to and follow prior panel and Appellate Body reports.[249] Panel and Appellate Body reports thus collectively develop a kind of "operative precedent" and disputing parties rely on these

[241] Cross and Harris, above n 237, 4
[242] It shown that the GATT dispute settlement process had become the most widely used mechanism to solve trade disputes between states, see Miquel Mora, 'A GATT with Teeth: Law Wins over Politics in the Resolution of International Trade Disputes', (1993) 31 *Columbia Journal of Transnational Law* 103, 105
[243] Up to 2005 (March), 328 trade dispute cases have been brought to the WTO Dispute Settlement Mechanism, see http://www.wto.org/english/tratop_e/dispu_e/dispu_status_e.htm (Accessed 11/03/05)
[244] Blackmore, above n 234, 504
[245] Adrian T. L. Chua, 'Precedent and Principles of WTO Panel Jurisprudence', (1998) 16 *Berkeley Journal of Institutions Law* 171, 183
[246] The ICJ Statute, above n 219, Art 59
[247] Philip M Nichols, 'GATT Doctrine', (1996) 36 *Virginia Journal of International Law* 379, 432
[248] Raj Bhala, 'The Power of the Past: Towards De Jure Stare Decisis in WTO Adjudication (Part three of a Trilogy)', (2001) 33 *George Washington International Law Review* 873, 894
[249] Arun Venkataraman, 'Binational Panels and Multilateral Negotiations: A Two-Track Approach to Limiting Contingent Protection', (1999) 37 *Columbia Journal Transnational Law* 533, 599

prior reports to formulate their arguments and harbour expectations that any panel would not to depart too frequently from the prior decisions in resolving disputes.[250]

The precedential value of previously adopted reports was formally raised for the first time in *Japan – Alcoholic Beverages* [251] in which the panel stated that adopted reports were to be "taken into account" by subsequent panels dealing with the same or a similar issue, although the reasoning in or results of previous reports did not necessarily have to be followed.[252] On appeal, the Appellate Body agreed with the panel's view, ruling that adopted reports created "legitimate expectations" amongst WTO Member States and should thus be taken into account where relevant to any dispute.[253]

Nevertheless, the doctrine of precedence is believed to be absent in WTO jurisprudence, as "a *de facto stare decisis* is not *stare decisis* at all." [254] Theoretically, future panels faced with a similar set of facts to previous cases, could arrive at different rulings. This is the potential to create uncertainty in the legal system, and is exacerbated by the *ad-hoc* nature of the panels, where the panellists making rulings do not remain in the same adjudicative capacity. Therefore, lack of *de jure stare decisis* in the WTO system is potential to severely undermine not only the credibility and stability of dispute settlement system, but also the entire WTO system.[255]

Those in favour of a formal system of precedent argue that the doctrine offers "even handed, predictable, and consistent development of legal principles", fosters "reliance on judicial decisions" as well as contributes to the "actual and perceived integrity of the

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[250] Cherie O'Neal Taylor, Dispute Resolution as A Catalyst for Economic Integration and an Agent for Deepening Integration: NAFTA and MERCOSUR? (1996-97)17 *Northwestern Journal of Internatinal Law & Business* 850, 896

[251] Japan-Taxes on Alcoholic Beverages, WTO Doc. AB-1996-2, Nov 1, 1996, WT/DS8, 10, 11/R, [hereinafter WTO Japan Alcohol-Panel Report]

[252] Ibid, ¶ 6.10, it found that unadopted panel reports "have no legal status in the GATT or WTO system" but said that "a panel could nevertheless find useful guidance in the reasoning of an unadopted panel report that it considered to be relevant,", ibid, ¶ 6.10; See also Chua, above n 245, 182

[253] See Japan- Alcohol Appellate Body Report, WT/DS8, 10, 11/AB/R; considered the Panel's conclusion that adopted panel reports constitute "subsequent practice" and "other decisions" to be in error; said that these reports "are not binding, except with respect to resolving the particular dispute between the parties to that dispute"; however, stated that such reports created "legitimate expectations" which should be taken into account where they are relevant to any dispute; and agreed with Panel's findings regarding unadopted panel reports, 12-15; see WorldTradeLaw.net on WTO case law index < http://www.worldtradelaw.net >at 24/11/2005

[254] Bhala, above n 248, 875 and 894

[255] Sung Joo Cho, 'GATT non-violent Issues in the WTO Framework: Are they the Achilles' Heel of the Dispute Settlement Process?' (1998) 39 *Harvard International Law Journal* 311, 331

judicial process".[256] Incorporating the concept into the WTO would assure that "the law will not merely change erratically" and that the system will be founded on "bedrock principles rooted in the law rather than in the "proclivities of individuals".[257]

An established practice of precedent in the WTO would set up determined law and it would guarantee the consistency of the panels and Appellate Body decisions and further add to a more predictable legal environment to the parties to the dispute and international trade community as a whole.

4.6 The Desirability of appeal processes

In most trade organisations, a Member State involved as a party to a dispute can usually appeal if it believes that the decision was incorrectly decided. Some believe that if Member States simply appeal every time they lose their case, there will be an overall loss of prestige and respect for panel decisions. This is probably an exaggerated view and the presence of an appeal process is not likely to rob the panel of prestige since not every decision is likely to be appealed. The number of appeals in the international context is parallel to those made in the national context – i.e. the majority of cases are not appealed.[258]

In the WTO, the drafters of the DSU created the Appellate Body based on the fact that the panel decisions under the DSU system were automatically adopted.[259] The Appellate Body would meet the need for greater assurance of legal correctness when dealing with cases where panels had 'cleaned out the underbrush and narrowed the dispute to the main legal issues'.[260] By providing two-tier system, panel and appeal review procedures for parties to the dispute, the system could provide for the correction of flawed decisions, if any that may have been decided in panel stages. Like any national appellate

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[256] Blackmore, above n 234, 505 (quotation omitted)
[257] Ibid. (quotation omitted)
[258] Claus-Dieter Ehlermann, 'Six Years on the Bench of the 'World Trade Court': Some personal Experiences as Member of the Appellate Body of the World Trade Organization', in Federico Ortino and Ernst-Ulrich Petersmann (eds), *The WTO Dispute Settlement System: 1995-2003*, (2004), 513
[259] Once the panel report is submitted to the DSB, the report will be adopted unless the DSB decides by consensus to reject the report or unless one of the parties requests an appeal, see the DSU, above n 1, art 16.4; see also section 3.3.2 Chapter 3
[260] Robert E Hudec, 'The New WTO Dispute Settlement Procedure: an Overview of the First Three Years', (1999) 8 *Minnesota Journal of Global Trade* 1, 33

court, the Appellate Body is to operate independently, impartially and objectively at all times.

The Appellate Body is limited to determinations on questions of law covered in the panel report and questions of legal interpretation developed by the panel.[261] Issues of fact remain the sole domain of panels. In the case of *EC – Hormones*,[262] the Appellate Body demarcated for the first time the dividing line between issues of law and issues of fact. It ruled that the legal qualification of a fact, i.e. the process of relating a fact to the requirements of a legal rule, was a legal issue.[263] As such, the control of this process was as much a part of the responsibility of the Appellate Body as was the interpretation of the legal rule *in abstracto*.[264]

With regards to NAFTA's Chapter 20, there is no appeal procedure available from decisions from the panel.[265] Chapter 19 panel decisions are also not subject to further review, but the extraordinary challenge procedure can be utilised if a disputing party alleges that a member of the panel was guilty of "gross misconduct" or bias or that the panel had "manifestly exceeded its powers".[266] The extraordinary challenge procedure involves an analysis of the panel's decision by a committee of three judges.[267] If the committee finds extreme misconduct on the part of a panel member or the panel as a whole, the original panel decision will be vacated.[268]

The appellate review is concerned mainly with law, and its innovation will lead to consistency on the interpretation of law. It further adds to the acceptability of the panel system as an international arbiter. Appellate review provides the parties that are displeased with the panel decisions an avenue to ensure that it can be corrected based on law and it

[261] The DSU, above n 1, art 17.6
[262] Appellate Body Report, European Communities – Measures Concerning Meat and Meat Products (Hormones), WTO Doc. WT/DS26/AB/R, WT/DS48/AB/R, adopted 13 February 1998, DSR 1998:I, para 132 [hereinafter *EC- Hormones AB Report*]
[263] Ehlermann, above n 258, 514
[264] Ibid, 514
[265] Hansen, above n 78, 491
[266] NAFTA, above n 20, Art 1904:13
[267] Ibid, Annex 1904:13.1
[268] Ibid, Annex 1904.13 (3); The members of the committee are all judges or former judges selected from a previously established 15-person roster. Each party selects one member from the roster, and then determine by lot who shall select the third member. If the committee vacates the original panel decision, a new panel will be established to rehear the case, id.

therefore assures that the decisions are accurate. Overall, this will promote an enhanced democratic legitimacy of the system.

4.7 Enforceability of Decisions

4.7.1 Adoption of decisions

In GATT, panel decisions became final only after the GATT Contracting Parties adopted them by consensus. Since this required no negative votes, any country, including the losing disputing party, was entitled to veto a panel ruling and thus block adoption of the panel's decisions.[269] To overcome this drawback, the WTO DSU created the "reverse consensus" procedure for adopting panel and Appellate Body reports. Under this system, reports are automatically adopted unless there is a 'consensus' against their adoption.[270] Thus, in an ironic twist, while the sole vote of the losing party was sufficient to prevent adoption of a panel decision under GATT, the sole vote of the winning party could force adoption in the WTO.

4.7.2 The binding effect of decisions

When the panel reports are adopted, the next step of the mechanism is the bindingness of the panel decisions to the parties to the dispute. Due to the nature of the international feature of the dispute settlement mechanisms utilized in major international organizations, including the DSU, the question arises whether the adopted reports bind the disputing countries based on a voluntary basis or as international obligation. This issue is significant as they have led to different consequences.

On the receipt of the NAFTA panel decisions, the disputing parties have "to "agree" on a resolution of the dispute, which should normally conform to the panel's determinations and recommendations."[271] From this wording the panel decisions can be regarded as having the same nature as recommendations. However, it does not mean that

[269] "Consensus comes close to [but is not] unanimity. It is, rather, a state of non-objection, a resigned let-it-go." Pierre Pescatore, 'The GATT Dispute Settlement Mechanism: Its Present Situation and Its Prospects', (1993) *Journal of International Arbitration*, 35
[270] The DSU, above n 1, Art 16
[271] NAFTA, above n 20, art 2018.1

the parties to the dispute are not bound by the panel decisions and can refuse to comply with the decisions as the provisions further state that if the parties fail to implement the panel decisions, they should provide compensation. [272] Moreover, in the event that there is no resolution of the dispute, aggrieved parties have recourse in taking retaliatory measures against the breaching parties through the suspension of benefits and the application of unequal treatment until the dispute is finally settled.[273]

In the WTO, the question as to whether or not panel and Appellate Body rulings create binding obligations, even on losing parties, has been the subject of long debate. On the one hand is the view that panel rulings are not binding on Member States in the traditional sense. This is premised on the position that considers WTO Agreements as any other bilateral contractual agreements entered into with other Members States on an individual basis. If a Member State, for whatever reason, decides not to adhere to a panel's ruling, it merely breaches its contractual obligation and should provide compensation in the form of damages or have the concessions afforded to it suspended.[274] This view relies on the voluntary compliance of the sovereign national governments forming the Member States.

On the other hand lays the belief that "WTO obligations are binding as a matter of law, even when they cannot be enforced."[275] This view considers that regardless of whether or not compliance to DSB recommendations takes place, panel and Appellate Body rulings are still to be regarded as binding. And while they cannot be enforced, accordingly, they have the two fallback outcomes of "encouraging compliance, discouraging free riders, and in cases of non-compliance, restoring the overarching balance of rights and obligations that serves as an incentive and reward for continued WTO membership despite imperfect

[272] Ibid, Art 2018.2; see also, David A Gantz, 'Dispute Settlement under the NAFTA and the WTO: Choice of Forum Opportunities and Risks for the NAFTA Parties', (1999) 14 *American University of International Law Review* 1025,1042

[273] NAFTA, above n 20, Art.2019 (1); the aggrieved party encourage to suspend benefits in the same sector where the dispute arose, but it is not prevented to suspend benefits in other sectors or all sectors. NAFTA, above n 20, Art 2019.2 (a) & (b)

[274]Judith H. Bello, 'The WTO Dispute Settlement Understanding: Less is More', (1996) 90 *American Journal International Law* 416, 417 [hereinafter Bello Less is More]

[275] Judith H Bello, 'Book Review', (2001) 95 *American Journal of International Law* 984, 986 [hereinafter Bello Book Review]

compliance by the WTO Members."[276] According to this view, the compliance to the panel decisions is voluntary; in a sense the compliance to the decisions would generate incentives to the parties concerned.

Accordingly, the panel reports are adopted pursuant to the DSU which represents an international agreement. As international agreements create binding international obligations, therefore the adopted panel report is "the international law obligation to perform the recommendation or to comply with the rulings of the panel or appellate report."[277]

With regards to the issue of compliance with DSB recommendations, under the DSU, the DSB is to continue to survey the implementation of the adopted recommendations and this scrutiny is to remain on the board's agenda until the inconsistent measures are withdrawn by the losing party.[278] However, the losing party can "buy out" its obligations to conform its illegal measures to the panel decisions, by "putting up with the suspension of obligations to it or providing 'compensation' by agreement."[279]

It should be noted that the DSU states that "prompt compliance with recommendations…is essential".[280] One can infer that the DSU provisions alone arguably and strongly suggest a legal obligation on the parties to the dispute to comply with the DSB recommendations given in panel and Appellate Body reports. Others have taken the further view that this notion of obligatory compliance is also already deeply entrenched in other WTO provisions, practices, procedures, decisions as well as in the GATT "jurisprudence." [281] Thus, despite the existence of non-compliance cases, the party whose measures violate covered agreements is obliged to comply with a panel or appellate report.

Under NAFTA, Chapter 11, Article 1136 provides that panel decisions on investment cases are binding only on the disputing parties with respect to that particular case before the panel.[282] Likewise, NAFTA's Chapter 19 binational panel reviews of

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[276] Ibid, 987
[277] See John J Jackson, 'Editorial comment: International Law Status of WTO Dispute Settlement Reports: Obligation to Comply or Option to 'Buy Out'?' (2004) 98 *American Journal of International Law* 109, 116; [hereinafter Jackson editorial]
[278] The DSU, above n 1, Art 21.6
[279] Jackson editorial, above n 277, 116
[280] The DSU, above n 1, Art 21.1
[281] For detailed explanation, Jackson editorial, above n 277, 117
[282] NAFTA, above n 20, art 136

AD/CVD cases are binding on the disputing parties and the rulings are directly applicable to the domestic law of the countries concerned.[283] The Member States, including their administering agencies, are bound by a matter of law to comply with panel decisions by virtue of Chapter 19 provisions and the implementing legislation carrying forward NAFTA provisions as a matter of domestic law.[284] Panel decisions, however, have no role, whether binding or advisory, in the rulings of future cases and the door is left open for future cases with similar facts to be decided differently.

Under the DSU, a Member State which fails to bring its inconsistent measure into compliance with the DSB's recommendations within the reasonable period of time that has been allocated must, if so requested, enter into negotiations with the complainants with a view to agreeing on mutually acceptable compensation or retaliation.[285]

Some have misread this provision to mean that a breaching party could simply provide compensation or endure retaliation as an alternative to implementing the panel's recommendations or rulings. This viewpoint, which allowed the breaching party to remain free to utilise its inconsistent measures, was seen particularly as favourable in circumstances where the breaching party would be worse off if it were to comply with the ruling than to if it were not to comply and accept the sanctions.

This view however, went against the nature of the DSU provisions which state the first objective of the dispute settlement mechanism as being to secure the withdrawal of inconsistent measures and that neither compensation nor the suspension of concessions or other obligations was to be preferred over the full implementation of recommendations.[286] Allowing governments to "buy out" of their obligations through the provision of compensation only creates more major problems in the trading system and had the effect of favouring richer Member States than the poorer Member States over poorer Member States as the former was more likely to be able to could afford to pay compensation while still retain measures that harmed and distorted trade in a manner inconsistent with the rules of

[283] Ibid, Art 1904:1 and Art 1904:9, "directly applicable" generally means that no domestic legislation is necessary to apply this law directly to citizens of that country, see John H Jackson, *Restructuring the GATT System*, (1990), 59-69 [hereinafter Jackson restructuring]
[284] Homer E. Moyer, 'Chapter 19 of the NAFTA: Binational Panels as the Trade Courts of Last Resort', (1993) 27 *International Law* 707, 719
[285] The DSU, above n 1, Art 22.2
[286] The DSU, above n 1, Art 3.7 and Art 22.1; See Jackson restructuring, above n 283, 115-117

the system.[287] Consequently, regardless of whether compensation or retaliation had been incurred, breaching parties are still obligated to remove their inconsistent measures.[288]

The DSU contains provisions that impose upon violating Member States the obligation to conform to panel recommendations.[289] Articles 3.5 and 3.7 state that the DSB's recommendations are aimed at "achieving a satisfactory settlement of the matter" and that all solutions were to be consistent with the WTO agreements and neither "nullify and impair benefits accruing to any Member" nor "impede the attainment of any objective of those agreements."[290] Once a panel's recommendations are adopted, the losing party must adhere to the decision and amend or withdraw the impugned measure(s).

Panel or Appellate Body reports are not binding in the traditional sense and, in this respect, only national legislatures and not a supranational body like the WTO had the authority to change domestic laws.[291] Therefore, in most legal systems, any obligation requiring the Member State's law to conform to panel recommendations had no self-executing effect and must ultimately be passed by the legislature before any changes can be made.[292] This view represents that the WTO law itself does not have any direct effect on the national domestic laws of its Members States and that Member States' sovereignty is preserved.

An example of the violating Member State that brought its domestic law into conformity with the WTO provisions is the *US-Gasoline* case.[293] In the 1995 case of *US* –

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[287] The Future of the WTO, above n 56, 54

[288] Jackson restructuring, above n 283, 117

[289] John H. Jackson, 'The WTO Dispute Settlement Understanding-Misunderstandings on the Nature of the Agreement', (1997) 91 *American Journal of International Law* 60, 64 [hereinafter Jackson understanding]

[290] *The DSU*, above n 1, Arts 3.5 and 3.7

[291] Scott Daniel McBride, 'Reformulating Executive and Legislative Relationships after Reformulated Gasoline: What's best for trade and the environment?' (1998) 23 *William and Mary Environmental Law and Policy Review* 299, 651

[292] Statement of Rufus Yerxa, Deputy U.S. Trade Rep, World Trade Organization: Hearing before the Senate Comm. On Foreign Relations, 104th Cong. (1994), see McBride, ibid, 651. In parallel with this view a statement stated that, "a WTO dispute settlement panel recommendation does not automatically change U.S law. It has no self executing effect … Only Congress can change the law to implement a panel recommendation."

[293] The US enacted the 1990 Clean Air Act Amendments which created two gasoline programs; first was intended to maintain pollution standards from gasoline below 1990 level, second was aimed to reduce the pollution in designated major population centre, this program, concerned with baseline reformulated gasoline that allowed to be sold; see McBride, above 293, 312; The dispute stemmed from the fact that the domestic refiners had three different standards that they could be used to meet the requirements of the regulation, whereas foreign refiners had only one; see Craig A A Dixon, 'Environmental Survey of WTO Dispute Panel

Gasoline, the panel determined that the US had violated the GATT provisions by applying different pollution emission standards to domestic and foreign petroleum refiners.[294] The panel report found that the regulation to be inconsistent with GATT Article III:4 and not to benefit from an Article XX exception.[295] In compliance with the appellate body report, the US brought its regulations into conformity with the recommendations of the DSB within the timeframe designated for implementation.[296]

Meanwhile, with regard to Chapter 19 of NAFTA, a number of safeguards have been incorporated to ensure the smooth running and implementation of the dispute settlement process. There are provisions requiring the amendment of current domestic law reflect panel findings; provisions requiring consultations between disputing parties if any process of the panel has been prevented by one disputing party; provisions for annual consultations to be held to consider problems and develop new rules; provisions for notification and consultation with respect to the amendment of domestic antidumping or countervailing duty laws; and provisions that specifically amended to the domestic laws of the United States, Canada and Mexico.[297] These safeguard provisions could improve the implementation of the mechanism. Unlike NAFTA that only consists of three member states where the implementation of the dispute mechanism would be much easier, in the WTO with a large number of member states, this area is complicated as it should balance all the interests of all Member States. For example, can smaller member states get compliance, or can they get an adequate remedy. This implementation problem will be discussed in the following section.

4.7.3 Implementation of decisions

In the WTO, adopted panel and Appellate Body reports represent DSB rulings and recommendations that are binding obligations in international law on the parties to the

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Resolution panel Decisions since 1995: Trade at all costs?' (2000) 24 *William and Mary Environmental Law and Policy Review* 89, 96; so there was discrimination upon foreign refiners, and Venezuela and Brazil complained to the US, ibid.

[294] The WTO Panel Report, United States-Standards for Reformulated and Conventional Gasoline, WT/DS2/R, Jan. 29, 1996 [hereinafter *US-Gasoline*]

[295] Ibid.

[296] McBride, above n 291, 655

[297] Kristin L. Oelstrom, 'A Treaty for the Future: The Dispute Settlement Mechanism of the NAFTA', (1994) 25 *Law & Policy International Business* 783, 793

dispute. The losing party found to be in violation of its WTO obligations is requested to bring its inconsistent measures into conformity with such recommendations or rulings within a reasonable period of time.[298] In practice, however, enforcement is difficult as WTO international law lacks tangible coercive powers.[299]

The WTO can never force a Member State to change its trade practices to conform to the WTO Agreement. Moreover, there is no independent policing structure responsible for ensuring that the panel and Appellate Body recommendations are implemented. Although the DSU insists that "prompt compliance with the recommendations or rulings of the DSB is essential in order to ensure effective resolution of disputes to the benefit of all Members",[300] the only relevant power the DSB has been given at this stage is to monitor how the governments in breach of their WTO obligations are implementing the rulings.

Compliance is really only based on the respect and credibility that the dispute settlement mechanism has built among the Member States and the Member States' sense of comity and goodwill. This is, of course, a rather optimistic view and not surprisingly, several disputes have erupted over the non-compliance of losing disputing parties and subsequently tested the WTO's system of remedies.[301]

Available remedies consist of the DSB's authorisation for compensation or retaliation to be imposed at a level equivalent to the level of the nullification or impairment.[302] But these solutions are considered as temporary measures. What is clearly preferred is for the withdrawal of the inconsistent measures and the full implementation of DSB recommendations to bring the situation into conformity with the covered agreements.

4.7.4 The effect of non-compliance with decisions

Compensation is the first avenue of redress if the inconsistent measures are not or cannot be withdrawn soon enough and parties to the dispute usually come to some

[298] The DSU, above n 1, Art 21.3
[299] Robert E Hudec, 'The Judicialisation of GATT Dispute Settlement', in Michael M Hart and Debra P Steger, eds, *In Whose Interest? Due Process and Transparency in International Trade*, (1990), 20
[300] The DSU, above n 1, Art 21.1
[301] At least ten cases that relate to non-compliance of the losing parties, see Bernard O'Connor, 'Remedies in the World Trade Organization Dispute Settlement System – The Bananas and Hormones cases', (2004) 38 (2) *Journal of World Trade* 245, 246; Of these ten cases a further subset have resulted in an award of Arbitrators fixing the level of suspension allowable for 5 cases. Id.
[302] *The DSU*, above n 1, Articles 22.2 and 22.4

agreement on the level of compensation. 'A reasonable period of time' is provided for the losing party to implement the DSB recommendations and rulings of the DSB.[303] If the Member concerned fails to comply with the rulings within this period of time, such Member shall enter into negotiations with the complaining party to reach a mutually acceptable compensation agreement before the reasonable period of time has expired.[304] If no compensation agreement is reached within a 20 day period from the expiration of 'the reasonable period of time', the winning party can take retaliatory sanctions but only after obtaining the prior authorisation of the DSB. Unless there is a consensus to the contrary, the DSB usually gives such authorisation upon request within 30 days of the expiry of the reasonable period of time.

Winning parties retaliate through suspending concessions for the purposes of're-balancing' benefits that have previously been unfairly acquired by the breaching party through its inconsistent measures. Though effective, retaliatory sanctions are, however, not particularly favoured and are seen even as a "last resort" as they involve the raising of trade barriers which not only goes against the core of the MFN principle but which also carry the potential to set trade-distorting measures into motion in both the disputant countries. In terms of the implementation of the adopted panel reports, the non-compliance and retaliation issues have created a handful of dispute settlement cases due to the lack of clarity of the procedural issues in the DSU which would be examined in the next section.

4.7.4.1 "Sequencing" problem (Articles 21 and 22 DSU)

Articles 21 and 22 of the DSU provides for a special procedure for an 'implementation' or 'compliance' panel to be established in the event a challenge alleging less that full compliance is made against a breaching parties implementation of the DSB's recommendations. Under the DSU, the complaining party may request of an authorization for suspension of concessions for failure to comply.[305]

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[303] Ibid, Art 21.3; the reasonable period of time shall be: (a) proposed by the Member concerned, or (b) mutually agreed by the parties to the dispute within 45 days after the date of adoption of the rulings, or (c) period of time determined through binding arbitration within 90 days after the date of adoption of the rulings, but in such arbitration, should not exceed 15 month from the date of adoption, ibid.
[304] Ibid, Art 22.2
[305] Ibid

Two procedures are provided in the DSU pursuant to which either the disputing parties can refer their dispute to Article 21.5 of the DSU [306] or they can resolve their disagreements by referring to Article 22.6 of the DSU.[307] However these articles create interpretive problems, stemming from "the textual ambiguity between Article 21.5 and 22.6 of the DSU as each supply a procedure to be taken by the complaining party if the losing party fails to fully comply with the DSU, but the DSU fails to clarify the relationship between the two procedures."[308] Article 22 does not refer to Article 21.5, nor does it require a finding of non-compliance before a party can seek authorization to retaliate.[309]

It can be said that as this procedure itself was not described in a sufficiently detailed fashion this raises the question of 'sequencing', namely, "whether there must be a determination of non-compliance before a party seeks authorization to retaliate." [310] For example, in *EC-Bananas*, the US and the EC had taken different view on the implementation of these two articles, at point, whether Article 21.5 procedure was a mandatory condition to the request of the right to retaliate under Article 22.[311]

In combating this 'sequencing' problem, the WTO Members States agreed two approaches to be applied; it was first necessary to determine whether or not there had been adequate implementation before moving on to the question of compensation and retaliation. The second approach was that any judgment concerning the failure to comply was a finding

[306] Article 21.5 of the DSU provides that the disagreement 'shall be decided through recourse to these dispute settlement procedures, including wherever possible resort to the original Panel', the DSU, above n 2, Art 21.5; but the DSU fails to clarify what exactly 'these dispute settlement procedures' is, when the parties to the dispute may invoke this procedure, and who may invoke them, see Mercurio, above n 2, 827

[307] Article 22.6 provides authorization retaliation, here, 'the DSB upon request shall grant authorization to suspend concessions or other obligations within 30 days of the expiry of the reasonable period unless there is consensus otherwise, or the losing party refers the request suspension amount to arbitration, the DSU, above n 1, Art 22.6; but the time table in this Article is not match with the provision in Article 21.5, see Mercurio, above n 2, 827

[308] Mercurio, above n 2, 826, for a good 'sequencing' debate, see id, 826-831

[309] Sylvia A Rhodes, 'The Article 21.5/22 Problem: Clarification through Bilateral agreements?' (2000) *Journal of International Economic Law* 553, 555

[310] A 'sequencing' problem could be defined "how a challenge on whether the response of the losing party has been adequate and can operate consistently with the provisions allowing the winning party to take counter-measures," see *The Future of the WTO*, above n 56, 53; as of 17 September 2004, there have been 12 cases of a sequencing agreement, for example, '*US-Shrimp* (WT/DS58/16), *US-FSC* (WT/DS108/12), and *EC-Bed-Linen* (WT/DS141/11), id; see also, Cherise M. Valles and Brendan P. McGivern, 'The Right to Retaliate under the WTO Agreement: the "Sequencing Problem", (2000) 34 (2) *Journal of World Trade* 63

[311] Valles and McGivern, above n 310, 72

that had to be made by and within the WTO system and not unilaterally.[312] There were, however, differences of opinion over the amount of time needed to investigate whether or not there had been proper implementation, which in turn depended upon the procedures to be followed by the disputing parties in reaching a decision.

This problem has been partly solved by practice having developed whereby disputing parties agreed on the sequencing approaches as mentioned above, to be applied to their particular case.[313] In short, the solution of disputes has become really a matter for the agreement between the parties to the dispute themselves. The parties to the dispute in several cases have reached agreements on the application of this provision, in this respect, the parties agreed to interpret Article 21.5 and 22 in such way, where this interpretation only applies to the dispute concerned.[314]

The disadvantage of this approach is, of course, that parties may fail to come to agreement, particularly in troublesome cases, for example *EC-Hormones* which will be explained in the latter section. Another appropriate choice to overcome the sequencing problem is by amending the DSU, but this would be a difficult choice considering the consensus requirement among the Contracting Parties of the WTO.

A good example for the sequencing problem is *EC-Bananas* case.[315] In September 1997 the DSB decided that the EU's regime for banana imports violated WTO rules and the agreed 'reasonable period of time' for the EU to correct its banana regime would have been expired on 1 January 1999. According to the US, Articles 22.2 and 22.6 provide a complaining party with a 10-day 'window of opportunity' to seek authorization to suspend concessions (from 21-31 January 1999). On 2 February 1999 the US complained that the EU had not complied with the DSB rulings, and asked for authority to impose sanctions. And on 3 March 1999 the US announced measures that would require importers to place

[312] WTO, Dispute Settlement System,
<http://www.wto.org/english/thewto_e/minist_e/min01_e/brief_e/brief17_e.htm > at 10/05/2005
[313] The future of the WTO, above n 56, 53
[314] For example three cases the parties to the dispute agreed to seek recourse to Article 21.5, they are, *Australia-Leather* (WT/DS126/8, 4 October 1999), *Brazil-Aircraft* (WT/DS46/13, 26 November 1999) and *Canada-Aircraft* (WT/DS70/9, 23 November 1999), see Rhodes, above n 311, 556; Also, *US- Shrimp/Turtle* and *Australia-Salmon* which the parties to the dispute interpreted this provision to be applied only on their disputes. Id
[315] *EC-Bananas* case, above n 120

bonds covering import duties of 100 per cent on the European products, the US was proposing for sanctions.[316]

On 4 March the EU alleged that the US action was inconsistent with the DSU and launched a new case (DS165). According to the EU the request for authority to retaliate should be based on a multilateral determination of non-compliance, and the DSB was not in a position to authorize the suspension of concessions as until the completion of the Article 21.5 process. The EC took the position that the right to seek authorization to suspend concessions was a 'conditional' rather than 'absolute' right.[317] That condition was that the EU first should be pronounced as having failed to bring the inconsistent measures under the DSB recommendations, before the DSB could give an authorization for retaliation.

The panel was established in June 1999 and ruled on April 2000 which found that the bonds requirement violated the WTO Agreement because the action was taken before there had been a ruling on whether the EU was still failing to comply in the Banana case.[318] This sequencing problem is an inevitable interpretative problem because of the ambiguity of the DSU provisions. The bilateral agreements between the disputing parties are an appropriate feature and have been proven to solve this problem.

4.7.4.2 "Carousel" retaliation

In the case of the offending party being unable to comply with the DSB recommendations and rulings, the DSU provides some general principles and procedures that should first be followed by complainant Parties wishing to suspend concessions. The complaining party is to firstly seek to suspend concessions on goods within the same sector.[319] If this is not practicable or effective, the complaining party can then seek to suspend concessions in other sectors under the same agreement. If even this is not

[316] These bonds would be held, in the US view "to preserve the US's right to impose 100% duties as of 3 March 1999 pending the release of the arbitrators' final decision', see http://www.wto.org/english/news_e/news01_e/dsb_10jan01_e.htm

[317] Valles and McGivern, above 311, 74

[318] Ibid.

[319] The WTO covered agreements consist of three groups of separate agreements: the GATT 1994 (together with other multilateral trade agreements on trade in goods), the GATS and the TRIPs Agreement. Various sectors are defined within each agreement. See http://www.wto.org/english/thewto_e/whatis_e/eo1/e/wto08/wto8_44.htm (Accessed 10/05/2005).

practicable and the circumstances are serious enough to warrant it, the complaining party can finally seek to suspend concessions under another covered agreement.[320]

When the EC was unable to comply with the adopted panel decision in *EC-Hormone*, the US, under Article 22 of the DSU, requested the authorization of suspension of concessions. In the process of drafting a list of goods included in the product categories on the request for authorization to suspend under Article 22.2 of the DSU, a much broader list was suggested which called this a "carousel retaliation technique",[321] This 'carousel' retaliation is an arrangement where by the concessions and other obligations subject to suspension will change every now and then, in particular in terms of product coverage.[322] This type of retaliation was attempted to give teeth to the countermeasures in the WTO, [323] as "the successful use of sanctions can be attributed largely to the credible threat of retaliation."[324] Carousel retaliation has become an issue in the ongoing reform of the DSU.[325]

In the *EC-Hormones,* the arbitrator granted the US the right to suspend a concession as against the EC. The original panel in the case served as the arbitrator in this case. Under the DSU, the targeted Member State could only object to the level of suspension proposed and the scope had already been set for the kind of products to which suspension of concessions could be applied.[326] As the case was concerned with trade in goods, the US had the freedom to target any good for the suspension of concessions.[327] In *EC – Hormones*, the US retaliated by imposing carousel retaliations on European products, ranging from cheese to handbags.[328] Although the carousel retaliation is not expressly outlawed by the DSU,[329]

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[320] The DSU, above n 1, Art 22.3.(a, b, c)
[321] Daniel Wüger, 'The Never Ending Story: The Implementation Phase in the Dispute Between the EC and the United States on Hormone-treated Beef', (2002) 33 *Law & Policy International Business* 777, 804
[322] See decision by Hormones Arbitrator, WTO Doc. WT/DS26/ARB adopted 12 July 1999, ¶ 22 [hereinafter hormones arbitrator]
[323] Rosemary A. Ford, 'The Beef Hormone dispute and carousel sanctions: A roundabout way of forcing compliance with World Trade Organisation Decision', (2002) 27 *Brooklyn Journal of International Law* 543, 566
[324] Ibid.
[325] Wuger, above n 321 , 811
[326] The DSU, above n 1, art 22 (f)(i) which stated that "…sector means: with respect to goods, all goods"
[327] Wüger, above n 321, 796
[328] In *EC-Hormones*, the US and Canada, as the complainants, were also authorized by the DSB to impose punitive tariffs on certain EC exports and were entitled to suspend tariff concessions over its trade with the EC to the amount of $116 million and CDN$11.3 million per year respectively. This level of suspension was

it is considered as a danger to the WTO system as well as the widely dispersed range of small business community which economically and politically are not well prepared for these actions. It is argued that this possibility of retaliation should be excluded from the DSU review discussion, as this issue in the DSU system is regarded as the 'last resort' of the mechanisms and has only been invoked in a few cases and a number of Member States prefer to comply with the DSB recommendations as their obligation under the DSU than chose the retaliation option.

