

ASEAN Dispute Settlement Mechanism: a Study of its Ineffectiveness in Resolving Economic Disputes

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ABSTRACT

By the official opening of ASEAN Economic Community (AEC) in 2015, it will bring a tremendous impact on transnational business operations. There will be many of business transactions arise which might lead many conflicts across different countries. The ASEAN integration and mutual comprehension through law project are essential. It is necessary for the ASEAN members to remove uncertainty and create more formal ASEAN Dispute Settlement Mechanism (DSM). Due to the increase of economic disputes, ASEAN acknowledged the necessity to establish the dispute settlement agreement which covered to the economic disputes by giving a consistency of procedure, predictable of outcomes, precise adoption of the ruling, and the sanctions of non-compliance to the rulings.

This paper will focus on the main legal framework of the 2004 Protocol for Enhanced Dispute Settlement Mechanism (EDSM) or known as the Vientiane Protocol and Protocol to the ASEAN Charter Dispute Settlement Mechanism in 2010 (PDSM). The ASEAN DSM has been formed for more than 10 years, but the systems have never been utilizing the process. Thus, it can imply that the mechanisms may contain some problems and weaknesses.

Keywords: ASEAN Dispute Settlement Mechanism, ASEAN economic disputes

บทคัดย่อ

ในปัจจุบันนี้ประเทศสมาชิกอาเซียนกำลังเดินทางเข้าสู่การเป็นประชาคมเศรษฐกิจอาเซียนในปี พ.ศ. 2558 (ค.ศ. 2015) ซึ่งเป็นการสนับสนุนการค้าและการลงทุนระหว่างประเทศสมาชิก แต่ในทางกลับกันนั้นโอกาสทางเศรษฐกิจอาจมีการแปรเปลี่ยนเป็นข้อพิพาททางเศรษฐกิจระหว่างประเทศสมาชิกได้ ถึงแม้ว่าอาเซียนจะได้มีบทบัญญัติที่กำหนดถึงวิธีการระงับข้อพิพาทด้านเศรษฐกิจโดยสันติวิธีไว้โดยเฉพาะใน “พิธีสารว่าด้วยกลไกการระงับข้อพิพาทของอาเซียน (ASEAN Protocol on Enhanced Dispute Settlement Mechanism – EDSM)” ซึ่งใช้กลไกการระงับข้อพิพาทของ องค์การการค้าโลก (WTO) เป็นต้นแบบนั้น โดยบทบัญญัตินี้ดังกล่าวได้มีขึ้นมาเกือบระยะเวลาสิบปี แต่ตราจนกระทั่งบัดนี้ยังไม่เคยมีประเทศสมาชิกคู่พิพาทใดเลือกใช้กระบวนการระงับข้อพิพาทตามพิธีสารฯ ดังกล่าวเลย ผู้วิจัยจึงสนใจที่จะทำการศึกษาถึงจุดอ่อนของบทบัญญัติดังกล่าว ซึ่งนำไปสู่บทสรุปและข้อเสนอแนะของผู้วิจัยและสามารถใช้เป็นแนวทางในการวางแผนนโยบายรัฐและมุ่งพัฒนากฎหมายภายในของประเทศสมาชิกให้สอดคล้องกับเจตนารมณ์ของประชาคมเศรษฐกิจอาเซียนต่อไป

คำหลัก : การระงับข้อพิพาททางเศรษฐกิจของอาเซียน ข้อพิพาททางเศรษฐกิจของอาเซียน

1. Introduction

The dispute among the ASEAN can be divided into: economic dispute and, non-economic dispute After ASEAN has inspired the economic integration by using AFTA, both the trading and disputes have been increased across the ASEAN regions. But during that period of time, ASEAN has got only the Treaty of Amity and Cooperation in Southeast Asia (TAC) as the only one instrument of ASEAN DSM. In 1976, ASEAN had adopted TAC at Bali Summit which is appropriate for settling the non-economic dispute. Under article 2 of the TAC, the key provision of TAC stipulated that the member states should refrain from the threat or use of force and settle any disputes through friendly negotiations (Treaty of Amity and Cooperation, Article 2). Therefore, it can be said that TAC is a landmark agreement which allows the signatories to settle disputes peacefully through consultation. TAC is used to resolve the disputes that do not involve the interpretation or application of any ASEAN

instrument (ASEAN Charter, Article 24 (2)). The dispute mechanism of TAC consists of the high council which comprised of the ministerial representatives of all high contracting parties that are members from the ten ASEAN countries (Treaty of Amity and Cooperation Article 14). The High Council will handle with the disputes or situations that likely to disturb the regional peace and harmony (TAC, Article 14). If the negotiation does not succeed in the settling the dispute, the High Council shall recommend appropriate means of dispute settlement (Treaty of Amities of Cooperation, Article 15). If both parties agreed, the high council may constitute itself as a committee of mediation, inquiry or conciliation. However, the weakness of TAC was the absence of clearly procedure and provision that require the disputing parties to respect decision, implement it, or adopt the sanction for non-compliance. Therefore, TAC is not the right answer for ASEAN to settle down the economic disputes due to the non-mandatory nature of procedures and no explicit provision for arbitration or adjudication by the tribunal.

Afterwards, an early agreement for amicable settlement of economic disputes can be found in the 1987 Agreement for the Promotion and Protection of Investments (Koesnaldi, Shalmont, Fransisca and Sahari, 2004). It specified that the unresolved disputes shall be submitted to the ASEAN Economic Ministers (AEM) for resolution. In November 1996, ASEAN established the Protocol for Dispute Settlement Mechanism. Like the WTO DSU, it encouraged the parties to settle the dispute amicably by using good offices, conciliation, and mediation. However, the Protocol for DSM in 1996 had failed to serve as an effective tool in settling dispute among the member states because it did not set up a group of experienced professionals to serve as appellate body but authorizes the AEM to serve as appellate body. Thus, it disturbed to the transparency of the mechanism which question to be overwhelmed by the political power. Later on, the 1996 protocol has been replaced by the 2004 Protocol for Enhanced Dispute Settlement Mechanism (EDSM) or known as the Vientiane Protocol. The EDSM 2004 has adopted as an annex of the Bali Concord II. It ensures the implementation of economic agreements and speedy resolution to the economic disputes. The major improvement of EDSM from 1996 to 2004 is the clearly detail of

procedure in each stage, the significant improvement of Appellate Body which provide more transparency to the mechanism and also guarantee the binding enforcement among the parties. By all of the new improvements, the model of EDSM becomes more legalistic and effective to support for the resolution to the disputes.

