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Dispute Settlement Mechanism for Economic Conflicts in ASEAN

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Abstract

The institutional configuration of ASEAN has been perceived for its uniqueness in which the member states have not been willing to sacrifice their sovereignty to the regional organization. One of ASEAN's key elements that help illustrate the organization's lack of resolve in realizing its regionalist institution in accordance with the supranational form is the Dispute Settlement Mechanism (DSM). For more than two decades, DSM has been developed from the traditional method of diplomatic-based to rule-based system. Despite this development, ASEAN member states have been reluctant to practice and implement a rules-based dispute settlement mechanism.

The uniqueness of having an impotent or inactivated rules-based institution, DSM, in a regional organization, ASEAN, is the major focus of this article. The article explores the evolution of ASEAN-based dispute settlement efforts and the viability of ASEAN's DSM to settle disputes among ASEAN members during the early period of DSM development up until the signing of the 2004 Enhanced Dispute Settlement Mechanism protocol. In doing so, it identifies four behavioral challenges to a rules-based dispute mechanism, namely the ASEAN DSM's lack of exclusive jurisdiction and its permission for members to go "forum shopping", the impractical nature of EDSM procedure, deficiency of funding, and the "ASEAN Way". This paper will help comprehensively understand ASEAN's distinct institutional configuration through cases of economic conflict.

Keywords

ASEAN, Thailand, Dispute Settlement Mechanism, Economic

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Introduction

The institutional configuration of ASEAN has been perceived for its uniqueness in which the member states have not been willing to sacrifice their sovereignty to the regional organization. One of ASEAN's key elements that help illustrate the organization's lack of resolve in realizing its regionalist institution in accordance with the supranational form is the Dispute Settlement Mechanism (DSM). In general, the increasingly legalized procedures of dispute resolution imply a strong supranational system that can take decisions over the objections of individual government. ASEAN, however, has taken a distinct path of development by continuously allowing states to maintain control over the DSM. Despite attempts to grant the DSM authority at the regional level with a series of protocols, ASEAN member states have been reluctant to practice and implement a rules-based dispute settlement mechanism (Koesrianti, 2015).

This paper looks at the development of ASEAN's DSM in cases of economic conflict between member states, and focuses on the evolution of ASEAN-based dispute settlement efforts and the viability of ASEAN's DSM to settle disputes among ASEAN members during the early period of DSM development up until the signing of the 2004 Enhanced Dispute Settlement Mechanism (EDSM) protocol. ASEAN spent two decades building its own mechanism to settle economic disputes and has yielded two protocols on Enhanced Dispute Settlement Mechanism in 2004 and 2019. The DSM was lauded as innovative and visionary, given the rules-based nature of the protocols, which is uncommon in ASEAN (Chow and Tan, 2013). However, thus far, no ASEAN member state has ever invoked the protocols, despite the arising of disputes, which brings into question, what went wrong. This paper will examine these issues in order to get a better understanding of the dynamics that are shaping the fate of the ASEAN Enhanced Dispute Settlement Mechanisms for what may be years to come.

Evolution of the Dispute Settlement Mechanism for Economic Conflicts

The settlement of economic disputes between regional-body member states requires a different pattern from other kind of disputes, such as territorial or political ones. The evolution of DSM for economic conflict in ASEAN can be therefore be looked at separately and can be divided into three periods of its institutionalization.

The Different Nature of Economic Conflicts and Territorial Dispute

Conflicts and disputes are common in international relations, whether within states (involving the interests of another state), between nation states, or within international organizations. According to John Burton (1990), "conflict" refers to a long-term issue that cannot easily be solved and has been deeply rooted to the point of being "non-negotiable". "Disputes" can be described in simple terms as short-term arguments or disagreements that

need to be resolved to avoid descent into hostility. A dispute takes place when a party believes that the other party is violating certain rights, agreements, or obligations. It can arise not only over territory, but also over economic activity. Similar to territorial disputes, economic disputes or conflicts take place when one party believes that another party is violating international agreements or international economic laws, which could happen between national economies, clashes over economic policy or within economic integration arrangements (Taylor, 2002). In terms of trade in goods, the World Trade Organization (WTO) has given the definition of disputes in trade as the following.

> *"Disputes are essentially about broken promises. Members have agreed that if they believe fellow-members are violating trade rules, they will use the multilateral system of settling disputes instead of taking action unilaterally. That means abiding by the agreed procedures, and respecting judgment."*
>
> (World Trade Organization [WTO], n.d.)