4.7.4.3 Post-retaliation

Following the DSB ruling on *EC-Hormones*, the EC claimed to have removed the measure found to be inconsistent with the GATT agreement by adopting Directive 2003/74/EC of the European Parliament and of the Council of 22 September 2003 amending Council Directive 96/22/EC concerning the prohibition on the use of certain substances in stockfarming that contained a hormonal or thyrostatic action and beta-agonists.[330] The Directive was published and entered into force on 14 October 2003. The EC maintained that the new directive was based on a comprehensive risk assessment and, in particular, on the opinion of the independent Scientific Committee on Veterinary Measure relating to public health.

On 27 October 2003 the EC notified the DSB of the adoption, publication and entry into force of this Directive as well as the preceding scientific risk assessments. The EC also argued that since it considered itself to have fully implemented the recommendations and rulings of the DSB, the US could no longer justify its suspension of concessions.[331] The US, however, disagreed and asserted that the new Directive was inconsistent with the EC's obligations under the SPS Agreement and as such, the US was entitled to continue its imposition of retaliatory duties on certain products from the EC.[332]

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considered as equivalent to the level of nullification or impairment caused by the EC beef ban. See hormones arbitrator, above n 322

[329] Ford, above n 323, 567

[330] WTO Doc. WT/DS320/1; G/L/713, 10 November 2004, request for consultations by the EC

[331] WTO Doc. WT/DS26/22, WT/DS48/20, 28 October 2003, communication from the EC

[332] The WTO DSB, Minutes of Meeting held on 7 November 2003, WT/DSB/M/157, 18 December 2003, ¶ ¶ 30, 32

The EC then requested consultations with the US government on 10 November 2004 and other WTO Members States, including Canada, Australia, and Mexico requested permission to join the consultations. The parties failed to reach a mutually agreeable solution. On 14 January 2005, the EC requested the establishment of a panel, but this was blocked by the US.[333] On 17 February 2005, the DSB established a panel.[334]

The EC maintained that it would respond to the request made by the US under the SPS Agreement for an explanation of the new EC Hormones Directive which had already been in place for more than a year. The US retorted that it had requested this explanation in December 2004 but that there had been no response from the EC. Meanwhile, Canada raised the issue that although the EC considered itself to have complied, there had been no multilateral confirmation of this. The EC had held that its unilateral determination and declaration of compliance overrode and annulled multilateral authorisation and Canada responded that this position was legally untenable.

This case is now before a WTO panel for the second time. In this 'second stage' of the dispute settlement proceedings, the EC is asserting that the US action to continue with retaliation is inconsistent with the its obligations under Article I and II of GATT 1994 as well as Articles 23.1, 23.2(a) and (c), 3.7, 22.8 and 21.5 of the DSU[335] on the grounds that the underlying objective of the WTO to promote international trade is being defeated and that the suspension of concessions was only ever intended as a temporary measure to be lifted as soon as the offending party removed the objectionable measure.[336] *EC –Hormones* is a case that involved the actual invocation of the WTO's retaliatory suspension procedure and which revealed ambiguities in the DSU as to what authority was responsible for determining whether the breaching party had adequately complied with the DSB's recommendations or ruling.

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[333] WTO DSB Establishes panels on US and Canada Sanctions in 'hormones' dispute, see http://www.wto.org/english/news_e/news05_e/dsb_17feb05_e.htm > at 11/05/2005

[334] WTO Doc. WT/DS320/6, 17 February 2005 Request for establishment of a Panel by the EC; The following members requested to be third parties: Australia, Canada, Mexico, Chinese Taipei and China [hereinafter the EC request for a panel-Hormones case]

[335] By continuing the retaliation, the US violate the rules and procedures of the DSU (Art 23.1), inconsistent with the findings contained in the panel and AB reports (Art 23.2.a), within the reasonable period of time (Art 23.2.c), as the last resort (Art 3.7), temporary (Art 22.8) and recourse to these dispute settlement procedure (Art 22.5), see the DSU, above n 1

[336] The EC request for a panel-Hormones case, above 334

4.8 Conclusion

Major international trade organizations generally employ dispute settlement mechanisms to resolve disputes that arise among their Member States and most utilise *ad hoc* panel systems where panels that are established for each dispute are dissolved when the dispute ends. This system has its advantages as well as its disadvantages. In the WTO context, there has been a push for a more permanent panel system to be set up replacing the current *ad hoc* system. A permanent system, however, is not without its shortcomings and further research on this field is needed before it can be said for certain that the advantages of such a system outweigh the disadvantages of the other.

With respect to the impartiality of panel decisions, most organisations have regulations and procedures in place to ensure that the panellists remain unbiased and objective. The majority of the mechanisms stipulate that panellists to a dispute cannot be comprised of citizens of Member States which are parties or third parties to a dispute. Besides this nationalistic connection, panellists are also required not to have any potential conflict of interests or functions. These instruments, however, only create a modest measure of protection and parties to the dispute are still encouraged to select panellists who are renowned for their objectivity and lack of bias.

Transparency is another important issue that cannot be ignored in a discussion concerning dispute settlement mechanisms as the concept relates to fair processes. In the WTO, transparency strengthens public confidence in the covered agreements and the more open and transparent panel proceedings are, the more accountable Member States would be. Issues such as private rights to appear before panels, *amicus curiae* submissions and public meetings are significant matters that support a system's transparency.

In practice, most of the tribunals still keep the panel proceedings secret, and argue that open up to the public would create 'trial by media', even though this view is not well founded. By opening the hearing, this not only provides the public with the information that could affect their economic welfare but also encourages the better quality of panellists and panel reports. The precedential value of panel decisions and the existence of an appeal procedure are also crucial for the system as these two factors can strengthen 'jurisprudence'

of the mechanism and enhance consistency of the panel decisions and promote the Member States confidence toward the system.

The enforceability of the decisions or recommendations is the last critical point that completes the whole dispute settlement proceedings as a decision that cannot be enforced is considered to be useless and to have been made in vain. International law, however, lacks coercive enforcement powers and implementation problems have abounded. WTO practice overall has, nevertheless, demonstrated that retaliatory procedures do encourage conformity with DSB recommendations.

This chapter has evaluated key procedural issues thoroughly. They are significant for the system in promoting effective resolution for the disputes among Member States. An effective mechanism is not only a *sine qua non* for international trade organisations as this would interpret the right and obligations of the Member States to be consistent with the covered agreements but it also preserves the equality of the Member States in pursuing their rights before the panels. From the discussion above one can compare and consider a mechanism that may go well for certain conditions and cultures, such as ASEAN. The dispute settlement mechanism in ASEAN will be analysed in the next chapter.

PART III

SETTLEMENT OF TRADE DISPUTES IN ASEAN
FROM DIPLOMACY TO LEGALISM

CHAPTER 5 – TRADE DISPUTE SETTLEMENT IN ASEAN UP TO AFTA AND THE 1996 PROTOCOL

5.0 Introduction

To date, ASEAN appears to have been successful in preventing conflict among its members that could ultimately have led to destabilisation of the region. The 'ASEAN way' which as discussed in Chapter 1, involves 'minimal institutionalization, the emphases on dialogue, consultation and consensus, quiet diplomacy, a non-confrontational approach, and non-interference in domestic affairs'[1] has been utilized to reduce tensions among ASEAN Members. In reality, however, ASEAN has been successful in preventing 'political' conflict. It has not been as successful in preventing disputes over trade. As ASEAN evolves into an integrated economic community by 2020, disputes over trade matters will only become more complex and more numerous. Thus, as noted in Chapter 2[2] the Bali Concord II calls for the strengthening of ASEAN institutions and the establishment of an effective dispute resolution mechanism in order to accommodate the need for consistency, certainty and predictability.

As discussed in Chapter 3, the adoption of a legalistic DSM has proven to be a necessary part of economic integration activities in other regions. This is also the case in the ASEAN region where, if economic integration is to fully succeed, adoption and implementation of a legalistic DSM is crucial. This will not only benefit ASEAN member governments to understand their rights and obligations under trade and investment agreements, and to pursue the implementation of those rights and obligations, but will also encourage foreign investors and individual entities that are doing business and investing their capital in the region. In this respect, a formal dispute resolution procedure

It will be recalled that the Treaty of Amity and Cooperation in South East Asia 1976 (TAC)[3] as amended by the 1987 and the 1998 Protocols calls for the peaceful settlement of

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[1] Mely Caballero-Anthony, 'Partnership for peace in Asia: ASEAN, the ARF and the United Nations', (2002) 24 *Contemporary South Asia* 528, 532

[2] Section 2.4.1 Chapter 2

[3] Treaty of Amity and Cooperation in South East Asia (TAC), signed at the Bali Conference, 1st ASEAN Summit, February 24, 1976, see <http://www.aseansec.org/1654.htm > at 25/10/2004 [hereinafter TAC]

disputes in the ASEAN region. Specific mechanisms for the settlement of trade disputes among ASEAN members are found in the 1992 CEPT-AFTA Agreement,[4] the 1996 ASEAN Protocol on Dispute Settlement Mechanism[5] (the ASEAN Protocol) and, more recently in the 2004 ASEAN Protocol on Enhanced Dispute Settlement Mechanism (the Enhanced Protocol) adopted as a follow up to the Declaration of Bali Concord II.[6] The Enhanced Protocol entered into force on 24 November 2004 and is to be applied to trade disputes among ASEAN Members.[7]

The adoption of the Enhanced Protocol marks the culmination of a process of development of the trade dispute resolution mechanisms in place in ASEAN from tools of diplomacy to legalistic adjudicatory mechanisms. The Enhanced Protocol, its provisions, its relationship with the WTO system and its suitability to the ASEAN milieu are examined in depth in Chapters 6 and 7. This chapter examines the precursors to the Enhanced Protocol as a demonstration of the shift from diplomacy to legality a shift that mirrors that which has taken place in other trading organizations as discussed in Chapter 3. This Chapter begins with a discussion of the rationale for an ASEAN trade dispute resolution mechanism and a discussion of the early approach to trade dispute resolution in the region. It then examines the provisions for settlement of disputes under the AFTA Agreement and the 1996 Protocol.

5.1 The Early Approach to Trade Dispute Settlement in ASEAN

Despite its origins as a relatively ineffectual and informal grouping of states ruled by the principle of non-interference and a readiness only to move at the speed of its slowest member, ASEAN has developed from a simple five country association into a ten member

[4] Agreement on the Common Effective Preferential Tariff Scheme for the ASEAN Free Trade Area, done at Singapore, 28 January 1992, see < http://www.aseansec.org/12375.htm >at 14/05/2005 [hereinafter CEPT-AFTA Agreement]

[5] The 1996 ASEAN Protocol on Dispute Settlement Mechanism, see <http://www.aseansec.org/7813.htm> at 05/06/2003 [hereinafter the 1996 Protocol]

[6] The ASEAN Protocol on Enhanced Dispute Settlement Mechanism of 2004, done at Vientiane, Laos PDR on 29 November 2004, see <http://www.aseansec.org/16754.htm> 20/09/2005 [hereinafter The Enhanced Protocol]

[7] This Protocol should apply to disputes under the Agreement (the AFTA Agreement and its amended Protocol) and 'covered agreements' i.e., agreements listed in Appendix I of the Protocol (46 agreements) and future ASEAN economic agreements, see, *ibid*, Art 1; for detailed discussion of the Enhanced Protocol see section 6.1 (chapter 6)

free trade area. This enlargement has undoubtedly affected its decision making processes as well as its dispute resolution processes, in that it is much harder to reach consensus amongst ten members than six members. It is therefore likely that more and more complex, disputes will arise.

As discussed in Chapter 1, ASEAN has traditionally relied on the informal principle of the "ASEAN Way" as a diplomatic basis to resolving disputes. This principle is based on the mutual respect of each other's independence, sovereignty, territorial integrity and non-interference in each other's affairs. These norms are codified in the TAC which calls for the creation of a system for peaceful dispute settlement.[8] Interestingly, Article 14 of the TAC calls for the establishment of a 'High Council' comprised of ministerial representatives from each state party to take cognizance of disputes while Article 15 empowers the High Council to,

> recommend to the parties in dispute appropriate means of settlement such as, good offices, mediation, inquiry or conciliation. If the disputing parties so agree, it may constitute a committee of mediation, inquiry or conciliation. [9]

However, the High Council has never been constituted and, at present, no member state has sought recourse to any of the provisions given. ASEAN members have continued to prefer a "non-adversarial and non-formal" method of settling their disputes as articulated in consensus building and the *mushawarah* concept.[10] ASEAN's "non-confrontational" model has allowed members to agree to put their disagreements aside, with a view to discussing the issue at a later date, and by doing so, continue to cooperate in current matters. It has not, however, necessarily resolved the dispute, in either security-political or trade disputes. In short, the ASEAN way commonly described as a manifestation of a serious aversion to legalistic procedures.

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[8] Fundamental principles include: (i) mutual respect for the independence, sovereignty, equality, territorial integrity, and national identity of nations; (ii) the right of every state to lead its national existence free from external interference, subversion or coercion; (iii) non-interference in the internal affairs of one another; (iv) settlement of differences or disputes by peaceful manner; (v) renunciation of the threat of use of force; (vi) effective cooperation among themselves, see TAC, above n 3

[9] Ibid, Art 15

[10] For mushawarah concept, see section 1.5.1. (Chapter 1)

This has been evidenced in a number of situations. For example, the diesel engine scheme of Singapore under the ASEAN Industrial Projects (AIPS)[11] failed to increase intra-ASEAN trade due to conflicting economic interests between individual members and regional cooperation. Projects were duplicated at the national and regional levels as other ASEAN Members; in particular, Indonesia and Malaysia also wanted to produce diesel engines. As a consequence, these members simply competed with each other for the regional market for diesel engines when the national plans for diesel engines had been completed. Unfortunately, there was no clear provision on the duplication of AIPS and national products. The Basic Agreement on AIPS stated,

> Upon the allocation of an ASEAN industrial project… similar new national projects can only be established after consultation with member countries and also on condition that the basis for the ASEAN industrial project is not affected by the proposed new national projects. However, similar national projects which have already been firmly planned and are already in their early stage of implementation before the allocation of the AIPS shall be allowed to proceed as national projects. Such projects shall be specified with particulars in the relevant supplementary agreement attached hereto. [12]

This provision allowed the national project to exist together with the AIPS. In other words, no project could expect to have a monopoly position within ASEAN. Ironically, neither a formal institution that could decide whether ASEAN project might not be affected nor a fixed criterion that could be used to define 'affected' was available in ASEAN provisions.[13] The Basic Agreement on AIP was also silent on what institution might exist that could consider whether national projects were 'firmly planned' or 'in their early stages of implementation'.[14]

Initially, Singapore assumed that special regional tariff preferences would be accorded to their diesel engines and that no other diesel engine plant would be allowed to be established in any other ASEAN country.[15] When Singapore's diesel engine project was launched however, it turned out that Indonesia was also developing similar products in co-

[11] For AIP see, section 2.1.2 (chapter 2)
[12] See the Basic Agreement on AIPS, Art.2 (2), see Basic Agreement on AIPS, Kuala Lumpur, 6 March 1980, <http://www.aseansec.org/6373.htm > at 14/09/2005
[13] Marjorie L Suriyamongkol, *Politics of ASEAN Economic Co-operation: The case of ASEAN Industrial Projects*, (1988), 180
[14] Ibid.
[15] Ibid, 152

operation with Deutz of Germany. Likewise, Malaysia had plans for five factories that could produce the same products. The Philippines also already had four plants producing the diesel engines. Suffice it to say, duplication of products occurred. However, despite Singapore's protests, the issue of duplication products remained unresolved and became a major point of disagreement between Indonesia and Singapore [16] which resulted with the withdrawal of the Singapore's AIP diesel engine project in 1978.

Disagreement also arose over Thailand's AIP soda ash project which duplicated an Indonesia plan to develop a national soda ash project that was schedule to start production in 1985, the same year in which the Thai plant was scheduled to come on line.[17] Eventually Thailand's project was cancelled. The point of these examples is to demonstrate the vagueness of ASEAN in handling the issue of national vs. regional interests. They also demonstrated the lack of any formal dispute resolution mechanism within ASEAN to overcome legal difficulties that might arise in the implementation of the schemes.

The implementation of the ASEAN Industrial Complementation (AIC) scheme provides yet another example.[18] This scheme was launched in 1976 but by the end of 1985 it had only had a minimal effect on stimulating intra-ASEAN trade and consultations with the private sector were suggested to identify the implementation problems and solutions thereto.[19] The root of the breakdown of this scheme lay in 'the absence of established goals and guidelines which are shared by the interested private sector bodies and the respective ASEAN governments'.[20] In other words, the scheme was unsuccessful due to the vagueness of regulations regarding product choice, market access and investment funding.[21] Ironically, most of ASEAN countries were successful in cooperating with third parties in setting up their own domestic automotive industries, precisely the type of economic cooperation that was envisaged by this scheme.[22]This is difficult to understand because it is

[16] Ibid
[17] Ibid, 194
[18] For the discussion of the AIC, see section 2.1.2. (chapter 2)
[19] The report of the ASEAN Standing Committee, the Annual Report of the ASEAN Standing Committee (1986-1987), quoted in Srikanta Chatterjee, 'ASEAN Economic Co-operation in the 1980s and 1990s', in Alison Broinowski (ed), *ASEAN into the 1990s,* (1990), 69
[20] Ibid.
[21] Ibid.
[22] Ibid.

clear that they were willing to cooperate with other third parties but did not do the same things for ASEAN.

The implementation of the Preferential Trading Arrangements (PTAs)[23] further illustrates another failure of the ASEAN economic schemes. Introduced in 1977 it was intended to expand intra-ASEAN trade by reducing tariffs on goods produced in ASEAN Members. Under this scheme an ASEAN-based importer would pay a lower tariff rate on a product if it originated from another ASEAN Members than if the same product were obtained from a non-ASEAN Member source.[24] However, this scheme also failed due to the national-regional interests' dichotomy, and the products offered for tariff preferences were products with low import values[25] which affected by rules of origin requirement.[26]

Moreover, the PTAs Agreement[27] provided an opt-out from a country's tariff preferences in the following situations:

(i) if the import of a product enjoying a trade concession was increasing at such a rate that it threatened 'serious injury' to sectors producing similar products in the importing country;
(ii) if a country had overriding balance of payments considerations and needed to protect its foreign exchange reserves by restricting imports;
(iii) if a country needed to limit export of a certain product to ensure sufficient domestic supply; or
(iv) if the country felt that one of the other member countries was not fulfilling its obligations under the trade preferences programme.[28]

However, the PTAs Agreement did not provide further guidance on the interpretation of these exceptions, including the meaning of 'serious injury' or on what institutions should decide disputes relating to differences of interpretation. In addition the Agreement failed to identify any national institutions charged with responsibility to determine whether a state

[23] See the Preferential Trading Arrangements Agreement signed by the ASEAN Economic Ministers in Manila in February 1977 <http://www.aseansec.org/2348.htm> at 12/09/2005 [hereinafter the PTAs Agreement]
[24] See ASEAN Secretariat, *Questions and Answers on the CEPT*, March 1995; For the discussion of the ASEAN Preferential Tariff Arrangements (PTAs), see 2.1.3.(Chapter 2)
[25] Products with low import values, for example, snow ploughs and nuclear reactors which were not exported by other ASEAN countries, see, Sahathavan Meyanathan and Ismail Haron, 'ASEAN trade co-operation: A survey of the issues', in Noordin Sopiee, Chew Lay See, and Lim Siang Jin (eds), *ASEAN at the Crossroads: Obstacles, Options & Opportunities in Economic Co-operation*, (1987), 27
[26] Ibid.
[27] The PTAs Agreement, above n 23
[28] See Meyanathan and Haron, above n 25, 27; see also, the PTAs Agreement, above n 23, Arts. 12. (1) (2), and 14 (2)

had or had not fulfilled its obligations under the PTAs Agreement. Nor were there any clear criteria as to when a country could qualify for exemptions on the basis that it needed to protect its domestic supply.

Clearly, the scope for disputes was great and no effective mechanisms existed for their resolution. In this context is it worth mentioning that the first case ever heard by the WTO under its Dispute Settlement Understanding involved Singapore and Malaysia.[29] ASEAN and its members have certainly not been immune to trade and trade related disputes. This case, brought by Singapore in 1995, involved a dispute between Malaysia and Singapore over the prohibition of imports of polyethylene and polypropylene, the raw materials used for plastics, which had been instituted and maintained by the Malaysian Government under the Customs (Prohibition of Imports) (Amendments) (no.5) Order 1994 dated 16 March 1994. The measures had come into force in April 1994. Meetings between officials including at the ministerial level had failed to resolve the dispute.

Singapore claimed that its benefits under the Agreement were being nullified and impaired since its export of these products had been reduced significantly as a result of the institution and maintenance of the import prohibitions in violation of the Malaysian Government's obligations under, inter alia, Articles X and XI of the GATT[30] 1994 and Article 3 of the WTO Agreement on Import Licensing Procedure.

In response Malaysia argued that the licensing scheme was temporary and would be reviewed at the end of two years. Consultations between the parties failed and Singapore requested the establishment of a panel. Indonesia, on behalf of the other ASEAN Members, suggested further consultations to find a mutually agreed solution.[31] At the DSB meeting on 19 July 1995 however the representative from Singapore, under 'other business' informed the DSB that his government had decided to withdraw its complaint concerning Malaysia's prohibition of the imports of polyethylene and polypropylene.[32] This case demonstrated that

[29] A case between Malaysia and Singapore, see, WTO Documents: WT/DS1/1, 13 January 1995 <http://www.wto.org/english/tratop_e/dispu_e/dispu_status_e.htm> at 1/10/2004

[30] See Article X concerning publication and administration of trade regulations and Article XI on general elimination of Quantitative Restrictions, <http://www.wto.org/english/docs_e/legal_e/gatt47_02_e.htm#articleX> at 22/09/2005

[31] See 'Singapore-Malaysia Dispute takes an edge at WTO', 21 Feb 1995, see <http://www.sunsonline.org/trade/process/followup/1995/02210095.htm > at 29/09/2005

[32] WTO Secretariat, *Dispute Settlement Body Annual Report* (1995); WT/DSB/3, 2 February 1996

the parties settled the dispute without recourse to the panel evidencing the preference for negotiated solutions over legally imposed ones.

5.2 Dispute settlement under AFTA

5.2.1 The need for trade dispute settlement mechanism

Despite their commitment to be bound by the 2002 deadline on reduction tariffs on all products, disputes have arisen as to the implementation of the AFTA Agreement. For example, Thailand and Malaysia have been arguing over automobile tariff reductions since 1995 after Malaysia refused to lower its tariffs for the automobile industry from five per cent to the mandated zero percent by 2002 under the AFTA scheme. Thailand has sought compensation on the basis that this will damage its automobile industry since Thailand is a regional production centre for international auto companies targeting Asian markets. Ironically, ASEAN agreed to allow Malaysia to maintain automobile import tariffs until 2005 so that its national car company Proton would not be hurt.[33] This appears to contradict Malaysian's commitment to comply with its' agreed tariff reductions rather than allowing an exception it might be expected that ASEAN would impose a requirement to compensate. This did not, however, happen.

There were fears that this incident had set a precedent which would encourage other ASEAN members to delay tariff reductions on other products. For example, the Philippines announced its intention to delay tariff cuts to its petrochemical industry.[34] Indonesia lobbied for sugar to be excluded from the 2002 deadline stating that Indonesian sugar farmers were not ready to reduce tariffs.[35] The local Indonesian pharmaceutical industry was also worried that they would face barriers in entering the ASEAN markets due to other members setting up non-tariff barriers, including imposing complicated requirements on Indonesian drug producers to register their products in their respective countries.[36]

It will be recalled that the AFTA Agreement provides an opt-out exception which allows member countries to suspend tariff concessions that have been previously granted,

[33] 'Southeast Asia Adrift', *Asiaweek* (Singapore), 1 September 2000
[34] 'Editorial: ASEAN must move towards integration', *Bangkok Post* (Bangkok), 5 May 2001
[35] 'RI ready for full 'implementation of AFTA in 2002', *The Jakarta Post* (Jakarta), 22 March 2001
[36] 'Will AFTA or Won't AFTA', *The Jakarta Post* (Jakarta), 2 January 2002

when imports threaten to cause serious injury to domestic industries producing similar or directly competitive products.[37] This exception is analogous to GATT Article XIX, which provides an 'escape clause' for serious injury to competing domestic producers imposed on a most favoured nation (MFN) basis.[38] ASEAN has, therefore, employed a peer-pressure approach to discourage its members from delaying the implementation of the AFTA. This approach has effectively speed up the implementation of AFTA since those members that are "lagging behind are pressured to abandon their excuses and move forward with the group, while more aggressive free traders are encouraged to forge ahead and pull the remaining ASEAN countries with them".[39]

Of course, commitments under the CEPT-AFTA scheme are legally binding on states parties as are the tariff reductions provided for. Member countries are therefore legally bound to fulfil their commitments under the CEPT-AFTA Agreement while Malaysia eventually agreed to lower its tariffs on automotive units earlier than originally schedule.[40] This case demonstrated that disputes under the AFTA Agreement were, and are, a very real possibility, although it must be noted that no dispute has yet been formally reported to ASEAN.

5.2.2 The AFTA dispute settlement regime

The ASEAN initiative to form a free trade area has clearly brought challenges to the traditional ASEAN way of settling disputes. Implementation of the AFTA is dependant on the political will of ASEAN members. However, to some extent it is also dependant on the existence of a reliable formal dispute settlement mechanism as well. The ASEAN Way which, as discussed in Chapter 1, is based on informal understanding, conciliation, negotiation and consensus, was inadequate to cope with trade disputes that might arise from the implementation of the AFTA. Thus a new approach was needed to ensure both

[37] The CEPT-AFTA Agreement, above n 4, Art 6.1
[38] Peter Kenevan and Andrew Winden, 'Flexible Free Trade: The ASEAN Free Trade Area', (1993) 34 *Harvard International Law Journal* 224, 232
[39] Ibid, 229
[40] In December 2004, Malaysia announced that it would reduce tariffs for completely built up (CBUs) and completely knocked down (CKDs) automotive units to meet its commitment under CEPT-AFTA Agreement, which was one year earlier than its original schedule, i.e, 1 January 2005, see ASEAN Secretariat, *ASEAN Annual Report 2003-2004*, <http://www.aseansec.org/ar04.htm> at 19/10/2004

consistencies of the mechanism as well as of the outcomes. The AFTA marks the first step in the long process of moving to the acceptance of a fully legalistic and institutionalised ASEAN trade dispute settlement mechanism.

The Framework Agreement on Enhancing ASEAN Economic Cooperation[41] under which the AFTA was adopted provides that:

> Any differences between the Member States concerning the interpretation or application of this Agreement or any arrangements arising there from shall, as far as possible, be settled amicably between the parties. Whenever necessary, an appropriate body shall be designated for the settlement of disputes.[42]

This article, the only one concerned with dispute settlement in this Framework Agreement, provides no further guidance as to what should occur in the case of parties failing to settle a dispute amicably. It does indicate however, that an appropriate body may be designated for the purpose of resolving disputes. This is then expanded by Article 8 of the CEPT-AFTA which provides:

> (1) Member States shall accord adequate opportunity for consultations regarding any representations made by other Member States with respect to any matter affecting the implementation of this Agreement.
> (2) Member States, which consider that any other Member State has not carried out its obligations under this Agreement, resulting in the nullifications or impairment of any benefit accruing to them, may, with a view to achieving satisfactory adjustment of the matter, make representations or proposals to the other Member State concerned, which shall give due consideration to the representations or proposal made to it.
> (3) Any differences between the Member States concerning the interpretation or application of this Agreement shall, as far as possible, be settled amicably between the parties. If such differences cannot be settled amicably, it shall be submitted to the Council referred in Article 7 of this Agreement, and, if necessary to the ASEAN Economic Ministers (AEM).[43]

As Article 8(1) makes clear consultation is intended as the first point of reference for the resolution of any disputes. Pursuant to this article ASEAN members should

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[41] See, Framework Agreement on Enhancing ASEAN Economic Cooperation, Jan.28, 1992, <http://www.aseansec.org/12374.htm> at 23/09/2005 as amended by the Protocol to Amend the Framework Agreement on Enhancing ASEAN Economic Cooperation signed in Bangkok on 15 December 1995 <http://www.aseansec.org/12373.htm at 29/09/2005 [hereinafter the Framework Agreement on enhancing economic cooperation]

[42] Ibid, article 9

[43] The CEPT-AFTA Agreement, above n 4, Art.8

facilitate consultations in order to solve differences among them. Even when a compliant has been made by one state against another on the basis that the latter's acts or omissions 'nullified or impaired' a benefit accruing to the former all that is required is consultation and the according of 'due consideration'. However, if the parties are still unable to resolve their dispute through consultation, the aggrieved party may request the AFTA Council to resolve the dispute.

The AFTA Council is the ministerial level body established under Article 7. It is supported by the ASEAN Economic Ministers (AEM) to conduct dispute resolution in respect of the AFTA Agreement.[44] It is comprised of one nominee from each Member State and the Secretary-General of the ASEAN Secretariat and is responsible for 'supervising, co-ordinating and reviewing the implementation of the CEPT-AFTA Agreement'[45] and assisting the AEM in all matters relating thereto. The creation of this type of Council as a dispute settlement body is not unique to ASEAN. It is also utilized by NAFTA where the NAFTA Free Trade Commission[46] which is given a role as mediator of disputes under the NAFTA can be regarded as analogous to the AFTA Council.[47]

The Senior Economic Officials' Meeting (SEOM) also supports the Council in the performance of its functions. Where the Council has been unable to find a satisfactory solution during previous consultations it may then seek guidance from the AEM. However, it should be noted that there are no procedural provisions stipulated which either the Council or the AEM must follow in dealing with these disputes. It is also not clear whether the persons in the AEM or the AFTA Council act in their individual capacity or as representatives of their respective states. This point is crucial to the question of the independence of these institutions as dispute settlement bodies. If they perform as

[44] Ibid, Art.7.1
[45] Ibid.
[46] The Free Trade Commission comprises of cabinet-level representatives of the Parties or their designees; see NAFTA, Art 2001.1, NAFTA Documents relating to Dispute Settlement Procedures, printed in Ralp H Folson, Michael W Gordon and John A Spanogle, *Handbook of NAFTA Dispute Settlement*, (1998), Part III, D1-1, Art. 2005 [hereinafter NAFTA DSM]; The Commission is responsible for supervising the implementation of the agreement; oversee its further elaboration; resolving disputes that may arise regarding its interpretation or application; supervising the work of all committees and working groups established under this Agreement; consider any other matter that may affect the operation of this Agreement, Art 2001.2, ibid.
[47] Ibid, Art. 2007; see also Kenevan and Wilden, above n 38, 237

individuals this will ensure the impartially of decisions as opposed to if they act as the ASEAN Members' representatives.

5.2.3. The AFTA dispute settlement machinery

The AFTA Council was launched on September 11, 1992 in Bangkok, Thailand.[48] Its responsibilities include receiving submissions relating to AFTA disputes involving ASEAN members where members have failed to settle disputes amicably. The Council meets annually in order to formulate annual reports consisting of a review of the implementation of the CEPT Scheme and to carry out policy work to follow-up on mandates from the ASEAN Summit in addition to discussing other relevant issues.

To further support the implementation of the CEPT Scheme for AFTA, the 26th ASEAN Economic Ministers Meeting in September 1995 agreed to establish an AFTA Unit in the ASEAN Secretariat and national AFTA Units in each respective member government.[49] The purpose of these units is to ensure the smooth implementation of the CEPT Scheme by monitoring the scheme and providing a quick response mechanism to possible problems. The units also act as a channel for information on AFTA and a forum in which private sector queries and complaints can be raised.[50]

At the 32nd AEM Meeting on 5 October 2000, ASEAN ministers endorsed a protocol that would assist in the settlement of free trade disputes in the region. At the fourth ASEAN Informal Summit in November 2000, ASEAN members certified a joint press statement on the Protocol regarding the implementation of the CEPT Scheme Temporary Exclusion List.[51] This protocol sets out a framework for compensation to be provided by AFTA members that do not comply with agreed tariff reductions.[52] Under this protocol a member state is allowed to temporarily delay the transfer of a product from its Temporary

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[48] See joint Press Statement of 2nd AFTA Council Meeting, Philippines, October 1992, <http://www.aseansec.org/12397.htm > at 07/10/2004

[49] See AFTA and National AFTA Units, <http://www.aseansec.org/10544.htm> at 11/10/2004

[50] Ibid.

[51] See the Fourth ASEAN Informal Summit, 22-25 November 2000, Singapore, <http://www.aseansec.org/11713.htm> at 1/10/2004

[52] See the Protocol regarding the Implementation of the CEPT Scheme Temporary Exclusion List was signed in the fourth ASEAN informal summit 22-25 November 2000 , < http://www.aseansec.org/5306.htm> at 26/09/2005 [hereinafter Protocol for CEPT Scheme]

Exclusion List (TEL) into the Inclusion List (IL) or to temporarily suspend its concession on a product already transferred into the Inclusion List.

