

The ASEAN Dispute Settlement Mechanism and its Role in a Rules-Based Community: Overview and Critical Comparison

by

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I. Introduction

The Association of South-East Asian Nations (ASEAN) has established an effective system to ensure proper implementation of all economic agreements and expeditious resolution of any dispute. This new system is meant to provide for advisory, consultative and adjudicatory mechanisms to resolve trade and investment disputes at the regional level.

In particular, pursuant to the Declaration of ASEAN Concord II,¹ ASEAN Members States (AMSs) undertook to implement the Recommendations of the High Level Task Force on ASEAN Economic Integration, which establish a comprehensive dispute settlement system, consisting of the following instruments: 1) Advisory Mechanisms, including the ASEAN Consultation to Solve Trade and Investment Issues (ACT) and the ASEAN Legal Unit; 2) Consultative Mechanisms, including the ASEAN Compliance Monitoring Body (ACMB) and possible bilateral conciliation or mediation instruments; and 3) Enforcement Mechanisms, including the Enhanced ASEAN Dispute Settlement Mechanism (ASEAN Enhanced DSM), established by the 2004 ASEAN Protocol on Enhanced Dispute Settlement Mechanism (the Protocol),² and special or additional dispute settlement mechanisms in certain ASEAN agreements.

Of the three systems above, only the latter provides for formal adjudication. The Protocol mirrors, in most cases, the provisions of the WTO Understanding on Rules and Procedures Governing the Settlement of Disputes (WTO DSU),³ adapting them to the needs and flexibilities of a regional organisation.

To date, AMSs have not yet made use of any of the dispute settlement mechanisms provided for within the ASEAN legal framework. Disputes among AMSs have been addressed and resolved through political channels only. AMSs also never resorted to the dispute settlement mechanism set out in the Protocol's predecessor, the 1996 ASEAN Protocol on Dispute Settlement Mechanism. However, formal DSM proceedings have been considered on a number of occasions and it is clear that the progressive process of globalisation and regional integration will inexorably add greater pressure for commercial

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¹ Declaration of ASEAN Concord II, Bali, adopted on 7 October 2003, available at: <http://www.aseansec.org/15159.htm> (visited 26 June 2009).

² ASEAN Protocol on Enhanced Dispute Settlement Mechanisms, Vientiane, Lao PDR, adopted on 29 November 2004, available at <http://www.aseansec.org/16754.htm>, visited 26 June 2009).

³ World Trade Organization, *The Results of the Uruguay Round of Multilateral Negotiations, the Legal Texts*, Cambridge University Press, 1999, 354.

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disputes to be referred to the adjudicatory mechanism provided by the ASEAN legal framework.

This is particularly the case in view of the creation of a Single ASEAN Market and Production Base and an ASEAN Economic Community by 2015. A solid, effective and efficient dispute settlement mechanism stands as a fundamental tool for the achievement of the desired rules-based Community by 2015, to the extent that it promotes and enhances the rule of law by securing compliance with, and enforcement of, obligations and commitments within the region.

This article intends to provide a general legal review of the ASEAN dispute settlement mechanism. Particular focus will be given to the ASEAN Enhanced DSM and a critical comparison of the provisions of the Protocol with those on the WTO DSU will be provided. Four key issues of the ASEAN Enhanced DSM are highlighted and analysed for purposes of this comparison. A set of conclusions will attempt to identify some of the main reasons why the dispute settlement mechanisms have, to date, not yet been utilised by AMSs.

II. The ASEAN Dispute Settlement Mechanism

A. Non-adjudicatory mechanisms of the ASEAN

The ACT is an informal, non-legally binding, dispute resolution mechanism for businesses encountering operational problems on cross-border issues related to the implementation of ASEAN agreements in trade and investment. It is implemented through an on-line network of government agencies, where complaints can be submitted directly by business operators through a website or through a national ACT office.

Once the complaint is lodged, the “Host ACT” (i.e., the AMS where the complainant is registered) will review the complaint and submit it to the ACT office of the AMS where the issue arose (the “Lead ACT”). The matter will be solved by the two AMSs involved. Through this system, ASEAN provides for the swift resolution of practical issues and obstacles encountered by businesses.

The ACMB is a non-legally binding consultative dispute settlement mechanism, modelled after the WTO Textiles Monitoring Body, providing for a less procedural and more expedited system of dispute resolution based on diplomacy.