However, surprisingly no dispute has been resolved by EDSM panel. The members were hesitating to use ASEAN EDSM due to the lack of confidence and unpredictable of the system. The absence using of ASEAN DSM can imply that there might be some loopholes in the system that waiting for the improvement. ASEAN DSM should not be only a model in the paper. Therefore, it is necessary for ASEAN to improve DSM in order to smoothly implement the economic agreements and gain the trust from all of the ASEAN members.

2. Dispute Resolution Mechanism under the Bali Concord II

Under the Bangkok Declaration, ASEAN have agreed to establish the three-pillars, the ASEAN Political Security Community (APSC), the ASEAN Economic Community (AEC), and the ASEAN Socio-cultural Community (ASCC). Among the three pillars, the economic pillar is the most advanced cooperation. ASEAN endeavors with their best effort to create a single market and production base in 2015 by forming AEC project (Woon SC and Marshall, 2012). The objective is to achieve the economic and trade liberalization. ASEAN agreed to form the AEC by the 2020 which later the timeframe has been changed into 2015. The aim of AEC is to enhance a free flow of goods, services, labors, investment and capital will help boosting up the ASEAN economy and investments (Understanding the ASEAN, 2016). By the official opening of AEC, it is necessary for ASEAN to prepare the appropriate ASEAN DSM which directly covers to the economic disputes. The economic integration will not be successful without the obedience and explicit of interpretation and implementation of the various economic agreements. Therefore, the establishment of such DSM was one of the important tasks of ASEAN.

On 7 October 2003, the Declaration of ASEAN Concord II has adopted at the 9th ASEAN Summit in Bali. ASEAN states undertook to implement the

recommendations of the High Level Task Force on ASEAN Economic Integration (Vergano, 2009). The formal system of DSM provided in Annex 1 of ASEAN Concord II, the DSM consisted of 3 instruments: including the ASEAN Consultation to Solve Trade and Investment Issues (ACT), ASEAN Compliance Monitoring Body (ACMB), and Enhanced ASEAN Dispute Settlement Mechanism (EDSM). The resolution of disputes range from the advisory stage to the consultative stage, and finally the adjudication stage; however, this is not mandatory. In other words, Member States or parties to the dispute may choose the appropriate stage for the resolution of their dispute (Nimnual, 2010).

The Protocol for Enhanced Dispute Settlement Mechanism (EDSM) 2004, or known as the Vientiane Protocol, has adopted as one of the annex in Bali Concord II. It ensures the implementation of economic agreements and speedy resolution to the economic disputes. The major improvement of EDSM from 1996 to 2004 is the clearly detail of procedure in each stage, the significant improvement of Appellate Body which provide more transparency to the mechanism and also guarantee the binding enforcement among the parties. By all of the new improvements, the model of EDSM becomes more legalistic and effective to support for the resolution to the disputes. The Bali Concord will separate into three sections: ACT, ACMB, EDSM panel.

2.1 ACT in Advisory Mechanism

In advisory mechanisms, it includes the ASEAN Consultation to Solve Trade and Investment Issues (ACT) and the ASEAN Legal Unit. The ACT offers the speedy legal interpretation and advice on potential trade dispute issues upon request from Member States. It is responsible for directing the problem to the appropriate government agencies in its country, and ensuring that a proposed solution is sent to the individuals/businesses via the Host ACT within 30 calendar days (Annex 1 ASEAN Consultation Issues 3). At this stage, it will guarantee to avoid the delays in resolving the disputes. For the non-compliance, the disputes will be sent to the next level of ACMB to resolve the dispute.

The legal unit consisted of qualified lawyers specializing in trade laws which employed by the ASEAN Secretariat. The unit will offer legal interpretation and

advice on potential trade dispute issues upon request from countries (Annex 1 ASEAN Legal Unit (2)). The advice is purely advisory and non-binding in nature. Its role is to screen out the issues that could be resolved through bilateral consultations.

2.2 ACMB in Consultative Mechanism

In consultative mechanisms, it includes the ASEAN Compliance Monitoring Body (ACMB) and conciliation or mediation instruments. The process will run by ASEAN Compliance Board (ACB). The AEM had directed SEOM to work out a Terms of Reference for this monitoring body (Annex 1 ASEAN Compliance Monitoring (4)).

The ACMB is kind of a peer adjudication, which is less legalistic and offers a speedier channel, to help countries resolve their disputes. Upon the request, the ACMB members that are not involved in the dispute will review and issue findings on the case within a stipulated timeframe (Nimnual, 2012, pp. 175). The case findings of the ACB are not legally-binding (Annex 1 ASEAN Compliance Monitoring (2)). Subject to agreement by both Parties, Member Countries who do not wish to avail of the ACMB after going through the ACT can go directly to the ASEAN EDSM panel (Annex 1 ASEAN Compliance Monitoring (3)).

2.3 EDSM in Enforcement Mechanisms

This stage includes the Enhanced ASEAN Dispute Settlement Mechanism (EDSM). The EDSM would be modeled after the WTO DSU in resolving the trade disputes. It ensures the binding decisions which based solely on legal considerations in order to depoliticize the entire process (Annex 1 Enhanced ASEAN DSM (2)). The detail of the entire process of EDSM will be explained deeply below here

2.3.1 The Procedure of EDSM

A. Consultation

In article 3 of EDSM, the compulsory first step of the process should begin with writing consultations which indicates the legal basis for the complaint. Then, SEOM will notify the request submission for consultation. Member States who have any benefit directly or indirectly can make representations or proposals to the other Member State concerned. The representations or proposals shall be given to consideration. Then, the other party must reply within 10 days after

the date of receipt of the request and shall enter into consultations within a period of 30 days after the date of receipt of the request. The protocol permits the parties to the dispute may at any time to agree or terminate the three other mechanisms which are good offices, conciliation and mediation depending on the request of the party.

