Title: RTA Panel Blocking: Evaluating Solutions to a Perennial Problem

Running Title: Resolving Panel-Blocking in RTA DSMs

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Abstract

Dispute settlement mechanisms ('DSMs') under Regional Trade Agreements ('RTAs') have rarely been invoked by states to resolve state-to-state trade disputes, despite their inclusion in the vast majority of RTAs currently in force. However, with the ongoing stalemate at World Trade Organization's ('WTO') Appellate Body, there is growing evidence to suggest that states are beginning to reconsider the role of RTA DSMs in such cases. Indeed, there is an increasing trend of states initiating disputes under RTA DSMs, and states continue to negotiate innovative and expansive approaches to dispute settlement in new RTAs. Many modern RTAs have attempted to respond to procedural deficiencies that made effective dispute settlement under older RTAs unfeasible or outright impossible, yet there are still numerous RTAs currently in force that retain such fundamental flaws. This paper examines one such flaw – the ability to unilaterally block or delay panel composition – and evaluates how modern RTAs have dealt with this perennial problem. This paper takes a critical look at several broad approaches adopted in modern RTAs and examines the effectiveness of each approach in resolving the panel blocking problem, as well as their efficiency in facilitating timely panel composition, and offers solutions for maximizing procedural efficiency.

I. Introduction

With over a year having passed since the United States ('US') effectively disabled the dispute settlement system of the World Trade Organization ('WTO') by blocking necessary appointments to the WTO's Appellate Body, many observers have rightly noted that binding third-party dispute settlement in the multilateral trading regime is under threat. The anticipation by some trade academics and practitioners that the recent change in US administrations will reverse this development may be pre-mature. In reality, it is far from certain that the new administration will be eager to re-engage with the WTO and lift the impasse at the Appellate Body without first exacting promises on reforming the dispute settlement mechanism. Efforts by WTO Members to keep appellate review alive through the multi-party interim appeal arrangement ('MPIA') has found support among some crucial Members, but has not so far attracted the participation of other important Members such as the US, India, and South Korea.[1] And while proceedings are still being carried out at the panel stage, this cannot be mentioned without also pointing out that 17 panel reports have been appealed "into the void" since 17 December 2019.[2]

Yet somewhat paradoxically, outside of the WTO system, many states recently have taken various actions to strengthen and legitimize binding third-party adjudication in state-to-state trade disputes. Since the demise of the Appellate Body, three large regional trade agreements ('RTAs') – the United State-Mexico-Canada Agreement ('USMCA'), Regional Comprehensive Economic Partnership ('RCEP'), and EU-UK Trade and Cooperation Agreement ('TCA') – have been concluded between major trading states, all of which contain binding third-party dispute settlement mechanisms ('DSMs'). Additionally, whereas many RTA DSMs have lay dormant for years if not decades, there are early indications of a renewed focus on these mechanisms for resolving bilateral trade disputes. Between December 2020 and January 2021 alone, panel reports

[1] At the time of writing, 24 Members had signed up to the MPIA: Australia; Benin; Brazil; Canada; China; Chile; Colombia; Costa Rica; Ecuador; the European Union; Guatemala; Hong Kong, China; Iceland; Macau, China; Mexico; Montenegro; New Zealand; Nicaragua; Norway; Pakistan; Singapore; Switzerland; Ukraine; and Uruguay.

[2] WTO Secretariat, 'Dispute Settlement: Appellate Body', https://www.wto.org/english/tratop_e/dispu_e/appellate_body_e.htm#fnt-1 (visited 15 February 2021).

were issued for disputes under the EU-Ukraine Association Agreement and the EU-Korea Free Trade Agreement ('FTA'), and Canada initiated consultations under the USCMA with respect to US safeguards on solar products.[3] Though the reasons motivating the use of these RTA DSMs over the WTO DSM are likely many and varied, given the uncertain situation at the WTO, cases that otherwise would be adjudicated under the auspices of that forum may instead be resolved increasingly through recourse to RTA DSMs.

Given this trend, problems are likely to arise where RTA DSMs contain fundamental procedural flaws, which are particularly prevalent with respect to panel composition procedures under RTA DSMs. The procedure for composing panels to hear state-to-state disputes has long been an issue of contention in the international trading regime. One of the chief concerns of the DSM under the General Agreement on Tariffs and Trade ('GATT') was the ability of states to unilaterally delay or block the dispute settlement process at various stages, including the panel composition stage.[4] As the GATT dispute settlement process became increasingly subject to procedural roadblocks in the 1980s and 1990s, eliminating procedural barriers to dispute settlement developed as an important issue during the Uruguay Round negotiations.[5] The solution under the new Dispute Settlement Understanding ('DSU') was to adopt a 'negative consensus' requirement for blocking various stages in the dispute settlement process, whereby the dispute settlement process and the adoption of panel and Appellate Body reports would only be hindered if there were a consensus favouring rejection.[6] As a result, the notion of 'automaticity' – that panels will be composed without the ability of a disputing party to delay or paralyze the process – was injected into the DSU, significantly strengthening the WTO DSM in relation to its GATT predecessor.[7]

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[3] Final Report of the Arbitration Panel, *Restrictions applied by Ukraine on exports of certain wood products to the European Union*, 11 December 2020; Report of the Panel of Experts, *Panel of Experts Proceeding Constituted Under Article 13.15 of the EU-Korea Free Trade Agreement*, 20 January 2021; Consultations Request by Canada, United States Solar Products Safeguard, 7 January 2021.

[4] William Davey, 'The WTO Dispute Settlement Mechanism' in Joost Pauwelyn, Andrew Guzman and Jennifer Hillman (eds), *International Trade Law*, 3rd ed. (New York: Wolters Kluwer, 2016), 128-138, at 129.

[5] Ibid.

[6] Michael J. Trebilcock, *Advanced Introduction to International Trade Law* (Cheltenham, UK: Edward Elgar, 2015) 26.

[7] Amelia Porges, 'The New Dispute Settlement: From the GATT to the WTO' 18 (1) Leiden Journal of International Law 115 (1995), at 119; Claude Chase, Alan Yanovich, Jo-Ann Crawford and Pamela Ugaz,

Just as the negotiators of the Uruguay Round sought to avoid the unilateral ability to block panel composition under the WTO DSM, states have likewise looked to ensure automaticity in panel composition under their RTA DSMs to safeguard the dispute settlement process. Yet, despite the shift toward replacing political and diplomatic dispute settlement models with more judicialized DSMs, panel composition is not automatic under many RTAs currently in force. This paper explores the more common defects found in RTA DSMs that make panel composition difficult if not impossible absent the good faith participation of the disputing parties, and assesses approaches to closing the 'panel blocking' loophole under modern RTAs.

II. Defective Panel Composition Procedures under RTA DSMs

Of the 341 RTAs currently in force, 222 provide for some sort of *ad hoc* adjudicative process.[8] The aim of such mechanisms is to provide for effective, binding dispute settlement in the event that a dispute arises between the RTA parties. This model is also intended to stand in stark contrast from what may be characterized as political or diplomatic DSMs.[9] Whereas a political or diplomatic DSM favours negotiated agreements, the adjudicative model injects legalism into dispute settlement and is reflective of the trend toward binding third-party dispute settlement that culminated in the adoption of the DSU. Since the advent of the WTO DSM, which effectively replaced the diplomatic DSM of the GATT and replaced it with a judicialized system, *ad hoc* adjudicative mechanisms have become increasingly common features of RTAs.[10] These DSMs attempt to create an automatic procedure for settling disputes when invoked, but in many cases they contain crucial flaws that can be exploited by an RTA party to undermine the automaticity of the process.

'Mapping of dispute settlement mechanisms in regional trade agreements – innovative or variations on a theme?' in Rochini Acharya (ed), *Regional Trade Agreements and the Multilateral Trading System* (Cambridge: Cambridge University Press, 2016), 608-702 at 643.

[8] World Secretariat, 'Regional Trade Agreement Database' https://rtais.wto.org/UI/PublicSearchByCrResult.aspx (visited 19 February 2021).

[9] Chase et al, above n 7, at 618.

[10] Victoria Donaldson and Simon Lester, 'Dispute Settlement' in Simon Lester, Bryan Mercurio and Lorand Bartels (eds), *Bilateral and Regional Trade Agreements: Commentary and Analysis*, 2nd ed (Cambridge: Cambridge University Press, 2015), 385-433 at 385.

