THE COMPOSITION AND ESTABLISHMENT OF THE DISPUTE SETTLEMENT BODY IN ASEAN: LEGAL PROCEDURAL ISSUE ON THE APPOINTMENT OF APPELLATE BODY MEMBERS

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Abstract

This paper examines why the Association of Southeast Asian Nations (ASEAN) has not appointed members to its Appellate Body. Although ASEAN established its dispute settlement mechanism in 1996 and revised it in 2004 and 2019, the Appellate Body remains unappointed. A similar problem exists in the World Trade Organization (WTO), where the appointment of Appellate Body members has also stalled, preventing the effective operation of appellate review. In contrast, the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP) does not face this issue. This article analyzes the ASEAN dispute settlement mechanism to identify legal barriers to appointing Appellate Body members. It finds that the requirement of consensus among all ASEAN Member States allows any state to block appointments. To address this problem, the paper suggests introducing a default appointment mechanism and allowing the use of an incomplete roster of Appellate Body members to ensure the system functions effectively

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For more than twenty years, the Association of Southeast Asian Nations (ASEAN) has not appointed members to its Appellate Body under the ASEAN dispute settlement mechanism (DSM). ASEAN established the mechanism in 1996 and revised it in 2004 and 2019 to strengthen its institutional framework for resolving economic disputes among ASEAN Member States.[1] However, the Appellate Body has never been established in practice. As a result, the ASEAN DSM cannot fully perform its adjudicative functions.[2]

ASEAN's dispute settlement system generally follows the model of the World Trade Organization (WTO),[3] which includes a quasi-judicial process with *ad hoc* panels at the first instance and a standing Appellate Body at the appellate stage.[4] Under the ASEAN framework, the ASEAN Economic Ministers Meeting (AEM) is responsible for establishing and appointing

1 Koesrianti. K. (2017). Legalization and adjudicative legitimacy of the ASEAN trade dispute settlement mechanism. *Comparative Law Review*, *8*(2), 1-28.

2 Davidson, P. J. (2002). *ASEAN: The evolving legal framework for economic cooperation*. Singapore: Times Academic Press, p. 5.

3 Sim, E. W. (2020). ASEAN further enhances its dispute settlement mechanism. *Indonesian Journal of International & Comparative Law,* 7(2), pp. 279-292.

4 Article 6-16 of the 2019 ASEAN Protocol on Enhanced Dispute Settlement Mechanism.

members of the Appellate Body.[5] However, decisions within ASEAN are made by consensus among all Member States.[6] This requirement allows any single Member State to block the appointment process, which has contributed to the continued absence of Appellate Body members.[7]

This article employs normative legal research using a comparative method to examine the legal procedures for the composition and establishment of the Appellate Body under the ASEAN dispute settlement mechanism. It compares ASEAN's procedures with those of the WTO and the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP), which provides an alternative model for dispute settlement. The analysis identifies procedural and institutional barriers within the ASEAN system and suggests that ASEAN should allow the use of an incomplete roster of Appellate Body members to ensure the effective functioning of its DSM.

1. The composition and establishment of the dispute settlement body under ASEAN, the WTO and the CPTPP

1.1. In ASEAN

Under the ASEAN dispute settlement system, Member States are provided with third-party adjudication and the possibility to appeal panel reports. The ASEAN Protocol on Enhanced Dispute Settlement Mechanism 2019 (2019 ASEAN DSM) introduces an appellate review process in which the Appellate Body serves as the highest authority for reviewing panel decisions. According to Article 14 of the 2019 ASEAN DSM, the ASEAN Economic Ministers (AEM) are responsible for establishing the Appellate Body. The mechanism provides that the Appellate Body shall be a standing body composed of seven members, with three members serving on any appeal in rotation according to the Appellate Body's working procedures.[8]

The 2019 ASEAN DSM further provides that the AEM appoints the members of the Appellate Body.[9] Although the protocol does not explicitly specify the decision-making procedure for such appointments, it is generally assumed that the AEM will act by consensus in accordance with the principles established in the ASEAN Charter.[10] This approach reflects

5 Article 8.4 and Article 14.1 of the 2019 ASEAN Protocol on Enhanced Dispute Settlement Mechanism.

6 Kaplan, J. A. (1996). ASEAN's Rubicon: A dispute settlement mechanism for AFTA. *University of California, Los Angeles Pacific Basin Law Journal, 14*(2), pp. 170-174; Article 20.1 of the ASEAN Charter.