When a dispute is referred to the ACMB, ACMB Members from countries not involved in the dispute will, upon request, review and issue findings within an agreed timeframe. Such findings are not legally-binding. However, an opinion pointing to non-compliance should lead to the AMS(s) found to be in compliance to seriously consider rectifying the non-compliance. According to the Declaration of ASEAN Concord II, ACMB’s findings would be tabled as inputs to the ASEAN Enhanced DSM, should the case be raised according to such procedure.

Therefore, both mechanisms are intended to facilitate the swift resolution of disputes through non-binding and non-adjudicatory systems.

B. The Protocol on Enhanced Dispute Settlement Mechanism

The Protocol was concluded and signed in 2004 with the aim of improving the ASEAN Dispute Settlement Mechanism, as required in the Bali Concord II Declaration and replacing an earlier instrument.

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The system envisaged by the Protocol applies to disputes brought under the ASEAN economic agreements (i.e., the covered agreements)⁴ and comprises a set of non-adjudicatory mechanisms, such as consultations, good offices, conciliation and mediation, and a set of procedures at the adjudicatory stage, which include proceedings before the panel, the possibility of a review of the panel's findings by the Appellate Body, and procedures for compliance monitoring. The mechanism and procedures envisaged by the Protocol mirror those of the WTO DSU, with some specific differences which are intended to adapt the multilateral 'model' to the regional framework as well as to the specific needs identified by the ASEAN negotiators.

Recourse to the procedures of the Protocol is without prejudice to the rights of AMSs to resort to other *fora* for the settlement of disputes involving other AMSs. An AMS involved in a dispute can resort to other *fora* at any stage of the dispute before a party to the dispute has made a request for the establishment of a panel.⁵ As it will be explained below, the flexibility granted by the Protocol to AMSs wishing to seek recourse to other *fora*, although it may facilitate the resolution of disputes, could also undermine the ASEAN Enhanced DSM and the role it should play within the ASEAN Economic Community.

The Senior Economic Official Meeting (hereinafter, the SEOM) is the ASEAN body competent for the administration of the Protocol. In particular, the SEOM establishes panels, adopts the reports of the panel and of the Appellate Body, and authorises countermeasures.⁶ In practice, its functions are very similar to those of the WTO Dispute Settlement Body.

Similarly to the WTO Dispute Settlement Mechanism (hereinafter, WTO DSM), the ASEAN Enhanced DSM is triggered by the lodging of a request for consultations. There are two main ways to settle a dispute once a request for consultations has been filed: (i) the parties find a mutually agreed solution, particularly during the phase of consultations; or (ii) through adjudication, including the subsequent implementation of the panel and Appellate Body reports, which are binding upon the parties once adopted by the SEOM. Adjudicatory procedures are structured in three stages: (i) consultations between the parties; (ii) adjudication by panels and, if necessary, by the Appellate Body; and (iii) implementation of the ruling, which includes the possibility of requesting compensation and applying countermeasures in the event of failure by the 'losing' party to implement the ruling.

Following the lodging of a request for consultations, the AMSs concerned formally become parties to the dispute. Consultations, which are a mandatory procedural step, give parties to a dispute the opportunity to discuss the matter and are aimed at facilitating the identification of a mutually accepted solution to the dispute without resorting to litigation. Consultations must end within sixty days from the receipt of the request for consultations, unless parties to the dispute agree otherwise. If consultations fail to settle the matter within that timeframe, the complaining AMS can request the establishment of the panel.⁷

Parties may decide to resort to the non-adjudicatory mechanisms of good offices, conciliation or mediation. Unlike consultations, which are a mandatory procedural step, good offices, conciliation and mediation are voluntary mechanisms for the settlement of disputes and may begin and be terminated at any time. These mechanisms are not intended to result in legal conclusions, but merely to assist in reaching a mutually agreed solution. If the parties to the dispute agree, procedures for good offices, conciliation or mediation may continue while the panel process proceeds.⁸

⁴ Article 1.2 of the Protocol.

⁵ Article 1.3 of the Protocol.

⁶ Article 2.1 of the Protocol.

⁷ Article 5.1 of the Protocol.

⁸ Article 4.2 of the Protocol.

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The procedure for the establishment of the panel is that of ‘reverse consensus’: the panel is established by the SEOM, unless the SEOM decides by consensus not to establish the panel.⁹ The request for the establishment of the panel initiates the phase of adjudication. From this moment onwards, AMSs involved in the dispute are prevented from resorting to other *fora* to settle this particular dispute.

