ARTICLES

ASEAN'S RUBICON: A DISPUTE SETTLEMENT MECHANISM FOR AFTA

Jeffrey A. Kaplan†

INTRODUCTION

As international trade has stepped to the forefront of international relations, Asia has emerged as a point of convergence. In particular, East Asia's economic dynamism has fixed the world's attention on the Association of Southeast Asian Nations ("ASEAN").[1] At the same time, the completion of both the Uruguay Round on the General Agreement on Tariffs and Trade ("GATT") and the North American Free Trade Agreement ("NAFTA"),[2] coupled with the progress of the Asia Pacific Economic Cooperation ("APEC"), have drawn ASEAN into the free trade arena.[3] ASEAN's efforts in this area—most notably the ASEAN Free Trade Area ("AFTA") and its subregional "growth triangles"[4]—have received international notice.

---

† J.D. from Harvard Law School. This article derives in large part from research conducted while the author was a 1994-95 Fulbright Scholar in Malaysia. The author currently serves as project manager for a United Nations Development Programme project assisting the Royal Government of Cambodia in its preparations to join ASEAN.

The author would like to thank Michelle Brandt, Professor Matthew Schaefer at the University of Nebraska College of Law and the Universiti Malaya Law Faculty for their generous support, patience and input into this article. Any errors that this article may contain are solely the responsibility of the author.

1. The Association of Southeast Asian Nations ("ASEAN") is comprised of Indonesia, Malaysia, the Philippines, Singapore, Thailand, Brunei and Vietnam.

2. North American Free Trade Agreement, *done* Dec. 17, 1992, Can.-Mex.-U.S., 32 I.L.M. 296 and 32 I.L.M. 605 [hereinafter NAFTA].

3. The rise of regionalism plainly motivated ASEAN, which feared a deterioration in its competitive trade posture, to focus on establishing its own regional economic initiatives. *See* Frank B. Gibney, *Creating a Pacific Community: A Time to Bolster Economic Institutions*, FOREIGN AFF., Nov.-Dec. 1993, at 22.

4. Following the lead of the informal subregional economic zone linking southern China with Hong Kong and Taiwan, members of ASEAN have created three subregional groupings, commonly called "growth triangles," to promote economic

Free trade, now closely linked to ASEAN's economic emergence, has captured the imagination and enmity of national policymakers and scholars alike. The free trade debate, however, is typically confined to its economic and geopolitical underpinnings. Parallel legal developments, crucial to the efficacy of any free trade agreement, are mainly ignored even though the process of defining a free trade area and eliminating trade barriers is, in large part, a legal process. For example, defining rules of origin and procedures for challenging actions inconsistent with a free trade agreement are essentially legal endeavors. The process of facilitating the economic linkages mandated by free trade agreements requires an elevated level of legal harmonization and institutional coordination between countries.

This is the crux of the problem currently facing ASEAN as it institutes a free trade area for Southeast Asia. In creating AFTA, ASEAN confronts the tension between AFTA's need for legal harmonization and the Association's persistent uneasiness over the institutionalization such harmonization requires. By failing to pay adequate attention to the legal infrastructure of trade, however, ASEAN risks handicapping its efforts to realize AFTA's primary objectives: drawing foreign investment to the region and increasing intra-ASEAN trade by reducing tariff and non-tariff barriers.

This article focuses upon one aspect of ASEAN legal reform, the creation of a dispute settlement mechanism for AFTA.[5]

---

development and serve as stepping stones for the realization of the ASEAN Free Trade Area ("AFTA"). The initial triangle— Singapore-Johor-Riau Growth Triangle (SIJORI)—was originally proposed in 1989, and became an active development zone in 1990-91, though a trilateral memorandum of understanding formally acknowledging SIJORI's existence was not signed until December 1994. Following its example, a northern ASEAN growth triangle, Indonesia-Malaysia-Thailand Growth Triangle (IMT-GT), was created in 1994 to join the southern provinces of Thailand, the four northern states of Malaysia and Indonesia's provinces in Aceh and northern Sumatra. Lastly, an eastern ASEAN triangle, the Eastern ASEAN Growth Area ("EAGA"), was organized in 1994 and encompasses the East Malaysian states of Sabah and Sarawak, Indonesia's provinces in Kalimantan, the Moloccus and Sulawesi, Brunei and parts of the Philippines. Thus far, EAGA has held three ministerial meetings.

5. As ASEAN finalizes other economic agreements, covering the services sector or intellectual property for example, *see* Daniel Pruzin, *ASEAN Ministers Endorse Draft Services Framework Agreement*, 12 Int'l Trade Rep. (BNA) No. 49, at 2040 (Dec. 13, 1995), a unified ASEAN dispute settlement system will offer the same benefits to ASEAN as the unified World Trade Organization ("WTO") system offers. Given how guarded ASEAN is about ceding sovereignty, it is more likely, however, that a broader ASEAN mechanism would continue to rely upon senior economic officials and economic ministers as the decision-making force overseeing a more defined dispute settlement process. While a broader ASEAN dispute settlement mechanism is beyond the scope of this Article, the basic issues associated with the creation of an AFTA dispute settlement mechanism directly impact the establishment of a comparable ASEAN mechanism.

Since the signing of the Bangkok Declaration of 1967,[6] which proclaimed the formation of ASEAN, a question has remained unanswered and largely ignored by member states: will ASEAN create a viable legal regime to support its regional cooperation efforts?[7] To capture ASEAN's current emphasis on free trade, the pressing question is whether ASEAN will create a viable dispute settlement mechanism for AFTA.

There are two reasons why, to date, the development of ASEAN's legal infrastructure has lagged behind its successful political cooperation and its recently invigorated economic cooperation. First, political concerns have been ASEAN's *raison d'etre*. Geopolitical forces drew ASEAN's members together in 1967 to defend against communist inroads into Southeast Asia.[8] Second, ASEAN as an organization has historically shunned institutionalization, relying instead upon high-level governmental contacts and periodic meetings. ASEAN's watchwords have been institutional caution. This caution has been both a benefit and a burden. While limiting the growth of a creeping bureaucracy whose "red tape" may stunt the pursuit of economic initiatives, institutional caution has at times fueled ASEAN's resistance to essential institutional reform.

ASEAN economic cooperation has now bolted to the forefront, and AFTA is its centerpiece.[9] AFTA's potential impor-

---

6. Association of Southeast Asian Nations Declaration, Bangkok, Thailand, Aug. 8, 1967, 6 I.L.M. 1233 (1967).

7. For a broad discussion of this question before ASEAN embarked upon its ambitious economic initiatives, see Purificacion Valera-Quisumbing, *Can ASEAN Forge a Viable Legal Regime for Regional Cooperation?*, 56 PHILIPPINE L.J. 209 (1981).

8. The formation of ASEAN was in direct response to the threat of communism to governments in the Southeast Asian region. Narongchai Akrasanee & David Stifel, *The Political Economy of the ASEAN Free Trade Area, in* AFTA: THE WAY AHEAD 27, 27 (Pearl Imada & Seiji Naya, eds.) (1992) (tracing the political history of and constraints to ASEAN economic cooperation); *see also* Sherry M. Stephenson, *ASEAN and the Multilateral Trading System*, 25 LAW & POL'Y INT'L BUS. 439, 439 (1994) (outlining the significant political and economic events attending ASEAN's early development); Bilson Kurus, *Agreeing to Disagree: The Political Reality of ASEAN Economic Cooperation*, 20 ASIAN AFF. 28, 29-30 (1993) (reviewing the political considerations present at ASEAN's formation).

9. Professor Mohamed Ariff, Dean of the Universiti Malaya's Faculty of Economics and a leading authority on AFTA, has said, "Without a doubt, AFTA represents the most important trade initiative that ASEAN has ever taken since its establishment in 1967." Mohamed Ariff Bin Abdul Kareen, *AFTA Another Futile Trade Area?*, SYARAHAN PERDANA, Feb. 3, 1994, at 1, 31 [hereinafter Ariff]. ASEAN economic cooperation is poised to expand dramatically over the next few years. Recently, ASEAN heads of government initialed framework agreements on services, *see* Pruzin, *supra* note 5, and intellectual property, *see ASEAN Leaders Endorse Framework on Intellectual Property Protection*, 12 Int'l Trade Rep. (BNA) No. 50, at 2082 (Dec. 20, 1995), while offering a commitment to implement an action plan on investment in ASEAN. *See ASEAN Officials Announce Initiative to Pro-*

tance cannot be underestimated. With the recent entry of Vietnam into ASEAN,[10] AFTA stands as the most populous free trade zone in the world, representing a market of 420 million people, comparable in population size to NAFTA or the European Union.[11] ASEAN already represents the fourth largest international trader in the world, trailing only the United States, Japan and the European Union.[12] When Cambodia, Laos and Myanmar eventually join ASEAN, AFTA will encompass the entire Southeast Asian region.[13]

Hence, the operative question is whether ASEAN will match economic development with coordinated legal and institutional developments. Reflecting typical free trade priorities, ASEAN policymakers and the private sector have focused on economic opportunities rather than legal incongruities. This disparity threatens to widen unless ASEAN commits to upgrading its common legal infrastructure.[14] As ASEAN hammers out the

---

mote Investment Within Region, 12 Int'l Trade Rep. (BNA) No. 47, at 1965 (Nov. 29, 1995) [hereinafter *ASEAN Officials Announce Initiative*].

10. In a move no doubt motivated by political calculations as much as economic ambitions, Vietnam officially joined ASEAN in July 1995. On December 15, 1995, ASEAN leaders signed a protocol formally committing Vietnam to AFTA's tariff reduction scheme. *ASEAN Leaders Adopt Agenda for Expanded Economic Integration* 12 Int'l Trade Rep. (BNA) No. 50, at 2082 (Dec. 20, 1995). Recognizing its lower level of development, Vietnam has been granted an additional three years to fully implement AFTA's tariff reduction program. *See ASEAN Summit to Highlight Expansion of Membership*, JAPAN ECON. NEWSWIRE, Sept. 13, 1995.

11. *See* Yang Razali Kassim, *Political Risks Put AFTA 2000 on Back Burner*, BUS. TIMES (Malay.), Sept. 13, 1995; Valerie Lee, *ASEAN Ministers to Speed Up Free-Trade Process*, THE REUTER ASIA-PAC. BUS. REP., Sept. 8, 1995.

12. *See* Anil Penna, *Brunei Meeting Gives Boost to ASEAN Free-Trade Program*, AGENCE FRANCE PRESSE, Sept. 10, 1995. Further demonstrating ASEAN's relative importance in the international economy, ASEAN international trade reached $543 billion in 1994. Its draw of foreign direct investment ("FDI") totaled nearly $40 billion, pushing its FDI stock to nearly $200 billion, three times that of China, the largest FDI recipient in 1994. *Id.*

13. Cambodia and Laos now enjoy observer status within ASEAN, and Myanmar has begun the membership process by acceding to the Treaty of Amity and Cooperation in Southeast Asia, ASEAN's foundational treaty. *See ASEAN Summit to Highlight Expansion of Membership*, *supra* note 10. Anticipating the expansion of AFTA, ASEAN leaders recently pledged to commence cooperative efforts to spur economic links with Cambodia, Laos and Myanmar. One specific objective of these efforts is to prepare the three countries for their "eventual participation" in AFTA. *See ASEAN Leaders Pave Way for Adding Cambodia, Laos, and Burma as Members*, 12 Int'l Trade Rep. (BNA) No. 50, at 2083 (Dec. 20, 1995).

14. Despite announcing recently ASEAN's endorsement of joint initiatives to promote investment and simplify investment procedures in the ASEAN region, ASEAN officials specifically denied that such investment coordination implied increased legal harmonization. As one Indonesian official put it, "One important principle is that each individual ASEAN member country still follows its own legal system and aspirations. . . . When you refer to harmonization, perhaps harmonization will prevail in terms of performance [but] not in terms of systems." *ASEAN Officials Announce Initiative*, *supra* note 9, at 1965.

details of a free trade area, its delay in creating a comprehensive dispute resolution mechanism for AFTA is a serious gap in its AFTA planning.

That situation may change. At the 27th ASEAN Economic Ministers Meeting held in September 1995, ASEAN announced its intention to craft a dispute resolution framework.[15] Without offering any details, ASEAN officials meeting under the aegis of the AFTA Council[16] proposed to establish an ASEAN dispute settlement mechanism "as soon as possible" in 1996.[17] Though a milestone, the press statements presented no implementation timetable. The early indication was that ASEAN's first attempt at a dispute resolution mechanism for AFTA would focus on government-to-government disputes,[18] leaving the private sector with recourse only to governmental avenues of redress, or perhaps to existing AFTA mechanisms.[19]

---

15. The joint press statement issued at the conclusion of the 27th Meeting of the ASEAN Economic Ministers ("AEM"), held on September 7-8, 1995 in Brunei Darussalam, stated: "In facilitating the implementation of the CEPT Scheme for AFTA and enhancing greater economic cooperation, the ministers agreed to the establishment of a specific Dispute Settlement Mechanism (DSM) for CEPT-AFTA and an umbrella DSM which will cover disputes arising from all ASEAN agreements on economic cooperation." *Full Text of ASEAN Economic Ministers Meeting Statement*, JAPAN ECON. NEWSWIRE, Sept. 8, 1995.

16. *See infra* note 111.

17. Daniel Pruzin, *ASEAN Members Agree to Timetable Covering Agriculture* 12 Int'l Trade Rep. (BNA) No. 49, at 2040, 2041 (Dec. 13, 1995).

18. Contemporaneous press accounts linked news of a dispute settlement mechanism with a dispute over Indonesia's announcement at the 27th AEM to indefinitely shield from AFTA's tariff reduction scheme certain agricultural products which it had previously listed on the inclusion list. *See* Kassim, *supra* note 11; Tan Kim Song, *Move To Hasten ASEAN Tariff Reductions Significant*, STRAITS TIMES (Sing.), Sept. 8, 1995, at 25 ("It was partly to remove such ambiguity that the AFTA Council decided to have a specific dispute settlement mechanism (DSM) to deal with the implementation of the CEPT scheme.").

The challenge of incorporating agriculture products into AFTA illustrates the macro-economic policy fault lines driving ASEAN plans for a dispute settlement mechanism. An April 1995 agreement that added unprocessed agricultural goods to AFTA's inclusion list nearly unravelled when Indonesia announced its intention to exclude as "sensitive" goods four major items—rice, sugar, wheat flour, and cloves—from AFTA's tariff reduction scheme. ASEAN officials crafted a compromise creating a special category of temporarily excluded goods which will be reviewed in 2003. Under the new agreement that essentially deferred a final resolution of the dispute, all "sensitive" items will be phased into AFTA by 2010. *See* Pruzin, *supra* note 17, at 2041; Michael Vatikiotis, *Advancing Sideways*, FAR E. ECON. REV., Dec. 21, 1995, at 60.

19. Malaysia's Minister of International Trade & Industry, Dato' Seri Rafidah Aziz, commenting on the future dispute settlement mechanism, envisioned it concentrating on mediation, the settlement of technical questions, and interpretation of AFTA agreements as opposed to acting more like a court enforcing trade sanctions. *ASEAN: ASEAN at Odds Over Timetable for Free Trade*, BANGKOK POST, Sept. 7, 1995.

Responding to a dispute between Malaysia and Singapore over Malaysia's tariff increase on petrochemicals, Thailand broached the idea of establishing an "in-

ASEAN has wavered in the past when facing decisions that imply greater commitments to institution-building.[20] Given its success at informal cooperation and each member's natural aversion to ceding any measure of sovereignty to a supranational organization, ASEAN has approved commitments to added institutionalization with little enthusiasm. To establish a credible dispute settlement mechanism for AFTA, however, ASEAN must squarely confront its misgivings over institutionalization.

