

# East Asia's Engagement with Cosmopolitan Ideals Under its Trade Treaty Dispute Provisions

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[See table of contents](#)

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Article abstract

An East Asian view about how trade dispute settlement systems should be designed is slowly emerging. Democratically-inspired trade law scholarship and cultural explanations of the international law behaviour of the Southeast and Northeast Asian trading nations have failed to capture or prescribe the actual treaty behaviour of these nations. Instead, such behaviour has resulted in the emergence of two different treaty models for the peaceful settlement of trade disputes. The first, which seems firmly established, may be found in ASEAN's 2004 dispute settlement protocol and the regimes established under the China-ASEAN, Korea-ASEAN, Japan-ASEAN, and ASEAN-Australia-New Zealand FTAs. A second model, based on the Trans-Pacific Strategic Economic Partnership Agreement, could in time become an alternative model for an Asia-Pacific-wide FTA (i.e., including the East Asian nations within it). It adopts a more open approach; one which better accommodates greater transparency in dispute proceedings. At least for now, the two models coexist, obviating the need for East Asia's legal policy-makers to choose a clear, dominant design for treaty-based trade dispute settlement in the region. But it also means that East Asia's trading partners can influence East Asian nations, at least in those trade agreements that—like the Trans-Pacific Partnership Agreement—involve negotiations with trans-continental partners.

# EAST ASIA'S ENGAGEMENT WITH COSMOPOLITAN IDEALS UNDER ITS TRADE TREATY DISPUTE PROVISIONS

*C.L. Lim\**

An East Asian view about how trade dispute settlement systems should be designed is slowly emerging. Democratically-inspired trade law scholarship and cultural explanations of the international law behaviour of the Southeast and Northeast Asian trading nations have failed to capture or prescribe the actual treaty behaviour of these nations. Instead, such behaviour has resulted in the emergence of two different treaty models for the peaceful settlement of trade disputes. The first, which seems firmly established, may be found in ASEAN's 2004 dispute settlement protocol and the regimes established under the China-ASEAN, Korea-ASEAN, Japan-ASEAN, and ASEAN-Australia-New Zealand FTAs. A second model, based on the Trans-Pacific Strategic Economic Partnership Agreement, could in time become an alternative model for an Asia-Pacific-wide FTA (i.e., including the East Asian nations within it). It adopts a more open approach; one which better accommodates greater transparency in dispute proceedings. At least for now, the two models coexist, obviating the need for East Asia's legal policy-makers to choose a clear, dominant design for treaty-based trade dispute settlement in the region. But it also means that East Asia's trading partners can influence East Asian nations, at least in those trade agreements that—like the Trans-Pacific Partnership Agreement—involve negotiations with trans-continental partners.

Un point de vue est-asiatique sur la conception des systèmes de règlement des différends commerciaux émerge lentement. Les écrits académiques d'inspiration démocratique traitant du droit commercial ainsi que les explications culturelles du comportement des pays de l'Asie du Sud-Est et du Nord-Est en matière de droit international n'arrivent ni à cerner, ni à prescrire leur comportement réel en matière de traités. Ce comportement a plutôt mené à l'émergence de deux modèles de traités différents pour la résolution pacifique des différends commerciaux. Le premier, qui semble solidement établi, se trouve dans le protocole de résolution des différends de l'ANASE de 2004 ainsi que dans les régimes établis sous les accords de libre-échange (ALÉ) Chine-ANASE, Corée-ANASE, Japon-ANASE et ANASE-Australie-Nouvelle-Zélande. Un second modèle, celui-ci basé sur l'Accord de partenariat économique stratégique transpacifique (APEST), pourrait éventuellement devenir un modèle d'ALÉ alternatif qui couvrirait toute l'Asie-Pacifique (i.e. y compris les pays de l'Asie de l'Est qui en font partie). Ce modèle adopte une approche plus ouverte qui favorise mieux la transparence lors des procédures relatives aux conflits. Pour l'instant, les deux modèles coexistent. Cela fait en sorte que les responsables des politiques juridiques de l'Asie de l'Est n'ont pas à choisir de modèle clair et dominant pour la résolution, par l'entremise de traités, des différends commerciaux dans la région. Néanmoins, cela signifie aussi que les partenaires commerciaux de l'Asie de l'Est peuvent exercer de l'influence sur les pays est-asiatiques, du moins quand il est question d'accords commerciaux qui, comme l'APEST, comprennent des négociations avec des partenaires transcontinentaux.

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<b>Introduction</b>	823
<b>I. Five Arguments for Greater Transparency in Trade Dispute Settlement</b>	825
<i>A. Is There a World Trade Court?</i>	828
1. A Judicial System?	828
2. Still a Diplomatic Body	831
<i>B. Is There a Trend Toward Greater Transparency?</i>	832
<i>C. Democracy as Ideal</i>	836
<i>D. A Heightened Search for Legitimacy Through Cosmopolitan Engagement</i>	838
<i>E. The Need to Pursue Democratically Coherent Trade Policies</i>	842
<b>II. Settling East Asian Trade Disputes</b>	842
<i>A. Asia and the International Settlement of Disputes</i>	842
1. Studying East Asia's Regional Trade Treaties	846
<i>B. ASEAN</i>	849
<i>C. Trade Dispute Settlement in ASEAN's Agreements with China, Korea, Japan, Australia, and New Zealand</i>	851
1. Introduction	851
2. Closed Proceedings and Confidential Submissions in Trade Disputes	852
3. Arbitrators' Confidentiality Obligation	852
4. Rules Governing the Presence of Parties and Third Parties	853
5. Confidentiality of Tribunal Deliberations	854
6. Keeping the Existence of a Dispute Confidential	854
<i>D. Enter the United States, and the Trans-Pacific Strategic Economic Partnership Agreement</i>	855
<b>III. Analytical Limitations of the "Cultural" Explanation</b>	856
<b>Conclusion</b>	859

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## Introduction

In the last ten years, there has been a proliferation of Regional Trade Agreements (RTAs)<sup>1</sup> in the East Asian region.<sup>2</sup> Parties to RTAs are free to choose between various models of dispute settlement, but we might also ask what sort of trade dispute settlement model East Asian countries should adopt. Should they choose “closed” or “open” models of trade dispute settlement design, especially in light of the debate on increasing the transparency of WTO dispute settlement? Should trade dispute proceedings be open to the public, and should arbitral tribunals and panels receive unsolicited *amici curiae* briefs? East Asia—comprising the North-east and Southeast Asian sub-regions—deserves our attention because this vast region promises to be a melting pot of ideas about trade rule design in light of the emergence in recent years of “transcontinental” RTAs between the United States and Asian nations, as well as the entry of Canada, Australia, the European Communities (EC) and others into the RTA race in the wider Asia-Pacific region.

US RTAs, for example, have conformed to an open model.<sup>3</sup> Others, such as Australia's FTAs, have been more equivocal and have adopted both transparent and closed regimes. This, presumably, is a result of individual negotiating dynamics and possibilities as much as it involves questions about Australia's foreign policy priorities. On the other hand, the Association of Southeast Asian Nations (ASEAN) has resisted an open model, either in the dispute settlement system for the ASEAN Free Trade Area (AFTA),<sup>4</sup> or under the various ASEAN “Plus One” FTAs with China (China-ASEAN FTA),<sup>5</sup> Korea (Korea-ASEAN FTA),<sup>6</sup> Japan (the Japan-

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<sup>1</sup> This paper uses a broader term—“RTAs”—which would include both free trade agreements (FTAs) and customs unions, unless a more specific term (e.g., “FTAs”) is more appropriate in the context in which the specific term arises.

<sup>2</sup> See CL Lim, “Who's Afraid of Asian Trade Regionalism, and Why?” in Ross P Buckley, Richard Weixing Hu & Douglas W Arner, eds, *East Asian Economic Integration: Law, Trade and Finance* (London, UK: Edward Elgar, 2011) (forthcoming).

<sup>3</sup> See e.g. *United States-Singapore Free Trade Agreement*, 6 May 2003, art 20.4.(4)(d) (entered into force 1 January 2004), online: Office of the United States Trade Representative <<http://www.ustr.gov>> [US-Singapore FTA]; *United States-Chile Free Trade Agreement*, 6 June 2003, art 22.10(1) (entered into force 1 January 2004), online: Office of the United States Trade Representative <<http://www.ustr.gov>>.

<sup>4</sup> See *Framework Agreements on Enhancing ASEAN Economic Cooperation*, 28 January 1992, online: ASEAN <<http://www.aseansec.org>> [ASEAN Framework Agreement]; *Agreement on the Common Effective Preferential Tariff Scheme for the ASEAN Free Trade Area*, 28 January 1992, online: ASEAN <<http://www.aseansec.org>>.

<sup>5</sup> *Framework Agreement on Comprehensive Economic Co-operation between ASEAN and the People's Republic of China*, 4 November 2002, online: ASEAN <<http://www.aseansec.org>> [China-ASEAN]; *Agreement on Dispute Settlement Mechanism Framework Agreement on Comprehensive Economic Co-operation between ASEAN and the*

ASEAN FTA, hereafter “Japan-ASEAN”),<sup>7</sup> and with Australia and New Zealand (AANZFTA).<sup>8</sup> Many ASEAN and East Asian countries are also the ones arguing against further transparency in Geneva’s dispute settlement system (e.g., regarding public submissions, open proceedings, and *amici curiae* briefs). They argue that transparency threatens the inter-governmental nature of the system, making East Asia and the wider Asia-Pacific region an important site in which such debate now takes place.

Part I addresses some of the main arguments for having greater transparency in trade dispute settlement. Part II discusses developments in East Asia and the Asia-Pacific region. Part II also evaluates the likelihood of greater transparency in East Asian trade dispute settlement design as these nations begin to integrate their economies between themselves, and also with their trading partners within the broader Asia-Pacific region and beyond. Part III argues against resorting to cultural and democratic explanations of (and prescriptions for) East Asian treaty behaviour in favour of a pragmatic understanding that accepts both the entrenchment of an East Asian, “closed” model of trade dispute settlement, and the limited success of democratic arguments thus far in modifying the treaty behaviour of these nations. Democratically informed scholarship is more likely to have an impact on East Asia’s current and future transcontinental trading partners, although this paper does not claim that “Western” FTAs are prime exemplars of cosmopolitanism. There is simply a greater likelihood of receptivity to cosmopolitan ideals in the diplomatic and trade treaty-related behaviour of a number of Western trading nations. As we will go on to see, the United States and the European Union have championed greater transparency in WTO trade dispute settlement.

In any event, what we are seeing today is the emergence of a new, “for export” model of trade dispute settlement design within East Asia where East Asian nations sometimes find themselves negotiating transcontinental deals with Western nations. Taken alongside East Asia’s own

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*People’s Republic of China*, 29 November 2004, online: ASEAN <<http://www.aseansec.org>> [*China-ASEAN DSA*].

<sup>6</sup> *Agreement on Trade in Goods under the Framework Agreement on Comprehensive Economic Cooperation among the Governments of the Member Countries of the Association of Southeast Asian Nations and the Republic of Korea*, 24 August 2006 (entered into force 13 December 2005), online: ASEAN <<http://www.aseansec.org>> [*ASEAN-Korea*].

<sup>7</sup> *Agreement on Comprehensive Economic Partnership among Japan and Member States of the Association of Southeast Asian Nations*, 14 April 2008, online: Ministry of Foreign Affairs of Japan <<http://www.mofa.go.jp>> [*Japan-ASEAN FTA*].

<sup>8</sup> *Agreement Establishing the ASEAN-Australia-New Zealand Free Trade Area*, 27 February 2009 (entered into force 1 January 2010), online: Australian Department of Foreign Affairs and Trade <<http://www.dfat.gov.au>> [*AANZFTA*].

"closed" treaty model, we are therefore beginning to see two different treaty models of trade dispute settlement emerge from within the Asian region. While this new phenomenon seems real enough, its causes may be harder to explain. Could it be that some East Asian trading nations now believe that trade agreements ought to conform to cosmopolitan ideals? Can the "West" now expect this of East Asia? This paper argues against the view that there has been any significant change in fundamental beliefs within East Asian policy circles. East Asia's own closed model is almost invariably employed when East Asians enter into intra-regional treaties. The more cosmopolitan arrangement under the Trans-Pacific Strategic Partnership Agreement, which we will discuss further below,<sup>9</sup> may be explained precisely on the basis that it is meant to form the basis of a cross-Pacific deal with trading partners for whom, presumably, cosmopolitanism is something more than a convenience.

## I. Five Arguments for Greater Transparency in Trade Dispute Settlement

A brief overview of some of the main arguments in favour of having an "open" model of trade dispute settlement may be useful, before looking at the current forms of East Asian treaty behaviour.

(1) *"The WTO Dispute System is a Law Court."* The first argument relies on the fact that the WTO's dispute settlement system already resembles a judicial process.<sup>10</sup> According to this argument, if the WTO dispute system *is* a judicial system, or is closely akin to one, then it should be "open" in the same way that judicial proceedings elsewhere, both domestically and internationally, are both public and transparent.<sup>11</sup> Insofar as many East Asian RTAs have adopted the WTO as a "benchmark", these

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<sup>9</sup> The *Trans-Pacific Strategic Economic Partnership Agreement* is my main example here as that is where a cosmopolitan model may be found of a treaty that is intended to have broad regional application (i.e., as opposed to some of the many "small" bilaterals that are, today, scattered about East Asia). See *Trans-Pacific Strategic Economic Partnership Agreement*, 18 July 2005, online: SICE <<http://www.sice.oas.org>> [TPA].

<sup>10</sup> See Robert E Hudec, "The New WTO Dispute Settlement Procedure: An Overview of the First Three Years" (1999) 8:1 Minn J Global Trade 1 [Hudec, "New WTO"]; Michael K Young, "Dispute Resolution in the Uruguay Round: Lawyers Triumph over Diplomats" (1995) 29 Int'l Law 389; JHH Weiler, "The Rule of Lawyers and the Ethos of Diplomats: Reflections on WTO Dispute Settlement" in Roger B Porter et al, eds, *Efficiency, Equity, and Legitimacy: The Multilateral Trading System at the Millennium* (Washington, DC: Brookings Institution Press, 2001) 334; Arie Reich, "From Diplomacy to Law: The Juridicization of International Trade Relations" (1996-1997) 17 Nw J Int'l L & Bus 775.