In article 4 of EDSM, once procedures for good offices, conciliation or mediation are terminated, a complaining party may then proceed with a request to the SEOM for the establishment of a panel.

B. Panel Process

In article 5 of EDSM, it stipulates that the panel shall be established by the SEOM, unless the SEOM decides by consensus not to establish a panel. If the consultations failed, the complainant may raise the dispute to the Senior Economic Official Meeting (SEOM) within 45 days after the receipt of the request and circulation.

The panel shall compose of three or five panelists depending on the agreement of the parties. According to Appendix II of the Protocol, it stipulated the selection of those who are qualified to become members of the panel must have these following qualifications:

1. Well-qualified governmental and/or nongovernmental individuals
2. Legal professionals or academics in the field of international trade law and ASEAN economic agreements.

ASEAN secretariat is responsible for listing the qualified individuals which members of a panel may be drawn. The list shall indicate the specific experience or expertise.

The function of the panel is to make an objective assessment of the dispute before it, examine the facts of the case and conform to the sections of the Agreement or any covered agreements, and rule out the findings and recommendations in relation to the case (ASEAN Protocol Article 7). The panel shall submit its findings and recommendations to the SEOM in the form of a written report within 60 days of its establishment (EDSM Article 8). Moreover, before submitting the

findings and recommendations to the SEOM, the panel shall equally provide opportunity to the parties to the dispute to review the report. A panel shall have the right to seek information and technical advice from any appropriate individual or body. The panel deliberations shall meet in closed session and shall be kept confidential. SEOM must adopt the report within 30 days unless there is a consensus not to do so or a party notifies its decision to appeal (ASEAN Protocol on Enhanced Dispute Settlement Mechanism Article 9.1). A non-reply shall be considered as accepting the decision into the panel report. The findings and recommendations of panel should be adopted within 60 days of its establishment in order to ensure the effective resolution of disputes (EDSM Article 15). If the party asks for the time extension to conform to its obligation, SEOM should give a decision within 14 days from the SEOM's adoption of the findings and recommendations of the Appellate Body's reports (EDSM Article 8 (2), 15 (1)).

Before the first meeting of the panel, the parties to the dispute shall submit the written submissions to the panel (EDSM App II, Article II (4)). During the first meeting, the panel shall ask the complaining party to present its case (EDSM App II Article II (5)). The third parties who related with the interest of the dispute shall be invited to present its case in writing in the first meeting (EDSM App II, Article II (6)). The parties shall have the right to submit the rebuttals to the panel in the first meetings but the formal rebuttals shall be made at a second meeting of the panel (EDSM App II, Article II (7)). Any member state who has a substantial interest shall notify to the panel in written submissions before transferring to SEOM (EDSM, Article 11 (2)).

C. Appellate Review

An appellate body established by the ASEAN Economic Ministers ("AEM"). It shall be composed of 7 people, 3 of whom shall serve on any one case (ASEAN Protocol, Article 12.1). The AEM shall appoint person to serve on the Appellate Body for a four-year term, and the term may renew once (EDSM, Article 12 (2)). The requirement of the appellate body shall consist of individuals of recognized with demonstrated expertise in international trade law and the subject matter to the

covered agreements (EDSM, Article 12 (3)). And they shall not participate in the consideration of any disputes that would create a direct or indirect conflict of interest (EDSM, Article 12 (3)).

Only parties to a dispute can appeal a panel report (EDSM, Article 12 (4)). An appellate body will decide the panel's report within 60 days after the appeal request was filed but an appeal must not exceed within 90 days (EDSM, Article 12 (5)). Appeals are limited to issues of law and interpretation which means the Appellate Body should not made their assessment based on the facts (Koesnaidi et al. (2014)). The proceedings of the Appellate Body shall be confidential (EDSM, Article 12 (9)). The Appellate Body may uphold, modify or reverse the legal findings and conclusions of the panel (EDSM, Article 12 (12)). The Appellate Body report shall be adopted by SEOM within 30 days following its circulation to the Member States, unless SEOM decided by the consensus not to do so (EDSM, Article 12 (13)). A non-reply, within 30 days after the report has been adopted, shall be considered as an acceptance of the Appellate Body report. The adoption process shall be completed within 30 days irrespective of whether it is settled at the SEOM or by circulation. The disputing parties should accept the report and comply within 60 days; otherwise SEOM has the right to impose sanctions (EDSM, Article 16 (2)). However, the parties shall have the right to request for the longer timeframe for implementation the report of the Appellate Body. The decision of the time extension shall be made within 14 days from the SEOM's adoption of the Appellate Body's reports (EDSM, Article 15 (3)).

In EDSM, it also stipulated the remedy in case the non-implementation of the findings and recommendations of panel and Appellate Body reports. When neither compensation nor the suspension of concessions or other obligations which provided by SEOM fails to resolve the issues within 60 days or within the period agreed by the party, the concerned party may trigger the process of compensation and the suspension of concessions (EDSM, Article 16). The process under this article 16 of EDSM is similar to WTO DSU.

3. Protocol to the ASEAN Charter Dispute Settlement Mechanism in 2010 (PDSM)

3.1 Protocol to the ASEAN Charter Dispute Settlement Mechanism in 2010 (PDSM)

The post stage of EDSM: the DSM through the ASEAN Charter

According to the article 25 of ASEAN Charter, it permitted the arbitration process to be counted as an appropriate DSM concerning on the interpretation or application of this Charter and other ASEAN instruments. If the dispute remains unresolved after recourse to such mechanisms, it can be referred to the ASEAN Summit for the ASEAN Leaders' decision (PDSM, Article 26). However, there are no guidelines for the ASEAN Summit to react or decide on non-compliance circumstance in order to impose a form of sanction on non-compliance.

In order to implement Article 25 of the Charter, ASEAN adopted the 2010 Protocol to portray an explicit details and procedures (2010 Protocol). Repeating Article 25 of the ASEAN Charter, Article 2 (1) of the 2010 Protocol stipulated its application to: (PDSM 2010, Article 2 (1)).