A. Absence of Any Default Mechanism in Case of Non-Participation

A crucial defect affecting the automaticity of panel composition arises where a DSM does not provide any safeguard provisions in the event of non-participation in the panel composition procedure. This defect is commonly found in older EU RTAs, such as the Euro-Mediterranean ('EUROMED') Agreements entered into between the EU and southern Mediterranean states soon after the WTO's establishment.[11] Some of these DSMs, such as the EU-Jordan Free Trade Agreement ('FTA'), have been strengthened through additional protocols or are the subject of ongoing negotiations.[12] Yet there are EUROMED Agreements still in force that contain weak and vague DSMs, providing for recourse to arbitration but making it easy for one party to unilaterally block the process. These RTAs typically provide that a party 'may notify the other of the appointment of an arbitrator', and that 'the other Party must then appoint a second arbitrator within two months'.[13] The process can easily be frustrated if the responding party fails to appoint the second arbitrator, as there are no provisions detailing the process for composing the panel if the responding party refuses to participate.

The same issue arises even in more recently concluded RTAs containing detailed dispute settlement provisions. Under Turkey's RTAs with Chile and Malaysia, back-up procedures are in place to ensure the appointment of the third arbitrator in the event that the parties cannot come to an agreement; however there are no procedures to ensure the panel is composed if a party fails to appoint its own arbitrator.[14] Likewise, the US-Oman

[11] Edna Ramírez Robles, 'Political & Quasi-Adjudicative Dispute Settlement Models in European Union Free Trade Agreements: Is the Quasi-Adjudicative Model a Trend or is it just Another Model?', WTO Economic Research and Statistics Division, Staff Working Paper ERSD-2006-09 1 (2006), at 15-16.
[12] Protocol between the European Union and the Hashemite Kingdom of Jordan establishing a dispute settlement mechanism applicable to disputes under the trade provisions of the Euro-Mediterranean Agreement establishing an Association between the European Communities and their Member States, of the one part, and the Hashemite Kingdom of Jordan, of the other part [2011] OJ L 177/1.
[13] Euro-Mediterranean Agreement establishing an Association between the European Communities and their Member States, of the one part, and the Arab Republic of Egypt, of the other part (EU-Egypt AA), entered into force 1 June 2004, OJ 2001 L 304/39, Article 82(4); Euro-Mediterranean Agreement establishing an association between the European Communities and their Member States, of the one part, and the Kingdom of Morocco, of the other part (EU-Morocco AA), entered into force 1 March 2000, OJ 2000 L 70/2, Article 86(4).
[14] Free Trade Agreement between the Republic of Chile and the Republic of Turkey (Turkey-Chile FTA), signed 14 July 2009, entered into force 1 March 2011, Article 43(2); Free Trade Agreement between the

FTA and US-Bahrain FTA provide that each party shall appoint one panelist, and the parties shall endeavour to agree on a chair, failing which the party chosen by lot shall select the chair.[15] Again, these DSMs provide a safeguard in the event that the parties cannot agree on a chair, but do not address how the panel will be composed if a party refuses to appoint its panelist.

Though the number of RTAs containing pathological DSMs of this kind has decreased in recent years, there are still RTAs currently in force with flawed provisions that easily allow a party to unilaterally evade or delay efforts by the other party to initiate dispute settlement proceedings. With such obvious and crippling defects, it raises the question of whether these RTA DSMs were intentionally designed so as to allow the parties to avoid binding dispute settlement. These systems are more reminiscent of the diplomatic model of GATT-era dispute settlement, with consultations and negotiations being the key focus of dispute settlement since recourse to arbitration essentially requires the consent of both parties.[16] Certainly, the EUROMED Agreements were intentionally designed in this manner, as all pre-2000 EU RTAs favoured the diplomatic approach to dispute settlement.[17] What is less clear is whether the more recent Turkish and American RTAs are intentionally pathological, especially given that they include safeguards for appointing the panel chair, but fail to do the same for the appointment of panelists.

B. Barriers to Roster Composition

A much more common and subtler defect is found in RTA DSMs that establish a standing 'roster' of individuals, usually appointed by the parties soon after the RTA

Government Of Malaysia and the Government of the Republic Of Turkey (Turkey-Malaysia FTA), entered into force 1 August 2015, Article 12.8(2).

[15] Agreement between the Government of the United States of America and the Government of the Sultanate of Oman on the Establishment of a Free Trade Area (US-Oman FTA), signed 19 January 2006, entered into force 1 January 2009, Article 20.7(3); Agreement between the Government of the United States of America and the Government of the Kingdom of Bahrain on the Establishment of a Free Trade Area (US-Bahrain FTA), signed 14 September 2004, entered into force 1 August 2006, Article 19.7(3).

[16] Ignacio Garcia Bercero, 'Dispute Settlement in EU Free Trade Agreements: Lessons Learned?' in Lorand Bartels and Federico Ortino (eds), *Regional Trade Agreements and the WTO Legal System* (Oxford: Oxford University Press, 2006), 383-405 at 389.

[17] Ibid.

enters into force, who are to serve as panelists if called upon by the disputing parties.[18] While rosters may help speed up panel composition by providing a ready-made list of potential panelists acceptable to the RTA parties, rosters may also serve as a barrier to panel composition, particularly when the roster is difficult to establish or maintain.

The inability to compose a panel due to the inexistence of a roster has been dubbed the 'fatal flaw' of the state-to-state DSM under Chapter 20 of the North American Free Trade Agreement ('NAFTA').[19] Indeed, despite early successes in state-to-state dispute settlement under the NAFTA, the abrupt abandonment of the Chapter 20 DSM is largely attributable to the failure to maintain a roster and the resulting difficulties in composing a panel.[20] At the time the NAFTA was replaced by the United States-Mexico-Canada Agreement ('USMCA') in July 2020, no panel had been established under NAFTA Chapter 20 since the *Cross Border Trucking Services* dispute in 2001, and very few attempts had been made to initiate the dispute settlement process under Chapter 20 thereafter.[21]

On a cursory reading of the provisions under NAFTA Chapter 20 setting out the panel composition procedure, there is nothing that stands out as being intrinsically pathological. The disputing parties are to 'endeavor to agree' on a panel chair within 15 days of the delivery of the request to establish a panel, failing which the disputing party chosen by lot is to select within five days an individual who is not a citizen of that party to serve as the panel chair.[22] Within 15 days of the selection of the chair, each party is to

[18] Other terms found in RTAs include 'contingent list', 'indicative list', or 'list of arbitrators', however this paper employs the term 'roster' in reference to all systems that establish a set list of arbitrators from which the disputing parties can, or must, select in composing the panel.
[19] Simon Lester, Inu Manak and Andrej Arpas, 'Access to Trade Justice: Fixing NAFTA's Flawed State-to-State Dispute Settlement Process', 18 (1) World Trade Review 63 (2019), at 68.
[20] David A. Gantz, 'The United States and Dispute Settlement under the North American Free Trade Agreement: Ambivalence, Frustration, and Occasional Defiance' in Cesare P. R. Romano (ed), *The Swords and the Scales: the United States and International Courts and Tribunals* (Cambridge: Cambridge University Press, 2009), 356-94 at 388.
[21] Final Report of the Panel, *Re Cross Border Trucking Services (United States v Mexico)*, USA-Mex-98-2008-01, 6 February 2001.
[22] The North American Free Trade Agreement (US-Canada-Mexico) (NAFTA), signed 17 December 1992, entered into force 1 January 1994, 32 I.L.M. 289, Article 2011(1)(b).

select two panelists who are citizens of the other disputing party.[23] If a disputing party fails to appoint its panelists within the allotted period, citizens of the other disputing party are to be selected by lot from the roster to serve as the remaining panelists.[24]

A critical problem arises in the selection of the remaining panelists. While the NAFTA Chapter 20 procedure anticipates the possibility of a disputing party failing to appoint its panelists within the prescribed time period, the contingency requires selection of the remaining panelists from among the roster established under Article 2009.[25] In accordance with Article 2009(1), the NAFTA Parties are obligated to 'establish by January 1, 1994 and maintain a roster of up to 30 individuals who are willing and able to serve as panelists'.[26] Roster members serve for a term of three years, with the possibility of reappointment, but they must be appointed by consensus of the NAFTA Parties.[27]

Despite the obligation to establish a roster soon after the NAFTA's entry into force, it is not clear that a formal Chapter 20 roster was ever established. Gantz suggests that the NAFTA Parties informally agreed on a roster in the 1990s, but the roster was never formally adopted or publicly disclosed.[28] The arbitral panel in *Cargill v Mexico*, composed to adjudicate an investor-state dispute under Chapter 11 of the NAFTA, recalled that a Chapter 20 roster existed in 1998 but had lapsed at some point thereafter, and a roster was not successfully re-established until December 1, 2006.[29] While the status of the Chapter 20 roster at various points of time is ambiguous, it is clear that the roster was not continuously maintained and is generally believed to have lapsed in 2009 without being subsequently reconstituted.[30]

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[23] Article 2011(1)(c) of the NAFTA.
[24] Article 2011(1)(d) of the NAFTA.
[25] Article 2011(1)(c) of the NAFTA.
[26] Article 2009(1) of the NAFTA.
[27] Article 2009(1) of the NAFTA.
[28] David A. Gantz, *Regional Trade Agreements: Law, Policy and Practice* (Durham, North Carolina: Carolina Academic Press, 2009), 141, footnote 270.
[29] Award, *Cargill, Inc. v. United Mexican States*, ICSID Case No. ARB(AF)/05/Z, 18 September 2009, para 87.
[30] Lester et al, above n 19, at 69.