<sup>11</sup> Thomas A Zimmermann, *Negotiating the Review of the WTO Dispute Settlement Understanding* (London: Cameron May, 2006) at 168; Bryan Mercurio & Rebecca Laforgia, "Expanding Democracy: Why Australia Should Negotiate for Open and Transparent Dispute Settlement in its Free Trade Agreements" (2005) 6:2 Melb J Int'l L 485 at 493.

RTA systems should therefore be judged against a WTO/judicial standard of openness. The argument turns on the nature or true character of the WTO system—whether the WTO model is truly a judicial model today, or still resembles a “diplomatic” model of trade dispute settlement. We will see that it contains elements of both.

(2) “*The Trend Today is for the World Trade Court to Become More Open.*” A second argument has to do with the perception that there is now a *trend* towards having more transparency in WTO dispute settlement. According to this argument, if the WTO system is becoming more transparent,<sup>12</sup> then closed RTA dispute systems that mimic or copy the WTO dispute settlement system are increasingly in danger of being inconsistent with that which they had set out to copy.<sup>13</sup>

(3) “*Democracy and Cosmopolitanism as International Legal Ideals.*” A third, related argument has to do with debate about what the WTO system (and RTA dispute systems) *should*, ideally, become. WTO dispute settlement *should* continue to move towards an open model and become more transparent. “Closed” models should be avoided. One reason for saying this is that there is an emerging international law principle of democratic governance which, in turn, is related to cosmopolitan ideals. In this paper, however, we will refer to two meanings of cosmopolitanism which have been adapted to the trade policy context. The first refers to a theory of politics founded upon the notions of individual freedom, choice, and autonomy (i.e., normative individualism, or the idea that our moral concepts refer, in the last analysis, to individual rights). According to this first meaning, the state *qua* treaty actor should act in ways that respect and promote individual freedom, choice, and autonomy.<sup>14</sup> A basic requirement of sovereign trade treaty behaviour is therefore that such behaviour should be made known to individual citizens in the first place; without such knowledge, the citizen will be unable to freely exercise a consumer choice.<sup>15</sup> In the latter case, the state acts illegitimately. Typically, such consumer choices will relate to particular trade policy outcomes, including the outcomes of trade disputes. Secondly, “cosmopolitics”—a term coined by Pascal Lamy—has now become a term of art. It re-

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<sup>12</sup> See WTO, *United States—Continued Suspension of Obligations in the EC—Hormones Dispute*, WTO Doc WT/DS320/8; *Canada—Continued Suspension of Obligations in the EC—Hormones Dispute*, WTO Doc WT/DS321/8 (2005) (Communication from the Chairman of the Panels) [*EC—Hormones*].

<sup>13</sup> Mercurio & Laforgia, *supra* note 11 at 496-97.

<sup>14</sup> Fernando R Tesón, “The Kantian Theory of International Law” (1992) 92:1 *Columbia L Rev* 53.

<sup>15</sup> Robert F Housman, “Democratizing International Trade Decision-making” (1994) 27:3 *Cornell Int’l LJ* 699 at 701.

fers to a counter-statist view of the world trading order, one that embraces non-governmental, non-sovereign participation and debate.<sup>16</sup> In the first sense, the state's internal legitimacy is at stake, while the second sense of the term "cosmopolitanism" implicates the legitimacy of the world trading system.

(4) *"Legitimacy is Functionally Important."* A fourth argument is that an undemocratic or anti-democratic dispute settlement system lacks popular legitimacy, feeds the globalization backlash, and threatens the functioning, health, and long-term viability of both the global trading system and regional trading systems.<sup>17</sup> This argument responds to the various criticisms of the WTO following events in Seattle in 1999.<sup>18</sup> These range from dissatisfaction over the loss of jobs (e.g., Ross Perot's reference to a "giant sucking sound going South"),<sup>19</sup> to the environmental impact of economic globalization, as well as human and labour rights concerns over the proliferation of third world sweatshops. Friends of the WTO generally believe tragic misunderstanding underlies these criticisms about what the WTO is and what it does. They argue that such doubt can be dispelled if only there were greater knowledge about the WTO—that is, greater transparency in what it does,<sup>20</sup> and better understanding of how its dispute settlement system works.<sup>21</sup> Their arguments are not confined to saving the WTO system. Perot was talking about NAFTA.<sup>22</sup>

(5) *"Democratic Nations Must Push for Democratic Dispute Regimes."* A fifth argument has to do with the need for "policy coherence" between the domestic political regimes of individual RTA countries and the supra-national RTA systems they create. Thus, democratic nations should advocate open, democratic trade dispute settlement in their RTA negotiations

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<sup>16</sup> Pascal Lamy, "Harnessing Globalization, Do We Need Cosmopolitics?" (Lecture delivered at the London School of Economics, 1 February 2001) online: London School of Economics <<http://www.lse.ac.uk>>.

<sup>17</sup> Related to this are other benefits of bringing transparency to bear—namely, that transparency increases the quality of third-party decision making, reduces the risk of corruption or undue influence, and could lead to a more coherent body of jurisprudence.

<sup>18</sup> Jeffrey J Schott, ed, *The WTO After Seattle* (Washington, DC: Institute for International Economics, 2000).

<sup>19</sup> "Transcript of 2d TV Debate between Bush, Clinton and Perot", *The New York Times* (16 October 1992) A11.

<sup>20</sup> James Bacchus, *Trade and Freedom* (London: Cameron May, 2004) [Bacchus, *Trade and Freedom*].

<sup>21</sup> *Ibid.*

<sup>22</sup> See William Greider, "A New Giant Sucking Sound", *The Nation* (31 December 2001) online: The Nation <<http://www.thenation.com>>.

or risk undermining democracy both at home and abroad.<sup>23</sup> While admitting that trade policy probably cannot be used internationally to promote periodic elections,<sup>24</sup> such proponents argue that it can nonetheless be used to promote ancillary values—for example accountability, openness, and transparency.

These arguments merit a closer examination, even if they require rehearsal of some old debates.

### A. *Is There a World Trade Court?*

#### 1. A Judicial System?

The WTO dispute settlement system (DSS) today represents a far more “judicialized” regime than the GATT regime of old, which evinced a “nuanced diplomatic style of adjudication”.<sup>25</sup> It is argued that the WTO dispute settlement system should, therefore, be just as transparent. To quote Zimmermann:

It is held that the lack of transparency in WTO dispute settlement emanates from the “old” diplomatic model of dispute settlement where compromise was encouraged and confidentiality played an important role. In the litigation setting of a more judicial dispute settlement system, withholding litigation documents would no longer be appropriate.

By contrast, opponents to more transparency argue that the government-to-government nature of the WTO should be preserved. Enhanced transparency would only lead to increased public pressure on negotiators and thereby preclude mutually agreed settlements.<sup>26</sup>

Likewise, Mercurio and Laforgia have argued that:

It should come as no surprise that ... the WTO model of dispute settlement is a closed one—the GATT was, and the WTO is, a member-driven organisation ... [While] the dispute settlement process in the GATT began as conciliation[,] ... as the system moved towards an adjudicatory model, the reasons for keeping the process closed became less persuasive.<sup>27</sup>

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<sup>23</sup> Mercurio & Laforgia, *supra* note 11 at 512-14.

<sup>24</sup> Strictly speaking, nothing stops RTAs from being used to impose direct electoral obligations.

<sup>25</sup> Hudec, “New WTO”, *supra* note 10 at 7. See also Young, *supra* note 10; Weiler, *supra* note 10; Reich, *supra* note 10.

<sup>26</sup> Zimmermann, *supra* note 11 at 168.

<sup>27</sup> Mercurio & Laforgia, *supra* note 11 at 493.

The view that the WTO system resembles adjudication is unobjectionable in itself. But it is a different matter when “adjudication” as a shorthand expression for describing WTO dispute settlement becomes a statement about what *all* trade dispute settlement should be about. In any event, the fact that the WTO has moved towards adjudication, and resembles adjudication, does not make it so in the strictest sense of the word.

Arbitration and international adjudication are distinguishable by the feature that both result in legally binding decisions or awards. Transparency is not a traditional distinguishing feature. In that sense they are no different from resort to good offices, conciliation, and mediation, which typically occur behind closed doors. Even as transparency increasingly becomes a feature of international adjudication and inter-state arbitration, the WTO and RTA dispute systems remain distinguishable on this score precisely because of their confidential nature. That is why WTO dispute settlement is said to contain “vestiges of the ‘diplomatic model’ of dispute settlement.”<sup>28</sup>

There are other features to consider. First, WTO panel and appellate body reports are not binding awards. They require adoption by a political body—the WTO dispute settlement body (DSB).<sup>29</sup> No court reports to a political body and seeks political approval of its judgments, and even with *adopted* panel and appellate body reports (that is, those which have already been adopted by the DSB) there is still the view that they do not impose legally binding obligations as such.<sup>30</sup>

Secondly, to the extent that the WTO dispute settlement system resembles arbitration, it resembles arbitration only in its archaic form. In previous times, a friendly sovereign who was asked to arbitrate a dispute between two nations might entrust the matter to experts who would then make their recommendation to that sovereign in due course. The friendly ruler would “adopt” their recommendation and issue a “binding award”.<sup>31</sup> If that sounds familiar, it is precisely what the DSB does as a body comprising all the members of the WTO. The adopted report thereby enjoys the imprimatur of the whole membership, almost all of whom are sover-

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<sup>28</sup> Debra P Steger, *Peace Through Trade: Building the World Trade Organization* (London: Cameron May, 2004), at 296.

<sup>29</sup> *Agreement Establishing the World Trade Organization*, April 1994, Annex 2, art 16(4), 17(14), online: WTO <<http://www.wto.org>> [*Agreement WTO*].

<sup>30</sup> See Judith Hippler Bello, “The WTO Dispute Settlement Understanding: Less is More”, Editorial Comment, (1996) 90:3 AJIL 416; John H Jackson, “The WTO Dispute Settlement Understanding—Misunderstandings on the Nature of Legal Obligation”, Editorial Comment, (1997) 91:1 AJIL 60 [Jackson, “WTO Dispute Settlement”]; Giorgia Sacerdoti, Correspondence, (1997) 91 AJIL 89-90.

<sup>31</sup> See e.g. *Argentine-Chile Frontier Case* (1969) 38 ILR 10.

eigns, much like enlisting the services of a powerful monarch as arbitrator. In this respect too, WTO dispute settlement still retains the features of diplomatic settlement.

Thirdly, the degree of control that disputing parties wish to exert over the dispute settlement process, particularly over the selection of arbitrators, distinguishes WTO panel settlement from international adjudication. One of the issues debated from time to time has been the proposal for the WTO to have “permanent” panellists. The European Communities have formally proposed such an arrangement, for example,<sup>32</sup> although the proposal goes back as far as 1998.<sup>33</sup> Yet, to date, the WTO does not have such a permanent set-up for panels. Instead, an ad hoc appointments system *characteristic* of arbitration currently exists and is likely to remain on account of the current lack of support for a permanent panel body (PPB).<sup>34</sup> In fact, some of the arguments made against the idea of permanent panelists are reminiscent of arbitration.<sup>35</sup> They have to do with the extent to which the sovereign members *should* exercise some degree of control over the dispute settlement process.<sup>36</sup>

Fourthly, consultations are secret and may occur in parallel with dispute settlement proceedings.<sup>37</sup> In that regard too, WTO dispute settlement continues to retain elements of diplomatic settlement. If it resembles arbitration, it again represents that “older” model, which is often associated with secrecy.<sup>38</sup> In diplomatic arbitration, such secrecy may extend to the fact or the content of negotiations to resolve a dispute.<sup>39</sup> Arbitra-

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<sup>32</sup> WTO, Dispute Settlement Body, *Contribution of the European Communities and its Member States to the Improvement of the WTO Dispute Settlement Understanding*, WTO Doc TN/DS/W/1, Special sess, (2002) at 2-4 (Section I: “Moving from *Ad Hoc* to More Permanent Panelists”), 9 (Amendment of Certain Provisions of the Understanding on Rules and Procedures Governing the Settlement of Disputes) at para 7, online: WTO <<http://docsonline.wto.org>> [WTO, *Contribution of the European Communities*].

<sup>33</sup> Zimmermann, *supra* note 11 at 133.

<sup>34</sup> *Ibid* at 135.

<sup>35</sup> See AHA Soons, ed, *International Arbitration: Past and Prospects* (Dordrecht: Martinus Nijhoff, 1990).

<sup>36</sup> See Thomas Cottier, “The WTO Permanent Panel Body: A Bridge Too Far?” (2003) 6:1 J Int’l Econ L 187.

<sup>37</sup> *Agreement WTO*, *supra* note 29, arts 5(2)(3).

<sup>38</sup> On the historical importance of secrecy as a diplomatic doctrine, see GR Berridge, *Diplomacy: Theory & Practice*, 3d ed (London: Palgrave, 2005) at 110.

<sup>39</sup> *Ibid*.

tions of such kind have probably not fallen entirely into disuse even today.<sup>40</sup>

It is therefore an exaggeration to say that the WTO dispute settlement system is adjudicatory, and to draw from that metaphysical finding the proposition that all trade dispute settlement should represent domestic court proceedings. At most, it may be said that WTO dispute settlement resembles international adjudication in some important aspects.<sup>41</sup> As for the WTO system's resemblance to arbitration, there are many forms of arbitration lying along an imaginary spectrum, and the WTO system still contains significant elements that fall towards the diplomatic end of that spectrum.

## 2. Still a Diplomatic Body

Admittedly, saying that no court submits its ruling to the approval of a political body is not the end of the matter altogether. The DSB's adoption of the panel or appellate body report is virtually automatic under the WTO's Dispute Settlement Understanding (DSU) due to the operation of a reverse consensus rule—so long as one DSB member favours adoption, the report will be adopted.<sup>42</sup> And however much the DSB is a political body, the appellate body is not,<sup>43</sup> and political debate in the DSB does not affect the panel and appellate body report adoption process as such.<sup>44</sup>

What truly makes the WTO dispute settlement system a diplomatic mechanism is that in the case of adjudication the winning plaintiff cannot *negate* a judicial ruling. In the case of the WTO, the winning plaintiff, acting with the consent of the other WTO members in the DSB, can—in

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<sup>40</sup> For a view on the resilience of the distinction between “legal” and “non-legal” disputes, see the discussion in MCW Pinto, “The Prospects for International Arbitration: Inter-State Disputes” in Soons, *supra* note 35, 63 at 93-95.