7 *Supra* note 4, art.8.4; and see also Robert, B., Leonardo, B., Hao Duy, P., Tan, H-Li., and Ranyta, Y. (2016). *Promoting compliance: The role of dispute settlement and monitoring mechanisms in ASEAN instruments*. Cambridge University Press, p. 80, Interview one of ASEAN delegation at ASEAN Committee Permanent Representatives in Jarkata, "Panel and the Appellate Body Composition", conducted on 8 March 2024.

8 Sacerdoti, G. (2017). The WTO dispute settlement system: Consolidating success and confronting new challenges. In Manfred, E., Bernard, H., Joost, P (Eds.), *Assessing the World Trade Organization,* 147-171. Cambridge University Press, p. 641.

9 Article 14.2 of the 2019 ASEAN Protocol on Enhanced Dispute Settlement Mechanism.

10 Bossche, P. V. d. (2008). *The law and policy of the World Trade Organization: Text, cases and materials*. Cambridge University Press, p. 259.

ASEAN's broader institutional practice, which emphasizes consultation, consensus, and intergovernmental control over formal legal processes.

The 2019 ASEAN DSM sets out the qualifications required for Appellate Body members. Individuals appointed must be recognized authorities with demonstrated expertise in law, international trade, and the subject matter of the covered agreements.[11] This requirement closely resembles the qualifications stipulated in Article 17.3 of the WTO DSU, which also requires Appellate Body members to possess recognized expertise in law and international trade.[12] These provisions are intended to ensure that appellate review focuses on legal issues and the interpretation of relevant agreements.

More broadly, the composition of the Appellate Body under the 2019 ASEAN DSM reflects a tension between legal institutionalization and ASEAN's traditional diplomatic practices. On the one hand, the establishment of a standing Appellate Body demonstrates ASEAN's intention to strengthen rule-based dispute settlement. On the other hand, the reliance on consensus in the appointment process may allow political considerations to influence institutional functioning.

Under 2019 ASEAN DSM, on the one hand, panelists will be selected from an indicative list approved by the SEOM by consensus. On the other hand, the AEM establishes and composes the Appellate Body by consensus. The process of composition of the Appellate Body under the ASEAN DSM is similar to the WTO which is members can block the procedure.

1.2. In the WTO

The WTO DSM is widely regarded as the most advanced and structured system for resolving state-to-state trade disputes.[13] Its strength lies in its combination of panel adjudication and a standing Appellate Body, which provides a quasi-judicial review of legal interpretations. Article 17.3 of the DSU requires the Appellate Body to comprise seven members broadly representative of WTO membership, considering geographical distribution, legal systems, and levels of development.[14] In theory, this ensures both expertise and legitimacy.

However, the WTO DSM also illustrates the vulnerability of consensus-based systems. The recent paralysis of the Appellate Body, caused by the blocking of appointments, demonstrates that even a technically robust mechanism can fail if member states prioritize political interests over institutional functionality.[15] While the panel stage continues to function, the absence of appellate review undermines the DSM's authority, decelerates

11 *Ibid*.

12 *Ibid*, p. 258.

13 Annex 2 of the 1995 WTO Dispute Settlement Understanding.

14 Article .17.3 of the 1995 WTO Dispute Settlement Understanding.

15 Bown, C., and M. Poulsen. (2020). *The WTO dispute settlement crisis: Causes and consequences*, Peterson Institute for International Economics, 2020, pp. 5-12.

dispute resolution, and reduces compliance incentives. This structural weakness highlights the tension between sovereignty and institutional efficiency in multilateral adjudication.