Similarly to the WTO DSM, the request for the establishment of an ASEAN panel must, *inter alia*, identify the measures at issue, provide a brief summary of the legal basis of the complaint and, when the complainant requests the panel to be established with other than standard terms of reference, the request must include the proposed text of the special terms of reference.¹⁰

Standard terms of reference will apply to the dispute unless the parties agree otherwise. They must contain the wording indicated in Article 6 of the Protocol, which, *mutatis mutandis*, is that of Article 7 of the WTO DSU.¹¹

When alternative terms of reference are agreed upon, they must be circulated to all AMSs and any AMS may raise any point relating to the terms of reference with the SEOM at the time of the establishment of the panel.¹²

Like WTO panels, ASEAN panels are composed of three panellists, unless the parties to the dispute agree to a panel composed of five panellists within ten days from the establishment of a panel.¹³ The function of the panel is to make an objective assessment of the dispute, including an examination of the facts of the case and the applicability of, and conformity with, the provisions of the covered agreements.¹⁴

Panel procedures in the ASEAN Enhanced DSM closely resemble those of the WTO and include the exchange of written submissions and rebuttals, hearings with the panel, the possibility of multiple complaints, third party participation, rules on confidentiality, etc. Such procedures are detailed in the Working Procedures of the Panel and by the working procedures that each panel must adopt.¹⁵ Without prejudice to any additional rule included in the panels’ own working procedures, the Working Procedures of the Panel provide that the panel proceedings will include the following steps:

- Written submissions to the panel;
- Substantive meeting of the panel with the parties;
- Third parties’ session (if any);
- Written rebuttals;
- Second substantive meeting with the panel;
- Questions from the panel (if any);
- Comments to the descriptive part of the report; and
- Interim review of the report.

According to Article 8.2 of the Protocol, ASEAN panels must submit a written report with their findings and recommendations within sixty days from their establishment. In exceptional cases, panels may take ten additional days to submit their report to the SEOM. According to the Protocol, such timeframe should be sufficient to enable the panel to be composed and to deliver its findings. As it will be discussed below, this tight timeframe appears both unrealistic and illogical.

⁹ Article 5.1 of the Protocol.

¹⁰ Article 5.3 of the Protocol.

¹¹ See World Trade Organization, above n 3, at 360.

¹² Article 6.3 of the Protocol.

¹³ See Paragraph I.5 of the Working Procedures of the Panel, Appendix II of the Protocol.

¹⁴ Article 7 of the Protocol.

¹⁵ Article 8.1 of the Protocol.

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The treatment of the panel report under the Protocol resembles that of the WTO. Panel reports are adopted by the SEOM within thirty days of their submission by the panels unless an AMS formally notifies the SEOM of its decision to appeal or the SEOM decides, by consensus, not to adopt the report.¹⁶

The ASEAN Enhanced DSM provides for the possibility of appellate review of the panel reports. The ASEAN Appellate Body is composed by seven persons, three of which serve on any given case. The Protocol details the structure of the Appellate Body and specifies the qualifications and requirements of the Members of the Appellate Body.¹⁷

The appeal of a panel report may be triggered only by parties to the dispute (and not by third parties) and is limited in scope to issues of law covered in the panel report and legal interpretations developed by the panel.¹⁸

Again, the appeal proceedings resemble those of the WTO DSM and are, for the most part, provided in the Working Procedures for Appellate Review. Proceedings of the Appellate Body should not exceed sixty days from the date of notification of the appeal. In cases of delay, the Appellate Body must inform the SEOM in writing of the reasons for the delay and provide an estimate of the period within which it will submit its report. However, under the Protocol, in no case the appeal proceedings must exceed ninety days.¹⁹ Therefore, the timeframe accorded for appellate review is longer than the one allocated to conduct the panel proceeding.