<sup>41</sup> Such a resemblance can be seen in the compulsory jurisdiction of the WTO dispute settlement system, automatic adoption of panel and appellate body reports, and automatic authorization of retaliation; in the appellate body's “rituals”, such as the quasi-judicial principle of collegiality that it adopts, the “swearing in ceremony” for appellate body members, and the adversarial manner in which the latter conducts its proceedings; and in securing a fairly high degree of predictability in its decision making, as well as a pious reliance on the Vienna Convention on the Law of Treaties when facing interpretative issues. See Steger, *supra* note 28 at 300-305.

<sup>42</sup> See Jackson, “WTO Dispute Settlement”, *supra* note 30 at 60. See also *Agreement WTO*, *supra* note 29, arts 6(1), 16(4), 17(14), 22(6).

<sup>43</sup> See generally Keisuke Iida, *Legalization and Japan: The Politics of WTO Dispute Settlement* (London: Cameron May, 2006) at 21 (the appellate body is legalistic, unlike the panels, and leaves political considerations to the DSB).

<sup>44</sup> See generally CL Lim, “Law and Diplomacy in World Trade Disputes” (2002) 6 *Sing JICL* 436.

principle, at least—seek the rejection of a ruling of a panel or the appellate body. The WTO dispute settlement system was designed to cure the situation where the losing party could block the adoption of a GATT panel report, but it was probably not designed to deal with the situation where the winning party, or the party which brought the claim, refuses to adopt the report.<sup>45</sup> While this seems unlikely to occur often in practice, it does show that the system is unlike a domestic court. The WTO system does not fully separate political rule from judicial rule. The WTO's political branch holds sway over its "adjudicatory" system notwithstanding the fact that the DSU's "negative consensus" rule is often easily, even routinely, met.<sup>46</sup>

### *B. Is There a "Trend" Toward Greater Transparency?*

In Geneva, the transparency debate was first sparked by the leakage of panel reports. This resulted in questions about whether members could actually discuss pending cases. It was against this backdrop that debate arose about the merits of greater transparency,<sup>47</sup> leading to diplomatic proposals being put forward by the United States and Canada.<sup>48</sup>

Among the reasons given for greater transparency has been the need to secure heightened legitimacy for the dispute settlement system, and the futility of concealing parties' arguments where panel reports will eventually become public anyway. Another factor was the wider policy argument that greater openness is generally a good thing in trade policy—it leads to a "Dracula effect" ("exposing evil to sunlight helps to destroy it").<sup>49</sup> This view is well captured in James Bacchus's plea:

We must open the doors of the WTO, and ... let in the light of public scrutiny. We must let the five billion people in the world who are served by the WTO see the WTO ... if we do not, the Members of the

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<sup>45</sup> See, for example, the Nicaraguan complaint against the 1985 US embargo, where Nicaragua itself blocked the adoption of the report on account of the fact that the panel was prevented from addressing the issues which Nicaragua wanted addressed (i.e., the legality of the US embargo under GATT article XXI): GATT, *Minutes of Meetings* (held on 29 May 1985), GATT Doc C/M/188 at 16, online: GATT Digital Library <<http://gatt.stanford.edu>>.

<sup>46</sup> *C.f.* Steger, *supra* note 28 at 300.

<sup>47</sup> See e.g. "Ruggiero Calls on Members Not to Talk about Cases Undergoing Dispute Settlement", *International Trade Reporter* 15:8 (25 February 1998); "WTO Chief Floats Solutions to Problem of Leaked Reports", *International Trade Reporter* 15:17 (29 April 1998). See also the further sources cited in Zimmermann, *supra* note 11 at 167, n 1.

<sup>48</sup> *Ibid.*

<sup>49</sup> Attributed to Jagdish Bhagwati. See Walter Goode, *Dictionary of Trade Policy Terms*, 5th ed (New York: Cambridge University Press, 2007) at 133 ("dracula effect").

WTO will never secure the increased public support that will be needed worldwide to continue to maximize all the mutual gains that can be made from trade through a ruled-based world trading system.<sup>50</sup>

Much depends, however, on what we mean by “transparency”. According to Bacchus, it does not mean that panel deliberations should be exposed. He admits that no court does this. But panel proceedings, appellate body oral hearings, and dispute settlement body meetings must be open (some of this is already beginning to happen). Likewise, panels and the appellate body should accept unsolicited *amici curiae* briefs.<sup>51</sup>

Others, such as the United States, go further. The United States has not only proposed that panel, appellate body, and arbitration proceedings should be open to the public, but that parties’ submissions should also be made public, except for sections involving confidential information.<sup>52</sup> Canada made the same proposal,<sup>53</sup> while the EC has proposed a slightly different version of the argument—that is, that within ten days of panel establishment, the parties should agree on whether the proceedings should be open to the public in whole or in part.<sup>54</sup> According to the EC proposal, the first substantive hearing could also be divided into two sections, one that is open to the public, and the other closed. Amongst the Asian countries, Japan also called for parties’ submissions to be made public within two weeks of each meeting.<sup>55</sup>

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<sup>50</sup> James Bacchus, “Let the Sunshine in: One View of Dispute Settlement Understanding Review” in Julio Lacarte & Jaime Granados, eds, *Inter-Governmental Trade Dispute Settlement: Multilateral and Regional Approaches* (London: Cameron May, 2004) 141 at 143.

<sup>51</sup> *Ibid* at 145. For a survey of individual WTO Members’ views, see CL Lim, “The Amicus Brief Issue at the WTO” (2005) 4:1 Chinese Journal of International Law 85 [Lim, “The Amicus Brief”].

<sup>52</sup> WTO, Dispute Settlement Body, *Contribution of the United States to the Improvement of the Dispute Settlement Understanding of the WTO Related to Transparency*, WTO Doc TN/DS/W/13, Special sess, (2002) at 2, s II (“Open Meetings”), online: WTO <<http://docsonline.wto.org>>.

<sup>53</sup> WTO, Canada, *Transparency and Derestriction*, WTO Doc WT/GC/W/98, online: WTO <<http://docsonline.wto.org>>; WTO, General Council, *Revised Proposals by the United States and Canada on Transparency in WTO Work: Procedures for the Circulation and Derestriction of WTO Documents*, WTO Doc WT/GC/W/106, (1998), online: WTO <<http://docsonline.wto.org>>.

<sup>54</sup> WTO, *Contribution of the European Communities*, *supra* note 32 at 20, para 32.

<sup>55</sup> WTO, Dispute Settlement Body, *Proposal by Japan on Negotiations on Improvements and Clarifications of the Dispute Settlement Understanding*, WTO Doc TN/DS/W/22, Special sess, (2002) at 4, online: WTO <<http://docsonline.wto.org>> [WTO, *Proposal by Japan*]. For all these positions, see Zimmermann, *supra* note 11 at 169-70.

However, other Asian and developing countries such as Mexico, Malaysia, Egypt, India, Taiwan, and the African Group strongly opposed this view.<sup>56</sup> The Asian states had previously played a notable role in resisting unsolicited *amici curiae* briefs by (unsuccessfully) opposing the legal power of panels and the appellate body to receive them.<sup>57</sup> Other WTO members have also opposed making WTO proceedings and submissions public on account of the inter-governmental nature of the WTO dispute settlement system. For example, Brazil, Chile, India, Mexico, and Uruguay have voiced their opposition to the possibility of “media trials”.<sup>58</sup> Likewise with Norway’s concern with external pressure from interest groups,<sup>59</sup> while Switzerland has expressed the over-riding concern that public access might actually prevent settlement in individual cases.<sup>60</sup>

Even if, in other respects, there is already a trend towards greater WTO transparency (e.g., in the declassification of WTO documents and so forth),<sup>61</sup> the dissenting voices amongst members still need to be accounted for. One of the most significant reasons given for saying that there is now a trend towards openness ignores this fact. Much depends upon how we should view the appellate body’s 2005 ruling in the *EC—Hormones* compliance dispute. There, the appellate body allowed proceedings to be made public through closed-circuit television. The appellate body reasoned that nothing in the rules precluded the parties from opening up the hearings to observers *if the parties so chose*.<sup>62</sup> But that ruling, precisely because it reflects only the views and agreement of the parties in that case, cannot be taken to support a more general view that

[t]his decision provides further evidence that not only is the WTO moving away from the closed system, but that FTAs that narrowly

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<sup>56</sup> *Ibid* at 170.

<sup>57</sup> See CL Lim, “The Asian WTO Members and the *Amicus* Brief Controversy: Arguments and Strategies” (2006) 1 Asian J WTO & Int’l Health L & Pol’y 85 [Lim, “Asian WTO Members”].

<sup>58</sup> Mercurio & Laforgia *supra* note 11 at 504.

<sup>59</sup> Special Session of Dispute Settlement Body, *Minutes of Meeting* (held on 16 April 2002), WTO Doc TN/DS/M/1 at para 30, online: WTO <<http://docsonline.wto.org>>.

<sup>60</sup> WTO, Dispute Settlement Body, *Minutes of Meeting* (held on 10 September 2002), WTO Doc TN/DS/M/4, Special sess, at para 45, online: WTO <<http://docsonline.wto.org>>. The Norwegian and Swiss objections are discussed in William J Davey, “Reforming WTO Dispute Settlement” in Mitsuo Matsushita & Dukgeun Ahn, eds, *WTO and East Asia: New Perspectives* (London: Cameron May, 2004) 91 at 135, n 126 [Davey, “Reforming WTO”].

<sup>61</sup> See Steve Charnovitz, “The WTO and Cosmopolitics” (2004) 7:3 J Int’l Econ L 675 at 677-78.

<sup>62</sup> *EC—Hormones*, *supra* note 12.

interpret the mechanisms based on WTO provisions may now contradict the very system they copied.<sup>63</sup>

No RTA party would disagree that dispute proceedings could, or even that they should, be opened up *if* the parties jointly agreed to do so. It is a useful juncture to introduce a silent but significant development on the Asia-Pacific RTA scene. The Trans-Pacific Strategic Economic Partnership Agreement (currently comprising the basis of the Trans-Pacific Partnership talks between New Zealand, Singapore, Chile, Brunei, Australia, Vietnam, Peru, the United States, and Malaysia)<sup>64</sup> provides exceptions to the confidentiality rule should the parties to a dispute agree.<sup>65</sup> Even without such express treaty clauses, nothing should preclude bilateral RTA parties from opening up dispute settlement proceedings (that is, waiving their rights by agreement) where the matter solely concerns their rights and obligations *inter se*. Presumably, the explicit provisions creating the exceptions under the Trans-Pacific Strategic Economic Partnership Agreement were thought necessary because of its plurilateral nature.

In the case of the *EC—Hormones* ruling, Canada, the United States, and the EC—the principal proponents of transparency—all agreed to open the hearings.<sup>66</sup> The ruling was based specifically on the joint request of the parties, and while it applies to cases in which the parties so agree, that is not the same thing as saying that the WTO dispute settlement system as a whole is moving away from the closed model. At most, the appellate body did not prevent the parties from choosing to adopt a procedure which the rules do not explicitly disallow. It would have been more significant had the appellate body ruled that hearings should be open regardless of the views of the parties, or of one of the parties, or if WTO members other than those very members who proposed greater openness were to switch towards making such joint requests in their disputes. None of this has yet occurred.

We might welcome the *EC—Hormones* compliance ruling. But to say that there is a “trend” towards an open model, and that RTA parties that have simply “bilateralized” and adopted the DSU in their RTAs are now bound to adopt a more open model, overstates the matter. We cannot extrapolate the pattern of things to come from the wishes of a few members.

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<sup>63</sup> *Ibid.*

<sup>64</sup> The latest reports reveal that, as of August 2010, Canada has also expressed an interest in joining the negotiations. See “Canada Peeping in on Trans-Pacific Partnership Talks; Investment Reform Urged by US Groups”, *The Council of Canadians* (20 August 2010), online: Council of Canadians Trade Blog <<http://www.canadians.org>>.

<sup>65</sup> See further, Part II.C.4, below.

<sup>66</sup> *EC—Hormones*, *supra* note 12.

### C. *Democracy as Ideal*

Should RTAs perform no democratic role at all? With the demise of the Cold War, there has been increased attention since the 1990s on whether international law should uphold a right to democratic governance.<sup>67</sup> Such attention has been concerned with the activities of the Human Rights Committee, the European Court of Human Rights, the European Commission, and the Inter-American Commission in furthering an international law right to democratic governance.<sup>68</sup>

But since RTA dispute settlement bodies also resemble these other international courts, tribunals, and bodies, and because trade law also involves the application of international legal rules, questions have understandably arisen about whether RTA dispute settlement should promote, or at least not defeat democratic ideals.

Around the same time, fierce debate erupted over the democratic legitimacy of supranational trade bodies such as the WTO and NAFTA.<sup>69</sup> There was intense scrutiny of the domestic implications of entry into the WTO in the United States and the European Union, leading to congressional hearings in the former and litigation in the case of the latter.<sup>70</sup> One issue had to do with the perceived loss of sovereignty in light of common perceptions about the enormous power that the WTO dispute settlement system wields over national regulatory policies.<sup>71</sup>

It is therefore unsurprising that having greater transparency in RTA dispute settlement systems has also come up for debate. Perhaps the best-known argument for democratic trade decision making is that offered by Robert Housman. According to Housman, universality may be better se-

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<sup>67</sup> See Thomas M Franck, "The Emerging Right to Democratic Governance" (1992) 86:1 AJIL 46; James Crawford, "Democracy and International Law" (1993) 64 Brit YB Int'l L 113.

<sup>68</sup> See *ibid* at 125-26.

<sup>69</sup> For writing in the popular arena, see e.g. John R MacArthur, *The Selling of "Free Trade": NAFTA, Washington, and the Subversion of American Democracy* (Berkeley: University of California Press, 2001).

<sup>70</sup> See e.g. Walter Dellinger, "Whether Uruguay Round Agreements Required Ratification as a Treaty: Memorandum to Ambassador Michael Kantor, United States Trade Representative (22 November 1994), online: Office of Legal Counsel, US Department of Justice, Office of Legal Counsel <<http://www.justice.gov>> (concerning Professor Laurence H Tribe's testimony on the effect of the WTO DSS on states' rights); *Re the Uruguay Round Treaties* (1994), 1994 ECR I-5267, [1995] 1 CMLR 205 (Court of Justice of the European Communities) (concerning the scope of the Commission's powers under article 113 EC).