The WTO Appellate Body has long been central to the credibility of the global rules-based trading system.[16] Designed as a standing, independent body to review panel reports, it ensures legal certainty and consistency in WTO law. However, the Appellate Body's reliance on member consensus for appointments has become a key vulnerability. Although the Dispute Settlement Body (DSB) formally selects members through a structured process including a Selection Committee and nominee interviews the discretion exercised by member states has significant legal and political implications.[17]

Analytically, the WTO experience highlights that formal procedures alone cannot guarantee functionality. Systems requiring full consensus are inherently vulnerable to deadlock, even with rigorous selection criteria. This structural weakness is directly relevant for regional mechanisms such as the ASEAN DSM, where consensus is required to appoint Appellate Body members, effectively preventing its operation.

1.3. In the CPTPP

The CPTPP was developed from the original Trans-Pacific Partnership (TPP) [18] and retains most of its substantive provisions,[19] including those relating to dispute settlement.[20] Unlike several other chapters of the agreement, the dispute settlement provisions were not suspended after the CPTPP entered into force and therefore apply fully to all CPTPP member states.[21] In contrast to the 2019 ASEAN DSM, which has struggled to operationalize its Appellate Body, the CPTPP dispute settlement system has been fully functional since the agreement entered into force. Chapter 28 of the CPTPP establishes a state-to-state dispute settlement mechanism based on ad hoc arbitral panels that provide third-party adjudication.[22] Although the CPTPP does not include an appellate review mechanism,[23] its procedural

16 *Supra* note 13.

17 Article 16.4 and Article 17.3 of the 1995 WTO Dispute Settlement Understanding.

18 Gantz, D. A. and Huerta-Goldman. J. A. (2021). Introduction: The Trans-Pacific Partnership Becomes the Comprehensive and Progressive Agreement for TPP. In Gantz, D. A. and Huerta-Goldman. J. A. (Eds.). *The Comprehensive and Progressive Trans-Pacific Partnership: Analysis and Commentary*. Cambridge University Press, pp. 1-4.

19 Barradas. R.Z. (2021). The TPP, a horizontal overview, In Jorge A. Huerta-Goldman & David A. Gantz (Eds.). *The Comprehensive and Progressive Trans-Pacific Partnership: Analysis and commentary*. 40–52. Cambridge University Press, p. 40.

20 Gantz, D. A. (2021). State-to-State Dispute Settlement under TPP Chapter 28 and NAFTA Chapter 20, In Jorge A. Huerta-Goldman and David A. Gantz (Eds.). *The Comprehensive and Progressive Trans-Pacific Partnership: Analysis and commentary*. pp. 683-94. Cambridge University Press, p. 690.

21 Gallardo-Salazar. N., Tijmes-lhl. J. (2020). Dispute Settlement at the World Trade Organization, the Comprehensive and Progressive Agreement for Trans-Pacific Partnership, and the Pacific Alliance. *Journal of International Dispute Settlement, 11*(4), p. 641. https://doi.org/10.1093/jnlids/idaa021

22 Article 1 and Article 2, Article 28.9.1-2 and Article 28.7 of the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP).

23 Claude, C., Alan, Y., Jo-Ann, C., and Pamela, U. (2016). Mapping of dispute settlement mechanisms

framework is designed to ensure that disputes can be resolved efficiently and without institutional deadlock.[24] This contrasts with the ASEAN DSM, where the consensus-based appointment of Appellate Body members has prevented the appellate mechanism from becoming operational.[25]

The CPTPP further strengthens its dispute settlement mechanism through a structured roster system under Article 28.11.[26] Two types of lists exist: a roster of panel chairs and party-specific lists of potential panelists. CPTPP parties are required to establish a roster of at least fifteen qualified individuals within 120 days after the agreement's entry into force.[27] If the parties fail to do so, the CPTPP Commission may appoint qualified individuals to ensure the continuity of the system.[28] In contrast, the ASEAN DSM does not include a comparable roster or default appointment mechanism. Without consensus among Member States, appointments cannot proceed, which increases the risk of institutional paralysis.[29]

The CPTPP dispute settlement mechanism therefore provides several practical lessons for ASEAN. First, the introduction of default appointment procedures or roster systems could prevent individual Member States from blocking institutional processes. Second, clearly defined timelines for panel establishment enhance transparency and predictability in dispute settlement procedure. Finally, separating procedural rules governing panel composition from political decision-making can strengthen the independence and credibility of adjudicative bodies.