- A. the ASEAN Charter;
- B. other ASEAN instruments unless specific means of settling such disputes have already been provided for;
- C. other ASEAN instruments which expressly provide that this Protocol or part of this Protocol shall apply.

Any disputes relating to this convention can be settled by the 2010 PDSM.

3.2 The Procedure of PDSM

A. Consultation

The first step is a request for consultation to the responding party; a party should reply the request within 30 days and must enter into the consultation. The consultation must be completed with a view to reaching a mutually agreed solution' within sixty days from the date of receipt of the request (PDSM 2010, Article 2 (1)). If the party did not respond within 30 days or the consultation fails within 90 days from the date of receipt of the consultation request, then the complaining party

may request the establishment of an arbitral tribunal (PDSM 2010, Article 8 (1)). As a general principle of ASEAN DSM, it can be concluded that the parties to the disputes should firstly hold the consultation before employing any legally binding DSM (Hao Duy Phan, 2013, p. 13).

B. Good offices, Mediation, and Conciliation

Once the arbitration request is made, the responding party has 15 days to positively respond to the complaining party; otherwise the complaining party may refer the dispute to the ASEAN Coordinating Council (ACC) (ASEAN Charter, article 8 (4)) which comprising the foreign ministers of all ten member states (ASEAN Charter, article 8 (4)).

The member states may request the appointment of arbitral tribunal (ASEAN Charter, article 8 (1)). An arbitration, which should be done in writing, can be formed by the mutual consent of the Parties to the dispute or a direction of the ACC (ASEAN Charter, article 20). The arbitral tribunal shall consist of three arbitrators (ASEAN Charter, Annex 4, rule 1 (1)). The arbitrators shall have expertise or experience in law, other matters covered by the ASEAN Charter or the relevant ASEAN instrument, or the resolution of disputes arising under international agreements (ASEAN Charter, article 11). The Chair of the arbitral tribunal shall be a national of a Member State but not a national of any Party to the dispute. An arbitral tribunal shall make an examination of the facts of the case before it, and decide the case providing the reasons for its rulings (ASEAN Charter, article 12).

Then, ACC has 45 days to directly make a decision by choosing any of the DSM including mediation, conciliation or arbitration that is appropriate to settle down the disputes. During the whole process, the parties to a dispute may also at any time agree to go through good offices, mediation or conciliation to resolve their disagreements (ASEAN Charter, article 6-7). When parties to the dispute receive a direction from the ACC, they are expected to comply with the ACC decision.

Once the disputes have been resolved by the good offices, it shall submit to the ASEAN Chairman or the ASEAN Secretary-General or a suitable person to provide good offices (ASEAN Charter, annex 1, rule 1 (2)). The concerned parties

may request the ASEAN Chairman or the ASEAN Secretary-General to provide good offices, conciliation or mediation (ASEAN Charter, article 23 (2)). They may also choose mediators, conciliators, or arbitrators from the list drawn up and maintained by the ASEAN Secretary-General (PDSM, annex 4, rule 5 (1)). By comparing with Article 4(3) of the EDSM, the ASEAN Secretary-General itself may offer to provide good offices, conciliation or mediation with a view to assisting the parties to settle their dispute. However, there is a concern on PDSM that the proactive of ASEAN Chairman and Secretary-General to offer good offices, conciliation or mediation without having to be requested from the disputed parties, this will be too interfering into the disputes. Consequently, it was ultimately decided that it would be better to let the concerned parties make the request by themselves rather than allow outside actors to actively attempt to get involved (Woon, 2009). The person providing good offices should be independent, neutral, impartial manner (PDSM, annex 1, r. 1 (2), 2) and enable this person to carry out his or her responsibilities (PDSM, annex 1, r. 1 (2)).

A mediator shall have a quite similar role. He or she may communicate with the parties together or separately and help to resolve the disputes which can be done in both orally or in writing (PDSM, annex 2, rule 4) Parties to the dispute shall comply with the decision and agreements resulting from good offices, mediation and conciliation (PDSM, Article 16).

By Compared with good offices or the mediator, conciliators are commonly used. They shall be in good faith to comply with the requests by conciliators to submit written materials, provide evidence or attend meetings (PDSM, annex 2, Rules 8). Additionally, conciliators may formulate the appropriate settlement to the parties or may assist the parties in drafting the settlement agreement (PDSM, annex 3, Rule 10). If one or both of the parties terminate the process, the good offices, mediation or conciliation shall end. Also, they shall be ceased when the disputes have been resolved (PDSM, Article 7 (2)-(3)).

C. Arbitration

The arbitral tribunal is composed of 3 arbitrators (PDSM, annex 4, Rules 1(1)). Each party has the right to appoint one arbitrator. If one party failed to appoint

the arbitrators, the ASEAN Secretary-General shall appoint the second arbitrator, who is in the list that may serve as arbitrators, within 15 days from the date receiving the request (PDSM, annex 4, Rules 1(3)). The arbitrator lists should be comprised by the 10 nominations from every ASEAN member states. The third arbitrator shall be appointed upon agreement by the parties (PDSM, annex 4, r. 1 (4), a). If the parties fail to do so, any party may request the ACC Chair to appoint the third arbitrator who shall be the chair of the arbitral tribunal (PDSM, annex 4, r. 1 (4)(b) and (c)). Another key point is the way PDSM use to limit the power of Secretary-general, when ASEAN Secretary-General appoint the second arbitrator, he or she shall not has the authority to appoint the third one. Secretary-General shall only submit the recommendation to the ACC, and then the decision shall be made by the consensus. In order to maintain the fairness, if the ACC Chair is a national of one of the parties to the dispute, the appointment of the third arbitrator shall be made by the next ACC Chair who is not a national of one of the parties to the dispute (PDSM, annex 4, r. 1 (4) (e)). As required by the DSMP, arbitrators shall possess expertise or experience in law and in the matters covered by the ASEAN Charter or the relevant ASEAN instrument (PDSM, article 11 (2)).

