

*PAYING COURT TO THE FUTURE – HAS THE TIME
FOR AN ASEAN TRADE TRIBUNAL ARRIVED?*

*Paying Court to the Future – Ha llegado el tiempo para un
Tribunal de comercio de la ASEAN?*

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Abstract

With the global climate for multilateral trade experiencing a marked slowdown and the dispute settlement mechanism (DSM) of the World Trade Organization under severe strain, attention has started to turn to the prioritizing of regional trade structures. Although ASEAN DSMs have traditionally pursued a consensual path towards resolution, this paper discusses the current opportunities for establishing a permanent ASEAN Trade Tribunal (ATT). Such an entity would need to fit within the boundaries of a cautious step in the gradual development of the rules-based ASEAN trading system, by extending the opportunities for using arbitration in disputes and for providing a procedure to ensure a coherent interpretation of ASEAN trade law.

Keywords

ASEAN – arbitration – international and regional courts – ASEAN Trade Tribunal – dispute settlement mechanisms

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Resumen

Con el clima global para el comercio multilateral experimentando una marcada desaceleración y el mecanismo de solución de controversias (MSC) de la Organización Mundial del Comercio bajo una fuerte tensión, la atención ha comenzado a centrarse en la priorización de las estructuras comerciales regionales. Si bien los MSC de la ASEAN han seguido tradicionalmente un camino consensuado hacia la resolución, este documento analiza las oportunidades actuales para establecer un Tribunal de Comercio de la ASEAN (TCA) permanente. Tal entidad necesitaría encajar dentro de los límites de un paso cauteloso en el desarrollo gradual del sistema de comercio de la ASEAN basado en normas, ampliando las oportunidades para utilizar el arbitraje en controversias y para proporcionar un procedimiento para garantizar una interpretación coherente de la legislación comercial de la ASEAN.

Palabras claves

ASEAN - arbitraje - tribunales internacionales y regionales - Tribunal de Comercio de la ASEAN - mecanismos de solución de controversias

SUMARIO: I. INTRODUCTION. II. ASEAN DISPUTE SETTLEMENT MECHANISMS. III. ASEAN TRADE TRIBUNAL. 1. *Introduction*. 2. *Nature of the Tribunal*. 3. *Contentious Jurisdiction: the Issues of Accessibility and Admissibility*. (i) Material Jurisdiction (*Ratione Materiae*): Legal Bases for the ATT's Contentious Jurisdiction. (ii) Personal Jurisdiction (*Ratione Personae*): Accessibility to the ATT. (a) ASEAN Member States. (b) Individuals and companies. 4. *Advisory Jurisdiction: a Prospect of the Tribunal's Influence on Courts of Member States*. 5. *Composition: Judges of the Court*. (i) Requirements and Qualifications. (ii) Number of Judges. (iii) Selection and Appointment. (iv) Terms of Office and Reappointment. IV. CONCLUSION. *BIBLIOGRAPHY*.

I. INTRODUCTION

In view of the current problems experienced by global trade flows, this work will encourage discussion of the establishment of a permanent ASEAN Trade Tribunal (ATT).² Using comparative perspectives from other systems, such a new entity would need to fit within the boundaries of a cautious – though arguably necessary – step in the gradual development of the dispute settlement mechanisms (DSMs) in the ASEAN trading system.

This short study therefore seeks to provide a starting point for reflection of what might be possible within the present climate to ensure that intraregional trade enjoys additional legal guarantees and protection while at the same time avoiding radical innovation that would be unacceptable to the still diverse economies of the ASEAN Member States (AMSs). The article will therefore argue that an ATT should be regarded in part as a consolidation of previous ASEAN DSMs, in part a crystallization of potential progress – already initiated by the introduction of arbitration as a means of settling ASEAN disputes – towards a more rules-based system of trade dispute resolution. In this latter aspect, attention will be paid as to how to open up these processes to individuals and companies thereby allowing them to become effective stakeholders in the new system. It will also deal with the possibility of providing a method that would ensure coherence in interpretation of ASEAN law in the AMSs.

² For earlier ideas on this theme, see Jeffrey A. Kaplan, «ASEAN's Rubicon: A Dispute Settlement Mechanism for AFTA», *UCLA Pacific Basin Law Journal* 14 (1996): 147-195.

II. ASEAN DISPUTE SETTLEMENT MECHANISMS

From its inception in 1967,³ ASEAN has been committed to promoting interdependence between its members,⁴ while preserving their individual national sovereignty and maintaining equality among them.⁵

While subsequent treaties have laid down standard norms of international law and diplomacy binding on AMSs,⁶ *inter alia*, the peaceful settlement of disputes,⁷ ASEAN leaders and diplomats have developed a set of decision-making procedures characterized by an informal, working style that they are expected to follow, the so-called ASEAN Way.⁸ For policymakers and politicians, this is more about resolving problems through informal, pacific, co-operative and inclusive measures than by use of ostensibly divisive and confrontational, public, judicial proceedings.