Without a formally established roster, the panel composition procedure is vulnerable to indefinite blockage. Article 2011(3) allows a disputing party to 'exercise a peremptory challenge against any individual not on the roster who is proposed as a panelist'.[31] In the absence of a roster, any individual proposed by a disputing party is automatically subject to a peremptory challenge, as they are not members of an established roster under Article 2009.[32] As a result, a party may indefinitely delay the dispute settlement process and effectively prevent the composition of a panel by continuously vetoing any panelist proposed by the other party.[33]

Far from being merely hypothetical, this exact scenario materialized in 2000, when Mexico attempted to compose a panel under Chapter 20 to challenge the legality of US quotas on Mexican sugar imports (the '*Sugar* dispute').[34] Repeated efforts by Mexico to select panelists over the course of 16 months were rebuffed by the US, and since no active Chapter 20 roster was in place at the time of the dispute, Mexico could not rely on the safeguards under Article 2011 to ensure the panel was composed.[35] Frustrated by its inability to resolve the dispute under Chapter 20, Mexico retaliated by imposing a 20% tax on soft drinks and other beverages containing sweeteners other than cane sugar.[36] The Mexican tax measure then became the subject of successful challenges by the US before a WTO panel and the Appellate Body,[37] and was also challenged in investor-state dispute settlement proceedings under NAFTA Chapter 11.[38]

The *Sugar* dispute saga revealed the ineffectiveness of Chapter 20 dispute settlement absent the cooperation of the NAFTA Parties in maintaining the roster. The safeguards built into Article 2011 intended to ensure automaticity in panel composition

[31] Article 2011(3) of the NAFTA.
[32] Ibid.
[33] Gantz, above n 28, at 141.
[34] Lester et al, above n 19 at 68.
[35] *Cargill*, above n 29, paras 87-100; WTO Panel Report, *Mexico – Tax Measures on Soft Drinks and Other Beverages (Mexico – Taxes on Soft Drinks)*, WT/DS308/R, adopted 24 March 2006, paras 4.91-4.92.
[36] *Cargill*, above n 29, para 100.
[37] *Mexico – Taxes on Soft Drinks*, above n 35; WTO Appellate Body Report, *Mexico – Tax Measures on Soft Drinks and Other Beverages*, WT/DS308/AB/R, adopted 24 March 2006.
[38] *Cargill*, above n 29; Award, *Archer Daniels Midland Co. and Tate & Lyle Ingredients Americas, Inc. v. Mexico*, ICSID Case No. ARB(AF)/04/5 (NAFTA), 21 November 2007; Award, *Corn Products International, Inc. v. Mexico*, ICSID Case No. ARB(AF)/04/1 (NAFTA), 18 August 2009.

only work if a formal roster exists at the time of the dispute. It is evident that even if a roster had been established in 1994, as required under Article 2009(1), the NAFTA Parties were incapable of maintaining it. While the exact reasons for why the NAFTA Parties failed to maintain the Chapter 20 roster are unclear, the text of Article 2009 makes maintaining such a roster remarkably difficult.

First, the term limit for each roster member is only three years.[39] Consequently, Article 2009 effectively requires the NAFTA Parties to enter into negotiations every three years in order to reconstitute the Chapter 20 roster. Though roster members can be reappointed, they must be appointed by consensus of all three NAFTA Parties.[40] By choosing not to participate in the process of reconstituting the roster or by refusing to agree to the appointment of individuals to the roster, a NAFTA Party therefore could unilaterally frustrate the operation of the Chapter 20 DSM. These textual limitations posed by Article 2009 likely explain the inability of the NAFTA Parties to maintain an active roster, which is also illustrated by the fact that between 1997 and 2006, at least seven different discussions regarding the Chapter 20 roster were held between the Parties before it was finally reconstituted at the end of 2006.[41]

While the NAFTA is the most prominent example of the ineffectiveness of dispute settlement in the absence of a set roster, the potential for panel blocking arises under other RTAs that envision recourse to a roster where the parties fail to agree on or fail to appoint a panelist. This is particularly true of older RTAs that entered into force prior to the late-2000s, which incorporate many of the limitations found under NAFTA Chapter 20. For example, the US-Singapore FTA and Canada-Costa Rica FTA also limit the term of roster members to three years, require consensus for appointment to the roster, and afford parties the right to peremptorily challenge proposed panelists who are not selected from the roster.[42] These NAFTA-style defects make establishing and

[39] Article 2009(1) of the NAFTA.
[40] Article 2009(1) of the NAFTA.
[41] *Cargill*, above n 29, para 87.
[42] United States-Singapore Free Trade Agreement (US-Singapore FTA), signed 6 May 2003, entered into force 1 January 2004, Article 20.4(b)(iii); Canada-Costa Rica Free Trade Agreement (Canada-Costa Rica FTA), entered into force 1 November 2002, Article XIII.9(1).

maintaining a roster extraordinarily challenging absent the good faith participation of the RTA parties and leaves the panel composition process vulnerable to paralysis.

Newer US RTAs such as the US-Australia FTA ('AUSFTA') do away with explicit term limits for roster members, however appointment to the roster still requires the agreement of both parties and is therefore susceptible to unilateral blockage.[43] Moreover, RTAs that eliminate the ability to peremptorily challenge non-roster appointees may still be problematic if the fail-safe provisions for ensuring panel composition in the event a disputing party refuses to participate require selection from a roster. For instance, the US-Singapore FTA does not include a right of peremptory challenge, but nonetheless holds that 'a panelist shall be selected by lot from the contingent list' if a party fails to appoint its panelist within the specified period of time.[44] The fail-safe procedure is thus frustrated in the absence of a roster. Considering the US-Singapore FTA, like other pathological roster systems, requires roster members to be appointed by consensus and limits their terms to three years, there is a high chance that even if established, a roster will subsequently lapse and nullify the effect of the fail-safe provision.[45]

Surveying the range of roster systems that could be described as procedurally problematic, there are some that are certainly faultier than others. At one end of the spectrum is NAFTA Chapter 20, which is particularly prone to procedural difficulties. The ability of a responding party to indefinitely veto non-roster appointees makes the system unworkable in the absence of a set roster. Given the consensus requirement for roster appointees and the automatic expiry of the roster every three years, establishing and maintaining a roster is extremely difficult. In contrast, RTAs such as the EU-Korea FTA that limit the consensus requirement, lengthen term limits for roster members, and

[43] United States-Australia Free Trade Agreement (US-Australia FTA), signed 18 May 2004, entered into force 1 January 2005, [2005] ATS 1, Article 21.7(4).
[44] Article 20.4(4)(a)(ii) of the US-Singapore FTA.
[45] Articles 20.4(4)(b)(ii)-(iii) of the US-Singapore FTA.

eliminate the right to peremptorily challenge non-roster appointees are less problematic.[46] While there may be some slight barriers to establishing the roster, once composed it is much easier to maintain. Indeed, rosters have been established under the EU-Korea FTA, the CAFTA-DR, and the EU- Southern African Development Community ('SADC') Economic Partnership Agreement ('EPA') despite those mechanisms relying, at least to some degree, on the good faith participation of the RTA Parties in composing the roster.[47] Nevertheless, there are a number of RTAs currently in force that employ roster systems that are vulnerable to abuse by one Party, which may ultimately delay or derail the dispute settlement process.