<sup>71</sup> See e.g. John H Jackson, *Sovereignty, the WTO and Changing Fundamentals of International Law* (Cambridge: Cambridge University Press, 2006).

cured by infusing trade decision making and regime design with democratic credentials because this “can help prevent value-based economic clashes.”<sup>72</sup> Nonetheless, Housman admits that

because many of the elements of democratic governance at the national level (for example, the election of representatives in free and fair elections) are inapplicable in the statially oriented world of international trade decision-making, this [argument] ... focuses more narrowly on the element of democracy that is most applicable to international relations: the democratic right of citizens to have knowledge of and participate in decisions that will [affect] their interests.<sup>73</sup>

Housman's proposal tries to avoid confusing domestic democratic legitimacy with international legitimacy.<sup>74</sup> He distinguishes the international legitimacy that supranational trade bodies require from, for example, the kind of view expressed by the US house majority leader during the People's Republic of China's WTO accession talks—that is, that trade policy is a democratic tool and “[w]e must look towards expanded trade as a significant opportunity to build greater understanding and encouragement of freedom and democracy.”<sup>75</sup> Yet it is doubtful that such a distinction can always be maintained. In practice, an attempt to make trade decision making and dispute settlement more participatory is just as likely to be seen by a trading partner as an encroachment into its internal affairs. Insofar as democratic arguments could therefore lead potential RTA partners towards a sense of rejection, or cause such countries to conceive of the issue as a contest of moral-political values, they are likely to be self-defeating. Questions about RTA design depend ultimately on the consent of the RTA partners. Their resolution therefore involves negotiation, not debate.

So how might democratic trade dispute regimes be promoted in East Asia? For many East Asian countries, legitimacy is not always a matter of addressing democratic gaps in public participation but involves the need to secure better public understanding of the intended economic benefits of trade liberalization. Various trade ministry and official RTA websites are

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<sup>72</sup> Housman, *supra* note 15 at 701.

<sup>73</sup> *Ibid* at 703. Housman's argument draws on Carole Pateman, *Participation and Democratic Theory* (Cambridge: Cambridge University Press, 1970). But see Keohane and Nye, who argue that democratic arguments are judged by their “inputs”, where the main issues here are transparency and accountability: Robert O Keohane & Joseph S Nye Jr, “The Club Model of Multilateral Cooperation and Problems of Democratic Legitimacy” in Porter et al, *supra* note 10, 264 at 281-82.

<sup>74</sup> For this criticism, see Robert E Hudec, Comment, in Porter et al, *supra* note 10, 295 at 298. See also Steger, *supra* note 28 at 264.

<sup>75</sup> See also Raj Bhala, “Enter the Dragon: An Essay on China's WTO Accession Saga” (2000) 15 *Am U Int'l L Rev* 1469.

largely directed at informing businesses and voters about these benefits. Why do they not focus on participation in trade policy decision making, as opposed to commercially useful knowledge and consumer knowledge? We need to distinguish two very different senses of “transparency”—a “thick” and a “thin” sense of the term. The cosmopolitan view, which we described earlier, involves the thick sense of advocating trade policy-related public information, but there is also a thin sense of doing so. East Asian nations do not appear to question the view that members of the public (citizens, workers, and consumers) will need to know something about how trade policies will affect them, even if some East Asian nations have questioned the need to introduce greater transparency into WTO trade dispute settlement.<sup>76</sup> So they agree that information about the aims and effects of particular trade policies may have to be communicated to the public. But while cosmopolitanism *requires* the communication of such information, East Asian nations may have entirely extraneous policy reasons to do so as part of an effort to “sell” individual policies (e.g., the benefits of having an FTA program) to their citizenry. Impressionistically, at least, East Asian nations are less likely to justify their policies along democratic lines, but are more likely to talk about anticipated trade and commercial gains. Another reason why providing public information may have nothing to do with upholding cosmopolitan ideals may be gleaned from the observation that few East Asian nations (except Japan) have agreed with the United States and Europe about the principled arguments for having greater transparency at the WTO,<sup>77</sup> and even fewer intra-East Asian FTAs have evinced a high degree of commitment towards fostering greater transparency in their trade dispute settlement *arrangements*.<sup>78</sup>

Finally, it can be counter-productive for democratic trading nations to frame trade negotiations in explicitly democratic terms. This could cause potential RTA partners to doubt the existence of a genuine commitment towards building a trade relationship, and can backfire.

#### *D. A Heightened Search for Legitimacy Through Cosmopolitan Engagement*

Perhaps what we are searching for is a more pragmatic and attractive version of the democratic argument. One example may be the view that a transparent and accountable international trade decision making process is more likely to be perceived to be legitimate. The argument arose from the WTO’s “legitimacy crisis”. It reflects James Bacchus’s argument, discussed above, that if the WTO would only let in a little light, such “mis-

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<sup>76</sup> Malaysia and Taiwan are two examples. See Zimmermann, *supra* note 11 at 170.

<sup>77</sup> WTO, *Proposal by Japan*, *supra* note 55 at 4.

<sup>78</sup> Discussed below, Parts II.B-C.

understandings" might be resolved.<sup>79</sup> In short, different rules or rule making institutions enjoy differing degrees of "compliance pull" (that is, perceived legitimacy),<sup>80</sup> and "getting institutional design right" will likely have a bearing on the legitimacy of the particular international body.<sup>81</sup>

To be sure, the WTO as a whole has become more "transparent". Documents have been declassified, and NGO participation has increased.<sup>82</sup> What is less certain is whether the WTO's legitimacy crisis had that much to do with transparency in the first place. Complaints about the legitimacy of WTO action are often substantive in nature, not merely procedural or political. In the aftermath of the backlash against the WTO, the current Director-General, Pascal Lamy, has called for greater attention to "cosmopolitics" in giving a name to what he sees as a potential solution for the WTO's crisis. The solution furnished responds to a perceived political-procedural need to involve non-governmental stakeholders more closely in the everyday life of the WTO as an organization.<sup>83</sup> While that might address the poor light in which the WTO is sometimes viewed, a number of examples suffice to illustrate that the real problem is not that the WTO suffers from bad press, but rather why it does.

Saying that the WTO is easily misunderstood is insufficient. Where governmental regulation of the market is justified ultimately on democratic grounds, new limitations on governmental action at the supranational level naturally lead to concerns over the possible emergence of a "democratic gap". Yet calling for greater citizen participation and accountability treats the difficulty as nothing more than a shallow political or public relations problem while genuine, substantive concerns about commercial fairness and social justice lurk in the background. To take the example of allegations of judicial activism on the part of the appellate body in anti-dumping cases,<sup>84</sup> businesses are allowed to express a legitimate concern when it comes to dumping because they are rightly con-

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<sup>79</sup> See also Bacchus, *Trade and Freedom*, *supra* note 20 at 51-198 (an attempt to throw light on what the appellate body does, and to justify what the WTO is and what it does on the basis of liberty).

<sup>80</sup> See Thomas M Franck, *The Power of Legitimacy Among Nations* (Oxford: Oxford University Press 1990). See also Steger, *supra* note 28 at 264-66. For its application to NAFTA Chapter 11 (investor-state) arbitration, see Charles H Brower II, "Structure, Legitimacy, and NAFTA's Investment Chapter," (2003) 36 *Vand J Transnat'l L* 37.

<sup>81</sup> In the context of DSU reform, the majority of members, including the developing countries, have supported the US proposal for swifter circulation of panel reports: Davey, "Reforming WTO", *supra* note 60 at 135, n 125.

<sup>82</sup> See Charnovitz, *supra* note 61 at 677-78.

<sup>83</sup> See *ibid* at 675.

<sup>84</sup> See Raj Bhala, "New WTO Antidumping Precedents (Part One: The Dumping Margin Determination)" (2002) 6 *Sing JICL* 335 at 401; Steger, *supra* note 28 at 288.

cerned that a level commercial playing field should exist. When businesses that are regulated differently engage in predatory pricing, for example, their competitors are entitled to protest. But when the appellate body restricts the freedom of WTO members to employ trade remedies in such cases, the fear arises that unfair trade from abroad cannot be stopped by democratic national processes. In the United States, the consent of business to the implementation of the GATT Tokyo Round was based precisely on the promise of having effective trade remedy rules—that is, in exchange for allowing foreign trade competition. Business accepted more competition provided it was “fair”.<sup>85</sup> The appellate body’s restraints on United States trade remedy action constitute the “real problem”, not for lack of a better understanding of the appellate body. The WTO is “illegitimate” because it is (alleged) to be “unfair”,<sup>86</sup> not because people are ignorant about what it does.

For other non-governmental actors, the problem is the reverse. For them, it is not that the WTO limits governmental acts that would otherwise favour business interests, but that it limits governmental action that tries to rein in the excesses of the free market. Such concerns about labour and environmental standards were admittedly a part of what the Seattle talks were about, but while some have focused on the lack of unity amongst the Quad countries, the Clinton administration’s lack of fast track authority or its correspondingly limited ambitions in Seattle, and the disaffection of developing countries as possible explanations,<sup>87</sup> others only cite NGO dissatisfaction as the cause of a crisis at the WTO.<sup>88</sup> Few trade negotiators think that the Seattle talks broke down “because the WTO lacks popular legitimacy.” If anything, a well-known, veteran trade negotiator has criticized some developing country delegations for playing to the gallery in Cancun, instead of getting on with the task of the negotiations.<sup>89</sup>

The argument that some of the WTO’s difficulties are attributable to an absence of transparency in the way it handles disputes is therefore something of a stretch. Transparency is important but is unlikely to address the WTO’s legitimacy crisis. Professor William Davey, who also fa-

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<sup>85</sup> Robert E Hudec, *Essays on the Nature of International Trade Law* (London: Cameron May, 1999) at 236.

<sup>86</sup> *Ibid* at 227-50 (arguing against the incoherence of such a standard of fairness in the first place).

<sup>87</sup> Jeffrey J Schott, “The WTO after Seattle” in Schott, ed, *supra* note 18, 3 at 5-8.

<sup>88</sup> Joseph Stiglitz, *Globalization and its Discontents* (London: Penguin, 2003), 3-4, 227-28 [Stiglitz, *Discontents*].

<sup>89</sup> Margaret Liang, “The Realpolitik of Multilateral Trade Negotiations from Uruguay to the Doha Round”, Note, (2004) 8 SYBIL 149 at 152.

vours greater transparency in panel and appellate body hearings, presents one of the more careful and considered views:

I see no problems with having more openness ... The problem of pressure can be solved by closed-circuit TV, such that the audience can see, but will not be seen ... the reality is that some disputes draw a great deal of attention. For these high-profile disputes, it is helpful to the credibility of the WTO system at large for those who have an interest in them to see how they are resolved.<sup>90</sup>

While arguing that “given popular fears of globalization and the WTO’s connection therewith, such increased credibility can be viewed as essential to ensure the future effectiveness of the WTO itself, as well as the dispute settlement system,”<sup>91</sup> Professor Davey admits to having “no empirical evidence to support this claim.” In doing so, he comes closer than most writers to asking whether legitimacy and transparency are connected. The Indian delegation has pointed out that such a connection does not exist.<sup>92</sup> Davey’s point is a far more modest one: “[O]penness of this sort would [at least] eliminate an argument that has been effectively used in US newspapers,”—namely, the “reference in full-page advertisements in US newspapers to dispute settlement as involving ‘faceless GATT bureaucrats’ and ‘star chamber proceedings’ could no longer be made.”<sup>93</sup> His explanation accepts the transparency argument for what it is: *a plea for better public relations*. But however well-considered, smart, and apt Davey’s argument is, it may have less to do with the legitimacy crisis as such.

At the other extreme, Joseph Stiglitz is less concerned with transparency than with reform. According to Stiglitz, the WTO’s legitimacy crisis requires a concerted response to environmental and labour concerns. Transparency is a *means* by which popular opinion may then be brought to bear on panellists and appellate body members.<sup>94</sup> The danger in this view is that it comes down to a prescription for panellists and appellate body members to decide trade disputes in light of those values which receive the loudest expression, and it is difficult to see how that could be more democratic.

In sum, the transparency argument is ultimately too little or too much, depending on the version one favours. Calling for more transpar-

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<sup>90</sup> Davey, “Reforming WTO”, *supra* note 60 at 136.

<sup>91</sup> *Ibid* at 136, n 129.

<sup>92</sup> WTO, Dispute Settlement Body, *Minutes of Meeting* (held 15 July 2002), WTO Doc TN/DS/M/3, Special sess, at para 59, online: WTO <<http://docsonline.wto.org>> (criticism of the Indian delegation), cited in Davey, “Reforming WTO”, *supra* note 60 at 136, n 129.

<sup>93</sup> *Ibid*.

<sup>94</sup> Stiglitz, *Discontents*, *supra* note 88 at 227-28.

ency amounts to saying that the WTO needs better public relations, or that it needs wholesale reform anyway, particularly in the way the linkages are drawn between trade and environmental concerns, or trade and labour concerns.<sup>95</sup>

### *E. The Need to Pursue Democratically Coherent Trade Policies*

Many of these arguments are about the WTO, but they also apply to RTAs, either because some RTA dispute systems are modelled after the WTO or because the arguments themselves apply to RTAs by analogy. The democracy argument reflects an ideal to which all trade policy decision making should aspire. Connected with these arguments for greater democracy and legitimacy is the argument that Mercurio and Laforgia have adapted from Housman and applied to RTAs. Mercurio and Laforgia's central argument is that democratic nations like Australia should pursue accountable and participatory RTA rules for the likely impact of such a policy in Southeast Asia and the wider Asia-Pacific region.<sup>96</sup> Perhaps this is true, but insofar as Mercurio and Laforgia are suggesting that Australia would, or could, successfully effect a shift from a preference for closed trade dispute settlement towards a preference for open trade disputes, the evidence thus far goes plainly against it.

In the next part, we will look to the actual treaty behaviour of Asian members, including those who have actively resisted the United States and EC proposals at the WTO.<sup>97</sup>

## II. Settling East Asian Trade Disputes

### *A. Asia and the International Settlement of Disputes*

Resort to international adjudication had a slow start in Asia, with the notable exception of India. Some of the reasons for Asian conservatism are historic. Nations that are still adapting to the use of formal third party dispute settlement, unlike other "high-end" and sophisticated users, are simply less likely to innovate and adopt progressive policies. As for the

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<sup>95</sup> See José E Alvarez, "Symposium: The Boundaries of the WTO", Foreword, (2002) 96 Am J Int'l L 1. See also the various symposium papers published in (2002) 96 Am J Int'l L.