Overall, the CPTPP demonstrates how carefully designed procedural rules can ensure the effective operation of a DSM.

2. Experience on the appointment under an Indicative list in the 2004 ASEAN Dispute Settlement Mechanism

ASEAN established its first dispute settlement mechanism in 1996 to provide a framework for resolving trade disputes among its Member States. However, the 1996 ASEAN DSM was never invoked, even though several trade disputes arose under ASEAN economic agreements. One reason was the bureaucratic and institutional weaknesses within ASEAN at that

in regional trade agreements – Innovative or variations on a theme?. Rohini, A (Eds.). *Regional trade agreements and the multilateral trading system*. Cambridge University Press, pp. 618-619. doi: https://doi.org/10.30875/6e743052-en

24 Article 28.9.2 of the CPTPP.

25 Waincymer, J. (2000). Transparency of dispute settlement within the World Trade Organization. *Melbourne University Law Review*, *24*(3), p. 806. doi: 10.1111/1467-9701.00409Top of FormBottom of Form

26 Article 28.11 of the CPTPP.

27 Article 28.11.1 and Article 28.11.3 of the CPTPP.

28 Article 28.11.2 of the CPTPP.

29 Koremenos, B. (2016). *The continent of international law: Explaining agreement design,* Cambridge University Press, p. 99.

time.[30] The organization's decentralized structure, overlapping committee responsibilities, and limited coordination among national secretariats created delays and inefficiencies, reducing confidence in the dispute settlement process.

To address these shortcomings, ASEAN replaced the 1996 DSM with the 2004 ASEAN DSM. The 2004 mechanism introduced clearer procedures for panel establishment and included formal working procedures for panels.[31] Under this system, when consultations fail to resolve a dispute within sixty days, the matter may be raised to the Senior Economic Officials Meeting (SEOM) if the complaining party requests the establishment of a panel. The SEOM is then required to establish the panel unless it decides by consensus not to do so.[32] Panels are normally composed of three members, although the parties may agree to a panel of five.[33] Panelists must be well-qualified individuals with relevant experience in international trade law, policy, or government service, with preference generally given to nationals of ASEAN Member States. [34]

The 2004 ASEAN DSM also provides for an indicative list of panelists maintained by the ASEAN Secretariat to facilitate panel selection. Member States may nominate qualified individuals, and the SEOM approves the names to be included on the list.[35] In principle, this system resembles the roster-based approach used in other international DSM.[36]

Despite these improvements, the ASEAN DSM has remained largely unused.[37] Even years after the adoption of the 2004 mechanism, the indicative list of panelists was incomplete and no disput was formally brought under the system.[38] For example, in 2008 the Philippines considered initiating a case against Thailand under the ASEAN DSM but ultimately chose to bring the dispute to the WTO instead.[39] This suggests that concerns about procedural clarity, institutional capacity, and the enforceability of decisions have continued to limit Member States' confidence in the ASEAN dispute settlement system.[40]

30 Villalta Puig, G., & Tsun, Tat. L. (2015). Problems with the ASEAN free trade area dispute settlement mechanism and solutions for the ASEAN economic community. *Journal of World Trade, 49*(2), pp. 277-308; *Supra* note 1, pp. 941-942.