III. Approaches to Ensuring Automaticity in Panel Composition in RTA DSMs

States have adopted a variety of methods to combat the potential of panel blocking in RTA DSMs, with some mechanisms being more effective at resolving the issue than others. Four broad approaches can be gleaned from assessing the RTAs currently in force: (i) RTAs with provisions safeguarding panel composition despite the absence of a functioning roster; (ii) RTAs with provisions safeguarding roster composition; (iii) RTAs with panel composition procedures that do not establish a roster; and (iv) RTAs that provide for recourse to an appointing authority. This section describes each approach before turning to an assessment of whether they eliminate the panel blocking process in a way that preserves procedural efficiency.

A. Provisions Safeguarding Panel Composition Absent a Functioning Roster

A fundamental flaw of the NAFTA system, laid bare in the *Sugar* dispute debacle, was the inability to compose a panel in the absence of a functioning roster. If the fail-safe procedure for appointment requires recourse to selection from a roster, but there is no roster to select from, then the procedure can grind to a halt unless that possibility is

[46] Free trade Agreement between the European Union and its Member States, of the one part, and the Republic of Korea, of the other part (EU-Korea FTA), signed 6 October 2010, entered into force 13 December 2015, OJ 2011 L 127/6, Articles 71, 85.

[47] Decision No. 2 of the EU-Korea Trade Committee of 23 December 2011, L 58/13 (2013/111/EU); CAFTA-DR, Decision of the Free Trade Commission on Appointment to the Rosters, 23 February 2011; Decision No 1/2019 of the Trade and Development Committee Established under the Economic Partnership Agreement between the European Union and its Member States, of the One Part, and the SADC EPA States, of the Other Part, of 18 February 2019, On the Establishment of a List of Arbitrators [2019/391].

accounted for. One approach to resolving this issue is to include provisions in the DSM that are meant to safeguard panel composition even if the Parties fail to establish a roster.

The Comprehensive and Progressive Agreement for Trans-Pacific Partnership ('CPTPP') is a good example of a recently concluded RTA that adopts this approach. Under the CPTPP, if the responding party fails to appoint its panelist within 20 days of the delivery of the request for the establishment of a panel, the complaining party is to select a panelist from among the individuals appointed by the responding party to their indicative list of panelists.[48] If the responding party has not appointed anyone to their indicative list, the complaining party is to select from among the individuals appointed to the roster of panel chairs.[49] Finally, if no roster of panel chairs has been established, the panelist will be randomly chosen from among three candidates proposed by the complaining party.[50]

The CPTPP procedure effectively closes the panel blocking loophole by ensuring that a panel can be composed despite the non-participation of the responding party and the lack of an established roster. The final stage of the fail-safe procedure – where the remaining panelist is chosen from among candidates proposed by the complainant – is dependent only upon the participation of the complainant, and thereby circumvents the need to resort to a roster. Notably, however, the roster of panel chairs was in fact composed within a year of the CPTPP coming into force.[51] Accordingly, a situation in which the process progresses to the third stage of the fail-safe procedure is unlikely to arise. Rather, in the event that a CPTPP party fails to participate in the process, the most likely outcome is that the panel will be composed of the complainant's chosen panelist and two individuals appointed to the roster of panel chairs.

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[48] Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP), signed 8 March 2018, entered into force 30 December 2018, [2018] ATS 23, Article 28.9(2)(c)(i).
[49] Article 28.9(2)(c)(ii) of the CPTPP.
[50] Article 28.9(2)(c)(iii) of the CPTPP.
[51] Decision by the Commission of the Comprehensive and Progressive Agreement for Trans-Pacific Partnership regarding the Establishment of a Roster of Panel Chairs under Chapter 28 on Dispute Settlement, 9 October 2019, CPTPP/COM/2019/D006.

A similar approach has been incorporated into an assortment of modern EU RTAs. The EU-Canada Comprehensive Economic and Trade Agreement ('CETA') DSM requires selection from a roster in the event that the parties cannot agree on the composition of the panel; however, Article 29.7(6) provides that if no roster has been established or if it does not contain a sufficient number of roster members, 'three arbitrators shall be drawn by lot from the arbitrators who have been proposed by one or both of the Parties'.[52] This same sort of provision is also included in other recent EU RTAs, including the EU-Vietnam FTA and EU-Ukraine FTA.[53] Other EU RTAs include similar provisions, but are more detailed and contain specific procedures for selecting the panel chair. The EU-Singapore FTA for example provides that in the absence of a complete roster of panel chairs, the chair 'shall be selected by lot from among former Members of the WTO Appellate Body'.[54] Under these types of procedures, provided the complaining party proposes individuals for appointment to the roster by the time the panel is to be composed, the lack of a formalized roster will not stand in the way of composing the panel.

B. Provisions Safeguarding Roster Composition

Another less common method of combating the panel blocking issue is to include provisions within the DSM that guarantee a roster will be composed, regardless of whether all parties to the RTA participate in composing the roster. This is the approach employed in the successor agreement to the NAFTA, the USMCA. Just as the panel composition process under NAFTA Chapter 20 is dependent on the existence of a functioning roster, so too is the process under Chapter 31 of the USMCA.[55] Yet, whereas establishing and maintaining the roster under Chapter 20 of the NAFTA was a

[52] Comprehensive Economic and Trade Agreement between Canada, of the one part, and the European Union and its Member States, of the other part (EU-Canada) (CETA), signed 30 October 2016, OJ 2017 L 11/23, Article 27.6(7).
[53] Free Trade Agreement between the European Union and the Socialist Republic of Viet Nam (EU-Vietnam FTA), signed 30 June 2019, entered into force 1 August 2020, OJ 2020 L 186/3, Article 15.7(7); Association Agreement between the European Union and its Member States, of the one part, and Ukraine, of the other part (EU-Ukraine FTA), signed 27 June 2014, entered into force 1 July 2014, OJ 2014 L 161/3, Article 307(7).
[54] Free Trade Agreement between the European Union and the Republic of Singapore (EU-Singapore FTA), signed 19 October 2018, entered into force 1 April 2020, OJ 2019 L 294/3, Articles 14.5(5)-(6).
[55] The Agreement between the United States of America, the United Mexican States, and Canada (US-Canada-Mexico) (USMCA), signed 10 December 2019, entered into force 1 July 2020, Article 31.9.

considerable challenge absent the good faith participation of all NAFTA Parties, the USMCA allows for the creation and maintenance of a roster without the active participation of all Parties to the Agreement.

In appointing members to the roster, each USMCA Party is allowed to designate up to 10 individuals.[56] Article 31.8(1) states that the Parties 'shall endeavor to achieve consensus on the appointments', but unlike under the NAFTA, consensus is not required.[57] If each of the USMCA Parties nominates its 10 individuals, and there is no agreement on all 30 proposed individuals within 30 days, the individuals nominated by each Party are appointed to the roster. [58] However, if for example the US failed to nominate its 10 individuals while Canada and Mexico each nominated their prospective roster members, the 20 individuals proposed by Canada and Mexico would form the roster. As a result, provided one USMCA Party proposes individuals to the roster, the roster will be formed within 30 days of the Agreement entering into force.[59] The USMCA also eliminates the three-year term limit for roster members found under NAFTA Chapter 20.[60] With respect to reappointments and new appointments, the Parties are to seek consensus, however if there is no agreement within 30 days, the individual proposed is added to the roster.[61]

In practice, this procedure seems to have worked remarkably well. The USMCA entered into force on July 1, 2020, and the roster of panelists for Chapter 31 disputes was released only a few days later.[62] The fact that there are 30 individuals appointed to the roster indicates that there was active participation by the US, Canada, and Mexico in appointing individuals to the roster.[63] As a final safeguard, the Rules of Procedure for Chapter 31 disputes outline the procedure to be followed in the event that the failure of a Party to designate its individuals to the roster 'impedes the composition of a panel … due

[56] Ibid.
[57] Ibid.
[58] Ibid.
[59] Ibid.
[60] Article 31.8(1) of the USMCA.
[61] Ibid.
[62] Decision No. 1 of the Free Trade Commission of the USMCA, 7 July 2020, Annex IV.
[63] Ibid.

to an insufficient number of individuals on the roster'.[64] Yet, recourse to this procedure is not necessary given how quickly the Parties moved in fully composing the roster.

