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Dispute settlement provisions in ASEAN's external economic agreements with China, Japan and Korea

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I. Introduction

Since its inception in 1967, ASEAN has helped to enhance not only the political cooperation of its member countries, but also the economic integration among the members. In addition to promoting internal collaboration, another important task of ASEAN is to strengthen its ties with countries outside of the region. Over the years, ASEAN has signed many agreements with other countries. Among them, the agreements with its three big neighbors up north, i.e., China, Japan and Korea (CJK) are especially noteworthy due to ASEAN's troubled history with Japan and China. This started with the Japanese invasion during the Second World War, followed by the Chinese efforts to export revolution in the 1950s and 1960s by supporting communist parties and training soldiers for guerilla wars, as well as the Sino–Vietnamese War in 1979. With such unpleasant experiences, it was no surprise that ASEAN countries viewed the big powers from north with suspicion. Indeed, one of the primary objectives for the founding of ASEAN in 1969 was to fend off the threat from other powers and "ensure their stability and security from external interference in any form or manifestation".[1] Given such historical background, the fact that ASEAN is willing to conclude agreements with CJK countries provides strong testimony to ASEAN's commitment to regional integration.

In recent years, CJK countries have emerged as the largest trade partners of ASEAN countries. For example, since 2010, China has been the largest trade partner of ASEAN, while Japan and Korea are the third and fifth largest.[2] Taken together, their total trade accounts for more than 30% of ASEAN's external trade. With such strong and increasingly-close economic ties, it is very important for ASEAN to maintain good relationships with CJK countries. In this regard, the international agreements provide the necessary platform for ASEAN to manage their trade relations with CJK countries. Moreover, as CJK countries are the biggest trade partners of ASEAN, ASEAN's trade agreements with them also provide good indications on how ASEAN manages its relationship with its trade partners.

Thus, this chapter will focus on ASEAN's trade agreements with CJK countries. In particular, we will concentrate on the dispute settlement mechanisms in these agreements. Compared with the dispute settlement mechanisms within ASEAN's internal agreements, the dispute settlement mechanisms of ASEAN's external economic agreements provide the real litmus test in assessing the success of ASEAN's in building a rule-based regime for the following

[1] 1967 ASEAN Declaration, adopted by the Foreign Ministers at the 1st ASEAN Ministerial Meeting in Bangkok, Thailand on Aug. 8, 1967.
[2] The 2010 data are available at Table 20: Top ten ASEAN trade partner countries/regions, available at http://www.asean.org/images/2012/resources/external_trade/Table20_27.xls. The latest available data is for 2015, available at http://asean.org/storage/2016/06/table20_as-of-30-Aug-2016-2.pdf.

reasons:

First, the external economic agreements provide a way to test the ability of ASEAN to respond to the pressures of larger, more powerful partners. The internal agreements are negotiated among ASEAN members, thus are less susceptible to power politics as the disparities among the members are relatively small. In contrast, the partners in ASEAN's external economic agreements are mostly big regional players or even global players, thus highly likely to apply strong pressures against ASEAN countries in the negotiations for the external agreements. Unless the ASEAN countries are able to stand together and resist such demands, the external economic agreements will be subject to heavy influences by the external partners. That is also why according to the ASEAN Economic Community (AEC) Blueprint 2025, one of the main areas of implementation of the Blueprint is "strengthening ASEAN's relationship with its external parties."[3] In that regard, studying the structure and design of the external economic agreements can tell us a lot about whether ASEAN countries can withstand external pressures.

Second, as these agreements are negotiated by ASEAN as a whole, they are also quite different from the trade agreements negotiated by individual ASEAN members. Negotiating the individual agreements is much easier as the particular ASEAN member can decide on its own. In comparison, when ASEAN countries negotiate agreements with external partners on a collective basis, they have to first negotiate among themselves in order to form a common position, then negotiate with the external parties to shape the agreements. On issues that are particularly difficult, they might have to go back and forth between external partners and ASEAN internal members before they can finalize their position. This is also confirmed in the ASEAN Economic Community (AEC) Blueprint 2015, which states that one of the strategic measures of ASEAN's global engagement is to "[d]evelop a more strategic and coherent approach towards external economic relations with a view to adopting a common position in regional and global economic fora".[4] Therefore, these external economic agreements also provide valuable insights on how well ASEAN can work as a whole and speak with a unified voice.

The rest of the chapter is organized as follows. First, the paper conducts a detailed critical analysis of the dispute settlement mechanisms in ASEAN's external economic agreements with CJK countries by reviewing the main procedural rules of these mechanisms. Next, the paper discusses the difference among these agreements, and compares them with the World Trade Organization (WTO) dispute settlement mechanisms. In the last part, the paper concludes with thoughts on how these dispute settlement mechanisms might evolve in the future, especially in view of the ongoing negotiations for the Regional Comprehensive Economic Partnership Agreement (RCEP).