That is to say, at the WTO, a trade dispute occurs when one or more-member countries agree that one country's trade policy measure breaks their agreements or commitments and obligations. Cases of disputes in trade range over a number of topics including protectionist measures imposed by another member within a framework such as licensing, undue custom procedure, rule of origins, etc.

When disputes take place, competing parties generally seek solutions or settlements. A process in reaching a solution or settlements between parties refers to "dispute settlement" which can be achieved through various means including lawsuits, arbitration, collaborative laws, mediation, conciliation, negotiation and facilitation. These mediums of dispute resolution can be divided into two categories: adjudicative[1] whereby judge, jury or arbitrator determines the outcomes and consensual processes[2] in which parties attempt to reach agreement. The main reason for settling a dispute is avoiding damaging action from both parties as well as effectively ending the dispute through agreeable and satisfactory settlements.

The second category of dispute resolution medium is the "dispute settlement mechanism"; an institutionalized system created to help parties settle disputes. International organizations such as the International Court of Justice (ICJ), the WTO, and the European Union (EU) have developed their own effective dispute settlement mechanism that not only helps their members to settle disagreements but also earn them respect and trust in terms of the credibility and fairness of its mechanism from global society. However, no matter how

[1] Including lawsuits and arbitration
[2] Such as collaborative law, mediation, conciliation and negotiation

well these systems are implemented, none of them are perfect yet. There have been issues that continue to challenge such mechanisms; for example, parties blocking or delaying the dispute resolution process, the time and resources consumed by the mechanism, as well as compliance problems. It is worth noting that, even with these challenges, on the positive side, disputing parties are mostly keen to resolve their dispute through dispute settlement mechanisms.

Dispute settlement mechanisms for economic disputes or conflicts have similar procedures and protocols as that of territorial disputes. Economic conflicts between nations normally require reinterpretation of existing law or will need the creation of new rules or methods to resolve disputes. The final outcome is to reach a settlement that is satisfactorily accepted by both parties. In the case of breakdown, parties will face sanction or less than satisfactory settlements.

In the case of the Association of Southeast Asian Nations or ASEAN, the Association seeks to develop its dispute settlement mechanism on economic conflict that is proper and binding. Due to the fact that ASEAN has its own way to manage and handle things based on its loose institutional structure called the "ASEAN Way", it would be difficult to impose binding resolutions on member states. The " ASEAN Way" is based on the preference of protecting each members' sovereignty and own interest rather than giving them to the Association. This core idea made ASEAN different. The "ASEAN Way", therefore, focuses on non-interference, consensus, and consultations. When there has always been room for negotiation, the envisioned binding commitments to resolutions seem impossible. In the end, national interest and sovereignty play an important role in settling disputes which result more or less as compromise than justice for all the parties in disputes. The following discussion will examine the development of a dispute settlement mechanism in the case of economic conflict in ASEAN.

Initial Stage of DSM on Economic Conflicts

ASEAN was established on 8th August 1967, with key objectives to promote peace, progress and prosperity in the region. The formation of ASEAN was originally motivated by the fear of the spread of Communism and concomitant war in the region. To foster trust amidst ongoing violence, instability and division, the five founding countries namely Thailand, Malaysia, Indonesia, the Philippines and Singapore met in Bangkok and signed the ASEAN Declaration (also known as the Bangkok Declaration). This Declaration did not create a regional organization as such. The loosely structured association that resulted from the declaration aimed at promoting intragovernmental cooperation and later on fostering and accelerating economic growth and political, security, military, educational and socio-cultural integration among members. As the Association founders intended to create 'a close and loose binding association' rather than an institutionalized organization, various protocols and

mechanisms that require binding commitments such as dispute settlement did not exist in the beginning.

The first explicit mention by the Association ever made of dispute settlement was on a terrestrial dispute during the Vietnam War. In 1971[3], the Association issued the Zone of Peace, Freedom and Neutrality (ZOPFAN) Declaration calling for respect for the sovereignty and territorial integrity of all states, avoid the use of threat or use of force as well as encourage peaceful settlement of any disputes, in accordance with the objectives of the United Nations (Woon, 2012). Such a declaration was made at a time of growing uncertainty facing the region's politics and security. However, it represented merely a recognition of the United Nations objectives and introduced no other initiatives to establish dispute settlement mechanism of any sort.