This article proposes a comprehensive dispute resolution mechanism for AFTA that accommodates both public and private sector disputes while addressing the institutional sensitivities of ASEAN. Part I examines the dispute resolution mechanisms of the major trade arrangements most relevant to ASEAN: the World Trade Organization ("WTO") and NAFTA.[21] This section summarizes the structure of each dispute settlement system, highlighting certain features that ASEAN should consider while formulating its own mechanism. Part II introduces the reader to AFTA. It outlines AFTA's goals and both discusses the present status of dispute resolution in AFTA and introduces a more complete system. Part III offers a model for an AFTA dispute reso-

---

house" ASEAN dispute settlement body in April 1995 at an informal meeting of ASEAN economic ministers. Singapore had maintained that the tariff increase breached an ASEAN agreement on AFTA. *Trade Dispute*, INT'L PETROCHEMICAL REP., Apr. 13, 1995, at 8. According to an official at the Thai Ministry of Commerce, without an AFTA dispute settlement mechanism, trade disputes would be resolved under the auspices of the WTO, a forum open only to member states. *Id.* The clear implication of such reports is that ASEAN officials envision an AFTA mechanism that will primarily address implementation disputes between AFTA member governments without offering the private sector a comprehensive, independent avenue of dispute resolution.

20. The challenge of institutionalization has already fractured ASEAN's traditionally unified stance on regional initiatives. For example, ASEAN is divided over the institutional development of the Asia Pacific Economic Cooperation ("APEC"), the major regional trade initiative in the Pacific region. *See, e.g.*, Mohamed Ariff, *Cautious Approach to Apec, EAEC*, THE STAR (Malay.), Nov. 2, 1995, at 20.

21. A second major regional trade initiative impacting ASEAN, the Asia-Pacific Economic Cooperation ("APEC"), has announced plans to address regional dispute resolution. As a first step, officials of the 18-member APEC Trade and Investment Committee agreed to establish a working group to discuss the creation of a dispute settlement system for APEC. *See APEC Officials Agree On Work Groups On Dispute Resolution, Customs Barriers*, 12 Int'l Trade Rep. (BNA) No. 7, at 309 (Feb. 15, 1995). On October 8, 1995, the Committee resolved to complete a draft recommendation on the settlement of government-to-government disputes by the 1996 APEC Summit scheduled for the Philippines. *See APEC Preparatory Meeting Endes Without Agreement on Farm Trade*, Int'l Trade Rep. (BNA) No. 41, at 1729 (Oct. 18, 1995). APEC's regional dispute settlement mechanism may be patterned on the WTO dispute settlement structure. *See id.* One of APEC's fifteen "action plans" promulgated at the 1995 APEC Summit in Osaka, Japan will focus on dispute mediation. Toshio Aritake, *APEC Leaders Summit Reaches Agreement on Vague Trade, INvestment Commitments*, 12 Int'l Trade Rep. (BNA) No. 46, at 1922 (Nov. 22, 1995).

lution mechanism that draws on the strengths of the WTO and NAFTA while expressing ASEAN's own management style for conflict resolution, as well as its aim to foster the private sector's role in AFTA.

I. DISPUTE SETTLEMENT SYSTEMS IN MAJOR TRADE AGREEMENTS

Within the context of trade-related legal reform, the launching of the WTO and the signing of NAFTA focused attention on international trade dispute settlement. Each agreement incorporated innovations in both the methods of trade dispute settlement and expanded the scope of dispute settlement to encompass broader categories of trade-related disputes. Given their dramatic changes to the nature of dispute settlement, the WTO and NAFTA systems merit careful scrutiny by ASEAN.

A. THE WTO

To cure perceived weaknesses in the prior GATT system,[22] revamping the GATT dispute resolution system was a major aim of the Uruguay Round negotiations.[23] Unlike earlier GATT negotiating rounds, ASEAN actively engaged in the Uruguay Round.[24] The United States in particular pressed to strengthen GATT's dispute settlement provisions and to ensure that all Uruguay Round agreements were subject to an integrated, defined, and enforceable system.[25] Other countries, favoring a more flexible, less structured and less adjudicatory system, supported re-

22. The prior GATT dispute resolution system suffered criticisms regarding delays in the establishment of GATT panels, the lack of transparency in the panel process, biased decisionmaking by government officials serving as panelists, and the overall quality of panel reports. *See* Norio Komuro, *The WTO Dispute Settlement Mechanism: Coverage and Procedures of the WTO Understanding*, J. INT'L ARB., Sept. 1995, at 81, 102-04. For discussions of the workings and reform of the pre-WTO dispute settlement system, see, for example, JOHN H. JACKSON, THE WORLD TRADING SYSTEM (1989); Pierre Pescatore, *The GATT Dispute Settlement Mechanism*, 27 J. WORLD TRADE 1, 5-20.

23. *See* Michael K. Young, *Dispute Resolution in the Uruguay Round: Lawyers Triumph Over Diplomats*, 29 INT'L LAW. 389 (1995) (discussing how dispute resolution progressed through the Uruguay Round ultimately producing a more legalistic system). While ASEAN participated actively in the Uruguay Round, it should be noted that no ASEAN members ever initiated GATT dispute settlement procedures. Indeed, only one member of ASEAN, Thailand, has ever been involved in a GATT panel. The United States requested a panel in 1990 to review Thailand's cigarette imports restrictions and taxes. *See* Stephenson, *supra* note 8, at 446.

24. *See* Stephenson, *supra* note 8, at 447.

25. *See Executive Summary: Results of the GATT Uruguay Round of Multilateral Trade Negotiations*, U.S. DEPARTMENT OF STATE DISPATCH SUPPLEMENT, Dec. 1993, at 3, 12 (explaining the objectives and results of the Dispute Settlement Understanding). Developing countries tended to support this position favoring the enshrinement of "a prompt and automatic right to legal rulings" to neutralize the

forms that would continue to accommodate political sensitivities and compromises. The result was the Dispute Settlement Understanding ("DSU"),[26] an agreement marking a clear shift in GATT dispute resolution toward a procedural legalism. In its first year of operation, WTO members responded favorably to the new system by lodging numerous complaints with the WTO.[27] Significantly, ASEAN members have likewise utilized the new WTO system.[28] Yet, within the context of the WTO's rigorously defined dispute settlement system, it would not be surprising to witness this procedural legalism tempered by the twin desires of member states to exercise political leverage and to avoid adverse decisions or enforcement proceedings.

The DSU reshaped the GATT system in key ways. Dispute settlement under the WTO is a more unified and obligatory system.[29] WTO members who believe that a GATT agreement has been violated or benefits under GATT have been impaired must resort exclusively to the WTO's dispute resolution mechanisms. The DSU disallows unilateral determinations of injury and impo-

---

economic and political leverage of larger trading nations. ROBERT E. HUDEC, DEVELOPING COUNTRIES IN THE GATT LEGAL SYSTEM 77 (1987).

26. *See General Agreement on Tariffs and Trade—Multilateral Trade Negotiations (The Uruguay Round): Understanding on Rules and Procedures Governing the Settlement of Disputes*, Dec. 15, 1993), 33 I.L.M. 112, *reprinted in* TRADE NEGOTIATIONS COMMITTEE, FINAL ACT EMBODYING THE RESULTS OF THE URUGUAY ROUND OF MULTILATERAL TRADE NEGOTIATIONS 353 (Apr. 15, 1994) [hereinafter DSU].

27. As of December 1995, there were 16 formal WTO complaints pending before the Dispute Settlement Body. *See U.S. and Canada in Final Stages of NAFTA Agriculture Panel Formation*, 12 Int'l Trade Rep. (BNA) No. 49, at 2057, 2058 (Dec. 13, 1995); *see also U.S. Loses Case in WTO's First Disputes Panel Ruling*, FIN. TIMES, Jan. 18, 1996, at 5 (providing a year-end tally of WTO cases commenced).

28. *See infra* note 40, noting Singapore's complaint against Malaysia before the WTO's Dispute Settlement Body.

29. The dispute settlement procedures are available for disputes arising from "covered agreements" listed in Appendix 1 of the DSU. Covered agreements include: the Agreement Establishing the World Trade Organization; Agreement on Trade in Goods; General Agreement on Trade in Services; the Agreement on Trade-Related Aspects of Intellectual Property Rights; and the DSU. If adopted by the respective signatories, the following agreements may also be subject to the DSU mechanism: the Agreement on Trade in Civil Aircraft; Agreement on Government Procurement; International Dairy Agreement; and Arrangement Regarding Bovine Meat. *See* DSU, *supra* note 26, at 131, app. 1. Special rules and procedures apply to certain areas of the covered agreements such as antidumping and countervailing measures. *See id.* at 132, app. 2.

Professor John H. Jackson had criticized the multitude of distinct dispute settlement mechanisms in the prior GATT system as the "balkanization" of trade dispute settlement. *See* John H. Jackson, *Governmental Disputes in International Trade Relations: A Proposal in the Context of GATT*, 12 J. WORLD TRADE L. 1 (1979).

sitions of trade sanctions.[30] In practical terms, installing the WTO as the avenue of first resort is predicated upon new provisions guaranteeing aggrieved members a right to a dispute resolution panel, expanding the scope of the dispute settlement process and setting specific time limits for each procedural step.

The WTO includes a centralized body to oversee the functioning of its dispute settlement system. Recognizing the need for better coordination and oversight, a Dispute Settlement Body ("DSB") administers the dispute settlement rules under a more explicit mandate than its GATT predecessor. It holds general authority to establish panels, adopt reports, monitor implementation of rulings, and authorize the suspension of GATT concessions.[31] The DSB, which acts by consensus, is open to all WTO members to join.[32]

To clarify its priorities, the DSU explicitly lists dispute settlement solutions in order of preference. Mutually agreeable solutions consistent with GATT agreements are preferred. If no mutually agreeable solutions are found, the DSU places priority on withdrawing measures inconsistent with GATT. The DSU permits compensation as an acceptable temporary response, but only if the immediate withdrawal of an inconsistent measure is impracticable and only until the offending measure is withdrawn. It lists the suspension of GATT concessions or other obligations, subject to approval by the DSB, as a last resort.[33]

The WTO dispute settlement system, despite its obligatory nature, disfavors formal adjudication of trade disputes. The DSU mandates consultations as the first avenue of effort to resolve disputes. When a WTO member requests consultations, the DSB must be notified of the request.[34] A respondent WTO

30. Section 23 states that WTO members "shall . . . not make a determination to the effect that a violation has occurred . . . except through recourse to dispute settlement in accordance with the rules and procedures of this Understanding . . . ." DSU, *supra* note 26, at 128-29. Continued use of unilateral trade sanctions by WTO members, most notably the United States remains a serious challenge to credibility of the WTO dispute settlement system. The mere threat of unilateral trade sanctions prompted a formal request by Japan for bilateral negotiations, the initial step in the WTO dispute settlement process, with the United States over proposed American trade sanctions against Japanese luxury automobiles. *See Japan Files Case With Trade Body in Fight With U.S. Over Auto Sanctions*, 12 Int'l Trade Rep. (BNA) No. 21, at 891 (May 24, 1995). Before the conclusion of an agreement in June 1995, the burgeoning U.S.-Japan dispute over automobiles and car parts loomed as the first major challenge to the integrity of the WTO.

31. *See* DSU, *supra* note 26, § 2.1.

32. The DSB is deemed to act by consensus if no WTO Member present at the meeting when a decision is considered formally objects to the proposed decision. *Id.* § 2.4 n.1.

33. *Id.* § 3.7.

34. *Id.* § 4.4.

member must respond within ten days and "accord sympathetic consideration to and afford adequate opportunity for consultation" regarding any allegation.[35] During a sixty-day period, WTO members engaged in consultations must attempt in good faith to reach a mutually satisfactory solution.[36] All WTO consultations are confidential, and the interests and problems of developing countries, if relevant, receive special attention.[37]

To underscore the WTO's commitment to non-adversarial dispute resolution, any party to any dispute may also request the confidential use of good offices, conciliation or mediation at any time.[38] If the parties agree, such measures may proceed even while a WTO panel convenes. The DSU allows independent arbitration within the WTO to facilitate settlement of clearly defined disputes.[39]

Should dispute avoidance measures fail or a responding party refuse to engage in consultations, a complaining party has the right to have a WTO panel established to resolve the dispute formally unless the DSB decides by a complete consensus to re-

---

35. *Id.* § 4.2.

36. *Id.* § 4.3. If a request for consultations receives no reply within 10 days after its submission, the complaining WTO member may proceed directly to request the establishment of a WTO panel to resolve the dispute. *Id.* The complaining party may also request a panel before the expiration of the sixty-day consultations period if the consulting parties jointly conclude that consultations have failed to settle their dispute. *Id.* § 4.7.

37. *Id.* §§ 4.6, 4.10. Faced with limited resources to prosecute trade claims in multiple GATT dispute settlement forums and limited retaliatory powers against developed countries, developing countries fared poorly under the prior GATT system. *See* JOHN H. JACKSON ET AL., LEGAL PROBLEMS OF INTERNATIONAL ECONOMIC RELATIONS 346-47 (3d ed. 1995).

38. DSU, *supra* note 26 § 5.3. The use of good offices, conciliation or mediation may commence or be terminated at any time. *Id.* The Director-General of WTO, on his or her own initiative, may also offer good offices, conciliation or mediation to assist the settlement of a dispute. *Id.* § 5.6. In a bid to minimize the institutional involvement of non-ministerial bodies, ASEAN may not wish to allow its administrative bodies, other than the AFTA Council perhaps, to inject themselves into an AFTA dispute on their own initiative. *See* discussion *infra* Part IV.F.

39. The DSU actually limits the ability of WTO members to use arbitration to disputes involving trade issues "that are clearly defined by both parties." *See* DSU, *supra* note 26, § 25. How one determines whether a dispute is sufficiently defined to permit arbitration is left unclear. Clarification of this issue will have to await guidance from precedents or a ruling by the new Appellate Body.

Interested third parties are likewise limited in their ability to join such arbitrations; all parties to the arbitration must agree to permit their participation. *See id.*

As one commentator has pointed out, the status of arbitral decisions under the WTO, in terms of their precedential value and relationship to the panel and appellate processes, is unknown. *See* Young, *supra* note 23, at 401 n.57. What is clear, however, is that arbitrations regarding GATT disputes occur under the auspices of the WTO and remain subject to its rules and enforcement mechanisms.

ject a panel's establishment.[40] Given the unlikelihood that a WTO member will reject its own request for a panel, the right to a WTO panel is now certain and swift.[41] Panels are empowered to address all issues raised under any covered GATT agreement.[42] Unlike its GATT predecessor, the WTO automatically adopts panel reports unless a consensus exists to reject a report.[43] Without question, automatic adoption of panel reports is the

40. *See* DSU, *supra* note 26, § 6.1. Developing countries have long championed the idea of automatic panel procedures against developed countries. *See, e.g.*, Robert E. Hudec, *Dispute Settlement, in* COMPLETING THE URUGUAY ROUND: A RESULTS-ORIENTED APPROACH TO THE GATT TRADE NEGOTIATIONS 228 (Jeffrey J. Schott ed., 1990).

On April 10, 1995, a claim by Venezuela that the U.S. Environmental Protection Agency's rules on reformulated gasoline unfairly favor U.S. producers was the first official complaint to be granted a WTO panel. *See WTO Panel Will Investigate Complaint By Venezuela Against U.S. Gas Rules*, 12 Int'l Trade Rep. (BNA) No. 15, at 658 (Apr. 12, 1995). The U.S. lodged its first WTO complaint at the same April 10th DSB meeting challenging South Korea's testing requirements for chemical residues on American perishable agricultural products. *See id.* Had bilateral negotiations not been successfully concluded, Singapore's dispute over Malaysian import restrictions on polyethylene and polypropylene produced in Singapore threatened to escalate into the first formal WTO/GATT trade dispute between ASEAN members. *See id.* Singapore had registered a complaint against Malaysia at the February 10, 1995 meeting of the DSB, commencing the 60-day period of consultations period. *See U.S. Urges Board Representation on Investigative Dispute Panels*, 12 Int'l Trade Rep. (BNA) No. 7, at 295 (Feb. 15, 1995).