Despite the basic tenets of the ASEAN Way, a gradual evolution into a more rules-based integration – profoundly influenced by developments in the WTO and further stimulated by the continuing impacts of the 2007 ASEAN Charter⁹ – has emerged during the last 15 years.¹⁰ This change in the mood music of ASEAN has also influenced developments in the three DSMs relevant to the present discussion.¹¹

³ Ralph H. Folsom, «ASEAN as a Regional Economic Group – A Comparative Lawyer’s Perspective», *Malaya Law Review* 25 (1983): 203-224.

⁴ Tobias I. Nischalke, «Insights from ASEAN’s Foreign Policy Co-operation: The ‘ASEAN Way’, a Real Spirit or a Phantom?», *Contemporary Southeast Asia* 22, n.º 1 (2000): 90.

⁵ Laurence Henry, «The ASEAN Way and Community Integration: Two Different Models of Regionalism», *European Law Journal* 13 (2007): 857-879.

⁶ Hiro Katsumata, «Reconstruction of Diplomatic Norms in Southeast Asia: The Case for Strict Adherence to the ‘ASEAN Way’», *Contemporary Southeast Asia* 25, n.º 1 (2003): 106-108.

⁷ Treaty of Amity and Co-operation in Southeast Asia, Art. 2, Feb. 24, 1976, 1025 U.N.T.S. 297 (TAC). This was expanded in the Charter of the Association of Southeast Asian Nations, Art. 2(2), Nov. 20, 2007, 2624 U.N.T.S. 223 (ASEAN Charter, AC).

⁸ Daniel Seah, «The ASEAN Charter», *International and Comparative Law Quarterly* 58 (2009): 198-199.

⁹ Simon S.C. Tay, «The ASEAN Charter: Between National Sovereignty and the Region’s Constitutional Moment», *Singapore Year Book of International Law* 12 (2008): 151-170.

¹⁰ Michael Ewing-Chow, «Culture Club or Chameleon: Should ASEAN Adopt Legalization for Economic Integration?», *Singapore Year Book of International Law* 12 (2008): 1-13.

¹¹ For a detailed analysis of all such dispute settlement mechanisms in ASEAN, see Robert Beckman et al., *Promoting Compliance: The Role of Dispute Settlement and Monitoring Mechanisms in ASEAN Instruments* (Cambridge: Cambridge University Press, 2016), 58-100.

First, disputes between AMSs concerning the application or interpretation of ASEAN economic and trade agreements¹² (normally under the Economic Community pillar of ASEAN) are generally governed by the 2004 Vientiane Protocol on Enhanced Dispute Settlement Mechanism.¹³ This Protocol standardized the various DSMs of the existing ASEAN economic agreements by making consultation a compulsory first step.¹⁴ If such consultations fail, then the complainant AMS can request the Senior Economic Officials Meeting (SEOM)¹⁵ to set up an arbitration panel¹⁶ with the power to assess and give recommendations on the matter.¹⁷ As with the Appellate Body (AB)¹⁸ of the World Trade Organization (WTO), appeal on points of law and legal interpretation lie to an Appellate Body (AB) that must decide the appeal within 60 days.¹⁹ The SEOM then adopts the AB report (unless it decides by reverse consensus not to do so) and must be accepted unconditionally by the parties.²⁰

Secondly, where disputes between AMSs arise from the 2007 ASEAN Charter or ASEAN instruments with no specified DSM, the 2010 Hanoi Protocol²¹ also allows for arbitration (again after failed consultations) as an option for resolution across the whole spectrum of such disputes. In addition, this Protocol governs disputes under other ASEAN instruments that expressly provide for its application.²²

An arbitral tribunal under this Protocol is composed of three arbitrators²³ who apply the provisions of the ASEAN Charter, other ASEAN instruments and applicable rules of public international law in its deliberations; and if the

¹² AC Art. 25.

¹³ ASEAN Protocol on enhanced dispute settlement mechanism, Nov. 29, 2004, 2624 U.N.T.S. 177 (Vientiane Protocol, VP).

¹⁴ VP Art. 3(1). Moreover, good offices, conciliation or mediation also remain possibilities: VP Art. 4.

¹⁵ The SEOM comprises the heads of ASEAN states' ministries of trade, industry, finance and commerce below the level of minister.

¹⁶ VP Art. 5(1).

¹⁷ VP Art. 7.

¹⁸ Such AB is composed of seven persons, three of whom sit on any one case, who are appointed by the ASEAN Economic Ministers (AEM) to serve for a four-year term, renewable once.

¹⁹ VP Art. 12(5).

²⁰ VP Art. 12(13).