In 1976, the first ASEAN Summit was held in Bali which resulted in the Bali Concord and the Treaty of Amity and Cooperation (TAC). This can be seen as ASEAN attempting to pave the way for the creation of a formal procedure for dispute settlement in ASEAN (Anthony, 1998). The Bali Concord and TAC provided a proper arrangement as well as legal instrument crucial for conflict settlement. The Bali Concord, for example, reiterates the need to settle intra-regional disputes through peaceful means. The TAC further states the need to renounce the use of force and maintain mutual respect for sovereignty, equality, territorial integrity as well as the national identity of all nations. The most important idea appears in Article 13, which stipulates that all disputes must be resolved and shall be resolved in a friendly manner (Abhijit Vasmatkar & Ronald, 2007). Article 14 sets forth the formation of a High Council comprised of representatives at the ministerial level of all parties with their main responsibility to encourage parties to settle disputes through non-legal channels of good offices, mediation, inquiry and conciliation, as stated in Article 15. If the parties agree to mediation, the High Council can transform itself into a committee of mediation, inquiry or conciliation.

However, the said procedure was too simple to deal with the complexities of disputes among nations. Abhijit observed that the DSM created by TAC of 1976 is actually inspired greatly from the procedure of the 1947 General Agreement on Tariffs and Trade (GATT). (Abhijit Vasmatkar & Ronald, 2007) Drawing on that observation, Walter argues there are plenty of problems related to this procedure; for example, this scheme is voluntary and non-mandatory in nature (Woon, 2012). In such cases, one of the disputants may block the procedure and hence break down the whole process. This voluntary element exists due to the fact that, the Association, to this date, hesitates to make excessive arguments over

[3] Zone of Peace, Freedom and Neutrality Declaration in Kuala Lumpur, Malaysia

something that can be negotiated among themselves so as not to disturb 'the peace and harmony' of the region[4].

Hence, it appears that even the procedure was envisioned to be a political tool from the very beginning. Furthermore, there is no provision for arbitration and adjudication by an independent court or tribunal to administrate this mechanism. To this day, the wide use of non-legal means of dispute settlement such as good offices, mediation, inquiry, and conciliation has been encouraged instead. No record of ASEAN implementing other legal methods for dispute settlements can be found in this early period. These omissions and evasions highlight the political nature of dispute settlement in ASEAN, with measures to ensure compliance and binding settlements still not in place. Such a practice continues to obstruct ASEAN DSM initiatives, as politics remain a critical barrier. Therefore, it can be concluded that the dispute settlement procedure as laid out in the TAC in 1976 is problematic, not to mention a lack of provisions related specifically to economic conflicts. As Jeffrey Kaplan wrote, "…*political concerns have been ASEAN's raison d'etre."* (Kaplan, 1996). Nevertheless, ASEAN's attempt in acknowledging the need for pacific dispute settlement and to introduce the idea of a dispute settlement procedure should be lauded, as it indicates a willingness among Association members to create proper instruments and institutions for ASEAN.

Consolidation Stage of Dispute Settlement Mechanism on Economic Conflict

During the nineteen-eighties and nineteen-nineties, the original members of the Association enjoyed rapid economic growth through export-oriented industrialization and FDI from overseas. To take full advantage of the economic opportunities at hand, ASEAN shifted its focus from political alliance to economic cooperation. In December 1987, ASEAN leaders ratified the Agreement on Promotion and Protection of Investment aiming to attract more investment into the region. This is the first agreement that provided a dispute settlement mechanism for investment related matters. Articles 9 and 10 stated that any disputes at first should be resolved amicably (ASEANSecretariat, 2018a). If that proved to be difficult, the matter could be brought to a conciliation or arbitration body such as the International Centre for Settlement of Investment Disputes under the United Nations or the Regional Centre for Arbitration (now Asian International Arbitration Centre, AIAC) situated in Kuala Lumpur, Malaysia. If the parties in dispute found it difficult to choose, a tribunal would be set up for the case consisting of a representative from each of the disputing parties and a neutral citizen of ASEAN to serve as the chairman. The decisions would be based on the majority and would be binding on all parties. This particular DSM continued to exist until 2009 when the Agreement was replaced with the ASEAN Comprehensive Investment Agreement (ACIA)

[4] Better understood as 'an excuse'

whereby the dispute settlement mechanism on investment matters was substituted with the 2004 Enhanced Dispute Settlement Mechanism (EDSM).