<sup>96</sup> Mercurio & Laforgia, *supra* note 11 at 512-14.

<sup>97</sup> Hong Kong, Japan, Philippines, Malaysia, Singapore, Thailand, India, and Pakistan have also featured prominently in resisting unsolicited *amici* briefs, with Singapore often speaking for ASEAN as a whole. See Lim, "Asian WTO Members", *supra* note 57.

People's Republic of China, Korea, and Japan, none has ever brought a case before the International Court of Justice (ICJ).

A more encouraging picture in recent years has been the willingness of Indonesia, Malaysia, and Singapore to bring various territorial disputes before the ICJ, including the Indonesia-Malaysia dispute over the islands of Sipadan and Ligitan,<sup>98</sup> and the Malaysia-Singapore dispute over Pedra Branca/Pulau Batu Puteh.<sup>99</sup> The latter had been preceded by another Malaysia-Singapore dispute brought before the International Tribunal for the Law of the Sea (ITLOS).<sup>100</sup> Before that, the last Southeast Asian case that had appeared before the ICJ involved a 1962 territorial dispute between Cambodia and Thailand.<sup>101</sup>

South Asia, unlike the Northeast and Southeast Asian sub-regions, has produced one case between Portugal and India,<sup>102</sup> and three contentious cases between Pakistan and India.<sup>103</sup> In none of these cases, either in East or South Asia, was the underlying dispute economic in nature.

In contrast, WTO dispute settlement has been a resounding success in Asia. Japan, India, South Korea, and China have been active participants in WTO disputes. The first case ever brought before the WTO involved a dispute between Singapore and Malaysia.<sup>104</sup> With the experience of Japan,<sup>105</sup> India, South Korea,<sup>106</sup> and with China's recent spate of cases,<sup>107</sup> the

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<sup>98</sup> See JG Merrills, "Sovereignty over Pulau Ligitan and Pulau Sipadan (*Indonesia v Malaysia*): The Philippines' Intervention" (2003) 51 Int'l & Comp LQ 718.

<sup>99</sup> *Case Concerning Sovereignty over Pedra Branca/Pulau Batu Puteh, Middle Rocks and South Ledge (Malaysia v Singapore)*, [2008] ICJ Rep 12.

<sup>100</sup> *Case Concerning Land Reclamation by Singapore in and Around the Straits of Johor (Malaysia v Singapore)*, [2005] Reports of International Arbitral Awards 133 (International Tribunal for the Law of the Sea). See also CL Lim, "The Uses of Pacific Settlement Techniques in Malaysia-Singapore Relations" (2005) 6 Melb J Int'l L 313.

<sup>101</sup> *Case Concerning the Temple of Preah Vihear (Cambodia v Thailand)*, [1962] ICJ Rep 6.

<sup>102</sup> *Case Concerning Right of Passage over Indian Territory (Portugal v India)*, [1960] ICJ Rep 6.

<sup>103</sup> *Case Concerning the Aerial Incident of 10 August 1999 (Pakistan v India)*, [2000] ICJ Rep 12; *Case Concerning Trial of Pakistani Prisoners of War (Pakistan v India)*, [1973] ICJ Rep 347; *Appeal Relating to the Jurisdiction of the ICAO Council (India v Pakistan)*, [1972] ICJ Rep 46.

<sup>104</sup> The dispute was eventually settled; see WTO, *Malaysia—Prohibition of Imports of Polyethylene and Polypropylene*, WTO Doc WT/DS1/1 (1995), online: WTO <<http://docsonline.wto.org>> (Request for Consultations).

<sup>105</sup> See Iida, *supra* note 43; Ichiro Araki, "Beyond Aggressive Legalism: Japan and the GATT/WTO Dispute" in Mitsuo Matsushita & Dukgeun Ahn, eds, *WTO and East Asia: New Perspectives* (London: Cameron May, 2004) 149; Saadia M Pekkanen, "International Law, the WTO, and the Japanese State: Assessment and Implications of the New Legalized System" (2001) 27:1 Journal of Japanese Studies 79.

WTO has unarguably contributed to the reception of formalized dispute settlement in international affairs in Asia. Prior to the establishment of the WTO in 1995, the East Asian nations showed little interest in GATT dispute settlement, Japan being the one notable exception.<sup>108</sup> By mid-2006, however, Korea had emerged as the most active East Asian complainant with thirteen cases, compared to twelve each for Japan and Thailand during that period,<sup>109</sup> and by late 2007, India had become the world's second most frequent developing country complainant after Brazil.<sup>110</sup> A notable feature in the last three years has been the sudden spate of cases involving China (both as complainant and respondent) with new disputes constantly emerging.<sup>111</sup>

At the same time, the sheer amount of RTA activity in Asia in recent years has required the greater familiarization of these East Asian nations

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<sup>106</sup> See e.g. Chulsu Kim, "East Asia in the WTO Dispute Settlement Mechanism" in Yasuhei Taniguchi, Alan Yanovich & Jan Bohanes, eds, *The WTO in the Twenty-First Century: Dispute Settlement, Negotiations, and Regionalism in Asia* (Cambridge: Cambridge University Press, 2007) 261 at 261-66.

<sup>107</sup> Henry Gao, "Taming the Dragon: China's Experience in the WTO Dispute Settlement System" (2007) 34:4 LIEI 369; Tina Wang, "China's Coming of Age in the WTO War", *Forbes* (20 April 2009) online: *Forbes* <<http://www.forbes.com>> [Wang, "China's Coming of Age"].

<sup>108</sup> Kim, *supra* note 106 at 261.

<sup>109</sup> *Ibid* at 262.

<sup>110</sup> Peter Van den Bossche, *The Law and Policy of the World Trade Organization*, 2d ed (Cambridge: Cambridge University Press, 2008) at 231.

<sup>111</sup> See Wang, "China's Coming of Age", *supra* note 107; Denise Tsang, "Beijing Hits Back at Trade Partners on Protectionism; WTO Asked to Act on US Curbs on Chinese Poultry Imports", *South China Morning Post [Hong Kong]* (25 June 2009) online: Global Factiva <<http://global.factiva.com>>; Denise Tsang, "Beijing Hits Out at US Duty on Steel Pipes", *South China Morning Post [Hong Kong]* (11 September 2009) online: Global Factiva <<http://global.factiva.com>>; "Beijing Starts Dumping Probe After US Tyre Move", *South China Morning Post [Hong Kong]* (14 September 2009) online: Global Factiva <<http://global.factiva.com>>; "Playing with Fire: The Tyre Wars", *The Economist* (19 September 2009) online: LexisNexis <<http://www.lexisnexis.com>>; Brendan McGivern "Chinese Import Restrictions on Publications and Entertainment Products Found to be WTO Inconsistent", *ASIL Insights* 13:19 (27 October 2009) online: American Society of International Law <<http://www.asil.org/insights.cfm>>; "US-China Disputes Round-Up", *Bridges Weekly Trade News Digest* 14:1 (13 January 2010) 3, online: International Centre for Trade and Sustainable Development Periodicals <<http://ictsd.org>>; "China Sets Anti-Dumping Penalties on US Poultry Imports", *Bridges Weekly Trade Digest* 14:5 (10 February 2010) 7, online: International Centre for Trade and Sustainable Development Periodicals <<http://ictsd.org>>; "US Group Urges WTO Case to Bring Down Chinese Internet Firewall", *Bridges Weekly Trade Digest* 14:3 (27 January 2010) 3, online: International Centre for Trade and Sustainable Development Periodicals <<http://ictsd.org>>; "China Brings Anti-Dumping Case against EU in Shoe Dispute", *Bridges Weekly Trade Digest* 14:5 (10 February 2010) 8, online: International Centre for Trade and Sustainable Development Periodicals <<http://ictsd.org>>.

with the *design* of formal dispute settlement systems for their bilateral and regional trade treaty regimes. Yet as one commentator points out:

While East Asian countries have been involved in a substantial number of disputes in the WTO ... [they] still cling to their non-litigious tradition of the past. This is evidenced by the increasing tendency to participate as co-complainants or third parties and the substantial number of disputes being resolved through consultations. In addition, the lack of expertise in WTO law, as well as the substantial legal costs ... appear to be major obstacles ... particularly for developing-country Members.<sup>112</sup>

Similarly, East Asian nations participating in the Geneva debate on reforming the WTO Dispute Settlement Understanding have tended to avoid proposals on systemic issues. Japan and Korea, for example, have focused on the so-called “sequencing” issue,<sup>113</sup> China has issued a proposal on increasing third party participation, while Malaysia has a proposal on the costs of litigation for developing countries.<sup>114</sup>

Such conservatism is reflected in the RTA treaty behaviour of these nations. By and large, they have chosen to adapt from the existing WTO dispute settlement system, sometimes wholesale. This clearly does not mean that current attempts by the European Union and the United States to make the WTO dispute system more transparent will be supported by the East Asian nations. Indeed, the contrary is true. We have seen that while Japan did support the call to make party submissions public, Malaysia and Taiwan have objected to the United States-European Union proposal. As for the unsolicited submission of *amici curiae* briefs by NGOs to panels and the appellate body, Hong Kong, Malaysia, China, Japan, the Philippines, Singapore, and ASEAN as a whole have consistently objected to panel and appellate body acceptance of such briefs.<sup>115</sup>

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<sup>112</sup> Kim, *supra* note 106 at 264.

<sup>113</sup> This issue concerns the need to await the conclusion of non-compliance hearings before engaging in unilateral retaliation.

<sup>114</sup> Kim, *supra* note 106 at 264.

<sup>115</sup> WTO, Dispute Settlement Body, *Minutes of Meetings* (held on 6 November 1998), WTO Doc WT/DSB/M/50, online: WTO <<http://wtodocsonline.wto.org>> (Hong Kong at 15-16, Japan at 16, Malaysia at 6, and Thailand at 2-3); WTO, Dispute Settlement Body, *Minutes of Meetings* (held on 7 June 2000), WTO Doc WT/DSB/M/83, online: WTO <<http://wtodocsonline.wto.org>> (Hong Kong at para 15, Japan at para 13, Philippines at paras 19-20, Malaysia at para 23, and Thailand at para 27); WTO, General Council, *Minutes of Meeting* (held on 22 November 2000), WTO Doc WT/GC/M/60, online: WTO <<http://wtodocsonline.wto.org>> (Hong Kong at paras 22-28, Singapore on behalf of the ASEAN members at paras 59-61). See Lim, “Asian WTO Members”, *supra* note 57; Lim, “The Amicus Brief”, *supra* note 51.

In the next section, we will see that the design of bilateral FTAs between individual East Asian nations and countries such as the United States is another matter altogether. In such cases, the individual East Asian nation is more likely to accept an American treaty template, for example, when negotiating with the United States. We will see that in cases where East Asian nations such as Brunei and Singapore have participated in the design of regional FTAs that (as with the Trans-Pacific Strategic Partnership Agreement) have not only potential regional adherence, but also a potential trans-continental reach. The conservative intra-East Asian model has been laid aside in favour of a more cosmopolitan treaty model.

### 1. Studying East Asia's Regional Trade Treaties

The treaties surveyed in this paper have been carefully chosen to reflect regional, as opposed to bilateral, treaty behaviour. What we are looking for is convergence in regional (that is, region-wide) treaty behaviour and, currently, no single East Asian nation is able to significantly influence or dictate FTA treaty design within the region, or is likely to be able to do so in the future. Individual bilateral treaties concluded by any individual East Asian nation, to the extent that they even exhibit any high degree of design consistency, are not likely to provide much indication of region-wide behaviour.<sup>116</sup>

In Southeast Asia, countries like Singapore, Malaysia, and Thailand, and to a lesser extent Brunei, have concluded various bilateral treaties with both regional and extra-regional trading partners, most famously in the case of Singapore, which has the most extensive network of bilateral FTAs in the region.<sup>117</sup> Likewise, Japan's policy-makers concluded that it

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<sup>116</sup> There are often significant differences even when we compare the FTAs of a single East Asian nation. For example, China's FTA with ASEAN is currently not as comprehensive as its FTAs with Singapore, New Zealand, and Chile. See Jiangyu Wang, "The Role of China and India in Asian Regionalism" in Muthucumaraswamy Sornarajah & Jiangyu Wang, eds, *China, India and the International Economic Order* (Cambridge: Cambridge University Press, 2010) 333 at 352-56. Another example would be Singapore's FTAs. Even when we compare Singapore's purely bilateral FTAs, there are significant differences in structure and design. Singapore's FTAs with Australia and the United States adopt a negative list approach in its services commitments, while its FTAs with New Zealand and Japan do not. There is no "Singapore template" as such. See Ong Ye Kung, "An Intuitive Guide to the Services Chapter of the US-Singapore Free Trade Agreement" in CL Lim & Margaret Liang, eds, *Economic Diplomacy: Essays and Reflections by Singapore's Negotiators* (Singapore: Institute of Policy Studies, 2010) 169 at 172.

<sup>117</sup> As of June 2010, Singapore had concluded bilateral FTAs with Australia, China, the Hashemite Kingdom of Jordan, India, Korea, Japan, New Zealand, Panama, Peru, the United States, and Costa Rica, in addition to its FTAs as an ASEAN Member, the

should not simply complete a deal with the whole of ASEAN; it proceeded to conclude FTAs with Indonesia, Singapore, Malaysia, the Philippines, Thailand, Brunei, and Vietnam within Southeast Asia, before concluding the larger Japan-ASEAN deal.<sup>118</sup> Japan had observed how China, which had imagined that it would have to negotiate with one entity, ASEAN, had ended up in ten separate bilateral negotiations from the outset. In addition, Japan negotiated FTAs with extra-regional partners. Like Japan, Korea also adopted a simultaneous bilateral FTA policy,<sup>119</sup> and engaged in a host of bilateral treaties worldwide, including bilateral agreements with individual ASEAN nations, while concluding the FTA with ASEAN as a whole.

Yet in none of these cases do we see an East Asian model emerge from the specific behaviour of any East Asian nation. This may also have to do with the fact that, to date, China, Japan, and Korea have not yet been able to conclude a deal between themselves and have instead focused their efforts during the past ten years on concluding their respective trade treaties with ASEAN instead. That is what makes ASEAN, which has also concluded an FTA with China, Korea, and Japan, and an FTA with Australia and New Zealand, and its closed model of dispute settlement so central to any serious study of the regional treaty behaviour of the East Asian nations.