II. Dispute Settlement Provisions in Economic Agreements

[3] Association of Southeast Asian Nations (ASEAN) Economic Community (AEC) Blueprint 2015, para. 1.
[4] *Id*., para. 80.1.

In general, the dispute settlement provisions in political agreements tend to be weak and informal, while those in trade agreements are usually much stronger and formal. In addition, while political agreements typically offer consultation or negotiation as the only means of dispute settlement, trade agreements offer the parties a variety of dispute settlement mechanisms, with the highly-institutionalized WTO-style arbitration panel as the dominant model.

Japan included dispute settlement mechanisms as a chapter in its Comprehensive Economic Partnership Agreement with ASEAN, while China and Korea each includes in their respective FTA packages with ASEAN a separate agreement on dispute settlement mechanisms (DSM). Their other economic agreements simply state that any dispute under these agreements shall be resolved through the procedures and mechanism as set out in the DSM agreement.[5] But there are some notable exceptions. For example, Article 8 of the 2009 Memorandum of Understanding between ASEAN and China on Cooperation in the Field of Intellectual Property states that disputes shall be settled "amicably through mutual consultation or negotiation among All Participants through diplomatic channels, *without reference to any third party or international tribunal*".[6] Similarly, article 5.1.2 of the 2005 Framework Agreement on Comprehensive Economic Cooperation among ASEAN and Korea explicitly carved out trade in services and investment from the coverage of the DSM Agreement. These provisions reflect the reluctance of the parties to enforce non-traditional trade issues such as services, investment and intellectual property rights.

A. Typical dispute settlement procedure

In general, the dispute settlement procedures in CJK countries' agreements are very similar to the one under the 2004 ASEAN Protocol on Enhanced Dispute Settlement Mechanism (EDSM),[7] which in turn is modeled after the Dispute Settlement Understanding (DSU) of the WTO. This section discusses the main stages of dispute settlement in these dispute settlement mechanisms. It not only notes the common elements of these procedures, but also discusses their main differences with the WTO dispute settlement mechanism and the EDSM. These analyses provide key insights into the designs of these mechanisms and the rationales behind them.

1. Consultations

Consultations in essence are bilateral negotiations. Because they are conducted directly

[5] See e.g., art. 19 of the 2006 Protocol to Amend the Agreement on Trade in Goods of the Framework Agreement on Comprehensive Economic Cooperation between ASEAN and the People's Republic of China; art. 5.1 of the 2005 Framework Agreement on Comprehensive Economic Cooperation among the Governments of the Member Countries of ASEAN and the Republic of Korea; art. 19 of the 2006 Agreement on Trade in Goods under the Framework Agreement on Comprehensive Economic Cooperation among the Governments of the Member Countries of ASEAN and the Republic of Korea.

[6] Emphasis added by the author. 2009 Memorandum of Understanding between the Governments of the Member States of ASEAN and the Government of the People's Republic of China on Cooperation in the Field of Intellectual Property.

[7] 2004 ASEAN Protocol on Enhanced Dispute Settlement Mechanism.

between the disputing parties without the involvement of third parties, it is usually easier to solve the disputes through consultations and that is why they are included in both non-economic and economic agreements. The difference between the two, however, is that the consultation provisions in the non-economic agreements tend to be rather general and do not include detailed instructions while the ones in the economic agreements are much more specific. They usually set out in detail the format, content, and time limit for the consultation process. This is in marked contrast to the loose language in political agreements and reflects the legalistic nature of the economic agreements.

Similar to the WTO DSU, a party may file a request for consultations against a measure by another party that nullifies or impairs the benefits accruable to the complaining party under the covered agreements.[8] The request shall be submitted in writing to the responding party, and shall include the specific measures at issue, as well as the factual and legal basis, such as the provisions of the covered agreements allegedly breached.[9]

Interestingly, none of the three DSMs recognize non-violation complaints, i.e., nullification or impairment caused by a measure that does not violate the WTO agreements.[10] The China DSM made this explicit by stating that "[n]on-violation disputes are not permitted under this Agreement".[11] The other two DSMs do not include such explicit prohibition on non-violation complaints. However, as they only recognize nullification or impairment caused by measures which are inconsistent with a party's obligation, or failure of a party to carry out its obligation,[12] we can infer that non-violation complainants are implicitly excluded. In the view of the author, non-violation complainants are mainly designed to deal with the problems of unforeseen developments caused by imperfect treaty drafting. For a large international treaty like the General Agreement on Tariffs and Trade (GATT), it is impossible to have all the parties discuss whether such unforeseen developments should be allowed due to the high transaction cost. In contrast, for bilateral treaties like the CJK-ASEAN economic agreements, the transaction cost is much lower. Thus, it is much better for the parties to solve the problem through bilateral consultations in such cases rather than trying to force the case through the dispute settlement mechanism.