During the nineteen-nineties, with the end of the Cold War and the rise of regional protectionism in developed economies particularly NAFTA, EU, and with the Uruguay Rounds stalled, ASEAN progressed with its own initiative to create a Southeast Asia-wide Free Trade Area (Chiou, 2010). This can be seen as a collective response by ASEAN members to the new challenges posed by the world economic situation in the nineties. Hence, in 1992, under the Framework Agreement on Enhancing ASEAN Economic Cooperation, the dispute settlement mechanism for economic conflict was further consolidated when ASEAN leaders agreed to established a proper dispute settlement mechanism through 'an appropriate body designed for the settlement of disputes'. ASEAN had made its first breakthrough in establishing a complete and fully developed dispute settlement mechanism (Sunida, 2022). However, it took five years for the first ASEAN DSM to actually materialize. The First ASEAN Protocol on Dispute Settlement Mechanism in 1996 covered any dispute arising between member states. The protocol only made mention of covering future economic arrangements and did not specifically mention economic conflicts *per se* due to the nature of economic disputes being different and more complex than other kinds of disputes. The protocol sought for parties in dispute to solve their differences amicably. If this proved difficult, their case would be referred to the ASEAN Free Trade Area (AFTA) Council. If the Council failed to make the parties come to terms, the case would then be passed to the ASEAN Economic Ministers (AEM), with the hope that it could be resolved there. ASEAN Economic Ministers would decide on the case using a simple majority and make it final and binding. As for compliance, neither the AFTA Council nor the AEM were given responsibility, they would rather continue observing through progress reports submitted by the disputed parties. The following figure demonstrates the procedural flow of the First Protocol. (See Figure 1)

Figure 1: First Protocol on Disputes Settlement Mechanism on Economic Matters 1996