31 Article 12.3 of the 2004 ASEAN Protocol on Enhanced Dispute Settlement Mechanism.

32 Article 5.1 of the 2004 ASEAN Protocol on Enhanced Dispute Settlement Mechanism.

33 Appendix II.I.5 of the 2004 ASEAN Protocol on Enhanced Dispute Settlement Mechanism.

34 Appendix II.I.1 of the 2004 ASEAN Protocol on Enhanced Dispute Settlement Mechanism.

35 Appendix II.I.4 of the 2004 ASEAN Protocol on Enhanced Dispute Settlement Mechanism.

36 Article 6 and Article 8 of the 2004 ASEAN Protocol on Enhanced Dispute Settlement Mechanism.

37 Joseph, W., Shalmont, J., Fransisca,Y., Sahari, P. A. (2014, January). For a more effective and competitive ASEAN dispute settlement mechanism. *SSRN Electronic Journal,* p. 17. doi: 10.2139/ssrn.2613871

38 *Supra* note 17.

39 Robert, B., Leonardo, B., Hao Duy, P., Tan, H-L., and Ranyta, Y. (2016). *Promoting compliance: The role of dispute settlement and monitoring mechanisms in ASEAN instruments,* Cambridge University Press, p. 77. doi: 10.1017/CBO9781316534700

40 Stefano, I., and Sim, E. W. (2015). *The foundation of the ASEAN economic community: An institutional and legal profile,* Cambridge University Press, pp. 159-160.

3. State's discretion on the appointment of the Appellate Body members

Since 1996, ASEAN has adopted three versions of its DSM, which largely mirrors the system of the WTO. Both frameworks face similar challenges in appointing Appellate Body members and establishing indicative lists of panelists, largely due to consensus-based decision-making that allows Members to delay or obstruct the process. By contrast, the DSM under CPTPP has not encountered such difficulties. Although Parties retain some discretion in nominating panelists, the Agreement includes safeguards that limit their ability to block the panel composition process.

3.1. Political control over judicial institutions

As previously discussed, under the 2019 ASEAN DSM, the authority to establish and appoint members of the Appellate Body rests with the AEM. The AEM is fundamentally a political body composed of representatives from all ASEAN Member States, including those involved in particular disputes. Its decision-making process follows the principle of consensus, reflecting the broader norms of ASEAN cooperation commonly referred to as the "ASEAN Way", which emphasizes consultation, flexibility, and unanimity among Member States. In practice, this means that decisions can only be adopted when no Member State objects. While this institutional structure promotes inclusiveness and political cohesion, it also poses challenges for timely and impartial decision-making in dispute settlement, where neutrality and efficiency are essential.

A comparable challenge can be observed in the WTO dispute settlement system. Under the WTO DSU, the Appellate Body must be established by the DSB,[41] and its members are appointed for a four-year term with the possibility of one reappointment. The WTO operates as a member-driven organization in which each member has one vote.[42] Consequently, any single member can block the appointment or reappointment of Appellate Body members simply by expressing opposition. This procedural rule has been a central factor in the paralysis of the WTO Appellate Body in recent years.[43]

In principle, the enforcement of international law depends on states themselves. International agreements rely on the willingness of participating states to comply with their obligations and to respect dispute settlement outcomes.[44] Institutions such as the WTO attempt to strengthen compliance through compulsory third-party adjudication mechanisms.[45] Nevertheless,

41 Article 17.1 of the 1995 WTO Dispute Settlement Understanding.

42 Sim, E. W. (2014). The outsourcing of legal norms and institutions by the ASEAN economic community. *Indonesian Journal of International & Comparative Law*, *1*(1), p. 16.

43 World Trade Organization Secretariat. (2017). *A handbook on the WTO dispute settlement system,* Cambridge University Press, pp. 24–25. doi: https://doi.org/10.30875/c17fbbd6-en

44 Hathaway, O., Shapiro, S. J. (2011). Outcasting: Enforcement in domestic and international law. *Yale Law Journal, 121*(2), p. 307.