C. Panel Composition Procedures without Recourse to a Roster

Given past challenges in composing and maintaining rosters and the potential for panel blocking that may arise as a result, many RTAs forego the roster system entirely. One type of panel composition procedure commonly found in RTAs involves each disputing party appointing its arbitrator, and proposing a list of three or four individuals to serve as chair.[65] If a disputing party fails to appoint a panelist within the specified period of time, the remaining panelist is either chosen by the other disputing party, or selected by lot from among the four individuals proposed by that party to serve as chair.[66] The same safeguard applies for appointing the chair, whereby the chair is appointed from among the individuals proposed by the complaining party if the responding party fails to participate, or if the parties otherwise cannot agree on a chair.[67] Consequently, this simple procedure affords to the complaining party the ability to unilaterally compose a panel without the participation of the responding party and without having to resort to an established roster to appoint the remaining panelists.

D. Recourse to an Appointing Authority

In the event that the disputing parties are unable to agree on the appointment of panelists, a number of RTAs resort to a designated appointing authority to overcome the impasse.[68] Under this approach, a political body or representative steps in and appoints the remaining panelists on behalf of the parties if they cannot come to an agreement.[69] A number of RTAs resort to a representative of a body internal to the RTA system for appointing remaining panelists. The Protocol of Olivos, which governs dispute settlement

[64] Ibid, Annex III, Article 17(1).
[65] Free Trade Agreement between New Zealand and the Republic of Korea (New Zealand-Korea FTA), signed 23 March 2015, entered into force 20 December 2015, NZTS 2015-10, Article 19.8; Canada-Korea Free Trade Agreement (Canada-Korea FTA), signed 22 September 2014, entered into force 1 January 2015, CTS 2015/3, Article 21.7.
[66] Ibid.
[67] Ibid.
[68] Chase et al, above n 7, at 644; Amelia Porges, 'Dispute Settlement' in Jean-Pierre Chaffour and Jean-Christophe Maur (eds), *Preferential Trade Agreement Policies for Development: A Handbook* (World Bank, 2011), 467-501 at 485.
[69] Ibid.

for the Southern Common Market ('MERCOSUR'), designates the MERCOSUR Administrative Secretariat as the residual appointing authority.[70] Likewise, under the Enhanced Dispute Settlement Mechanism ('EDSM') of the Association of East Asian Nations ('ASEAN'), if the disputing parties fail to agree upon the appointment of panelists, it falls to the ASEAN Secretary-General to appoint the remaining panelists.[71]

EU RTAs frequently feature both roster and internal appointing authority systems, where the appointing authority steps in to appoint a panelist or chair from the roster by lot in the event that the disputing parties cannot agree. Under the CETA, if the parties cannot agree on the composition of the panel, a party can request that the remaining panelists be drawn by lot from the roster by the Chair of the CETA Joint Committee or their delegate.[72] Similar provisions are found in both the EU-SADC EPA and the EU-Japan EPA.[73]

Other RTAs resort to an external appointing authority in the event that the disputing parties cannot agree on the composition of the panel. A host of Asian-Pacific RTAs, including the China-New Zealand FTA and ASEAN-Japan Comprehensive Economic Partnership Agreement ('CEPA'), designate the WTO Director-General as the appointing authority.[74] In addition to the WTO Director-General, the Secretary-General of the Permanent Court of Arbitration ('PCA') is frequently designated as the appointing authority in RTAs,[75] and the President of the International Court of Justice ('ICJ') has

[70] Olivos Protocol for the Settlement of Disputes in MERCOSUR (Protocol of Olivos), signed 18 February 2002, entered into force 1 January 2004, 2251 UNTS 243, Article 10(2)(ii).
[71] Protocol on Enhanced Dispute Settlement Mechanism (ASEAN EDSM), entered into force 24 November 2004, Annex II, Article I.7.
[72] Article 29.7(3) of the CETA.
[73] Economic Partnership Agreement between the European Union and its Member States, of the one part, and the SADC EPA States, of the other part (EU-SADC EPA), signed 10 June 2016, entered into force 10 October 2016, OJ 2016 L 250/3, Article 80(3); Agreement between the European Union and Japan for an Economic Partnership (EU-Japan EPA), signed 17 July 2018, entered into force 1 February 2019, OJ 2018 L 330/3, Article 31.8(3).
[74] Free Trade Agreement between the Government of New Zealand and the Government of the People's Republic of China (New Zealand-China FTA), signed 7 April 2008, entered into force 1 October 2008, NZTS 2008 No. 19, Article 189(4); Agreement on Comprehensive Economic Partnership among Japan and Member States of the Association of Southeast Asian Nations (ASEAN-Japan FTA), signed 26 March 2008, entered into force 1 December 2008, Article 65(2).
[75] Agreement on Free Trade and Economic Partnership between Japan and the Swiss Confederation (Japan-Switzerland FTA), signed 19 February 2009, entered into force 1 September 2009, Article 141(6); Free

also been designated as the appointing authority in a few agreements.[76] The Regional Comprehensive Economic Partnership ('RCEP') is unique in that it provides a fail-safe appointing authority; the WTO Director-General is designated as the default appointing authority, but in the event that the WTO Director-General fails to act, a party may request that the PCA Secretary-General make the necessary appointments.[77]

IV. Assessment for Approaches to Ensuring Automaticity in Panel Composition in RTA DSMs

The panel composition procedure under NAFTA Chapter 20 is often held up as the prime example of a defective DSM that allows one party to unilaterally disrupt the dispute settlement process. Yet, examining the DSMs of RTAs currently in force, it is clear that this defect is not exclusive to the NAFTA. In many instances, states have reduced the likelihood of panel blocking in their RTAs, but have not employed sufficient fail-safe mechanisms that would guarantee, in all circumstances, that a panel would be composed upon a party's request. There are, therefore, still opportunities for a party to undermine the RTA dispute settlement process by failing or refusing to participate in the panel or roster composition procedure. As the previous section demonstrates, states have attempted to respond to the panel blocking problem through implementing a variety of procedures designed to ensure automaticity in roster or panel composition. This section offers a critical analysis of the effectiveness and efficiency of each of those approaches, but first identifies a common theme that appears in the DSMs most successful in dealing with the panel blocking issue.

A. A Common Approach to Eliminating Panel Blocking: Redistributing Procedural Control and Incentivizing Participation

What defective RTA panel composition procedures tend to have in common is that they do not allow the complaining party to unilaterally compose a panel without at least some level of cooperation from the other RTA parties or a third party. Under many roster-style

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Trade Agreement Between Canada and the States of the European Free Trade Association (Canada-EFTA FTA), signed 26 January 2008, entered into force 1 July 2009, CTS 2009/20, Annex K, para 2(e).

[76] New Zealand-Thailand Closer Economic Partnership Agreement (New Zealand-Thailand FTA), signed 19 April 2005, entered into force 1 July 2005, NZTS 2005 No. 8, Article 17.5(3).

[77] Regional Comprehensive Economic Partnership (RCEP), signed 15 November 2020, not yet entered into force, Articles 19.11(7)-(8).

RTAs, the consensus requirement for appointments to the roster necessitates the active participation of the RTA parties in composing the roster, and without a composed roster, the fail-safe provisions designed to ensure automaticity are inoperable. Other RTAs provide no safeguards in the event the responding party fails to appoint its panelists. And under RTAs that designate an appointing authority, the complainant cedes control of the process to the appointing authority, which may refuse to act or take a long time to appoint the remaining panelists (discussed in detail in Subsection (iv) below). In these cases, the complainant cannot push ahead with composing the panel and is either left at the mercy of the respondent or some other third party, which may result delays to the dispute settlement process, whether intended or not.

The RTA DSMs most effective in safeguarding automaticity in panel composition either vest with the complaining party control over the dispute settlement process, or create strong incentives for RTA parties to participate in the process, or ideally, do both. This is a common element of effective panel composition procedures regardless of whether the DSM employs a roster system, envisions purely *ad hoc* panel composition, or provides recourse to an appointing authority. As such, panel blocking can be eliminated from each type of panel composition procedure, provided the DSM either vests control over the process with the complaining party or creates strong incentives for the RTA parties to actively participate.

B. Efficiently Eliminating Panel Blocking in Roster Systems

Many modern RTAs that employ a roster system effectively deal with the panel blocking issue, but do so using different methods. The USCMA approach guarantees roster composition and maintenance without the participation of all the RTA parties. This in turn incentivizes each party to participate in composing the roster, because by failing to participate a party may lose out on appointing its preferred candidates to the roster.

The CPTPP approach in contrast does not guarantee that a roster will be established,[78] but allows the complainant to appoint individuals who are not on the roster to the panel in the event of non-participation by the respondent, without the respondent being able to block those appointments. This procedure also encourages the respondent's participation in composing the panel, as the complainant can appoint two panelists if the respondent does not participate.