²¹ Protocol to the ASEAN Charter on Dispute Settlement Mechanisms, Apr. 8, 2010: <<http://agreement.asean.org/media/download/20160829075723.pdf>> (Hanoi Protocol, HP).

²² HP Art. 2(1).

²³ HP Annex 4, r. 1(1).

parties agree, it can decide a case *ex aequo et bono*.²⁴ The award of such an arbitral tribunal is binding and final.²⁵

Lastly, the investor-state DSM in the 2009 ASEAN Comprehensive Investment Agreement (ACIA)²⁶ allows investors of an AMS, whether natural or legal persons, to bring a claim against the government of another AMS for the loss or damage to their investment resulting from the breach of obligation under ACIA.²⁷ It is thus the only way in which individuals or companies can currently use an ASEAN DSM to protect their rights.

The ACIA DSM process provides initially for consultation and negotiation²⁸ but, if these fail, the disputing investor can submit an arbitration claim to the courts or administrative tribunals that have jurisdiction over such claim or other international arbitration rules and institutions.²⁹ Of interest is the fact that the ACIA DSM also applies to foreign investors constituted or organized under the applicable laws of AMSs, i.e. foreign-owned ASEAN-based companies.³⁰

III. ASEAN TRADE TRIBUNAL

1. Introduction

Like the trade-focused European integration from the late 1950s onwards, in the context of deepening of commercial activities between AMSs, the arguments for a central quasi-judicial, rules-based tribunal to resolve disputes would be a much less contentious issue for the sovereignty-conscious AMSs than a human rights court.³¹ The ASEAN DSM landscape has considerably altered over the last 15 years despite the continuing role of the ASEAN Way. This period has been notable for the introduction of arbitration as an option for dispute resolution between AMSs and its confirmation as a DSM in cases between an AMS and private investors. In addition, AMSs have shown no reticence in initiating cases before the WTO (panels and AB)

²⁴ HP Art. 14.

²⁵ AC Art. 15.

²⁶ ASEAN Comprehensive Investment Agreement, Feb 26, 2009; <<http://agreement.asean.org/media/download/20140119035519.pdf>>, (ACIA). Kim M. Rooney, «Overview of the 2009 ASEAN Comprehensive Investment Agreement», *Dispute Resolution International* 4, n.º 2 (2010): 169-189.

²⁷ ACIA Arts. 28 and 29.

²⁸ ACIA Art. 31.

²⁹ ACIA Art. 32.

³⁰ ACIA Art. 4(e).

³¹ Hao Duy Phan, «A Blueprint For a Southeast Asian Court Of Human Rights», *Asian-Pacific Law & Policy Journal* 10, n.º 2 (2009): 384-433.

even against other AMSs.³² The International Court of Justice (ICJ) and the International Tribunal on the Law of the Sea (ITLOS) have also heard cases involving intra-ASEAN disputes before them³³ and the experience of the Extraordinary Chambers in the Courts of Cambodia (ECCC)³⁴ has further accustomed AMSs to the use of international law in national judicial proceedings within the region. Consequently, AMSs are not averse to using DSMs that are more rules-based and (quasi-) judicial in character rather than cleaving to their ASEAN Way principles.

However, deficiencies remain. ASEAN DSMs (like the WTO process) are largely to be conducted on an interstate level and, apart from investor disputes, exclude direct action by private parties: companies still have to encourage their state to litigate.³⁵ By turning the dispute into an inter-state one, political and diplomatic moves enter into the frame, in a way depriving the original dispute (private party v. AMS) of its economic rationale or at least marginalizing it in the DSM. In this sense, too, the procedures under TAC and the Vientiane and Hanoi Protocols have little relevance in trade matters that usually require speed, consistency and clarity in resolution rather than a cumbersome, slow, step-by-step process to resolve an outstanding dispute between AMSs.

Another issue is that the panels and AB in the ASEAN DSMs remain ad hoc. Yet, in view of the fact that the economies of AMSs have reached such a developmental level, a permanent quasi-judicial entity may be required to deal with trade disputes more efficiently and expeditiously. Without an actual operational WTO DSM predicted from the end of 2019, then AMSs may be forced to turn towards their own DSMs to resolve trade disputes.

Despite these deficiencies, there is a sense that the tenets of the ASEAN Way are not set in stone and will need to evolve so that ASEAN can take full advantage of new commercial possibilities opening up to it. This may only

³² Request for Consultations by Singapore, *Malaysia – Prohibition of Imports of Polyethylene and Polypropylene*, WTO Doc. WT/DS171 (Jan. 13, 1995); and Panel Report, *Thailand – Customs and Fiscal Measures on Cigarettes from the Philippines*, WTO Doc. WT/DS371/RW (Nov. 12, 2018).