Upon receipt of the request for consultations, the respondent shall reply to the request within seven days and enter into consultations within thirty days.[13] The parties shall conduct the consultations with good faith and make every effort to reach a mutually satisfactory solution.

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[8] Art. 4.1, 2004 Agreement on Dispute Settlement Mechanism of the Framework Agreement on Comprehensive Economic Co-Operation between the Association of Southeast Asian Nations and the People's Republic of China ("China"); art. 3.1, 2005 Agreement on Dispute Settlement Mechanism under the Framework Agreement on Comprehensive Economic Cooperation among the Governments of the Member Countries of ASEAN and the Republic of Korea ("Korea"); art. 62.1, 2008 Agreement on Comprehensive Economic Partnership among Member States of the Association of Southeast Asian Nations and Japan ("Japan").

[9] China, art. 4.2; Korea, art. 3.2; Japan, art. 62.2.

[10] See art. XXIII.b of General Agreement on Tariffs and Trade 1994; art. XXIII.3 of General Agreement on Trade in Services.

[11] China, Footnote 1 to art.4.1.

[12] Korea, art. 3.1; Japan, art. 62.1.

[13] China, art. 4.3; Korea, art. 3.3; Japan, art. 62.3. Note that the deadline to reply to the request is 10 days under the Japanese DSM.

As consultation is conducted on a bilateral basis, the disputing parties might be reluctant to provide information for fear that such information might be used against them in later proceedings. To alleviate such concern, the DSMs explicitly require the parties to provide sufficient information to enable a full examination of how the measure might affect the operation of the covered agreement. At the same time, to avoid the misuse of the information, the parties are also required to treat information provided by the other party as confidential. To enable frank discussions, the consultation process is also confidential and without prejudice to the rights of the parties under other proceedings. If consultations fail to settle the dispute within sixty days, the complainant may request for the establishment of the panel.

In case of urgency, such as those concerning perishable goods, the time periods for starting and ending consultations are shortened to one-third of the original time periods, i.e., ten days and twenty days respectively. This provision is of particular importance to ASEAN, which export many tropical fruits that are easily perishable.

While the economic agreements do not make this explicit, consultation seems to be the mandatory first-step in the dispute settlement procedure. This conclusion is drawn from the provisions on the establishment of the arbitral tribunal, which can only be requested by the complaining party in any of the three scenarios: if the respondent fails to respond to the consultation request or enter into consultations in time; or if the consultation fails to resolve the dispute after a certain period.[14]

2. Establishment of arbitral tribunal/panel

Upon the delivery of the request for the establishment of the panel, the panel shall be established automatically. As the arbitration panels are not standing bodies, they need to be composed on an *ad hoc* basis for each specific dispute. Normally, there are three members in the panel. Two of them are appointed by the complainant and respondent respectively, while the third – the chair - has to be agreed by the two parties. If any party fails to appoint its arbitrator within the time period provided for under the DSM, the arbitrator appointed by the other party shall be the sole arbitrator. As I mentioned below, this is an important change compared to the WTO DSU and solves the problem caused by the blockage of the process through refusal to appoint a panelist by a party, especially the respondent. If the parties cannot agree on the third arbitrator, they may request the Director-General of the WTO to appoint an arbitrator. If the Director-General is a national of one of the disputing parties, the Deputy Director-General or the officer next in seniority who is not a national of either party shall be requested to make the appointment. This provision is a good innovation as there is a real possibility of a national of the parties serving as WTO Director-General, such as dr. Supachai.

To ensure the competence of the panel, the DSMs requires panelist to "have expertise or experience in law, international trade, other matters covered by the covered agreements or the

[14] China, arts. 4.3 & 6.1; Korea, arts. 3.3 & 5.1; Japan, art. 64.1.

resolution of disputes arising under international trade agreements".[15] Given the dominance of the state in international trade affairs in most ASEAN and CJK countries, this requirement means that most panelists are probably government officials. Indeed, this seems to be consistent with the practice of these countries in the WTO, as they tend to nominate government officials to the indicative list for panelists. The problem with having government officials as panelists, however, is that they normally rule along the lines of official national policy. To prevent this problem, the DSMs also state that a panelist "shall be chosen strictly on the basis of objectivity, reliability, sound judgment and independence and shall conduct himself or herself on the same basis throughout the course of the arbitral panel proceedings".[16] Stricter rules apply to the Chair, who "shall not be a national of any party to the dispute and shall not have his or her usual place of residence in the territory of, nor be employed by, any party to the dispute nor have dealt with the referred matter in any capacity".[17]

For the purpose of calculating the time periods under the DSM, the date of the establishment of the panel shall be the date on which the chair is appointed, or the 30th day after the receipt of the request for establishment of panel in case of a sole-member panel.