In order to get this concession, a written submission must be made to the AFTA Council, which should include information on the product whose transfer is to be temporarily delayed or the concession which is temporarily suspended, the duration of the delay of the suspension requested, the reason for the request and the real problems faced. The submission will then be considered by the relevant ASEAN bodies and separately between members.

Separate discussions may include a provision for compensatory adjustment measures which may take any form including those under the agreement, mutually agreed to by the applicant member state and member state having principal or substantial supplying interest. In principle, any compensatory adjustment negotiated shall be extended on a most favoured nation (MFN) basis to all other member states.

5.2.4 An Assessment of the AFTA regime

It should be underlined that the AFTA Agreement has broad, undefined and vague provisions which are subject to differing interpretations such as, for example, 'sensitive' and 'temporary' list, 'adequate opportunity for consultations', and general exceptions.[53] All of these provisions provide member states with a legal justification for evading their treaty obligations and introducing protectionist measures like quantitative restrictions. Thus, in order to pre-empt or resolve trade disputes, ASEAN needs a proper mechanism that can be utilized by its Members when a trade dispute arises. Only by taking this kind of approach can enforcement of the Agreement be preserved. The AFTA Agreement however provides a mechanism that lacks the detail necessary for effective results. As a consequence, the parties have little direct guidance in resolving their disputes.[54]

[53] Article 9 of the CEPT for AFTA Agreement on 'general exceptions' enables each ASEAN country to take action and adopt measures 'which it considers necessary for the protection of its national security, the protection of public morals, the protection of human, animal or plant life and health, and the protection of articles of artistic, historic and archaeological value', the CEPT-AFTA Agreement, above n 4, art.9

[54] Deborah A Haas, 'Out of Others' Shadows: ASEAN moves toward Greater Regional Cooperation in the face of the EC and NAFTA', (1994) 9 *American University Journal of International Law & Policy* 809, 893

Most fundamentally, there is no provision in the AFTA Agreement for the conduct of judicial or quasi-judicial dispute settlement or adjudication as a formal type of dispute resolution. In other words, the parties have to settle their disputes without involving judges and lawyers. Government officials, politicians and policy decision makers are given the power to resolve disputes. Hence, this agreement facilitates the use of non-judicial procedures, since all decisions made by AEM are made through political and diplomatic channels. It also has no clear mechanism for disputes to be settled. This is a drawback of the Agreement.

One may compare this process with the GATT/WTO institutional development. In the history of the application of the General Agreement on Tariffs and Trade (GATT) there were tensions between pragmatist and legalist approaches over how international trade dispute resolution should be structured.[55] The pragmatists have supported negotiation and political compromise as methods of dispute resolution based on the belief that such systems provide the best means of coping with power relationships between countries.[56] The power status of the parties is a critical point in this approach. On the other hand, legalists have advocated the creation of rule-based trade tribunals that can move world trade towards a governance system based on the 'rule of law.'[57] According to this view, since the 'GATT is both law and international obligation',[58] meaning, that as consists of arrangements to promote cooperation among its Contracting Parties and requires strict compliances with those rules, the system should be more focused on the adjudication of the disputes by an impartial third-party on the basis of established rules.[59]

However, despite the fact that the GATT is a legal instrument, the GATT system was essentially a pragmatic one as it focused on diplomacy and voluntary compliance.[60] Its success story in its early years was largely due to the 'homogeneity of its initial members

[55] John H Jackson, *Restructuring the GATT System*, (1990), 51-3; Miquel Montana I Mora, 'A GATT with Teeth: Law wins over politics in the resolution of International Trade Disputes', (1993) 31 *Columbia Journal Transnationals Law*, 103; G Richard Shell, 'Trade Legalism and International Trade Theory: An Analysis of the World Trade Organisation', (1995) 44 *Duke Law Journal* 829
[56] I Mora, above n 55, 110
[57] Shell, above n 55, 833
[58] I Mora, above n 55, 111
[59] Jackson, above n 55, p 51
[60] I Mora, above n 55, 111

and the consensus to support the GATT rules.'[61] As GATT membership increased, so too, the tensions amongst the Contracting Parties who had competing interests. Disputes become increasingly complicated involving competing values. In the case of dispute settlement, the consensus approach failed to address these competing values,[62] in particular, thanks to the requirement that adoption of GATT panel reports required the affirmative vote of all Contracting Parties, including the losing party. As a consequence, the losing party could block the approval of the decision. Refusal to adopt reports regrettably did take place frequently resulting in a decrease in compliance with the system.[63] In the end, the GATT Contracting Parties lost confidence on the GATT panel system and this eventually caused its deterioration.

The WTO, the successor of the GATT, shifted from the GATT pragmatic approach to a legalistic strategy by adopting a rigorous adjudicatory and enforcement mechanism. The WTO system differs from the GATT system in that it creates a single dispute resolution mechanism,[64] including an appellate body,[65] and utilizes 'negative consensus' for the adoption of reports.[66] Its procedures are quick with disputes being settled within 18 months, including time for appeals. Since its inception, the WTO system has been increasingly utilised by WTO members, including developing countries, to considerable effect. To date over 300 cases have been brought to the DSB under the DSU, since it started

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[61] Ibid

[62] For example, competing values between trade liberalization and environmental values; see Robert Howse, 'Adjudicative Legitimacy and Treaty Interpretation in International Trade Law: The early years of WTO jurisprudence', in J. H. H. Weiler, *The EU, the WTO and the NAFTA: Towards a common law of International trade?*, 2000, 38; this occurred, for example, in the *Tuna/Dolphin* case in the early 1990s. Id. The issue was the intention of the US to enforce a regime to protect dolphins for biodiversity reasons (which already applied domestically, so it was non-discriminatory measures and in line with Article XX of GATT which gives exception GATT-inconsistent measures for the animal life or health reasons), In this case, the panel was called for adjudication of potentially competing trade liberalization and environmental values. Id. Under the WTO, these competing values have been provided in an obvious and explicit way in treaty provisions, for example, the WTO agreements on Technical Barriers to Trade and on Sanitary and Phytosanitary Measures, the Agreement on Trade Related Intellectual Property. Id. The consistency of panel decisions could be preserved. Id.

[63] Kendall W. Stiles, 'The New WTO Regime: The Victory of Pragmatism', (2000) 4 *Journal International Law & Practice* 3, 9

[64] See the Final Act of the WTO, Annex 2, the Understanding on Rules and Procedures governing the settlement of disputes, < http://www.wto.org/english/docs_e/legal_e/28-dsu_e.htm#3> at 7/02/05 or for printed version, WTO Secretariat, *The WTO Dispute Settlement Procedures: A Collection of the Relevant Legal Texts*, (2nd ed, 2001) [hereinafter the DSU]

[65] Ibid, Art.17.1

[66] Ibid, Art.2.4

operating in January 1995, compared to the final total of 300 cases filed during the 47 years of the GATT.[67] It is true that of those 300 cases, not all decisions have been complied with ('Bananas' case and 'Beef Hormones' cases are examples for this). However, the significant number of WTO members bringing their disputes under the WTO DSU is a signal of the confidence of WTO Members in the WTO system. Overall, the DSU appears to be serving the WTO Members well.

As the GATT/WTO context, the need for institutionalisation and legalisation of dispute settlement mechanisms has become increasingly apparent in the ASEAN context. As will be seen in the following sections, this move to formal legalism has almost come to fruition.

5.3. The 1996 Protocol on Dispute Settlement Mechanism (the 1996 Protocol)

After the establishment of the AFTA, the need for an effective trade dispute settlement mechanism in the region became apparent. The CEPT-AFTA Agreement only provides for consultations when the member states are experiencing differences concerning the interpretation or application of the Agreement.[68] Consequently there was little guidance for parties in resolving their disputes. An institutional mechanism to resolve disputes had been on the AFTA Council's agenda since its third meeting in December 1992.[69] In 1995 the AEM called for strengthening some of the mechanisms governing ASEAN economic cooperation, in particular concerning the commitments ASEAN Members toward the CEPT-AFTA Agreement. It had become clear that the informal and cooperative style of decision-making in ASEAN had to be complemented by a more rule-based mechanism to ensure transparency and the sustainability of regional economic cooperation.[70]

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[67] See 'Dispute settlement, force of argument, not argument of force', <http://www.wto.org/english/thewto_e/minist_e/min03_e/brief_e/brief13_e.htm > at 10/10/2005; It was also documented that over 40 cases have been completely resolved, 70 cases are under legal examination, another 70 cases or so are consulting bilaterally, and over 100 cases have been settled or defused as a result of bilateral consultations. Id.

[68] The CEPT-AFTA Agreement, above n 4, Art 8 (consultation) stated, that member states shall accord opportunity for consultation regarding (i) any representations made by other members with respect to any matter affecting the implementation of this Agreement; (ii) if they felt that any other member states not carried out its obligation under the Agreement, resulting in the nullification or impairment of any benefit accruing to them

[69] See press statement the third AFTA Council Meeting, <http://www.aseansec.org/12567.htm > at 7/10/2004

[70] ASEAN Secretariat, *AFTA Reader*, Vol. V, December 1998, 11[hereinafter AFTA Reader Vol.V]

On 20 November 1996, ASEAN leaders agreed to establish an ASEAN Dispute Settlement Mechanism by signing the Protocol on Dispute Settlement Mechanism.[71] The intention of the 1996 Protocol was to expand on Article 9 of the Framework Agreement to strengthen the mechanism for the settlement of disputes in the area of ASEAN economic cooperation. The 1996 Protocol lists 47 agreements relating to trade in goods, services, intellectual property and investment agreements to which it applies.[72] It also stipulates that it applies to future economic agreements. In other words, it applies to all previous and future ASEAN economic agreements.

The signal feature of the 1996 Protocol is that it marks a significant shift towards legal formalism in the settlement of trade disputes in the ASEAN region. ASEAN Members were obliged to bring any trade dispute under the 1996 Protocol. The objective of the 1996 Protocol is 'to create an expeditious and transparent process of resolving disputes in ASEAN.'[73]

The 1996 Protocol borrows heavily from the WTO Dispute Settlement Understanding (WTO DSU),[74] although it is a much more limited arrangement. While the WTO DSU is comprised of twenty seven very lengthy articles, and four appendices, the 1996 Protocol is a very short document consisting of only twelve articles and two appendices. Both Article 1 of the 1996 Protocol and Article 1 of the DSU contain similar provisions, namely, the coverage and application of the Agreement. The covered agreements' list which is provided in Appendix 1 of the 1996 Protocol is analogous to the annexes in the WTO Agreement. Additionally, both procedures utilize consultation and a panel system to resolve disputes. Like the WTO DSU, the 1996 Protocol also recognises good offices, conciliations, and mediation. They also have an appeal procedure, provide for strict time limits and include provisions relating to compensation or the suspension of concessions.

The two mechanisms differ, however, in some important respects. While the WTO DSU formed a new dispute settlement body, the Dispute Settlement Body (DSB) that is responsible to administer the rules and procedures covered by the WTO DSU, the 1996

[71] The 1996 Protocol, above n 5
[72] Ibid, Appendix 1
[73] AFTA Reader Vol. V, above n 70, 12
[74] The WTO DSU has been discussed in more detail in Chapters 3 and 4

Protocol does not create such body. In addition, while the WTO DSU employs the tool of negative consensus, the 1996 Protocol uses simple majority for its decision making procedures. Finally, the WTO DSU covers terms of reference for panels, multiple complainants, third parties, and adoption of panel and Appellate Body reports. Reflecting its more limited scope, these provisions are not included in the 1996 Protocol.

5.3.1. Consultations

The 1996 Protocol does not provide detailed provisions on consultation. Only three paragraphs are included which provide,

> (1) Member States shall accord adequate opportunity for consultations regarding any representations made by other Member States with respect to any matter affecting the implementation, interpretation or application of the Agreement or any covered agreement. Any differences shall, as far as possible, be settled amicably between the Member States;
>
> (2) Member States which consider that any benefit accruing to them directly or indirectly, under the Agreement or any covered agreement is being nullified or impaired, or that the attainment of any objective of the Agreement or any covered agreement is being impeded as a result of failure of another Member State to carry out its obligations under the Agreement or any covered agreement, or the existence of any other situation may, with a view to achieving satisfactory settlement of the matter, make representations or proposals to the other Member States concerned, which shall give due consideration to the representations or proposals made to it;
>
> (3) If a request for consultations is made, the Member State to which the request is made shall reply to the request within ten (10) days after the date of its receipt and shall enter into consultations within a period of no more than thirty (30) days after the date of receipt of the request, with a view to reaching a mutually satisfactory solution.[75]

In this regard, the 1996 Protocol is similar to the WTO DSU. However, the WTO DSU agreement does provide rather more detailed procedural guidelines on the procedures for and effects of consultations.[76] For instance, the DSU requires member states who request consultations to notify the DSB and the relevant Councils and Committees of the request.[77] The 1996 Protocol does not provide for this, meaning that there is no requirement

[75] The 1996 Protocol, above n 5, Art 2
[76] See the DSU, above n 64, Art. 4.
[77] See ibid, art 4.4, which stated that 'all such requests for consultations shall be notified to the Dispute Settlement Board (DSB) and the relevant Councils and Committees', ibid. Councils and Committees are WTO subsidiaries bodies. WTO belongs to its members where they make their decisions through various

for Member States who request consultation to notify the SEOM.[78] Thus, under the 1996 Protocol, there is no official record of the number of days during which a consultation is to take place. This has the potential to become a problem, when calculating the number of days required to have passed to fit it with the every step in the dispute settlement processes. Since there is no clear date when a case was actually notified to the SEOM, it may be difficult to determine when the following stage for the case is to take.

Under the 1996 Protocol, the member countries in dispute can hold consultations as a first step towards resolving the dispute. Member countries can make a representation or proposal to the other member state concerned when 'any benefit accruing to them directly or indirectly, under the Agreement or any covered agreement is being nullified or impaired, or the attainment of any objectives of the Agreement or any covered agreement is being impeded as a result of other Member States to carry out its obligations under the view to achieving satisfactory settlement of the matter'.[79] This article further stipulates that the member state to which the request is made shall reply to the request within ten days after the date of its receipt and shall enter into consultations within a period of no more than thirty days after the date of receipt of the request, with a view to reaching a mutually satisfactory solution.[80]

In relation to the termination of consultations, the 1996 Protocol stipulates that it may proceed to raise the matter to SEOM within 60 days after the date of receipt of the request for consultation while the DSU states that the party making a complaint may proceed with a request for the establishment of a panel.[81] The SEOM can take either of two

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council and committees whose membership consist of all WTO members. See <http://www.wto.org/english/thewto_e/whatis_e/tif_e/org1_e.htm > at 9/11/2005; Topmost level is Ministerial Conference, the second level is General Council and the third level is Council for each broad area. Id. Each Council has subsidiary bodies, for example, the goods council has 10 committees dealing with specific subject, such as, agriculture, market access, subsidies, anti dumping measures and so on. Id. A party to dispute should notify consultations to Councils and Committees relevant with its case.

[78] SEOM is a central organization for the ASEAN DSM and is assigned to handle all aspects of ASEAN economic cooperation. It is a result of the dissolution of five former ASEAN Committees, namely the Committee on Food, Agriculture, and Forestry (COFAF), Finance and Banking (COFAB), Industry, Minerals and Energy (COIME), Transport and Communications (COTAC) and Trade and Tourism (COTT) and all their subsidiary bodies and committees, all works of which were overtaken by SEOM; see Organizational Structure of ASEAN, <http://www.aseansec.org/13105.htm> at 19/12/2003

[79] The 1996 Protocol, above n 5, Art 2 (2)

[80] Ibid, Art 2 (3)

[81] Ibid, Art 4.1; SEOM meets four times a year and is directly responsible to the ASEAN Economic Ministers Meeting (AEM), which is the highest authority on economic matters and oversees and provides policy

actions; it can establish a panel or it can solve the dispute to achieve 'an amicable settlement'.[82]

5.3.2 Good Offices, Conciliation and Mediation

The 1996 Protocol also provides for good offices, conciliation and mediation. Based on the nature of these procedures the parties to the dispute may agree to begin and terminate these procedures at any time.[83] The ASEAN Secretariat[84] acting in an *ex officio* capacity, can offer these mechanisms to assist members to resolve a dispute.[85]

Once procedures for good offices, conciliation or mediation are terminated, a complaining party may then take the matter to SEOM. Procedures for good offices, conciliation or mediation may continue, however, while the dispute proceeds, as long as the concerned parties agree.[86] In this regard, the 1996 Protocol models itself after the DSU. It must be noted, however, that in the context of the DSU, good offices, conciliation and mediation are rarely, if ever, used.

5.3.3 Panels

According to Article 4 (2) of the 1996 Protocol the SEOM shall establish a panel if the consultations fail to settle a dispute within sixty days after the date of receipt of the request for consultation. This is a rather complicated issue since, as noted above; the parties are not required to notify their request for consultation. Thus, it is not clear where any record of notification may exist from which this time limit can be counted. Therefore, it

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guidance on the implementation of economic cooperation programs and activities. The SEOM itself is comprised of senior economic officials (senior civil servants and permanent secretaries) from all of the ASEAN member states attached to the Ministry of Trade.

[82] Ibid, Art .4 (1), (2), and (3); the WTO DSB does not have this kind of authority, to pursue 'an amicable settlement' for the disputes

[83] The DSU, above n 64, Art 4 (3) and the 1996 Protocol, above n 5, Art 3 (1)

[84] The ASEAN Secretariat is a body that provides secretarial and technical support under the surveillance of the SEOM"s ruling and AEM's decisions, see the 1996 Protocol, above n 5, Art.10 (1) and (2); The ASEAN Secretariat was established under the Agreement on the Establishment of the ASEAN Secretariat in 1976 and its size and function was expanded after the 25th AMM in Manila in 1992; It functions as a secretariat for the ASEAN DSM and maintains an indicative list of governmental and non-governmental individuals qualifying as panel members, see the 1996 Protocol, above n 5, Appendix 2, s.4; The protocol provides for good offices, conciliation or mediation in order to assist Members to resolve disputes.

[85] The 1996 Protocol, above n 5, Art 11 (3)

[86] Ibid, Art.3 (2)

would not be possible to know the exact date when a panel should be established. This constitutes as a drawback of the 1996 Protocol.

SEOM is to establish a panel no later than thirty days after the date on which the dispute has arisen.[87] The size, composition and terms of reference of the panel are to be determined by SEOM [88] and not by the panel itself. It may be said that to some extent the panel is not an independent body. The working procedures of panels are provided for in Appendix 2 of the 1996 Protocol. The composition of panels is similar to that under the WTO DSU with panels to be composed of 'well-qualified governmental and/or non-governmental individuals',[89] namely persons who:

(1) have served on or presented a case to a panel,
(2) served in the Secretariat,
(3) taught or published on international trade law or policy, or
(4) served as a senior trade policy official of a member states.[90]

Panel members are to be selected from persons with sufficiently diverse backgrounds, and a wide spectrum of experience in order to ensure their independence.[91]

The 1996 Protocol provides that in the nomination of panels, the nationals of ASEAN member states should be given first preference, [92] although this is not compulsory. This provision is unique, as was seen in Chapter 3, in that there is no other similar provision in any of the other regional organizations, such as NAFTA, MERCOSUR and the WTO. According to Appendix 2 Part I-4 of the 1996 Protocol, the Secretariat can assist in the selection of panellists by maintaining an indicative list of governmental and non-governmental individuals possessing the above mentioned qualifications. Member states may periodically suggest names of governmental and non-governmental individuals for inclusion on the indicative list, providing relevant information on their knowledge of international trade and of the sectors or subject matter of the covered agreements.[93] The approval of the addition of these names to the list must be presented to the SEOM.

[87] Ibid, Art 5 (2)
[88] Ibid, Art 5 (3)
[89] Ibid, Appendix 2 (I).1
[90] Ibid
[91] Ibid, Appendix 2 Part I (2), these provision are exactly as the same as the DSU, above n 66, art 8
[92] Ibid, Appendix 2 Part I (1)
[93] Ibid, Appendix 2, I-4

5.3.3.1 Appointment of Panelists.

Panels shall be composed of three panellists, unless the parties to the dispute agree, within ten days from the establishment of the panel, to a panel composed of five panellists. Members shall be informed promptly of the composition of the panel.[94] Nationals of Member States whose governments are parties to the disputes shall not serve on a panel concerned with that dispute, unless the parties to the dispute agree otherwise.[95] This provision may prevent prejudice and biased decisions made by panel members who come from member states involved in the disputes.

The parties to a dispute have no power to nominate a panel member, although they can veto panellists in limited circumstances. The Secretariat puts forward nominations for the panel to the parties to the dispute. The parties to the dispute cannot oppose these nominations unless they have a compelling reason.[96]

If there is no agreement on the panellists within twenty days of the establishment of a panel, at the request of either party, the Secretary-General, in consultation with the SEOM Chairman, shall determine the composition of the panel by appointing the panellists whom the Secretary-General considers most appropriate in accordance with any relevant special or additional rules or procedures of the covered agreement or covered agreements which are at issue in the dispute, after consulting with the parties to the dispute. The SEOM Chairman shall then inform the members of the composition of the panel thus formed no later than 10 days after the date the chairman receives such a request.[97] Member states shall undertake, as a general rule, to permit their officials to serve as panellists.[98]

[94] Ibid, Appendix 2, I-5
[95] Ibid, Appendix 2, I-3,
[96] Ibid, Appendix 2, I-6
[97] Ibid, Appendix 2, I-7
[98] Ibid, Appendix 2, I-8

5.3.3.2 The function, authority and responsibilities of the panels

The 1996 Protocol stipulates that the function of the panel is 'to make an objective assessment of the dispute before it, including an examination of the facts of the case and the applicability of and conformity with the sections of the Agreement or any covered agreement, and make such other findings as will assist the SEOM in making the rulings provided for under the Agreement or any covered agreement'.[99] In short, SEOM, not the panel, is given the power to make rulings regarding disputes. This is different from the DSU, which strengthens the adjudicative function of a panel, by providing that 'the report (of a panel) shall be adopted at a DSB panel unless a party to the dispute formally notifies the DSB of its decision to appeal or the DSB decides by consensus not to adopt the report'.[100]

Panels have the right to seek information and technical advice from any source they deem appropriate.[101] Although normally parties supply all the information, panels do not have to rely on them completely. Rather, Article 6.1 of the 1996 Protocol provides that the panel shall regulate its own procedures in relation to the rights of parties to be heard and its deliberations. It must submit its findings to the SEOM within sixty days of its formation, except in certain circumstances it may be granted an additional ten days.[102]

Panels have quasi-judicial nature to ensure the neutrality of panels themselves. By performing as individual capacities, the panellists can keep to be neutral in rendering the decisions. In this respect, panellists serve in their individual capacities, neither as government representatives nor as representatives of any organization. Member states must not give instructions or seek to influence them as individuals with regard to any matter being heard before a panel.[103] In order to secure the neutrality of the report, panel deliberations must be confidential, namely, panel reports must be drafted without the presence of the parties in light of the information provided and the statements made.[104]

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[99] The 1996 Protocol, above n 5, Art 5 (1)
[100] The DSU, above n 64, Art 16 (4)
[101] The 1996 Protocol, above n 5, Art 6.3
[102] Ibid, Art 6.(2) and (4)
[103] Ibid, Appendix 2, I-9
[104] Ibid, Art.6.4, this provision is the same as the DSU, above n 64, Art.14, but the latter further provides that 'opinion expressed in the panel report by individual panellists shall be anonymous'.

5.3.3.3 Panel reports

The 1996 Protocol provides that it is the SEOM who can make a ruling regarding a dispute being considered before the panel.[105] It further states that the SEOM shall deliver its deliberations and make a ruling on a dispute within thirty days from the submission of the report by the panel. This time limit can be extended by ten days in exceptional cases.

The SEOM must make a ruling based on a simple majority. The DSU, on the other hand, provides that the DSB shall adopt the panel report within sixty days after the date of a panel report to the members, unless the party appeals the report or consensus regarding the report is negative. If one party indicates that they want to adopt the report, then it becomes a formal ruling and is adopted by the DSB.

5.3.4 Appellate Review

According to Article 8 of the 1996 Protocol, member states who are parties to the dispute may appeal the SEOM'S rulings to the ASEAN Economic Ministers (AEM) within thirty days of the ruling. After receiving an appeal the AEM has to issue a decision within thirty days. However in exceptional cases this time limits can be extended for another ten days. The decision is based on a simple majority and is final and binding on all parties to the dispute.

It is worth noting that both the SEOM and the AEM employ a simple majority[106] in making decisions which differs from general ASEAN practice which utilizes consensus in its decision making. This reflects the fact that the area of dispute resolution differs from other areas of ASEAN cooperation in that there is a need for processes to be more flexible but pragmatic, too, in order to speed up the dispute resolution process. Nevertheless, the provision of adoption of reports or decision of appeals by political bodies instead of a standing Appellate Body is still a limitation of the legalistic structure of the 1996 Protocol.

[105] The 1996 Protocol, above n 5, Art 7; this article stipulates that the SEOM shall make a ruling on a dispute within thirty days of the submission of the report by the panel, and in exceptional cases, this time frame can extended to ten days.
[106] Ibid, Art 7 and Art 8.2

5.3.5 The Implementation of Recommendations/Rulings and Time Limits

If a member state fails to comply with decisions made by either the SEOM or the AEM within a reasonable period of time, the 1996 Protocol provides that 'such member shall,… enter into negotiations with any party having invoked the dispute settlement procedures, with a view to developing mutually acceptable compensation'.[107] This negotiation must be carried out within twenty days after the expiration of the set period of time. If the parties to a dispute fail to agree on compensation, any party having invoked the dispute settlement procedure may 'request authorization from the AEM to suspend the application to the member state concerned of concessions or other obligations under the Agreement or any covered agreements'.[108]

The 1996 Protocol further stipulates that both of these solutions, namely, compensation and the suspension of concessions and other obligations is preferred over the implementation of a recommendation to bring the measure into conformity with the covered agreements.[109] Thus, the 1996 Protocol attempts to balance remedies available with the concept of state sovereignty in a way that does not adversely interfere in the domestic relations of Member States.

5.3.6 An assessment of the 1996 Protocol

By establishing a panel system the 1996 Protocol ostensibly moves towards an adjudicative approach to resolving trade disputes among its members. Indeed, this Protocol contains the first formal provisions regarding the settlement of economic disputes in ASEAN. Accordingly, this dispute settlement mechanism should help settle disputes and answer interpretive questions regarding existing economic agreements. Such interpretative problems are unavoidable given the fact that it is impossible when drafting agreements to anticipate every situation that may occur. The 1996 Protocol institutionalizes the panel system as the engine of the mechanism and the appropriate body to resolve such interpretive disputes. In this respect the 1996 Protocol addresses the lacunae in the AFTA and related agreements to which it applies.

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[107] Ibid, Art 9.1
[108] Ibid
[109] Ibid, Art 9.2

As previously noted, the mechanism utilized in the 1996 Protocol is modelled on the WTO dispute settlement system which already had an established and proven track record in resolving trade disputes. Like the WTO DSU, it encourages the parties to a dispute to enter into consultations with the view to reaching a mutually satisfactory solution. It also provides for resort to good offices, conciliation and mediation procedures. Conciliation and mediation have traditionally been used by ASEAN members as a way to emphasise consensus and avoid "loss of face".[110] By providing this provision, the 1996 Protocol still maintains the pragmatic oriented system to accommodate the traditional non-formal dispute resolution in ASEAN.

It should also be noted that beside 'the covered agreements' matters, if one sees the 1996 Protocol further in detail, the 1996 Protocol should be applied to any disputes related to the 'Agreement', namely, the AFTA Framework Agreement and its amended Protocol.[111] This is also in line with the Protocol regarding the implementation of CEPT scheme which stipulated that the 1996 Protocol should be applied to the AFTA Agreement.[112] Thus, the 1996 Protocol overcomes the drawbacks of AFTA Agreement in the area of dispute settlement mechanism.

However, the 1996 Protocol does not preclude the right of an ASEAN Member 'to seek recourse to other fora for the settlement of disputes'.[113] It appears that ASEAN Members can bring their disputes to the other forum, other than ASEAN dispute settlement mechanism forum. This could lead to 'forum shopping' by the ASEAN Members. The further wording of this article stated, 'A Member State involved in a dispute can resort to other fora at any stage before the SEOM has to make a ruling on the panel report'.[114] The

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[110] It is different to individuals from a Western common law background who preferred an adversarial system that they considered it as a normal and acceptable procedure, see Michael Pryles, Jeff Waincymer and Martin Davies, *International Trade Law*, (1996), 501

[111] The Agreement in this respect means the Framework Agreement on Enhancing ASEAN Economic Cooperation, as amended by the Protocol to Amend the Framework Agreement on Enhancing ASEAN Economic Cooperation signed in Bangkok on 15 December 1995, see the Framework Agreement on enhancing economic cooperation, above n 41

[112] See, the Protocol for CEPT Scheme, above n 52 (which was signed in 2000), Art.10; It stated: 'The Protocol of Dispute Settlement Mechanism for ASEAN shall apply in relation to any dispute arising from or any difference between Member States concerning the interpretation or application of this Protocol'

[113] The 1996 Protocol, above n 5, Art.3

[114] Ibid, Art 3; This provision later was amended by the Enhanced Protocol 2004, which it stated, 'A Member State involved in a dispute can resort to other fora at any stage before a party has made a request to the SEOM to establish a panel…', see The 2004 Protocol, above n 6, Art.1.3, see section 6.4.4. (Chapter 6)

parties to the dispute exercise this 'forum choice' any time during the process of the settlement of the dispute (before the SEOM's final decision is adopted). This procedure may give the parties flexibility but it also undermines the 1996 Protocol by failing to preserve the integrity of its processes and exclusivity.

Moreover, instead of inserting a new body like the DSB of the WTO, the 1996 Protocol employs the existing SEOM as a body that is responsible for the settlement of economic disputes. Since the composition of SEOM is clearly political rather than legal in nature this leads to the possibility of directly or indirectly prejudicing decisions and making them politically biased.

Further, the 1996 Protocol employs the existing AEM as the appeal body.[115] Like SEOM, the AEM is also comprised of political representatives' not legal experts. Thus, they are more likely to represent their national interests. Consequently, decisions adopted may be politically biased. This potential for politically biased decisions can be regarded as a shortcoming of the 1996 Protocol.

As to how decisions should be decided, the 1996 Protocol utilizes simple majority.[116] Compared to the GATT which utilized consensus, this approach may be regarded as an improvement which will lead to more expeditious decision making. Importantly, too, it is a departure from the traditional ASEAN method of consensus decision making processes.[117] However, simple majority voting does have its limitation, not the least of which lies in the likelihood that decisions will not be respected in implemented and that states can 'opt-out' of decisions being binding on them.

Nevertheless, the 1996 Protocol was a significant development in the area of economic disputes settlement mechanism. It may seem ironic that ASEAN Members have signed the 1996 Protocol, indicating their agreement to bring dispute under it and yet, to date, no dispute has been brought under it. The usefulness of the 1996 Protocol may seem to be open to question, particularly given the ability of Member States to take disputes to

[115] The 1996 Protocol, Art 8.1 stated, 'Member States … may appeal the ruling by the SEOM to the AEM …', see the Protocol 1996, above n 4, Art 8.1.
[116] Ibid, Art 7 and 8.2
[117] Rahmat Mohamad, 'ASEAN Protocol on Dispute Settlement Mechanism: A Rule-Based or Political Approach', (1998) *International Trade Law and Regulation* 48, 54

the WTO DSU, such as, was done by Singapore and Malaysia in 1995.[118] However, not all Members of ASEAN are Members of the WTO. Moreover, regional dispute settlement mechanism must be preferable, particularly in the ASEAN region and given the historic emphasis of states in the region on setting disputes in accordance with their 'ASEAN Way'. Accordingly, the adoption of the 1996 Protocol was an important step for ASEAN. As the Member States develop familiarity with it the potential for its use increases.

5.6 Conclusion

It will be apparent from the discussion above that as trade dispute settlement mechanisms in ASEAN has been developed, it has transformed from a non-formal into a formal system, from a pragmatic approach to a legalistic one. The pragmatic approach that had been utilized by the GATT had proven unsuccessful to secure the certainty of enforcement of the panel recommendations. The WTO as successor of the GATT, therefore, adopted a rule-oriented approach with the creation of the WTO DSU. Likewise, with the adoption of the 1996 Protocol ASEAN moved toward a legalistic system relying on panels and simple majority as the decision making mechanism. This move was regarded as a strategy to avoid the presence of the blockage of the adoption of the panel recommendations by the losing parties as had happened in the GATT.

Nevertheless, as has been shown, the 1996 Protocol still contained a number of shortcomings and non-legalistic features. To further address the lacunae ASEAN adopted an Enhanced Protocol on Dispute Settlement in 2004 which is analysed in the following chapter.

[118] A case between Malaysia and Singapore, WTO Documents: WT/DS1/1, 13 January 1995

CHAPTER 6 – THE ASEAN PROTOCOL ON ENHANCED DISPUTE SETTLEMENT MECHANISM (THE 2004 PROTOCOL)

6.0 Introduction

The signing of the ASEAN Protocol on an Enhanced Dispute Settlement Mechanism in 2004 (the 2004 Protocol) marked a significant step in the strengthening of ASEAN's institutional structure and the latest step in the process of legalisation and institutionalisation of the trade dispute settlement mechanisms in ASEAN. The 2004 Protocol is significant also to ASEAN's move to establish an ASEAN Economic Community (AEC) by 2020.

The aim of this chapter is to discuss the 2004 Protocol highlighting, in particular, the important procedures that have been adopted to enhance the mechanisms for settlement of trade disputes within ASEAN and comparing and contrasting the 2004 Protocol with the 1996 Protocol discussed in the previous chapter. It will be seen that the 2004 Protocol is a more legalistic DSM which has been adopted by ASEAN in anticipation of the formation of the AEC. This will lay the ground work for the final analysis of the ability of the 2004 Protocol to act as a reliable mechanism for resolving trade disputes among ASEAN Members in the future.

Before examining the 2004 Protocol, however, this chapter begins with a discussion of the other dispute resolution mechanisms established pursuant to the Bali Concord II. Whereas the 2004 Protocol is concerned with the utilisation of a panel based adjudicatory system, the Bali Concord II also established mechanisms for the speedy resolution of practical and technical trade dispute among ASEAN Members. Accordingly, for the sake of comprehensiveness, these procedures and mechanisms are also described here.