Finally, the approach adopted under recent EU RTAs permits the disputing parties to select as panelists individuals who have been proposed to the roster, even if the roster has not been formally established or does not contain a sufficient number of roster members required to preside over a dispute. While ensuring that a panel can still be composed in the absence of a full roster, this procedure also incentivizes the parties to propose individuals for appointment to the roster. A complaining party may bring a dispute and at the same time propose members for the roster so as to ensure there are individuals who may be selected as panelists even if the roster is not formalized prior to the panel being composed. The complainant's proposals would then motivate the respondent to similarly propose individuals to the roster, so as to minimize the likelihood that the panel is composed entirely of individuals proposed by the complainant. Each of these approaches therefore prevents another party from unilaterally frustrating the dispute settlement process while also providing incentives for the RTA parties to participate in the panel or roster composition process.

While the USMCA, CPTPP, and EU RTA approaches effectively deal with the panel blocking issue, the CPTPP DSM is potentially less efficient. A responding party can still delay the panel composition process by choosing not to participate. The procedure for appointing panelists under the CPTPP can be controlled by the

[78] While a roster of panel chairs has been established under the CPTPP, the process for establishing the rosters is not automatic. Article 28.11 provides that the parties shall agree on a roster of panel chairs (by consensus) within 120 days of the Agreement entering into force, failing which the Trans-Pacific Partnership Commission shall immediately convene to appoint individuals to the roster. The Commission, however, is made up of government officials from each CPTPP Party and takes decisions by consensus (see Article 27.3). It is therefore possible in theory for a CPTPP Party to block the establishment of a roster by continuously objecting to any proposed decision on a roster. Again, while this did not occur under the CPTPP, it could under another RTA DSM that adopts a similar design.

complainant, allowing the complainant to push ahead with selecting the panelists even if the respondent does not participate. However, the procedure for selecting the panel chair is vulnerable to extended delays that are outside the control of the complaining party, particularly where the respondent refuses to participate.[79] If the disputing parties fail to agree on a chair, which would be inevitable if the respondent refused to participate, it falls to the two appointed panelists to select an individual from the roster of panel chairs.[80] If the panelists cannot agree on a chair, the CPTPP provides that 'the two panelists shall appoint the chair with the agreement of the disputing Parties'.[81] Again though, if one of the parties refuses to agree, the procedure is further delayed, with the next step being that the disputing parties 'select the chair by random selection' from the roster of panel chairs.[82] Unlike the USMCA, the CPTPP does not provide guidance on how to proceed if a disputing party fails to participate in choosing the chair via 'random selection'.[83] In any event, it can take up to 60 days to reach this point, and the complaining party does not have any control over speeding up the process if the panelists cannot agree on appointing a chair and if the respondent refuses to participate.[84] For these reasons, the CPTPP approach is likely to result in longer delays in composing a panel in the absence of the participation of the respondent, despite its effectiveness in ultimately eliminating the possibility of panel blocking.

In contrast, the USMCA provides a relatively efficient panel composition process, as the complaining party is afforded significant control over the panel composition process in the event that the respondent fails to participate. At each stage in the process, the USMCA envisions that the parties will attempt to come to a consensus on appointments, but provides that in the event of the respondent's non-participation, it falls to the complaining party to make the selection.[85] In total, the panel composition procedure is intended to take a maximum of 35 days, which is a realistic timeframe given

[79] Article 28.9(2) of the CPTPP.
[80] Article 28.9(2)(d)(ii) of the CPTPP.
[81] Article 28.9(2)(d)(iii) of the CPTPP.
[82] Article 28.9(2)(d)(iv) of the CPTPP.
[83] Article 31.9(c) of the USMCA.
[84] Ibid.
[85] Article 31.9 of the USMCA.

that the complaining party can quickly and unilaterally compose the panel even if the responding party refuses to participate.[86]

Examining the EU RTA approach to eliminating panel blocking, delays may arise under those RTAs that employ a hybrid roster/appointing authority approach (discussed further in Subsection (iv) below). Setting aside potential issues with the appointing authority, the EU RTA approach provides an efficient means of circumventing the panel blocking issue. Under the CETA, for example, the disputing parties are to consult with a view to agreeing on the composition of the panel within 10 days of the request for the establishment of the panel.[87] If they cannot agree, it falls to the Chair of the CETA Joint Committee to appoint the remaining panelists within 5 working days, drawing by lot from the panelist and panel chair rosters.[88] Again, if any of the rosters have not been formally established at the time the party requests the Chair's assistance in appointing the remaining panelists, the Chair will draw from among the individuals proposed for inclusion on the rosters by one or both of the parties.[89] In theory, the process for appointing the panelists should take no more than 15 days, and the non-participation of the responding party in the panel composition process does not have the potential of delaying that timeline further. As a result, the EU-RTA approach provides the most efficient means of composing a panel while still envisioning recourse to a roster for panelist selection and guarding against panel blocking.

C. The Pros and Cons of Ad Hoc Panel Composition Procedures

The *ad hoc* panel composition approach is effective in preventing the responding party from delaying or blocking panel composition, and also effective in encouraging the respondent's participation. Generally, the complainant nominates its panelist and proposes up to four individuals to serve as the chair, and if the respondent fails to appoint their panelist, the respondent's panelist is selected by lot from among those proposed by the complainant to serve as the chair.[90] The chair is then selected by lot from among the

[86] Ibid.
[87] Article 29.7(2) of the CETA.
[88] Article 29.7(3) of the CETA.
[89] Article 29.7(6) of the CETA.
[90] Article 19.8 of the New Zealand-Korea FTA; Article 21.7 of the Canada-Korea FTA.

candidates proposed by the complainant if the respondent has not put forward any names.[91] The complainant therefore retains complete control over composing the panel in the event that the respondent does not participate. Moreover, the respondent has a strong interest in participating in the panel composition process. If the respondent fails to appoint anyone, the panel is composed entirely of individuals proposed by the complainant. Consequently, the respondent must at least appoint its panelist and propose individuals to serve as the panel chair if it wants to ensure the panel is not composed in the complainant's favour.

This approach is appealing in its simplicity. The parties are not required to negotiate and agree on a roster in order for the DSM to be operable, nor are they required to resort to a third-party or political body under the RTA to appoint panelists in the event of an impasse. Yet, as simple as this approach is, there are drawbacks to employing a system that relies purely on *ad hoc* procedures for panel composition. It is often presupposed that appointment from a roster is inherently more advantageous than *ad hoc* appointment, but it is worth exploring the merits of roster versus *ad hoc* approaches in relation to panel composition in order to determine whether the simplicity of the *ad hoc* panel composition procedure outweighs the benefits provided by a roster system.

The main appeal of a roster system is the potential efficiency benefits it can yield for disputing parties. Panelists chosen from a pre-established, agreed upon list of qualified individuals are less likely to be challenged on the basis of their qualifications or independence, thereby minimizing the risk of these sorts of procedural delays. Moreover, roster members are more likely to be familiar with the RTA's provisions and procedures, and are typically required to attest to their 'willingness and ability to make time commitments necessary for service on panels'.[92] As a result, rosters have the potential of accelerating the dispute settlement process by increasing the efficiency of the panel composition and deliberative processes.[93]

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[91] Ibid.
[92] Invitation for Applications for Inclusion on the Dispute Settlement Rosters for the United States-Mexico-Canada Agreement, 85 FR 15847, 19 March 2020.
[93] Porges, above n 68, at 485.