3. Panel proceedings

Once the panel has been composed, it shall fix the timetable for the panel proceedings.[18] To assist the panel, the DSMs also include annexes which set out the rules and procedures of the panel proceedings in detail. Of course, after consulting the parties, the panel may adopt additional rules and procedures for specific disputes.[19]

In general, the panel will hold two substantive meetings with the parties. Before each substantive meeting, the parties shall submit written submissions to the panel and the other disputing parties. The first round of submissions starts with the submission from the complaining party, which usually use this opportunity to substantiate its case by presenting the facts and making the legal arguments in more detail. This submission also helps the responding party to understand the factual and legal bases of the complaint, and to respond to them in its own submission. At the first substantive meeting, the complainant will present their arguments first, followed by the respondent. After the meeting, the parties shall submit another round of written submissions to rebut the arguments made by the other parties. These rebuttals will be presented at the second substantive meeting of the panel.

The submissions of the parties shall be kept confidential and made available only to the parties to the dispute and the panel, but there are two exceptions: first, a party is not precluded from disclosing its own position or the submission to the public; second, if a party submits a confidential version of a written submission, it shall provide a non-confidential

[15] China, art. 7.6; Korea, art. 6.6; Japan, art. 65.6.
[16] *Id.*
[17] China, art. 7.6; Korea, art. 6.6; Japan, art. 65.2.
[18] China, art. 9.3; Japan, art. 68.7.
[19] China, art. 9.5; Korea, art. 10.1; Japan, art. 68.2.

summary at the request of the other party to the dispute for disclosure to the public.

In addition to the written submissions and oral statements by the parties, the panel may also seek information from the parties by posing questions either in writing or orally.[20] Moreover, the panel may seek additional information on the case from any person or institution.[21] In particular, the panel may seek advice on technical or scientific issues from experts.[22] Of course, such experts do not have the power to vote in respect of any decision to be made by the panel. In the interest of fairness, such information shall also be made available to the parties.

Given the language differences among the parties, the DSMs also explicitly require the panel proceedings and the documents submitted to the panel to be in English.[23]

After the substantive meetings, the panel shall meet to deliberate on the case and draft the report based on the written submissions and oral presentations of the parties, as well as additional information and expert advice it gathers from other sources. The deliberations shall be kept confidential[24] and the report shall be drafted without the presence of the parties to the dispute.[25] As 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 covered agreements, the panel report shall address both the factual and legal issues. In general, the report shall set out findings of facts and law together with reasons, including the applicability of particular provisions of the covered agreements to the current dispute as well as whether the parties have failed to carry out its obligations under the current agreements.[26]

During deliberation and drafting of panel report, the members of the panel might disagree on certain issues. In such cases, the panel shall attempt to reach a decision by consensus or a majority vote if consensus could not be reached.[27] In the latter case, the panelist who is not in the majority might decide to write a dissenting opinion. However, even in such case, the opinions of individual panelists shall be made on an anonymous basis.[28]

Following deliberation, the panel shall first issue an interim report or draft award setting out its findings and conclusions for review by the disputing parties.[29] The parties may comment on both the factual and legal aspects of the report and their comments shall be addressed by the panel in its final report.

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[20] China, Rule 5, Rules and Procedures for the Arbitral Proceedings; Japan, art. 67.2.
[21] China, Rule 8; Korea, art. 13.1; Japan, art. 67.3.
[22] China, Rule 8; Korea, art. 13.2; Japan, art. 67.3.
[23] China, art. 14; Korea, art. 16.
[24] China, art 9.4. Korea, Rule 21; Japan, art. 68.10.
[25] China, art 9.6. Korea, Rule 17; Japan, art. 69.1.
[26] Korea, art. 11.2.
[27] China, art. 8.5. Korea, Rule 20; Japan, art. 69.7.
[28] China, art. 9.6; Korea, Rule 17;
[29] China, art. 9.7; Korea, Rule 18; Japan, art. 69.2.