6.1 Dispute resolution under the Bali Concord II

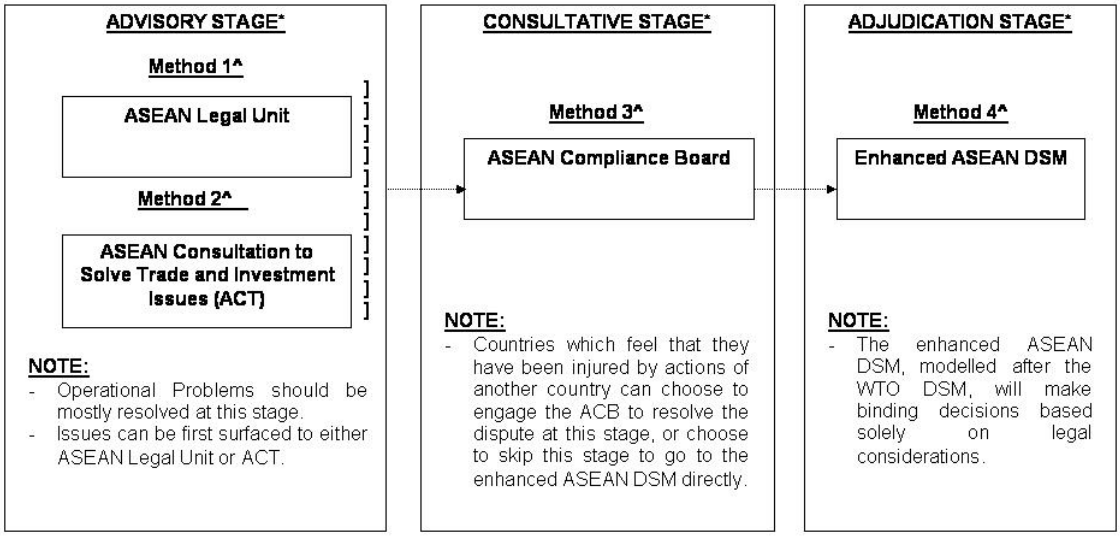
Both because of the shortcomings of the 1996 Protocol and because of the decision to move to the establishment of the AEC, the need for a new trade dispute settlement

mechanism (DSM), which would strengthen the existing ASEAN DSM, by 2003, had become clear. The Bali Concord II proposed that ASEAN put in place those recommendations made by the High-Level Task Force (HLTF) on ASEAN Economic Integration[1] relating to the establishment of an effective system to ensure proper implementation of all economic agreements and the expeditious resolution of any disputes. This new system would be comprised of three stages of dispute resolution mechanisms: an advisory, consultative and adjudicatory mechanism. ASEAN also agreed to revise the existing ASEAN Dispute Settlement Mechanism (DSM) to ensure that binding decisions could be made expeditiously and based solely on legal considerations for intra-ASEAN trade disputes. This ASEAN DSM will be discussed in section 6.3 below.

The scheme under the HLTF recommendations itself consists of four institutions, namely the ASEAN Legal Unit, the ASEAN Consultation to Solve Trade and Investment Issues (ACT), the ASEAN Compliance Monitoring Body (ACMB) or ASEAN Compliance Board (ACB), and the Enhanced ASEAN DSM, which together are designed to accommodate the differences among member countries as well as their private sectors. While the resolution of disputes should generally advance from the advisory stage to the consultative stage, and finally the adjudication stage, this is not mandatory.[2] In other words, member countries or the parties to a dispute may choose the appropriate stage for the resolution of their dispute. Furthermore, member countries do not need to move through each method sequentially; rather they can go to the ACB or proceed directly to the Enhanced ASEAN DSM after issues have been raised at the ASEAN legal unit or straight to the ASEAN Consultation to Solve Trade and Investment Issues (ACT) stage (see the flowchart of ASEAN dispute).

[1] Recommendations of the HLTF, see <http://www.aseansec.org/hltf.htm> at 29/09/2005[hereinafter the HLTF]

[2] The flowchart of mechanisms and processes of the ASEAN Dispute Settlement System as Annex 2 of the HLTF, see< http://www.aseansec.org/hltf_flowchart.htm> at 10/10/2003



NOTE:

* While resolution of disputes should generally advance from the advisory stage to the consultative stage, and finally the adjudication stage as shown in the flowchart, this is not mandatory. Countries may choose to make use of the appropriate mechanisms as they wish.

^ Countries do not need to go through the four methods sequentially. After surfacing the issue at either the ASEAN Legal Unit or ACT, they can either go to the ACB or proceed directly to the enhanced ASEAN DSM.

- Upon mutual agreement, involved countries should engage in consultations or avail themselves of the good offices of the ASEAN Secretary General to engage in concurrent conciliation and mediation processes at any stage.

Flowchart dispute settlement mechanism 1

(Source: ASEAN Website-November 2005)

6.1.1 ASEAN Legal Unit (Advisory Mechanisms)

In 2004, ASEAN established a legal unit within the ASEAN Secretariat to provide legal advice on trade disputes. Member countries can bring their trade disputes to and seek advice from this body. It provides legal interpretations and advice on potential trade dispute issues upon request from member countries. The advice is purely advisory and non-binding in nature.

Parties can bring a dispute that is operational or technical in nature to the ASEAN Legal Unit. These disputes can then be resolved through bilateral consultation. Done this way, mistakes and disagreements can be addressed at an early stage without having to go to the next level of dispute settlement, in this case the ASEAN Compliance Monitoring Body or the Enhanced ASEAN Dispute Settlement Mechanism.

It should be noted that, at this phase, as the mechanism aims to solve disputes which are operational or technical in nature, this mechanism may categories as ‘business friendly’.

Indeed, trade disputes to some extent involved businesses or companies who the actual participants of trade agreements. At the ASEAN regional level, their interests are represented by their national governments. By accommodating this type of mechanism, this will help citizens and businesses to avoid long delays in resolving their problems. These procedures have been put in place due to the need to address disputes resulting from the possible misapplication of trade agreements by public administrations in member countries immediately. This is because by fixing operational problems at this stage, the confidence of businesses toward ASEAN economic agreements is preserved.

6.1.2. The ASEAN Consultation to Solve Trade and Investment Issues (ACT) stage (Consultative mechanisms)

This stage, adapted from the EU SOLVIT mechanism[3] deals with operational problems which should mostly be resolved at this stage.[4] By concluding operational disputes at this phase, it would reduce the cost and the private sectors usually prefer to solve their problems, let alone operational problems, as far as they can. It involves a network of government agencies (one from each country) which allow private sectors to cut through red tape and achieve speedy resolution of operational problems encountered. In this stage, issues can be brought to either the ASEAN Legal Unit or the ASEAN Consultation to Solve Trade and Investment Issues (ACT).[5] By resolving operational problems in their early stages, existing and new trade initiatives within ASEAN become more attractive to foreign investors thereby increasing intra-ASEAN trade and investment flow.

Meanwhile, an ACT is due to be set up in each member country, so that when a firm experiences an operational problem, it can complain to the ACT in its home country (Host

[3] Background of the establishment of SOLVIT, see http://europa.eu.int/solvit/site/background/index_en.htm> at 23/11/2004); The EU Commission set up of problem solving in its Communication on effective problem solving in the Internal Market (SOLVIT) which does not duplicate the existing networks instead filling the gap between expectation and reality by providing a shared online database. It should be a one-stop access for cross border problems which provides clear information, advice and a remedy for the users. See also, Commission of the EC, *Communication from the Commission to the Council, the European Parliament, the Economic and Social Committee and the Committee of the Regions*, Brussels, 27 November 2001, see http://europa.eu.int/eur-lex/en/com/pdf/2001/com2001_0702en.html> at23/11/2004)

[4] Effective Problem Solving in the Internal Market (SOLVIT); It has been set up to help citizens and businesses when they run into a problem resulting from the possible misapplication of Internal Market rules by public administrations in other member states, ibid

[5] Mechanism of the Dispute Settlement System, as an Annex 1 of the HLTF, at http://www.aseansec.org/hltf.htm (Accessed 10/10/2003) [hereinafter the Mechanism]

ACT). This body will solve the problem or get its counterpart in another ASEAN country to resolve it within a month.[6] It involves a network of government agencies which provide a one-stop access for cross border problems which use a share online database. An ACT would provide clear information, advice and a remedy to the private sectors in resolving those problems.

For those problems encountered within the home country, the Host ACT will direct the problem to the appropriate government agencies and ensure that a proposed solution is sent to the individual or businesses within thirty calendar days. Meanwhile, for problems encountered in other ASEAN countries, the Host ACT will forward the problem to the other country's ACT (Lead ACT). The latter will be responsible for directing the problem to the appropriate government agencies in that country and ensuring that a proposed solution is sent to the individual or businesses via the Host ACT within a month.

In the instance where a dispute cannot be resolved at this stage, the parties can request that their governments move the issue to one of the other dispute settlement mechanisms. To minimise delays, communication between host and lead ACTs should be done electronically, by for example, an online database accessible to all member countries. By setting up this body in this way, the ASEAN DSM should be regarded as pro business as it was designed to tackle practical problems that arise because of the innumerable cross-border movements and transactions that take place. When these problems occur, there is a need for efficient resolution and redress. The quick resolution of these problems is critical to the credibility of the internal market in the eyes of citizens and business.

6.1.3 The ASEAN Compliance Monitoring Body (ACMB) or the ASEAN Compliance Board (ACB) - (Compliance mechanisms)

ASEAN member countries who feel that they have been injured by actions of another country can go to the ACB to resolve a dispute at this stage. They can also skip this stage and move straight to the panel under the 2004 Protocol (ASEAN DSM).

[6] The HLTF, above n 1

The ACMB is modelled on the Textile Monitoring Body (TMB) of the WTO.[7] Even though the findings of this body would be tabled as inputs to the ASEAN dispute settlement mechanism under the 2004 Protocol, where a dispute is brought to be resolved by a panel, these findings are not legally-binding on the parties in dispute.

A dispute can only be brought to this body if the parties to the dispute agree to it. Member countries who do not wish to use the ACMB after going though the ACT can go directly to the panel of the ASEAN DSM. The ACMB may also be regarded as a facilitator of ASEAN agreement implementation and is distinct from the formal adjudication process. It should also be noted that this stage is not that dissimilar to the consultation phase in the dispute settlement process under the ASEAN DSM under the 2004 Protocol.

Compared to the ASEAN DSM under the 2004 Protocol, this mechanism is less legalistic. However, like the Textile Monitoring Body of the WTO, this is a quasi-judicial body with its main purpose being the supervision of the operation of the covered agreements. It employs peer adjudication and just like the ASEAN Legal Unit or the ACT, this body offers a speedier channel for member countries to resolve their disputes.

6.2 An assessment of the dispute settlement mechanisms under the Bali Concord II

The dispute settlement mechanisms proposed by the Bali Concord II are already in place. The ASEAN Legal Unit, the ACT, and the ACB are ready to solve operational or

[7] The Textile Monitoring Body of the WTO was established to supervise the implementation of the Agreement on Textile and Clothing (ATC) in the WTO During the Uruguay Round, which went into effect on January 1, 1995, the members negotiated the Uruguay Round Agreement on Textiles and Clothing (ATC) which established rules governing the integration of textiles and apparel into GATT; Agreement on Textiles an Clothing, April 15, 1994, Marrakesh Agreement Establishing the WTO, Annex 1A; see also Xiaobing Tang, 'The integration of Textiles an Clothing into GATT and WTO dispute settlement', in James Cameron and Karen Campbell, eds, *Dispute Resolution in the World Trade Organization*, (1998), 171; Alice J. H Wohn, 'Towards GATT Integration: Circumventing Quantitative Restrictions on Textiles and Apparel Trade Under the Multi-Fibre Arrangement', (2001) 22 *University of Pennsylvania Journal of. International Economic Law* 375; Meanwhile TMB objective is to supervise the implementation of the ATC and to adjudicate disputes among members. It is a quasi-judicial, standing body which consist of a Chairman and ten TMB members, discharging their function on an *ad personam* basis. It reports directly to the Council for Trade in Goods. The Council for Trade in Goods, at its meeting of 27 January 1997, clarified the status of TMB Members, that instead of discharging their duties as representatives of their governments, TMB members are to serve in an individual, neutral capacity. See, Kristine Dunn, 'The Textile Monitoring Body: Can it bring textile trade into GATT?', (1998) *Minnesota Journal of Global Trade*, 123,146-150

technical problems. The purpose of these institutions is to provide speedy settlement of trade disputes and they are intended to be business friendly mechanisms. The ACT for example is a non-legal and non-binding internet-based problem-solving network that provides a resolution of complaints within 30 days. The ACB also has been set up to provide an adjudication mechanism wherein ASEAN Members can make use of the less legalistic peer pressure in dispute resolution.

6.3 The ASEAN Protocol on Enhanced Dispute Settlement Mechanism (the 2004 Protocol)

In 2004, the ASEAN Member States signed a new dispute settlement mechanism protocol, known as the ASEAN Protocol on Enhanced Dispute Settlement Mechanism (the 2004 Protocol),[8] which replaced the previous 1996 Protocol that had until then dealt with the subject.[9] The 2004 Protocol is intended to resolve trade disputes that have been brought regarding any matter affecting the implementation, interpretation or application of the Agreement[10] or any covered agreement.[11] In short, "the [2004] Protocol is aimed to bring certainty in the settlement of trade disputes based on the principle of equality and in a rapid, effective and acceptable manner."[12]

With the adoption of the 2004 Protocol, ASEAN has taken an essential step in creating a legalistic system of adjudication distinct from the previous system which had focused on conciliation and adjustment. Under that previous system, the conciliation or adjustment processes were methods intended to bring disputants to a solution which each party would elect to accept. If there was disagreement, the parties simply set aside the issue; and they agree to disagree in that issue. The new adjudicative process is, instead, an

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[8] ASEAN Protocol on Enhanced Dispute Settlement Mechanism, done at Vientiane, Lao PDR on 29 November 2004, see <www.aseansec.org/16755.htm > at 6/01/2005, its Article 21 states that it shall enter into force upon signing ; as all ASEAN Members signed this Protocol is presumed that this Protocol has enter into force on 29 November 2004 [hereinafter *the 2004 Protocol*]

[9] The Protocol on Dispute Settlement Mechanism, signed in Manila on 20 November 1996, see <www.aseansec.org/7813.htm > at 8/03/2005 [hereinafter *the 1996 Protocol*]

[10] The Agreement in this respect is the Framework Agreement on Enhancing ASEAN Economic Cooperation signed on 28 January 1992, as amended by the Protocol to Amend the Framework Agreement on Enhancing ASEAN Economic Cooperation signed in Bangkok on 15 December 1995 [hereinafter *the Agreement*], *see the 2004 Protocol*, above n 8, the Preamble

[11] *The 2004 Protocol*, above n 8, Art 3.1

[12] Pos Hutabarat, Director general of International Trade at the Industry and Trade Ministry Indonesia, 'Indonesia to seek to optimise ASEAN Trade Dispute Mechanism', *Antara*, 26 August 2004

institutional process that determines the rights and obligations of the parties to a dispute.[13] This approach contemplates the dispute settlement process as a relatively disciplined juridical process by which impartial panels can make objective rulings about whether or not certain Member States' activities are inconsistent with any of the covered agreements.

Access to ASEAN's dispute settlement procedure is limited to the Member States and individuals are not permitted standing in the dispute resolution process.[14] The ASEAN dispute settlement process is very similar to the one employed by the WTO DSM. Under the 2004 Protocol, the first step toward the resolution of disputes involves the parties to the dispute negotiating between themselves through consultations to reach a mutually agreed solution without any resort to any form of third party intervention.[15] Other forms of alternative dispute resolution such as mediation, conciliation and good offices are also available to the disputing parties. Disputes that reach the formal adjudication process are decided by ad hoc panels comprised of independent experts.

This 2004 Protocol replaces and builds on the 1996 Protocol by providing more detailed provisions on consultation, panel procedures, deliberations, and findings. It also adds new procedures, such as, terms reference of panels, multiple complainants, third parties, panel and appellate body recommendations. Indeed, the establishment of the Appellate Body is the most significant development of the 2004 Protocol. The 2004 Protocol, which marks the final stage in the transition from diplomatic to adjudicatory dispute resolution, is discussed in detail in the following sections.

6.3.1 Consultations

The consultation phrase is the preliminary stage of the dispute settlement process where disputing Member States are given the opportunity to avoid litigation and to settle their dispute informally through reaching a mutually satisfactory solution. The 2004 Protocol states that Member States which "consider that any benefit accruing to them

[13] Curtis Reitz, 'Enforcement of the GATT', (1996) 17 *University of Pennsylvania Journal of International Economic Law* 555, 558

[14] If one reads the 2004 Protocol closely, there is no single article provides for individual parties to be a disputant, most of the articles are intended for Member States, for example Article 1 (on coverage and application) stated: "The provisions of this Protocol are without prejudice to the rights of Member States to seek …"; see *the 2004 Protocol*, above n 8, Art 1

[15] Ibid, Art 3.1

directly or indirectly, under the Agreement or any covered agreement is being nullified or impaired, or that the attainment of any objective of the Agreement or any covered agreement is being impeded as a result of failure of another Member State to carry out its obligations under the Agreement or any covered agreement, or the existence of any other situation may, with a view to achieving satisfactory settlement of the matter, make representations or proposals made to it".[16]

Regarding representations made by other Member States on any matter affecting the implementation, interpretation or application of the Agreement[17] or any covered agreements,[18] an ASEAN Member State is to accord adequate opportunity for consultations to take place. Like the WTO, ASEAN also encourages its Member States to resolve their disputes through consultations and the 2004 Protocol stipulates for all Member States to, as far as possible, settle their disputes amicably.

All requests for consultations must be notified to the Senior Economic Officials Meetings (SEOM) .[19] This notification to the SEOM is an improvement of the 1996 Protocol.[20] Since there is an obligation to notify SEOM, it would be possible to determine the exact date when the consultation begins and ends. Like the DSB in the WTO, the SEOM has the authority to establish panels, adopt panel and Appellate Body reports as well as to conduct surveillance over the implementation of panel and Appellate Body findings and recommendations as well as for authorising the suspension of concessions or other obligations under the covered agreements.[21]

Under the 2004 Protocol, a Member State from which consultations have been requested is to reply to the request within ten days after the date of receipt.[22] The parties to the dispute will then, within a period of thirty days, enter into consultations in good faith

[16]Ibid, art 3 (2)
[17] The Framework Agreement on Enhancing ASEAN Economic Cooperation signed on 28 January 1992 and its amendment Protocols, see *the Agreement*, above n 10
[18] The covered agreements are the agreements listed in Appendix I and future ASEAN economic agreements, see *the 2004 Protocol*, above n 8, Art 1.1; the list of the covered agreements is on the Appendix I which there are 46 covered agreements which includes trade, investment, free trade area, intellectual property rights, services, and customs, see *id*, Appendix I
[19] For the explanation on Senior Economic Officials Meetings (SEOM), see section 1.4.6 Chapter 1
[20] The 1996 Protocol does not provide the notification of consultation to SEOM; see section 5.3.1 Chapter 5
[21] *The 2004 Protocol*, above n 8, Art 2.1
[22] ibid, Art 3.4

with a view to reaching a mutually satisfactory solution.[23] If consultations fail to settle the dispute within sixty days, the complainant party is entitled to bring the matter to the SEOM to request the establishment of a panel.[24] The consultation phase is mandatory and while the disputing parties must allow the consultation period to run for these sixty days before moving on to formal adjudication, there is no maximum length of time stipulated in which consultations must be completed.

ASEAN Member States can also resolve their disputes through good offices, conciliation or mediation, as offered by the ASEAN Secretary General acting in an ex officio capacity.[25] At this stage of the dispute settlement process, assistance is provided to the disputing parties to aid their attempt in resolving their differences through negotiations and compromise. Parties to a dispute can begin and terminate these procedures at any given time. Once terminated, the complaining party can then proceed with a request to the SEOM for the establishment of a panel. Subject to the disputing parties' agreement, however, these procedures can still be continued even while the matter is being raised before the panel.[26]

Consultations, good offices, conciliation and mediation,[27] as provided for in the 2004 Protocol, are key non-juridical, diplomatic features of the ASEAN dispute settlement system offering less expensive alternatives to litigation. These methods are common as the initial phase of international dispute resolution systems in other trade organisations too. For instance, in the NAFTA dispute resolution system, disputing parties are required to engage in negotiations and consultations privately and, if necessary, later under the auspices of the NAFTA Commission aided by technical advisors or working groups, who can recommend solutions to the parties.[28]

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[23] Ibid.
[24] Ibid, Art 5.1
[25] Ibid, Art 4.1
[26] Ibid, Art 4.2; this procedure is similar with the DSU, in a sense, the procedures still can continue while the dispute is in the panel stages, see section 3.2.2 Chapter 3
[27] These terms are basically the involvement of an independent third party to assist the parties to dispute to resolve a dispute; in good offices, a third party (e.g., the WTO Director General) provides a mean by which the disputing parties may negotiate in a productive atmosphere; in conciliation, an impartial party conducts an independent investigation and suggests a solution to the parties to the dispute; in mediation, an impartial third party acts to bring about a resolution of the dispute, see Hansel T. Pham, Developing Countries and the WTO: the need for more mediation in the DSU, (2004) 9 *Harvard Negotiation Law Review* 331, 367
[28] NAFTA, Art 2006 and Art 2007.5; the text of NAFTA is reprinted in Ralph H Folsom, Michael W Gordon and John A Spanogle, *Handbook of NAFTA Dispute Settlement*, loose leaf, 1998, Part III [hereinafter *NAFTA]*

6.3.2 The Panel Process

6.3.2.1 Establishment of Panels

Under the 2004 Protocol a panel will be established at the complainant's request if the parties to the dispute have failed to reach a mutually agreed solution at the consultation stage.[29] The SEOM will hold a meeting immediately after receiving the request and the establishment of the panel will be placed on the SEOM's agenda. Like the WTO DSU, the 2004 Protocol utilises the negative consensus rule and panels for disputes are convened upon the request by the complainant party absent a consensus finding by the SEOM not to do so.[30] As complainant parties are unlikely ever to vote against a panel's establishment, the process is regarded as virtually automatic. Therefore, this procedure is legalistic system. This incorporation of the negative consensus rule in the new protocol marks a significant improvement from the 1996 Protocol.[31]

The creation of panels is, however, subject to regimented timetables. If no SEOM meeting is held within 45 days after the receipt of the request, the establishment of the panel is settled through circulation.[32] Thus, regardless of whether the panel is established by the SEOM or by circulation, the process does not exceed 45 days. This provision is another important procedural improvement from the 1996 Protocol in preventing delays and speeding up panel proceedings.

6.3.2.2 Composition of the Panels

A panel is normally comprised of three individuals, but if both parties to the dispute agree, the panel may be comprised of five panellists.[33] As each dispute requires the selection of a new panel, panel members are appointed specifically for the case on an *ad*

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[29] *The 2004 Protocol,* above n 8, Art 5.1; the parties can evoke this procedure with certain conditions, if the respondent party does not reply within 10 days after the date of receipt of the request, or does not enter into consultations within a period of 30 days after the date of receipt of the request, or the consultations fails to settle a dispute within 60 days after the receipt of the request. Id. This provision is same as the WTO DSU

[30] *The 2004 Protocol,* above n 8, Art.5.1

[31] The 1996 Protocol stipulated that the SEOM shall establish a panel no later than thirty (30) days after the date on which the dispute has been raised to it, see *The 1996 Protocol,* above n 9, Art 5.2

[32] *The 2004 Protocol,* above n 8, Art 5.2; circulation means the decision to establish a panel is decided, instead of in the SEOM meeting, the decision is taken by distribute them to all the Member States.

[33] *The 2004 Protocol,* above n 8, Appendix II.I.5

hoc basis.[34] Individuals approved to served on panels are to be well-qualified governmental or non-governmental persons who have expertise on international trade and the sectors or subject matter of the covered agreements, have either served on or presented a case to a panel, or served in the ASEAN Secretariat, or taught or published material on international trade law or policy, or served as senior trade policy officials of a Member State.[35] The Secretariat maintains an indicative list of these individuals from which panellists may be drawn as appropriate.[36] The list clearly indicates each individual's specific areas of experience or expertise, including the relevant sectors, or relevant subject matter of the covered agreements. ASEAN Member States periodically propose names of qualified individuals for inclusion on the indicative list which must then be approved by the SEOM.[37]

The ASEAN Secretariat proposes the members of a panel and the parties to the dispute cannot oppose these nominations unless they have compelling reasons for supporting such opposition.[38] This procedure provides for the quick formation of panels. In these nominations, while preference is given to individuals who are nationals of ASEAN Member States,[39] those who are nationals of the Member States which are parties to the dispute are prohibited from serving on the panels unless the parties to the dispute have agreed otherwise.[40]

Although the parties to the dispute cannot oppose the nomination of panellists by Secretariat, except for compelling reasons, it is still possible for them not to agree with the formation of the panel. If there is no agreement between the parties concerning the panellists within twenty days of the decision of the SEOM to establish a panel, the Secretary-General of ASEAN then determines the composition of the panel.[41] This

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[34] Ibid, Appendix II.I.2; it is identical with the WTO DSU
[35] Ibid, Appendix II.I.1; Compare with Chapter 19 NAFTA, which expresses a clear preference for judges and lawyers, see NAFTA, above n 28, Annex 1901.2, ¶ 1, "the roster shall include judges or former judges to the fullest extent practicable."; see also, annex 1901.2, ¶ 2, "A majority of the panellists on each panel shall be lawyer in good standing."
[36] *The 2004 Protocol,* above n 8, Appendix II.I.4
[37] Ibid.
[38] Ibid, Appendix II.6; an example for compelling reasons is for example, nationalistic relations where the panellists have similar national with the disputing countries.
[39] Ibid, Appendix II.I.1; For panellists, the nationals of the ASEAN countries are the first preferences
[40] Ibid, Appendix II.I.3
[41] Ibid, Appendix II.I.7

procedure is conducted under certain conditions, namely (i) at the request of either disputing party; (ii) after the Secretary-General has consultations with the SEOM (iii) to be completed within ten days; and (iv) after the Secretary-General consults with the disputing parties (but this last condition only applies in the case where the relevant procedures of the covered agreements which are at issue in the dispute require special or additional rules).[42]

Concerning the impartiality of panellists, panel members serve in their individual capacities and not as representatives of their respective governments or of any organization.[43] While Member States are, as a general rule, to permit their officials to serve as panellists,[44] they are prohibited from giving them instructions or seeking to influence them with regard to any matter before the panel.[45] Unlike Chapter 19 of NAFTA, there is no preference for panellists to be lawyers but they are selected with a view to ensuring their independence and that they have a sufficiently diverse background as well as a wide spectrum of experience.[46]

6.3.2.3 Terms of Reference for Panels

Article 6 of the 2004 Protocol sets up the standard terms of reference, stating:

> "To examine in the light of the relevant provisions in (name of the covered agreement(s) cited by the parties to the dispute), the matter referred to the SEOM by (name of party) in (document)…and to make such findings as will assist the SEOM in the adoption of the panel report or in making its decision not to adopt the report."[47]

In this respect, panels are to address the relevant provisions in the relevant covered agreement(s) cited by the parties to the dispute. Parties to a dispute can, however, agree to use terms of reference other than the standard terms that have been provided but they have to raise the matter to the SEOM at the time the request for a panel's establishment is made.[48] The SEOM will then authorize the panel's chairman to draw up different terms of

[42] Ibid, this mirrors the WTO DSU
[43] Ibid, Appendix II.I.9
[44] Ibid, Appendix II.I.8
[45] Ibid, Appendix II.I.9
[46] Ibid, Appendix II.I.2; this is similar with the WTO DSU
[47] Ibid , Art 6.1
[48] Ibid

reference after consulting with the parties to the dispute and these specific terms of reference will then be circulated to all the Member States.[49]

The same procedure is also utilised in the DSU of the WTO where parties to a dispute can agree to have different terms of reference drawn up for their case instead of the standard one provided by the DSU.[50] The issue of terms of reference of panels has arisen in the WTO. In the *Brazil-Measures Affecting Desiccated Coconut* [51]case, the Appellate Body observed that a panel's terms of reference were primarily important for two reasons.[52] Firstly, they fulfilled a key due process objective in giving the disputing parties and third parties sufficient information concerning the claims at issue and allowing the respondent the opportunity to respond to the complainant's case. Secondly, they established the panel's jurisdiction by defining the precise claims at issue in the dispute. The Appellate Body also stated that:

> "…the 'matter' referred to a panel for consideration consists of the specific claims stated by the parties to the dispute in the relevant documents specified in the terms of reference. We agree with the approach taken in previous adopted panel reports that a matter, which includes the claims composing that matter, does not fall within a panel's terms of reference unless the claims are identified in the documents referred to or contained in the terms of reference.[53]

Similarly, in the *Japan-Taxes on Alcoholic Beverages* case,[54] the Appellate Body ruled that the panel had erred in law by limiting its conclusions in its report concerning

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[49] Ibid, art 6.3

[50] The Understanding on Rules and Procedures governing the settlement of disputes, reprinted in WTO Secretariat, *The WTO Dispute Settlement Procedures: A Collection of the Relevant Legal Texts*, (2001), Art 7.3 [hereinafter *the DSU*]

[51] *The Brazil measures affecting desiccated coconut*- Report of the Appellate Body, 20 March 1997, WT/DS22/AB/R [hereinafter *Brazil-Coconut*]

[52] Debra P. Steger and Susan M. Hainsworth, 'New Directions in International Trade Law: WTO Dispute Settlement', in James Cameron and Karen Campbell (eds), *Dispute Resolution in the World Trade Organization*, (1998), 43

[53] See, *Brazil-Coconut*, above n 51, 22 ; see also Steger and Hainsworth, ibid, 43

[54] WTO Document on *Japan-Taxes on Alcoholic Beverage*- Report of Appellate Body, 4/10/1996, WT/DS10/AB/R ; In this case, the EC, Canada and the US complained that spirits exported to Japan were discriminated against under the Japanese liquor tax system which in their view levies a substantially lower tax on "shochu" than whisky, cognac and white spirits; Id. The Panel report found that the Japanese tax system to be inconsistent with GATT Article III:2. Id. Japan appealed the ruling, and the Appellate Body affirmed the Panel conclusion, but pointed out several areas where the Panel had erred in its legal reasoning, including the panel terms of reference. Id. Sochu literally as 'burned liquor' is a distilled alcoholic beverage which is traditionally produced in Japan (known as Japanese vodka).

'directly competitive or substitutable products' to 'shochu, whisky, brandy, rum gin, genever, and liqueurs.' In this case, the Panel's terms of reference cite the matters referred to the DSB by the EC, Canada and the United States in WT/DS8/5, WT/DS10/5 and WT/DS11/2, respectively.[55] The EC referred the DSB to Japan's taxation of "shochu", "spirits", "whisky/brandy" and "liqueurs"; Canada referred the DSB to Japan's taxation of 'shochu' and products falling "within HS 2208.30 ('whiskies'), HS 2208.40 ('rum and fafia'), HS 2208.90 ('other' including fruit brandies, vodka, ouzo, korn, cream liqueurs and 'classic liqueurs'; while the US referred the DSB to Japan's taxation of shochu and "all other distilled spirits and liqueurs falling within HS heading 2208."[56]

Since the Panel's conclusion on "directly competitive or substitutable products" relate only to "shochu, whisky, brandy, rum, gin, genever, and liqueurs" which narrower than the range of products referred to the DSB, the Appellate Body considered that the Panel report failed to address the full range of alcoholic beverages included in the Panel's Terms of Reference made by the complaining parties and to be an error of law by the Panel.[57] This case represented that the Appellate Body corrected law applicable to the disputes. As the 2004 Protocol, unlike the 1996 Protocol, provides specifically terms of reference of panels, the ASEAN DSM would anticipate for resolving the similar case.

6.3.2.4 Panel proceedings

The working procedures for panels have been set out in Appendix II of the 2004 Protocol. Apart from these provisions, the protocol also stipulates that panels can regulate their own procedures with regard to the rights of parties to be heard and their deliberations.[58]

Panel proceedings are held in closed sessions attended only by the parties to the dispute and interested parties who have been invited by the panel to appear before it.[59] Panel deliberations and any documents that are submitted to the panel are kept

[55] Ibid, on footnote 56;
[56] Ibid.
[57] Ibid; see also, Steger and Hainsworth, above n 52, 44
[58] *The 2004 Protocol*, above n 8, Art 8.1
[59] Ibid, Appendix II.II.2

confidential.[60] Member States are also to treat as confidential any information submitted to the panel by another Member State which has been designated by the latter as confidential.[61] Upon a Member State's request, however, a non-confidential summary of the information contained in documents submitted to the panel may be disclosed to the public. Disputing parties are also required to provide the panel with a written version of their oral statements. All submissions will be made available to all the parties involved in the dispute, including the third parties.[62]

Before the first substantive meeting between the panel and the parties to the dispute takes place, the parties to the dispute are to each transmit to the panel written documents in which they present the facts of the case, their position and arguments.[63]
In the initial substantive meeting, the panel will first invite the complaining party to explain its case and subsequently request the respondent party to present its point of view.

Third parties comprised of Member States who have a substantial interest in the matter and who have notified this interest to the SEOM also have an opportunity to be heard by the panel and to make written submissions to the panel.[64] These written submissions will be given to the parties to the dispute and reflected in the panel report. Third parties are also not only invited to present their views in the first substantive meeting held between the panel and the disputing parties but they are also allowed to be present for the entirety of this session.[65] The third parties will also receive the written submissions provided by the parties to the dispute to the panel.