³³ ICJ, *Sovereignty over Pedra Branca/Pulau Batu Puteh, Middle Rocks and South Ledge (Malaysia/Singapore)*, 2008 I.C.J. Rep. 12 (May 23); and ITLOS, *Case concerning Land Reclamation by Singapore in and around the Straits of Johor (Malaysia v. Singapore)*, Provisional Measures, Case No. 12, Order of Oct. 8, 2003, 2003 ITLOS Rep. 10.

³⁴ Simon M. Meisenberg e Ignaz Stegmiller, eds., *The Extraordinary Chambers in the Courts of Cambodia – Assessing their Contribution to International Criminal Law* (The Hague: T.M.C. Asser Press, 2016).

³⁵ Gonzalo Villalta Puig y Lee Tsun Tat, «Problems with the ASEAN Free Trade Area Dispute Settlement Mechanism and Solutions for the ASEAN Economic Community», *Journal of World Trade* 49, n.º 2 (2015): 289-292.

be properly achieved with a more certain, ascertainable system of rules on which individuals and companies (both ASEAN and non-ASEAN) can depend. Changes however incremental will thus be driven by economic actors not by the AMSs themselves: in such case, the resolution of disputes with private parties need not, in any event, touch upon the settlement of matters between AMSs under the various ASEAN instruments that already exist.

2. *Nature of the Tribunal*

The Vientiane and Hanoi Protocols currently provide for mandatory consultations between the parties to take place first and only where they are unsuccessful, is it possible for ad hoc arbitral tribunals to be constituted in order to determine the case between the AMS parties.

At this stage of development, it is recommended that compulsory consultation should be retained as a necessary guarantee for the AMSs. The present plan though also argues for the establishment of a permanent arbitration tribunal³⁶ with its own administration. As a quasi-judicial entity, it would mark a step along the way of evolving the DSM regime for ASEAN while avoiding a complete judicialization of the process in the form of a regional court like the Court of Justice of the European Union (CJEU).³⁷ Internally, in addition to its own permanent secretariat and administration, the ATT could be organized into a lower-level chamber as with the EU's General Court (GC)³⁸ or the East African Court of Justice (EACJ)³⁹ or even panels at the WTO DSM,⁴⁰ with an internal appeal on points of law to the Court of Justice, the EACJ Appellate Division or to the WTO Appellate Body (AB), respectively.

In this latter respect, an ATT Arbitration Appeals Chamber (AAC) would replace the ad hoc AB under the Vientiane Protocol and its review powers would be limited to matters of law and legal interpretation made by an initial three-person panel. In such cases, the AAC (like the WTO AB)

³⁶ For contrary arguments, see Gino J. Naldi, «The ASEAN Protocol on Dispute Settlement Mechanisms: An Appraisal», *Journal of International Dispute Settlement* 5, n.º 1 (2014): 117-118.

³⁷ Consolidated Version of the Treaty on the Functioning of the European Union, Arts. 251-253, May 8, 2008 O.J. (C 115) 47 (TFEU).

³⁸ TFEU Arts. 254 and 256.

³⁹ Treaty for the establishment of the East African Community (as amended 2006 and 2007) Arts. 23 and 35A, Nov. 30, 1999, 2144 U.N.T.S. 255 (EAC).

⁴⁰ Marrakesh Agreement Establishing the World Trade Organization, Annex 2, Understanding on Rules and Procedures Governing the Settlement of Disputes, Apr. 15, 1995, 1867 U.N.T.S. 31874 (Dispute Settlement Understanding, DSU).

could uphold, modify or reverse the report of the panel and, like the panel, where appropriate recommend that the measure conform and the ways in which to accomplish this. If either the ASEAN Summit (the biannual meetings of the leaders of AMS governments) or the SEOM plays the role of the WTO Dispute Settlement Body (DSB) in this scenario, then the relevant body would have to adopt the AAC's report unless it declined to do so by consensus.

Lastly, in the ATT at the lower level, certain of the chambers or panels (with a specified number of arbitration members) could be designated to hear cases in a particular field, e.g., investor protection disputes, protection of intellectual property rights, competition matters, etc., in order to develop specific competences in them.

3. *Contentious Jurisdiction: the Issues of Accessibility and Admissibility*

(i) Material Jurisdiction (*Ratione Materiae*): Legal Bases for the ATT's Contentious Jurisdiction

The fundamental proposition would be to consolidate – over time – the various arbitration regimes within ASEAN into the ATT. At the beginning, though, a blanket transfer of jurisdiction to the ATT might be too ambitious. In that case, the ATT might simply be initially designated to deal with all disputes arising within the ambit of the ASEAN Economic Community, thereby superseding the Vientiane Protocol to the extent necessary. With experience and over time, it could subsequently replace the DSMs within the remit of the Hanoi Protocol as well as perhaps those designated under any other ASEAN agreement, e.g., with third states.⁴¹ As noted above, only once compulsory consultations have proved to be unsuccessful within a predetermined but reasonably short time-limit, would the mandatory use of the ATT's contentious arbitration jurisdiction arise.