Turning from bilateral to regional deals, the Southeast Asian nations were the first to develop a sub-regional treaty (that is, under a “closed” model) that the People’s Republic of China was content to adopt in its FTA with ASEAN.<sup>120</sup> The China-ASEAN FTA is now the largest regional FTA in East Asia. The existence of a China-ASEAN trade treaty spurred Japan and Korea to complete FTAs with ASEAN. Both these treaties also employed the ASEAN model and there are many similarities in the negotiation and design of the China-ASEAN, Korea-ASEAN, and Japan-ASEAN treaties.<sup>121</sup> Convergence between the China-ASEAN, Japan-

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Trans-Pacific Strategic Economic Partnership Agreement, (with Brunei, New Zealand, and Chile) and FTAs with other regional trading areas such as the European Free Trade Area and the Gulf Cooperation Council. See Lim & Liang, *supra* note 116, Annex, 293-95.

<sup>118</sup> For the origins of this policy, see Hatakeyama Noboru, “A Short History of Japan’s Movement to FTAs (Part 3)” (2003) 22 *Journal of Japanese Trade & Industry* 42.

<sup>119</sup> Dukgeun Ahn, “Korea’s FTA Policy” in *The New International Architecture in Trade & Investment: Current Status and Implications* (Singapore: APEC, 2007) 49, online: APEC <<http://publications.apec.org>>.

<sup>120</sup> See further, David Chin, “ASEAN’s Journey towards Free Trade” in Lim & Liang, *supra* note 116 at 209.

<sup>121</sup> *Ibid.*

ASEAN, and Korea-ASEAN FTAs is what makes it possible to say that there is now an emerging intra-East Asian model.

A notable divergence from this emerging regional model is that provided under the dispute settlement provisions of the Trans-Pacific Strategic Economic Partnership Agreement.<sup>122</sup> It is for this reason that we have chosen to focus on a comparison between this treaty and the ASEAN, China-ASEAN, Japan-ASEAN, and Korea-ASEAN treaties.

Finally, as we are solely concerned with East Asian inter-state *trade* dispute settlement,<sup>123</sup> we will leave aside investor-state dispute settlement provisions under existing East Asian treaties.<sup>124</sup>

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<sup>122</sup> For the reasons given earlier, divergences from the East Asian model in individual, bilateral FTAs are not as significant from a regional viewpoint. The significance of such bilaterals is further reduced where they proceed from an extra-regional “template”, such as in the case of US FTAs. Thus, the US-Singapore FTA has uncharacteristic provisions that are the result of a US, as opposed to a Singapore, “FTA template”. According to the dispute provisions of the US-Singapore FTA, public consultations follow a request for consultations made by either of the two parties. There is also provision for the submission of unsolicited *amici curiae* briefs by NGOs in relation to disputes occurring under the US-Singapore FTA. Interestingly, Singapore’s late counsel for the US-Singapore FTA negotiations had described these provisions in his recollections of the negotiations in functional, not cosmopolitan, terms: “The idea is to take into account the views of all those affected and draw upon a broad range of perspectives in arriving at a solution.” See Sivakant Tiwari, “The Role of Legal Counsel and Dispute Settlement” in Tommy Koh & Chang Li Lin, eds, *The United States-Singapore Free Trade Agreement: Highlights and Insights* (Singapore: Institute of Policy Studies, 2004) 151. This contrasts with the US Chief Negotiator’s published recollections of the negotiations which highlights the importance given to “[e]nhanced transparency” in the negotiations: Ralph F Ives, “The USSFTA: Personal Perspectives on the Process and Results” in *ibid*, 123, 23 at 28. Transparency provisions will also likely be a negotiating issue in East Asian nations’ bilateral FTAs with the European Union as the latter begins to negotiate more FTAs with the East Asian nations. Until recently, the European Union had been slow to engage East Asia in its FTA negotiations but, at the time of writing, this situation is swiftly changing as the European Union competes with the United States in the East Asian region.

<sup>123</sup> Notwithstanding the provision for investor-state dispute settlement within AFTA (i.e., ASEAN’s 1987 Agreement on the Promotion and Protection of Investment), the Korea-ASEAN FTA’s Investment Agreement, and Chapter 11 of the AANZFTA, there is little that can usefully be said at the present time about confidentiality in the case of investor-state disputes under these treaty regimes. Unlike the corresponding provisions on inter-state trade dispute settlement, the investment treaties themselves are largely silent on the issue. Much will depend on the applicable arbitration rules, and it remains to be seen whether the decisions emanating from NAFTA supporting greater transparency in investor-state proceedings will be applied to East Asian and Australasian investor-state disputes. Taking the Korea-ASEAN FTA’s Investment Agreement as an example, the investor may choose from ICSID Arbitration (including arbitration under the ICSID Additional Facility Rules), arbitration under UNCITRAL arbitration rules or “any other arbitration or any other arbitration rules.” The treaty is otherwise silent on the issue of confidentiality. See *Agreement on Investment under the Framework Agree-*

## B. ASEAN

Much has been written about Southeast Asia's preference for diplomatic settlement according to the so-called "ASEAN Way" (that is, via consultation and consensus, as opposed to legal settlement). However, following the creation of the ASEAN Free Trade Area (AFTA) in 1991 and its "relaunch" in 1994, ASEAN moved towards having a dispute settlement system. The result was ASEAN's Protocol on the Dispute Settlement Mechanism of 1996.<sup>125</sup> The most important shift in thinking was the authority given to ASEAN's meeting of Senior Economic Officials (ASEAN SEOM) to issue final and legally binding rulings by *majority* vote.<sup>126</sup> The 1996 Protocol was eventually superseded by the "Protocol on Enhanced Dispute Settlement Mechanism" of 2004 (2004 Protocol). The latter was

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*ment on Comprehensive Economic Cooperation among the Governments of the Member Countries of the Association of Southeast Asian Nations and the Republic of Korea*, 24 August 2006 (entered into force June 2007), online: International Enterprise Singapore <<http://www.iesingapore.gov.sg>>.

<sup>124</sup> While discussing investor-state disputes in the context of internationalized contracts, some commentators have, however, suggested that a party may in such circumstances reveal its own case or the existence of the dispute without the consent of the other party. See Nigel Rawding, "Protecting Investments under State Contracts: Some Legal and Ethical Issues" (1995) 11:4 *Arb Int'l* 341 at 343. In ICSID Arbitration under NAFTA Chapter 11, there have been tribunal pronouncements in favour of the freedom of the parties to make information regarding the arbitration publicly available, and also the suggestion that confidentiality would be undesirable. See Cindy G Buys, "The Tensions Between Confidentiality and Transparency in International Arbitration" (2003) 14 *Am Rev Int'l Arb* 121 at 132-33; Jeffery Atik, "Legitimacy, Transparency and NGO Participation in the NAFTA Chapter 11 Process" in Todd Weiler, ed, *NAFTA Investment Law and Arbitration: Past Issues, Current Practice, Future Prospects* (Ardsey, NY: Transnational Publishers, 2004) 135 at 148, n 34; *SD Myers Inc v Canada* (2002), 126 ILR 161 (NAFTA Arbitration Tribunal); *The Loewen Group, Inc v United States of America*, Case No ARB(AF)/98/3 (2003), 7 ICSID 421 at para 25 (International Centre for Settlement of Investment Disputes). NAFTA parties have also confirmed that "[n]othing in NAFTA imposes a general duty of confidentiality"; "Notes of Interpretation of Certain Chapter 11 Provisions [NAFTA Free Trade Commission, July 31, 2001]" in Charles H Brower II, Jack J Coe Jr & William S Dodge, eds, *NAFTA Chapter Eleven Reports, Primary Materials*, vol 1 (The Hague: Kluwer Law International, 2006) 138 at para A(1). Under the Permanent Court of Arbitration's rules, which are based largely on the UNCITRAL Arbitration Rules, confidentiality is generally a matter for parties to agree upon. However, a presumption lies in favour of confidentiality; hearings are held in camera, unless the parties agree otherwise under article 25(4), whereas under article 32(5) the award may only be made public with the parties' consent; "PCA Optional Rules for Arbitrating Disputes between Two States", online: Permanent Court of Arbitration <<http://www.pca-cpa.org>>.

<sup>125</sup> *ASEAN Protocol on Dispute Settlement Mechanism*, 20 November 1996 (entered into force 26 May 1998), online: ASEAN <<http://www.aseansec.org>>.

<sup>126</sup> See Paul J Davidson, "The ASEAN Way and the Role of Law in ASEAN Economic Cooperation" (2004) 8 SYBIL 165 at 173.

part of a series of reforms designed to take ASEAN closer to the aim of having an ASEAN Economic Community.<sup>127</sup>

Mirroring the WTO DSS, the 2004 Protocol adopts the WTO's "negative consensus" procedure. A panel shall be established, and its report (and in the case of appeals, the report of the ASEAN appellate body) shall be adopted unless the SEOM decides by consensus not to do so. Similarly, authorization for the suspension of concessions in case of non-compliance shall be given unless the SEOM decides by consensus not to do so.<sup>128</sup> As in the case of the WTO, the provisions in the Protocol governing ASEAN's panel and appellate body procedures are preceded by provision for consultations,<sup>129</sup> good offices, conciliation, and mediation.<sup>130</sup> In short, the 2004 Protocol created a regional version of the WTO dispute settlement system.

Under articles 8 and 12 of the 2004 Protocol, ASEAN panel and appellate body deliberations shall be confidential, and reports shall be drafted in the absence of the parties.<sup>131</sup> Article 13(2) provides that while parties' written submissions, too, shall be confidential, a party may publicly disclose its own position. Members shall treat as confidential information submitted by another member to the panel or to the appellate body where the information has been designated so. Upon the request of a member, however, a non-confidential summary shall be provided to the requesting member for public disclosure.<sup>132</sup>

The 2004 Protocol expressly states that the "the interests of full transparency" under this ASEAN framework simply means that "presentations, rebuttals and statements ... shall be made in the presence of [only] the parties."<sup>133</sup> This is clearly a far cry from the democratic view of what transparency should mean in trade dispute settlement (discussed in Part I, above).

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<sup>127</sup> *ASEAN Protocol on Enhanced Dispute Settlement Mechanism*, 29 November 2004 (entered into force 29 November 2004), online: ASEAN <<http://www.aseansec.org>> ["2004 Protocol"].

<sup>128</sup> *Ibid.*, arts 5(1), 9(1), 12(13), 16(6).

<sup>129</sup> *Ibid.*, art 3.

<sup>130</sup> *Ibid.*, art 4.

<sup>131</sup> *Ibid.*, arts 8(5), 12(9) and App II, s II, para 2.

<sup>132</sup> See also *ibid.*, App II, s II, para 3. The drafting language is unclear. What is the distinction between written submissions, which must be disclosed to the other party but are otherwise *automatically* to be treated as confidential, and the rule that "Member States" shall treat as confidential "information submitted by another Member State" that has been *designated* as such? The better interpretation may be that a party should always mark its written submissions confidential.

<sup>133</sup> *Ibid.*, App II, s II, para 11.

Instead, ASEAN adopts a closed model for all its dispute settlement needs, including its trade dispute settlement requirements.

*C. Trade Dispute Settlement in ASEAN's Agreements with China, Korea, Japan, Australia, and New Zealand*

1. Introduction

The emergence of the 2004 ASEAN protocol coincided with the proliferation of East Asian RTAs.<sup>134</sup> It was a period during which various proposals for East Asian economic integration were also heard, including proposals for an agreement between ASEAN, China, Japan, and South Korea, and possibly extending to the inclusion of Australia, New Zealand, and India as well. In addition, there have been proposals for an agreement between the twenty-one members of APEC,<sup>135</sup> and a wider proposal by Australia's erstwhile Rudd administration to have the twenty-one APEC economies and India within a single "Asia Pacific Community".<sup>136</sup> Together with the individual, mainly bilateral, RTAs recently concluded or pursued by China, Korea, Japan, Australia, New Zealand, and virtually all the individual ASEAN countries, these larger initiatives form part of a complex network of intra-regional and extra-regional, transcontinental RTAs, which aim to connect the East Asian and Asia-Pacific economies to each other, as well as to East Asia's trading partners in other continents.

The first major step towards a broader, regional—as opposed to a purely bilateral—model was the China-ASEAN FTA. There had been an earlier proposal for China-Japan-Korea-ASEAN economic integration, but failing consensus at the ASEAN Economic Ministers' Meeting (AEM) in Chiangmai in October 2000, the Chair had proposed separate RTAs be-

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<sup>134</sup> See Barry Desker, "In Defence of FTAs: From Purity to Pragmatism in East Asia" (2004) 17:1 *The Pacific Review* 3.

<sup>135</sup> "[W]hile affirming our commitments to the Bogor Goals and the successful conclusion of the WTO/DDA negotiations, we instructed Officials to undertake further studies on ways and means to promote regional economic integration, including a Free Trade Area of the Asia-Pacific as a long-term prospect, and report to the 2007 APEC Economic Leaders' Meeting in Australia" (APEC Economic Leaders, *Ha Noi Declaration*, 14th Meeting (held on 18-19 November 2006), Doc No 2006/AELM/DEC, 1-2, online: Asia-Pacific Economic Cooperation Meeting Document Database <<http://aimp.apec.org>>).