A panel can at any time put questions to the parties and request explanations either during the course of a meeting with the parties or later in writing.[66] In the sense that they can seek information from and pose questions to the parties, ASEAN panels can be said to be 'inquisitorial'[67] – a feature characteristic of the continental civil law jurisdictions rather

[60] Ibid, Appendix II.II.3
[61] Ibid.
[62] Ibid, Appendix II.II.11
[63] Ibid, Appendix II.II.4
[64] Ibid, Art 11.2
[65] Ibid, Appendix II.II.6
[66] Ibid, Appendix II.II.8
[67] Eric A Engle, 'The Professionalization Thesis: The TBR, The WTO, and World Economic Integration', (2002) 11 *WTR Currents: International Trade Law Journal* 16, 19

than the standard judicial procedure of Anglo-American common law.[68] The panel will examine the oral arguments as well as written submissions of the parties to the dispute and prior to final delivery of its decision to the SEOM, the parties to the dispute will be given adequate opportunity to review the report.[69]

As in the WTO, disputing parties in ASEAN are allowed to review and make comments on the descriptive portion of the panel's report which contain the summary of the facts of the case and the parties' arguments. The panel will consider the parties' comments, after which it will issue an interim report which includes the descriptive portion as revised, if necessary, together with the panel's findings and recommendations.[70] The parties will then be allowed to comment on the draft final report and to request a further meeting with the panel on precise aspects of the interim report. If no comments are received, the draft becomes the panel's final report. All of these procedures are intended to assure factual accuracy as well as to offer additional opportunity to the parties to settle the dispute.[71]

6.3.2.5 Adoption of the panel reports

Panel findings and recommendations are to be submitted to the SEOM in the form of a written report within sixty days of the panel's establishment. This time period can be extended for a further ten days in an exceptional case that warrants such.[72] Before submitting its recommendations, the panel must give adequate opportunity to the parties to dispute to review the report but the drafting process of the report must itself be done without the presence of the disputing parties and only in light of the information that has been provided and the statements that have been made.[73]

Within thirty days of its submission, the panel's report will be adopted by the SEOM unless a party to the dispute formally notifies the SEOM of its intention to appeal the matter or the SEOM decides by consensus not to adopt the report.[74] In the case of an

[68] Ibid.
[69] *The 2004 Protocol*, above n 8, Art 8.3
[70] David Palmeter and Petros C. Mavroidis, *Dispute Settlement in the World Trade Organization: Practice and Procedure*, (2004), 166
[71] Ibid.
[72] *The 2004 Protocol*, above n 8, Art 8.2
[73] Ibid, Art 8.3 and 8.5
[74] Ibid, Art 9.1

appeal, the panel report will not be considered for adoption by the SEOM until after the completion of the appeal. The SEOM representatives from Member States which are parties to the dispute are allowed to be present during the deliberations of the SEOM.[75]

The adoption of the panel and Appellate Body reports, like the establishment of a panel, is also subject to the 'negative consensus' rule, which is another improvement from the 1996 Protocol under which the SEOM made rulings on the panel findings based on majority votes.[76] This previous decision-making process has allowed disputing parties to garner support from other Member States which has made the SEOM outcomes subject to political intervention.[77] In other words, the majority voting as decision making still makes it possible for the parties to politicize the panel rulings, therefore the result is less judicial than that achieved by negative consensus. By employing this new approach, the ASEAN 2004 Protocol is likely to prove a more effective dispute settlement mechanism from the previous model as has been demonstrated by the WTO DSM.

As discussed in the section 3.3.2 (Chapter 3), the WTO dispute resolution procedures, such as the creation of panels, the selection of panellists as well as the authorization for retaliation have utilized the negative consensus, and the processes are becoming automatic. In other words, there are serious legal consequences, in the mechanism to resolve the trade disputes. The obvious result of this practice is that the WTO DSM has been hailed as 'the most effective area of adjudicative dispute settlement in the entire area of public international law.'[78]

6.4 Appeal procedure

The 2004 Protocol gives a chance for panel reports to be corrected by providing appellate review for the parties to the dispute. After panel proceedings are over, parties can appeal the panel's decisions to the Appellate Body. The Appellate Body shall be

[75] Ibid, Art 9.1
[76] *The 1996 Protocol*, above n 9, Art 7
[77] Nobuo Kiriyama, 'Institutional Evolution in Economic Integration: Contribution to Comparative Institutional Analysis for International Economic Organization', (1998) 19 *University of Pennsylvania Journal of International Economic Law* 53, 69
[78] Palmeter and Mavroidis, above n 70, 234

established by the ASEAN Economic Ministers ("AEM")[79] and comprises seven persons who will serve on the Appellate Body for a four-year term, after which their service may be repeated for another term. [80] Three out of the seven Appellate Body members will serve on any given case on a rotational basis as determined in the working procedures of the Appellate Body.[81]

Appellate Body members need to have recognised expertise in law, international trade and the subject matter of the covered agreements generally.[82] These individuals are chosen irrespective of nationality and are not limited to legal experts. They cannot be affiliated with any government and/or participate in the consideration of any dispute which involves or may involve a direct or indirect conflict of interest. They must also be available at all times on short notice and stay abreast of all the dispute settlement activities and other relevant activities of ASEAN. All of these procedures are intended to guarantee the neutrality, independence, impartiality and professional competence of the Appellate Body.

Under the WTO, the appellate procedure was introduced as a safeguard measure against possible legal errors contained in panel rulings.[83] Objections to the panel report must consist of allegations of error relating to what the appellant party wishes the Appellate Body to overturn. In this respect, the Appellate Body can only concern itself with addressing the panel's legal finding and the reasoning supporting such a conclusion. The appeal procedure thus serves as a check on ill-considered panel decisions whether due to bias, inexperience or incompetence. By using this two-tier system of panel and appeal review procedures, the ASEAN DSM will generate credibility of the rulings.

Theoretically, once in operation, the ASEAN Appellate Body will function like a national appellate court - as a neutral and objective arbiter. Thus, the creation of a

[79] As to author's knowledge, ASEAN is in the process of nominating people for the Appellate Body, interview with the ASEAN officer (legal unit).
[80] The Protocol provides for an appellate process as part of dispute settlement mechanism which establishes a permanent appellate body of seven individuals of whom three shall sit on any case, *The 2004 Protocol*, above n 8, Art.12.1
[81] Ibid, working procedure of the Appellate Body shall be drawn up by the SEOM, and any amendments thereto, shall be drawn up from time to time as necessary by the Appellate Body in consultation with the SEOM and the Secretary-General of ASEAN, and communicated to the Member States for their information. Id, Art 12.8; However, neither the Appellate Body nor its working procedures however has not yet been materialized
[82] Ibid, Art 12.3
[83] See section 5.9 Chapter 5

permanent ASEAN Appellate Body is designed to foster legitimacy as well as to increase disputing parties' confidence as to the efficacy of the process. By providing an appellate review procedure, it is envisaged that the system will have a fact-finding body and an appellate review tribunal with features similar to those of domestic civil litigation systems.[84] It should be noted that the existence of the Appellate Body in the WTO DSM that has now also been adopted in the 2004 Protocol is a unique phenomena under international law since no other similar practice exists in concurrent trade organisations.

6.4.1 Appeal review process

Only the parties to a dispute and not the third parties have the authority to appeal a panel report.[85] However, if the third parties have notified the SEOM of their substantial interest in the matter, they are allowed to make written submissions to and be given an opportunity to be heard by the Appellate Body.

In ASEAN, Appellate Body decisions are confidential as are the deliberations of panels.[86] Like the Appellate Body in the WTO, the ASEAN Appellate Body can only review the legal interpretations of panel reports and cannot concern itself with questions of fact.[87] The difference between legal and factual questions is determinative of the Appellate Body's jurisdiction. Thus it is important to understand the difference between the two. Generally, a fact is the occurrence of a certain event in time and space.[88] Questions of fact therefore relate to the existence and circumstances of these occurrences. A legal question, on the other hand, has been stated by the WTO Appellate Body to be one that deals with "the consistency or inconsistency of a given fact or set of facts with the requirements of a given treaty provision."[89]

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[84] Daniel C. K. Chow, 'A new era of legalism for Dispute Settlement under the WTO', (2001) 16 *Ohio State Journal on Dispute Resolution* 447, 457
[85] *The 2004 Protocol,* above n 8, Art 12.4
[86] Ibid, Art 12.9
[87] Ibid, Art 12.6
[88] The WTO Appellate Body Report, EC Measures concerning Meat and Meat Products (Hormones), WTO Doc. WT/DS26/AB/R; WT/DS48/AB/R, ¶ 132 [hereinafter *EC-Hormones*]
[89] Ibid.

In terms of the time frame for appellate review, as a general rule, the 2004 Protocol provides that the Appellate Body proceedings are not to exceed sixty days.[90] This period is calculated from the date a party to the dispute formally notifies the SEOM of its decision to appeal the panel's decisions to the date the Appellate Body circulates its report. If any delay is envisaged, the Appellate Body is to inform the SEOM in writing giving reasons for the delay as well as an estimated time period of when the report will be submitted. Under the 2004 Protocol, however, the proceedings cannot be prolonged longer than ninety days.[91] In short, disputes among the ASEAN Member States must be settled within ninety days at a maximum. This time frame is very similar to the deadline given by the DSU of the WTO for the appellate review to be completed by.[92]

The ASEAN Appellate Body can uphold, modify or reverse the legal findings and conclusions of the panel.[93] In the WTO, several submissions have raised the issue of the possibility of conferring remand authority on the Appellate Body.[94] This issue concerns the problem faced by the Appellate Body "when a new decision on the facts is required because the Appellate Body's decision is based on a different interpretation of the law, on a different legal reasoning from that of the panel or on procedural mistakes."[95] In such cases, where the Appellate Body decision is based on the legal reasoning of panel reports which may consist of inadequate fact findings then it may possible for the Appellate Body to send the case back to the original panel.[96]

Regarding the remand authority of the WTO Appellate Body, the European Community proposed that in the event the panel report does "not contain sufficient factual findings so as to enable the Appellate Body to resolve the dispute, the Appellate Body shall explain in detail in its report the specific insufficiencies of the factual findings in order to

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[90] *The 2004 Protocol,* above n 8, Art.12.5
[91] Ibid.
[92] The DSU, above n 50, Art 17.5; Appellate review proceedings must generally be completed within 60 days and in no case take longer than 90 days from the date when the notice of appeal was filed
[93] *The 2004 Protocol,* above n 8, Art 12.12
[94] Kim Van de Borght, 'The review of the WTO Understanding on Dispute Settlement: Some Reflections on the Current Debate', (1999) 14 *American University of International Law Review* 1223,1243
[95] David Palmeter, 'The WTO Appellate Body Needs Remand Authority', (1998) 32 *Journal World Trade,* 41, 44,
[96] Van de Borght, above n 94, 1243; Under the DSU, the Appellate Body must either decide itself without real legal basis for this authority or send the case to the DSB, which could establish a new panel. *Id.* The Appellate Body has never sent a case back to the DSB. *Id.*

allow any party to the dispute to request a remand of the matter or part thereof to the original panel."[97] Thus, if there were factual mistakes in the panel report, the Appellate Body was to send the case back to the original panel as only the original panel had all the background information of the case; otherwise, the disputing parties would not derive any benefit from the appeal review process. From the discussion above it is clear that by inserting the Appellate Body in the system, it is anticipated that the ASEAN DSM will be able to adopt qualified well-reasoned decisions.

6.4.2 Adoption of appellate review report

Under the 2004 Protocol, Appellate Body reports are to be drafted without the presence of the parties to the dispute and in the light of the information provided by and the statements made by the parties.[98] Opinions expressed in the report by the Appellate Body members are to remain anonymous.[99]

Appellate Body reports will be adopted by the SEOM and unconditionally accepted by the parties to the dispute unless the SEOM by consensus decides not to adopt the report within thirty days following its circulation to the Member States.[100] Adoption of the reports is based on the 'negative-consensus' rule and thus, as same as the adoption of panel reports, it is quasi-automatic.

It will be recalled that under the 1996 Protocol, the parties to a dispute can appeal the ruling adopted by the SEOM to the ASEAN Economic Ministers (AEM)[101] The AEM consists of government representatives from ASEAN Members, thus it is considered as a political body. Under the 1996 Protocol it conducts appellate review and make decisions based on majority voting,[102] as the same basis as the SEOM, this sort of procedure may "leave(s) more room for bargaining among member states, and will increase uncertainty and the reliability of agreements".[103]

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[97] The Dispute Settlement Body, Contribution of the EC and its Member States to the Improvement and Clarification of the WTO Dispute Settlement Understanding, TN/DS/W/38, ¶¶ 20-21 (Jan. 23, 2003)
[98] *The 2004 Protocol*, above n 8, Art 12.9
[99] Ibid, Art 12.10
[100] Ibid, Art 12.13
[101] *The 1996 Protocol*, above n 9, Art 8.1
[102] Ibid, Art 8.2
[103] Kiriyama, above n 77, 95

According to the 2004 Protocol, however, if no meeting of the SEOM has been scheduled or planned within thirty days after the Appellate Body report is issued, the adoption or non-adoption of the report will be done by circulation. In these circumstances, if no reply is made upon the report that has been sent by the SEOM to the party in concerned, within this period, it will be considered as an acceptance of the Appellate Body report. As with the report adoption process at the panel level, the adoption of Appellate Body reports must be completed within the thirty day period irrespective of whether adoption has occurred via the SEOM or circulation.

The adoption procedure in the appellate review phase is to be done without prejudice to the rights of Member States to express their views on the Appellate Body report.[104]In other words, adoption of an Appellate Body report does not necessarily imply total agreement with it and members are at liberty to express their opinions about the report. Nevertheless, once adopted, the Appellate Body's decisions is binding on the parties to the dispute although neither panels nor the Appellate Body can, in their findings and recommendations, add to or diminish the rights and obligations of Member States as provided in the covered agreements.[105] If the Appellate Body concludes that a respondent party's measure is inconsistent with a covered agreement, it will recommend to that Member State to bring the measure into conformity with that agreement. The Appellate Body can also add suggestions on how that Member State concerned should implement the recommendation.[106]

6.5 Transparency

Transparency can be defined as the visibility and "openness of the operations of the process."[107] As discussed in Chapter 4 (section 4.3), in the WTO context, the concept of transparency has evolved significantly to include publication requirements for laws and regulations of trade dispute settlement mechanism as well as the mode of administration in

[104] *The 2004 Protocol*, above n 8, Art 12.13
[105] Ibid, Art 14.2
[106] Ibid, Art 14.1
[107] William Safire, *On language: Transparency, Totally*, NY Times, 4 January 1998 as quoted in Sylvia Ostry, 'China and the WTO: The Transparency Issue', (1998) 3 *UCLA Journal of International Law & Foreign Affairs* 1, 2

trade services.[108] Transparency is important and necessary in order to provide stability, predictability and information exchange in a rule-based trade regime and dispute settlement procedure.[109]

In the ASEAN context – transparency appears to mean availability of information to the public. It relates to a number of issues, such as the submissions of the parties, public meetings and amicus curiae issues. These issues would be discussed in the following sections.

6.5.1 Written submissions

In ASEAN, although written submissions to the panel and the Appellate Body are made available to the parties to the dispute, they are still to be treated as confidential.[110] A party to a dispute, however, is not prohibited from making statements disclosing its own position to the public. Upon the request of another Member State, a party to the dispute can also provide a non-confidential version of the information contained in its written submissions for public disclosure. It can be assumed that the more available and accessible written submissions are to the public, the more trust people will have in the dispute settlement institution and the trade organisation itself which will then be more open and accountable to the citizens of the ASEAN Members States.

Effective dispute settlement in ASEAN, as in the WTO or other international trade bodies, is premised on the objective assessment by panels of the matters in dispute and the facts of the case. At the centre of the dispute resolution process is the receipt and the provision of factual information. The parties to the dispute are required to submit and exchange a set of written submissions that is necessary to support a challenge to or a defence of the measure at issue.

Under the 2004 Protocol, the parties to the dispute shall submit written submissions to the panel or the Appellate Body, though it should be available to the parties to the

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[108] Ibid, 9, the definition of transparency can be captured in Article X of the 1947 GATT. *Id.*
[109] WTO Secretariat, *WTO Work on Transparency in Government Procurement*, the 9th International Anti-Corruption Conference, The papers, at http://www.transparency.org/iacc/9th_iacc/papers/day2/ws2/d2ws2_wto.html (Accessed 14/07/2005)
[110] *The 2004 Protocol*, above n 8, Art 13.2

dispute as well, they should be treated as confidential.[111] The parties should provide a non-confidential version of their submissions, upon the request of a Member State, to be disclosed to the public.[112] Since 'nothing in this Protocol shall preclude a party to a dispute from disclosing a statement of its own positions to the public',[113] the parties to the dispute generally are free to disclose their own submission to the public. Some WTO Members have released their submissions on their own websites, as soon as they are filed, after an oral hearing, or once the procedure is concluded.[114] ASEAN could promote the transparency of the dispute settlement process by adopting the WTO practice and learning from the WTO practice.

The Working Group on Transparency in Government Procurement was established by the Singapore mandate[115] "to conduct a study on transparency in government procurement practices, taking into account national policies",[116] and based on the study of this Working Group, new procedures for the de-restriction of documents was agreed upon by the WTO Member States. Previously, restricted documents did not become public for at least three to eight months and even then, there was the possibility of further extension. Documents were only de-restricted upon the adoption of the report, upon the decision pertaining to their subject matter or upon consideration for de-restriction 6 months after the date of their circulation.[117] Under the new procedure, documents are de-restricted either after they are first considered by the relevant WTO body or 60 days after circulation, whichever comes earlier or unless otherwise requested by the Member State concerned.[118] In WTO context, Member States retain control over the restriction status of their own documents and can request that their submissions remain further restricted for a period of

[111] Ibid, Art 13.2
[112] Ibid.
[113] Ibid.
[114] For example, the United State, Australia, Canada, European Union, and New Zealand as well as some developing country parties represented by the Advisory Centre on WTO law, see WTO, *A Handbook on the WTO Dispute Settlement System*, 2004, 55 [hereinafter *WTO handbook*]; see also section 5.6.3 Chapter 5;
[115] The WTO Singapore Ministerial Conference held in December 1996
[116] The WTO Working Group on Transparency in Government Procurement held its first meeting in May 1997, and since then has met nine times, see WTO Work on Transparency in Government Procurement, Presentation by the WTO Secretariat, at the 9th International Anti-Corruption Conference 1996 <http://www.transparency.or/iacc/9th_iacc/papers/day2/ws2/d2ws2_wto.html > at 14/07/2005
[117] The WTO General Council, WTO Doc, WT/L/160/Rev.1, 26 July 1996[hereinafter *Procedure for Circulation 1996*]; This decision subject to be reviewed every two years, id.
[118] The WTO General Council, Procedures for the circulation and de-restriction of WTO documents, WT/L/452, 16 May 2002 [hereinafter hereinafter *Procedure for Circulation 2002*]

30 days.[119] This extension period can also be renewed upon request by that Member State.[120] In this regard, Member States' rights regarding their own submissions are protected.

It should be noted, that the EC proposed that the General Council Decision on Procedures for circulation and de-restriction of WTO documents,[121] should not apply to submissions to a dispute settlement panel, which is governed by the relevant provisions of the DSU.[122] Panel reports are circulated as unrestricted, unless the party to the dispute requests delayed de-restriction, which may not exceed ten days since the date of circulation. This provision is subject to review within the context of the review of the DSU.[123] Submissions of the parties are kept confidential[124] but the panel report which circulated to all the Member States is made public.[125]

6.5.2 Public meetings

Under the 2004 Protocol, panel and Appellate Body proceedings are confidential and not open to the public.[126] This is ironic as panels and the Appellate Body frequently adjudicate on disputes that involve matters of broad public interest and affect large sectors of civil society of member countries. Moreover, the implementation of panel or Appellate Body decisions requires adjustments to be made to Member States' trade measures and in certain cases, the prompt enactment of new laws by Member States through their respective legislative body. Denying the public the right to observe the dispute settlement process could arouse suspicions and court public resistance towards the new regulations.

Accordingly, granting the public access to panel and Appellate Body proceedings would have the effect of reinforcing the legitimacy of their rulings as well as of the procedures of the dispute settlement system. By opening the proceedings, less-experienced panel members who are not involved in those particular proceedings would have valuable

[119] Ibid, ¶ 2.a
[120] Ibid.
[121] See *Procedure for Circulation 1996*, above n 117
[122] The WTO General Council, Improving the transparency of WTO operations, communication from the European Communities, WTO doc. WT/GC/W/92, 14 July 1998
[123] Ibid.
[124] The DSU, above n 50, Art 18.2 and Working Procedures, Appendix 3 of the DSU, para 3
[125] *The WTO handbook*, above n 114, 55
[126] *The 2004 Protocol*, above n 8, Appendix II.II.1 &2 and Art 12.9

opportunities to attend and benefit from learning through observation. It is suggested that proceedings could be opened up to the public except in such cases where confidential information is being discussed. If technology permits, the proceedings could also be transmitted through live telecast so that the public could view the matter in a certain location in the Secretariat.

In the WTO practice, it was proposed that as soon as the 'findings and conclusions' portion of a final panel report was completed in all the three official languages of the WTO (English, French and Spanish), the final report should be issued to the parties to the dispute and the 'findings and conclusions' portion circulated as an unrestricted document for informational purposes.[127] The decision of the General Council of 14 May 2002 decided that all official WTO documents are unrestricted and these include panel and Appellate Body reports (WT-series).[128] This decision has overcame the problem of limited access to panel and Appellate Body proceedings, which had to remain confidential as opening them up to the public would undermine the goal of achieving settlements.

Interestingly, in the recent decision of the WTO panel in *EC – Hormones,*[129] at the request of the parties to the disputes, the panels agreed to open up their meetings during the period of 12-15 September 2005 for observation by WTO Members States and the general public via closed-circuit broadcast to a separate location at the WTO headquarters.[130] Although the meeting of the panels with the third parties remained closed as not all the third parties had agreed to open up their hearings for public observation, this decision marked an incredible development on this issue as it allowed the general public to view the panel hearings.

6.5.3 *Amicus Curiae*

Although not clearly expressed, it can be assumed that the provision which relates to *amicus curiae* in the 2004 Protocol is Article 8.4 which provides that 'a panel shall have

[127] Transparency in WTO Work, Revised Proposals by the United States and Canada, WTO Doc, WT/GC/W/106, 13 October 1998
[128] *The Procedures for the circulation 2002*, above n 118, ¶ 1
[129] US-Continued suspension of obligations in the EC-Hormones dispute, DS 320 and Canada-Continued suspension of obligations in the EC-Hormones dispute, DS321, see above n 88
[130] Communication from the Chairman of the Panels, WTO Doc, WT/DS320/8;WT/DS321/8, 2 August 2005; see section 3.6.4 Chapter 3

the right to seek information and technical advice from any individual or body which it deems appropriate.'[131] The possible wide interpretation of the provision has, however, led to the question as to whether the assistance sought by the panel has to be limited only to technical advice or if it can be more than that. Another question that has arisen concerns whether or not the assistance can be provided without formal request from the panel, that is, whether any individual or body can supply the information required voluntarily.

On a literal and strict reading, the answers of these questions are inherent in the provision itself. Regarding the first question, since the provision refers to 'information', it can be inferred that the right of the panels is not limited to technical advice but covers all information. For the second question, the answer is that the information and technical advice could not provided on a voluntarily basis, as the provision states that the panel is the one who will seek it.

As was seen earlier in Chapter 4 in the discussion on WTO dispute settlement practice, *amicus curiae* briefs have frequently been submitted by non-governmental organisations (NGOs).[132] In the ASEAN context, at least 56 accredited NGOs are affiliated with ASEAN.[133] These NGOs consist of organizations concerned with issues relating to labour, goods, commerce, law, health, transport, fisheries, business, education, forestry, etc., and most are very specific and technical organizations[134]. However, in the many statements and declarations ASEAN has produced, it appears that there is not much prominent involvement and cooperation with these organizations.

Despite this fact, the promotion and utilization of the 2004 Protocol would clearly encourage sustained participation from the NGOs as they may be involved directly or indirectly. NGOs often have better information, skills, and vast expertise on certain issues than national governments. NGOs can promote public awareness on a range of issues, such as environment, health, democracy, agriculture, and civil rights. By providing information through various media, NGOs would have encouraged public participation to be involved in the decision making of certain issues.

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[131] *The 2004 Protocol*, above n 8, Art 8.4
[132] See section 3.7.3 Chapter 3
[133] As of 28 March 2000, there are 56 ASEAN affiliated NGOs, see International Council on Social Welfare, *Civil Society & the ASEAN: An ICSW Briefing Paper*, Bangkok: ICSW, 2001, Appendix 9
[134] See, e.g., ICSW Website; < http://www.icsw.org/publications/sdr/2003_dec/Commentary3.html. >at 30/11/2005

6.6 Implementation

Although the last stage of the dispute resolution process, implementation is regarded as the most important step of the whole process. In this stage, the losing party may or may not comply with the panel's or Appellate Body's recommendations. It should be noted that in their report, a panel or the Appellate Body may suggest ways in which the Member State concerned might implement the recommendations.

6.6.1 The surveillance of implementation of findings and recommendations

Parties to the dispute are required to comply with the findings and recommendations of panel and Appellate Body reports within sixty days from the SEOM's adoption of the reports. This sixty days timeframe is, however, not a fixed time period as the parties to the dispute can agree on one that is longer after taking into account the circumstances of the particular case and according favourable consideration to the complexity of the actions required for compliance.[135] For instance, it may be necessary for the losing party to enact and pass national legislation. The party who requests an extension of time to comply with the findings or recommendations must do so within fourteen days from the SEOM's adoption of the findings and recommendations of the panel or Appellate Body report.[136]

Either party to the dispute can report in writing to the SEOM regarding the progress of the respondent party's implementation of the findings or recommendations of the panels and Appellate Body.[137] In a case where there is disagreement over whether or not a new measure is consistent with the findings or recommendations of the panel or Appellate Body report adopted by the SEOM, such a dispute will be decided through recourse to the dispute settlement procedures, including a referral back to the original panel wherever possible.[138]

The SEOM has the responsibility of conducting surveillance over the implementation of the adopted findings and recommendations of panel and Appellate Body

[135] *The 2004 Protocol*, above n 8, Art 15.2
[136] Ibid, Art 15.3
[137] Ibid, Art 15.4
[138] Ibid, Art 15.5

reports. Any Member State can raise the issue of implementation to the SEOM at any time following the adoption of the reports.[139] This issue will be placed on the agenda of the SEOM meeting and will remain there until it is resolved or until the SEOM decides otherwise. In each SEOM meeting, the losing party concerned must provide the SEOM with a written status report of its progress in implementing the panel or Appellate Body findings and recommendations.[140]

6.6.2 Compensation and the suspension of concessions

In the event that the findings and recommendations are not implemented within the period of sixty days, the party which prevailed in the case can either elect to be compensated or to suspend concessions or other obligations temporarily until the requisite measures are brought into conformity with the covered agreements.[141] The 2004 Protocol states that compensation is voluntary and, if granted, should be consistent with the covered agreements. In such case, the panel or Appellate Body shall recommend that the Member concerned make a mutually satisfactory adjustment as final settlement of the dispute and compensation may be part of it.

This involves the losing party Member State first entering into negotiations with the complainant party with a view to deciding on a mutually acceptable compensation.[142] If within twenty days after the expiry of the agreed period of time for implementation, there is disagreement among the parties to the dispute as to compensation, the complainant party can request authorisation from the SEOM to suspend concessions afforded to the Member State in breach of its obligations.[143] The SEOM is required to grant such authorization within thirty days of the expiry of the reasonable period of time unless it decides by consensus to reject the request.[144] The level of the suspension of concessions or other obligations authorized by the SEOM must be equivalent to the level of the nullification or

[139] Ibid, Art 15.6
[140] Ibid, Art 15.6
[141] Ibid, Art 16.1
[142] Ibid, Art 16.2
[143] Ibid.
[144] Ibid, Art 16.6

impairment.[145] The SEOM cannot authorise the suspension of concessions or other obligations if a covered agreement prohibits such suspension. [146]If no meeting of the SEOM is scheduled or planned within the thirty-day time limit for authorisation, authorization can be obtained through circulation.[147]

Under the 2004 Protocol, provisions similar to those of the WTO DSU set out the general principles and procedures to be followed regarding the suspension of concessions. They are:

(a) that the complaining party should first seek to suspend concessions or other obligations with respect to the same sector(s) as that in which the panel or Appellate Body has found a violation or other nullification or impairment;

(b) if that party considers that it is not practicable or effective to suspend concessions or other obligations with respect to the same sector(s), it may seek to suspend concessions or other obligations in other sector(s) under the same agreement;

(c) if that party considers that it is not practicable or effective to suspend concessions or other obligations with respect to other sector(s) under the same agreement, and that the circumstances are serious enough, it may seek to suspend concessions or other obligations under another covered agreement.[148]

In applying such principles, the complaining party is to take into account a number of issues. First, it should consider the trade in the sector or under the agreement under which the panel or Appellate Body has found a violation or other nullification or impairment. Then it should consider the importance of such trade to that party, and the broader economic elements related to the nullification or impairment as well as the broader economic consequences of the suspension of concession or other obligations.[149]

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[145] Ibid, Art 16.4
[146] Ibid, Art 16.5
[147] Ibid, Art 16.6
[148] *Ibid*, Art 16.3.(a) (b) (c); 'sector' in this provision means: (i)with respect to goods, all goods or (ii) with respect to services, a principal sector as identified in the current schedules of commitment under the ASEAN Framework Agreement on Services (AFAS), see *id*, Art 16 (e); meanwhile, 'agreement' means (i) with respect to goods, the agreement in relation to goods listed in Appendix I of the Protocol, and (ii) with respect to services, the ASEAN Framework Agreement of Services and subsequent protocols, (iii) any other covered agreement as defined in Article 1 of the Protocol, see id, Art 16.3 (f)
[149] *Ibid*, Art 16.3.(d)

6.6.3 Arbitration

If the respondent Member State in breach of its obligations objects to the level of suspension proposed or claims that the general principles and procedures have not been followed by the complaining party, the matter can be referred to arbitration. The arbitration can be carried out by the original panel or by arbitration panel appointed by the Secretary-General of ASEAN and shall be completed within 60 days after the date of expiry of the reasonable period of time.[150]

Arbitration does not address the nature of the concessions or other obligations to be suspended but instead determines whether the level of such suspension is equivalent to the level of nullification or impairment.[151] Arbitration is also used to determine whether the proposed suspension of concessions or other obligations is allowed under the covered agreement. If the matter concerns a claim alleging that the losing party has not followed the requisite principles and procedure, the arbitrator must examine that claim.

If the arbitrator determines that those principles and procedures have not been followed, the complaining party must apply them consistently with the provision set out in Article 16.3 of the 2004 Protocol.[152] The decision of the arbitrator is final and the parties to the dispute cannot seek a second arbitration.[153] The SEOM is to be promptly informed of the decision and is, upon request, to grant authorisation for the suspension of concessions or other obligations consistent with the arbitrator's decision, unless the SEOM decides by consensus to reject the request.[154]

6.6.4 Surveillance

The SEOM is to maintain surveillance over the implementation of recommendations and findings of adopted panel and Appellate Body reports, including in cases where compensation has been provided or concessions or other obligations have been suspended

[150] Ibid, Art 16.7
[151] Ibid 1, Art 16.7
[152] The Article 16.3 provides principle and procedures relate to concession or obligation to suspend, see n 149 above
[153] *The 2004 Protocol*, above n 8, Art 16.8
[154] *Ibid*

but where the offending measure(s) have yet to be brought into conformity with the covered agreements.[155] Like in the WTO, the suspension of concessions or other obligations in ASEAN are only considered as temporary measures applied until such a time when the inconsistent measures are removed following the recommendations and findings of the panel or Appellate Body reports or until the parties to the dispute reach a mutually satisfactory solution.[156]

As far as the covered agreements are concerned, the dispute settlement provisions provided in the covered agreements may be invoked in respect of measures affecting their observance taken by regional or local governments or authorities within the territory of a Member State.[157] In a case where the SEOM has ruled that a provision of a covered agreement has not been observed by a Member State, that Member State concerned has to take such reasonable measures as may be available to it to ensure observance with the covered agreement. The provisions of the covered agreements and the 2004 Protocol relating to compensation and the suspension of concessions or other obligations apply in cases where securing such observance has not been possible.

6.6.5 Fund/Cost

The 2004 Protocol also contains provisions concerning the ASEAN DSM Fund ("the Fund"), which is an ASEAN initiative to fund the proceedings proposed by the Protocol. As part of their findings and recommendations, the 2004 Protocol also states that panels and the Appellate Body must deal with the issue of expenses to be borne by the parties and third parties to the dispute in replenishing the Fund.[158] The Fund was established for the purpose of the Protocol and is a revolving fund separate from ASEAN Secretariat's regular budget.[159] The initial sum for the Fund comprised of equal contribution from all the Member States. Any drawdown from the Fund is to be replenished by the parties to the dispute according to the Protocol's provisions, which state that parties

[155] *Ibid*, Art 15.6 and Art 16.9
[156] *Ibid*
[157] Ibid, Art 16.10
[158] Ibid, Art 14.3, an ASEAN DSM Fund [hereinafter referred to as 'the Fund'] as provided in article 17 of the Protocol
[159] Ibid, Art 17.1

to a dispute should contribute to the expenses of the dispute. The ASEAN Secretariat is responsible for administering the Fund.[160]

The expenses of panels and the Appellate Body expenses as well as any related administration cost incurred by the ASEAN Secretariat will be covered by the Fund. All other expenses incurred by any party to a dispute, including the costs of legal representation, are to be borne by that party itself. Meanwhile, the subsistence allowances and other expenses of the panels and the Appellate Body shall be in accordance with the criteria approved by the AEM on the recommendations of the ASEAN Budget Committee.[161]

6.6.6 Time Frame

When a Member State requests consultation with another Member State, both parties have to enter into consultations within thirty (30) days of the date the request is received. If the consultations fail to resolve the dispute within sixty (60) days after the receipt of the request, the complaining party can then raise the matter before the SEOM if that party wishes to request the establishment of a panel. The stipulated period for consultations is thus sixty (60) days.

Under the 2004 Protocol, a panel's establishment is to be done within the timeframe of forty five (45) days, irrespective of whether the matter is settled by the SEOM at one of its meetings or by circulation. The panel will be established by the SEOM unless the SEOM decides by consensus not to do so. At the panel stage, the panel is to submit its findings and recommendations to the SEOM within sixty (60) days of its establishment. In exceptional cases, a panel may be granted an additional ten (10) days to submit its findings and recommendations to the SEOM. The SEOM is to adopt the panel report within thirty (30) days of its submission unless a party appeals the matter or the SEOM decides by consensus not to adopt the report. Under the Protocol, the time limit for the panel report's adoption or non-adoption is thirty (30) days.