In addition, a list of the agreements covered by the ATT's jurisdiction would usefully be set down in an annex to the ATT's statute. In order to facilitate the extension of that jurisdiction over time, the ASEAN Summit would have the power to amend and add to the list of these "covered agreements." This would allow for natural development without having recourse to a treaty-amending process.

⁴¹ For example, the DSMs that govern ASEAN's bilateral trade relations with the major East Asian economies: Henry Gao, «Dispute Settlement Provisions in ASEAN's External Economic Agreements with China, Japan and Korea», en *ASEAN Law in the New Regional Economic Order: Global Trends and Shifting Paradigms*, ed. por Pasha L. Hsieh y Bryan Mercurio (Cambridge: Cambridge University Press, 2019), 64-82.

(ii) Personal Jurisdiction (*Ratione Personae*): Accessibility to the ATT

(a) ASEAN Member States

In the present study, it has already been argued that the ATT would become the permanent body for arbitration. At the outset, it would mainly deal with cases arising between the AMSs and thus exercising a jurisdiction in this respect akin to that of the WTO panels and AB. AMSs would retain the TAC and its provisions to deal with outstanding political disputes between them, while the ATT would deal (at least initially exclusively) with trade disputes.

(b) Individuals and companies

While the scope of mechanisms for resolving disputes between AMSs and private individuals from other AMSs should be increased to protect other important commercial interests, few international tribunals or trade courts allow such parties to have direct standing before them. For example, within the limited terms of Article 263 TFEU, individuals and companies can challenge the acts of EU institutions provided they can fulfil the test, *inter alia*, that the challenged act was of direct and individual concern to them.⁴²

What then might be possible? For one option, the idea of an investor-AMS DSM could be incorporated into the overall structure of the ATT. This is not so far-fetched since the Organization for the Harmonization of Business Laws in Africa (OHADA) has a single regional organ that covers both judicial and arbitral means of resolving disputes, the OHADA Common Court of Justice and Arbitration.⁴³

Another prospect would be to find a way, either mandatorily or optionally, for individuals and companies to argue issues on ASEAN law before the ATT in the absence of a right to bring a direct action against an AMS. One way of doing this would be to allow the ATT to be the final arbiter in what ASEAN trade law meant in the same way, e.g., that the CJEU has the ultimate say as to what EU law means. In the latter case, the reference for a preliminary ruling under Article 267 TFEU allows EU Member State courts to refer questions of EU law interpretation to the CJEU; in the case of courts against whose decision no appeal lies, then they are required to make such a reference.⁴⁴ While this procedure is very well established in the EU, it is

⁴² On the interpretation of “direct concern,” Case C-583/11P, *Inuit Tapiriit Kanatami v. Parliament*, ECLI:EU:C:2013:625, Oct. 3, 2013; and on “individual concern” Case 25/62, *Plaumann v. Commission*, ECLI:EU:C:1963:17, July 15, 1963.

⁴³ Michael W. Bühler, «Out of Africa: The 2018 OHADA Arbitration and Mediation Law Reform», *Journal of International Arbitration* 35, n.º 5 (2018): 517-539.

⁴⁴ TFEU Art. 267(2) and (3).

likely to prove controversial for the ATT. In such situation, then the mechanism set out below in the next section may be more useful.

4. *Advisory Jurisdiction: a Prospect of the Tribunal's Influence on Courts of Member States*

The ability to give advisory opinions is nothing new: the ICJ can provide such legal advice to the UN or its specialized agencies.⁴⁵ This jurisdiction has also been given to various regional courts. In Africa, for example, the Common Market Tribunal of the first East African Community (EAC) (1967-1977)⁴⁶ could be asked to give an advisory opinion regarding questions of law arising from the provisions of the (earlier) EAC Treaty affecting the East African common market by the EAC Common Market Council that comprised ministers from the governments of Kenya, Uganda and Tanzania. Where such requests were made, then those three states had the right to be represented and take part in the proceedings.⁴⁷ Another example comes from a now moribund regional court, the Southern African Development Community (SADC) Tribunal⁴⁸ which could similarly give advisory opinions, this time on such matters as the SADC Summit (heads of state) or the SADC Council (government ministers) might refer to it. In both these latter cases, however, only regional institutions had the power to refer questions for an advisory opinion to the relevant court.

Closer to the CJEU model of allowing references from national courts under Article 267 TFEU for interpretation of EU law in domestic cases, is the EFTA Court's jurisdiction⁴⁹ to give advisory opinions on the interpretation of the Agreement on the European Economic Area (EEA).⁵⁰ Where such a question is raised before any court or tribunal in an EFTA State (Iceland, Liechtenstein or Norway), then that court or tribunal may, if it considers it necessary to enable it to give judgment, request the EFTA Court to give such an opinion.⁵¹

⁴⁵ Statute of the International Court of Justice, Arts. 65-68, Oct. 24, 1945 (ICJ).