The Appellate Body may uphold, modify or reverse the legal findings and conclusions of the panel.²⁰

Rules on *ex parte* communications and on the confidentiality of the submissions are very similar to those of the WTO DSU. *Ex parte* communications with the panel or the Appellate Body are not allowed. Under the Protocol, written submissions to the panel and the Appellate Body must be treated as confidential. However, parties are not prevented to disclose their own statements to the public. AMSs are required to treat as confidential the information submitted by another AMS, which has been designated as confidential information. Upon request of an AMS, a party to the dispute must provide a non-confidential summary of the information contained in its submissions that could be disclosed to the public.²¹

Both the panel and the Appellate Body reports are adopted by the SEOM according to the 'reverse consensus' procedure. Where the panel or the Appellate Body concludes that a measure is inconsistent with a covered agreement, it will recommend that the AMS concerned bring the measure into conformity with that agreement and it may suggest ways in which the AMS concerned could implement the recommendations.²² As also required under the WTO DSU, ASEAN panels and the Appellate Body may not add to or diminish the rights and obligations provided for in the covered agreements.²³

A specific feature of the ASEAN Enhanced DSM mechanism is that the costs of the ASEAN disputes are to be covered by an ASEAN Dispute Settlement Mechanism Fund (ASEAN DSM Fund), established by the Protocol.²⁴ Initial contributions to the ASEAN DSM Fund are made by all AMSs. As the fund must be subsequently replenished by the

¹⁶ Article 9.1 of the Protocol.

¹⁷ Article 12.1-3 of the Protocol.

¹⁸ Article 12.6 of the Protocol.

¹⁹ Article 12.5 of the Protocol.

²⁰ Article 12.12 of the Protocol.

²¹ Article 13 of the Protocol.

²² Article 14.1 of the Protocol.

²³ Article 14.2 of the Protocol.

²⁴ Article 17 of the Protocol.

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parties and third parties to disputes, panels and the Appellate Body also have to deal with the issue of expenses and must apportion the costs of the specific dispute settlement proceeding to the parties and third parties to the dispute, as part of their findings and recommendations.²⁵ As it will be explored more in detail below, the system adopted by ASEAN for funding its DSM raises a number of concerns.

Similarly to the WTO DSM, the ASEAN Enhanced DSM provides for instruments to monitor the compliance with the findings and recommendations of the panel and the Appellate Body reports adopted by the SEOM. It also provides for temporary measures, in the form of compensation and suspension of concessions (i.e., countermeasures), when such findings and recommendations are not implemented within the implementation period.

Therefore, the procedures at the implementation stage under the ASEAN Enhanced DSM include a compliance phase and, eventually, compensation or the suspension of concessions.

In particular, under the Protocol, parties to the dispute are required to comply with the findings and recommendations of the panel/Appellate Body report(s) adopted by the SEOM within sixty days from their adoption, unless a longer period of time is agreed.²⁶ Specific rules apply to a request for a longer period of time: differently from the WTO DSU, the Protocol expressly provides that, when a party to the dispute requests a longer period of time for complying with the findings and recommendations of the adopted report(s), the other party shall accord favourable consideration to the complexity of the actions required to comply and the request must not be unreasonably denied. Where compliance requires passing national legislation, a longer period appropriate for such purpose must be allowed. The decision must be taken within fourteen days from the SEOM's adoption of the panel/Appellate Body reports.²⁷

A 'compliance' adjudicatory proceeding may apply when there is disagreement as to the existence or consistency with a covered agreement of measures taken to comply with the findings and recommendations of the adopted report(s). Similarly to what is provided under the WTO DSU, under the Enhanced ASEAN DSM claims of non-compliance are to be decided using the mechanisms provided in the Protocol, including whenever possible by the original panel. The deadline set for the panel to circulate its report is sixty days from the date of the referral to it. Such deadline can be extended to, but must not exceed, ninety days.²⁸ Again, it appears odd that the timeframe granted to a compliance panel under the ASEAN DSM is longer than the one accorded to the panel in the original proceedings.

The responsibility for surveying the implementation of the panel and Appellate Body reports rests within SEOM. Similarly to the WTO DSM, according to the Protocol, the issue of implementation of the report(s) may be raised at the SEOM's meetings by any AMS following their adoption. Unless the SEOM decides otherwise, the issue of implementation is placed on the agenda of the SEOM meeting and must remain on the SEOM's agenda until it is resolved. The Protocol requires that the party concerned provide the SEOM with a status report in writing of its progress in the implementation of the findings and recommendations of the adopted report(s) at least ten days prior to each such SEOM meeting.²⁹

Finally, under the ASEAN Enhanced DSM, compensation and countermeasures are available in case an AMS fails to comply. As provided in the WTO DSU, such measures are temporary measures and in no case they must be preferred to full implementation of the recommendations. The procedures for resorting to compensation and the criteria that should

²⁵ Article 14.3 of the Protocol.