The final report shall be released to the disputing parties within 120 days from the date of the establishment of the panel.[30] The time period may be shortened in case of urgency or extended if the panel has difficulty in issuing its report in time. The report shall be made available publicly within 10 days of the release to the disputing parties.[31]

To encourage the parties to seek a mutually satisfactory solution to the dispute, the panel may be suspended at any time before the issuance of the final report with the agreement of the parties.[32] If a solution is found, the panel proceeding may be terminated.[33] On the other hand, if the parties fail to reach a solution, the panel process may be resumed pursuant to the request of any party.[34]

4. Implementation, compensation and retaliation

If the panel finds against the respondent, the respondent is supposed to bring its measure into conformity with the panel report. However, the panel report might not specify how the panel recommendations shall be implemented. Instead, the parties are supposed to agree on the means to implement the recommendations.[35] Moreover, as it usually takes time for the respondent to change its measures through the domestic legislative process, the parties shall also agree on the reasonable period of time necessary for the respondent to implement the recommendations.[36] If the parties cannot reach agreement, they may refer the matter back to the original panel, which shall assess the consistency of the means proposed by the respondent.[37] If the parties disagree on whether or not the respondent has complied with the panel report, they may also refer the matter to the original panel for decision.[38]

If the respondent fails to comply with the panel recommendations within a reasonable period of time, the complainant may request compensatory adjustment from the respondent in the form of tariff reductions on other products.[39] If the parties cannot reach agreement on compensation, the parties may request the original panel to determine the proper level of retaliation.[40] As compensation and the suspension of concessions or benefits are temporary measures available in the absence of implementation,[41] they shall only continue until such time as implementation has taken place.[42]

5. Alternative dispute settlement mechanisms

[30] China, art. 9.8; Korea, Art. 12.2; Japan, art. 69.6.
[31] China, art. 9.9. Korea, Art. 12.3; Japan, art. 69.9.
[32] China, art. 11.1; Korea, Art 8.1; Japan, art. 70.1.
[33] China, art. 11.2; Korea, Art 8.2; Japan, art. 70.2.
[34] China, art. 11.1; Korea, Art 8.1; Japan, art. 70.1.
[35] China, art. 12.2; Korea, art. 14.3.
[36] China, art. 12.2; Korea, art. 14.3.
[37] China, art. 12.2; Korea, art. 14.4.
[38] China, art. 12.3; Korea, art 14.5; Japan, art. 71.4.
[39] China, art. 13.2; Korea, art 15.2; Japan, art. 71.3.
[40] China, art. 13.3; Korea, art 15.3; Japan, art. 71.3.
[41] China, art. 13.1; Korea, art 15.1; Japan, art. 72.1.
[42] China, art. 13.6; Korea, art 15.6.

In addition to the normal dispute settlement process mentioned above, the three DSMs also included some alternative dispute settlement mechanisms. For example, all three DSMs include conciliation or mediation. In addition, the Korean and Japanese DSMs also include good offices. They shall only be undertaken if all the parties to the dispute agree to their use. They may be requested by any party, and they may start or terminate at any time. They may be pursued concurrently with the proceedings of the arbitral panel if the parties agree. These proceedings and the positions of the parties during such proceedings shall be confidential and without prejudice to the rights of the parties in any other proceedings.

The DSMs do not provide detailed rules on how good offices, conciliation or mediation should work. As these provisions are copied from Article 5 of the DSU, the parties might wish to refer to the explanations provided by the Director-General of the WTO, which states that good offices shall consist primarily of providing physical support and Secretariat assistance to the parties; conciliation shall consist of good offices plus the further involvement of the Director-General in promoting discussions and negotiations between the parties; while mediation shall consist of conciliation plus the possibility of the Director-General to propose solutions to the parties.[43]

B. Differences among the DSMs

As the Chinese and Korean DSMs take the form of stand-alone agreements while the Japanese DSM is a chapter in its FTA, one might think that the Japanese DSM is less detailed or legalistic than the other two. However, this is not the case as the provisions in the Japanese DSM are very similar to those in the other two.

At the same time, there are still some important differences among the three mechanisms. First, the Korean DSM is much more detailed than the Chinese and Japanese DSMs. For example, while the establishment of the panel does not need the approval of all parties under all three DSMs, only the Korean DSM explicitly state that the panel shall be established automatically upon delivery of the request to establish a panel while the other two DSMs are silent on the issue.[44] Similarly, while both the Chinese and Korean DSM provides that a new panel shall be established if the original panel is unable to conduct its work, only the Korean DSM provides that the new panel shall apply the same time frame as the original panel.[45]

Second, the Korean DSM is more legalistic by providing more explicit guidelines on how to enforce certain obligations. For example, even if the respondent fails to implement the panel recommendations, both the Chinese and Japanese DSMs require the authorization from the panel before the complainant may retaliate.[46] In contrast, the Korean DSM states that the complainant may retaliate by simply providing a written notice of retaliation to the other

[43] Art. 5 of the Dispute Settlement Understanding: Communication from the Director-General, WT/DSB/25, July 17, 2001, Attachment B: Procedures for Requesting Action Pursuant to Article 5 of the DSU, footnote 15.
[44] Korea, art. 5.3.
[45] Compare China, art. 7.7 and Korea art. 6.7.
[46] See China, art. 13.3; Japan, art. 72.2 & 71.4.

parties.[47] While the same provision also allows the respondent to request a panel to rule on the legitimacy of the retaliation, the Korean rule provides a much stronger incentive for the respondent to implement the panel recommendations as the burden of initiating the retaliation panel procedure is placed on the respondent rather than the complainant.