⁴⁶ Treaty for East African Co-operation, Art. 38, June 6, 1967, 1989 U.N.T.S. 34026.

⁴⁷ Advisory opinions can currently be requested from the EACJ by the EAC Summit, EAC Council or by a Member State (EAC Art. 36).

⁴⁸ Treaty of the Southern African Development Community, Art. 16(4), Aug. 17, 1992, 32 I.L.M. 116.

⁴⁹ Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice, Art. 34, May 2, 1992, 1994 O.J. (L 344) 3 (EEA SCA).

⁵⁰ Agreement on the European Economic Area, May 2, 1992, 1994 O.J. (L 1) 3 (EEA).

⁵¹ An EFTA State may nevertheless in its internal legislation limit the right to request such an advisory opinion to courts and tribunals against whose decisions there is no judicial remedy under national law: EFTA SCA Art. 34.

Another step away from the CJEU model but probably most useful for the ATT is the one provided in the Mercosur Permanent Review Tribunal (PRT).⁵² This allows not just the Member States (conjointly) but also Mercosur institutions, including the Mercosur Parliament, to ask the PRT for an advisory opinion on legal questions concerning the interpretation of Mercosur norms. This right is also granted to domestic superior courts of Mercosur states that enjoy nationwide competence, provided that such opinions relate to cases on trial and involve the interpretation of Mercosur norms. Nevertheless, such PRT opinions are not binding nor are they compulsory, and in any event cannot refer to issues already under consideration in the Mercosur dispute settlement system. In many respects, this would be an ideal model for the ATT to follow and would be consonant with the ASEAN Way of doing things.

5. *Composition: Judges of the Court*

(i) Requirements and Qualifications

The necessary requirements and qualifications to sit as a judge on a regional or international court do not vary widely, emphasizing as they do an attempt to balance independence with accountability. The ICJ⁵³ requirements, on which subsequent global and regional courts based their own criteria, requires its judges to be “independent ... of high moral character, who possess the qualifications required in their respective countries for appointment to the highest judicial offices, or are jurisconsults of recognized competence in international law.”

The judges of the International Criminal Court (ICC)⁵⁴ are chosen from among persons “of high moral character, impartiality and integrity who possess the qualifications required in their respective States for appointment to the highest judicial offices.” Moreover, they are to have either (i) established competence in criminal law and procedure, and the necessary relevant experience, whether as judge, prosecutor, advocate or in other similar capacity, in criminal proceedings; or (ii) established competence in relevant areas of international law such as international humanitarian law and the law of human rights, and extensive experience in a professional legal capacity which is of relevance to the ICC’s judicial work. In addition, candidates must be fluent in either English or French, the working languages of the ICC.

⁵² Olivos Protocol for the Settlement of Disputes in Mercosur, Chapter III, Feb. 18, 2002, 42 I.L.M. 2.

⁵³ ICJ Art. 2.

⁵⁴ Rome Statute on the International Criminal Court, Art. 36, 2187 U.N.T.S. 38544 (ICC).

Consequently, because of the particular nature of the ATT and its specialist jurisdiction, it would be necessary to consider further qualifications for candidates. Taking the WTO AB as an example,⁵⁵ candidates would need to be “of recognized authority, with demonstrated expertise in law, international trade and the subject-matter of the covered agreements generally.” In fact, the criteria for panel arbitrators or AB members appointed through the two already existing protocols would ideally form the nucleus of requirements for being considered and appointed as an ATT member.

Under the Vientiane Protocol,⁵⁶ members appointed to the AB are to be persons of recognized authority, irrespective of nationality, with demonstrated expertise in law, international trade and the subject matter of the covered agreements generally. From the perspective of independence and impartiality, such appointees must not be affiliated with any government; are to be available at all times and on short notice; must stay abreast of dispute settlement activities and other relevant activities of ASEAN; and are to avoid any direct or indirect conflict of interest in consideration of any dispute. Under both the Vientiane⁵⁷ and Hanoi⁵⁸ Protocols, arbitrators must possess expertise or experience in law and in the matters covered by the ASEAN Charter or the relevant ASEAN instrument. They are chosen on the basis of objectivity and reliability and are neither affiliated with nor take instructions from any parties to the dispute. One persistent problem as regards possible members of the ATT would be the lack of qualified candidates in ASEAN who are not also working in their own national public administrations.

(ii) Number of Judges

In international courts with limited numbers on the bench, judges are chosen to reflect the different legal traditions and systems throughout the world. With regional courts, where numbers of Member States are smaller, the options can be the nomination of one judge per state or possibly two with both as full time (GC) or even three with two being ad hoc (EFTA Court): in the latter case, ad hoc judges to sit on a case if, e.g., there is a conflict of interest.⁵⁹ As for the Court of Justice of the Economic Community of West African States (ECOWAS), countries take it in turn to nominate their judge in a set rotation.⁶⁰

⁵⁵ WTO DSU Art. 17(3)

⁵⁶ VP Art. 12(3).