41. To further dampen the ability of members to stall the establishment of panels, the DSB allows disputing parties only twenty days to agree to the terms of reference for a panel. Failing that, the DSB furnishes the following default terms of reference:

> To examine, in the light of the relevant provisions in (name of the covered agreement/s cited by the parties to the dispute), the manner referred to the DSB by (name of party) in document . . . and to make such findings as will assist the DSB in making the recommendations or in giving the rulings provided for in that/those agreement/s.

DSU, *supra* note 26, § 7.1.

42. *Id.* §§ 7.2, 11.1. Once established, panels shall establish a timetable for the process and must set strict deadlines for party submissions. *Id.* §§ 12.3, 12.5, 12.6. As a general rule, the total time period for a panel to issue a final report to the parties is six months from the time of a panel's composition. *Id.* § 12.8. Under no circumstances may a panel take longer than nine months to issue its final report unless the parties have requested the panel to suspend its proceedings. *Id.* §§ 12.9, 12.12.

Panel proceedings are confidential. *Id.* § 14.1. Further, panels may by right seek any information, technical advice or opinions considered necessary and appropriate from GATT members on a confidential basis or from any relevant source such as expert review groups. *Id.* § 13.

43. Within 60 days after the circulation of a panel report, it "shall be adopted at a DSB meeting unless one of the parties to the dispute formally notifies the DSB of its decision to appeal or the DSB decides by consensus not to adopt the report." *Id.* § 16.4. The automatic adoption of binding reports avoids problems that plagued the prior GATT dispute settlement system—where consensus was required to adopt a report—whereby panel reports might remain unadopted for years as they became "debating points" or bargaining chips for countries involved in multiple disputes. *See* Young, *supra* note 23, at 402.

most powerful tool created in the DSU to insure both the credibility and reliability of the WTO dispute resolution process.[44]

Representing a second milestone in international trade and a new level of legalism for GATT, the WTO system includes a new appellate review process.[45] A party (excluding third parties) dissatisfied with a final panel report may file an appeal regarding any issue of law arising from the report.[46] Reports by the WTO Appellate Body are adopted by the DSB automatically and accepted unconditionally by the disputing parties unless the DSB decides by consensus to reject a report.[47] Given the minimal added costs and the need politically to defend national laws and policies before domestic audiences, one must expect that the losing party will appeal nearly every panel report.

Yet, the availability of appellate review may not alter the system's current focus on negotiated settlements. Only settlements assure all parties the ability to achieve at least some of their goals, namely eliminating offending practices or guarding national policies. Indeed, the WTO's appellate review and

---

The focus of the process is now on the panels and the Appellate Body. *See* Miquel Montaña i Mora, *A GATT With Teeth: Law Wins Over Politics in the Resolution of International Trade Disputes*, 31 COLUM. J. TRANSNAT'L L. 103, 150 (1993) (The WTO dispute settlement process "introduces a shift of influence from the Contracting Parties to the panels and the Appellate Body [which] enhances the judicial nature of the panel process.").

44. The ability of losing parties to thwart the earlier GATT dispute settlement process was a continuing source of frustration under the GATT. For a discussion of cases in which losing parties obstructed the adoption of panel reports, see ROBERT E. HUDEC, ENFORCING INTERNATIONAL TRADE LAW: THE EVOLUTION OF THE MODERN GATT LEGAL SYSTEM 201-03 (1991).

45. One commentator shrewdly pointed out that some provision for appellate review was inevitable once the adoption of panel reports was made virtually automatic. *See* Andreas F. Lowenfeld, *Remedies Along with Rights: Institutional Reform in the New GATT*, 88 AM. J. INT'L L. 477, 483 (1994).

46. The DSB will establish a seven-person standing Appellate Body to hear appeals from WTO panel decisions. Three-person panels of the Appellate Body are empowered to review "issues of law covered in the panel report and legal interpretation[s] developed by the panel." DSU, *supra* note 26, § 17.6. Its proceedings are confidential, and its reports are drafted without the presence of the disputing parties. *Id.* §§ 17.10, 18.2. *Ex parte* communications with the Appellate Body are forbidden. *Id.* § 18. Regarding its decisionmaking authority, the Appellate Body may affirm, modify or reverse the legal findings and conclusions of a panel. *Id.* § 17.13.

Appellate Body members (with the exception of three of the initial seven members) will serve four-year terms, and each person may be reappointed for one additional term. The prolonged selection process concluded, at least temporarily, on November 29, 1995 when the DSB, after months of political wrangling by WTO members over the nominations, reached a temporary agreement on the initial members of the Appellate Body. The European Union ("EU"), however, plans to demand a reshuffling of the Body's membership at the WTO Ministerial Meeting in Singapore in December 1996 to increase EU membership on the Body. *See WTO Meets to Finalize Members List For Appeals Body; EU Still Has Complaint*, 12 Int'l Trade Rep. (BNA) No. 47, at 1973, 1973-74 (Nov. 29, 1995).

47. DSU, *supra* note 26, § 17.14.

strengthened enforcement provisions may provide added incentive to settle. Under the WTO, prevailing parties are more certain in their ability to enforce victories. As it considers an AFTA dispute settlement system, ASEAN should note this fact. Even the WTO system, a framework more legalistic than ASEAN will contemplate, will not smother the disputing states' mutual interests in guarding certain priorities and policy objectives by seeking informal settlements.[48]

It is clear, however, that a body of WTO precedents will be steadily created as appellate decisions are handed down. What remains unclear is how this body of precedents will impact the dispute settlement process and what degree of credibility (or moral authority) the Appellate Body or panel reports will develop.[49]

The DSB also seriously addresses the question of compliance with panel decisions. GATT, devoid of sure enforcement powers, had proved ineffectual in overcoming a country's natural disinclination to alter its trade practices. Under the WTO, a member must implement panel recommendations and bring its laws or activities into conformity with panel rulings within an established time period.[50] If a party fails to comply with a ruling, the complaining party may seek authorization for retaliation equivalent to the level of the nullification or impairment of WTO benefits until inconsistent measures are removed, the panel rulings have been implemented or a mutually satisfactory solution is found.[51] The impact of panel rulings on the economies of devel-

48. The resolution of ASEAN's first WTO/GATT dispute illustrates this point. *See supra* note 40.

49. In establishing its institutional authority and acceptability, one commentator has suggested that the Appellate Body's development of its own, independent institutional expertise is essential. *See* Lowenfeld, *supra* note 45, at 485. Without doubt, the credibility of the WTO dispute settlement system will rest in large part on the perception, if not the reality, of its thorough decisionmaking and expertise. The same will be true for any AFTA dispute settlement system.

50. The party to which a panel or appellate report is directed must inform the DSB within 30 days of the report's adoption how it intends to implement the rulings and recommendations of the DSB. *See* DSU, *supra* note 26, § 21.3. If the timing of an offending party's compliance is not settled by the parties, the issue is referred to binding arbitration. *Id.* The DSB is charged with surveillancing the implementation of adopted reports and rulings, and implementation issues remain on the DSB's agenda until resolved. *Id.* § 21.6.

51. *Id.* §§ 22.4, 22.8. If a party fails to cure measures inconsistent with GATT or abide by a panel ruling, it must enter into negotiations with a complaining party, if requested, to set a mutually acceptable level of compensation. Should such efforts fail after a reasonable period of negotiations, a complaining party may request the DSB to authorize the suspension of selected GATT concessions or obligations based upon principles outlined in the DSU. *Id.* §§ 22.2, 22.3. Under these circumstances, the DSB "shall grant authorization to suspend concessions or other obligations within thirty days of the expiry of the reasonable period of time unless the DSB decides by consensus to reject the request." *Id.* § 22.6. Any disagreements over the

oping countries must be considered by the DSB when addressing the implementation of panel decisions involving a developing country.[52]

Swift enforcement mechanisms, long a priority for certain GATT members including the United States, still permit member countries to wield domestic trade sanction powers, if pre-authorized by the DSB, but now without the risk of counter-retaliation. Special considerations are nonetheless given to the WTO's least-developed members in all cases.[53]

Though imperfect, the WTO system represents a step forward in procedural clarity and a half-step forward in procedural transparency.[54] The WTO dispute settlement procedures achieve greater procedural clarity by setting defined time limits on each phase of the process and strengthening the procedural checks and balances on the ability of parties to thwart the process. With respect to decisional transparency, the WTO reforms offer smaller gains. Although each disputing party must present a non-confidential summary of their panel submissions that are accessible to the public, the WTO process retains a large degree of confidentiality. Continued confidentiality represents only one of several areas where the WTO system failed to fully rectify past weaknesses.[55] Despite its modest offering of greater transparency, the WTO system more closely resembles a judicial forum for trade disputes with its surer enforcement mechanisms and appellate review.

Though sharing some of the same impulses to formulate an effective trading system, ASEAN's differing priorities will assuredly be reflected in the structure of AFTA's dispute settlement mechanism. Formal appellate review, one of the WTO's most striking features, is far too legalistic a structure for ASEAN's less formal style. Other features of the WTO, considered weaknesses by some observers, will appeal to ASEAN. For example, the WTO's limits on transparency fit neatly into ASEAN's manner

---

level of authorized suspensions or procedures will be settled by arbitration. *Id.* §§ 22.6, 22.7.

52. *Id.* § 21.8.

53. *Id.* § 24 (discussing special considerations associated with disputes involving least-developed countries).

54. *But see* Young, *supra* note 23, at 406 (asserting that GATT's closed, confidential nature of dispute resolution is basically maintained).

55. For a useful analysis of issues left unresolved by the DSU, see Young, *supra* note 23, at 406-09 (identifying continuing confidentiality, ensuring compliance and decreasing politicization of the dispute settlement process as lingering questions). Also see Jennifer Schultz, *The GATT/WTO Committee on Trade and the Environment—Toward Environmental Reform*, 89 AM. J. INT'L L. 423, 431-32 (1995), for a brief comparison and assessment of transparency issues with respect to the WTO and NAFTA dispute settlement systems. Increased transparency and public participation remain, for many, priority issues for continued WTO reform. *See id.* at 433.

in resolving disputes. ASEAN will likely wish to preserve its ability to build political solutions which downplay intra-ASEAN differences and present a united front regarding AFTA's progress. ASEAN's inclination to find face-saving solutions to trade disputes will be served by a system that guards against public observation of the settlement process.

One crucial question is how ASEAN will prevent parties from frustrating decisions produced by its dispute settlement system. The WTO reforms responded to such concerns by enhancing the organization's surveillance and enforcement mechanisms. As discussed in Part III, the ways in which ASEAN addresses such concerns will be critical to AFTA's success.

B. NAFTA

From the outset, dispute resolution represented a priority area for NAFTA negotiators. NAFTA's constituent governments dedicated one of the original nineteen NAFTA negotiating groups exclusively to dispute settlement.[56] Both Canada and Mexico prioritized the creation of strong dispute settlement mechanisms to check the ability of the United States to impose unilateral sanctions under its domestic trade laws. For Canada and the United States, a dispute resolution system mollified fears that reliance on Mexico's legal system would undermine NAFTA's enforcement.[57]

NAFTA's framers created a four-track dispute resolution framework. Chapter 19 was specifically created to resolve disputes involving antidumping and countervailing duties laws.[58]

---

56. GARY CLYDE HUFBAUER & JEFFREY J. SCHOTT, NORTH AMERICAN FREE TRADE: ISSUES AND RECOMMENDATIONS 24-25 (1992).

57. *Id.* at 37.

58. *See* NAFTA, *supra* note 2, art. 1901. Under Chapter 19, a NAFTA party wishing to amend its antidumping or countervailing duty laws must notify affected NAFTA parties prior to enactment of any changes and enter into consultations if requested. *Id.* art. 1902(2). NAFTA parties affected by such amendments may request a binational panel to review the proposed amendments and issue declaratory opinions as to whether the changes are consistent with NAFTA. *Id.* art. 1903. NAFTA's binational review process is designed to replace the ordinary domestic judicial review of antidumping and countervailing duty decisions of each NAFTA party. *Id.* art. 1904. Interestingly, Chapter 19 also requires annual consultations regarding the operation of this special dispute settlement process, the development of more effective rules on government subsidies and other means for addressing unfair transborder pricing practices. *Id.* art. 1907.

A vital yet unresolved issue regarding NAFTA concerns the breadth of a panel's authority. Is a panel simply empowered to narrowly determine, in a more judicial fashion, whether a NAFTA member's domestic laws were applied correctly, or may the panel independently judge the substantive propriety of a governmental decision despite procedural errors? Such issues were raised during the first hearing of a NAFTA dispute resolution panel, a challenge by U.S. steel companies to the compensatory duties imposed on U.S. imports of galvanized steel sheets by the

Chapter 11, a novel provision for NAFTA's investment regime, established a dispute settlement system that allows for binding arbitration of investment disputes.[59] The NAFTA supplemental agreements on environmental and labor matters—the environmental and labor "side agreements"—established a third novel dispute settlement mechanism that mirrors NAFTA's general dispute settlement procedures in most respects.[60] Finally, Chap-

---

Secretaria de Comercio y Fomento Industrial, Mexico's commerce agency. *See NAFTA Dispute Resolution Panel Examines Steel Issue in First Hearing*, 12 Int'l Trade Rep. (BNA) No. 17, at 736 (Apr. 26, 1995).

At least one commentator has argued that NAFTA's specialized dispute settlement mechanism for antidumping and countervailing duty disputes will effectively discriminate against East Asian nations. Shielding Mexico from punitive U.S. trade sanction laws by channelling such disputes to a binational review panel, the argument goes, gives Mexico an advantage over East Asian countries competing with Mexican manufacturers. *See* Han Soo Kim & Ann Weston, *A North American Free Trade Agreement and East Asian Developing Countries*, 9 ASEAN ECON. BULL. 287, 291 (1993).

59. Chapter 11, Section B, details NAFTA's unique dispute settlement mechanism for investment disputes. Its guiding principles are equal treatment, reciprocity and due process for all NAFTA investors. *See* NAFTA, *supra* note 2, art. 1115. Investors from a party to NAFTA may submit claims against a NAFTA party (i.e., one of NAFTA's member nations) for breach of an investment principle included in Section A to binding arbitration provided that the investor waives its right to initiate proceedings before any NAFTA party's domestic tribunals or courts. *Id.* art. 1121. The investment dispute settlement provisions mandate pre-claim consultations and set forth election of arbitration rules and default arbitration procedures. *See id.* art. 1118, 1122-38. For a clear and thorough discussion of Chapter 11 dispute settlement, see Cheri D. Eklund, *A Primer on the Arbitration of NAFTA Chapter Eleven Investor-State Disputes*, J. INT'L ARB., Dec. 1994, at 135.

60. *See* North American Agreement on Environmental Cooperation, *done* Sept. 14, 1993, U.S.-Can.-Mex., 32 I.L.M. 1480 [hereinafter Environmental Side Agreement]; North American Agreement on Labor Cooperation, *done* Sept. 14, 1993, U.S.-Can.-Mex., 32 I.L.M. 1499 [hereinafter Labor Side Agreement]. While nearly identical to Chapter 20 with respect to procedures, establishment and selection of panels, third-party participation, experts and reports, the NAFTA environmental dispute settlement system does not apply to individual violations but only to allegations of a "persistent pattern of failure by [a] Party . . . to effectively enforce its environmental laws relat[ing] to a situation involving workplaces, firms, companies or sectors that produce goods or provide services . . . ." *Id.* art. 24(1). The Labor Side Agreement contains a parallel "persistent pattern" provision. *See* Labor Side Agreement, *supra*, art. 27.