<sup>136</sup> "Rudd Pushes for Asia-Pacific Community", *The [Melbourne] Age* (4 June 2008) online: *The Age* <<http://www.theage.com.au>>; Hadi Soesastro, "Kevin Rudd's architecture for the Asia Pacific", *The Jakarta Post* (11 June 2008) online: *Jakarta Post* <<http://www.thejakartapost.com>>; "Kevin Rudd suggests formation of Asia-Pacific Community", *The Hindu* (12 August 2008) online: *The Hindu* <<http://www.hindu.com>>. See further, CL Lim "Australia's 'Rudd Proposal': Business as Usual" (2008) 14 *Asian YB Int'l L* 287.

tween ASEAN and China, ASEAN and Japan, as well as ASEAN and Korea. Between 2001 and 2009, ASEAN accordingly began concluding RTAs with China (the China-ASEAN FTA), Korea (the Korea-ASEAN FTA), Japan (Japan-ASEAN), India (AIFTA), and with Australia and New Zealand (AANZFTA).<sup>137</sup> In each case, the dispute settlement provisions provide for the submission of inter-state disputes to arbitration.<sup>138</sup>

## 2. Closed Proceedings and Confidential Submissions in Trade Disputes

A “closed” dispute settlement model akin to ASEAN’s 2004 Protocol was adopted in ASEAN’s FTAs with China, Korea, Japan, Australia, and New Zealand. All these treaties contain explicit rules requiring closed proceedings and the confidentiality of written submissions. These rules are substantially similar to those adopted in the 2004 ASEAN Protocol.<sup>139</sup>

## 3. Arbitrators’ Confidentiality Obligation

There is an even closer resemblance between the China-ASEAN FTA, Korea-ASEAN FTA, Japan-ASEAN FTA, and AANZFTA. Unlike ASEAN’s 2004 Protocol, ASEAN’s agreements with these nations provide for an arbitration tribunal. Nonetheless, there remain subtle differences

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<sup>137</sup> See Chin, *supra* note 120.

<sup>138</sup> Investor-state arbitration is also provided for under AFTA, the Korea-ASEAN FTA’s Investment Agreement, and the AANZFTA. See further *Agreement among the Governments of Brunei Darussalam, the Republic of Indonesia, Malaysia, the Republic of the Philippines, the Republic of Singapore and the Kingdom of Thailand for the Promotion and Protection of Investments*, 15 December 1987, art X, online: ASEAN <<http://www.aseansec.org>>; as amended by *Protocol to Amend the Agreement Among the Government of Brunei Darussalam, the Republic of Indonesia, Malaysia, the Republic of the Philippines, the Republic of Singapore, and the Kingdom of Thailand for the Promotion and Protection of Investments*, 12 September 1996, art 5, online: ASEAN <<http://aseansec.org>>; *Agreement on Investment under the Framework Agreement on Comprehensive Economic Cooperation Among the Governments of the Member Countries of the Association of Southeast Asian Nations and the Republic of Korea*, 2 June 2009, art 18, online: ASEAN <<http://aseansec.org>>; AANZFTA, *supra* note 8, c 11, art 20. In the case of the *Agreement for the Promotion and Protection of Investments*, 1987, the investor-state dispute settlement clause is infelicitously worded, but the intent seems clear enough. See further M Sornarajah & Rajenthiran Arumugam, “An Overview of the Foreign Direct Investment Jurisprudence” in Denis Hew, ed, *Brick by Brick: The Building of an ASEAN Economic Community* (Singapore: ISEAS, 2007) 144.

<sup>139</sup> *China-ASEAN DSA*, *supra* note 5, arts 9(1), 9(4); *Agreement on Dispute Settlement Mechanism Under the Framework Agreement on Comprehensive Economic Cooperation Among the Governments of the Member Countries of the Association of Southeast Asian Nations and the Republic of Korea*, 13 December 2005, art 10(3) and Annex, art 21, online: ASEAN <<http://www.aseansec.org>> [*Korea-ASEAN DSA*]; *Japan-ASEAN FTA*, *supra* note 7, arts 68(8), 68(10), 68(11); AANZFTA, *supra* note 8, arts 13(6), 13(10), and c 7, Annex at para 21.

even between these latter treaties. For example, the China-ASEAN FTA and the Japan-ASEAN FTA are silent where the Korea-ASEAN FTA and the AANZFTA expressly impose an obligation of confidentiality upon the “members of the arbitral panel and the persons retained by the arbitral panel”, permitting only the disclosure of information that is already in the public domain.<sup>140</sup>

While arbitrators are generally bound by an ethical duty to maintain confidentiality notwithstanding the China-ASEAN FTA's and the Japan-ASEAN FTA's silence,<sup>141</sup> it is noteworthy that the Korea-ASEAN FTA and AANZFTA chose to make this a matter of express treaty obligation and to extend that treaty obligation to persons retained by the arbitral panel.

#### 4. Rules Governing the Presence of Parties and Third Parties

ASEAN's trade deals with China, Korea, Japan, and with Australia and New Zealand also state—in somewhat curious language—that the parties are allowed to be present only when invited to do so by the tribunal.<sup>142</sup> This drafting language is derived from the ASEAN 2004 Protocol's Panel Working Procedures.<sup>143</sup> With the exception of the China-ASEAN Dispute Settlement Agreement, each treaty also makes express provision for third parties to be heard.<sup>144</sup> However, while the Japan-ASEAN and Korea-ASEAN FTAs envisage a session being set aside during the first meeting for this purpose, and also provide explicitly for the presence of third parties “during the entirety of this session”, the AANZFTA only states that third parties “shall have an opportunity to be heard by the arbitral tribunal at its first substantive meeting with the Parties to the dispute.”<sup>145</sup>

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<sup>140</sup> See *Korea-ASEAN DSA*, *supra* note 139, Annex at para 11. The rule that what is already in the public domain cannot by definition be confidential or secret is self-explanatory. It can hardly be a secret that “the Sun rises in the East”, for example. See also *AANZFTA*, *supra* note 8 at c 7, Annex at para 11 for similar provisions.

<sup>141</sup> See Buys, *supra* note 124 at 124, n 8; American Arbitration Association & American Bar Association, *Code of Ethics for Arbitrators in Commercial Disputes*, canon VI B, online: American Bar Association <<http://www.americanbar.org>>; ICSID, *Rules of Procedure for Arbitration Proceedings* (Washington, DC: ICSID, 2003), 106-107, r 6.

<sup>142</sup> *China-ASEAN DSA*, *supra* note 5, art 9(1); *Korea-ASEAN DSA*, *supra* note 139, art 10(3); *Japan-ASEAN FTA*, *supra* note 7, art 68(8); *AANZFTA*, *supra* note 8, c 17, art 13.

<sup>143</sup> “2004 Protocol”, *supra* note 127, App II, s II, para 2.

<sup>144</sup> *Japan-ASEAN FTA*, *supra* note 7, art 68(9); *Korea-ASEAN DSA*, *supra* note 139 Annex at para 16; *AANZFTA*, *supra* note 8, c 17, art 10.

<sup>145</sup> *Ibid*, c 17, art 10(3).

The AANZFTA's more restrictive formulation seems to have been derived from the ASEAN 2004 Protocol's provision for third parties.<sup>146</sup> Nonetheless, any practical difference between the ASEAN 2004 Protocol and AANZFTA, or between these and the Japan-ASEAN and Korea-ASEAN FTAs, would be more apparent than real. Both the AANZFTA and the ASEAN 2004 Protocol go on to provide for an entire session being set aside for third parties in their respective tribunal and panel working procedures instead.<sup>147</sup>

### 5. Confidentiality of Tribunal Deliberations

ASEAN's 2004 Protocol<sup>148</sup> and ASEAN's FTAs with China, Korea, and Japan, as well as with Australia and New Zealand, state that a tribunal's internal "deliberations" shall be confidential.<sup>149</sup>

Notably, the AANZFTA's Annex and the Korea-ASEAN FTA contemplate the retention of assistants, interpreters, and translators,<sup>150</sup> and while only tribunal members may "take part" in the deliberations,<sup>151</sup> such deliberations shall be kept confidential by tribunal members as well as persons retained by the tribunal.<sup>152</sup> ASEAN's 2004 Protocol, and ASEAN's FTAs with China, Korea, and Japan contain express language forbidding the parties to be present during the drafting of the award.<sup>153</sup>

### 6. Keeping the Existence of a Dispute Confidential

The most noteworthy difference between the 2004 Protocol and the China-ASEAN, Korea-ASEAN, and Japan-ASEAN FTAs lies in the fact that the latter treaties require the final report of the arbitral panel to be

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<sup>146</sup> "2004 Protocol", *supra* note 127, art 11(2) (third-parties "shall have an opportunity to be heard by the panel").

<sup>147</sup> *Ibid*, App II, s II, para 6; AANZFTA, *supra* note 8, c 7, Annex at para 19.

<sup>148</sup> "2004 Protocol", *supra* note 127, App II, s II, para 3.

<sup>149</sup> This is in addition to a provision requiring their tribunals to meet in closed session. See *China-ASEAN DSA*, *supra* note 5, arts 9(4) and 9(6); *Korea-ASEAN DSA*, *supra* note 139, Annex at para 11; *Japan-ASEAN FTA*, *supra* note 7, art 68(10); AANZFTA, *supra* note 8, c 7, Annex at para 11.

<sup>150</sup> See e.g. *ibid*, c 7, Annex at para 10.

<sup>151</sup> *Ibid*, c 7, Annex at para 9.

<sup>152</sup> See *ibid*, c 7, Annex at para 11; *Korea-ASEAN DSA*, *supra* note 139, Annex at para 11.

<sup>153</sup> "2004 Protocol", *supra* note 127, art 8(5); *China-ASEAN DSA*, *supra* note 5, art 9(6); *Korea-ASEAN DSA*, *supra* note 139, Annex at para 17; *Japan-ASEAN FTA*, *supra* note 7, art 69(1).

made publicly available within ten days of the report being presented to the parties.<sup>154</sup> AANZFTA contains a similar rule stating:

The arbitral tribunal shall provide its final report to all other Parties seven days after the report is presented to the Parties to the dispute, and at any time thereafter a Party to the dispute may make the report publicly available subject to the protection of any confidential information contained in the report.<sup>155</sup>

The significance of this is that, in principle, the very existence of a dispute solely between ASEAN members *could* be kept secret, whereas a dispute arising under ASEAN's FTAs with China, Korea, and Japan, and under the AANZFTA, must eventually be disclosed.

#### *D. Enter the United States, and the Trans-Pacific Strategic Economic Partnership Agreement*

Future agreements with the United States, Canada, and the European Union could alter Asia's emerging approach towards dispute settlement. Individual agreements with the United States such as the US-Singapore FTA,<sup>156</sup> the US-Australia FTA,<sup>157</sup> and the Korea-US FTA demonstrate elements of, and adherence to, an open model.<sup>158</sup> But despite de-

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<sup>154</sup> *China-ASEAN DSA*, *supra* note 5, art 9(9); *Korea-ASEAN DSA*, *supra* note 139, art 12(3); *Japan-ASEAN FTA*, *supra* note 7, art 69(9).

<sup>155</sup> *AANZFTA*, *supra* note 8, c 17, art 13(16). AANZFTA also contains a further express provision protecting all confidential information in the report (*ibid*).

<sup>156</sup> *US-Singapore FTA*, *supra* note 3, art 20.4(4)(d)(i) (mandating open proceedings), art 20.4(d)(iii) (subject to the protection of confidential information, written responses to a request or questions from the panel to be made public), and art 20.4(d)(iv) (providing a clause for *amici curiae* briefs: "[T]he panel shall consider requests from nongovernmental entities in the Parties' territories to provide written views regarding the dispute that may assist the panel in evaluating the submissions and arguments of the Parties"). For a comprehensive overview of the US-Singapore FTA, see Koh & Lin, *supra* note 122.

<sup>157</sup> *The United States-Australia Free Trade Agreement*, 18 May 2004, arts 21.8(1)(a) and 21.8(1)(d) (entered into force 1 January 2005), online: Office of the United States Trade Representative <<http://www.ustr.gov>>. The US-Australia FTA mandates open proceedings under article 21.8(1)(a) and requires written party submissions, written versions of the parties' oral statements, and written responses to a request or questions from the panel to be made public under article 21.8(1)(d), subject to the protection of confidential information. For an overview of the US-Australia FTA, see Andrew D Mitchell, "The Australia-United States Free Trade Agreement" in Ross Buckley, Vai Io Lo & Laurence Boulle, eds, *Challenges to Multilateral Trade: The Impact of Bilateral, Preferential and Regional Agreements* (Netherlands: Kluwer Law International, 2008) 115.

<sup>158</sup> *Korea-United States Free Trade Agreement*, 30 June 2007, art 22.10(1)(b), online: Office of the United States Trade Representative <<http://www.ustr.gov>> (mandating open proceedings subject to the protection of confidential information)[*KORUS*]; *KORUS* mandates open proceedings in article 22.10(1)(b) subject to the protection of confidential information. For an overview of *KORUS*, see Yong-Shik Lee, "The Beginning of Economic

bate at the WTO, the intra-East Asian and Australasian RTAs have thus far demonstrated a preference for closed dispute settlement.

So East Asia now has two coexisting models for trade dispute settlement. Putting aside Singapore, Australia, and Korea's FTAs with the United States, the Trans-Pacific SEP Agreement, which at the time of writing received considerable press attention following the Obama administration's support for its enlargement through the Trans-Pacific Partnership talks,<sup>159</sup> allows its parties to agree on alternative dispute procedures. Failing such special agreement, the general procedures in Annex 15.B of the Agreement apply. Annex 15.B prescribes a closed model for panel proceedings *unless* the parties "decide" otherwise.<sup>160</sup> Parties' submissions may be designated confidential, but this is without prejudice to the disclosure of a party's own submissions.<sup>161</sup>

The Trans-Pacific SEP Agreement is at once more open and demonstrates a degree of flexibility absent in the East Asian RTAs discussed above. As a result, there are potentially two models of "East Asian" trade dispute settlement at the present time. The first is a closed model for the "internal" management of Northeast Asian, Southeast Asian, and Australasian trade relations *inter se*. The other is a flexible, "for export only" arrangement, which would permit (and is intended to attract) future accession by trans-Pacific and trans-continental RTA partners.

Thus, the region has not only chosen a closed model, it has developed a dexterous mechanism for its future treaty engagements with non-regional trading partners.

### III. Analytical Limitations of the "Cultural" Explanation

Many if not most of the East Asian nations we have discussed have continued to resist both cosmopolitics and its legal counterpart—namely, legal rules that would support, even increase non-governmental participation in WTO dispute proceedings. For these, unless and until a WTO member consents to increased public participation, the WTO system should therefore remain a government-to-government organization.

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Integration between East Asia and North America?" The US-Korea FTA" in Buckley, Lo & Boulle, *supra* note 157, 125.

<sup>159</sup> See e.g. Office of the United States Trade Representative, Press Release, "USTR Ron Kirk Comments on Trans-Pacific Partnership Talks" (18 June 2010), online: USTR <<http://www.ustr.gov>>.

<sup>160</sup> TPA, *supra* note 9, Annex 15 B at para 21.

<sup>161</sup> *Ibid*, Annex 15 B at para 27.