C. Comparison with the WTO dispute settlement procedure

In these dispute settlement procedures, we can find many influences from the WTO DSU and the EDSM. For example, the provisions on the terms of reference of the arbitral panel are copied verbatim from the WTO. Similarly, the provisions on compensation and suspension of concessions also originated from the DSU. Given the maturity of the WTO DSM, it is no wonder that it serves as a good model for the dispute settlement provisions in these agreements.

At the same time, some of the DSU provisions seem to have been blindly copied into these agreements with little consideration on their suitability. One example is the provisions on interim report. The rationale for having such a step in the WTO DSM is probably to provide additional time for the parties to review the findings of the panel and decide whether or not to lodge an appeal. Without such a mechanism, the parties might not have sufficient time to digest the panel findings and make an intelligent decision within the 60-day period from the issuance of the final panel report and the submission of notice of appeal. As CJK countries' economic agreements do not provide for the possibility of appeal, it is unclear what useful purpose such a mechanism would serve. Even worse, the provisions on the interim report could lead to two highly-undesirable consequences.

First, it could result in the leakage of the interim report. While this frequently happens in the WTO,[48] it does not cause problems as the panelists are usually not nationals of the disputing parties.[49] In contrast, as the two non-chairing panelists in cases brought under CJK countries' DSMs are appointed by the two disputing parties, they are very likely to be nationals of the parties, sometimes even the officials of these parties. Leaking the report will subject them to political pressure at home through their national governments, and this could undermine the integrity of the panel.

Second, the parties could use the interim review to request a wholesale rewrite of the panel report. This has not happened in the WTO so far, because the DSU only allows the parties to request the panel to "review precise aspects" in the interim report.[50] In its report in the *Australian-Salmon* case, the WTO Panel ruled that this means that the parties cannot request the panel to make sweeping changes to the report.[51] Curiously, this language has not been

[47] Korea, art. 15.3.
[48] Valerie Hughes, "The WTO Dispute Settlement System: A Success Story", in Julio Lacarte and Jaime Granados eds., *Inter-Governmental Trade Dispute Settlement: Multilateral and Regional Approaches* 115 (2004).
[49] This is prohibited by art. 8.3 of the DSU.
[50] Art. 15.2 of the DSU. See Hughes at 115.
[51] See Hughes, *supra* note 45, at 115. See Panel Report, Australia – Measures Affecting Importation of Salmon,

copied into CJK countries' agreements. While this might simply be the result of an oversight in drafting, it could well open up the floodgate of abuse by the parties to these agreements.

Another example is the provisions on suspension of benefits. As a form of self-help, this mechanism might not be useful for everyone. As explained by Valerie Hughes, if a developing country imposes high tariffs on imports from a non-complying developed country, the level of trade affected might be too small to cause hardship to the developed country, while the developing country itself might suffer due to the higher tariffs.[52] Thus, such a measure has not been frequently used in the WTO. The same is true in the ASEAN-CJK context. CJK countries are much bigger trade powers compared with most ASEAN member countries, even though Korea and China are both developing countries. Thus, if CJK countries fails to implement any panel decision, the winning ASEAN member countries might not be able to effectively retaliate, making it difficult to secure compliance. Furthermore, under the WTO, it is possible for the winning Member to suspend concessions in other sectors, especially services trade and the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS). Under the ASEAN-CJK agreements, however, retaliation is practically limited to goods trade as there are no substantial concessions on services and TRIPS. This further limits the utility of suspension of concessions. There are two possible ways to solve the problem: the first is the introduction of collective retaliation, which allows all ASEAN members to retaliate against their bigger neighbors from the north. The second is monetary compensation, whereby the winning party does not have to worry about any potential back-firing of retaliatory measures. However, as there are no precedents from the WTO, ASEAN might face substantial resistance from CJK countries in introducing such innovative mechanisms in the agreements.

Of course, this does not mean that the drafters of CJK countries' agreements simply copied the DSU without making any changes. To the contrary, a few provisions have been either deleted or modified by CJK countries' agreements. The most conspicuous among them is the absence of a provision on an appellate mechanism in CJK countries' agreements. This makes sense as CJK countries' agreements are unlikely to generate a significant number of disputes to justify the establishment of a standing appellate tribunal.