²⁶ Article 15.1 of the Protocol.

²⁷ Article 15.2-3 of the Protocol.

²⁸ Article 15.5 of the Protocol.

²⁹ Article 15.6 of the Protocol.

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inform the request for authorisation to apply countermeasures are similar to those of the WTO DSM.

An arbitration procedure is envisaged when the AMS concerned by the countermeasures objects the level of suspension of concessions proposed.³⁰

III. Selected issues for comparison

The brief description of the ASEAN Enhanced DSM given above shows how such system closely resembles the WTO DSM. However, there are specific features that characterise the ASEAN system as a unique system. A few specific features of the ASEAN system are capable of raising concerns or resulting in impracticalities affecting the procedures. Most importantly, they appear to undermine the strength of the ASEAN Enhanced DSM as a system based on the rule of law, its authority and its role in promoting the achievement of a rules-based Community. This section analyses four issues that are considered relevant and more interesting for purposes of a comparison between the ASEAN Enhanced DSM and the WTO DSM:

- The problem of ASEAN's exclusive jurisdiction and '*forum shopping*';
- The relationship of the ASEAN DSM Protocol with the ASEAN Charter;
- The timing of the panel process; and
- Funding costs of the DSM.

A. The problem of ASEAN's exclusive jurisdiction and '*forum shopping*'

As seen above, until a request for the establishment of an ASEAN panel is made, the Protocol allows AMSs to resort to any other *fora* for the settlement of disputes. In particular, Article 1.3 of the Protocol provides that:

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.

It is assumed that the disputes which Article 1.3 refers to, and that may be brought to other *fora*, are disputes arising under the covered agreements. Therefore, Article 1.3 allows AMSs to take their disputes to other *fora* and to attempt to settle a dispute both within the context of the ASEAN Enhanced DSM and another dispute settlement *forum*, until a request for the establishment of an ASEAN panel is made.

In the WTO system, according to Article 23 of the WTO DSU, WTO Members are not allowed to seek redress of the violation of obligations under the covered agreements through other *fora* than the WTO. Therefore, whereas Article 23 of the WTO DSU obliges WTO Members to have recourse to, and abide by, the rules and procedures of the WTO DSU with the exclusion of other dispute settlement *fora*, Article 1.3 of the Protocol grants AMSs this flexibility.

The flexibility granted by the ASEAN Enhanced DSM appears useful, to the extent that, by allowing recourse to other dispute settlement *fora*, including arbitral tribunals, it

³⁰ Article 16 of the Protocol.

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surely facilitates an expedited solution of the matter when, for example, the controversy concerns practical matters and issues that are clearly definable by the parties. However, the flexibility of resorting to systems that are outside of the ASEAN DSM, could undermine the authority of the ASEAN DSM as it is not the exclusive mechanism for resolving disputes arising under ASEAN covered agreements.

B. The relationship of the ASEAN DSM Protocol with the ASEAN Charter

An interesting issue appears to be the relationship between the ASEAN Enhanced DSM and certain provisions of Chapter VIII of the ASEAN Charter, providing for a set of principles and rules on the settlement of disputes arising between AMSs.

Of particular interest is the relationship between Articles 26 and 27 of the ASEAN Charter³¹ and the Protocol. Article 26 of the Charter provides that:

When a dispute remains unresolved, after the application of the preceding provisions of this Chapter, this dispute shall be referred to the ASEAN Summit, for its decision.

The wording of Article 26 of the ASEAN Charter appears to introduce the possibility of achieving a (political) solution for ‘unresolved’ disputes through recourse to the ASEAN Summit.³² As it appears that such recourse is only available after exhaustion of the specific remedies envisaged for the solution of a given category of disputes, in relation to economic agreements, the term ‘unresolved’ dispute must refer to the case of an AMS not accepting the findings and recommendations of the panel and Appellate Body as adopted by the SEOM.

If this is the case, the introduction of the possibility to resort to the ASEAN Summit appears to undermine the strength and legal certainty of the dispute settlement mechanism as a system based on the rule of law, to the extent that it introduces an element of political discretion in favour, most likely, of the AMSs ‘losing’ the cases and unwilling to comply with the rulings. It introduces a further instance of review, centred on diplomacy rather than law.

Another interpretation of such article suggests that the intent of the intervention of the ASEAN Summit would be aimed at facilitating parties to a dispute to broker a deal and avoid the application of temporary measures indefinitely, or avoid that such measures are applied at all.