[160] Ibid.
[161] *Ibid*, Art 17.3

In appeal matters, Appellate Body proceedings are, as a general rule, not to exceed sixty (60) days from the date a party to the dispute formally notifies its decision to appeal to the date the Appellate Body circulates its report. If the Appellate Body cannot meet this deadline, it is to inform the SEOM of the reasons for the delay and give an estimate of the period within which it will submit its report. In no case will the appeal proceedings exceed ninety (90) days. The Appellate Body report will be adopted by the SEOM within thirty (30) days following its circulation to the Member States unless the SEOM decides by consensus not to adopt the report. The 2004 Protocol clearly states that the adoption process is to be completed within the thirty (30) days period irrespective of whether it is settled by the SEOM at one of its meetings or by circulation.

In summary, the total time involved for the dispute resolution process to be completed, from the consultations stage up to appellate review, amounts to 315 days. This is more or less similar with the time period taken by the WTO DSU, that is, 12 months for matters which are appealed and 9 months for matters that are not appealed.

The SEOM in essence uses quasi-automatic decision-making procedures for dispute settlement processes as the 2004 Protocol has provided 'negative consensus' rule for the establishment of panels[162] and the adoption of panel[163] and Appellate Body reports.[164] Utilising these kind of procedures have the effect of ensuring strict adherence to the stipulated time frames.

6.6.8 The independence of the system

The 2004 Protocol provides for a dispute settlement mechanism that breaks new ground and brings ASEAN to a whole new level. It creates tribunals which will guarantee that disputes will be resolved in an objective and impartial manner as the function of panels is to make objective assessments of disputes that come before them.[165]

Under the 1996 Protocol, disputes were handled by ministers who tended to argue and politicise matters whereas under the 2004 Protocol, disputes are handled by

[162] *Ibid*, Art 5.1
[163] *Ibid*, Art 9.1
[164] *Ibid*, Art 12.13; see also the use of negative consensus for the granting of request for the suspension of concession in the case of non-implementation of dispute settlement rulings, see *id*, Art 16.6
[165] *Ibid*, Art 7

independent tribunals through the panel system and there is little chance for disputing parties to politicise the proceedings. Moreover, panel members serve in their individual capacities and not as representatives of their government or of any other organization. Member States in turn cannot give panel members instructions or seek to influence them as individuals with regards to matters before the panel.[166] All of these procedures provided by the Protocol would ensure that panel members remain impartial and will render objective decisions.

6.7 Conclusion

As a result of the Declaration of Bali Concord II 2003, ASEAN has successfully established a mechanism intended to resolve trade disputes among its Member States. A division of dispute settlement bodies in ASEAN could resolve trade disputes related to operational or technical problems. Apart from that, ASEAN has also adopted the 2004 Protocol which will apply to trade disputes arising from a belief that any benefit of an ASEAN Member under the covered agreement is being nullified or impaired as a result of the failure of another Member State to carry out its obligations under the covered agreements.

The new 2004 Protocol represents a crucial step toward a more rule-oriented system and is a significant improvement over the 1996 Protocol. The improvements include the following features: the utilisation of the negative consensus rule for establishing panels, the adoption of panel and Appellate Body reports, and the authorization to suspend concessions; the insertion of an appellate review body in the mechanism replacing the ASEAN official body; the setting up of a strict time period for each step and the provision of more legalistic measures at the enforcement stages. All of these procedures maintain consistency of the mechanism and at the end promote the legitimacy of the ASEAN system. Suffice it to say, an improved mechanism is vital equipment for ASEAN in promoting its legitimacy.

From the discussion above it is obvious that the 2004 Protocol is very similar with the WTO DSU. Therefore it could be said that ASEAN is intending to form a mini-WTO

[166] *Ibid,* Appendix II.I.9

DSM in the ASEAN region. Regardless of its lack of originality, the 2004 Protocol ostensibly completes the transition to a fully legal adjudicatory mechanism for the resolution of trade disputes in the ASEAN region. Perhaps, by adopting a mechanism which is similar with the DSU, its acceptability will be guaranteed as eight of ten ASEAN Members are also WTO Members and the DSU has been regarded as a reliable mechanism to resolve trade disputes among the WTO members.

Moreover, it has also been said that an international agreement that is not accompanied by specific means to resolve possible controversies is useless. The dispute settlement mechanism is created to interpret the rights and obligations of the signatory countries as provided for in the covered agreements. As the ASEAN 2004 Protocol is already in place, it is for the ASEAN Member States to now capitalise on it. Henceforth the years until 2020 will be the 'learning years', that is, the critical period for ASEAN to learn to apply the 2004 Protocol so that when the ASEAN Community materialises in 2020, the ASEAN Member States will already have gotten used to it. To date, no member has initiated a case under the Protocol.[167] This is not to suggest that disputes do not exist, but rather, that ASEAN members still appear reluctant to utilise the legalistic procedures they have established. The next few years will be critical learning years in ASEAN's adoption and implementation of the DSM.

[167] The case of *Yaung Chi Oo Trading Pte Ltd* v *Government of the Union of Myanmar*, Association of Southeast Asian Nations (ASEAN) Arbitral Tribunal: Yaung Chi Oo Trading PTE LTD v Government of the Union of Myanmar (Award), 42 *I.L.M.* 540, May 2003; the case was initially a dispute between Yaung Chi Oo Trading Pte Ltd, a Singaporean incorporated company, and Myanmar Foodstuff Industries as well as a Myanmar State agency (the Ministry of Industry of Myanmar). The main issue in this case was whether the investments made by the YCO in Myanmar received a certain kind of protection under the ASEAN 1987 Treaty.

CHAPTER 7 – CONCLUSION

Since the adoption of the ASEAN Free Trade Area in 1992, ASEAN has been concerned with the economic cooperation in the region. Gradually, ASEAN has become the pre-eminent international organisation in the South East Asian region. In doing so ASEAN has strengthened and improved its institutional mechanisms and organs and has moved to increase its stature as a regional economic organization. In 1997, ASEAN adopted the ASEAN Vision 2020 as the foundation for ASEAN's planning to the year 2020. Among other things, this Vision calls for the establishment of the ASEAN Economic Community by 2020. As ASEAN has moved to implement this Vision, a number of trade agreements have been adopted, moving the region to ever more integrated economic cooperation. Importantly, ASEAN has also moved to develop a modern and effective mechanism for the settlement of trade disputes.

As this thesis has shown, ASEAN has followed the lead of other international economic organizations regarding to the settlement of trade disputes among Member States. ASEAN has improved its dispute settlement system from one relying on pragmatic diplomacy to a legalistic rule-based system. This transformation is especially and most comprehensively evidenced in the adoption of the 2004 Protocol which, given its close resemblance to the WTO DSU and its reliance on independent third party panels and heavy legalistic methods, represents a new era and a shift in emphasis for ASEAN.

However, the ASEAN trade dispute settlement mechanism can be regarded as still in its very early stages of development. To date, no cases have been brought under it and the mechanism is therefore untested. Accordingly, any analysis of its effectiveness and efficiency must, at this stage, be somewhat speculative. Nevertheless, an examination of the key procedural issues that have arisen in respect of trade dispute settlement mechanism in other international economic organisations reveals that while ASEAN has come a long way to adopting judicial processes this transformation is not yet complete, difficulties in application of the ASEAN mechanism may still arise and diplomatic considerations may still influence outcomes.

For instance, this thesis has revealed that in the WTO system, the consultation phase has an added value in that it gives disputing parties an opportunity to clarify the facts and the claims of the complainant in order to dispel any possible misunderstandings as to the actual nature of the measure at issue alleged to be in violation of WTO provisions. This double functioning of consultations lays a foundation for settlement as well as for further proceedings. This feature can be employed by ASEAN to make for a more versatile mechanism. This follows from ASEAN's reliance on the principles of *musyawarah* and *mufakat* -consultation and consensus- to organise regional agreements on delicate issues that respect the diverse cultural sensitivities, methods of governance and national sovereignty of the different Member States.[1] Instead of using a legalistic approach, this principle largely relies on a patient consensus-building process to arrive at informal understandings or loose agreements.[2] As discussed in Chapter 2 ASEAN has developed and pursued its goals by utilizing this principle and has accommodated its Members opportunities as a consultative rather than a negotiating forum.

This unique approach aptly reflects the cultural tendencies of ASEAN Member States in avoiding conflicts and preferring solutions that accommodate Asian societal attitudes toward peaceful dispute settlement.[3] For example, in Thailand, conflict avoidance is highly prized and litigation is customarily viewed as an inappropriate form of local dispute settlement.[4] These typical Asian cultural and traditional traits have been paramount in ASEAN practices and are now reflected in the 2004 Protocol. This thesis has demonstrated that the informal dispute settlement alternatives of consultation, conciliation and mediation are clearly in line with the ASEAN preference and have been institutionalised by the 2004 Protocol. The Protocol's provisions facilitate disputing parties with many-layered opportunities to consult and mediate in the hope that the parties will

[1] Paul J. Davidson, 'The ASEAN Way and the Role of Law in ASEAN Economic Cooperation', (2004) 8 *Singapore Year Book of International Law* 165,167
[2] In arriving at informal understandings, the process involves intensive informal and discreet meetings behind the scenes to work out a general consensus, often with the involvement of respected leaders which it became the starting point around which the unanimous decision is finally accepted in more formal meetings, see ibid.
[3] Deborah A. Haas, 'Out of Others' Shadows: ASEAN Moves toward Greater Regional Cooperation in the Face of the EC and NAFTA', (1994) 9 *American University Journal of International Law & Policy* 809, 864
[4] Ibid (quotation omitted)

eventually elaborate and modify their behaviour toward the dispute and litigation can thus be avoided.

However, apart from consultative mechanisms, the 2004 Protocol provides for greater certainty through the addition of a legalist model of dispute resolution which can be resorted to in situation where diplomatic consensus and compromise prove ineffective or impossible to attain. Under the 2004 Protocol trade disputes are brought before panels. This system focuses on impartial and objective procedures for adjudication and theoretically it will promote consistency, 'predictability and certainty' of the decisions. A legalistic model of DSM is significant for ASEAN economic integration activities in the lead up to the formation of the AEC which, in the final analysis, will require a reliable mechanism for resolving trade disputes among ASEAN Members, such as that represented by the 2004 Protocol.

Nevertheless, since corruption is still a serious problem in some ASEAN countries, a code of conduct for panellists should be provided in the system to prevent conflicts of interest. A survey done by Transparency International for its 2004 global corruption perceptions index revealed that of the 146 countries surveyed, Indonesia ranks 137th, which slightly above that of Myanmar.[5] These two countries are perhaps the more corrupt from their other fellow ASEAN countries with Singapore ranked 5th, Malaysia at 39th and Thailand at the 66th position. Despite ongoing cooperation among the ASEAN Member States to eradicate corruption in the ASEAN region, it would be better for ASEAN to have a safeguard provision in the ASEAN system, such as code of conduct for the panellists. Under both the NAFTA and the WTO systems, panellists serving in panels are subject to codes of conduct designed to ensure their impartiality and that they avoid conflicts of interests. The provisions of these codes of conduct can be used as guidance for ASEAN in forming a code of conduct of its own.

The fact that the 2004 Protocol states that preference is to be given to candidates from ASEAN Member States suggests that potential panellists are not limited to nationals

[5] See Global Corruption Report, at http://www.globalcorruptionreport.org/gcr2005/download/english/country_reports_a-j.pdf (Accessed 27/07/2005)

of the Member States and that prospects exist for outsiders to serve on ASEAN panels.[6] This provision does have an advantage in terms that panellists from ASEAN Member States have the opportunity to learn from more experienced individuals from other nations, particularly from developed countries.

There have been arguments that ASEAN Member Countries lack the human resources necessary to produce well-qualified individuals with sufficient expertise on international law or policy or on the subject matter of the covered agreements. This view has proved to be misleading as, over the last ten years, there have been many scholars, academics and politicians from ASEAN nations who have been trained in leading educational institutions around the world. ASEAN has also been focusing attention and efforts on human resource development, rural development and other training related to knowledge-base and technology in its region and in cooperation with its dialogue partners and international institutions.[7] In addition to this, ASEAN in 1995 established the ASEAN University Network consisting of leading universities and institutions of higher learning in the region to contribute toward human resource development.[8] This network has been promoting student and faculty exchanges, research collaborations, seminars and workshops as well as fellowship and scholarship programs.

Individuals who qualify to serve as panellists must, apart from their expertise in international law and trade, have good proficiency in the English language. This is because the formal language of ASEAN is English and all the ASEAN documents are singularly issued in that language. From research conducted on the experience of NAFTA, it was found that one of several factors that could be considered as probable causes for panel delays is the problem of language constraints.[9] The research report concluded that "the panel process is affected by differences in legal culture and by other obstacles to communication between participants".[10] Therefore, diverse legal traditions and varying

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[6] ASEAN Protocol on Enhanced Dispute Settlement Mechanism, done at Vientiane, Lao PDR on 29 November 2004, see <www.aseansec.org/16755.htm > at 6/01/2005 [hereinafter the 2004 Protocol], Appendix II.I.1

[7] Rodolfo Severino Jr, Former Secretary-General of ASEAN, *How Relevant is ASEAN?*, available at Asian Affairs, see < http://www.asian-affairs.com/Crisis/severinojr.html > at 12/07/2005

[8] See ASEAN University Network, see < http://www.aseansec.org/4961.htm > at 12/07/2005

[9] Gabriel Cavazos Villanueva and Luis F. Martinez Serna, 'Private Parties in the NAFTA Dispute Settlement Mechanisms: The Mexican Experience', (2003) 77 *Tulane Law Review* 1017, 1021 (citation omitted)

[10] Ibid

proficiency in English or other language skills among ASEAN panellists can make panel proceedings lengthier and frustrating. Considering the diverse backgrounds of ASEAN Member States with regard to language, legal system, culture, religion and politics, this is a major issue that needs to be addressed in the first place.

Moreover, ASEAN Members have been reluctant to be too legalistic, preferring to conduct relationships in the ASEAN way.[11] The ASEAN dispute settlement mechanism style was based on informal mechanisms rather than hard legal processes.[12] As the 2004 Protocol is a rules-based system, it is important to know whether this Protocol will enhance the ASEAN mechanism in resolving disputes among its Members.

In recent years, ASEAN has concluded a number of agreements which are legally binding on ASEAN Member States, namely, the ASEAN Free Trade Area (AFTA), ASEAN Framework Agreement on Services (AFAS), ASEAN Investment Area (AIA), and ASEAN Framework Agreement on Intellectual Property Cooperation. These agreements are building blocks toward achieving an integrated ASEAN market. In October 2003, the ASEAN Member States agreed by 2020 to establish the ASEAN Community which will comprise of three pillars: the ASEAN Economic Community, ASEAN Security Community and ASEAN Social and Culture Community. ASEAN has thus moved from cooperation into integration.

All of these efforts demonstrate the growing influence of legalism in the ASEAN system. As ASEAN moves toward further economic integration, it is recognised that more legally binding trade agreements will be undertaken and this will entail an increased number of disputes arising with respect to the application and implementation of such agreements.[13]

The 2004 Protocol means that ASEAN now has a formal dispute settlement mechanism besides the informal mechanism of the ASEAN Way.[14] The argument has arisen that the ASEAN Way will be an obstacle for ASEAN in implementing the Protocol. This observation, however, is incorrect. In having two kinds of mechanisms, ASEAN has

[11] Davidson, above n 1, 166
[12] Lay Hong Tan, 'Will ASEAN Economic Integration progress beyond a free trade area', (2004) 53 *International & Comparative Law Quarterly* 935, 942
[13] Ibid, 945
[14] For the discussion of the ASEAN Way, see section 1.5.2 Chapter 1

the benefit of being able to utilize both of them and disputes can be settled either by the ASEAN Way or by the 2004 Protocol. At this point, it would seem appropriate for non-trade disputes to be resolved using the ASEAN Way and for trade disputes to be settled using the Protocol as the latter type of disputes, by their nature, require outcomes that are precise, even-handed, predictable and reliable.[15] It can, perhaps, even be said that these two mechanisms complement one another. While the 2004 Protocol is already in place,[16] it is dependent on the political will and discretion of the Member States to capitalise on its provisions.

By signing the 2004 Protocol, ASEAN Member States have agreed to a change from a negotiation-based dispute settlement system to an adjudication-based system where trade disputes are brought before panels. The negotiation-based dispute resolution system is a diplomatic means of settling disputes characterised by:

> the flexibility of the procedures, the control over the dispute by the parties, their freedom to accept or reject a proposed settlement, the possibility of avoiding 'winner-loser-situations' with their repercussions on the prestige of the parties, the only limited influence of legal considerations, and the often larger influence of the current political processes in, and relative political weight of, each party [17]

On the other hand, adjudication-based dispute settlement systems typically strive for legalistic, impartial and objective procedures for adjudication. In this respect, these systems have more precise definitions of obligations and more effective means of implementation.[18] They are commonly utilised in arbitration and in courts and are particularly favoured by those who:

> want to obtain rule-oriented, binding decisions in conformity with their mutually agreed long-term obligations and interests (as defined in multilaterally agreed legal rules of a permanent nature) and prefer to avoid the various risks involved in 'diplomatic' means of dispute settlement (such as dependence on the consent and good will of the defendant,

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[15] Tan, above n 12, 950

[16] Art 21 of the 2004 ASEAN DSM Protocol stated that "this Protocol shall enter into force upon signing" that means, it has legal effect on 29 November 2004 when the ASEAN members signed it, see *The 2004 Protocol,* above n 6, Art 21.1

[17] Ernst-Ulrich Petersmann, *The GATT/WTO Dispute Settlement System: International Law, International Organizations and Dispute Settlement*, (1998), 69

[18] Hansel T. Pham, 'Developing Countries and the WTO: The need for more Mediation in the DSU', (2004) 9 *Harvard Negotiation Law Review* 331, 346 (citation omitted)

> bilateral ad hoc solutions possibly reflecting the relative power of the parties rather than the merits of their case …).[19]

Theoretically speaking, the adjudication system should promote consistency, predictability, certainty and undistorted competition as well as reduce transaction costs, de-politicise economic activities and commit governments to more transparent, non-discriminatory and proportionate trade policy instruments.[20] Negotiation-type systems are often regarded as puzzling, fragmented, flawed, full of loopholes and difficult to understand, respect and obey.[21]

Nevertheless, history has shown that the adjudicative approach has been practiced in major international trade organizations for the last two decades. In the WTO dispute settlement system, for example, the adjudicative approach refers to a system that prescribes a more rigid and systematic procedure for handling trade disputes. It consists of the key elements of strict timeframes, establishment of the Dispute Settlement Body (the DSB) to administer the DSU and oversee the handling of disputes, explicit procedures for consultations, automatic establishment of a panel, standard terms of reference and provisions ensuring expeditious, impartial composition of panels, automatic adoption of panel and Appellate Body reports, establishment of the Appellate Body, automatic authorization to take retaliatory measures and limits on unilateral actions.[22] Employing these key elements the WTO dispute settlement system enables the disputing parties to reach mutually agreed solutions, which in turn fulfils one of the primary aims of the DSU - which is to secure prompt and positive resolutions to disputes.[23] By utilizing the 2004 Protocol which has identical provisions with the DSU, the parties to a dispute in the ASEAN region will also be able to achieve positive resolutions of their disputes.

However, as has been revealed in this thesis, ASEAN has not completely adopted the WTO system. Under the WTO, an independent DSB with an impartial Chairs administers the DSU and oversees the handling of disputes, while in ASEAN the dispute

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[19] Petersmann, above n 17, 66
[20] Pham, above n 18,346 (citation omitted); Petersmann, above n 17, 67
[21] Pham, above n 18, 346 (citation omitted)
[22] Debra P. Steger and Susan M. Hainsworth, 'New Directions in International Trade Law: WTO Dispute Settlement', in James Cameron and Karen Campbell (eds), *Dispute Resolution in the World Trade Organization*, (1998), 30-31
[23] Ibid, 34

settlement mechanism is administered by a political entity, the SEOM, which has the authority to "establish panels, adopt panel and Appellate Body reports, maintain surveillance of implementation of findings and recommendations of panel and Appellate Body reports… and authorise suspension of concessions and other obligations under the covered agreements". The choice of SEOM as the administrator of the dispute settlement mechanism, while different from the approach taken in the WTO, appears a pragmatic one designed to avoid any further burden on ASEAN's limited budget. Nevertheless, this choice may provide avenue for political influence.

In any event, the ultimate goals of the ASEAN dispute settlement system are the same as those of the WTO: that is to resolve disputes by clarifying measures in question concerning the covered agreements; to restore any imbalances in the system caused by inconsistent measures; and to secure Member States' compliance with the covered agreements.[24] The purpose of the dispute resolution proceedings is therefore to determine whether a particular Member State's measure is inconsistent with the covered agreements. In other words, ASEAN Member States cannot unilaterally define such inconsistencies as this is now the exclusive privilege of the ASEAN adjudicating bodies.

In examining the mechanism utilized in various trade agreements, this thesis revealed that two types of trade dispute settlement have been utilized i.e., power-oriented settlement by negotiation and agreement with reference (explicitly or implicitly) to the relative power status of the parties; and rule-oriented settlement by negotiation or decision with reference to norms or rules to which both parties have previously agreed.[25] The former relies on diplomatic negotiations between treaty partners or political powers with reference to the relative economic and other power which the disputants possess. The most powerful party would have the advantage over the other parties and the smaller countries are particularly disadvantaged and would hesitate to challenge larger countries on which their trade is dependent on.[26] In short, under this system, the bargaining power of the parties to the dispute is unequal politically and economically.

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[24] *The 2004 Protocol*, above n 6, Art 16.1

[25] Two conflicting viewpoints, the power oriented and rule oriented emerged in the debate over the GATT DSM, see John H Jackson, *Restructuring the GATT System*, (1990), 51[hereinafter Jackson restructuring]

[26] Ibid, 52

In a rules-based system, on the other hand, the parties to the dispute are arguing about the application of the rules by referring to the agreed rules.[27] This type of system incorporates a formal adjudicatory decision-making process and effective enforcement mechanisms to resolve conflicts over the interpretation and application of international agreements.[28] This model rigorously adheres to legal norms and leads to a judicial, adjudication of disputes which adopts a rule-oriented approach in conducting international trade relations in order to provide more precise decisions on the merits of disputes and more effective implementation of decisions.[29]

As discussed in Chapter 3 the GATT model, unlike the legalistic approach, primarily sought to reach mutually satisfactory conclusions based on consensus and individual States were encouraged to find equitable solutions.[30] This pragmatic approach rested on the notion of tolerance and the belief that dispute settlement systems should only be used to facilitate negotiated settlements of trade disputes through the institutions of consensus and compromise within the general framework of rules.[31] This approach was also the early model for ASEAN.

Dispute avoidance, however, flourished under this pragmatic model and there were regular blockages of panel decisions not to mention increasing disobedience and non-compliance by the parties to the dispute with panel rulings. The GATT developing country Contracting Parties which had long sought to level the playing field and compete against the larger industrial democracies, eventually were persuaded to adopt the legalist position[32] which they hoped would lead to a stronger dispute settlement system which would give them additional leverage in negotiating with wealthier states over protectionist laws that limited their ability to export to these States.[33] Eventually, the GATT signatories considered that a new dispute resolution mechanism based on the legalist model was needed.

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[27] Ibid.
[28] Oliver Long, *Law and its limitations in the GATT Multilateral Trade System*, (1985), 61-64
[29] Miquel Montana I Mora, 'A GATT with teeth: Law wins over Politics in the Resolution of International Trade Disputes', (1993) 31 *Columbia Journal of Transnational Law.* 103, 107
[30] Jackson restructuring, above n 25, 49-54
[31] Mora, above n 29, 107
[32] G. Richard Shell, 'Trade Legalism and International Relations Theory: An Analysis of the World Trade Organization', (1995) 44 *Duke Law Journal* 829, 830
[33] Ibid, 835

In the international system, it is impossible for all nations to be of "equal stature" because, apart from having dissimilar beliefs, all sovereign States also have different capabilities and powers which they use to compete with each other in order to fulfil their own sovereign self-interests.[34] In this context, the multilateral trade system introduced by the WTO agreement provides more stable, predictable and just outcomes from these asymmetries. In establishing the WTO DSM, the larger developed countries realised that such a system would also advance their interests of market access as well as the interests of the developing country Member States which desired to level the playing field.[35]

As the successor to GATT, the WTO provides a dispute settlement mechanism that better ensures that the less powerful Member States can negotiate more confidently with the more powerful Member States with the knowledge that the agreements reached will be enforceable. For example, in trade disputes involving environmental issues, the WTO developing country Member States have found success in legal challenges against the developed countries under the WTO dispute settlement system.[36] It is this legalistic WTO approach which has now essentially been adopted by ASEAN. In this context it is important to bear in mind that ASEAN Member States comprise two groups – the older members and newer members (the latter group being relatively poorer than the former group).[37] This wide inherent gap in economic and social development and trade liberalization among the Member States is referred to as the "two-tier structure" of ASEAN.[38] The less powerful nations have required special treatment in negotiating their rights within the ASEAN system and for this reason, the 2004 Protocol was urgently needed to establish a rule-oriented system that would protect the interests of these States.

A rule-oriented dispute settlement mechanism was also considered desirable by private sectors in ASEAN countries as it would provide more certain, predictable and fair

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[34] Thomas Hobbes, *Leviathan*, (first published in 1651, 1996 ed) in Richard Tuck
[35] Shell, above n 32, 837
[36] Kevin C Kennedy I, 'Trade and the Environment: Implications for Global Governance, why Multilateral matters in resolving Trade-Environment Dispute', (2001) 7 *Widener Law Symposium Journal* 31, 64
[37] Old members are Brunei Darussalam, Indonesia, Malaysia, Philippine, Thailand, Singapore and the new members including Vietnam, Laos, Cambodia and Myanmar;
[38] Eric Teo Chu Cheow, Bali Summit moves ASEAN toward sense of community, *The Japan Times*, 10 October 2003; It has been recommended that ASEAN policy-maker should officially adopt the principle of a "two-speed" ASEAN (i.e., a two-tier economic integration process), see, Denis Hew and Hadi Soesastro, Realizing the ASEAN Economic Community by 2020: ISEAS and ASEAN-ISIS approaches, (2003) 20 *ASEAN Economic Bulletin*, 292

outcomes which were vital for business. It must be remembered that the negotiation process at the international level actually consists of two levels.[39] While negotiations take place between the government representatives of Member States in dispute with one another, each of those representatives is simultaneously negotiating with private stakeholders and other concerned domestic interests.

In these negotiations, governments and stakeholders often have different time horizons and different objectives.[40] Business sectors typically desire prompt solutions to problems while governments, on the other hand, require solutions that connect with their larger trade policy goals. For instance, in a dispute that lacks commercial concern and business involvement, governments have a free reign in targeting their arguments, as was in the case of Korean market for powdered milk (the EU versus Korea)[41]. In contrast, in *EC-Bananas*, litigation in the WTO took place due to pressures from congressional leaders who had met with the most active U.S stakeholder company.[42] From this experience, it is important for ASEAN to give a role to the business sectors as they are key players in international trade.

The 2004 Protocol is an international agreement between ASEAN Members. Like the majority of international trade agreements, the 2004 Protocol deals with the conduct of sovereign nations, in a sense that the relations within this scope are comprised of relations among and between sovereign states. ASEAN Members, like other nation states, sign and ratify trade agreements to fulfil their national interests and have agreed upon the dispute settlement mechanism provided by the trade agreements in order to cope with disagreements concerning the interpretation of the trade agreements.

Generally, panel proceedings are systems that recognise the litigious elements of proceedings and panel decisions are considered legally binding, that is, that disputants have to comply with and implement them. In the WTO DSM, the losing party has to "bring the inconsistent measures into conformity with that agreement." In other words, the losing party has to relinquish some of its sovereignty in order to obey the panel rulings. One may

[39] Amelia Porges, 'Settling WTO Disputes: What do Litigation Models tell us?' (2003) 19 *Ohio State Journal on Dispute Resolution* 141, 143 (citation omitted)
[40] Ibid.
[41] Korea – Definitive Safeguard Measure on Import of Certain Dairy Products, WTO Doc. WT/DS98/1
[42] Porges, above n 39, 144

argue that procedures of this kind infringe upon the national sovereignty of the Member States as they are forced to comply with the panel or Appellate Body recommendations.[43] This view is misleading, however. It is a singular feature of international relations that states in the exercise of their sovereignty agree to be bound by product of their negotiations. In the WTO context, for example, this means that members have agreed to resort to the DSM exclusively to resolve any disputes arising under the covered agreements. Furthermore, as a condition of membership, States are to comply with and implement all of the Uruguay Round agreements.[44] Compliance with panel or Appellate Body rulings thus constitutes a consequential obligation of WTO membership rather than a violation of national sovereignty. Obedience to panel or Appellate Body rulings does not at this point mean that a Member State cedes its sovereignty. Since the Member State concerned was accused of and found to be in violation of its international obligations, it should, in accordance with international law, amend its measures that are inconsistent with the covered agreements.[45] Having said that, the national sovereignty of disputant nations is being eroded when the panel or Appellate Body creates new rights and obligations on issues which the Member States have not explicitly bound themselves to as signatories of the trade agreement.[46]

As has been shown ASEAN still lacks a supranational decision-making or law-making organ for legislating community law or for enforcing any of its protocols and the rulings of the panel or Appellate Body. It is apparent that ASEAN's institutions, with the exception of its Secretariat, are all member-state based. The staffs in the various ASEAN institutions are representatives of the governments of the Member States and are subject to their government's authority and direction. It can be said that the Member States have not delegated a substantial amount of power to the organization's institutions.

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[43] John H Jackson, The Great 1994 Sovereignty debate: United States acceptance and implementation of the Uruguay Round results, (1997) 36 *Columbia Journal of Trans-national Law* 157, 174 [hereinafter Jackson sovereignty debate]

[44] The Agreement establishing the WTO requires all member countries to "ensure the conformity of its laws, regulations and administration procedures with its [WTO] obligations", Final Act, Art XVI, ¶ 4, see also see Larry A DiMatteo, et.al, 'The Doha Declaration and Beyond: Giving A Voice to non-trade concerns within the WTO Trade Regime', (2003) 36 *Vanderbilt Journal of Transnational Law* 95, 99

[45] John H Jackson, *The World Trading System*, (1997), 126

[46] Ibid, see also the discussion of amicus curiae in section 4.4.3 Chapter 4

Moreover, in ASEAN there is no institutional equivalent to the EU Commission which is in charge of identifying, implementing or enforcing the ASEAN norms and agenda. In the absence of this sort of institution, the enforcement of the ASEAN covered agreements may become difficult as there is no institution that can investigate and commence proceedings before the court against any member states which violate the covered agreements. Without effective enforcement the organization will become meaningless. To this end, the enforcement of the covered agreements or the panel or the Appellate Body reports mainly relies on the good faith of the Member States. While it is too early to comment on the manner in which this good faith will be exercised, the potential for a systematic undermining of the 2004 Protocol's mechanism does exist.

One could say that the creation of a supranational body is perceived as a threat to the sovereignty of ASEAN Members. This view is not well founded, however, as in NAFTA's experience where the creation of a supranational authority is an attempt to 'level the playing field' so that weaker member countries feel confident enough to negotiate for their interests against stronger member countries. A dispute settlement mechanism of this sort is basically designed to promote the "efficient and just future functioning of the overall system."[47] Moreover, by creating a 'court like' structure, i.e. a panel system and appeal review, the ASEAN dispute settlement mechanism has given rise to placing legal obligations on the part of the offending party to comply with the decisions of the panels or Appellate Body. In this respect, the party concerned must amend its inconsistent measures to conform to the covered agreements as recommended by the reports of the panels or Appellate Body.

From the above discussion it is apparent that ASEAN has intended to follow the other international organisations regarding the settlement of trade disputes among Member States. ASEAN has improved its dispute settlement system from one of pragmatic diplomacy to a legalistic rule-based system. This has been reflected in the adoption of the 2004 Protocol. The ASEAN DSM, however, can be regarded as still in its very early stages of development. In the end, however, the success of the 2004 Protocol depends upon a

[47] Symposia: Summary of Proceedings of the Seminar on Dispute Resolution under the Canada-United States Free Trade Agreement, (1989) 26 *Stanford Journal of International Law* 153, see also, Kristin L. Oelstrom, 'A Treaty for the Future: The Dispute Settlement Mechanisms of the NAFTA', (1994) 25 *Law & Policy of International Business*, 783, 785

number of factors which have been identified in this thesis. It remains to be seen how the ASEAN Member States will implement and operationalize the provisions of the 2004 Protocol.