The Side Agreements' dispute resolution process have been described as "the premier attempt to date to provide a modality in international trade law for reconciling trade values with social and environmental values." Jack I. Garvey, *Trade Law and Quality of Life—Dispute Resolution Under the NAFTA Side Accords on Labor and the Environment*, 89 AM. J. INT'L L. 439 (1995) (categorizing the side agreements as more process than substance while identifying the creation of a dispute resolution process for social and environmental issues as a key force for NAFTA's passage).

One key feature of the Side Agreements is their enforcement mechanisms which permit the collection of monetary damages should remedial measures fail. This monetary damages provision, unique among trade agreements, has been promoted as a model for free trade agreements. *See* Charles M. Gastle, *Policy Alterna-*

ter 20 governs general disputes not covered by NAFTA's dispute-specific settlement mechanisms. The general dispute settlement mechanism, an outgrowth of the Canada-U.S. Free Trade Agreement[61] (Canada-U.S. FTA),[62] provides for the establishment of binational panels vested with the power to deliver non-binding reports.[63] Though incorporating a right to panel dispute resolution, NAFTA in many ways duplicates the pre-WTO GATT dispute settlement system.[64]

Chapter 20 creates an intergovernmental dispute resolution mechanism to address disputes involving the interpretation and application of NAFTA, as well as alleged NAFTA violations. General disputes under Chapter 20 are handled by a Free Trade Commission (the "NAFTA Commission"), a newly created institution comprised of ministerial-level representatives of the three NAFTA nations administratively assisted by a Secretariat. The NAFTA Commission is one of several new bodies created as institutional safeguards to ensure that NAFTA operates in accordance with each member's expectations.[65]

---

tives for Reform of the Free Trade Agreement of the Americas: Dispute Settlement Mechanisms, 26 LAW & POL'Y INT'L BUS. 735, 808-09 (1995).

61. Canada-U.S. Free Trade Agreement, H.R. Doc. No. 100-216, at 2977 (1988), *reprinted in* 27 I.L.M. 281 (entered into force Jan. 1, 1989) [hereinafter Canada-U.S. FTA]. Specifically, Chapter 20 of NAFTA is modelled after Chapter 18 of the Canada-U.S. FTA which in turn was based in part on Chapter 19 of the Israel-U.S. Free Trade Agreement, Apr. 22, 1985, U.S.-Isr., art. 19, (1985) 24 I.L.M. 653, 664-65. *See* Gary N. Horlick & F. Amanda DeBusk, *Dispute Resolution Under NAFTA*, J. WORLD TRADE 21, 34, n.132 (1993).

62. Hufbauer & Schott, *supra* note 56, at 38. The dispute settlement system in Canada-U.S. FTA was generally considered effective in producing a large number of settlements as well as credible, timely and high quality decisions. *See id.*; David S. Huntington, *Settling Disputes under the North American Free Trade Agreement*, 34 HARV. INT'L L. J. 407, 415 (1993) ("Panel decisions have been marked by high quality, timeliness, and impartiality . . . .") (citing Andreas F. Lowenfeld, *Binational Dispute Settlement Under Chapter 19 of the Canada-United States Free Trade Agreement: An Interim Appraisal*, 24 INT'L L. & POL. 269, 334 (1991) and Gary N. Horlick & F. Amanda DeBusk, *Dispute Resolution Panels of the U.S.-Canada Free Trade Agreement: The First Two and One-half Years*, 37 MCGILL L.J. 575, 581-82 (1992)).

63. Panel reports pursuant to Chapter 20 may include findings of fact, determinations of whether particular measures violate NAFTA and recommendations for the resolution of a dispute. *See* NAFTA, *supra* note 2, art. 2016.

64. *See* Gastle, *supra* note 60, at 795. Ironically, despite its similarity to the weaker and much-maligned pre-WTO GATT system, critics of NAFTA, including some American firms and certain members of the U.S. Congress, favor further weakening its dispute settlement process. *See NAFTA Expansion Seen to Be in Limbo as Republicans Stick Close to Home*, 12 Int'l Trade Rep. (BNA) No. 9, at 421 (Mar. 1, 1995).

65. NAFTA includes a number of new institutional bodies. For example, to oversee implementation of the Labor Side Agreement, NAFTA created a network of new commissions and offices including a Council of Labor Ministers and its administrative arm, the Secretariat of the Commission for Labor Cooperation. The latter, much like the ASEAN Secretariat, prepares agendas for Council meetings, compiles data relevant to the Labor Side Agreement and conducts comparative la-

The Commission is charged with resolving disputes, supervising NAFTA's implementation, and monitoring the work of the various NAFTA committees and working groups.[66] It also enjoys a broad, though ambiguous, authority to consider any other matters relevant to NAFTA's functioning.[67] The Secretariat is charged with providing general assistance to the NAFTA Commission and any panels or committees established pursuant to Chapters 19 and 20.[68] Patterned after the GATT Council and the Canada-U.S. FTA's Commission, the NAFTA Commission has been described as "a political troubleshooting institution rather than an independent arbitral body."[69]

Chapter 20 gives the right to initiate dispute resolution to NAFTA's three federal governments. Under Chapter 20, a complaining government must first request consultations with another NAFTA signatory regarding an existing or proposed action it believes represents a violation or will impact the Agreement.[70] Consultations are a prerequisite to engaging in full Chapter 20 reviews.[71] Interested third parties are entitled to join in the consultations.[72] All parties involved must pledge to use their fullest efforts during the consultation period to reach a "mutually satisfactory resolution" of disputed issues.[73] After thirty days, if no settlement has been concluded, a consulting party may request the NAFTA Commission to meet formally to resolve the dispute.[74] The Commission may offer a variety of alternative dispute resolution measures—including mediation, conciliation, its

---

bor studies. *See NAFTA Labor Cooperation Secretariat Maps Out It's Agenda, Responsibilities*, 12 Int'l Trade Rep. (BNA) No. 41, at 1721, 1722 (Oct. 18, 1995) (discussing the chain of consultations created to informally resolve labor issues arising under the Labor Side Agreement). A Secretariat of the Commission for Environmental Cooperation carries out comparable functions for the Environmental Side Agreement. *See also infra* note 100 (describing the establishment of an advisory committee on private commercial dispute).

Their basic structure has been described as "set of supranational institutions that oversee a four-stage process after a complaint is filed." Garvey, *supra* note 60, at 443. Yet, the Side Agreements create no permanent dispute settlement body relying instead upon a decentralized arbitration process. Indeed, NAFTA's member states specifically rejected such a permanent tribunal favoring a more ad hoc, less judicial system. *Id.* at 447.

66. *See* NAFTA, *supra* note 2, art. 2001.

67. *See id.* art. 2001(e).

68. *See id.* art. 2002(3).

69. David S. Huntington, *Settling Disputes Under the North American Free Trade Agreement*, 34 HARV. INT'L L.J. 407, 416 (1993).

70. *See* NAFTA, *supra* note 2, art. 2003 and 2006.

71. *See id.* art. 2006-08.

72. *See id.* art. 2006(3).

73. *See id.* art. 2006(5). During consultations, parties must provide, on a confidential basis, all information needed to fully examine the impact of disputed measures. *See id.* art. 2006(5)(a) and 2006(5)(b).

74. *See id.* art. 2007(1).

good offices, technical assistance, or expert working groups—to facilitate the parties in reaching their own settlement.[75]

If the NAFTA Commission fails to facilitate a settlement within thirty days after it first convenes, the Commission shall establish an arbitration panel if requested to do so in writing by any consulting party.[76] Under NAFTA, once consultations and Commission-sponsored efforts fail to produce a settlement, parties have a right to panel proceedings. Again, interested third parties may intervene provided they formally notify other parties within seven days of the panel request.[77] Panelists are to be chosen from a permanent list of individuals with expertise in international trade, NAFTA, international trade dispute resolution or law.[78] NAFTA explicitly makes objectivity, reliability and independent judgment the criteria for the selection of panelists.[79] The parties agree upon the chairperson for their five-person panel and then select two panelists who are citizens of another disputing party.[80]

As a matter of right, parties are entitled to at least one hearing before the panel at which they may present initial and rebuttal submissions.[81] All panel proceedings (including submissions, communications and hearings) are confidential, except for the issuance of a panel's final report.[82] Unless the parties otherwise agree to different terms of reference, panels are authorized to make findings, determinations and recommendations after examining party submissions in light of NAFTA's relevant provisions.[83] Disputing parties may request a panel to address the degree of adverse trade effects stemming from a measure which violated NAFTA or impaired or nullified a NAFTA benefit.[84] Panels, on their own initiative or upon request from a party, may request technical reports from experts in fields relevant to the dispute.[85]

---

75. *See id.* art. 2007(5).
76. *See id.* art. 2008.
77. *See id.* art. 2008(3).
78. *See id.* art. 2009.
79. *See id.* art. 2009(2).
80. *See id.* art. 2011.
81. *See id.* art. 2012(1)(a).
82. *See id.* art. 2012(1)(b) and 2017(4).
83. *See id.* art. 2012(3).
84. *See id.* art. 2012(5).
85. *See id.* art. 2014. Article 2015 also permits parties, or a panel on its own initiative so long as the parties do not disapprove, to seek a written report from a scientific review board on any factual issue regarding environmental, health, safety or other scientific matter raised by a disputing party. Parties are given the right to comment on any expert report and have their comments considered by the panel in connection with the report. *See id.* art. 2015(3).

Before issuing any final decision, the panel presents an initial report to the disputing parties.[86] Initial reports must be presented within three months after a panel's establishment. Parties have fourteen days to submit written comments or objections regarding any findings of fact or law or any proposed recommendations.[87] The panel may request additional comments, revise its report or conduct any further proceedings deemed necessary in light of the party submissions.[88] The panel must issue a final report within thirty days after the release of its initial report.[89] The parties transmit the final report to the NAFTA Commission (together with any scientific review board report used) with written comments from parties appended if desired.[90] The Commission, whose decisions are based on consensus,[91] will normally publish a final report within fifteen days after its receipt.[92]

Decisions issued by Chapter 20 panels are not binding upon the parties, nor are they subject to any form of appellate review. Panel reports serve more as focal points for negotiations regarding a party's compliance with NAFTA than obligatory legal decisions. These shortcomings have led at least one commentator to argue that the WTO system, bolstered by appellate review and enhanced surveillance mechanisms, should be favored over NAFTA's general dispute settlement provisions.[93]

Disputing parties are directed to agree upon a final resolution of the disputed issues which "normally shall conform" to the final report's findings and recommendations.[94] NAFTA requires that, whenever possible, non-complying parties conform to panel reports by removing or halting implementation of offending measures or, alternatively, by paying the complaining party appropriate monetary compensation.[95] If no agreement is reached within thirty days of the final report's receipt, the complaining party may retaliate against the offending party with economic sanctions, if possible in the same sectors as affected by the offending measures. Sanctions must represent an amount

86. *See id.* art. 2016.
87. *See id.* art. 2016(2) and (4).
88. *See id.* art. 2016(5).
89. *See id.* art. 2017(1).
90. *See id.* art. 2017(3).
91. *See id.* art. 2001(4).
92. *See id.* art. 2017(4).
93. *See* Gastle, *supra* note 60, at 796-99. According to Gastle, utilizing NAFTA mechanisms is justified only where NAFTA offers advantages in enforcement or damage awards as illustrated by its use of binding arbitration for investment disputes and the availability of monetary damages for environmental and labor violations. *Id.* at 820.
94. *See* NAFTA, *supra* note 2, art. 2018.
95. *See id.* art. 2018(2).

equivalent to the lost economic benefits.[96] The sanctioned party may request the NAFTA Commission to establish a panel to review sanctions viewed as "manifestly excessive."[97] Unlike the WTO, NAFTA makes no provision for the surveillance or monitoring of party compliance with Chapter 20 panel decisions.

Interestingly, NAFTA's framers also addressed situations where private parties raise NAFTA issues in domestic judicial or administrative proceedings involving private parties. Input from the NAFTA Commission or individual parties to NAFTA is permitted.[98]

In the sphere of private trade disputes, NAFTA affirmatively obligates signatory governments to promote dispute settlement. When private trade disputes arise in the NAFTA free trade area, NAFTA governments are obligated, "to the maximum extent possible, [to] encourage and facilitate the use of arbitration and other means of alternative dispute resolution."[99] To this end, NAFTA governments must provide mechanisms to ensure that arbitration agreements and arbitral awards are recognized and enforced.[100]

In effect, NAFTA acts as a bully pulpit for dispute settlement in the region. Yet, while NAFTA encourages disputes and private commercial disputes, the private sector is generally excluded from its dispute settlement system. Furthermore, even NAFTA's member states are left without any provisions empowering a NAFTA body to ensure decisions are effected.[101] Still,

---

96. *See id.* art. 2019.

97. *See id.* art. 2019(3).

98. If solicited by a domestic court or regulatory body, or if deemed appropriate by a NAFTA party, the NAFTA Commission may submit a response representing the consensus of NAFTA's members. Individual NAFTA parties may submit their own views if no consensus is reached on a Commission statement. *See id.* art. 2020.

99. *See id.* art. 2022(1).

100. *See id.* art. 2022(2). Complying with the *1958 United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards* (the "New York Convention") is one way to meet the obligations of this provision. NAFTA thus is designed to promote broader acceptance of international agreement on dispute settlement. It also directs the NAFTA Commission to establish a body to monitor general issues of dispute resolution and arbitration arising in the free trade area. An Advisory Committee on Private Commercial Disputes is charged with the task of reporting on the availability, use and effectiveness of arbitration and other dispute settlement procedures in the NAFTA region. *See id.* art. 2022(4).

101. Article 2019 does authorize a NAFTA party to suspend NAFTA benefits of a party who refuses to comply with a panel decision or reach agreement to resolve a disputed matter. However, the NAFTA Secretariat is only empowered to establish a panel to review the propriety of the benefits suspended, i.e., whether the level of suspended benefits was "manifestly excessive." *See* NAFTA, *supra* note 2, art. 2019. In no sense is NAFTA's institutional weight brought to bear against recalcitrant NAFTA parties to enforce compliance with panel reports. In simple terms, if a NAFTA violator declines to abide by a panel report despite negotiations and a com-

NAFTA has served as a useful backdrop that, if not prompting arbitration reform, at least influenced its members' acceptance of modern arbitral dispute resolution mechanisms.[102]

NAFTA's expansive institutional structure is overly developed for ASEAN's needs. Yet, the NAFTA Secretariat, as a political troubleshooting body, serves as a model for a revamped AFTA Council or ASEAN Secretariat. Expanding the AFTA Council's role to encompass a broader range of duties would serve AFTA's institutional needs. ASEAN, however, should be wary of emulating NAFTA's Chapter 20 dispute settlement framework. Unlike the WTO, Chapter 20 panel reports are both non-binding and unsupported by any genuine enforcement capabilities. NAFTA members rely upon self-help remedies to redress wrongs identified in panel reports. If negotiations fail to produce a resolution complying with a panel report, parties must resort to unilateral trade sanctions.[103] Ultimately, enforcement is left dependent upon the political and economic leverage of the NAFTA parties. While recognizing that trade disputes cannot be disassociated from political concerns, ASEAN should resist installing a purely political dispute settlement mechanism.

II. AFTA

In January 1992, the ASEAN member states signed the Singapore Declaration pledging to establish a free trade area, AFTA.[104] Utilizing a Common Effective Preferential Tariff ("CEPT") system,[105] AFTA was designed as a vehicle for re-

---

plaining party in response suspends a proper level of benefits, NAFTA provides no further institutional measures to pressure the violator's compliance.

102. In the case of Mexico, NAFTA, though not the driving force behind the reform of its domestic arbitration laws, did at least influence the pace of reform. *See* Michael Tenenbaum, *International Arbitration of Trade Disputes in Mexico: The Arrival of the NAFTA and New Reforms to the Commercial Code*, J. INT. ARB., Mar. 1995, at 76-77 (1995) (discussing the nature and impact of Mexico's 1993 reforms in its arbitration laws).