45 Anthony, A. (2005). *Handbook of International Law,* Cambridge University Press, 3.

compliance with international law ultimately depends on political incentives and national interests.[46] States are more likely to support institutional arrangements when those arrangements are perceived to advance their collective or individual interests.[47] This dynamic helps explain why WTO members were able to reach consensus in 1995 to establish the Appellate Body but have been unable to agree on new appointments in recent years.[48]

A similar dynamic can be observed within ASEAN. Like the WTO's DSB, the AEM does not possess the authority to compel Member States to nominate candidates for the Appellate Body. The appointment process depends on Member States voluntarily proposing qualified individuals for consideration. Once nominations are submitted, the AEM must engage in consultations and negotiations to reach consensus on the appointment of Appellate Body members. However, unlike the WTO's DSB which functions primarily as a dispute settlement body, the AEM serves as a broader diplomatic forum responsible for overseeing the implementation of ASEAN economic agreements and coordinating economic cooperation among Member States. It is not a permanent body and meets only periodically. This limited institutional capacity further constrains its ability to address politically sensitive issues such as judicial appointments in dispute settlement.

In practice, concerns about the functioning of the ASEAN DSM may also contribute to the reluctance of Member States to complete the process of appointing Appellate Body members.[49] Without an operational Appellate Body, the appellate stage of dispute settlement cannot function. This has important procedural consequences.[50] Under the 2019 ASEAN DSM, a panel report cannot be adopted by SEOM if a party decides to appeal. If the Appellate Body has not been constituted, the appeal cannot proceed, and the dispute remains unresolved. In effect, a responding Member State could delay the resolution of a dispute simply by filing an appeal to a non-functioning Appellate Body.[51]

This structural weakness has practical implications for the credibility of the ASEAN dispute settlement system. If Member States believe that disputes cannot be resolved effectively through the ASEAN DSM, they may prefer to use alternative mechanisms. Evidence from past disputes

46 Ginsburg, T., McAdams, R. H. (2004). Adjudicating in anarchy: An expressive theory of international dispute resolution. *William and Mary Law Review, 45*(4), p. 1234. https://scholarship.law.wm.edu/wmlr/vol45/iss4/2

47 Richard, B. B. (1986). An overview of international dispute settlement. *Emory Journal of International Dispute Resolution*, *1*(1), p. 15.

48 The World Trade Organization. *Dispute settlement activity - Some figures*. https://www.wto.org/english/tratop_e/dispu_e/dispustats_e.htm (accessed 2024, January 8)

49 Interview one of ASEAN delegation at ASEAN Committee Permanent Representatives in Jarkata, "Panel and the Appellate Body Composition", conducted on 8 March 2024.

50 Lester, S., Manak, I., and Arpas, A. (2019). Access to trade justice: Fixing NAFTA's flawed state-to-state dispute settlement process. *World Trade Review, 18*(1), p. 66. doi:10.1017/S147474561800006X

51 *Ibid,* pp. 66-68.

suggests that this tendency already exists. For example, the Philippines did not invoke the ASEAN DSM in its dispute with Thailand concerning cigarette taxes in 2008, partly because the ASEAN mechanism was not fully operational at the time.[52] Similarly, in 2015, Vietnam initiated dispute settlement proceedings against Indonesia concerning safeguard measures on certain iron or steel products before the WTO rather than using the ASEAN dispute settlement system.[53] One explanation for these choices lies in the perceived reliability and predictability of WTO adjudication.[54]

The experiences of ASEAN and the WTO reveal a common structural issue. In both systems, the appointment of Appellate Body members depends on decisions taken by political bodies operating based on consensus. In ASEAN, the authority of the AEM combined with the principle of unanimity has prevented the Appellate Body from ever being constituted. In the WTO, the requirement of positive consensus for judicial appointments has allowed individual members to block new appointments, leading to the paralysis of the Appellate Body.

These developments highlight an important lesson regarding the design of international dispute settlement mechanisms. Legal frameworks alone cannot guarantee effective adjudication. Even well-designed systems depend on the political willingness of member states to support and maintain the institutions responsible for adjudication.