Another change made by CJK countries' agreements is the number of panelists. Under the DSU, each panel is usually composed of three panelists but the number may be expanded to five.[53] In contrast, while CJK countries' agreements also set the default panelist number at three, the panel could also include only one panelist. Such variations reflect the different procedures for the appointment of panelists: Under the DSU, the panelists are proposed by the Secretariat and agreed by the disputing parties or appointed by the DG. Under CJK countries' agreements, however, one panelist is named by each individual disputing party,

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WT/DS18/R and Corr.1, adopted 6 November 1998, as modified by Appellate Body Report WT/DS18/AB/R, DSR 1998: VIII, p. 3407, at para. 7.3.

[52] See Hughes, *supra* note 45, at 135. See also Julio Lacarte & Fernando Pierola, "Comparing the WTO and GATT Dispute Settlement Mechanisms: What was accomplished in the Uruguay Round?", in Lacarte & Granados eds., *Inter-Governmental Trade Dispute Settlement: Multilateral and Regional Approaches* 60 (2004).

[53] Art. 5.8 of the DSU.

with the third one to be agreed by the parties. Thus, under CJK countries' agreements, the respondent could try to stalk the process by refusing to name its own panelists. To prevent this, CJK countries' agreements state that the panelist appointed by the complainant shall be the sole panelist if the respondent fails to appoint someone within the deadline. Such a problem would not arise under the DSU, where all panelists have to be agreed by the parties and the DG will appoint the three members if the parties fail to agree, making it impossible to have only one panelist.

The third change is on language, where CJK countries' agreements explicitly state that English shall be the language used in the proceedings. This is an improvement over the DSU, where the requirement that the panel report shall be circulated only when it is available in all three official languages can lead to lengthy delays.[54] As there is no common language between CJK countries and ASEAN members, the use of English – a common second language of all countries - can help to make it easier to conduct the proceedings.

The last change is on costs, where CJK countries' agreements make the following arrangements: each party shall bear the costs of its appointed arbitrator; the costs of the Chair shall be born in equal parts by the parties to the dispute; other expenses of the panel proceedings shall be born in equal shares by the parties; and each party shall bear its own costs of participating in the dispute, including the legal costs.[55]

With the exception of the last point, the cost arrangement under CJK countries' agreements is completely different from that of the WTO, where costs of the panel and proceedings are borne by the WTO. Of course, this does not mean that the disputing parties do not have to pay anything at all. As the WTO dispute settlement mechanism is funded by the general operating budget of the WTO, each WTO Member, including the disputing parties, also indirectly contribute to the operating expenses of the DSM through its payment of the membership fee. Nonetheless, as the payment is not directly associated with the dispute settlement activities, there is a potential for a free-rider problem. In practice, however, this has not turned to be a major problem for the WTO, as most WTO cases are usually brought by or against the Members with bigger trade volumes. In CJK countries' agreements, however, things are different. First of all, the members do not pay any membership fees. Furthermore, there is very little formal institutional structure handling the disputes. Thus, it makes sense to have the disputing parties contribute directly to the panel expenses.

III. Concluding Thoughts and Reflections

As we can see from our discussions above, the dispute settlement mechanisms in ASEAN's external economic agreements with CJK countries are rather legalistic. This is quite different than the ones under its external political agreements, which usually prefers soft consultations over hard semi-judicial mechanisms.

[54] Hughes, *supra* note 45, at 116.
[55] China, art. 15; Korea, art. 17; Japan, art. 73.

In practice, however, the difference in the styles of dispute settlement mechanisms between the economic and non-economic agreements might not matter much. After all, even though it is highly legalistic, the dispute settlement mechanisms in CJK countries' economic agreements have never been used. In a way, this is not surprising, as dispute settlement mechanisms in most free trade agreements (FTA) around the world have rarely been used. Instead, most countries prefer to use the WTO dispute settlement mechanism to handle their disputes with another WTO Member even if both are members of an FTA with a well-designed dispute settlement mechanism. The main reason for such preference is that the WTO dispute settlement mechanism has developed rich jurisprudence on trade issues, and is thus more predictable and reliable. Moreover, as the membership of the WTO is much bigger than any FTAs, a ruling obtained through the WTO dispute settlement system can set the precedent in similar cases and deter other WTO members from adopting similar trade barriers. Thus, the difference in the dispute settlement mechanisms of the economic and non-economic agreements might be of more theoretical rather than practical relevance.

Moreover, the divergence in the approaches taken on economic and non-economic agreements might not always be the case, especially as ASEAN countries seem to be moving towards a more legalistic approach even for internal non-economic issues in recent years. The best example for this is the 2010 Protocol to the ASEAN Charter on Dispute Settlement Mechanisms (Hanoi Protocol), which provides for rather formalized and legalistic approach even for non-economic disputes.