Indeed, at the WTO, Members have debated the merits of a roster versus *ad hoc* panel composition procedure. In a 2003 Communication to a special session of the WTO DSB, the European Communities ('EC') laid out an argument in favour of moving away from the WTO's *ad hoc* system for appointing panelists and toward the establishment of a permanent panel body.[94] In advocating for a permanent roster of panelists, the EC emphasized that the increasing complexity of cases before the WTO, both substantively and procedurally, puts a 'greater strain on panelists selected on an *ad hoc* basis' by substantially increasing their workload.[95] Writing in support of the EC's proposal, Davey notes that this complexity creates numerous hurdles throughout the dispute settlement process. The increased time commitment required of panelists makes it more difficult to find individuals who can devote sufficient time to the dispute, increasing the length of the panel composition process.[96] With the stakes of each dispute becoming increasingly significant, Davey also argues that disputing parties have become more selective when considering panelists, leading to frequent disagreements between the parties on appointees and increased reliance on the WTO Director-General to resolve the impasse.[97]

The EC's proposal for creating a permanent panel body was unsuccessful, but the same arguments could be applied in the context of RTA DSMs. As RTAs have expanded in their substantive coverage and RTA dispute settlement procedures have become increasingly complex, panelists are likely to have to devote significant time to RTA disputes. Indeed, in the US-Guatemala labour dispute under the CAFTA-DR, the panel repeatedly stressed that the complexity of the dispute, both procedurally and substantively, required that the panel work additional hours far in excess of what was contemplated under the RTA.[98] Strictly with a view to maximizing efficiency in

[94] Communication from the European Communities, Contribution of the European Communities and Its Member States to the Improvement of the WTO Dispute Settlement Understanding, TN/DS/W/1, 13 March, 2002.
[95] Ibid, at 2.
[96] William J. Davey, 'The Case for a WTO Permanent Panel Body' 6 (1) Journal of International Economic Law 177 (2003), at 178.
[97] Ibid.
[98] Presentation of the Final Report, Letter from the Panel Chair, *Guatemala – Issues Relating to the Obligations Under Article 16.2.1(a) of the CAFTA-DR*, 14 June 2017,

composing panels, a roster may speed up the process as roster members generally provide assurances upon their appointment that they will be able to devote the time required to carry a dispute from start to finish.[99]

An argument proponents of the *ad hoc* approach often raise is that rosters, to some extent, restrict party autonomy over the composition of the panel by restricting the pool of potential panelists.[100] But considering that all RTA parties are given the opportunity to nominate individuals to the roster and, under carefully designed systems, can appoint replacement arbitrators without the approval of the other RTA parties, the roster system still preserves a large degree of party autonomy.

Overall, despite the lack of substantial empirical evidence suggesting that one system is clearly preferable to the other,[101] the roster system seems more likely to provide for efficient panel composition than the *ad hoc* selection system, and as the USMCA, CPTPP, and recent EU RTAs demonstrate, can still be designed in manner that ensures automaticity. Where roster-style DSMs can effectively eliminate panel blocking and provide an efficient, complainant-driven panel composition process, the benefits afforded by the *ad hoc* approach do not outweigh the stability of the roster system.

D. Recourse to an Appointing Authority – A Mixed Bag

Recourse to an appointing authority theoretically provides an effective method of panel composition in the event that the disputing parties cannot agree on the panelists, or where one party refuses to participate.[102] There are potential issues however with recourse to both internal and external appointing authorities. Where an internal representative acts as the default appointing authority, problems may arise depending on how that representative is assigned to their position. The Korea-Chile FTA, for example,

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https://www.mineco.gob.gt/sites/default/files/Integracion%20y%20comercio%20exterior/transmittal_letter_-_final_report_of_the_panel_june_14_2017.pdf.

[99] Invitation for Applications, above n 92.

[100] William J. Davey, 'A Permanent Panel Body for WTO Dispute Settlement: Desirable or Practical?' in Daniel L. M. Kennedy and James D. Southwick (eds), *The Political Economy of International Trade: Essays in Honor of Robert E. Hudek* (Cambridge: Cambridge University Press, 2009), 496-527 at 511.

[101] Leon Trakman, 'Enhancing Standing Panels in Investor-State Arbitration: The Way Forward?' 41 Georgetown Journal of International Law 1145 (2017), at 1168.

[102] Chase et al, above n 7, 645.

designates as the appointing authority the 'chairperson of the [Free Trade] Commission' when the Parties cannot agree on a chair or panelist.[103] However, the Agreement provides that the Free Trade Commission ('FTC') 'shall be chaired alternately by each Party'.[104] The EU-SADC EPA provides a similar process, whereby the Chairperson of the Trade and Development Committee is tasked with making appointments, but the Committee Chairperson alternates between the parties each year.[105] What happens if the chairperson is a national of the responding party and simply refuses to appoint any panelists? Where the appointing authority lacks complete neutrality between the disputing parties, there is an increased risk that the panel composition procedure may be subject to vulnerabilities.

The CETA also provides for recourse to an internal appointing authority in the event that the parties cannot agree on the panel's composition within 10 days, allowing either party to request that the Chair of the CETA Joint Committee or their delegate draw by lot arbitrators from the roster.[106] Article 26 states that the CETA Joint Committee shall be co-chaired by government officials of both Canada and the EU, and that decisions and recommendations of the CETA Joint Committee shall be made by mutual consent.[107] It is not clear, therefore, whether both co-chairs must approve of the selection by lot, or whether the co-chair of the complainant's government can act unilaterally and conduct the selection by lot even if the other co-chair does not provide their consent. Unfortunately, the Rules of Procedure of the CETA Joint Committee do not offer any clarification.[108] If mutual consent is required, panel composition may be susceptible to paralysis if the respondent's co-chair fails to take action in appointing the panelists.

The EU-Japan EPA seems to resolve this issue. If the parties do not agree on the panel's composition within 10 days, each party is to appoint a panelist from the roster.[109] If a party fails to make its appointment, then the co-chair of the Joint Committee from the

[103] Free Trade Agreement between the Republic of Korea and Chile (Korea-Chile FTA), signed 1 February 2003, entered into force 1 April 2004, Articles 19.9(3)-(4).
[104] Article 18.1(5) of the Korea-Chile FTA.
[105] Articles 80(3) & 103(2) of the EU-SADC EPA.
[106] Articles 29.7(2)-(3) of the CETA.
[107] Articles 26.1(1) & 26.3(3) of the CETA.
[108] Decision 001/2018 of the CETA Joint Committee of 26 September 2018 adopting its Rules of Procedure and of the Specialized Committees, 26 September 2018, OJ 2018 L 190/15.
[109] Article 21.8(3) of the EU-Japan FTA.

complaining party steps in to appoint a panelist from the roster.[110] The same general procedure applies in the event that the parties cannot agree on a panel chair, with the co-chair of the Joint Committee from the complaining party making the selection by lot from the roster of panel chairs.[111] Like the CETA, lack of a roster under the EU-Japan EPA is not itself a barrier to composing the panel, provided the complainant has formally proposed individuals for the panelist and panel chair rosters at the time the panel is to be composed.[112] The EU-Japan approach is therefore preferable to the CETA approach as it explicitly permits the co-chair from the complaining party to unilaterally compose the panel, allowing the complainant to push forward with panel composition even in the absence of a roster and the active participation of the respondent.

Considering that recourse to an internal appointing authority may be stymied depending on whether the respondent has any control over the body designated as the appointing authority, an external appointing authority may be preferred. Even where there is little concern over the possibility of deliberate delay, outsourcing the appointment process to an external party may be desirable in order to promote the appearance of neutrality, or to defer to a party that may have greater expertise and experience in acting as an appointing authority. Indeed, panel composition may be delayed if an inexperienced appointing authority is incapable of finding a suitable and available panelist and checking potential conflicts of interest in a timely manner.

A key consideration that should be taken into account when weighing the option of enlisting an external appointing authority is the reliance that must be placed on that authority to act in a timely fashion. First, the nature of the relationship between the parties to the RTA and the appointing authority is an important factor. Where there is no legally binding relationship between the external appointing authority and the RTA parties, it may be difficult to ensure that the external body or representative selected will actually act if called upon.[113] This may be problematic where RTA parties have chosen

[110] Ibid.
[111] Article 21.8(4) of the EU-Japan FTA.
[112] Articles 21.8(5)-(6) of the EU-Japan FTA.
[113] Chase et al, above n 7, at 645.

the WTO Director-General as the appointing authority, as it is unclear that the Director-General would have any binding legal obligation to act as the appointing authority if so designated under an RTA.[114]

Similarly, the procedure for designating the President of the ICJ as an appointing authority is not formally set out under the Rules of the Court or the Statute of the ICJ. ICJ publications allude to the President of the ICJ undertaking such a role, and recommend that RTA parties consult the President on their willingness to act as an appointing authority.[115] Yet, the nature of the legal relationship between the ICJ President as appointing authority and the RTA parties is ambiguous. In contrast, the PCA Secretary-General will act as an appointing authority provided he is satisfied on a *prima facie* review of the documents submitted by the parties that he is empowered to act.[116] Provided the dispute settlement clause explicitly names the PCA Secretary-General as the appointing authority, and assuming all other pre-conditions (being submission of a formal request along with documents for the Secretary-General's review and payment of a non-refundable fee)[117] have been met, the Secretary-General will make the necessary appointments.