The Chair of the arbitral tribunal shall not be a national of the parties (PDSM, Article 11 (3)). Parties to the dispute may challenge an arbitrator, if they doubt in his or her impartiality or independence (PDSM, annex 4, r. 2 (2)).

The award of the arbitral tribunal shall be final and binding on the Parties to the dispute (PDSM, Article 15). It shall be reached by a majority vote of the arbitrators (PDSM, annex 4, rule 14). In cases of no majority, the chair of the tribunal shall have a casting vote. The arbitral tribunal shall fix the timetable for the arbitral proceedings within 15 days or as soon as possible from the date of its establishment. From the date of the establishment of the arbitral tribunal until the date of the final award, the arbitral proceedings shall not exceed the period of six months unless the Parties to the dispute agree otherwise (PDSM, Annex 4, rule 8). The award of the arbitral tribunal shall be made in writing and reasonable confined to the subject-matter of the dispute (PDSM, annex 4, rule 17).

After all, it can be concluded that arbitration is a formal dispute resolution with legal binding force, however the good offices, mediation or conciliation are voluntary mechanisms which sometimes have no-binding force (Hao Duy Phan, 2013, p. 15).

The PDSM aims to handle with those disputes which arising from divergent interpretation and application of the ASEAN Charter and other ASEAN instruments. The disputes often related with the political, social and cultural sensitive issues within ASEAN. As a matter of fact, ASEAN has never had arbitration as a mode of DSM before, except in the EDSM where arbitration is only provided in cases of disputes concerning compensation and suspension of concessions (ASEAN Charter, article 15). Although the ASEAN Charter did not set up the courts of justice like other organizations, but it offered a venue for ASEAN to pursue in case they have disputes concerning the interpretation and application in the ASEAN Charter (Hao Duy Phan, 2013, p. 7). This is a big step way forward of ASEAN DSM.

4. The Ineffective of ASEAN DSM regarding to the Economic Disputes

ASEAN has stipulated the way to settle down the economic disputes in both EDSM and ASEAN Charter. By the rapid emerging of trading and economic investment, the concern of ASEAN that the EDSM and PDSM may not cover to all of the complexity in economic conflicts. The main issue to be focused in this paper was the ineffective of ASEAN DSM to settle down the economic disputes.

After observing through the details of ASEAN EDSM and PDSM, there are some points that ASEAN need to be improved and aware of in order to fill in the loopholes of the system. Currently, the mechanism has never been utilized by any of ASEAN member states. The problems that affected the confidence of the system are mentioned below here.

4.1 Legal uncertainty due to the ASEAN way and the consensus from the ASEAN Summit

After studying ASEAN DSM, I discovered that ASEAN Charter and ASEAN way have a big impact over ASEAN community. The Charter has been placing as the

constitution of community. The aim of the charter is to bolster and motivate the ASEAN economic goal and institutional framework. It established ASEAN as an inter-governmental organization which gradually mold ASEAN as a strong community. ASEAN has used ASEAN Charter and the norms of ASEAN way in driving their cooperation and integration amongst the community.

ASEAN has been dominated by the ASEAN way, a non-confrontation negotiable way of ASEAN. The purpose is based on the principle of respect sovereignty by not interfering in the internal affairs of ASEAN member states (Altbach, 1998). It has a big influence over the ASEAN community. It is the special characteristics of non-confrontation negotiable way of ASEAN to avoid conflicts during the economic integration or conducting the policies. ASEAN mostly operate their policies relying more on diplomacy rather than law. Following the "ASEAN way", decision-making is based on *musyawarah* (consultation) and *muafakat* (consensus) (Nimnual, 2010, p. 159). The decision-making among the ASEAN member states shall be conducted by the "consensus" at the Summit official meeting not by the majority votes, meanwhile, it needed to respect the sovereignty of the state-member. In order to reach the consensus, all of the members need to agree with that policy or decision-making. ASEAN is aware of the sensitive issues, likes boundaries conflicts or political conflicts, which might lead to the quarrels. Therefore, amicably negotiation is important in order to sustain a friendly relationship among the members. At the same time, it needs to respect the sovereignty of the ASEAN member states by not interfere in domestic affairs of the others.

By referring the interview of Dr. Thanes Sujareekul from the LL.M. thesis of Ms. Puthachart Boonklom, (Puthachart, 2017, pp. 68-69) he suggested that ASEAN way has pros and cons. Every ASEAN's decision-making or policy should be discussed and agreed by the consensus. If there is any disagreement from any member, the decision will be failed and postponed out until receiving the consensus from all the members. Even though this action supports the ASEAN way by respecting the sovereignty of ASEAN member states, but the issue keeps dragging and cannot be solved in time.

From the WTO, the general principle of effective dispute settlement mechanism should compose with 4 principles: Equitable, fast, effective, and mutually accepted.

1. Equitable – the neutrality can create the confidence among the ASEAN member state. Moreover, the legal experts, who have high experienced in that substantial law and should be without prejudice and the interest related to the case, will strengthen the credibility of the process. The DSM should be transparent and revealed from the beginning of the process until the end as well as the enforcement of the decision should be speedy and fair.

2. Fast – The effective compliance of DSM has to be done quickly as soon as possible. If the trade dispute resolution process is delayed, it will affect to the business operations and investors which will hesitate with the confidence of the dispute resolution process.

3. Effective – The decision should be enforced and applicable to the circumstances in order to settle down the disputes.

4. Mutual accepted- Under the conditions of international law, the dispute settlement should mutually accepted from both parties and applicable to the case under any circumstances.

From the observation, no evidence can prove that the summit will use these principles as a standard fundamental in making a consensus. Thus, the transparency of ASEAN's decision-making has been questioned, since there is no procedure to control or limit the power of the ASEAN Summit. This affected to the certainty and confidence of ASEAN DSM that it might be interfered by political pressure or peer pressure among the ASEAN member states.