APPENDIX I

DECLARATION OF ASEAN CONCORD II

(BALI CONCORD II)

The Sultan of Brunei Darussalam, the Prime Minister of the Kingdom of Cambodia, the President of the Republic of Indonesia, the Prime Minister of the Lao People's Democratic Republic, the Prime Minister of Malaysia, the Prime Minister of the Union of Myanmar, the President of the Republic of the Philippines, the Prime Minister of the Republic of Singapore, the Prime Minister of the Kingdom of Thailand and the Prime Minister of the Socialist Republic of Viet Nam;

RECALLING the Declaration of ASEAN Concord adopted in this historic place of Bali, Indonesia in 1976, the Leaders of the Association of Southeast Asian Nations (ASEAN) expressed satisfaction with the overall progress made in the region;

NOTING in particular the expansion of ASEAN to ten countries in Southeast Asia, the deepening of regional economic integration and the impending accession to the Treaty of Amity and Cooperation (TAC) by States outside Southeast Asia;

CONSCIOUS of the need to further consolidate and enhance the achievements of ASEAN as a dynamic, resilient, and cohesive regional association for the well being of its member states and people as well as the need to further strengthen the Association's guidelines in achieving a more coherent and clearer path for cooperation between and among them;

REAFFIRMING their commitment to the principles enshrined in the ASEAN Declaration (Bangkok, 1967), the Declaration on Zone of Peace, Freedom, and Neutrality (Kuala Lumpur, 1971), the Treaty of Amity and Cooperation in Southeast Asia (Bali, 1976), the Declaration of ASEAN Concord (Bali, 1976), and the Treaty on the Southeast Asia Nuclear Weapons Free Zone (Bangkok, 1995);

COGNIZANT that the future of ASEAN cooperation is guided by the ASEAN Vision 2020, the Hanoi Plan of Action (1999-2004), and its succeeding Plans of Action, the Initiative for ASEAN Integration (IAI), and the Roadmap for the Integration of ASEAN (RIA);

CONFIRMING further that ASEAN Member Countries share primary responsibility for strengthening the economic and social stability in the region and ensuring their peaceful and progressive national development, and that they are determined to ensure their stability

and security from external interference in any form or manner in order to preserve their national interest in accordance with the ideals and aspirations of their peoples;

REAFFIRMING the fundamental importance of adhering to the principle of non-interference and consensus in ASEAN cooperation;

REITERATING that the Treaty of Amity and Cooperation in Southeast Asia (TAC) is an effective code of conduct for relations among governments and peoples;

RECOGNIZING that sustainable economic development requires a secure political environment based on a strong foundation of mutual interests generated by economic cooperation and political solidarity;

COGNIZANT of the interdependence of the ASEAN economies and the need for ASEAN member countries to adopt "Prosper Thy Neighbour" policies in order to ensure the long-term vibrancy and prosperity of the ASEAN region;

REITERATING the importance of rules-based multilateral trading system that is equitable and that contributes towards the pursuit of development;

REAFFIRMING that ASEAN is a concert of Southeast Asian nations, bonded together in partnership in dynamic development and in a community of caring societies, committed to upholding cultural diversity and social harmony;

DO HEREBY DECLARE THAT:

1. An ASEAN Community shall be established comprising three pillars, namely political and security cooperation, economic cooperation, and socio-cultural cooperation that are closely intertwined and mutually reinforcing for the purpose of ensuring durable peace, stability and shared prosperity in the region;

2. ASEAN shall continue its efforts to ensure closer and mutually beneficial integration among its member states and among their peoples, and to promote regional peace and stability, security, development and prosperity with a view to realizing an ASEAN Community that is open, dynamic and resilient;

3. ASEAN shall respond to the new dynamics within the respective ASEAN Member Countries and shall urgently and effectively address the challenge of translating ASEAN cultural diversities and different economic levels into equitable development opportunity and prosperity, in an environment of solidarity, regional resilience and harmony;

4. ASEAN shall nurture common values, such as habit of consultation to discuss political issues and the willingness to share information on matters of common concern, such as environmental degradation, maritime security cooperation, the enhancement of defense

cooperation among ASEAN countries, develop a set of socio-political values and principles, and resolve to settle long-standing disputes through peaceful means;

5. The Treaty of Amity and Cooperation in Southeast Asia (TAC) is the key code of conduct governing relations between states and a diplomatic instrument for the promotion of peace and stability in the region;

6. The ASEAN Regional Forum (ARF) shall remain the primary forum in enhancing political and security cooperation in the Asia Pacific region, as well as the pivot in building peace and stability in the region. ASEAN shall enhance its role in further advancing the stages of cooperation within the ARF to ensure the security of the Asia Pacific region;

7. ASEAN is committed to deepening and broadening its internal economic integration and linkages with the world economy to realize an ASEAN Economic Community through a bold, pragmatic and unified strategy;

8. ASEAN shall further build on the momentum already gained in the ASEAN+3 process so as to further draw synergies through broader and deeper cooperation in various areas;

9. ASEAN shall build upon opportunities for mutually beneficial regional integration arising from its existing initiatives and those with partners, through enhanced trade and investment links as well as through IAI process and the RIA;

10. ASEAN shall continue to foster a community of caring societies and promote a common regional identity;

DO HEREBY ADOPT:

The framework to achieve a dynamic, cohesive, resilient and integrated ASEAN Community:

A. ASEAN SECURITY COMMUNITY (ASC)

1. The ASEAN Security Community is envisaged to bring ASEAN's political and security cooperation to a higher plane to ensure that countries in the region live at peace with one another and with the world at large in a just, democratic and harmonious environment. The ASEAN Security Community members shall rely exclusively on peaceful processes in the settlement of intra-regional differences and regard their security as fundamentally linked to one another and bound by geographic location, common vision and objectives.

2. The ASEAN Security Community, recognizing the sovereign right of the member countries to pursue their individual foreign policies and defense arrangements and taking into account the strong interconnections among political, economic and social realities, subscribes to the principle of comprehensive security as having broad political, economic,

social and cultural aspects in consonance with the ASEAN Vision 2020 rather than to a defense pact, military alliance or a joint foreign policy.

3. ASEAN shall continue to promote regional solidarity and cooperation. Member Countries shall exercise their rights to lead their national existence free from outside interference in their internal affairs.

4. The ASEAN Security Community shall abide by the UN Charter and other principles of international law and uphold ASEAN's principles of non-interference, consensus-based decision-making, national and regional resilience, respect for national sovereignty, the renunciation of the threat or the use of force, and peaceful settlement of differences and disputes.

5. Maritime issues and concerns are transboundary in nature, and therefore shall be addressed regionally in holistic, integrated and comprehensive manner. Maritime cooperation between and among ASEAN member countries shall contribute to the evolution of the ASEAN Security Community.

6. Existing ASEAN political instruments such as the Declaration on ZOPFAN, the TAC, and the SEANWFZ Treaty shall continue to play a pivotal role in the area of confidence building measures, preventive diplomacy and the approaches to conflict resolution.

7. The High Council of the TAC shall be the important component in the ASEAN Security Community since it reflects ASEAN's commitment to resolve all differences, disputes and conflicts peacefully.

8. The ASEAN Security Community shall contribute to further promoting peace and security in the wider Asia Pacific region and reflect ASEAN's determination to move forward at a pace comfortable to all. In this regard, the ARF shall remain the main forum for regional security dialogue, with ASEAN as the primary driving force.

9. The ASEAN Security Community is open and outward looking in respect of actively engaging ASEAN's friends and Dialogue Partners to promote peace and stability in the region, and shall build on the ARF to facilitate consultation and cooperation between ASEAN and its friends and Partners on regional security matters.

10. The ASEAN Security Community shall fully utilize the existing institutions and mechanisms within ASEAN with a view to strengthening national and regional capacities to counter terrorism, drug trafficking, trafficking in persons and other transnational crimes; and shall work to ensure that the Southeast Asian Region remains free of all weapons of mass destruction. It shall enable ASEAN to demonstrate a greater capacity and responsibility of being the primary driving force of the ARF.

11. The ASEAN Security Community shall explore enhanced cooperation with the United Nations as well as other international and regional bodies for the maintenance of international peace and security.

12. ASEAN shall explore innovative ways to increase its security and establish modalities for the ASEAN Security Community, which include, inter alia, the following elements: norms-setting, conflict prevention, approaches to conflict resolution, and post-conflict peace building.

B. ASEAN ECONOMIC COMMUNITY (AEC)

1. The ASEAN Economic Community is the realisation of the end-goal of economic integration as outlined in the ASEAN Vision 2020, to create a stable, prosperous and highly competitive ASEAN economic region in which there is a free flow of goods, services, investment and a freer flow of capital, equitable economic development and reduced poverty and socio-economic disparities in year 2020.

2. The ASEAN Economic Community is based on a convergence of interests among ASEAN members to deepen and broaden economic integration efforts through existing and new initiatives with clear timelines.

3. The ASEAN Economic Community shall establish ASEAN as a single market and production base, turning the diversity that characterises the region into opportunities for business complementation making the ASEAN a more dynamic and stronger segment of the global supply chain. ASEAN's strategy shall consist of the integration of ASEAN and enhancing ASEAN's economic competitiveness. In moving towards the ASEAN Economic Community, ASEAN shall, inter alia, institute new mechanisms and measures to strengthen the implementation of its existing economic initiatives including the ASEAN Free Trade Area (AFTA), ASEAN Framework Agreement on Services (AFAS) and ASEAN Investment Area (AIA); accelerate regional integration in the priority sectors; facilitate movement of business persons, skilled labour and talents; and strengthen the institutional mechanisms of ASEAN, including the improvement of the existing ASEAN Dispute Settlement Mechanism to ensure expeditious and legally binding resolution of any economic disputes. As a first step towards the realization of the ASEAN Economic Community, ASEAN shall implement the recommendations of the **High Level Task Force on ASEAN Economic Integration as annexed.**

4. The ASEAN Economic Community shall ensure that deepening and broadening integration of ASEAN shall be accompanied by technical and development cooperation in order to address the development divide and accelerate the economic integration of Cambodia, Lao PDR, Myanmar and Viet Nam through IAI and RIA so that the benefits of ASEAN integration are shared and enable all ASEAN Member Countries to move forward in a unified manner.

5. The realization of a fully integrated economic community requires implementation of both liberalization and cooperation measures. There is a need to enhance cooperation and integration activities in other areas. These will involve, among others, human resources development and capacity building; recognition of educational qualifications; closer consultation on macroeconomic and financial policies; trade financing measures; enhanced infrastructure and communications connectivity; development of electronic transactions through e-ASEAN; integrating industries across the region to promote regional sourcing; and enhancing private sector involvement.

C. ASEAN SOCIO-CULTURAL COMMUNITY (ASCC)

1. The ASEAN Socio-cultural Community, in consonance with the goal set by ASEAN Vision 2020, envisages a Southeast Asia bonded together in partnership as a community of caring societies.

2. In line with the programme of action set by the 1976 Declaration of ASEAN Concord, the Community shall foster cooperation in social development aimed at raising the standard of living of disadvantaged groups and the rural population, and shall seek the active involvement of all sectors of society, in particular women, youth, and local communities.

3. ASEAN shall ensure that its work force shall be prepared for, and benefit from, economic integration by investing more resources for basic and higher education, training, science and technology development, job creation, and social protection. The development and enhancement of human resources is a key strategy for employment generation, alleviating poverty and socio-economic disparities, and ensuring economic growth with equity. ASEAN shall continue existing efforts to promote regional mobility and mutual recognition of professional credentials, talents, and skills development.

4. ASEAN shall further intensify cooperation in the area of public health, including in the prevention and control of infectious diseases, such as HIV/AIDS and SARS, and support joint regional actions to increase access to affordable medicines. The security of the Community is enhanced when poverty and diseases are held in check, and the peoples of ASEAN are assured of adequate health care.

5. The Community shall nurture talent and promote interaction among ASEAN scholars, writers, artists and media practitioners to help preserve and promote ASEAN's diverse cultural heritage while fostering regional identity as well as cultivating people's awareness of ASEAN.

6. The Community shall intensify cooperation in addressing problems associated with population growth, unemployment, environmental degradation and transboundary pollution as well as disaster management in the region to enable individual members to fully realize their development potentials and to enhance the mutual ASEAN spirit.

We hereby pledge to our peoples our resolve and commitment to bring the ASEAN Community into reality and, for this purpose, task the concerned Ministers to implement this Declaration.

Done in Bali, Indonesia, on the Seventh Day of October in the Year Two Thousand and Three.

For Brunei Darussalam

HAJI HASSANAL BOLKIAH
Sultan of Brunei Darussalam

For the Kingdom of Cambodia

SAMDECH HUN SEN
Prime Minister

For the Republic of Indonesia

MEGAWATI SOEKARNOPUTRI
President

For the Lao People's Democratic Republic

BOUNNHANG VORACHITH
Prime Minister

For Malaysia

DR. MAHATHIR BIN MOHAMAD
Prime Minister

For the Union of Myanmar

GENERAL KHIN NYUNT
Prime Minister

For the Republic of the Philippines

GLORIA MACAPAGAL-ARROYO
President

For the Republic of Singapore

GOH CHOK TONG
Prime Minister

For the Kingdom of Thailand

DR. THAKSIN SHINAWATRA
Prime Minister

For the Socialist Republic of Viet Nam

PHAN VAN KHAI
Prime Minister

APPENDIX II

Protocol on Dispute Settlement Mechanism

The Governments of Brunei Darussalam, the Republic of Indonesia, Malaysia, the Republic of the Philippines, the Republic of Singapore, the Kingdom of Thailand and the Socialist Republic of Vietnam, Member States of the Association of South East Asian Nations (ASEAN);

RECALLING the Framework Agreement on Enhancing ASEAN Economic Cooperation signed in Singapore on 28 January 1992, as amended by the Protocol to Amend the Framework Agreement on Enhancing ASEAN Economic Cooperation signed in Bangkok on 15 December 1995 (the "Agreement");

RECOGNIZING the need to expand Article 9 of the Agreement to strengthen the mechanism for the settlement of disputes in the area of ASEAN economic cooperation;

HAVE AGREED AS FOLLOWS :

ARTICLE 1
Coverage and Application

1. The rules and procedures of this Protocol shall apply to disputes brought pursuant to the consultation and dispute settlement provisions of the Agreement as well as the agreements listed in Appendix 1 and future ASEAN economic agreements (the "covered agreements").

2. The rules and procedures of this Protocol shall apply subject to such special or additional rules and procedures on dispute settlement contained in the covered agreements. To the extent that there is a difference between the rules and procedures of this Protocol and the special or additional rules and procedures in the covered agreements, the special or additional rules and procedures shall prevail.

3. The provisions of this Protocol are without prejudice to the rights of Member States to seek recourse to other fora for the settlement of disputes involving other Member States. A Member State involved in a dispute can resort to other fora at any stage before the Senior Economic Officials Meeting ("SEOM") has made a ruling on the panel report.

ARTICLE 2
Consultations

1. Member States shall accord adequate opportunity for consultations regarding any representations made by other Member States with respect to any matter affecting the implementation, interpretation or application of the Agreement or any covered agreement. Any differences shall, as far as possible, be settled amicably between the Member States.

2. Member States which consider that any benefit accruing to them directly or indirectly, under the Agreement or any covered agreement is being nullified or impaired, or that the attainment of any objective of the Agreement or any covered agreement is being impeded as a result of failure of another Member State to carry out its obligations under the Agreement or any covered agreement, or the existence of any other situation may, with a view to achieving satisfactory settlement of the matter, make representations or proposals to the other Member State concerned, which shall give due consideration to the representations or proposals made to it.

3. If a request for consultations is made, the Member State to which the request is made shall reply to the request within ten (10) days after the date of its receipt and shall enter into consultations within a period of no more than thirty (30) days after the date of receipt of the request, with a view to reaching a mutually satisfactory solution.

ARTICLE 3
Good Offices, Conciliation or Mediation

1. Member States which are parties to a dispute may at any time agree to good offices, conciliation or mediation. They may begin at any time and be terminated at any time. Once procedures for good offices, conciliation or mediation are terminated, a complaining party may then proceed to raise the matter to SEOM.

2. If the parties to a dispute agree, procedures for good offices, conciliation or mediation may continue while the dispute proceeds.

ARTICLE 4
Senior Economic Officials Meeting

1. If the consultations fail to settle a dispute within sixty (60) days after the date of receipt of the request for consultations, the matter shall be raised to the SEOM.

2. The SEOM shall:

a) establish a panel; or

b) where applicable, raise the matter to the special body in charge of the special or additional rules and procedures for its consideration.

3. Notwithstanding Article 4 paragraph 2, if the SEOM considers it desirable to do so in a particular case, it may decide to deal with the dispute to achieve an amicable settlement without appointing a panel. This step shall be taken without any extension of the thirty (30)-day period in Article 5 paragraph 2.

ARTICLE 5
Establishment of Panel

1. The function of the panel is to make an objective assessment of the dispute before it, including an examination of the facts of the case and the applicability of and conformity with the sections of the Agreement or any covered agreement, and make such other findings as will assist the SEOM in making the rulings provided for under the Agreement or any covered agreement.

2. The SEOM shall establish a panel no later than thirty (30) days after the date on which the dispute has been raised to it.

3. The SEOM shall make the final determination of the size, composition and terms of reference of the panel.

ARTICLE 6
Function of the Panel

1. The panel shall, apart from the matters covered in Appendix 2, regulate its own procedures in relation to the rights of parties to be heard and its deliberations.

2. The panel shall submit its findings to the SEOM within sixty (60) days of its formation. In exceptional cases, the panel may take an additional ten (10) days to submit its findings to SEOM. Within this time period, the panel shall accord adequate opportunity to the parties to the dispute to review the report before submission.

3. The panel shall have the right to seek information and technical advice from any individual or body which it deems appropriate. A Member State should respond promptly and fully to any request by a panel for such information as the panel considers necessary and appropriate.

4. Panel deliberations shall be confidential. The reports of panels shall be drafted without the presence of the parties to the dispute in the light of the information provided and the statements made.

ARTICLE 7
Treatment of Panel Result

The SEOM shall consider the report of the panel in its deliberations and make a ruling on the dispute within thirty (30) days from the submission of the report by the panel. In exceptional cases, SEOM may take an additional ten (10) days to make a ruling on the dispute. SEOM representatives from Member States which are parties to a dispute can be present during the process of deliberation but shall not participate in the ruling of SEOM. SEOM shall make a ruling based on simple majority.

ARTICLE 8
Appeal

1. Member States, who are parties to the dispute, may appeal the ruling by the SEOM to the ASEAN Economic Ministers ("AEM") within thirty (30) days of the ruling.

2. The AEM shall make a decision within thirty (30) days of the appeal. In exceptional cases, AEM may take an additional ten (10) days to make a decision on the dispute. Economic Ministers from Member States which are parties to a dispute can be present during the process of deliberation but shall not participate in the decision of AEM. AEM shall make a decision based on simple majority. The decision of the AEM on the appeal shall be final and binding on all parties to the dispute.

3. Since prompt compliance with the rulings of the SEOM or decisions of the AEM is essential in order to ensure effective resolution of disputes, Member States who are parties to the dispute shall comply with the ruling or decision, as the case may be, within a reasonable time period. The reasonable period of time shall be a period of time mutually agreed to by the parties to the dispute but under no circumstances should it exceed thirty (30) days from the SEOM's ruling or in the event of an appeal thirty (30) days from the AEM's decision. The Member States concerned shall provide the SEOM or the AEM, as the case may be, with a status report in writing of their progress in the implementation of the ruling or decision.

ARTICLE 9
Compensation and the Suspension of Concessions

1. If the Member State concerned fails to bring the measure found to be inconsistent with the Agreement or any covered agreement into compliance therewith or otherwise comply with SEOM's rulings or AEM's decisions within the reasonable period of time, such Member State shall, if so requested, and no later than the expiry of the reasonable period of time, enter into negotiations with any party having invoked the dispute settlement procedures, with a view to developing mutually acceptable compensation. If no satisfactory compensation has been agreed within 20 (twenty) days after the date of expiry of the reasonable period of time, any party having invoked the dispute settlement procedures may request authorization from the AEM to suspend the application to the Member State concerned of concessions or other obligations under the Agreement or any covered agreements.

2. However, neither compensation nor the suspension of concessions or other obligations is preferred to full implementation of a recommendation to bring a measure into conformity with the Agreement or any covered agreements.

ARTICLE 10
Maximum Time-Frame

Member States agree that the total period for the disposal of a dispute pursuant to Articles 2, 4, 5, 6, 7, 8 and 9 of this Protocol shall not exceed two hundred and ninety (290) days.

ARTICLE 11
Responsibilities of the Secretariat

1. The ASEAN Secretariat shall have the responsibility of assisting the panels, especially on the historical and procedural aspects of the matters dealt with, and of providing secretarial and technical support.

2. The ASEAN Secretariat shall have the responsibility of monitoring and maintaining under surveillance the implementation of the SEOM's ruling and AEM's decision as the case may be.

3. The ASEAN Secretariat may offer good offices, conciliation or mediation with the view to assisting Members to settle a dispute.

ARTICLE 12
Final Provisions

1. This Protocol shall be deposited with the Secretary-General of ASEAN who shall promptly furnish a certified copy thereof to each Member State.

2. This Protocol shall enter into force upon the deposit of instruments of ratification or acceptance by all signatory governments with the Secretary-General of ASEAN.

IN WITNESS WHEREOF, the undersigned, being duly authorized thereto by their respective Governments, have signed the Protocol on Dispute Settlement Mechanism.

DONE at Manila, this 20th day of November 1996 in a single copy in the English Language.

For the Government of Brunei Darussalam :

(signed)

ABDUL RAHMAN TAIB
Minister of Industry and Primary Resources

For the Government of the Republic of Indonesia:

(signed)

T. ARIWIBOWO
Minister of Industry and Trade

For the Government of Malaysia:

(signed)

RAFIDAH AZIZ
Minister of International Trade and Industry

For the Government of the Republic of the Philippines :

(signed)

CESAR B. BAUTISTA
Secretary of Trade and Industry

For the Government of the Republic of Singapore:

(signed)

YEO CHEOW TONG
Minister for Trade and Industry

For the Government of the Kingdom of Thailand:

(signed)

SUKON KANCHANALAI
Deputy Minister of Commerce

For the Government of the Socialist Republic of Vietnam:

(signed)

LE VAN TRIET
Minister of Trade

APPENDIX 1
COVERED AGREEMENTS

1. Multilateral Agreement on Commercial Rights of Non-Scheduled Services among ASEAN, Manila, 13 March 1971.

2. Agreement on ASEAN Preferential Trading Arrangements, Manila, 24 February 1977.

3. Memorandum of Understanding on the ASEAN Swap Arrangements, Kuala Lumpur, 5 August 1977.

4. Supplementary Agreement to the Memorandum of Understanding on the ASEAN Swap Arrangement, Washington D.C., 26 September 1978.

5. Second Supplementary Agreement to the Memorandum of Understanding on the ASEAN Swap Arrangement, Denpasar, Bali, 9 September 1979.

6. Agreement on the ASEAN Food Security Reserve, New York, 4 October 1979.

7. Basic Agreement on ASEAN Industrial Projects, Kuala Lumpur, 6 March 1980.

8. Supplementary Agreement of the Basic Agreement on ASEAN Industrial Projects ASEAN Urea Project (Indonesia), Kuala Lumpur, 6 March 1980.

9. Supplementary Agreement of the Basic Agreement on ASEAN Industrial Projects ASEAN Urea Project (Malaysia), Kuala Lumpur, 6 March 1980.

10. Amendments to the Memorandum of Understanding on the ASEAN Swap Arrangement Colombo, Sri Lanka, 16 January 1981.

11. Basic Agreement on ASEAN Industrial Complementation, Manila, 18 June 1981.

12. Third Supplementary Agreement to the Memorandum of Understanding on the ASEAN Swap Arrangement, Bangkok, 4 February 1982.

13. ASEAN Ministerial Understanding on Plant Quarantine Ring, Kuala Lumpur, 8-9 October 1982.

14. ASEAN Ministerial Understanding on the Standardization of Import and Quarantine Regulation on Animal and Animal Products, Kuala Lumpur, 8-9 October 1982.

15. Protocol to Amend the Agreement on the ASEAN Food Security Reserve, Bangkok, 22 October 1982.

16. ASEAN Customs Code of Conduct, Jakarta, 18 March 1983.

17. ASEAN Ministerial Understanding on Fisheries Cooperation, Singapore, 20-22 October 1983.

18. Basic Agreement on ASEAN Industrial Joint Ventures, Jakarta, 7 November 1983.

19. ASEAN Ministerial Understanding on ASEAN Cooperation in Agricultural Cooperatives, Manila, 4-5 October 1984.

20. ASEAN Ministerial Understanding on Plant Pest Free Zone, Manila, 4-5 October 1984.

21. Agreement on ASEAN Energy Cooperation, Manila, 24 June 1986.

22. ASEAN Petroleum Security Agreement, Manila, 24 June 1986.

23. Agreement on the Preferential Shortlisting of ASEAN Contractors, Jakarta, 20 October 1986.

24. Supplementary Agreement to the Basic Agreement on ASEAN Industrial Joint Ventures, Singapore, 16 June 1987.

25. Fourth Supplementary Agreement to the Memorandum of Understanding on the ASEAN Swap Arrangement, Kathmandu, Nepal, 21 January 1987.

26. Protocol on Improvements on Extensions of Tariff Preferences under the ASEAN Preferential Trading Arrangement, Manila, 15 December 1987.

27. Memorandum of Understanding on Standstill and Rollback on Non-Tariff Barriers among ASEAN Countries, Manila, 15 December 1987.

28. Revised Basic Agreement on ASEAN Industrial Joint Ventures, Manila, 15 December 1987.

29. Agreement Among the Government of Brunei Darussalam, the Republic of Indonesia, Malaysia, the Republic of the Philippines, the Republic of Singapore, and the Kingdom of Thailand for the Promotion and Protection of Investments, Manila, 15 December 1987.

30. Protocol on Improvements on Extension of Tariff Preferences under the ASEAN Preferential Trading Arrangement, Manila, 15 December 1987.

31. Agreement on the Establishment of the ASEAN Tourism Information Centre, Kuala Lumpur, 26 September 1988.

32. Financial Regulations of the ASEAN Tourism Information Centre, Kuala Lumpur, 26 September 1988.

33. Memorandum of Understanding Brand-to-Brand Complementation on the Automotive Industry Under the Basic Agreement on ASEAN Industrial Complementation (BAAIC), Pattaya, Thailand, 18 October 1988.

34. Protocol to Amend the Revised Basic Agreement on ASEAN Industrial Joint Ventures, 1 January 1991.

35. Supplementary Agreement to the Basic Agreement on ASEAN industrial Projects - ASEAN Potash Mining Projects (Thailand), Kuala Lumpur, 20 July 1991.

36. Agreement on the Common Effective Preferential Tariff Scheme for the ASEAN Free Trade Area, Singapore, 28 January 1992.

37. Second Protocol to Amend the Revised Basic Agreement on ASEAN Industrial Joint Ventures, Manila, 23 October 1992.

38. Ministerial Understanding on ASEAN Cooperation in Food, Agriculture and Forestry, Bandar Seri Begawan, 28-30 October 1993.

39. Memorandum of Understanding on ASEAN Cooperation and Joint Approaches in Agriculture and Forest Products Promotion Scheme, Langkawi, Malaysia, 1994.

40. Third Protocol to Amend the Revised Basic Agreement on ASEAN Industrial Joint Ventures, 2 March 1995.

41. Protocol to Amend the Agreement on the Common Effective Preferential Tariff (CEPT) Scheme for the ASEAN Free Trade Area (AFTA), Bangkok, 15 December 1995.

42. Protocol to Amend the Agreement on ASEAN Preferential Trading Arrangements, Bangkok, 15 December 1995.

43. ASEAN Framework Agreement on Services, Bangkok, 15 December 1995.

44. ASEAN Framework Agreement on Intellectual Property Cooperation, Bangkok, 15 December 1995.

45. Protocol Amending the Agreement on ASEAN Energy Cooperation, Bangkok, 15 December 1995.

46. Basic Agreement on ASEAN Industrial Cooperation, Singapore, 26 April 1996.

47. Protocol to Amend the Agreement Among the Government of Brunei Darussalam, the Republic of Indonesia, Malaysia, the Republic of the Philippines, the Republic of Singapore, and the Kingdom of Thailand for the Promotion and Protection of Investments, Jakarta, 12 September 1996.

APPENDIX 2
WORKING PROCEDURES OF THE PANEL

I. Composition of Panels

1. Panels shall be composed of well-qualified governmental and/or non-governmental individuals, including persons who have served on or presented a case to a panel, served in the Secretariat, taught or published on international trade law or policy, or served as a senior trade policy official of a Member State. In the nomination to the panels, preference shall be given to individuals who are nationals of ASEAN Member States.

2. Panel members should be selected with a view to ensuring the independence of the members, a sufficiently diverse background and a wide spectrum of experience.

3. Nationals of Member States whose governments are parties to the dispute shall not serve on a panel concerned with that dispute, unless the parties to the dispute agree otherwise.

4. To assist in the selection of panelists, the Secretariat shall maintain an indicative list of governmental and non-governmental individuals possessing the qualifications outlined in paragraph 1, from which panelists may be drawn as appropriate. Members may periodically suggest names of governmental and non-governmental individuals for inclusion on the indicative list, providing relevant information on their knowledge of international trade and of the sectors or subject matter of the covered agreements, and those names shall be added to the list upon approval by the SEOM. For each of the individuals on the list, the list shall indicate specific areas of experience or expertise of the individuals in the sectors or subject matter of the covered agreements.

5. Panels shall be composed of three panelists unless the parties to the dispute agree, within 10 days from the establishment of the panel, to a panel composed of five panelists. Members shall be informed promptly of the composition of the panel.

6. The Secretariat shall propose nominations for the panel to the parties to the dispute. The parties to the dispute shall not oppose nominations except for compelling reasons.

7. If there is no agreement on the panelists within 20 days after the date of the establishment of a panel, at the request of either party, the Secretary-General, in consultation with the SEOM Chairman, shall determine the composition of the panel by appointing the panelists whom the Secretary-General considers most appropriate in accordance with any relevant special or additional rules or procedures of the covered agreement or covered agreements which are at issue in the dispute, after consulting with the parties to the dispute. The SEOM Chairman shall inform the Members of the composition of the panel thus formed no later than 10 days after the date the Chairman receives such a request.

8. Member States shall undertake, as a general rule, to permit their officials to serve as panelists.

9. Panelists shall serve in their individual capacities and not as government representatives, nor as representatives of any organization. Member States shall therefore not give them instructions nor seek to influence them as individuals with regard to matters before a panel.

II. Panel Proceedings

1. In its proceedings the panel shall follow the relevant provisions of this Protocol. In addition, the following working procedures shall apply.

2. The panel shall meet in closed session. The parties to the dispute, and interested parties, shall be present at the meetings only when invited by the panel to appear before it.

3. The deliberations of the panel and the documents submitted to it shall be kept confidential. Nothing in this Protocol shall preclude a party to a dispute from disclosing statements of its own positions to the public. Member States shall treat as confidential information submitted by another Member State to the panel which that Member State has designated as confidential. Where a party to a dispute submits a confidential version of its written submissions to the panel, it shall also, upon request of a Member State, provide a non-confidential summary of the information contained in its submissions that could be disclosed to the public.

4. Before the first substantive meeting of the panel with the parties, the parties to the dispute shall transmit to the panel written submissions in which they present the facts of the case and their arguments.

5. At its first substantive meeting with the parties, the panel shall ask the party which has brought the complaint to present its case. Subsequently, and still at the same meeting, the party against which the complaint has been brought shall be asked to present its point of view.

6. Formal rebuttals shall be made at a second substantive meeting of the panel. The party complained against shall have the right to take the floor first to be followed by the complaining party. The parties shall submit, prior to that meeting, written rebuttals to the panel.

7. The panel may at any time put questions to the parties and ask them for explanations either in the course of a meeting with the parties or in writing.

8. The parties to the dispute shall make available to the panel a written version of their oral statements.

9. In the interest of full transparency, the presentations, rebuttals and statements referred to in paragraphs 5 to 9 shall be made in the presence of the parties. Moreover, each party's written submissions, including any comments on the descriptive part of the report and responses to questions put by the panel, shall be made available to the other party or parties.

10. Any additional procedures specific to the panel.

APPENDIX III

ASEAN Protocol on Enhanced Dispute Settlement Mechanism

The Governments of Brunei Darussalam, the Kingdom of Cambodia, the Republic of Indonesia, the Lao People's Democratic Republic, Malaysia, the Union of Myanmar, the Republic of the Philippines, the Republic of Singapore, the Kingdom of Thailand and the Socialist Republic of Viet Nam, Member States of the Association of South East Asian Nations (hereinafter collectively referred to as "ASEAN" or "Member States" or singularly as "Member State");

RECALLING the Framework Agreement on Enhancing ASEAN Economic Cooperation signed in Singapore on 28 January 1992, as amended by the Protocol to Amend the Framework Agreement on Enhancing ASEAN Economic Cooperation signed in Bangkok on 15 December 1995 (the "Agreement") and the Protocol on Dispute Settlement Mechanism signed in Manila on 20 November 1996 (the "1996 Protocol on DSM");

FURTHER RECALLING that the 9th ASEAN Summit held in Bali on 7-8 October 2003, had decided on institutional strengthening of ASEAN, including the improvement of the ASEAN Dispute Settlement Mechanism, as reflected in the Bali Concord II;

DESIRING to replace the 1996 Protocol on DSM with the ASEAN Protocol on Enhanced Dispute Settlement Mechanism (hereinafter referred to as "Protocol");

HAVE AGREED AS FOLLOWS:

ARTICLE 1
Coverage and Application

1. The rules and procedures of this Protocol shall apply to disputes brought pursuant to the consultation and dispute settlement provisions of the Agreement as well as the agreements listed in Appendix I and future ASEAN economic agreements (the "covered agreements").

2. The rules and procedures of this Protocol shall apply subject to such special or additional rules and procedures on dispute settlement contained in the covered agreements. To the extent that there is a difference between the rules and procedures of this Protocol and the special or additional rules and procedures in the covered agreements, the special or additional rules and procedures shall prevail.

3. The provisions of this Protocol are without prejudice to the rights of Member States to seek recourse to other fora for the settlement of disputes involving other Member States. A Member State involved in a dispute can resort to other fora at any stage before a party has made a request to the Senior Economic Officials Meeting ("SEOM") to establish a panel pursuant to paragraph 1 Article 5 of this Protocol.

ARTICLE 2
Administration

1. The SEOM shall administer this Protocol and, except as otherwise provided in a covered agreement, the consultation and dispute settlement provisions of the covered agreements. Accordingly, the SEOM shall have the authority to establish panels, adopt panel and Appellate Body reports, maintain surveillance of

implementation of findings and recommendations of panel and Appellate Body reports adopted by the SEOM and authorise suspension of concessions and other obligations under the covered agreements.

2. The SEOM and other relevant ASEAN bodies shall be notified of mutually agreed solutions to matters formally raised under the consultation and dispute settlement provisions of the covered agreements.

ARTICLE 3
Consultations

1. Member States shall accord adequate opportunity for consultations regarding any representations made by other Member States with respect to any matter affecting the implementation, interpretation or application of the Agreement or any covered agreement. Any differences shall, as far as possible, be settled amicably between the Member States.

2. Member States which consider that any benefit accruing to them directly or indirectly, under the Agreement or any covered agreement is being nullified or impaired, or that the attainment of any objective of the Agreement or any covered agreement is being impeded as a result of failure of another Member State to carry out its obligations under the Agreement or any covered agreement, or the existence of any other situation may, with a view to achieving satisfactory settlement of the matter, make representations or proposals to the other Member State concerned, which shall give due consideration to the representations or proposals made to it.