Assuming that the body entrusted to act as the external appointing authority undertakes to actually perform that function when requested, there is still the issue of timeliness. Indeed, acting as an appointing authority in RTA disputes is outside the normal scope of duties of the WTO Director-General and the President of the ICJ, who may reasonably give priority to disputes internal to those organizations before turning their attention to assisting in RTA disputes. This is less of an issue for the PCA, as appointing authority services fall within its regular scope of business and are not subsidiary to the PCA's other dispute settlement functions. Having responded to over 800 appointing authority requests since 1981, the PCA has significant experience in providing such services and the Secretary-General will give effect to appointment procedures,

[114] Ibid.
[115] International Court of Justice, 'Yearbook 2015-2016', 70 ICJ Yearbook 68 (2015).
[116] Brooks Daly, Evgeniya Goriatcheva, Hugh Meighen (eds), *Guide to the PCA Arbitration Rules* (Oxford: Oxford University Press, 2014) 23-24.
[117] Ibid, Appendix XIV.

including the timelines for appointment, established under the applicable dispute settlement clauses.[118] Nevertheless, in giving up a degree of control over the panel composition process to an external body, the parties must depend on the capacity of that body to act in a timely manner.

V. Concrete Proposals for Eliminating Panel Blocking

The analysis in the previous section demonstrates that the RTA systems most effective at eliminating the possibility of panel blocking are those that inhibit the ability of one RTA party to control the roster or panel composition process, while at the same time provide incentives for the RTA parties to participate in that process. Indeed, these approaches differ in their effectiveness at eliminating panel blocking, as well as their overall efficiency in ensuring timely panel composition. Taking this into account, this section offers concrete proposals for states to eliminate panel blocking under their RTA DSMs in a manner that maximizes procedural efficiency in panel composition.

A. Improvements to the Roster-Based Approach

As discussed above in Section B, panel blocking only tends to arise under roster-based RTAs where no roster has been formally established. The CPTPP, USMCA, and EU-RTAs employ different approaches to resolving this issue, with varying effectiveness and efficiency. For existing RTAs with pathological roster-based DSMs, the simplest method for eliminating the possibility of panel blocking is to adopt the EU-RTA approach. For example, since there is no established roster under the AUSFTA or the KORUS, there is a possibility that the panel composition process could be blocked as the safeguard provisions for ensuring automaticity are tied to the existence of a roster.[119] The RTA

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[118] Manuel Indlekofer, *International Arbitration and the Permanent Court of Arbitration* (New York: Wolters Kluwer, 2013), 246; Scott Falls, 'Outsourcing FTA Dispute Settlement Administration to Third-Party International Arbitral Institutions: Opportunities and the Roles of the Permanent Court of Arbitration' 19 (1) Law & Practice International Courts & Tribunals 49 (2020), 59; Permanent Court of Arbitration, 'Annual Report 2018', at 15.

[119] While the status of the rosters under these agreements is not clear, it is reasonable to assume that no rosters exist. Where rosters have been established under RTAs, they have been created via a decision of the RTA ministerial body, which has then been publicized by one of the RTA parties (this has been the case, for example, under the USMCA, CAFTA-DR, EU-SACU EPA, and EU-Korea FTA). In 2012, the Office of the US Trade Representative invited applications for inclusion on the rosters of US RTAs with Australia, Colombia, Korea, Morocco, and Singapore, but no public information is available indicating that these rosters were established, and there are no decision of the ministerial bodies under these RTAs establishing a

parties could resolve this issue by amending – or perhaps by issuing an interpretation – of the text by including a provision which states that in the event the roster under the agreement is not fully composed, the remaining panelists shall be selected by lot from among the individuals formally proposed by the parties for inclusion on the roster. The addition of this simple provision would not require a substantial redrafting of the panel or roster composition process that already exists under the RTA, and would also have two positive effects. First, it would allow the complainant to initiate a dispute, even in the absence of an agreed upon and fully constituted roster, provided the complaining party proposes its individuals for inclusion on the roster. As such, the respondent would not be able to hold up the dispute settlement process by failing to participate in the panel or roster composition process. Second, this type of provision would spur the creation of a roster, as the complaining party would have to propose individuals for the roster in order to ensure the panel is composed, and the respondent would likely respond by proposing its own individuals so as to ensure the panel is not composed entirely of the complainant's preferred candidates. Consequently, in adding this type of provision to an existing RTA DSM without a fully composed roster, the parties could guarantee the automaticity of panel composition in the absence of a roster while also encouraging the creation of a roster.

For effectively eliminating panel blocking in future RTAs while ensuring efficient panel composition, states would be prudent to adopt the USMCA approach. The advantage of the USMCA is that it essentially guarantees the rapid composition of a roster, which yields efficiency benefits for the disputing parties. Moreover, the complainant retains control over the panel composition process from start to finish, unlike the under the CPTPP and EU RTA approaches, under which another party ultimately must be consulted in order to finalize appointments to the panel. In sum, the USMCA approach not only ensures efficient panel composition while negating the possibility of panel blocking, but also all but guarantees that a roster will be established soon after the agreement enters into force.

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formal roster. See: Invitation for Applications for Inclusion on Dispute Settlement Lists for U.S. Free Trade Agreements (FTAs) With Australia, Colombia, Korea, Morocco, and Singapore, 77 FR 37948, 25 June 2012, https://www.regulations.gov/document?D=USTR-2012-0009-0001.

B. Improvements to the Appointing Authority Approach

The appointing authority approach loses its efficiency (and may be ineffective in preventing panel blocking) where the complainant cedes control over the process to an internal body that can be stymied by the respondent, or to an external body that may not act in a timely manner, if at all. For states that wish to incorporate an internal appointing authority into current and future RTAs, the best course of action would be to adopt a procedure similar to that provided under the EU-Japan EPA. The procedure under the EU-Japan EPA allows recourse to an internal appointing authority but neutralizes any opportunity for the respondent to influence the appointing process by allowing the complainant to appeal to their own co-chair of the Joint Committee in selecting the panelists and chair. This procedure all but guarantees that a panel will be composed as long as the complainant takes steps to try to compose the panel and enlists the assistance of its co-chair if the respondent fails to participate.

Under RTAs such as the CETA and EU-Vietnam RTA that provide for recourse to an internal appointing authority that is co-chaired by representatives of the parties, but do not clarify on whether a decision on appointments must be taken by consensus, this ambiguity could be easily resolved by adopting an interpretation of the provision in question, or by writing the clarification into the applicable rules of procedure. Neither course of action would require any significant change to the panel composition process or the structure of the appointing authority, but would effectively eliminate the possibility of delays or panel blocking by allowing the complainant's co-chair of the ministerial body to make the necessary appointments absent the respondent's participation.

If parties prefer an external appointing authority, the best course of action is to select an institution with significant experience in acting as an appointing authority in order to avoid any delays in the panel composition process. In this regard, the PCA has an impressive track record in acting as an appointing authority in a large number of cases, including state-to-state disputes. Provided the parties make a proper request to the PCA Secretary-General to act as the appointing authority, there is little doubt that he will do so in a timely manner and will select a suitable candidate (or candidates) based on the

parties needs and preferences. The same cannot be said of requests made to other potential appointing authorities who do not typically provide the same sort of institutional appointing authority services offered by the PCA.

VI. Conclusion

Procedural limitations to effective dispute settlement resolution are a common feature of RTAs. In many cases, the parties are aware of these limitations and intend to include them in their RTA DSMs, as they are reflective of their governments' larger international trade policies. Certain types of disputes may be excluded from an RTA DSM's jurisdictional scope if they are potentially politically sensitive. Other RTA DSMs do not provide for binding third-party dispute settlement at all, and instead favour diplomatic means of settling disputes arising under the agreement. While provisions of this nature inherently limit the reach and effectiveness of the DSM, in many cases there are justifiable explanations for why they are included in the RTA, and are usually the subject of intense negotiations and compromise.

Other limitations can only be characterized as defects. This is particularly true of RTA DSMs that provide for recourse to binding third-party arbitration, but contain exploitable provisions that allow a disputing party to frustrate the proceedings for its own gain. Despite noteworthy precedents that reveal the critical consequences of these sorts of defects, states have continued to negotiate and conclude RTAs that replicate the same problems endemic to RTAs of the past. And even where attempts have been made to remedy these procedural defects, more often than not, they have fallen short of being a resounding success.

Encouragingly, recently concluded RTAs have employed innovative and largely effective approaches to eliminating the ability of a party to unilaterally undermine the efficient conduct of dispute settlement proceedings, specifically by limiting the ability of one party to block or delay the panel composition process. This is a welcome development given the trend toward greater use of RTA DSMs. However, as this paper

has attempted to show, improvements can still be made if states are to have complete confidence in turning to their RTA DSMs when the need or opportunity arises.