⁵⁷ VP Appendix II, clause I(1).

⁵⁸ HP Art. 11(2).

⁵⁹ EFTA SCA Art. 30(4).

⁶⁰ Supplementary Protocol A/SP.1/06/06 amending the Revised ECOWAS Treaty, Art. 2, replacing 1993 Revised Treaty, Art. 18(4), 2006 ECOWAS O.J. (49) 21.

Of a more complicated nature is the EACJ, which – like the WTO DSU and CJEU – has two tiers: each EAC Member State can appoint maximum two judges for the first instance division and one for the appellate division.⁶¹

The present proposals envisaged for the ATT provide for panels and an AAC similar to the structure of the WTO DSU. Nevertheless, with only ten AMSs at the present time, it would be easier politically and arguably an application of the ASEAN Way approach by allowing the AMSs to be treated equally if each AMS (at least initially) were to have a right to list, e.g., three members – one for the AAC and two to sit in the panels.

(iii) Selection and appointment

Selection of judges to sit in regional and international courts is usually subject to the ultimate control of the states concerned. For example, members of the EFTA Court are appointed by common accord of the governments of EEA-EFTA states of Iceland, Liechtenstein and Norway.⁶² In a similar fashion, the seven members of the WTO AB are appointed by the Dispute Settlement Body (DSB)⁶³ in effect, a session of the General Council of the WTO, i.e., all of the representatives of the WTO member governments, usually at ambassadorial level, meeting together. The WTO DSB thus represents the highest political body, bringing together all the Member States.

Other courts, however, have introduced some non-executive controls. For example, the appointment of CJEU judges⁶⁴ – similarly to their EFTA Court counterparts – is made by “common accord of the governments of the Member States for a term of six years” and which further allows them to be reappointed for a non-defined number of occasions. Yet all candidates – proposed by the Member State governments for positions as judges of the Court of Justice (CoJ) and the General Court (GC) – must go before a judicial appointments panel⁶⁵ that produces an opinion on the suitability of each of them. While the Council of the European Union (the Council of Ministers) is responsible for establishing the Panel⁶⁶ and its operating rules,⁶⁷ its decisions in both these matters are made following the initiative of the President of the

⁶¹ EAC Art. 24(1).

⁶² EFTA SCA Art. 30(1).

⁶³ WTO DSU Art. 17(2).

⁶⁴ TFEU Art. 253.

⁶⁵ TFEU Art. 255.

⁶⁶ Council Decision 2010/125/EU appointing the members of the panel provided for in Article 255 of the Treaty on the Functioning of the European Union, 2010 O.J. (L 50) 20.

⁶⁷ Council Decision 2010/124/EU relating to the operating rules of the panel provided for in Article 255 of the Treaty on the Functioning of the European Union, 2010 O.J. (L 50) 18 (Operating Rules).

CoJ. The panel is made up of seven persons chosen from among former members of the CoJ and the GC, members of national supreme courts, and lawyers of recognized competence, one of whom is proposed by the European Parliament (the one minor contribution to democratic accountability in the whole selection process). Panel members are appointed for four years and may be reappointed once.⁶⁸

The sitting panel members must give a collective reasoned opinion on the merits of each proposed candidate, setting out the principal grounds for its opinion.⁶⁹ Such opinion remains confidential and is never made public; it is forwarded to the Representatives of the Governments of the EU Member States. Even with this judicial panel, the appointment of a judge to the CJEU (either CoJ or GC) still requires unanimous agreement of the EU Member State governments.

In the ASEAN context, the AEM is likely to want to maintain ultimate political control over appointments to the ATT. Yet it might be more attuned to the ASEAN Way for an independent panel of experts to give their opinions on the suitability of the candidates nominated by an AMS, before proceeding to have their nomination confirmed through the AEM by common accord.

(iv) Terms of Office and Reappointment

In this particular matter, two points would need to be addressed: (i) whether the term should be short or long; and (ii) whether the ATT member might be reappointed and, if so, for how often.

Short terms of four years with one possibility of reappointment are provided for the WTO AB but that has caused problems with the continued functioning of that body in the face of US refusals to allow for either appointment or reappointment to it.⁷⁰

Longer terms, with possible reappointment, are provided for the CJEU and the EFTA Court and were formerly provided for the European Court of Human Rights (ECtHR). Judges at the ECtHR could originally sit for renewable terms of nine years,⁷¹ which terms were reduced to six years in

⁶⁸ Operating Rules, point 3.

⁶⁹ Henri de Waele, «Not Quite the Bed that Procrustes Built? Dissecting the System for Selecting Judges at the Court of Justice of the European Union», en *Selecting Europe's Judges: A Critical Review of the Appointment Procedures to the European Courts*, ed. por Michal Bobek (Oxford: Oxford University Press, 2015), 24-26.