A. For EDSM at SEOM, the panel stage and the appellate stage

Under Article 5(1) of EDSM stipulated that SEOM shall reject a panel or Appellate body, unless the consensus not to establish a panel (EDSM, article 5(1)). From this, the consensus can influence on the SEOM's decision to establish the panel or the appellate body. Moreover, in the panel stage, in article 9(1) of EDSM, the panel shall adopt its report within 30 days except a party to the dispute notifies the SEOM

to appeal the report or SEOM decides by consensus not to adopt the report (EDSM, article 9(1)). And the same procedure also applied to the Appellate stage too. In Article 12(13) of EDSM, an Appellate Body report shall be adopted by the SEOM within 30 days. The parties shall unconditionally accept unless the SEOM decides by consensus not to adopt the Appellate Body report (EDSM, article 12(13)).

SEOM is the powerful board formed to administer the entire EDSM procedure. It has the authority to adopt the panel reports and Appellate reports, supervise the implementation of the ruling, and enforce the retaliation when a member does not comply with the ruling. However, the power of SEOM has limited by the consensus, it can overturn the SEOM's decision. In contrast, there is no clear procedure for Summit to solve out the resolution by the consensus. It is likely that the ASEAN's consensus will be overshadowed by the political power from the Summit. ASEAN should aware that the Summit will not act as a final arbitrator and the dispute shall be decided on a case-by-case basis depending on the submission and evidence at the time.

B. For PDSM 2010

For unresolved disputes

According to the Rules for Reference of Unresolved Disputes to the ASEAN Summit, it has to seek consultation first; then it has to try good offices, mediation, or arbitration and go to the ACC to look for direction. Only after these mechanisms fail, then it can be referred as the unresolved dispute and submit to the ASEAN Summit. In article 26 of ASEAN Charter, it stipulated that if the concerned parties fail to resolve the disputes, the disputes shall be referred to the ASEAN Summit for its decision.

Before an unresolved dispute can reach the ASEAN Summit, it has to go through the ACC (EDSM, annex 5, rule 2). The ACC has the power to give another chance to the parties without having to go to the ASEAN Summit. The ACC cannot “direct” but can only “consider suggesting, recommending or providing assistance, as appropriate, to the Parties to the dispute to resolve the dispute through some other dispute settlement mechanisms provided for under this Protocol.”(EDSM, annex

5, rule 3(2)). When the unresolved disputes have reached the ASEAN Summit, the consensus will be decided by using the submission from the disputing parties, the report and recommendations from the ACC (PDSM, *supra* note 7, annex 5, rule 4(3)). At this stage, ACC may recommend to invite the experts to the ASEAN Summit for the resolution of the unresolved disputes (PDSM, *supra* note 7, annex 5, rule 4 (3)).

The unresolved disputes can be withdrawn from ASEAN Summit only when the dispute has already been resolved or both parties agreed to resolve in another way. Regarding to the final resolution giving by the ASEAN Summit, there was a concern that the disputes will be resolved through the political solution instead of focusing on rule-of-law. For non-compliance

Before submitting to the ASEAN Summit, the matter has to be considered by the ACC. In this regard, the ACC potentially has an active role to play in helping concerned parties to find a way to comply with arbitral awards or settlement agreements before having the instance of non-compliance referred to the ASEAN Summit (Hao Duy Phan, 2013). In some cases, if the party aggrieved by non-compliance, ACC can provide the assistance by conducting the consultation among the parties in order to facilitate and accomplish the compliance (PDSM, article 20, annex 6, rule 3 (a)). However, if the disputing parties satisfied with the consultation outcome, it may withdraw the reference from the ASEAN Summit (PDSM, article 20, annex 6, rule 4).

By referring the non-compliance to the ASEAN Summit for the consensus, under the article 27 of ASEAN Charter, ACC shall submit a report described the information of the cases and actions to be taken or recommendations on any measures to ensure the compliance (PDSM, article 20, annex 6, rule 5 (b) (v)). After the reference has reached the ASEAN Summit, it will provide the decision-making by the consensus which will not be able to enforce any strong actions against the non-complaint state (Hao Duy Phan, 2013, p. 28). It should be noted that ASEAN Summit can contribute only peer pressure pointing to the concerned parties that are not following the compliance or agreements. ASEAN Summit cannot do much except encouraging the concerned parties to comply with the decision and further update

the ASEAN Summit on the compliance matter (Hao Duy Phan, 2013, p. 28). Therefore, it is likely that the non-compliance issue will not be resolved on time.

Lastly, ASEAN should bear in mind that the Summit will not serve as an “ASEAN Supreme Court”. The Summit should act as the policy-maker of the ASEAN by depending on a consensus basis. Thus, the key point of bringing the unresolved disputes to the ASEAN Summit would simply to express their concerns and then to recommend, urge or call upon the concerned parties to resolve the dispute by other peaceful means (Hao Duy Phan, 2013, p. 25).

4.2 Limiting the power of EDSM not to invalidate the existing domestic laws and creating new law (Kooi, 2007, pp. 10-13)

By comparing to the European community (EC), a centralized supranational legal organization, it has developed new approaches and combined models (Nakamura, 2009, p. 135). The European Court of Justice (ECJ), based in Luxembourg, is assigned to consider disputes between member states of the European Union; between the European Union and member states; between the institutions within the European Union; between individuals, or corporate bodies, and the European Union (Thailand Journal of Law and policy, 2016). It may deliver opinions on international agreements and give preliminary rulings on cases referred by national courts. Moreover, it appeared that ECJ allows itself to be involved in the national caseload for the development of community law (Davies, 2007, p. 183). The ECJ has developed the concepts of direct effect and supremacy. Direct effect may be defined as the capacity of a domestic court to apply EC law, (Weiler, 1991) while supremacy refers to a court’s ability to overrule domestic law on the basis of its incompatibility with EC law (De Witte, 1999). The establishment of these two principles meant that the EC agreements shall apply directly within member states’ legal systems and any domestic law found to be inconsistent with an agreement could be considered as invalid (Sander, 2006). Through the application of direct effect and supremacy, EC law is used to invalidate domestic law of member states, also limiting the power of member states not to violate the EC agreements. A method of invalidation may be

when the ECJ declare the policy is invalid, and the domestic court is bound to follow the ECJ's determination (Martens, 1998). In case of non-compliance or absent invalidation by the ICJ, the state's government has the option of paying penalties rather than changing its policy (Kalanke V. Bremen, 1997). These concepts have ensured the ECJ's compliance and promoted the legal integration among the EU law.