The referral to the ASEAN Summit of unresolved matters is raised again in Article 27 of the ASEAN Charter:

2. Any Member State affected by non-compliance with the findings, recommendations or decisions resulting from an ASEAN dispute settlement mechanism, may refer the matter to the ASEAN Summit for a decision.

Again, the Charter appears to provide for the possibility that the matter be resolved through a political solution, this time in favour to the ‘winning’ party to the dispute, at the expense of the rule of law. This second provision is unclear on whether remedies should be exhausted before resorting to the ASEAN Summit, although it is plausible that non-compliance would need to be ascertained by a panel or the Appellate Body.

³¹ The ASEAN Charter, adopted in Singapore on 27 November 2007, ASEAN Secretariat, 2008.

³² The ASEAN Summit comprises the Head of States or Governments of the AMSs.

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C. The timing of the panel process

As mentioned under Section II.B, Article 8.2 of the Protocol requires the panel to submit its findings and recommendations within sixty days of its establishment. In exceptional cases, the panel may be granted ten additional days. This timeframe for the panel process does not appear realistic or logical.

It is not realistic to expect a panel to complete its work within sixty to seventy days from its establishment. This is particularly the case in light of WTO practice, where on average, it takes fourteen months between panel establishment and circulation of the report. In fact, panel proceedings are articulated in a number of procedural steps before the panels able to circulate their report. As the indicated timeframe starts running from the establishment of the panel (differently from the WTO DSU, where the different timeframe provided therein must be counted from the composition of the panel), the first step would be the composition of the panel, which is a process that can take up to thirty days.³³

Therefore, by the time it is composed and can actually start working, an ASEAN panel may only have thirty to forty days left to complete its work and submit its report. Within these remaining days, the panel and the parties are expected to complete the panel proceedings, which comprise, at least, two rounds of written submissions by the parties,³⁴ two rounds of meetings with the parties³⁵ and the *interim* review of the report before it is submitted to the SEOM.³⁶

In addition, the Protocol provides for the possibility that the panel seek expert advice.³⁷ As WTO experience shows, obtaining and processing expert advice is usually very time-consuming. Therefore, it is simply not realistic to expect that an ASEAN panel will be able to complete its work within thirty to forty days.

The timeframe for the ASEAN panel process appears also not logical if compared with the timeframes the Protocol accords to the Appellate Body to complete its review and to the compliance panel (in both cases, sixty to ninety days).³⁸

In particular, it is recalled that the Appellate Body, unlike the panel, does not examine and make rulings on the facts of the dispute and commonly deals with fewer legal issues than the panel did. Yet, it is granted, under the Protocol, a longer timeframe to complete its report.

In relation to the compliance panel, while it may be expected that the compliance panel will often be the original panel and that, therefore, no time needs to be set aside for panel composition, the timeframe for the compliance panel process is still longer than the timeframe for the panel process. In both cases this difference in timeframes does not appear logic.

Therefore, it is likely that ASEAN panels will fail to respect the compulsory timeframe for the panel process in a number of occasions. This could cause a prejudice to the credibility and 'attractiveness' of the ASEAN DSM system.

D. Funding costs of the DSM

³³ See Paragraph I.7 of the Working Procedures of the Panel.

³⁴ See Paragraphs II.4 and II.7 of the Working Procedures of the Panel.

³⁵ See Paragraphs II.5 and II.7 of the Working Procedures of the Panel.

³⁶ See Article 8.3 of the Protocol.

³⁷ See Article 8.4 of the Protocol.

³⁸ See Articles 17.5 and 21.5 of the WTO DSU, World Trade Organization, above n 3, at, respectively, 366 and 369.

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As mentioned above, the Protocol provides for the establishment of the ASEAN DSM Fund, to cover the costs of the ASEAN Enhanced DSM.³⁹ These costs include the expenses of the panels, the Appellate Body and any related administrative costs of the ASEAN Secretariat. All other expenses incurred by any party, including legal representation, are not covered by the Fund and must be borne by that party.