103. Unilateral suspensions of trade benefits, however, unfairly disadvantage smaller countries confronting a larger economic state violators who are little impacted by such suspensions. JOHN H. JACKSON, THE WORLD TRADE AND THE LAW OF GATT 185-86 (1969).

104. Singapore Declaration of 1992, *done* Jan. 28, 1992, 31 I.L.M. 498 [hereinafter The Singapore Declaration]; *ASEAN Free Trade Area (AFTA)*, RIS BACKGROUNDER, 1993, at 5; Robert L. Curry, Jr., *AFTA and NAFTA and the Need for Open Regionalism*, SOUTHEAST ASIAN AFFAIRS, 1993, at 57. In actuality, AFTA is defined by three ASEAN documents: the Singapore Declaration of 1992; the Framework Agreement on Enhancing ASEAN Economic Cooperation; and the Agreement on the Common Effective Preferential Tariff.

105. The heart of AFTA is its Common Effective Preferential Tariff ("CEPT") scheme. Initially, the CEPT scheme included two tracks, a 15-year tariff phased reduction plan for products with the exception of unprocessed agricultural goods, excluded "sensitive" items, and a 10-year "fast track" for certain other items. In the

newed ASEAN economic cooperation and a means to expand the ASEAN market and spur export-oriented growth by enhancing the region's attractiveness to foreign investment.[106] Facing heightened competition for capital,[107] AFTA was in many ways ASEAN's answer to NAFTA.[108]

---

end, all tariffs would range from zero to five percent. Products eligible for AFTA's preferential tariff scheme require forty percent local (i.e., ASEAN) content. The CEPT Agreement also mandates the elimination of non-tariff barriers. *See* Agreement on the Common Effective Preferential Tariff (CEPT) Scheme for the ASEAN Free Trade Area, *done* Jan. 28, 1992, 31 I.L.M. 513.

In 1994, ASEAN economic ministers endorsed a plan to accelerate AFTA's tariff reduction schedule by five years from its original 15-year timetable. Under the new plan, AFTA would reach the zero-to-five percent tariff goal for "fast-track" items by the year 2000 and for all AFTA tariff lines, including items on the "temporary exclusion" list, by 2003. *ASEAN Ministers Agree to Speed Up Implementation of Free Trade Area*, 11 Int'l Trade Rep. (BNA) No. 38, at 1495 (Sept. 28, 1994); *Critics Claim AFTA Benefits Exaggerated Despite ASEAN Claims*, 12 Int'l Trade Rep. (BNA) No. 49, at 2042, 2043 (Dec. 13, 1995) [hereinafter *Critics Claim AFTA Benefits Exaggerated*]. In December 1995, the AFTA Council agreed that ASEAN members should eliminate non-tariff barriers by 2003. *See* Pruzin, *supra* note 17, at 2041. Ultimately, the result is to be a free trade area.

106. The ASEAN Secretariat, in its first quarterly publication on AFTA, stated:

> The ultimate objective of AFTA is to increase ASEAN's competitive edge as a production base geared for the world market. . . . As the cost of competitiveness of manufacturing industries in ASEAN is enhanced and with the larger size of the market, investors can enjoy economies of scale in production. In this manner, ASEAN hopes to attract more foreign direct investment into the region.

ASEAN SECRETARIAT, AFTA READER: QUESTIONS AND ANSWERS ON THE CEPT FOR AFTA 1 (1993). *See also ASEAN: New Strategies for Growth, in* SOUTHEAST ASIA: CHALLENGES OF THE 21ST CENTURY 15, 19 (1994) (asserting that by creating a larger ASEAN market free of border restrictions, AFTA will attract foreign and regional investment); *APEC and ASEAN: New Roles, New Directions, in* SOUTHEAST ASIA: CHALLENGES OF THE 21ST CENTURY 55, 67 (1994) (discussing how AFTA was designed to promote more competitive products and attract foreign direct investment); Suthipand Chirathivat, *A Step Towards Intensified Economic Integration?, in* ASEAN: FUTURE ECONOMIC AND POLITICAL COOPERATION 5, 7 (Wolfgang Moellers & Rohana Mahmood eds., 1992).

AFTA's proponents who laud its prospects for enhancing ASEAN trade are not without their detractors. For example, a director of the Thai Development and Research Institute, a leading Thai policy institute, maintains that ASEAN has oversold AFTA's benefits claiming that AFTA "will not have a big impact on trade." *See Critics Claim AFTA Benefits Exaggerated, supra* note 105, at 2042. A second critic has argued that ASEAN, by establishing AFTA as a "trade bloc," will forfeit the larger economic gains of an "open regionalism" approach under which it lowers trade barriers to all imports on a most-favored-nation basis. *See* Dean A. DeRosa, *Southeast Asia's Timid Traders*, FAR E. ECON. REV., Jan. 11, 1996, at 27.

107. For a discussion of the factors leading to AFTA's birth, see Seiji Naya & Pearl Imada, *The Long and Winding Road Ahead for AFTA, in* AFTA: THE WAY AHEAD 53, 55-58 (Perl Imada & Seiji Naya eds., 1992).

108. *See id.* at 57-58 (discussing ASEAN's concerns regarding NAFTA). *See also* Sharon Kwong, *AFTA and ASEAN*, RIS BACKGROUNDER 1993, 14 (discussing ASEAN's motivations for establishing AFTA to develop markets and maintain its competitiveness in drawing foreign investment); Kim & Weston, *supra* note 58, at 298 (NAFTA and regional initiatives in Europe revived ASEAN interest in a free

ASEAN's ambitious economic plans for AFTA, supported by a relatively steady political consensus, were drafted without contemporaneous plans for legal reforms. Though presently under consideration, AFTA currently includes no formal, independent dispute resolution mechanism. In the AFTA Framework Agreement, the brief and somewhat ambiguous dispute settlement provision reads:

> Any differences between the Member States concerning the interpretation or application of this Agreement shall, as far as possible, be settled amicably between the parties. Whenever necessary, an appropriate body shall be designed for the settlement of disputes.[109]

The Agreement on the Common Effective Preferential Tariff (CEPT) Scheme for the ASEAN Free Trade Area (AFTA)[110] (the "CEPT Agreement") contains a nearly identical consultation provision except that it creates a ministerial-level council, commonly referred to as the AFTA Council,[111] to resolve AFTA disputes.[112]

Other provisions of the CEPT Agreement reinforce the AFTA Council's primary role in dispute settlement. The AFTA Council, "guided" by the ASEAN Economic Ministers Meeting ("AEM"), oversees consultations between AFTA members who disagree over "any matter affecting the implementation" of the

---

trade area); Kurus, *supra* note 8, at 28 (noting the fear of economic regionalism that surrounded AFTA's negotiation); Lee Tsao Yuan, *The ASEAN Free Trade Area: The Search for a Common Prosperity*, 8 ASIAN-PAC. ECON. LITERATURE, 1, 1-2 (1994) (noting the coincidence of internal and external political and economic factors leading to AFTA).

109. Framework Agreement on Enhancing ASEAN Economic Cooperation, done Jan. 28, 31 I.L.M. 506.

110. Agreement on the Common Effective Preferential Tariff (CEPT) Scheme for the ASEAN Free Trade Area (AFTA), *done* Jan. 28, 1992, 31 I.L.M. 513, 520 [hereinafter CEPT Agreement].

111. The AFTA Council, a ministerial-level body consisting of a representative from each ASEAN member and the Secretary General of the ASEAN Secretariat, stated in a December 1992 Press Statement that it will "provide the institutional mechanism to resolve disputes and provide immediate solution and settlement." Press Statement from *Third Meeting of the AFTA Council for CEPT*, ASEAN: FUTURE ECONOMIC AND POLITICAL COOPERATION 22 (Wolfgang Moellers & Rohana Mahmood eds., 1992).

112. CEPT Agreement, *supra* note 110, art. 8, § 3. Article 8 of the CEPT Agreement reads in part:

> Any differences between the Member States concerning the interpretation or application of this Agreement shall, as far as possible, be settled amicably between the parties. If such differences cannot be settled amicably, it shall be submitted to the [AFTA] Council . . . and, if necessary, to the AEM.

AFTA agreements or members who believe AFTA benefits have been nullified or impaired by another member.[113]

Reading the AFTA agreements as a unit, the basic structure of AFTA's current dispute settlement process clearly emerges. From the outset, ASEAN envisioned AFTA disputes as government-to-government disputes. Parties with disagreements relating to AFTA are expected to first consult amongst themselves. If some amicable solution cannot be reached by the parties, the AFTA Council, and the AEM as a last resort, may help the parties resolve a dispute.

Two aspects of AFTA's present dispute settlement process should be noted. First, dispute settlement under the auspices of the AFTA Council is only available for member states; at present, the private sector is formally excluded from AFTA dispute settlement. Second, the current AFTA dispute settlement process by definition rests entirely upon closed-door political settlements. Private interstate negotiations are the bedrock of AFTA's present dispute settlement scheme.[114] Such a politicized dispute settlement mechanism comports with ASEAN's roots as an organization founded primarily to serve political ends.[115] The resulting political consultations process, however, does not substitute for a genuine dispute settlement system.

Commentators have long recognized the need for an AFTA dispute settlement system,[116] particularly to encourage active pri-

---

113. *Id.* art. 8, §§ 1, 2. Operational Certification Procedures for the Rules of Origin of the ASEAN Common Effective Preferential Tariff Scheme for the ASEAN Free Trade Area sets out procedures regarding the issuance and verification of certificates of origin for AFTA products. *See* ASEAN SECRETARIAT, *supra* note 106, at 57. The Certification Procedures also outline a dispute settlement process. Rule 22 provides:

> In the case of a dispute concerning origin determination, classification of products or other matters, the Government authorities concerned in the importing and exporting Member States shall consult each other with a view to resolving the dispute, and the result shall be reported to the other Member States for information. In the case of where no settlement can be reached bilaterally, the issue concerned shall be decided by the SEOM [Senior Economic Officials Meeting].

Id. at 68. As the Certification Procedures highlight, AFTA disputes are expected to be resolved by the disputants informally, or as a last resort by ASEAN senior officials.

114. In this regard, AFTA closely resembles the prior GATT system. *See* Huntington, *supra* note 62, at 409-10.

115. *See supra* note 8 and accompanying text.

116. *See, e.g.*, Margaret Rozario & Chuah Bee Hwa, *AFTA—Questions and Answers*, RIS BACKGROUNDER, 1993, at 7; Sharon Kwong, *AFTA and ASEAN*, RIS BACKGROUNDER, 1993, at 16; Anwar Nasution, *Open Regionalism: The Case of ASEAN Free Trade Area*, *in* ASEAN: FUTURE ECONOMIC AND POLITICAL COOPERATION 16 (Wolfgang Moellers & Rohana Mahmood eds., 1992); *ASEAN: New Strategies for Growth*, SOUTHEAST ASIA: CHALLENGES OF THE 21ST CENTURY 15, 34 (1994) (asserting that a dispute settlement mechanism should be established to act as

vate sector participation.[117] ASEAN, after publicly disavowing a dispute settlement system, has only recently committed itself to creating such formal mechanisms. Given ASEAN's abhorrence of legalistic approaches and creeping institutionalism, some experts had called a formal dispute resolution system for AFTA "unthinkable."[118] Recent events, however, demonstrate that ASEAN is prepared to think the unthinkable. At the September 1995 meeting of the ASEAN Economic Ministers, ASEAN publicly declared its intention to create a dispute settlement system for AFTA in 1996.[119]

To date, disagreements over AFTA have been resolved at the ministerial level by the AFTA Council and the AEM. However, AFTA disputes thus far have been primarily macroeconomic differences in policy.[120] For example, members have debated tariff timetables, product coverage and individual start dates.[121]

Yet, AFTA, founded upon three short documents that total a mere 21 pages, covers a host of potentially thorny legal issues that require the interpretation of AFTA's basic agreements. Rules of origin,[122] non-tariff barriers,[123] and dumping are only three examples of troublesome technical issues that AFTA must

---

a sort of ASEAN court of justice); Jeffrey A. Kaplan, *AFTA Needs a Dispute Resolution System*, NEW STRAITS TIMES, (Malay.) Sept. 3, 1994, at 15. More generally, one commentator, comparing AFTA to NAFTA and the Europe Agreements ("EAs"), observed that "the institutional underpinnings of free trade are given much more attention in Nafta and the EAs than in Afta." Rolf J. Langhammer, *AFTA—A Step Towards Intensified Economic Integration?*, *in* ASEAN: FUTURE ECONOMIC AND POLITICAL COOPERATION 31, 44 (Wolfgang Moellers & Rohana Mahmood eds., 1992).

117. Ariff, *supra* note 9, at 24.

118. *Id.* ("A formal dispute settlement machinery for ASEAN is almost unthinkable, as it is accustomed to an informal, casual approach that is hardly amenable to any legalistic framework."). Other commentators, while viewing a transparent mechanism as essential, identified creating an AFTA dispute settlement mechanism as a prime candidate for controversy. Naya & Imada, *supra* note 107, at 58. *But see* Nobuyuki Yasuda, *Law and Development in ASEAN Countries*, 10 ASEAN ECON. BULL. 144, 152-53 (1994) (discussing factors favoring the potential for greater harmonization and integration of ASEAN laws).

119. *See supra* note 17 and accompanying text.

120. *See supra* note 18.

121. *See* Ariff, *supra* note 9, at 24. Professor Ariff notes that "[t]here has been much horse trading with respect to content, timing and pace of tariff reductions." Indeed, actual start dates for implementation have varied for AFTA members. *Id.* For additional discussion of AFTA's macroeconomic adjustments and disputes, see *supra* notes 10 (Vietnam permitted an additional three years) and 18 (Indonesia allowed a temporary exclusion for certain unprocessed agricultural products).

122. *See* Akrasanee & Stifel, *supra* note 8, at 39-40 (discussing the difficulty and importance of enforcing strict rules of origin for AFTA products).

123. In one private sector survey, non-tariff barriers were cited as the most serious deterrent to increased ASEAN trade. *See* Sree Kumar, *Policy Issues and the Formation of the ASEAN Free Trade Area*, *in* AFTA: THE WAY AHEAD 71, 83-87

clarify. Trade disputes over these and other issues will assuredly arise.[124] ASEAN has recognized this fact, implicitly conceding that, as presently constituted, the AFTA Council—responsible for supervising, coordinating and implementing the entire CEPT scheme—cannot provide an adequate settlement process for such disputes.[125]

Put another way, the present AFTA Council-AEM consultations process cannot effectively manage micro-disputes over the application of AFTA's local content rules, charges of dumping, problems with import licenses and customs procedures or the existence of domestic cartels or business arrangements which effectively act as non-tariff barriers to trade. Such disputes are less likely to be government-to-government, but rather business-to-business, or perhaps business-to-government. The private sector cannot afford to delay business decisions while such disputes filter up the AFTA organizational hierarchy for resolution by ASEAN ministers. Accordingly, it is crucial that ASEAN produce an AFTA dispute settlement mechanism responsive to both the needs of AFTA member states and the private sector.

To ensure the credibility of AFTA to the private sector, unquestionably the linchpin for AFTA's success, a transparent, independent dispute resolution system must exist. Creating a dispute resolution mechanism requires careful preparatory work.[126] So far, neither ASEAN nor any commentators have considered the issues thoroughly or have publicly proposed a dispute settlement system for AFTA.[127] The cause is not entirely

---

(Pearl Imada & Seiji Naya eds., 1992) (discussing the significance of non-tariff barriers to intra-ASEAN trade development).

124. *See* Naya & Imada, *supra* note 107, at 58-63 (discussing critical legal issues which ASEAN will need to develop and clarify).