3.2. Depoliticized panels

Similar to the role played by SEOM under the 2019 ASEAN DSM and the DSB in the WTO system, the CPTPP designates an administrative body-the Trans-Pacific Partnership Commission to oversee dispute settlement.[55] The Commission consists of government representatives from each Party, typically at the ministerial or senior official level.[56] One important distinction from the ASEAN and WTO systems lies in the Commission's authority to review the roster of panel chairs. Under Article 28.11 of the CPTPP, the Commission must review the roster every three years and may establish a new one when necessary.[57]

Although the Commission generally operates on the basis of consensus, Article 27.3 clarifies that a decision is considered adopted if no Party present formally objects.[58] This approach resembles the procedure used

52 Joseph, W., Shalmont, J., Fransisca,Y., Sahari, P. A. (2014, January), *Supra* note 17, p. 17.

53 Indonesia - Safeguard on Certain Iron or Steel Products, DS496, 2015, https://www.wto.org/english/tratop_e/ dispu_e/cases_e/ds496_e.ht

54 Vidigal, G. (2017). Why is there so little litigation under Free Trade Agreements? Retaliation and adjudication in international dispute settlement. *Journal of International Economic Law*, *20*(4), pp. 927-950.

55 Article 27.1 of the CPTPP.

56 Article 27.2 of the CPTPP.

57 Article 27. 2. g of the CPTPP.

58 Article 27.3.1 of the CPTPP.

under the North American Free Trade Agreement (NAFTA) Chapter 20, where Parties are informed in advance about potential panelists and given the opportunity to review proposed candidates. Such transparency helps ensure that all Parties are aware of the individuals who may serve on dispute settlement panels and contributes to greater confidence in the system.[59]

Importantly, the CPTPP incorporates safeguards designed to prevent Parties from obstructing panel formation. Article 28.11(2) addresses situations in which the Parties fail to establish the roster within the required timeframe. In such cases, the Commission must convene and appoint individuals to the roster, considering nominations submitted by the Parties and the qualifications specified in Article 28.10.[60] The Commission must complete this process no later than 180 days after the Agreement enters into force. This mechanism ensures that no Party, particularly a responding Party, can delay dispute adjudication by refusing to cooperate in establishing the roster. The inclusion of this safeguard addresses institutional weaknesses previously observed under NAFTA Chapter 20, where disputes could be stalled due to difficulties in appointing panelists.[61]

In practice, the CPTPP system has demonstrated a relatively efficient process for panel selection and composition. Disputing Parties have generally not encountered significant difficulties concerning the availability of rosters or party-specific lists, allowing panels to be established within a reasonable timeframe. Furthermore, even if a respondent Party fails to establish its own list of panelists, the Agreement provides additional safeguards. Under Article 28.9, the panelist who has not yet been appointed may be selected at random from a list of three candidates nominated by the complaining Party or Parties. This procedure prevents procedural deadlock and reinforces the effectiveness of the CPTPP DSM.[62]

The CPTPP also adopts a flexible approach regarding Party-specific Indicative lists. Article 28.11.9 provides that a Party *may* establish a list of individuals willing and able to serve as panelists at any time after the Agreement's entry into force.[63] The use of the term "may" indicates that the establishment of such lists is optional. If a Party chooses to create a list, it may include both nationals and non-nationals and may determine the number of individuals included.[64] The Party also retains the discretion to modify the list by adding or replacing individuals when necessary.

59 Rojas, H. V. (1993). The dispute resolution process under NAFTA. *United States-Mexico Law Journal*, 1, p. 23.

60 Article 28.11.2 of the 1995 WTO Dispute Settlement Understanding.

61 Stanislaus, U. N. (2021). Is the WTO appellate body in limbo? The roots of the crisis in the WTO dispute settlement body and the available routes navigating the quagmire. *Potchefstroom Electronic Law Journal*, 24, pp. 65-66. doi: 10.17159 / 1727-3781 / 2021 / v24i0a8580

62 Article 28.9.2. c. ii and iii of the 1995 WTO Dispute Settlement Understanding.

63 Article 28.11.9 of the CPTPP.

64 Article 28.11.10 of the CPTPP.

Importantly, the absence of a Party-specific Indicative list does not allow a Party to block or delay the panel composition process. Under Article 28.9(2)(c)(ii), if the respondent Party has not established such a list, the complaining Party must select the panellist from the roster of panel chairs. If no roster exists, the panellist is selected by random draw from three candidates nominated by the complaining Party or Parties.[65] As a result, the respondent Party has limited ability to obstruct or postpone panel formation.