We have also seen in Part I above that criticisms of this view rely on arguments about the nature and contemporary direction of the WTO; arguments which are sought to be justified by appealing to democratic theory, to the need to treat transparency as a prerequisite of legitimacy, and to the need for policy coherence on the part of democratic nations entering into FTA negotiations. In rough terms, these are anti-authoritarian arguments. Against this view, recent writings on arbitration and alternative dispute resolution (ADR) demonstrate a strong thread of culturally- and philosophically-oriented scholarship celebrating “Asian”,<sup>162</sup> “Confucian”, “Chinese”, and other forms of cultural exceptionalism,<sup>163</sup> and which are sometimes inadvertently or otherwise reminiscent of the “East Asian Values” debate of the 1990s.<sup>164</sup>

But there is also another way of looking at the treaty behaviour of the East Asian trading nations. We could simply take Asian treaty behaviour as representations of longer-term policy commitments. In studying such behaviour, we find an increasing acceptance of the importance of formal legal institutions in international economic relations and predictable legal rules. We also find a general rejection of cosmopolitics.<sup>165</sup> While cultural critiques provide some explanation for this rejection, they fall short of explaining East Asia's ready adoption of third party settlement, at least when it comes to trade disputes, and the region's broad acceptance of the need for stable, predictable international legal rules. Culture has not caused East Asian nations to reject liberal economic rights either. Granting foreign investors the right to bring investor-state disputes under an RTA investment chapter runs against authoritarianism, and calls for serious explanation if the cultural perspective is to be believed.

Treating an emergent “East Asian approach” as an expression of cultural difference is therefore intellectually dissatisfying if such differences

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<sup>162</sup> See Joel Lee and Teh Hwee Hwee, eds, *An Asian Perspective on Mediation* (Singapore: Academy, 2009).

<sup>163</sup> Qi Zhang, *Consultations within WTO Dispute Settlement: A Chinese Perspective* (Bern: Peter Lang, 2007). See also, Randall Peerenboom, *China's Long March toward Rule of Law* (Cambridge: Cambridge University Press, 2002) (arguing that China is not transitioning towards a liberal, democratic conception of the rule of law).

<sup>164</sup> Joanne R Bauer and Daniel A Bell, eds, *The East Asian Challenge for Human Rights* (Cambridge: Cambridge University Press, 1999); Daniel A Bell, *East Meets West: Human Rights and Democracy in East Asia* (Princeton, NJ: Princeton, 2000).

<sup>165</sup> This conclusion is reinforced by Asian comparative legal scholarship's distinction between the acceptance by some Asian nations of a “thin” (formalist), but not a “thick” (liberal) conception of the rule of law in their internal constitutional arrangements. See Randall Peerenboom, ed, *Asian Discourses of Rule of Law: Theories and Implementation of Rule of Law in Twelve Asian Countries, France and the United States* (London: Routledge, 2004).

are treated simply as unalterable cultural facts.<sup>166</sup> Confucian metaphors have made their way into trade scholarship,<sup>167</sup> but that picture must be measured empirically against modern developments in actual treaty behaviour. The recent flurry of scholarship on the emergence of Japanese<sup>168</sup> and, more recently, Chinese “aggressive legalism” (that is, litigiousness) speaks to this change.<sup>169</sup> Aggressive legalism at the WTO on the part of the East Asian nations and strong rule-based and formalized dispute settlement mechanisms show that the East Asian nations are not averse to cultural adaptation.

In ASEAN’s case, where liberal democratic and non-liberal democratic nations interact closely, the acceptance of binding inter-state dispute settlement mechanisms for the management of their economic and other relations, albeit within a highly closed dispute settlement model, suggests prior deliberation and pragmatic choice, not culture. While the choice currently lies in favour of a closed model of trade dispute settlement, what underlies the acceptance of an increasing number—indeed, an entire “noodle bowl”—of formal RTA rules is a broader intention to develop and complement export-oriented, investment-friendly economic strategies. As the *Jakarta Post* in Indonesia has observed:

The real aim of ASEAN in establishing a free trade area and in building an economic community of ten nations is ... to enhance the competitiveness of the entire community, and thereby its attractiveness as an investment destination, both from within and more importantly from outside ASEAN.<sup>170</sup>

This reflects Thailand’s “discussion paper” outlining the original proposal for an ASEAN Free Trade Area, namely, a need to (a) prepare for greater global trade liberalization following the Uruguay Round, (b) liberalize internal trade in order to attract foreign direct investment, (c) conduct trade negotiations with external trading partners as a single entity, and (d) to

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<sup>166</sup> Recent scholarship on Chinese attitudes towards mediation in the People’s Republic of China has avoided such a singular perspective, and has sought to explain attitudes in China along philosophical and historical-ideological lines (e.g., the influence of Communist ideology), in addition to the “cultural” explanation; see Gabrielle Kaufmann-Kohler & Fan Kun, “Integrating Mediation into Arbitration: Why it Works in China” (2008) 25:4 J Int’l Arb 479.

<sup>167</sup> Zhang, *supra* note 163 at 9-13.

<sup>168</sup> See e.g. Iida, *supra* note 43; Araki, *supra* note 106; Pekkanen, *supra* note 105.

<sup>169</sup> Gao, *supra* note 107.

<sup>170</sup> Romeo A Reyes, “Are jobs being created or lost in AFTA?”, *The Jakarta Post* (31 May 2005) online: Global Factiva <<http://global.factiva.com>>.

do so within APEC and the East Asia Economic Group.<sup>171</sup> In other words, the ASEAN FTAs are motivated—at least on the Southeast Asian side—by economic, not political, considerations in the language of neo-functional theory.<sup>172</sup>

In cases where RTA dispute settlement design is likely to become a negotiating issue, there is therefore a real likelihood of accommodating some degree of pressure from external trading partners about conferring greater transparency on trade disputes. This explains the difference between the ASEAN agreements and the Trans-Pacific SEP Agreement. But in cases where the East Asian nations—the nations of ASEAN, China, Korea, and Japan, and even Australia and New Zealand—are interacting *purely* between themselves, transparency has been given a fairly low priority.

## Conclusion

An East Asian view about how trade dispute settlement systems should be designed is slowly emerging. Democratically inspired trade law scholarship and cultural explanations of the international law behaviour of the Southeast and Northeast Asian trading nations have failed to capture or prescribe East Asia's regional treaty behaviour. Instead, such behaviour has resulted in the emergence of two different treaty models for the settlement of trade disputes. In the course of our argument, we have traced the treaty practice of ASEAN, together with those of China, Korea, Japan, Australia, and New Zealand. We find two models of trade dispute settlement emerging. The first is to be found in ASEAN's 2004 Protocol and the regimes established under the China-ASEAN FTA, Korea-ASEAN FTA, Japan-ASEAN FTA, and AANZFTA. All adopt a closed, sovereign-centric view of trade dispute settlement. The second is to be found in the Trans-Pacific Strategic Economic Partnership Agreement.

Democratic arguments supporting greater transparency in trade disputes are salient where authoritarianism is primarily at issue. But that is not the case with East Asia. Major East Asian (and Australasian) trading nations are democratic, with some of the newer democracies, such as Indonesia, demonstrating an even more fervent popular commitment to democratic ideals. A cultural argument (e.g., an "Authoritarian Asia" argu-

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<sup>171</sup> *The ASEAN Free Trade Area: A Proposal* (Thai discussion paper, October 1991), cited in Rudolfo Severino, *Southeast Asia in Search of an ASEAN Community* (Singapore: ISEAS, 2006) at 223.

<sup>172</sup> C.f. David Mitrany, *A Working Peace System* (Chicago: Quadrangle Books, 1966), 92-99, 172; Ernst B Haas, "The Uniting of Europe" in Mette Eilstrup-Sangiovanni, ed, *Debates on European Integration: A Reader* (New York: Palgrave Macmillan, 2006) 105 at 111.

ment) would have difficulty in explaining treaty behaviour that has adapted along pragmatic lines of economic strategy. On the other side, culture would also be a poor normative argument in response to the benefits that greater transparency can bring, namely, its tendency to improve the quality of third party decision making, to reduce the risk of corruption or undue influence, and to lead to a more coherent body of jurisprudence.

While East Asia has demonstrated a basic acceptance of Hans Kelsen's notion of institutionalized modes for the pacific settlement of international disputes,<sup>173</sup> this has not amounted to a further acceptance of "Kantian" cosmopolitanism.<sup>174</sup> Contemporary developments in Asian trade dispute settlement design reflect, instead, a world view in which the Northeast and Southeast Asian trading nations interact on equal, sovereign terms while making small exceptions only as pragmatism might suggest, such as the perceived need, under the Trans-Pacific SEP Agreement and Korea's FTA with the United States, to have institutional arrangements that transcontinental partners would presumably find more attractive. In their innermost vision of an intergovernmental world trading order, the traditional modes of inter-state, classical diplomacy trump cosmopolitanism. The East Asian nations subscribe to realism in international affairs, not liberalism.<sup>175</sup>

Similarly, democratically inspired trade law scholarship has had limited practical bearing, persuasive import, or predictive value in relation to the behaviour of East Asian trading nations. Yet such scholarship speaks to the region's potential transcontinental trading partners.

Frederick Abbott once likened the rise of RTAs to that of a "new dominant trade species".<sup>176</sup> We can take the analogy further. East Asia now has a new, regional subspecies—an East Asian RTA dispute settlement model—following the successive conclusion of the China-ASEAN, Korea-ASEAN, and Japan-ASEAN FTAs, and the AANZFTA. Together with the "for export" dispute settlement model found in the Trans-Pacific SEP

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<sup>173</sup> Hans Kelsen, *Peace through Law* (Chapel Hill: University of North Carolina Press, 1944), 116; Hans Kelsen, *Law of the United Nations: A Critical Analysis of Its Fundamental Problems* (London: Stevens: 1951) 484.

<sup>174</sup> See generally Charnovitz, *supra* note 61 at 678. See also Tesón, *supra* note 14.

<sup>175</sup> For "realism" and "liberalism" in international relations theory, see Kenneth W Abbott, "International Relations Theory, International Law, and the Regime Governing Atrocities in Internal Conflicts", Symposium on Method in International Law, (1999) 93:2 *AJIL* 361.

<sup>176</sup> Frederick M Abbott, "A New Dominant Trade Species Emerges: Is Bilateralism a Threat?" in William J Davey & John Jackson, eds, *The Future of International Economic Law* (Oxford: Oxford University Press, 2008) 133.

Agreement,<sup>177</sup> and to a lesser extent the US-Singapore, Australia-US, and the (as yet unratified) Korea-US bilateral deals, these two models coexist. Each occupies its own niche in East Asia's emerging trade architecture. By this diversification of trade policy choices, East Asia's policy-makers have helped to create an environment where the two species will not be forced to compete in an environment reminiscent of ecology's "niche" concept.<sup>178</sup>

[I]f ... two species are forced to compete in an undiversified environment one inevitably becomes extinct. If there is a diversification in the system so that some parts favor one species, other parts the other, the two species can coexist.

Another way of describing what now seems to be happening in the realm of trade dispute settlement design in the East Asian region is that we have two models. The first is historically derived from ASEAN's own internal dispute settlement regime, which "leans in" towards Southeast Asia, China, Korea, Japan, Australia, and New Zealand. The second model is based on the model in the Trans-Pacific SEP Agreement (to which Singapore, New Zealand, and Brunei are founding parties), the US-Singapore FTA, Australia-US FTA, and Korea-US FTA, which "lean outwards" to the wider Asia-Pacific.

What this means is that East Asia's transcontinental trading partners have an historic opportunity to influence the treaty behaviour of the East Asian nations, and beyond that, the political morality of East Asia. While there is the risk, following the global financial crisis, that an ascendant East Asia could become more insular,<sup>179</sup> the trade policies, commercial habits, and public treaty arrangements that accompany this may yet hold the key to a continued engagement between East and West. When the GATT was first established, the United States was the largest economy in the world. Since then, first the European Union, then Japan, and now China have also become the world's most powerful economies, with national economic and political systems that are different, and in the case of China considerably different, from that of the United States, Canada, and Western Europe.<sup>180</sup> From the social market economy model in Europe,<sup>181</sup>

<sup>177</sup> See *TPA*, *supra* note 9, art 20.6, para 1 (inviting the participation of APEC economies and other states).

<sup>178</sup> G Evelyn Hutchinson, "Concluding Remarks" (1957) 22 *Cold Spring Harbor Symposia on Quantitative Biology: Population Studies* 415 at 417.

<sup>179</sup> See Simon SC Tay, *Asia Alone: The Dangerous Post-Crisis Divide from America* (Singapore: John Wiley & Sons, 2010).

<sup>180</sup> See Sylvia Ostry, *The Post-Cold War Trading System: Who's on First?* (Chicago: University of Chicago Press, 1997) for the now classic work on the systemic causes of trade friction during the Cold War era.

to the steered economic liberalization of China,<sup>182</sup> these East Asian nations (and the great majority of nations) now embrace Adam Smith's view that as with people, nations too can trade and in that way cooperate without coercion.<sup>183</sup> The East Asian trading nations all accept the benefits that an international division of labour will bring. Yet the commercial societies they create within this "simple system of natural liberty" do not always adhere to democratic ideals; their governments support the workings of the market without recognizing that just as a free market fosters individual freedom, choice and autonomy,<sup>184</sup> there is at least an argument to be made for fostering free markets through policies which uphold these individual values.

One way by which East Asia's differences with the West may be addressed today is in negotiating the kinds of trade treaty provisions we have seen in the sorts of highly secluded negotiating rooms where trade treaty negotiators meet, and where these negotiators can and already do deliberate the merits of cosmopolitan ideals and democratic thought.

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<sup>181</sup> *Treaty of Lisbon Amending the Treaty on the European Union and the Treaty Establishing the European Community*, 13 December 2007, [2007] OJ, C 306/01. Article 2(3) stipulates that the Lisbon Treaty obliges the member states of the European Union to work together for a "highly competitive social market economy, aiming at full employment and social progress."

<sup>182</sup> See Randall Peerenboom, *China Modernizes: Threat to the West or Model for the Rest?* (Oxford: Oxford University Press, 2007).

<sup>183</sup> Adam Smith, *An Inquiry into the Nature and Causes of the Wealth of Nations* (New York: Modern Library, 1994).

<sup>184</sup> Bacchus, *Trade and Freedom*, *supra* note 20 at 155.