Even though ASEAN has formed as an inter-organization for nearly 50 years, but it has a little progress in its legal cooperation. Since, ASEAN is consisted of 10 countries with their different cultures, traditions, languages and religions. It has different styles of political systems for example, Westminster-style parliamentary systems, democracy elected president, socialism and military government etc. Furthermore, the law and legal systems also vary greatly, some are based on the Civil law, English common law, Dutch continental law, or Islamic law etc (Chukiert, 2015, p. 3). In some ASEAN countries, likes Malaysia, Brunei, and Indonesia, they are controlled under Muslim Shari'ah Courts which exercising jurisdiction over Muslims on certain matters. These factors make it hard for all ASEAN members to be bound and accepted the same legal systems. As a result, the legal cooperation among ASEAN countries is tardy.

By contradict with the ASEAN way, ASEAN did not accept the idea of direct effect and supremacy like EC did. ASEAN sticks hardly with the norm of the ASEAN way. They needed to respect the sovereignty of the member states by not interrupting in the internal affairs. Thus, it is important to be careful and limit the power of the panels or the Appellate Body by not letting them invalidate the existing law or create the new law.

ASEAN member states should amend the EDSM Protocol by clearly stating the provisions to restrict the power of the panels and Appellate Body. It shall not invalidate any provisions of existing law (Chukiert, 2015, p. 13). The amendment should cover to the decisions of the panels or the Appellate Body that shall not be considered as the precedent for the future disputes. The case should be decided case-by-case. There are two dangers that EDSM may interfere to the legal system of ASEAN member states.

A. Invalidating existing law

To avoid the direct confrontation, the panel or Appellate Body should review the domestic law before interpret or made a determination that whether the parties to the dispute has violate the ASEAN agreement. The limiting of implementation or interpretation of the agreement will eventually invalidate the existing law. On the other hand, if the panel or Appellate Body has limited the power of domestic law that violates the agreement, it will begin to usurp the lawmaking power to the member state (Braid & Horte, 1994).

B. Creating the new law

In European Community, the principle of direct effect and supremacy will automatically bind to the EC members. However, ASEAN did not agree with this principle. In order to maintain the power of domestic members' courts, they refrained from using the decision in the previous case as a precedent in the future. Therefore, the explicit restrictions and clear legal framework not only encourage the cooperation of ASEAN under the context of the ASEAN Way but also they help to bolster the confidence of ASEAN member states in using EDSM.

4.3 Amending the provision of the EDSM

A. The short duration of EDSM panel's timeframe

The strict and limit timeframe under EDSM appears to be unachievable. It does not appear to be realistic or logical. The whole process of EDSM, from the beginning when the parties file a request for consultation until the adoption of the report by the Appellate Body, may take around 11 months. By contrast to WTO DSU, it takes around 16 months to complete the process.

By virtue of Article 8. 2 of the Protocol of EDSM, the panel must complete its work and submits report to the SEOM around 60-70 days after the establishment of the panel. This short timeframe is impossible for ASEAN to form the composition of the panel, two rounds of submissions by the parties (EDSM, Appendix II. 2 (4) and (7)), two rounds of meetings (EDSM, Appendix II. 1 (b) and (7)), and interim review report (EDSM, Article 8 (3)). However, the WTO DSU timeframe for the panel is around 9 months which start counting after panelists are selected.

As establishing the ASEAN panel, the composition of the panel takes up to 30 days. The panel has only 30-40 remaining days to complete the proceedings. According to the article 8(4) of EDSM, the limited timeframe makes it impossible to invite the experts to the case because it is quite time consuming procedure. As a result, it is likely that ASEAN will be unable to follow their compulsory timeframe. This could affect to the credibility of the mechanism.

Furthermore, by comparing to the Appellate proceedings stipulated in article 12.5 of the Protocol EDSM, it gives the longer timeframe within 60-90 days. Thus, the timeframe in panel stage is too short and unrealistic.

Therefore, it is likely that ASEAN panels will fail to respect the compulsory timeframe of EDSM. This is one of the factors which dissuade ASEAN member states to utilize the EDSM.

B. Coverage of ASEAN DSM Fund in EDSM

First, the EDSM has no provision to apportion the expenses of the dispute to the parties. According to the article 17 of EDSM, it mentioned about the expense which covered through the process. It includes all expenses arising from the panels, the Appellate Body and other administrative costs of the ASEAN Secretariat (Vergano, 2009, p. 12). However, it remains unclear about the appropriate guidelines or the evaluation method detailed on how panels and the Appellate Body will be shared the costs among the parties and third parties. And the expense did not cover to legal representation.

The second is the vague expense of ASEAN DSM. According to a source from ASEAN Secretariat, it has informed that the ASEAN DSM fund has reached US\$345,000 which is likely to be insufficient to cover all expenses of the panel, Appellate Body and the ASEAN Secretariat which counted from the time a party file a request for consultation to the time of implementation of the reports.

The clear evaluation of expense will encourage the ASEAN member states to trust in the process of ASEAN DSM. Besides, it should be compliance in accordance with the New York Convention of United Nations.

4.4 Lacking of human resources and administrative function of ASEAN Secretariat

ASEAN Secretariat is in charge of various administrative as well as on other functions in all fields of ASEAN cooperation such as political-security, economic and socio-cultural (The ASEAN Political-Security Community Blueprint, 2009). Moreover, they also need to engage in monitoring the compliance of disputing parties with the arbitral awards and mutually settlement agreements.

This can be proved by the report from Dr Surin Pitsuwan, ASEAN Secretary-General, he explained that the ASEAN Secretariat employed 260 personnel, including 79 staffs openly recruited from member states (K. Shongkittavorn, 2016). They are responsible for the general administrative functions under the ASEAN Charter, as well as under the 2004 Protocol. In contrast, the WTO employs more than 600 staffs to handle only trade cooperation and settlement of disputes (WTO, 2016). From the situation, ASEAN Secretariat is not as effective as it should be due to the lack of human resources and the workloads that it needs to handle.