Initial contributions to the Fund are equally conferred by all AMSs. After such initial contributions, the Protocol provides that the Fund will be replenished by the parties and third parties to disputes. To this end, panels and the Appellate Body will apportion the costs of dispute settlement to the parties and third parties.⁴⁰

The system adopted by ASEAN for funding its DSM is likely to be of concern to the ambition of ASEAN to establish a rules-based Community. In particular, if costs are to be borne by the parties to a dispute, the economically less-developed, poorer AMSs will be discouraged to resort to the mechanism of the Protocol, or even to participate actively as defendants, as such recourse and participation may involve significant expenses in addition to the costs of legal representation. As a result, the poorer AMSs will likely find their access to the DSM hindered. This is difficult to reconcile with ASEAN's ambition of establishing a rules-based Community by 2015.

In this respect, it is recalled that, under the WTO, the costs of WTO dispute settlement are covered by the WTO Secretariat Budget and by the Budget for the Appellate Body and its Secretariat. All WTO Members contribute to these budgets according to a formula based on their share of international trade in goods and services. The solution offered by the WTO appears to ensure that contributions are made on more equitable basis and could be taken as a model.

One of the major concerns, that the current system for funding the ASEAN Enhanced DSM raises, relates to the criteria for apportioning the costs. In the absence of any guidance from the Protocol, it remains unclear how are panels and the Appellate Body to apportion the costs to parties and third parties. To start with, it is not clear whether the costs will be allocated to the party 'losing' the dispute and if so, how will the panel or the Appellate Body determine what constitutes 'losing' a dispute and what treatment to give to third parties.

IV. Conclusions

The preceding sections provided an overview of the ASEAN mechanisms for dispute settlement and, in particular, of the adjudicatory mechanism created by the Protocol. As the review of the mechanism showed, the Protocol is largely inspired by the WTO DSU, where the differences mostly reflect the flexibilities of a regional organisation as well as the intention to create a mechanism whose role is to accompany and enforce the process of a deeper regional integration.

However, differently than WTO Members, to date AMSs have never resorted to the available ASEAN instruments of dispute resolution. With particular reference to the mechanisms envisaged by the Protocol and its predecessor, the failure of AMSs to resort to such mechanism in spite of the possible existence of disputes and instances of alleged inconsistency with obligations under ASEAN agreements, can be attributed to a number of factors.

Among such factors, is certainly the less 'confrontational' nature of Asian culture, which is reflected in the ASEAN Governments' preference for a negotiated and diplomatic

³⁹ See Article 17 of the Protocol.

⁴⁰ See Article 14.3 and 17.1 of the Protocol.

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solution over recourse to outright legal and institutional mechanisms for the resolution of disputes. In this context, the alternative non-adjudicatory mechanisms provided within the ASEAN framework and those provided under the Protocol itself (*i.e.*, good offices, conciliation and mediation) stand to have greater chances of success to the extent that they may appear more appealing to AMSs than the ‘competing’ confrontational and adjudicatory mechanism envisaged by the Protocol.

The less ‘confrontational’ nature of Asian culture is also reflected in the language of a number of ASEAN economic agreements, where cooperative language is often preferred to the provision of a set of enforceable rights and obligations. The small amount of legally binding obligations must be coupled with the proliferation of agreements, which creates different, and often overlapping ‘layers’ of obligations which may be in practice difficult to map. This factor may also have contributed in preventing recourse by AMSs to dispute settlement mechanisms.

A number of procedural and institutional shortcomings, as seen above, may also play at a disadvantage for the ASEAN DSM system vis-à-vis other international dispute settlement systems (such as the one of the WTO), which appear more reliable, more predictable, better rehearsed, less costly, based on clearer and well interpreted procedural and substantive rules, more enforceable and, in short, more ‘attractive’.

Lastly, another factor which may have inhibited recourse by AMSs to the mechanism provided for in the Protocol so far, is the fear that the use of such system could trigger a process of ‘tit-for-tat’ recourses to the dispute settlement mechanism between and among AMSs, where AMSs would increasingly or systematically point at each other’s instances of non-compliance with the agreements instead of finding mutually acceptable solutions. This approach is maybe understandable, given the early stage of economic integration and the focus of AMSs to positively and constructively build a strong and mutually supportive community of ‘brothers and sisters’. However it is likely that the trend towards compromise and non-confrontation may slowly lose appeal, particularly as a result of the international economic crisis and the pressures from non-ASEAN economic interests and operators that have invested in the region and may drive the dispute settlement process.

Notwithstanding these factors, the three mechanisms envisaged for the solution of disputes arising under ASEAN economic agreements, and in particular the adjudicatory mechanism of the ASEAN Enhanced DSM stand to have a great role in the completion of the ASEAN Single Market and the creation of a rules-based Community.

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