According to a commentator, it is based on the EDSM, which in turn is based on the DSU of the WTO.[56] The author finds this view hard to agree. It is true that the Hanoi Protocol does indeed provide for consultations within a fixed timeframe, failing which the complainant may request the appointment of an arbitral tribunal.[57] However, the decision-making rule for the establishment of tribunal/panel is very different under the two instruments. According to the Hanoi Protocol, the arbitral tribunal will only be established if the responding party explicitly agrees to the establishment of tribunal.[58] In contrast, the Vientiane Protocol adopts the reverse/negative consensus rule as under the WTO DSU, which means that the panel shall be established unless the Senior Economic Officers Meeting decides by consensus not to establish a panel.[59]

Nonetheless, the Hanoi Protocol is still a big improvement over the rudimentary rules on dispute settlement under the Treaty of Amity and Cooperation in Southeast Asia (TAC) and the 2007 ASEAN Charter, as it explicitly provides for the possibility of arbitration by a court-like tribunal. Moreover, even though the establishment of the arbitral tribunal is subject to the consent of the responding party, no consent from the parties is required for the adoption of the arbitral award. Instead, once issued, the award of the arbitral tribunal shall be final and

[56] See Walter Woon, "Dispute Settlement in ASEAN", 1(1) *The Korean J. Int'l and Comp. L.* 100, 100-01 (2013).
[57] *Id*., at 101.
[58] Hanoi Protocol, art. 8.3-4.
[59] Vientiane Protocol, art. 5.1.

binding on the parties to the dispute[60] and the parties are explicitly required to comply with the award.[61] In this respect, the Hanoi Protocol is even more legalistic than the Vientiane Protocol or the WTO DSU, as the panel reports under these two dispute settlement mechanisms still require the approval of the political bodies,[62] even though one may argue such approval is only a matter of formality because they follow the negative consensus rule.

As ASEAN is seeking to merge its economic agreements with CJK countries under the RCEP,[63] the separate dispute settlement mechanisms under the individual agreements will need to be consolidated as well. Under the current agreements, each of CJK countries has a separate dispute settlement mechanism with ASEAN on a bilateral basis. When one of CJK countries has a dispute with the ASEAN countries, the other two CJK countries may not join the dispute settlement proceeding as co-complaints or third parties, but the other ASEAN countries may do so. In contrast, as the RCEP is a regional initiative, any of ASEAN's external partners will be able to join the dispute between an ASEAN country and another external partner. This will change the dynamics of the dispute settlement process and make individual ASEAN countries subject to more political pressures from external partners when they are involved in trade disputes.

To solve the problem, the author believes that ASEAN countries should use the opportunity of negotiating the RCEP to further strengthen the existing dispute settlement mechanism by making some structural changes. For example, ASEAN countries might consider changing the rule that each party nominates one panelist in a dispute as this would politicize the dispute settlement process. Instead, the panelists shall be chosen from RCEP member countries that are not parties to the dispute. For this purpose, ASEAN countries might consider establishing an indicative list of panelists, or better still, setting up a permanent panel body, which shall be composed of one panelist nominated by each country in the RCEP. When a dispute arises, three panelists who are not nationals of the parties to the dispute shall be assigned to adjudicate the case on a random basis. This will ensure that panelists from ASEAN countries get more experience in dispute settlement, and will help to establish a rule-based system for the RCEP.

Also, under the current dispute settlement mechanisms, the costs of panel proceedings shall be split between the disputing parties. This might prevent smaller and poorer ASEAN countries from participating in dispute settlement proceedings as they do not have resources comparable to the non-ASEAN partners. ASEAN countries should propose changing it to the WTO model, i.e., a dispute settlement mechanism that is free for disputing parties and supported by the membership fees of member countries based on their respective trade volumes. This will help to alleviate the cost concerns for ASEAN members and make them more willing to participate in dispute settlement proceedings.

[60] Hanoi Protocol, art. 15.1.
[61] Hanoi Protocol, art. 15.1 & 16.1.
[62] See Vientiane Protocol, art. 9.
[63] ASEAN Framework for Regional Comprehensive Economic Partnership (2012).

Of course, like any other dispute settlement mechanism, the success of the dispute settlement mechanisms in ASEAN's agreements with its external partners ultimately depends on the political will of ASEAN countries and its partner countries. However, other things being equal, a well-designed dispute settlement mechanism could help to de-politicize trade disputes and foster the culture of respect for the international rule of law among ASEAN and its partners. In the long term, the international rule of law provides the best way for ASEAN to achieve its aim of "maintain[ing] the centrality and proactive role of ASEAN as the primary driving force in its relations and cooperation with its external partners in a regional architecture that is open, transparent, and inclusive".[64]

[64] ASEAN Charter, art. 1 sec. 15.