On the other hand, Secretariat also played a role as legal advisor, so it requires the knowledge of the law of treaties and other substantial international law in order to support EDSM panel conducting with the trade disputes. However, the ASEAN Secretariat's Legal Services and Agreements Division employs only five lawyers for providing legal advice and opinions on trade disputes and interpreting the Charter (Interview with an official of the ASEAN Secretariat, 2014). In contrast, the WTO Legal Affairs Division employs seventeen lawyers to provide legal advice to the WTO dispute settlement panels, other bodies and members (WTO, 2016).

Even though the ASEAN secretariat is responsible for many tasks, but still the secretariat has low power to enhance the process. There was a proof from Dr. Surin Pitsuwan, the ASEAN Secretary-General, that ASEAN secretariat has been faced to the lack of resources and a severe shortage of funds (Surin, 2011, pp. 26 and 34). Despite to the responsibilities of the Secretariat, the financial funding for the secretariats should be increased.

4.5 Recommendations to ASEAN EDSM

After studying ASEAN DSM, I will give some recommendations that can help to improve the mechanism.

1. To uphold the stability of the mechanism, ASEAN should amend some provisions in EDSM in order to make them more predictable, realistic and effective.

a. ASEAN should extend the timeframe in the panel stage of ASEAN EDSM in order to make the model appropriate, logical and realistic. The longer timeframe will help ASEAN to have appropriate time in preparing the documents, evidence, or invite the experts to the EDSM panel.

b. ASEAN should discuss about the amendment of agreement in the section of coverage fund. They should create the clear calculation and to show the coverage all over the process. The fees need to be more precise and predictable.

c. EDSM Protocol should explicitly stipulate the provisions to restrict the power of the panels and Appellate Body in order to not invalidate any provisions of existing law or creating the new law. The express restrictions should strengthen the cooperation of ASEAN under the context of the ASEAN way.

d. The panel or Appellate Body did not have the status as a supreme court. ASEAN should bear in mind that the rulings from the previous cases shall not be used as the precedent in the next future case. The decision should be made case by case.

e. To improve the transparency and restrain the political power away from the ASEAN DSM, ASEAN should clearly state the requirements that consensus can influence to the DSM.

2. The function of ASEAN Secretariat should be improved. From the current situation, the secretariats need to handle with tons of works such as the general administrative issue, legal advice or legal interpretation in both economic and non-economic disputes. The complicated and disorganized tasks of secretary result in malfunction of the working process. Employing more legal experts, experienced lawyers, and other administrative officers will help secretariats providing better service.

3. The funding to ASEAN officials should be in appropriate amount in order to convince the high quality of human resources working with ASEAN such as legal experts, panelists, arbitrators, or other administrative officials.

4. For the better legal cooperation and integration among ASEAN members, the government should encourage their legal experts to engage more in the international ASEAN seminars, conferences or any other ASEAN workshops in order to exchange legal issues, opinions, and support the mutual cooperation among ASEAN and other international lawyer. These will improve the quality of ASEAN human resources. The cooperation of ASEAN lawyers or legal experts in the international level such as WTO or ICJ will help upgrading the quality and knowledge of human resources. If ASEAN settle the disputes by using ad hoc arbitration, they can invite the ASEAN legal experts who have been involved in the international case or the legal experts from the international organization to the panel.

5. Conclusion

ASEAN has foreseen the necessity to develop the consistency and formality of ASEAN DSM in order to deal with the economic disputes. Currently, the most important of ASEAN DSM instruments are EDSM, which resembled the model of WTO DSU, and the PDSM which have a big impact on the interpretation and implementation of ASEAN economic agreements. The mechanism is highly formal, legalistic. However, the ASEAN DSM has never been utilized by the ASEAN member states. From the case study, it showed that ASEAN preferred to choose WTO DSU and ICJ as their dispute resolution. The ASEAN way can reflect the impact of the consensus from the Summit which seems to hinder and undermine the legal certainty of ASEAN. For an effective mechanism, ASEAN should guarantee that the disputes will be resolved in timely manner. The decision-making by the consensus takes a long time-consuming process. It has a little chance that all of the members will totally agree with the policy in the first round of the Summit meeting. Therefore, the disputes will be dragging and submitting into the second round of meetings. In case of urgent and severe disputes, a lengthy process of negotiation may undermine the regional peace and security of ASEAN community.

Moreover, EDSM should explicitly stipulate the authority of the panel and Appellate Body. As ASEAN has the norms of respecting the sovereignty of the members' countries and not interfering in the other domestic affairs, they should avoid invalidating any provisions of existing law or creating the new law. It means that EDSM panels and the Appellate Body should not add or diminish the rights and obligations provided in the ASEAN economic agreement; otherwise it will begin to take a role of lawmaking power. And they should beware that the result of the previous disputes cannot be used as the precedent for the case in the future; the disputes shall be decided case by case. The clear procedure of EDSM will encourage the implementation of ASEAN DSM. It increases the confidence of the investors and progresses cooperation in achieving the economic goals. The amending of some procedures in EDSM will provide a better resolution and avoid the recurrence in the future. This helps maintaining a friendly relationship in the long run. The members will not waste their time dragging on the conflicts and spending tons of money fighting against each other.

On the other hand, there are many discussions argued about the contribution of ASEAN court or ASEAN arbitration center. The establishment of ASEAN court or ASEAN arbitration center needs a huge amount of financial support which would be a big burden to the organization. ASEAN should carefully consider the amount of the current disputes, if the number of disputes is not that many, it is not necessary to spend that high cost for the construction of the court or the arbitration center like EU or WTO. Regarding from the interview with Dr. Nattapat Limsiritong, he mentioned about the ASEAN awareness to protect their sovereignty. ASEAN will try as best as they can to protect and not let anyone interfere in their domestic affairs. So, the plan to establish the ASEAN court is hardly to be seen in the near future.

Lastly, I hope that this dissertation will be a useful guideline for the improvement of mechanism in the future. ASEAN should encourage in bringing out ASEAN DSM into concrete actions not just only the paper model or theoretical framework. The effective of ASEAN DSM will promote the security and stability of ASEAN which will accelerate the economic and legal cooperation in the long term.

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