⁷⁰ Jeffrey L. Dunoff y Mark A. Pollack, «The Judicial Trilemma», *American Journal of International Law* 111, n.º 2 (2017): 237-238 y 244.

⁷¹ Convention for the Protection of Human Rights and Fundamental Freedoms, Art. 40, Nov. 4, 1950, E.T.S. No. 5 (original version): “The members of the Court shall be elected for a period of nine years. They may be re-elected.”

1994.⁷² However, since ECtHR judges can give named dissenting and concurring opinions to judgements, from the late 1990s, it appeared that some governments were using their reappointment powers as a means of disciplining recalcitrant judges whose interventions they did not like. In 2004, these renewable terms were abolished and replaced with a non-renewable term of nine years.⁷³

Depending on the length of the single term adopted under the relevant legal rules, this can allow some of the advantages of life tenure – security, irremovability, and therefore independence – to be combined with a system of rotation in office. The result is that no one group of judges can maintain their grip on a court or tribunal over an extended period of time. Nevertheless, the future career prospects of judges may still affect their decision-making: this might be particularly relevant for younger judges who need to find other positions after their non-renewable ECtHR term expires.⁷⁴ There has also been consideration of the idea of changing the six-year renewable term at the CJEU by appointing judges for a longer non-renewable period.⁷⁵

Taking these examples into consideration, it may be possible to propose a period of between six-nine years for ATT members without a prospect of reappointment. The length of tenure would underline continuity and evolution in the ATT's decision-making, while the removal of the option to stand for reappointment might reduce the fear of ATT members with respect to their home government. In this latter respect, although not discussed due to its procedural nature, the decision of the ATT should be the only one handed down, with no dissenting or concurring opinions (as is the situation vis-à-vis both the CJEU and EFTA Court). A single ruling might at least avoid the exercise by AMS governments over their ATT members when resolving disputes before them.

IV. CONCLUSION

The 2007 ASEAN Charter marked an advance in becoming a more rules-based organization. Consequently, as AMSs seek to deepen their economic

⁷² Protocol No. 11 to the Convention for the Protection of Human Rights and Fundamental Freedoms 1994, Art. 37, May 11, 1994, 1994 E.T.S. 155.

⁷³ Protocol No. 14 to the Convention for the Protection of Human Rights and Fundamental Freedoms, Amending the Control System of the Convention 2004, Art. 2, May 13, 2004, 2004 C.E.T.S. 194. This provision amended Art. 23(1), ECHR that now reads: “The judges shall be elected for a period of nine years. They may not be re-elected.”

⁷⁴ David Kosař, «Selecting Strasbourg Judges: A Critique», en *Selecting Europe's Judges*, ed. por Bobek, 140.

⁷⁵ Takis Tridimas, «The European Court of Justice and the Draft Constitution: A Supreme Court for the Union?», en *EU Law for the Twenty-First Century: Rethinking the New Legal Order*, ed. por Takis Tridimas y Paolisa Nebbia (Oxford: Hart Publishing, 2004) vol. 1, 119.

co-operation and integration, the issue of a permanent ATT – designed to further that project – will continue to provide a gravitational pull for some of those states and relevant (potential) stakeholders in the economy and academia. Given the refocusing of ASEAN on its further integration, its citizens and economic development and integration, those calls from stakeholders across the region will become louder. The ATT could therefore act to maintain legal certainty with regard to ASEAN law of the region. With the authority to provide independent and uniform interpretations of ASEAN legal obligations and to resolve definitively disputes in a rules-based manner, the ATT would greatly minimize the potential for political conflict over the application and enforcement of ASEAN law.⁷⁶

The eventual creation of a fully adjudicative ATT will not, on its own, ensure the success of ASEAN: decision-making and supervisory institutions as well as further permanent bodies and administration are also needed as well to bolster and reinforce the institutionally-strategic role of the ATT. Further evolution is inevitable and the above proposals provide some ideas as to how AMSs could take the next steps in developing ASEAN DSMs. This could be achieved by allowing individuals and companies to bring cases indirectly before the ATT; by extending its jurisdiction gradually to cover all the economic and trade agreements of ASEAN; by allowing the ATT to provide authoritative interpretations of ASEAN law for courts in the AMSs; and by consolidating into the ATT's jurisdiction the plethora of proceedings that arise in relation to the Vientiane and Hanoi Protocols as well as other ASEAN instruments.

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⁷⁶ Diane A. Desierto, «ASEAN's Constitutionalization of International Law: Challenges for Evolution Under the New ASEAN Charter», *Columbia Journal of Transnational Law* 49 (2011): 297-317.

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*Paying Court to the Future – Ha llegado el tiempo para un
Tribunal de comercio de la ASEAN?*

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