125. As noted earlier, many commentators view the present process as inadequate. *See supra* note 116. The AFTA Council is not presently a standing body with a centralized, permanent support staff. Rather, officials from each ASEAN member with the assistance of the ASEAN Secretariat complete the preparations for upcoming Council meetings. One noted AFTA observer has stated that to ensure AFTA's success:

> there must be an institutionalized enforcement and dispute settlement procedure which is objective and unbiased. . . . The institutional mechanism for monitoring, dispute handling and enforcement will be essential if NTBs [non-tariff barriers] are to be dismantled and the private sector be given a recourse for settling outstanding cross-border trade issues. Member governments must be willing to delegate such responsibility and powers as needed to the constituted body if unfair practices are not to jeopardize the formation of the free trade area.

Kumar, *supra* note 123, at 90-91.

126. *See* Naya & Imada, *supra* note 107, at 64.

127. Professor Ariff has proposed that an independent arbitration body be established under the auspices of the Society General of Surveillance. *See* Mohamed Ariff, *More Trade Barriers Should Go*, THE STAR, (Malay.) Apr. 27, 1994, at 20. The Federation of Malaysian Manufacturers supports the creation of an arbitration body

lost. Since its inception, ASEAN has continually demonstrated a flexible practicality: the ability to forge consensus on difficult issues when its members perceive serious, common obstacles or threats to AFTA's integrity. When national interests have converged, usually prompted by common external pressures, ASEAN has mustered the political will to move forward.[128] AFTA is a prime example. Disputes will assuredly arise, as demonstrated by Indonesia's plan to exclude a set of previously scheduled agricultural products. ASEAN's resolution of Indonesia's threat to backtrack on the agreement incorporating unprocessed agricultural goods into AFTA's tariff reduction scheme and its concurrent commitment to create a dispute resolution framework illustrate ASEAN's pragmatism.

In many ways, AFTA is a confidence game. To gain the confidence of the ASEAN private sector, crucial to AFTA's success, and international investors, whom AFTA is aiming to lure, ASEAN must formulate a credible, flexible dispute settlement system for AFTA.

III. A MODEL DISPUTE SETTLEMENT MECHANISM FOR AFTA

It is time for ASEAN not only to imagine the unthinkable, but commence the task of realizing it. Having faced the reality that an AFTA dispute settlement mechanism is needed, ASEAN must move forward without delay. Unquestionably, an AFTA dispute settlement mechanism must fit comfortably into ASEAN's informal, consultative style. While drawing on some useful, effective elements of the WTO and NAFTA dispute settlement systems, AFTA must incorporate its own unique mechanism in character with ASEAN's more consensus-based decisionmaking. More importantly, any proposed dispute settlement mechanism must be both politically acceptable to ASEAN and supportive of the private sector-led growth that AFTA is designed to bolster. Given these parameters, creating an acceptable yet workable AFTA dispute settlement mechanism remains feasible.

---

with binding authority. *Id.* It also suggested that disputes between two ASEAN countries should be arbitrated by nationals of other uninvolved ASEAN countries. *Id.* The ASEAN Federation of Glass Manufacturers, at a 1993 meeting of the ASEAN Chamber of Commerce and Industry, proposed the establishment of an arbitration body under the auspices of the AFTA Council to settle trade disputes arising from AFTA. *Businesses Suggest Arbitration Body for AFTA*, BUS. TIMES (Malay.), Jan. 16, 1993, at 3.

128. *See* Kurus, *supra* note 8, at 30-39 (discussing how the coalescing of political will, or failure to do so, has determined the progress of ASEAN economic cooperation).

Like NAFTA, AFTA's dispute settlement system can be designed primarily as a dispute avoidance mechanism.[129] With that goal in mind, this Section discusses the issues that ASEAN must address to create such a mechanism. This Article posits, at a minimum, that any AFTA dispute settlement mechanism must incorporate two features: a consultations process and an arbitration process. The Appendix of this Article offers an abbreviated model dispute settlement agreement for AFTA. It does not incorporate every conceivable provision which ASEAN should include in a dispute settlement agreement. Rather, it offers a roadmap of key issues for ASEAN to address. Without commenting on each provision of the model AFTA arbitration agreement, this Section assesses selected core issues that ASEAN must unavoidably consider.

A. JURISDICTION

In creating an AFTA dispute settlement mechanism, the initial issue concerns what types of disputes it will administer. At a minimum, an AFTA dispute settlement mechanism must resolve claims that a provision of AFTA has been violated or that a particular national law or regulation is inconsistent with AFTA. Following the lead of the WTO and NAFTA, AFTA's dispute settlement mechanism should also address so-called "non-violation" claims that AFTA benefits have been substantially reduced or impaired.[130] Permitting such nullification and impairment claims will prevent AFTA member governments from carrying out actions not explicitly covered by AFTA but which severely undermine trade benefits AFTA was intended to deliver. Loss-of-benefits claims are a powerful deterrent against governmental attempts to gain advantage for domestic markets, industries or products by skirting the letter and spirit of AFTA.

ASEAN is unlikely to fret over accepting such claims as valid AFTA disputes amenable to dispute settlement, at least when raised by member states. Accepting such claims, however, does imply yielding to some degree a government's freedom to operate. The CEPT Agreement already subjects non-violation disputes to its present dispute settlement mechanism if raised by a member government.[131] Moreover, ASEAN members have joined the WTO, which also countenances such claims in its dispute settlement system.

---

129. *See* Kristin L. Oelstrom, *A Treaty for the Future: The Dispute Settlement Mechanisms of the NAFTA*, 25 LAW & POL. INT'L BUS. 783, 787 (1994) (discussing how NAFTA's general dispute settlement system is designed primarily as a dispute avoidance mechanism).

130. *See* NAFTA, *supra* note 2, art. 2012(5); DSU, *supra* note 26, § 26.

131. *See supra* note 113 and accompanying text.

Practices that undercut AFTA benefits, on which AFTA may be silent, will be no less a problem for ASEAN than outright breaches of AFTA provisions. To meaningfully insure AFTA's long-term integrity, granting an AFTA dispute settlement mechanism jurisdiction over both violation and non-violation claims is vital. An appropriate AFTA provision might read as follows:

> The dispute settlement procedures of this Agreement shall apply with respect to any dispute between persons, as defined in this Agreement, regarding the interpretation or application of an AFTA agreement or where a person considers that a measure of an AFTA signatory is or will be inconsistent with AFTA obligations or cause a nullification or impairment of a benefit created by AFTA.

B. Permissible Parties

Who will be permitted access to an AFTA dispute settlement mechanism is a difficult issue for ASEAN, as it is in any trade agreement. The present process ensures that AFTA disputes, if not resolved privately by the parties, are ultimately resolved by the AEM. This process enables ASEAN ministers to retain maximum flexibility to operate, shielding disagreements between AFTA member states from the public while maintaining discretion to select what issues are addressed and what decisions, if any, are publicly revealed. Private sector disputes will not be readily resolved by such an opaque process. The private sector needs a speedy, transparent mechanism to ensure its ability to implement business plans efficiently.

The present process, enhanced by an external arbitration mechanism, could be retained for inter-governmental AFTA disputes. In the isolation of non-public ASEAN meetings, disputes between AFTA members can be resolved outside the often uncomfortable glare of public scrutiny. This dispute settlement feature differs little from both the WTO and the general dispute mechanism in NAFTA. Yet, it permits ASEAN members greater leeway than WTO and NAFTA disputants to seek consensus internally unshackled by legalistic formalities, non-governmental appellate review or public inquiry.

Purely private sector disputes—one company accusing another company of violating AFTA (for example, nullifying AFTA's commitment to unobstructed intra-ASEAN trade by blocking other ASEAN companies from entering a market through the use of domestic cartels or exclusive business arrangements)—are best served, however, by a swifter, more independent process. A more difficult matter is whether and to what extent the private sector should have direct access to an AFTA

dispute settlement process for claims that a member government has violated AFTA.[132] This is potentially the most vital and difficult dispute scenario. AFTA members are the most likely entities to act inconsistently with AFTA's requirements; the private sector will be most immediately and financially impacted by such actions. The risk for ASEAN in permitting such claims is that a failure to negotiate a settlement may lead to the political discomfort of a more visible, binding arbitration decision. Allowing private parties to challenge governmental actions, however, spares a private disputant's government from any domestic pressures to confront another ASEAN member over an alleged breach of AFTA.

International trade agreements have not typically granted private parties access to dispute settlement mechanisms. In this vein, the WTO and NAFTA's general settlement system represent the norm. The NAFTA Side Agreements are a notable exception to the present norm. This should not dissuade ASEAN from incorporating private sector disputes into AFTA's dispute settlement mechanism. Unlike AFTA, both the WTO and NAFTA are rooted in a state-centric view of international trade in which governments are the primary actors and national policies are the primary focus. Expanding a dispute settlement system to encompass the private sector would represent a paradigmatic shift from this statist orientation. ASEAN, however, consciously developed AFTA to harness the private sector as the engine of economic cooperation. Accepting private sector disputes into AFTA's dispute settlement system should properly be viewed as a tangible expression of ASEAN's private sector-centered perspective on trade rather than a step toward increased legalization.

AFTA will gain a maximum level of reliability and credibility by establishing a uniform mechanism that grants the private sector standing to raise claims against AFTA member governments. Enjoying the benefits of AFTA trade liberalization is most important to the ASEAN private sector. For the private sector, it also removes the need to press home governments to pursue a case on their behalf, instantly transforming any dispute into a national issue.

The following is a proposed provision to define permissible parties to AFTA dispute settlement mechanisms:

---

132. In addition to governmental parties, NAFTA, in the context of antidumping and countervailing disputes and investment disputes, allows private individuals and companies to settle disputes with governments directly. *See* NAFTA, *supra* note 2, ch. 19 (dumping and countervailing dispute settlement) and ch. 11(B) (investment dispute settlement); Oelstrom, *supra* note 129, at 790-92, 800. Yet, trade agreements permitting direct access to private parties are the exception rather than the rule.

> Any person who has suffered or will suffer a loss or damage caused by another person due to an interpretation or application of an AFTA agreement or a measure that is or will be inconsistent with an AFTA agreement or cause a nullification or impairment of a benefit created by AFTA may commence proceedings pursuant to this Agreement. The term "person" is defined as any natural person, business entity or signatory of AFTA.[133]

AFTA's attractiveness to the business community will be enhanced by the predictability and consistency of an independent AFTA dispute settlement process fully accessible to the private sector. Such accessibility is a necessity for international commercial transactions. Empowering the private sector to raise claims against AFTA members likewise ensures that it has an ongoing stake in, and responsibility for, AFTA's success. Hence, ASEAN's private sector will be fully engaged in AFTA's progress. Such a mechanism need not interfere with ASEAN's chosen tradition of informally resolving intra-ASEAN governmental disputes by negotiation and consensus. As elaborated upon below, such a mechanism also need not remove ASEAN from the dispute settlement process.

C. Disputes Violating Both AFTA and GATT

Conceivably, an action violating AFTA may concurrently violate GATT. ASEAN must consider how to handle disputes involving violations of both AFTA and GATT. With certain exceptions,[134] NAFTA permits parties with disputes arising from both NAFTA and GATT to elect either forum for their dispute settlement, though commentators have promoted the WTO as the more effective system.[135] ASEAN, while having different priorities, may choose a similar provision.

Strictly speaking, to minimize the use of an AFTA mechanism, parties with a dual AFTA-GATT dispute who wish a formal resolution might be required to use the WTO mechanisms. Yet, ASEAN, exhibiting a greater inclination to avoid the WTO's highly legalistic structure, may design a mechanism for AFTA that aggressively encourages informal dispute settlement while sidestepping the WTO's legalistic system.

---

133. ASEAN plans to consider establishing a more formal dispute settlement mechanism for member governments that arise from AFTA or other ASEAN agreements. To establish a distinct dispute settlement mechanism for ASEAN members, building upon the AFTA Council's present role would be a sound starting point.

134. Certain disputes related to the environment, sanitary and phytosanitary measures and standards-related measures must be pursued exclusively under NAFTA's dispute settlement provisions. *See* NAFTA, *supra* note 2, art. 2005.

135. *See* NAFTA, *supra* note 2, art. 2005; Castle, *supra* note 93 and accompanying text.

ASEAN can both encourage informal settlement while minimizing resort to any formal AFTA dispute resolutions (i.e., arbitration) by requiring parties with AFTA disputes, even those which include an alleged GATT violation, to initially utilize AFTA's consultations process.[136] If no adequate resolution is found, parties should be compelled to settle all disputes with a GATT component using the highly structured WTO process. Such a provision might read as follows:

> Persons alleging that they have suffered a loss or damage due to a breach of the provisions of an AFTA agreement, if they are unable to settle their disputes amicably and seek a formal resolution of their claims, must use the consultations process provided in this Agreement. This requirement applies, inter alia, to disputes arising from both AFTA and the General Agreement on Tariffs and Trade, or any successor agreement, ("GATT") including the Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations.
> If a claim arising under both an AFTA agreement and GATT is not resolved at the conclusion of the consultations process provided for in this Agreement, parties must refer such claim to the dispute settlement procedures of the World Trade Organization ("WTO"). Once such a claim has been referred to the WTO, the WTO forum shall be used to the exclusion of the procedures provided in this Agreement.

Parties adverse to the WTO's more legalistic, transparent, and public dispute resolution process may be doubly encouraged to settle disputes before an automatic transfer to the WTO is triggered. Requiring parties who fail to resolve disputes during an extended AFTA consultations phase to begin settlement efforts anew before the WTO will underscore this point. Disputants will be adverse to expending time and expense for an AFTA consultations process only to be compelled to pursue an unresolved dispute in a lengthy, international WTO dispute settlement process.[137]

In considering such a provision, ASEAN must assess its priorities. If ASEAN seeks to avoid abdicating any portion of its ability to interpret AFTA, the WTO should not be presented as the formal dispute settlement mechanism of first resort. If, however, the primary goal is to discourage disputants from using the AFTA mechanism, a WTO preference serves this aim. It may also relieve ASEAN from confronting issues which might prove

136. NAFTA incorporates a similar requirement for antidumping and countervailing duty disputes. Parties alleging such violations of NAFTA may not resort to the GATT for settlement. Oelstrom, *supra* note 129, at 791.

137. The WTO dispute settlement process can last up to eleven months from the request for consultations until a binding panel decision is finally adopted by the DSB (fourteen months if a panel report is appealed). *See* DSU, *supra* note 26, art. 4.7, 20.1.

divisive and challenge its ability to maintain consensus. Naturally, if ASEAN disagrees with any WTO decision that impacts AFTA, it could issue a clarification of AFTA's provisions or obligations.

D. The Initial Steps: Dispute Avoidance

Given ASEAN's preference for informal dispute settlement, any AFTA dispute settlement process should stress dispute avoidance during its initial stages by preventing delays and forcefully favoring informal settlements. In this respect, AFTA would share common ground with NAFTA's multi-layered approach to alternative dispute resolution.[138]

Delay is the bane of the private sector. AFTA should have deadlines for each phase of the dispute settlement process and should not tolerate delaying tactics by non-responsive parties. To encourage negotiated settlements over binding arbitrations, ASEAN should front-weigh the time periods allotted for early settlement phases. To press disputing parties to settle before the arbitral process begins, ASEAN should permit longer time periods for early phases of alternative dispute resolution while creating stringent deadlines for later arbitration stages. Parties faced with a swift, streamlined process of binding arbitration will be more inclined to informally resolve their AFTA disputes.