3. All such requests for consultations shall be notified to the SEOM. Any request for consultations shall be submitted in writing and shall give the reason for the request including identification of the measures at issue and an indication of the legal basis for the complaint.

4. If a request for consultations is made, the Member State to which the request is made shall reply to the request within ten (10) days after the date of its receipt and shall enter into consultations within a period of thirty (30) days after the date of receipt of the request, with a view to reaching a mutually satisfactory solution.

5. In cases of urgency, including those which concern perishable goods, the parties to the dispute, panels and the Appellate Body shall make every effort to accelerate the proceedings to the greatest extent possible.

ARTICLE 4
Good Offices, Conciliation or Mediation

1. Member States which are parties to a dispute may at any time agree to good offices, conciliation or mediation. They may begin at any time and be terminated at any time. Once procedures for good offices, conciliation or mediation are terminated, a complaining party may then proceed with a request to the SEOM for the establishment of a panel.

2. If the parties to a dispute agree, procedures for good offices, conciliation or mediation may continue while the panel process proceeds.

3. The Secretary-General of ASEAN may, acting in an *ex officio* capacity, offer good offices, conciliation or mediation with the view to assisting Member States to settle a dispute.

ARTICLE 5
Establishment of Panels

1. If the Member State to which the request for consultations is made does not reply within ten (10) days after the date of receipt of the request, or does not enter into consultations within a period of thirty (30) days after the date of receipt of the request, or the consultations fail to settle a dispute within sixty (60) days after the date of receipt of the request, the matter shall be raised to the SEOM if the complaining party wishes to request for a panel. The panel shall be established by the SEOM, unless the SEOM decides by consensus not to establish a panel.

2. A panel shall be established at the meeting of the SEOM held immediately after the receipt of the request for a panel and accordingly the request shall be placed on the agenda of the SEOM at that meeting. In the event that no the SEOM meeting is scheduled or planned within forty five (45) days of receipt of the request, the establishment of the panel or the decision not to establish it shall be done or taken, as the case may be, by circulation. A non-reply shall be considered as agreement to the request for the establishment of a panel. The issue of the establishment of the panel shall be settled within the forty five (45) day-period, irrespective of whether it is settled at the SEOM or by circulation.

3. The request for the establishment of a panel shall be made in writing. It shall indicate whether consultations were held, identify the specific measures at issue and provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly. In case the complainant requests the establishment of a panel with other than standard terms of reference, the written request shall include the proposed text of the special terms of reference.

ARTICLE 6
Terms of Reference of Panels

1. Panels shall have the following terms of reference unless the parties to the dispute agree otherwise prior to the establishment of a panel:

> "To examine in the light of the relevant provisions in (name of the covered agreement(s) cited by the parties to the dispute), the matter referred to the SEOM by (name of party) in (document) … and to make such findings as will assist the SEOM in the adoption of the panel report or in making its decision not to adopt the report."

2. Panels shall address the relevant provisions in any covered agreement or agreements cited by the parties to the dispute.

3. In establishing a panel, the SEOM may authorise its Chairman to draw up the terms of reference of the panel in consultation with the parties to the dispute, notwithstanding the provisions in paragraph 1 hereof. The terms of reference thus drawn up shall be circulated to all Member States. If other than standard terms of reference are agreed upon, any Member State may raise any point relating thereto with the SEOM at the time of establishment of a panel.

ARTICLE 7
Function of Panel

The function of the panel is to make an objective assessment of the dispute before it, (including an examination of the facts of the case and the applicability of and conformity with the sections of the Agreement or any covered agreements) and its findings and recommendations in relation to the case.

ARTICLE 8
Panel Procedures, Deliberations and Findings

1. A panel shall, apart from the matters covered in Appendix II regulate its own procedures in relation to the rights of parties to be heard and its deliberations.

2. A panel shall submit its findings and recommendations to the SEOM in the form of a written report within sixty (60) days of its establishment. In exceptional cases, the panel may take an additional ten (10) days to submit its findings and recommendations to the SEOM.

3. Before submitting its findings and recommendations to the SEOM, the panel shall accord adequate opportunity to the parties to the dispute to review the report.

4. A panel shall have the right to seek information and technical advice from any individual or body which it deems appropriate. A Member State shall respond promptly and fully to any request by a panel for such information as the panel considers necessary and appropriate.

5. Panel deliberations shall be confidential. The reports of panels shall be drafted without the presence of the parties to the dispute in the light of the information provided and the statements made.

ARTICLE 9
Treatment of Panel Report

1. The SEOM shall adopt the panel report within thirty (30) days of its submission by the panel unless a party to the dispute formally notifies the SEOM of its decision to appeal or the SEOM decides by consensus not to adopt the report. If a party has notified its decision to appeal, the report by the panel shall not be considered for adoption by the SEOM until after the completion of the appeal. SEOM representatives from Member States which are parties to a dispute can be present during the deliberations of the SEOM.

2. In the event that no meeting of the SEOM is scheduled or planned to enable adoption or non-adoption of the panel report, as the case may be, within the thirty (30) day period in paragraph 1 hereof, the adoption shall be done by circulation. A non-reply shall be considered as acceptance of the decision and/or recommendation in the panel report. The adoption or non-adoption shall be completed within the thirty (30) day period in paragraph 1 hereof, notwithstanding the resort to a circulation process.

ARTICLE 10
Procedures for Multiple Complainants

1. Where more than one Member State requests the establishment of a panel related to the same matter, a single panel may be established to examine these complaints taking into account the rights of all Member States concerned. A single panel should be established to examine such complaints whenever feasible.

2. The single panel shall organize its examination and present its findings and recommendations to the SEOM in such a manner that the rights which the parties to the dispute would have enjoyed had separate panels examined the complaints are in no way impaired. If one of the parties to the dispute so requests, the panel shall submit separate reports on the dispute concerned. The written submissions by each of the complainants shall be made available to the other complainants, and each complainant shall have the right to be present when any one of the other complainants presents its views to the panel.

3. If more than one panel is established to examine the complaints related to the same matter, to the greatest extent possible, the same persons shall serve as panelists on each of the separate panels and the timetable for the panel process in such disputes shall be harmonized.

ARTICLE 11

Third Parties

1. The interests of the parties to a dispute and those of other Member States under a covered agreement at issue in the dispute shall be fully taken into account during the panel process.

2. Any Member State having a substantial interest in a matter before a panel and having notified its interest to the SEOM (referred to in this Protocol as a "third party") shall have an opportunity to be heard by the panel and to make written submissions to the panel. These submissions shall also be given to the parties to the dispute and shall be reflected in the panel report.

3. Third parties shall receive the submissions of the parties to the dispute to the first substantive meeting of the panel.

4. If a third party considers that a measure already the subject of a panel proceeding nullifies or impairs benefits accruing to it under any covered agreement, that Member State may have recourse to normal dispute settlement procedures under this Protocol. Such a dispute shall be referred to the original panel wherever possible.

ARTICLE 12
Appellate Review

1. An Appellate Body shall be established by the ASEAN Economic Ministers ("AEM"). The Appellate Body shall hear appeals from panel cases. It shall be composed of seven (7) persons, three (3) of whom shall serve on any one case. Persons serving on the Appellate Body shall serve on cases in rotation. Such rotation shall be determined in the working procedures of the Appellate Body.

2. The AEM shall appoint persons to serve on the Appellate Body for a four-year term, and each person may be reappointed once. A person appointed to replace a person whose term of office has not expired shall hold office for the remainder of the predecessor's term.

3. The Appellate Body shall comprise of persons of recognised authority, irrespective of nationality, with demonstrated expertise in law, international trade and the subject matter of the covered agreements generally. They shall be unaffiliated with any government. All persons serving on the Appellate Body shall be available at all times and on short notice, and shall stay abreast of dispute settlement activities and other relevant activities of ASEAN. They shall not participate in the consideration of any disputes that would create a direct or indirect conflict of interest.

4. Only parties to the dispute, not third parties, may appeal a panel report. Third parties, which have notified the SEOM of a substantial interest in the matter pursuant to paragraph 2 of Article 11 may make written submissions to, and be given an opportunity to be heard by the Appellate Body.

5. As a general rule, the proceedings of the Appellate Body shall not exceed sixty (60) days from the date a party to the dispute formally notifies its decision to appeal to the date the Appellate Body circulates its report. In fixing its timetable the Appellate Body shall take into account the provisions of paragraph 5 of Article 3. When the Appellate Body considers that it cannot provide its report within sixty (60) days, it shall inform the SEOM in writing of the reasons for the delay together with an estimate of the period within which it will submit its report. In no case shall the proceedings exceed ninety (90) days.

6. An appeal shall be limited to issues of law covered in the panel report and legal interpretations developed by the panel.

7. The Appellate Body shall be provided with the appropriate administrative and legal support as it requires.

8. Working procedures of the Appellate Body shall be drawn up by the SEOM. Any amendments thereto, shall be drawn up from time to time as necessary by the Appellate Body in consultation with the SEOM and the Secretary-General of ASEAN, and communicated to the Member States for their information.

9. The proceedings of the Appellate Body shall be confidential. The reports of the Appellate Body shall be drafted without the presence of the parties to the dispute and in the light of the information provided and the statements made.

10. Opinions expressed in the Appellate Body report by the individuals serving on the Appellate Body shall be anonymous.

11. The Appellate Body shall address each of the issues raised in accordance with paragraph 6 hereof during the appellate proceeding.

12. The Appellate Body may uphold, modify or reverse the legal findings and conclusions of the panel.

13. An Appellate Body report shall be adopted by the SEOM and unconditionally accepted by the parties to the dispute unless the SEOM decides by consensus not to adopt the Appellate Body report within thirty (30) days following its circulation to the Member States. In the event that no meeting of the SEOM is scheduled or planned to enable adoption or non-adoption of the report, as the case may be, within the thirty (30) day period, adoption shall be done by circulation. A non-reply within the said thirty (30) day period shall be considered as an acceptance of the Appellate Body report. This adoption procedure is without prejudice to the rights of Member States to express their views on an Appellate Body report. The adoption process shall be completed within the thirty (30) day period irrespective of whether it is settled at the SEOM or by circulation.

ARTICLE 13
Communications with the Panel or Appellate Body

1. There shall be no *ex parte* communications with the panel or Appellate Body concerning matters under consideration by the panel or the Appellate Body.

2. Written submissions to the panel or the Appellate Body shall be treated as confidential, but it shall be made available to the parties to the dispute. Nothing in this Protocol shall preclude a party to a dispute from disclosing statement of its own positions to the public. Member States shall treat as confidential information submitted by another Member State to the panel or the Appellate Body which that Member State has designated as confidential. A party to a dispute shall also, upon request of a Member State, provide a non-confidential summary of the information contained in its written submissions that could be disclosed to the public.

ARTICLE 14
Panel and Appellate Body Recommendations

1. Where a panel or the Appellate Body concludes that a measure is inconsistent with a covered agreement, it shall recommend that the Member State concerned bring the measure into conformity with that agreement. In addition to its recommendations, a panel or the Appellate Body may suggest ways in which the Member State concerned could implement the recommendations.

2. In their findings and recommendations, a panel and the Appellate Body cannot add to or diminish the rights and obligations provided in the covered agreements.

3. The panels and the Appellate Body shall also deal with the issue of expenses to be borne by the parties to the dispute, including third parties, to replenish the ASEAN Dispute Settlement Mechanism ("DSM") Fund as part of their findings and recommendations. The panels and the Appellate Body may apportion the expenses in the manner appropriate to the particular case.

ARTICLE 15
Surveillance of Implementation of Findings and Recommendations

1. Since prompt compliance with the findings and recommendations of panel and Appellate Body reports adopted by the SEOM is essential in order to ensure effective resolution of disputes, parties to the dispute who are required to do so shall comply with the findings and recommendations of panel reports adopted by the SEOM within sixty (60) days from the SEOM's adoption of the same, or in the event of an appeal sixty (60) days from the SEOM's adoption of the findings and recommendations of the Appellate Body reports, unless the parties to the dispute agree on a longer time period.

2. When a party to the dispute requests for a longer time period for compliance, the other party shall take into account the circumstances of the particular case and accord favourable consideration to the complexity of the actions required to comply with the findings and recommendations of panel and Appellate Body reports adopted by the SEOM. The request for a longer period of time shall not be unreasonably denied. Where it is necessary to pass national legislation to comply with the findings and recommendations of panel and Appellate Body reports, a longer period appropriate for that purpose shall be allowed.

3. The decision of the parties on the extension of time shall be made within fourteen (14) days from the SEOM's adoption of the findings and recommendations of the panel report, or in the event of an appeal fourteen (14) days from the SEOM's adoption of the findings and recommendations of the Appellate Body's reports.

4. Any party required to comply with the findings and recommendations shall provide the SEOM with a status report in writing of their progress in the implementation of the findings and recommendations of panel and Appellate Body reports adopted by the SEOM.

5. Where there is disagreement as to the existence or consistency with a covered agreement of measures taken to comply with the findings and recommendations of panel and Appellate Body reports adopted by the SEOM such dispute shall be decided through recourse to these dispute settlement procedures, including wherever possible resort to the original panel. The panel shall circulate its report within sixty (60) days, after the date of referral of the matter to it. When the panel considers that it cannot provide its report within this time frame, it shall inform the SEOM in writing of the reasons for the delay together with an indication of the period within which it will submit its report. In no case shall the proceedings for this purpose and the submission of the report exceed ninety (90) days after the date of reference of the matter to the panel.

6. The SEOM shall keep under surveillance the implementation of the findings and recommendations of panel and Appellate Body reports adopted by it. The issue of implementation of the findings and recommendations of panel and Appellate Body reports adopted by the SEOM may be raised at the SEOM by any Member State at any time following their adoption. Unless the SEOM decides otherwise, the issue of implementation of the findings and recommendations of panel and Appellate Body reports adopted by the SEOM shall be placed on the agenda of the SEOM meeting and shall remain on the SEOM's agenda until the issue is resolved. At least ten (10) days prior to each such the SEOM meeting, the party concerned shall provide the SEOM with a status report in writing of its progress in the implementation of the findings and recommendations of panel and Appellate Body reports adopted by the SEOM.

ARTICLE 16
Compensation and the Suspension of Concessions

1. Compensation and the suspension of concessions or other obligations are temporary measures available in the event that the findings and recommendations of panel and Appellate Body reports adopted by the SEOM are not implemented within the period of sixty (60) days or the longer time period as agreed upon by the parties to the dispute as referred to in Article 15. However, neither compensation nor the suspension of concessions or other obligations is preferred to full implementation of a recommendation to bring a measure into conformity with the covered agreements. Compensation is voluntary and, if granted, shall be consistent with the covered agreements.

2. If the Member State concerned fails to bring the measure found to be inconsistent with a covered agreement into compliance therewith or otherwise comply with the findings and recommendations of panel and Appellate Body reports adopted by the SEOM within the period of sixty (60) days or the longer time period as agreed upon by the parties to the dispute as referred to in Article 15, such Member State shall, if so requested, and no later than the expiry of the period of sixty (60) days or the longer time period referred to in Article 15, enter into negotiations with any party having invoked the dispute settlement procedures, with a view to developing mutually acceptable compensation. If no satisfactory compensation has been agreed within twenty (20) days after the date of expiry of the period of sixty (60) days or the longer time period as agreed upon by the parties to the dispute as referred to in Article 15, any party having invoked the dispute settlement procedures may request authorization from the SEOM to suspend the application to the Member State concerned of concessions or other obligations under the covered agreements.

3. In considering what concessions or other obligations to suspend, the complaining party shall apply the following principles and procedures:

(a) the general principle is that the complaining party should first seek to suspend concessions or other obligations with respect to the same sector(s) as that in which the panel or Appellate Body has found a violation or other nullification or impairment;

(b) if that party considers that it is not practicable or effective to suspend concessions or other obligations with respect to the same sector(s), it may seek to suspend concessions or other obligations in other sector(s) under the same agreement;

(c) if that party considers that it is not practicable or effective to suspend concessions or other obligations with respect to other sector(s) under the same agreement, and that the circumstances are serious enough, it may seek to suspend concessions or other obligations under another covered agreement;

(d) in applying the above principles, that party shall take into account:

(i) the trade in the sector or under the agreement under which the panel or Appellate Body has found a violation or other nullification or impairment, and the importance of such trade to that party;

(ii) the broader economic elements related to the nullification or impairment and the broader economic consequences of the suspension of concessions or other obligations;

(e) for purposes of this paragraph, "sector" means:

(i) with respect to goods, all goods;

(ii) with respect to services, a principal sector as identified in the current schedules of commitments under the ASEAN Framework Agreement on Services (AFAS).

(f) for purposes of this paragraph, "agreement" means:

(i) with respect to goods, the agreements in relation to goods listed in Appendix I to this Protocol;

(ii) with respect to services, the ASEAN Framework Agreement of Services and subsequent protocols;

(iii) any other covered agreement as defined in Article 1 of this Protocol.

4 The level of the suspension of concessions or other obligations authorized by the SEOM shall be equivalent to the level of the nullification or impairment.

5. The SEOM shall not authorise suspension of concessions or other obligations if a covered agreement prohibits such suspension.

6. When the situation described in paragraph 2 hereof occurs, the SEOM, upon request, shall grant authorization to suspend concessions or other obligations within thirty (30) days of the expiry of the sixty (60) day-period or the expiry of the longer period agreed upon by the parties to the dispute, as the case may be, referred to in Article 15, unless the SEOM decides by consensus to reject the request. In the event that no meeting of the SEOM is scheduled or planned to enable authorisation to suspend concessions or other obligations within the thirty (30) day period, the authorisation shall be done by circulation. A non-reply within the said thirty (30) day period shall be considered as an acceptance of the authorisation. The authorisation process shall be completed within the thirty (30) day period irrespective of whether it is settled at the SEOM or by circulation.

7. However, if the Member State concerned objects to the level of suspension proposed, or claims that the principles and procedures set forth in paragraph 3 have not been followed where a complaining party has requested authorisation to suspend concessions or other obligations pursuant to paragraph 3(b) or (c), the matter shall be referred to arbitration. Such arbitration shall be carried out by the original panel, if members are available, or by an arbitration appointed by the Secretary-General of ASEAN and shall be completed within sixty (60) days after the date of expiry of the sixty (60) day period or the expiry of the longer period agreed upon by the parties to the dispute, as the case may be, referred to in Article 15. Concessions or other obligations shall not be suspended during the course of the arbitration.

8. The arbitrator acting pursuant to paragraph 7 hereof shall not examine the nature of the concessions or other obligations to be suspended but shall determine whether the level of such suspension is equivalent to the level of nullification or impairment. The arbitrator may also determine if the proposed suspension of concessions or other obligations is allowed under the covered agreement. However, if the matter referred to arbitration includes a claim that the principles and procedures set forth in paragraph 3 hereof have not been followed, the arbitrator shall examine that claim. In the event the arbitrator determines that those principles and procedures have not been followed, the complaining party shall apply them consistent with paragraph 3 hereof. The parties shall accept the arbitrator's decision as final and the parties concerned shall not seek a second arbitration. The SEOM shall be informed promptly of the decision of the arbitrator and shall, upon request, grant authorisation to suspend concessions or other obligations where the request is consistent with the decision of the arbitrator, unless the SEOM decides by consensus to reject the request.

9. The suspension of concessions or other obligations shall be temporary and shall only be applied until such time as the measure found to be inconsistent with a covered agreement has been removed, or the Member State that must implement recommendations and findings of the panel and Appellate Body reports adopted by the SEOM provides a solution to the nullification or impairment of benefits, or a mutually satisfactory solution is reached. In accordance with paragraph 6 of Article 15, the SEOM shall continue to keep under surveillance the implementation of adopted recommendations and findings of the panel and Appellate Body reports adopted by the SEOM, including those cases where compensation has been provided

or concessions or other obligations have been suspended but the recommendations to bring a measure into conformity with the covered agreements have not been implemented.

10. The dispute settlement provisions of the covered agreements may be invoked in respect of measures affecting their observance taken by regional or local governments or authorities within the territory of a Member State. When the SEOM has ruled that a provision of a covered agreement has not been observed, the responsible Member State shall take such reasonable measures as may be available to it to ensure its observance. The provisions of the covered agreements and this Protocol relating to compensation and suspension of concessions or other obligations shall apply in cases where it has not been possible to secure such observance.

ARTICLE 17
ASEAN DSM Fund

1. There shall be established an ASEAN DSM Fund (hereinafter referred to as 'the Fund') for the purposes of this Protocol. The Fund shall be a revolving fund, separate from ASEAN Secretariat's regular budget. The initial sum for the Fund shall be contributed equally by all the Member States. Any drawdown from the Fund shall be replenished by the parties to the dispute in line with the provision of paragraph 3 of Article 14. The ASEAN Secretariat shall be responsible for administering the Fund.

2. The Fund shall be used to meet the expenses of the panels, the Appellate Body and any related administration costs of the ASEAN Secretariat. All other expenses, including legal representation, incurred by any party to a dispute shall be borne by that party.

3. The subsistence allowances and other expenses of the panels and the Appellate Body shall be in accordance with the criteria approved by the AEM on the recommendations of the ASEAN Budget Committee.

ARTICLE 18
Maximum Time-Frame

The total period for the disposal of disputes under this Protocol until the stage contemplated under paragraph 7 of Article 16, shall not exceed 445 days, unless the longer time period under Article 15 applies.

ARTICLE 19
Responsibilities of the Secretariat

1. The ASEAN Secretariat shall have the responsibility of assisting the panels and the Appellate Body, especially on the legal, historical and the procedural aspects of the matters dealt with, and of providing secretarial and technical support.

2. The ASEAN Secretariat shall assist the SEOM to monitor and maintain surveillance of the implementation of the findings and recommendations of the panel and Appellate Body reports adopted by it.

3. The ASEAN Secretariat shall be the focal point to receive all documentations in relation to disputes and shall deal with them as appropriate.

4. The ASEAN Secretariat in consultation with the SEOM shall administratively update the list of covered agreements in Appendix I, as may be required from time to time. The Secretariat shall inform Member States as and when the changes have been made.

ARTICLE 20
Venue for Proceedings

1. The venue for proceedings of the panels and the Appellate Body shall be the ASEAN Secretariat.

2. Notwithstanding the provisions of paragraph 1 above, panel and Appellate Body proceedings, apart from substantive meetings, may be held at any venue which the panels and the Appellate Body consider appropriate in consultation with the parties to the dispute, having regard to the convenience and cost effectiveness of such venue.

ARTICLE 21
Final Provisions

1. This Protocol shall enter into force upon signing.

2. This Protocol shall replace the 1996 Protocol on DSM and shall not apply to any dispute which has arisen before its entry into force. Such dispute shall continue to be governed by the 1996 Protocol on DSM.

3. The provisions of this Protocol may be modified through amendments mutually agreed upon in writing by all Member States.

4. This Protocol shall be deposited with the Secretary-General of ASEAN, who shall promptly furnish a certified copy thereof, to each ASEAN Member State.

IN WITNESS WHEREOF, the undersigned, being duly authorised thereto by their respective Governments, have signed the ASEAN Protocol on Enhanced Dispute Settlement Mechanism.

DONE at Vientiane, Lao PDR on 29 November 2004, in a single copy in the English language.

For the Government of Brunei Darussalam **ABDUL RAHMAN TAIB** Minister of Industry and Primary Resources	For the Government of the Kingdom of Cambodia **CHAM PRASIDH** Senior Minister Minister of Commerce
For the Government of the Republic of Indonesia **MARI ELKA PANGESTU** Minister of Trade	For the Government of the Lao People's Democratic Republic **SOULIVONG DARAVONG** Minister of Commerce
For the Government of Malaysia	For the Government of the Union of Myanmar

RAFIDAH AZIZ Minister of International Trade and Industry	**SOE THA** Minister of National Planning and Economic Development
For the Government of the Republic of the Philippines **CESAR V. PURISIMA** Secretary of Trade and Industry	For the Government of the Republic of Singapore **LIM HNG KIANG** Minister for Trade and Industry
For the Government of the Kingdom of Thailand **WATANA MUANGSOOK** Minister of Commerce	For the Government of the Socialist Republic of Vietnam **TRUONG DINH TUYEN** Minister of Trade

APPENDIX I
COVERED AGREEMENTS

1. Agreement on ASEAN Preferential Trading Arrangements, Manila, 24 February 1977.

2. Agreement on the ASEAN Food Security Reserve, New York, 4 October 1979.

3. Basic Agreement on ASEAN Industrial Projects, Kuala Lumpur, 6 March 1980.

4. Supplementary Agreement of the Basic Agreement on ASEAN Industrial Projects ASEAN Urea Project (Indonesia), Kuala Lumpur, 6 March 1980.

5. Basic Agreement on ASEAN Industrial Joint Ventures, Jakarta, 7 November 1983.

6. Agreement on ASEAN Energy Cooperation, Manila, 24 June 1986.

7. ASEAN Petroleum Security Agreement, Manila, 24 June 1986.

8. Agreement on the Preferential Shortlisting of ASEAN Contractors, Jakarta, 20 October 1986.

9. Supplementary Agreement to the Basic Agreement on ASEAN Industrial Joint Ventures, Singapore, 16 June 1987.

10. Protocol on Improvements on Extensions of Tariff Preferences under the ASEAN Preferential Trading Arrangement, Manila, 15 December 1987.

11. Revised Basic Agreement on ASEAN Industrial Joint Ventures, Manila, 15 December 1987.

12. Agreement Among the Government of Brunei Darussalam, the Republic of Indonesia, Malaysia, the Republic of the Philippines, the Republic of Singapore, and the Kingdom of Thailand for the Promotion and Protection of Investments, Manila, 15 December 1987.

13. Protocol to Amend the Revised Basic Agreement on ASEAN Industrial Joint Ventures, 1 January 1991.

14. Framework Agreement on Enhancing ASEAN Economic Cooperation, Singapore, 28 January 1992.

15. Agreement on the Common Effective Preferential Tariff Scheme for the ASEAN Free Trade Area, Singapore, 28 January 1992.

16. Second Protocol to Amend the Revised Basic Agreement on ASEAN Industrial Joint Ventures, Manila, 23 October 1992.

17. Third Protocol to Amend the Revised Basic Agreement on ASEAN Industrial Joint Ventures, 2 March 1995.

18. Protocol to Amend the Agreement on the Common Effective Preferential Tariff (CEPT) Scheme for the ASEAN Free Trade Area (AFTA), Bangkok, 15 December 1995.

19. Protocol to Amend the Agreement on ASEAN Preferential Trading Arrangements, Bangkok, 15 December 1995.

20. ASEAN Framework Agreement on Services, Bangkok, 15 December 1995.

21. ASEAN Framework Agreement on Intellectual Property Cooperation, Bangkok, 15 December 1995.

22. Protocol Amending the Agreement on ASEAN Energy Cooperation, Bangkok, 15 December 1995.

23. Basic Agreement on ASEAN Industrial Cooperation, Singapore, 26 April 1996.

24. Protocol to Amend the Agreement Among the Government of Brunei Darussalam, the Republic of Indonesia, Malaysia, the Republic of the Philippines, the Republic of Singapore, and the Kingdom of Thailand for the Promotion and Protection of Investments, Jakarta, 12 September 1996.

25. ASEAN Agreement on Customs, Phuket, Thailand, 1 March 1997

26. Protocol Amending the Agreement on the ASEAN Energy Cooperation, Kuala Lumpur, Malaysia, 23 July 1997

27. 2nd Protocol to Amend the Agreement on the ASEAN Food Security Reserve, Subang Jaya, Malaysia, 23 July 1997

28. Protocol to Implement the Initial Package of Commitments Under the ASEAN Framework Agreement on Services, Kuala Lumpur, Malaysia, 15 December 1997

29. Agreement on the Establishment of the ASEAN Center for Energy, Manila, Philippines, 22 May 1998

30. Protocol on Notification Procedures, Makati, Philippines, 7 October 1998

31. Framework Agreement on the ASEAN Investment Area, Makati, Philippines, 7 October 1998

32. ASEAN Framework Agreement on Mutual Recognition Arrangement (MRAs), Ha Noi, Viet Nam, 16 December 1998

33. Protocol to Implement the Second Package of Commitments Under the ASEAN Framework Agreement on Services, Ha Noi, Viet Nam, 16 December 1998

34. ASEAN Framework Agreement on the Facilitation of Goods in Transit, Ha Noi, Viet Nam, 16 December 1998

35. Protocol on the Special Arrangement for Sensitive and Highly Sensitive Products, Singapore, 30 September 1999

36. Protocol regarding the Implementation of the CEPT Scheme Temporary Exclusion List, Singapore, 23 November 2000

37. E-ASEAN Framework Agreement, Singapore, 24 November 2000

38. Protocol 5: ASEAN Scheme of Compulsory Motor Vehicle Insurance, Kuala Lumpur, Malaysia, 8 April 2001

39. Protocol to Amend the Framework Agreement on the ASEAN Investment Area, Ha Noi, Viet Nam 14 September 2001

40. Protocol to Implement the Third Package of Commitments Under the ASEAN Framework Agreement Services, Ha Noi, Viet Nam, 31 December 2001

41. ASEAN Sectoral Mutual Recognition Arrangement for Electrical and Electronic Equipment, Bangkok, Thailand, 5 April 2002

42. Protocol to Implement the Second Package of Commitments on Financial Services Under the ASEAN Framework Agreements on Services, Yangon, Myanmar, 6 April 2002

43. Protocol to Amend the Agreement the Common Effective Preferential Tariff (CEPT) Scheme for the ASEAN Free Trade Area (AFTA) for the Elimination of Import Duties, 31 January 2003

44. Protocol Governing the Implementation of the ASEAN Harmonized Tariff Nomenclature, Makati, Philippines, 7 August 2003

45. Agreement on the ASEAN Harmonized Cosmetic Regulatory Scheme, Phnom Penh, Cambodia, 2 September 2003

46. Protocol to Amend the Protocol Governing the Implementation of the ASEAN Harmonised Tariff Nomenclature, Jeju Island, Korea, 15 May 2004

APPENDIX II
WORKING PROCEDURES OF THE PANEL

I. Composition of Panels

1. Panels shall be composed of well-qualified governmental and/or non-governmental individuals, including persons who have served on or presented a case to a panel, served in the Secretariat, taught or published on international trade law or policy, or served as a senior trade policy official of a Member State. In the nomination to the panels, preference shall be given to individuals who are nationals of ASEAN Member States.

2. Panel members should be selected with a view to ensuring the independence of the members, a sufficiently diverse background and a wide spectrum of experience.

3. Nationals of Member States whose governments are parties to the dispute shall not serve on a panel concerned with that dispute, unless the parties to the dispute agree otherwise.

4. To assist in the selection of panelists, the Secretariat shall maintain an indicative list of governmental and non-governmental individuals possessing the qualifications outlined in paragraph 1, from which panelists may be drawn as appropriate. Members may periodically suggest names of governmental and non-governmental individuals for inclusion on the indicative list, providing relevant information on their knowledge of international trade and of the sectors or subject matter of the covered agreements, and those names shall be added to the list upon approval by the SEOM. For each of the individuals on the list, the list shall indicate specific areas of experience or expertise of the individuals in the sectors or subject matter of the covered agreements.

5. Panels shall be composed of three panelists unless the parties to the dispute agree, within ten (10) days from the establishment of the panel, to a panel composed of five panelists. Members shall be informed promptly of the composition of the panel.

6. The Secretariat shall propose nominations for the panel to the parties to the dispute. The parties to the dispute shall not oppose nominations except for compelling reasons.

7. If there is no agreement on the panelists, within twenty (20) days of the decision of the SEOM to establish a panel, at the request of either party, the Secretary-General of ASEAN, in consultation with the SEOM shall, within ten (10) days determine the composition of the panel by appointing the panelists whom the Secretary-General of ASEAN considers most appropriate, and if so relevant, in accordance with any relevant special or additional rules or procedures of the covered agreed or covered agreements which are at issue in the dispute, after consulting the parties in the dispute. The ASEAN Secretariat shall inform the Member States of the composition of the panel thus formed.

8. Member States shall undertake, as a general rule, to permit their officials to serve as panelists.

9. Panelists shall serve in their individual capacities and not as government representatives, nor as representatives of any organization. Member States shall therefore not give them instructions nor seek to influence them as individuals with regard to matters before a panel.

II. Panel Proceedings

1. In its proceedings the panel shall follow the relevant provisions of this Protocol. In addition, the following working procedures shall apply.

2. The panel shall meet in closed session. The parties to the dispute, and interested parties, shall be present at the meetings only when invited by the panel to appear before it.

3. The deliberations of the panel and the documents submitted to it shall be kept confidential. Nothing in this Protocol shall preclude a party to a dispute from disclosing statements of its own positions to the public. Member States shall treat as confidential information submitted by another Member State to the panel which that Member State has designated as confidential. Where a party to a dispute submits a confidential version of its written submissions to the panel, it shall also, upon request of a Member State, provide a non-confidential summary of the information contained in its submissions that could be disclosed to the public.

4. Before the first substantive meeting of the panel with the parties, the parties to the dispute shall transmit to the panel written submissions in which they present the facts of the case and their arguments.

5. At its first substantive meeting with the parties, the panel shall ask the party which has brought the complaint to present its case. Subsequently, and still at the same meeting, the party against which the complaint has been brought shall be asked to present its point of view.

6. All third parties which have notified their interest in the dispute to the SEOM shall be invited in writing to present their views during a session of the first substantive meeting of the panel set aside for that purpose. All such third parties may be present during the entirety of this session.

7. Formal rebuttals shall be made at a second substantive meeting of the panel. The party complained against shall have the right to take the floor first to be followed by the complaining party. The parties shall submit, prior to that meeting, written rebuttals to the panel.

8. The panel may at any time put questions to the parties and ask them for explanations either in the course of a meeting with the parties or in writing.

9. The parties to the dispute and any third party invited to present its views in accordance with Article 11 shall make available to the panel a written version of their oral statements.

10. The parties to the dispute shall make available to the panel a written version of their oral statements.

11. In the interest of full transparency, the presentations, rebuttals and statements referred to in paragraphs 5 to 8 shall be made in the presence of the parties. Moreover, each party's written submissions, including any comments on the descriptive part of the report and responses to questions put by the panel, shall be made available to the other party or parties.

12. Any additional procedures specific to the panel.

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