Nevertheless, CPTPP Parties retain a degree of discretion in shaping the composition of the roster and any Party-specific lists through nominations and consultations. While Parties may influence which individuals are nominated or excluded, they do not possess veto power over the process.[66] Even if Parties fail to establish the roster or indicative lists, the Commission may intervene to ensure that the dispute settlement process continues. This institutional design ensures that disputes can proceed even in the absence of full cooperation among Parties.[67]

When compared with the ASEAN dispute settlement framework, particularly the 2019 ASEAN DSM, the CPTPP reflects a fundamentally different institutional philosophy regarding the balance between political control and procedural effectiveness. Under the 2019 ASEAN DSM, dispute settlement, especially appellate review, remains structurally dependent on political consensus within the AEM. The AEM's authority to appoint members of the Appellate Body, combined with strict consensus requirements and the participation of disputing parties in decision-making, has resulted in the Appellate Body never being constituted. This outcome reflects ASEAN's long-standing commitment to the "ASEAN Way," which prioritizes political harmony, non-interference, and flexibility over legal certainty.

By contrast, the CPTPP adopts a more pragmatic and depoliticized approach to dispute settlement. Rather than relying on a permanent Appellate Body, the Agreement relies on *ad hoc* panels and incorporates procedural safeguards designed to prevent obstruction by non-cooperative Parties. Although oversight remains with a political body, the CPTPP Commission's, authority is constrained by clear timelines, mandatory obligations, and fallback mechanisms such as Commission intervention and random selection of panellists. Unlike the ASEAN DSM, the CPTPP limits individual States' ability to block dispute settlement proceedings.

65 Article 28.9.2. c. ii of the CPTPP.

66 Abbott, K. W., Keohane, R. O., Moravcsik, A., Slaughter, A.-M., & Snidal, D. (2000). The concept of legalization. *International Organization, 54*(3), 401–419. doi:10.1162/002081800551271

67 Smith, J. McCall. (2012). The politics of dispute settlement design: Explaining legalism in regional trade pacts. In Beth, A. S., and Richard H, S (Eds.), *International law and international relations,* 331-374, Cambridge University Press, 140.

The comparison, therefore, highlights a fundamental difference in institutional design. The ASEAN DSM is politically embedded and consensus-driven, resulting in flexibility but weak judicial autonomy and limited enforceability. In contrast, the CPTPP prioritizes procedural continuity, predictability, and enforceability, even without appellate review. While CPTPP Parties retain some indirect influence through the nomination process, they lack veto power over panel formation, ensuring that disputes can proceed.

This situation raises a fundamental institutional question: how can the 2019 ASEAN DSM effectively perform its quasi-judicial functions.

For ASEAN, the implications are clear: procedural reform is essential. Allowing the Appellate Body to function with an incomplete roster, introducing default appointments, or establishing clearer timelines for nominations would prevent paralysis, strengthen judicial independence, and enhance the DSM's credibility. Such reforms would align ASEAN with best practices observed in both the WTO and CPTPP, ensuring that the dispute settlement system effectively enforces economic agreements and supports deeper regional integration. Without these changes, the Appellate Body will remain a dormant institution, undermining ASEAN's legal and economic objectives. ●

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[4] Robert, B., Leonardo, B., Hao Duy, P., Tan, H-L., and Ranyta, Y. (2016). *Promoting compliance: The role of dispute settlement and monitoring mechanisms in ASEAN instruments,* Cambridge University Press. doi: 10.1017/CBO9781316534700

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Author Contribution

The author contributed to the study conception and design. The author read and approved the final manuscript.

Declarations

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