Such provisions might read:

> A person wishing to raise a claim must provide a written notice of dispute together with a brief summary of the legal basis of the claim and the relief sought to a party that has allegedly breached an AFTA agreement, implemented a measure that is or will be inconsistent with an AFTA agreement, or nullified or impaired a benefit from an AFTA agreement, with copies to the AFTA Council and to the ASEAN Secretariat. All parties to a dispute must enter into consultations pursuant to this Agreement and make every effort in good faith to settle the dispute amicably.
>
> If a person receiving a notice of dispute does not respond within ten days, or does not enter into consultations within a period of no more than 30 days from the date of the notice,

138. The initial phases of a NAFTA dispute require parties to engage in negotiations and consultations privately and later under the auspices the NAFTA Commission aided by technical advisors or working groups, if needed, which can recommend solutions to the parties. *See* NAFTA, *supra* note 2, art. 2006, 2007:5.

The process set forth in NAFTA's Side Agreements is also instructive. Though culminating in a mandatory arbitration process, the most notable aspect of the detailed elaboration of this process is the multiple provisions for consultations between the parties, and for mediation before, during and after arbitration, allowing a many-layered opportunity to modify behavior and avoid the imposition of sanctions. Garvey, *supra* note 60, at 443-44 (outlining the Side Agreement's dispute settlement process).

> the complaining party shall provide written notice to the ASEAN Secretariat which shall direct the non-responsive person to immediately enter into consultations pursuant to this Agreement. If the non-responsive person fails to enter into consultations within 10 days from the date of the Secretariat's consultation directive, the complaining party may commence arbitration proceedings pursuant to this Agreement.
>
> If no mutually satisfactory resolution of the claim is reached within 60 days of delivery of the notice of dispute, the complaining party shall deliver a request for assistance to the ASEAN Secretariat[139] which shall promptly assist the disputing parties in resolving the claim. The Secretariat may use its good offices to conduct consultations, conciliation or mediation, solicit and offer the advice of experts, make recommendations, or use other appropriate measures to aid the parties in resolving their claim.
>
> If, with the assistance of the ASEAN Secretariat, the disputing parties are unable to reach an amicable settlement of a dispute within 30 days from the date of the request for assistance, any consulting party may submit a written request to the Secretariat and all other parties to establish an arbitral panel. Upon receipt of the request, the Secretariat shall establish an arbitral panel pursuant to this Agreement.

The early stages of the proposed AFTA dispute settlement mechanism include the ASEAN Secretariat in facilitating an informal resolution of a claim. Instead of permitting disputants to pursue formal arbitration immediately after failed consultations, the AFTA mechanism should effectively utilize ASEAN's existing institutions to revitalize efforts to settle AFTA disputes informally. Although ASEAN resists institutionalization, offering the Secretariat or the AFTA Council a constructive role in the informal consultations process should not offend. Such provisions create no new ASEAN or AFTA institutions, and no substantial expansion of the Secretariat need occur. Nonetheless, charging the AFTA Council as the operative administrative body requires a certain measure of institutional strengthening. The Council would likely require an expanded permanent staff commensurate with the level of AFTA disputes and its new administrative role.

Some critics may protest the inclusion of the ASEAN Secretariat or AFTA Council in a reformed AFTA dispute settlement mechanism. Guaranteeing a role in the process for ASEAN as an institution, they might argue, threatens the true independence

139. As an alternative to asking the ASEAN Secretariat for AFTA dispute settlement functions, ASEAN may decide to expand the AFTA Council to handle greater day-to-day responsibilities for AFTA's dispute settlement system. Should this be the case, the term "AFTA Council" should be substituted for "ASEAN Secretariat" in the provisions suggested by this Article which address the role of the ASEAN Secretariat.

of the dispute settlement mechanism. Such a risk may exist. ASEAN, however, retains not only a superior understanding of AFTA but also expert institutional resources to assist in dispute settlement.

ASEAN undoubtedly favors retaining room for parties to seek political adjustments to AFTA-offending behavior. The possibility of political accommodations should be encouraged provided that political adjustment is not transformed into political interference. The Secretariat should be prohibited from making any effort to impose a settlement upon disputing parties. So long as claimants may elect to resolve a claim in an independent, binding arbitration, ASEAN's participation in a second round of consultations should not risk the independence of later arbitration procedures. ASEAN's substantive input, bringing to bear its AFTA expertise or advice from technical advisers and industry working groups of the ASEAN Chamber of Commerce & Industry, for example, could be harnessed as a positive force for settlement. In this vein, provisions should explicitly permit any mediation or conciliation measures being conducted under the auspices of the Secretariat (or independently) to continue, with the agreement of the parties, once an arbitral panel has convened until the issuance of the panel's final report.

E. The Arbitration Process

Parties unable to reach amicable resolution of an AFTA dispute should, at their option, be entitled to seek formal, binding arbitration of their claims. Industry groups within ASEAN that have publicly addressed the issue of AFTA dispute settlement have all endorsed an AFTA arbitration mechanism.[140] To meet the private sector's needs, any AFTA arbitration procedures should be expeditious, reliable and transparent. Competent arbiters should conduct arbitrations independently of ASEAN institutions, pursuant to clear procedures. This will assure the private sector that AFTA's dispute settlement mechanism is credible.[141]

---

140. *See supra* note 127.

141. To maintain the appearance of neutrality, ASEAN should, where possible, avoid permitting current government officials to sit as AFTA arbiters. If ASEAN chooses to allow current government officials to sit on AFTA panels, such officials should be directed to act solely in their private, as opposed to official, capacities free from any influence or direction from their governments. This is a less desirable course for protecting the independence of an AFTA dispute settlement mechanism. Any individual arbiter may harbor concerns over possible repercussions of acting against the interests of their employer or their government. The WTO procedures include requirements regarding governmental individuals sitting on GATT panels. *See* DSU, *supra* note 26, §§ 8.8, 8.9. These provisions read:

> Members shall undertake, as a general rule, to permit their officials to serve as panelists. Panelists shall serve in their individual capacities

An AFTA mechanism that offers binding arbitration to private disputants will have more in common with NAFTA's Chapter 11 investment dispute settlement system, which likewise employs a private investor-oriented approach to trade, than the more traditionally state-centered WTO system and NAFTA Chapter 20 system.

Panelists must be individuals competent to render decisions in the areas at issue in a dispute. The ASEAN Secretariat should maintain a roster of qualified panelists.[142] For practicality and efficiency, arbitration panels should be comprised of three members, one selected by each disputant[143] with the chair chosen by the panelists selected. If ASEAN distrusts the absolute neutrality of an individual associated with a member government or quasi-governmental body, it should consider requiring, to the extent possible, that panelists not share the same nationality as any disputant before them.

AFTA should also maintain a strict schedule for arbitrations to discourage disputants from allowing disputes to reach this stage. Ensuring that the arbitration process takes no more than four months from selection of panelists to issuance of a final report fulfills this objective. The AFTA procedures, while guarding the ability of parties to provide meaningful input into all stages of the decisionmaking,[144] can maintain a firm schedule in the following manner:

> An arbitration panel convened under this Agreement shall submit a draft final report to the parties for comment within

---

> and not as government representatives, nor as representatives of any organization. Governments shall therefore not give them instructions nor seek to influence them as individuals with regard to any matters before a panel nor punish them in any manner for decisions made in any arbitral proceeding.

Id.

142. The roster provision might read:

> The ASEAN Secretariat shall maintain a roster of individuals willing and able to serve as arbiters for AFTA disputes. Roster members shall be chosen by a consensus of AFTA members on the basis of their objectivity, sound judgment, experience and expertise in international trade, law, commercial dispute settlement or other matters covered by AFTA. Compensation for their services shall be fixed in advance by the AFTA Council.
>
> The roster may include individuals currently serving as government officials with AFTA member governments. However, such individuals shall serve as arbiters only in their individual capacities and not as representatives of any AFTA member or other organization. AFTA members may not seek in any way to influence or direct their actions with respect of any matter before a panel.

143. Should a dispute include more than two parties, the complaining parties as a group should agree to one panelist and the disputing parties as a group should agree to the second panelist.

144. *See infra* Appendix 1, § 9.

> three months after the selection of the panel is complete. By agreement of all parties, this period may be extended by a maximum of 30 days. The draft report shall contain findings of fact, rulings on the consistency of measures with AFTA or the impairment or nullification of AFTA benefits, and recommendations regarding issues raised by the parties or resolution of the dispute.
> Disputing parties may submit written comments to the arbitration panel within 14 days after the issuance of the draft report. On the basis of the draft report and comments submitted by the parties, the panel may request comments from any party, reconsider any aspect of the draft report and conduct any further investigations that it deems appropriate.
> The panel shall issue a written, final report to the parties within 30 days after issuance of the draft report. Copies of the final report shall be forwarded to the AFTA Council and the ASEAN Secretariat.

Panel decisions should be binding only upon parties to the arbitrated dispute. Such a limitation should ease any ASEAN fears that ad hoc panels will broadly rewrite or amend AFTA in ways at odds with ASEAN's intentions. For purposes of clarity and fairness, panel decisions should be written and should resolve the dispositive issues raised by the parties. To contribute most effectively to ASEAN's implementation of AFTA, the panel chairperson should forward a copy of the panel decision to the AFTA Council and the ASEAN Secretariat to keep ASEAN abreast of AFTA arbitrations and help build a body of AFTA precedents. This will enable ASEAN to review the progress of AFTA's implementation and identify any recurring problems.

To ensure arbitrations do not effectively amend AFTA, ASEAN should consider retaining a form of review over AFTA arbitration decisions. ASEAN oversight need not approach the formality of the WTO's formal appellate body.[145] Drawing partially upon the WTO's example, panel decisions could be considered final 30 days after issuance of the decision unless the AFTA Council, by unanimous consensus, agrees to reject the panel decision in whole or in part.[146] Such review, however, lacks the legalistic formula of the WTO appellate procedures which require a written decision by the Appellate Body addressing legal issues raised on appeal. The AFTA provisions might read:

> Final reports shall be binding upon the parties to a dispute unless the AFTA Council unanimously agrees to reject a final report, in whole or in part, within 30 days of its issuance. If

145. *See supra* notes 45-47 and accompanying text.

146. Such a review mechanism mimics, to some degree, the new WTO procedures without incorporating the added institutionalism represented by the WTO's Appellate Body. WTO panel decisions are adopted automatically unless the DSB votes by consensus to reject a decision. *See supra* note 43 and accompanying text.

> the AFTA Council rejects only a portion of a final report, the remaining aspects of the final report are binding upon the parties. Any decisions by the AFTA Council to reject a panel report, in whole or in part, must be written and delivered to the parties and the ASEAN Secretariat.
> Within 30 days after the expiration of the AFTA Council's consideration period, the disputing parties shall agree upon a resolution of the dispute in conformance with all aspects of the final report not unanimously rejected by the AFTA Council. The parties shall notify the AFTA Council and the ASEAN Secretariat of their agreed upon resolution of their AFTA dispute.

Enforcement is vital to the credibility of any dispute settlement mechanism.[147] Given ASEAN's preferred informal style, parties should be encouraged to find independent solutions to AFTA disputes that are consistent with panel decisions. Certain ASEAN officials have indicated that ASEAN disfavors a more judicial style of AFTA dispute enforcement.[148] ASEAN may be tempted to follow NAFTA's example by making its arbitral decisions not binding. ASEAN should resist this course. To fortify the private sector's confidence in AFTA, AFTA arbitration should be binding and backed by mechanisms to enforce arbitral decisions. The implicit threat of an institutional enforcement of panel decisions by ASEAN or domestic courts will lend power to the enforcement process. More importantly, it will focus the parties' efforts to find a mutually acceptable solution before solutions are imposed upon them.

If ASEAN is unable politically to accept judicial enforcement against member governments who violate AFTA, the AFTA dispute settlement system should at least permit judicial enforcement of arbitration decisions against private parties.[149]

---

147. As noted earlier, the question of enforcement was crucial during the negotiation of the Uruguay Round, particularly to countries such as the United States. *See* Stephenson, *supra* note 24 and accompanying text. Enforcement issues were also central to NAFTA's member states when the free trade agreement was being negotiated. *See* HUFBAUER & SCHOTT, *supra* note 57 and accompanying text. Even NAFTA's Side Agreements which offer the possibility of monetary awards have been criticized for enforcement loopholes. *See* Garvey, *supra* note 60, at 442. Such criticisms have focused on explicit exceptions to enforcement based upon law enforcement needs and the allocation of resources to "higher priorities," the prolonged nature of the process which can last nearly four years and the ease of a government's ability to exercise political means that take precedence over enforced sanctions. *See id.*

AFTA commentators have likewise stressed the need for AFTA arbitration to be binding in nature, *see* Ariff, *supra* note 127, and flagged enforcement as a key issue. *See* Kumar, *supra* note 123, at 90-91.

148. *See ASEAN: ASEAN at Odds Over Timetable for Free Trade*, *supra* note 19 (comments by Malaysia's Minister of International Trade & Industry).

149. In this respect, AFTA's dispute settlement mechanism would incorporate provisions consistent with the New York Convention on the Enforcement of Foreign

Absent such mechanisms, AFTA arbitrations will not be truly binding in nature. The following provision provides an example of a binding framework for private parties:

> If, after 60 days of the issuance of a final report determining that a measure is inconsistent with an AFTA agreement or causes a nullification or impairment of an AFTA benefit, no mutually satisfactory solution has been reached by the parties, a complaining party may submit a notice of objection to the AFTA Council. The AFTA Council shall issue an order of compliance directing the appropriate party to comply with the final report. The AFTA Council may order any measures or actions it deems appropriate to encourage the parties to comply with a final report.
>
> If, after 30 days after the AFTA Council has issued an order of compliance, the parties to a dispute pursuant to an AFTA Agreement fail to agree to a mutually satisfactory solution consistent with a final report which determines that a party (other than a signatory of AFTA) has acted inconsistently with AFTA or caused a nullification or impairment of an AFTA benefit, such final report shall be enforceable by a complaining party in the domestic courts of any AFTA signatory. A dispute over whether a measure complies with a final report shall be referred to the arbitration panel that issued such final report.

By reserving the authority and flexibility to prod or compel parties to comply with AFTA panel decisions, ASEAN properly remains the guarantor of AFTA's success. When parties understand that ASEAN or a domestic court can compel their adherence to panel decisions, they will be more likely to find mutually acceptable solutions.

The toughest test will arise when a panel rules against an AFTA member who refuses to abide by the panel decision. It is impossible to foresee how ASEAN will handle such a situation. Assuming ASEAN declines to permit judicial enforcement against an AFTA member, one would hope that ASEAN could impress upon a recalcitrant AFTA member the importance of maintaining a credible dispute settlement system and the damage to AFTA that may result from governments avoiding adverse AFTA rulings.

There is reason for optimism. ASEAN thus far has demonstrated its ability to prevent serious backtracking by AFTA members who threaten AFTA's credibility.[150] ASEAN's ultimate authority, assuming ASEAN has the political will to exercise it, can act as an insurance policy, persuading AFTA members to

---

Arbitral Awards. The majority of ASEAN's members are already signatories to the New York Convention.

150. *See* Kassim, *supra* note 18.

reach solutions with prevailing private parties. While such issues remain purely speculative, ASEAN undeniably holds the power to establish a reliable dispute settlement mechanism for AFTA. To do so, however, ASEAN must consider how to ensure that AFTA members adhere to dispute settlement decisions.

F. Institutional Issues

Questions concerning the institutional role of ASEAN underlie any discussion of an AFTA dispute settlement mechanism. An effective mechanism requires attention to ASEAN's basic institutional dynamics and the designation of a coordinating body. Yet, ASEAN often displays a practical suspicion of institution building.[151] In contrast, NAFTA's framers shared a greater suspicion of other parties' ultimate willingness to comply with NAFTA than a suspicion of institutionalism. In response, the member states established a host of new institutions to oversee NAFTA's activities[152] and, in large part, to ensure the agreement's proper functioning. While an effective coordinating body is essential, new institutional infrastructure for an AFTA dispute settlement system is unnecessary. ASEAN can restructure its institutional dynamic to accommodate both political input and binding decisionmaking by organizing the ASEAN Secretariat or the AFTA Council to act as AFTA's administrative fulcrum.

ASEAN has expanded the Secretariat's functions as new institutional needs have been recognized.[153] The Secretariat cur-

151. Suspicion of new institutional mechanisms is not endemic to ASEAN alone. The U.S., after successfully pushing for a sturdier GATT dispute settlement system, shows troubling signs of political backpedalling. Legislation introduced in the U.S. Senate proposes to create a commission of federal judges to review WTO decisions rendered against the United States. The bill would empower Congress to withdraw its endorsement of U.S. participation in the WTO if the commission determines that WTO panels exceeded their authority, added obligations or diminished rights under the Uruguay Round agreements or acted arbitrarily or capriciously in issuing decisions against the U.S. *See* Gary G. Yerkey, *Sen. Dole Places WTO Legislation on Senate Calendar for this Session*, 12 Int'l Trade Rep. (BNA) No. 49, at 2049 (Dec. 13, 1995). Certain members of the U.S. Congress and the private sector have voiced similar reservations with respect to the operation of NAFTA's dispute settlement process. *See supra* note 64.

U.S. distrust of international trade institutions is likely to develop into a focal point in the American political debate now that the first ruling by a WTO panel has been issued in favor of claims by Venezuela and Brazil regarding U.S. gasoline standards. *See infra* note 40. On January 17, 1996, a panel ruled that a section of the Clean Air Act discriminated against non-U.S. oil refineries. The panel ordered the U.S. to develop plans to alter rules on imported gasoline or risk sanctions. *See* David E. Sanger, *Trade Group Orders U.S. to Alter Law for First Time*, N.Y. Times, Jan. 18, 1996, at D1.

152. *See, e.g.*, *supra* notes 66-69 and accompanying text.

153. In January 1992, at the Fourth ASEAN Summit, ASEAN restructured and strengthened the ASEAN Secretariat. *See* The Singapore Declaration, *supra* note

rently exercises responsibility for compiling information necessary for realizing AFTA.[154] It has the capacity to maintain a list of panelists, offer its good offices to facilitate settlements and compile a record of dispute settlement cases and decisions. To allay concerns of unchecked institutional activism, ASEAN can ensure that the Secretariat's role is more circumscribed than the WTO's analogous body. The WTO empowers its Director-General, for example, to initiate conciliation or mediation on his or her own accord.[155] ASEAN may be reticent to accept such an active role for the Secretariat.

If ASEAN empowered the AFTA Council to carry out many of the administrative functions required by an AFTA dispute settlement mechanism, ASEAN would largely alleviate its institutional concerns. Vesting the AFTA Council with the authority to oversee a comprehensive AFTA dispute settlement mechanism, however, will require an expansion of the Council's personnel and resources. This will constitute an unavoidable, though limited, increase in the institutional presence of the AFTA Council. For ASEAN, adding institutional weight to the AFTA Council may be more palatable than further expanding the ASEAN Secretariat. The AFTA Council, comprised of ministerial-level officials from ASEAN's member states, is politically accountable to the ASEAN governments. Provided that the AFTA Council resists reaching beyond its supervisory role to impose ASEAN's will upon the arbitral process, its designation as the system's administrative arm should not undermine the system's integrity.

Whichever course ASEAN chooses to manage AFTA's dispute settlement system, ASEAN must be willing to set aside its antipathy toward institutionalism and equip the Secretariat or the AFTA Council with the resources and personnel necessary to administer an effective AFTA dispute settlement mechanism

---

104, at 505. The Secretariat was again reshaped in July 1992 at the 25th ASEAN Ministerial Meeting. A Bureau of Economic Research was created to aid the Secretariat, in conjunction with the Economic Cooperation Bureau, in coordinating and monitoring AFTA's implementation including its CEPT scheme. In the leadup to meetings of the AEM, SEOM, and AFTA Council, the Secretariat prepares draft agendas. Problems with funding and staffing, however, have at times hampered the Secretariat's ability to carry out its coordinating and administrative tasks for AFTA.

154. For example, in November 1993, the Secretariat published a consolidated roster of products and tariff reduction programs under the CEPT scheme. It is also compiling a list of unprocessed agricultural products in connection with the CEPT framework as well as a list of non-tariff barriers ("NTBs") within ASEAN which it will monitor as NTBs are phased out under AFTA. *See* Pruzin, *supra* note 18, at 2041.

155. *See* DSU, *supra* note 38.

without ultimately infringing upon its independence and credibility.

CONCLUSION

In realizing its mission to foster greater regional economic cooperation, ASEAN faces countless challenges ahead. AFTA represents the Association's boldest attempt at economic cooperation, but the task of implementation remains unfinished. AFTA's development rests upon concurrent development of ASEAN's legal infrastructure. In particular, AFTA needs its own credible and procedurally transparent dispute settlement mechanism to resolve both governmental and private sector disputes. ASEAN's private sector and regional commentators have recognized this fact.[156] ASEAN must not only acknowledge the legal dimension of free trade but address it meaningfully.[157] By confronting its institutional demons and creating an AFTA dispute settlement mechanism, ASEAN will have crossed its Rubicon and secured AFTA as an ambitious, effective free trade area in which the ASEAN private sector and foreign investors will feel encouraged in their trading activities.

Without mimicking existing dispute settlement systems, ASEAN can draw upon the lessons and work of NAFTA and the WTO. The challenge for ASEAN is building a mechanism to facilitate negotiated settlements without compromising the reliability of its dispute settlement capabilities. By merging certain innovations of the more comprehensive but legalistic systems of the WTO and NAFTA with ASEAN's proven ability to build informal consensus, ASEAN can structure a uniquely effective dispute settlement mechanism for AFTA. Framing AFTA's dispute settlement mechanism to provide both a forum for political negotiations and binding arbitration will buttress the viability of AFTA's trade scheme. AFTA's mechanism should not only offer ASEAN, and in particular its private sector, a reliable avenue of dispute resolution, but also broadly encourage ASEAN's current and future members to strengthen their own domestic dispute settlement systems.

156. *See supra* notes 116, 127.

157. In private discussions with the author, numerous ASEAN officials have conceded that AFTA requires some formal dispute settlement system. To date, however, no ASEAN members have publicly proposed a blueprint for a comprehensive AFTA dispute settlement system.

APPENDIX

MODEL DISPUTE SETTLEMENT PROCEDURES FOR AFTA

1. General Objectives

Dispute settlement procedures for AFTA are a basic element in assuring the credibility and predictability of AFTA's operation. AFTA members recognize that such procedures can be used to safeguard the rights and duties of AFTA members and facilitate the efficient, fair implementation of the free trade area.

The main objective of these procedures is to produce a fair, positive and mutually satisfactory solution to disputes which arise regarding AFTA. Solutions mutually acceptable to parties and consistent with the agreements for AFTA are strongly preferred.

All disputing parties must make every effort in good faith to resolve their disputes and give meaningful consideration to any representations made by another party regarding the operation or implementation of the AFTA.

2. Jurisdiction

The dispute settlement procedures of this Agreement shall apply with respect to the avoidance or settlement of any dispute between persons, as defined in this Agreement, regarding the interpretation or application of an AFTA agreement or where a person considers that a measure of an AFTA signatory is or will be inconsistent with AFTA obligations or cause a nullification or impairment of a benefit created by AFTA.

3. Standing

Any person who has suffered or will suffer a loss or damage by another person due to an interpretation or application of an AFTA agreement or a measure that is or will be inconsistent with obligations under an AFTA agreement or cause a nullification or impairment of a benefit created by an AFTA agreement may commence proceedings pursuant to this Agreement. For purposes of this Agreement, the term "person" is defined as any natural person, business entity or signatory of AFTA.

4. Disputes Violating Both AFTA and GATT

Persons alleging that they have suffered a loss or damage due to a breach of the provisions of an AFTA agreement or suffered a nullification or impairment of benefits under an AFTA agreement, if they are unable to settle their disputes amicably and seek a formal resolution of their claims, must make use of the consultations process provided in this Agreement. This requirement applies, inter alia, to disputes arising from both an

AFTA agreement and the General Agreement on Tariffs and Trade, or any successor agreement ("GATT"), including the Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations.

If a claim arising under both an AFTA agreement and GATT is not resolved at the conclusion of the consultations process provided in this Agreement, parties must refer such claim to the dispute settlement procedures of the World Trade Organization ("WTO"). Once a dispute has been referred to the WTO, the WTO forum shall be used to the exclusion of the procedures provided in this Agreement.

5. Consultations and Mediation

A person wishing to raise a claim must provide a written notice of dispute together with a brief summary of the legal basis of the claim and the relief sought to a party that has allegedly breached an AFTA agreement, implemented a measure that is or will be inconsistent with an AFTA agreement, or nullified or impaired a benefit from an AFTA Agreement, with copies to the AFTA Council and to the ASEAN Secretariat. All parties to a dispute must enter into consultations pursuant to this Agreement and make every effort in good faith to settle the dispute amicably.

If a person receiving a notice of dispute does not respond within ten days, or does not enter into consultations within a period of no more than 30 days, from the date of the notice, the complaining party shall provide written notice to the ASEAN Secretariat [or AFTA Council] which shall direct the non-responsive person to immediately enter into consultations pursuant to this Agreement. If the non-responsive person fails to enter into consultations within 10 days from the date of the Secretariat's consultation directive, the complaining party may commence arbitration proceedings pursuant to this Agreement.

If no mutually satisfactory resolution of the claim is reached within 60 days of the delivery of the notice of dispute, the complaining party shall deliver a request for assistance to the ASEAN Secretariat which shall promptly assist the disputing parties in resolving the claim. The Secretariat may use its good offices to conduct consultations, conciliation or mediation, solicit and offer the advice of experts or recommendations, or use other appropriate measures to aid the parties in resolving their claim, including inviting the assistance of other parties. If the parties to a dispute agree, procedures for the Secretariat's assistance may continue while the arbitral panel process proceeds.

Notwithstanding its efforts to offer assistance, the ASEAN Secretariat shall not attempt to impose or compel the disputing parties to accept any settlement of a claim.

If, with the assistance of the ASEAN Secretariat, disputing parties are unable to reach an amicable settlement of a dispute within 30 days from the date of the request for assistance, any consulting party may submit a written request to the Secretariat and all other parties to establish an arbitral panel. Upon receipt of the request to arbitrate, the Secretariat shall establish an arbitral panel pursuant to this Agreement.

6. Interested Third Parties

A third party that has a substantial trade interest in consultations or dispute settlements being conducted pursuant to this Agreement may participate in such procedures pursuant to this Agreement upon the delivery of written notice to all other parties and the ASEAN Secretariat summarizing the basis for its participation. Should a party to a dispute object to the participation of a third party, the complaining party shall notify the ASEAN Secretariat which shall decide within 10 days from the date of such notification whether to permit the third party to participate.

7. Roster of Arbiters

The ASEAN Secretariat shall maintain a roster of individuals willing and able to serve as arbiters for AFTA disputes. Roster members shall be chosen by a consensus of AFTA members on the basis of their objectivity, sound judgment, experience and expertise in international trade, law, commercial dispute settlement or other matters covered by AFTA. Compensation for their services shall be fixed in advance by the AFTA Council.

The roster may include individuals currently serving as government officials with AFTA member governments. However, such individuals shall serve as arbiters only in their individual capacities and not as representatives of any AFTA member or other organization. AFTA members may not seek in any way to influence or direct their actions with respect of any matter before a panel nor punish them in any manner for decisions made in any arbitral proceeding.

8. Establishment of Arbitration Panels

An arbitral panel shall consist of three members. Except for extraordinary circumstances, panelists shall be selected from the roster maintained by the ASEAN Secretariat. Within 15 days of the delivery of the request for arbitration, the parties shall select

panelists. The complaining party (or parties) shall select one panelist who does not share the same citizenship as any complaining party. The disputing party (or parties) shall select one panelist who does not share the same citizenship as any disputing party.

Within 10 days of the selection of the panelists by the parties, the two panelists selected by the parties shall mutually agree upon a third panelist who shall act as chair of the arbitral panel.

Any disputes regarding the selection of panelists that are not resolved by the parties within 10 days after the selection of the panelists begins, shall be resolved by the Director-General of the ASEAN Secretariat.

9. Rules of Procedure

The ASEAN Secretariat shall establish Model Rules of Procedure for arbitral panels to follow which, at a minimum, shall incorporate the following principles:

> (a) the parties shall have the right to at least one hearing before the arbitral panel and the right to provide written submissions;
> (b) panel proceedings shall be confidential unless the parties agree otherwise;
> (c) the panel, on its own initiative or with the agreement of the parties, may seek written information, advice or recommendations from any experts that it deems appropriate. If input from experts is sought by the panel, the parties shall be given an opportunity to submit written comments on the expert submissions; and
> (d) panel proceedings shall have a set timetable and strict deadlines for party submissions.

Unless the parties agree otherwise, the terms of reference for an arbitral panel shall be:

> To examine, in light of the relevant provisions of AFTA, the matters referred to the ASEAN Secretariat in the notice of dispute and issue findings of fact and law, determinations and recommendations for the resolution of such matters.

10. Panel Reports

An arbitration panel convened under this Agreement shall submit a draft final report to the parties for comment within 3 months after the selection of the panel is complete. By agreement of all parties, this period may be extended by a maximum of 30 days. The draft report shall contain findings of fact, rulings on the consistency of measures with AFTA or the impairment or nullification of AFTA benefits, and recommendations regarding issues raised by the parties or resolution of the dispute.

The panel shall base its report on the submissions and arguments of the parties and on any information or input sought from experts. Panelists shall make every effort to reach consensus on all matters, but individual panelists may provide separate opinions on any matter not unanimously agreed.

Disputing parties may submit written comments to the arbitration panel within 15 days after the presentation of the draft report. On the basis of the draft report and comments submitted by the parties, the panel may request comments from any party, reconsider any aspect of the draft report and conduct any further investigations that it deems appropriate.

The panel shall issue a written final report, including any separate opinions, to the parties within 30 days after presentation of the draft report. Copies of the final report shall be forwarded to the AFTA Council and the ASEAN Secretariat.

Final reports shall be binding upon the parties to a dispute unless the AFTA Council unanimously agrees to reject a final report in whole or in part within 30 days of its issuance. If the AFTA Council rejects only a portion of a final report, the remaining aspects of the final report are binding upon the parties. Any decisions by the AFTA Council to reject a panel report in whole or in part must be written and delivered to the parties and the ASEAN Secretariat.

11. Implementation of Final Reports

Within 30 days after the expiration of the AFTA Council's consideration period, the disputing parties shall agree upon a resolution of the dispute in conformance with all aspects of the final report not unanimously rejected by the AFTA Council. The parties shall notify the AFTA Council and the ASEAN Secretariat of their agreed upon resolution of their AFTA dispute.

If, after 60 days of the issuance of a final report determining that a measure is inconsistent with an AFTA agreement or causes a nullification or impairment of a benefit under an AFTA agreement, no mutually satisfactory solution has been reached by the parties, a complaining party may submit a notice of objection to the AFTA Council. The AFTA Council shall direct the appropriate party to comply with the final report. The AFTA Council may order any measures or actions it deems appropriate to encourage the parties to comply with a final report.

If, after 30 days after the AFTA Council has issued an order of compliance, the parties to a dispute pursuant to an AFTA Agreement fail to agree to a mutually satisfactory solution consistent with a final report which determines that a party (other than a signatory of AFTA) has acted inconsistently with AFTA

or caused a nullification or impairment of an AFTA benefit, such final report shall be enforceable by a complaining party in the domestic courts of any AFTA signatory. A dispute over whether a measure complies with a final report shall be referred to the arbitration panel that issued such final report.

12. Domestic Actions

No AFTA member may provide for a right of action under its domestic laws based on grounds that a measure or action is or will be inconsistent with AFTA obligations or cause nullification or impairment of a benefit created by AFTA.