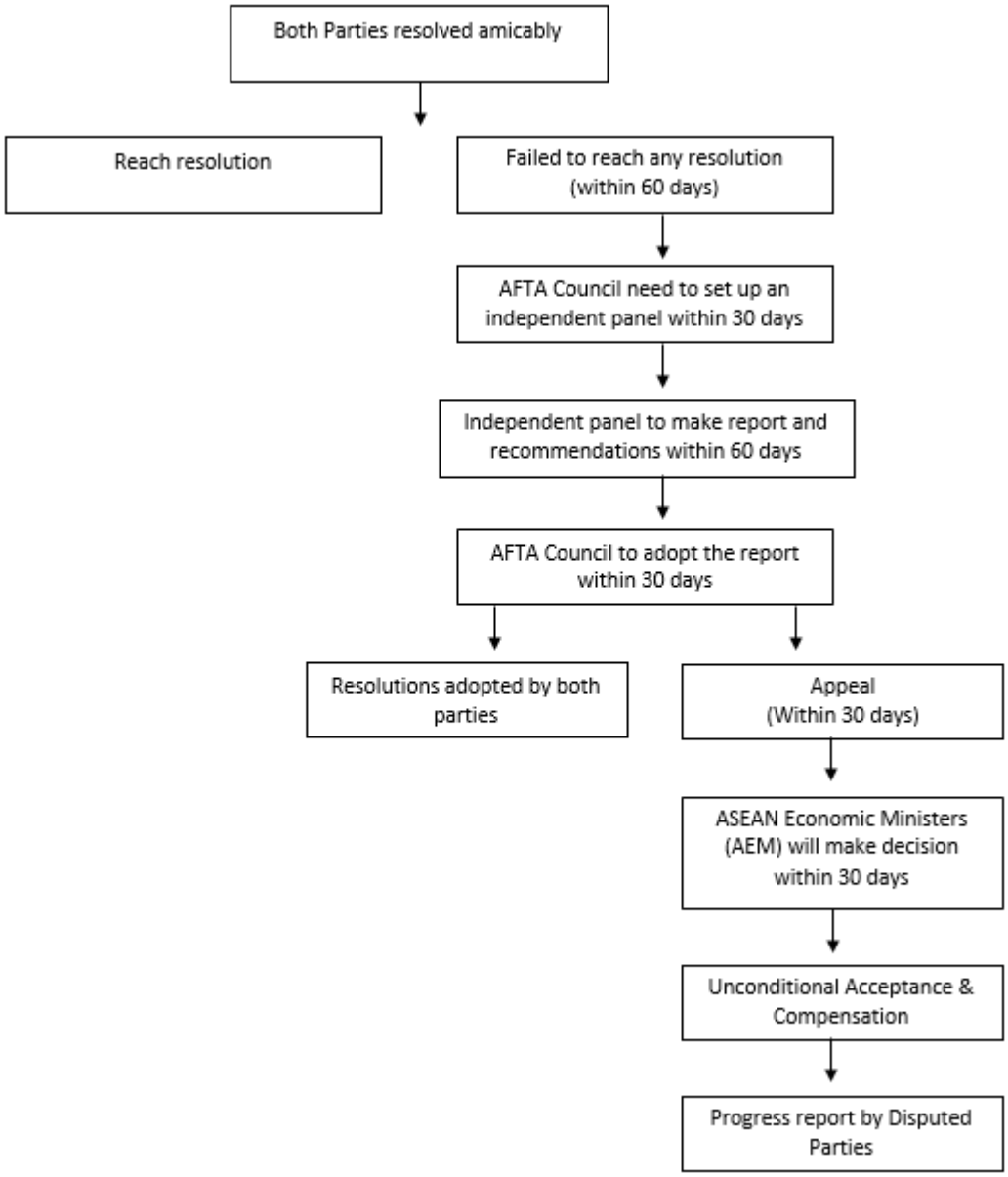

Figure 1 First Protocol on Disputes Settlement Mechanism on Economic Matters 1996

Source: the author

The procedure of the First Protocol was so linear that it received a great deal of criticism. Firstly, while the mechanism was designed to resolve intergovernmental conflicts in a fair and just manner, it appeared that such mechanisms worked best behind closed doors where the settlement was done basically on political will. The evidence for this claim can be seen from the way settlements were decided by either the AFTA Council or the AEM instead

of following the rule of law (Kaplan, 1996). Despite this, there were efforts at this time to resolve economic conflicts through the proper dispute settlement mechanism, yet the linear procedure did not take the complexities of disputes and its resolution into consideration. Be that as it may, this long-awaited mechanism was welcomed as it demonstrated ASEAN's commitment to building proper instruments, institutions and infrastructure for region-wide economic issues. It was not long until ASEAN realized the deficiencies of the first protocol which led to a collective effort to revise the first DSM.

The Institutionalized Stage of Dispute Settlement Mechanism for Economic Conflict

The institutionalization of DSM in ASEAN came amidst a growing sense of the need for economic integration in ASEAN. Among the three pillars of the ASEAN Community established in 2015, the ASEAN Economic Community (AEC) is the most advanced. With rapid economic growth and bright region-wide prospects, ASEAN member countries pushed forward with the idea of closer ASEAN cooperation. Economic cooperation was first voiced during the thirtieth anniversary of ASEAN in 1997 whereby leaders agreed to create an economic bloc by 2020 (Koesrianti, 2015). The envisioned economic bloc would see an integration of the market and production base becoming one and include the free flow of goods, services, investment, and *freer* flows of capital and skilled labour. ASEAN realized that, to achieve successful economic integration, the Association would need to establish a proper mechanism for economic dispute settlement. At the same time, a proper DSM would increase the credibility of ASEAN's economic environment by demonstrating ASEAN's determination to transform itself into a rules-based, and transparent, institution. Previously, ASEAN member economies had been reluctant to institutionalize any protocols or instruments due to the preference for a diplomatic culture and the fear of losing their sovereignty to the Association (Ravenhill, 2008). However, this new development was warmly welcomed by many parties. As Suraj Shah observed, a dispute settlement mechanism is necessary for an economic institution to work at the optimal level (Shah, 2017). This mechanism would help to address various issues including problems with collaborations and enhancing the credibility of commitments (which would include exposing free riding and violations, as well as measures to punish non-compliance). DSM would have to be effectively put in place to adjudicate conflicts or allegations of violations of agreements so as to ensure investor protections, and rebuild confidence and trust in the region's foreign trade and investment climate, which became much-needed after the 1997 Asian Financial Crisis.

The Second ASEAN Concord (Bali Concord II) in 2003 further reaffirmed dispute related issues such as the commitment to peaceful settlement of disputes and called for the improvement of the existing DSM. An ASEAN DSM for economic conflict was finally

institutionalized under the ASEAN Protocol on Enhanced Dispute Settlement Mechanism (EDSM), which replaced the first protocol of 1996.

The ASEAN Protocol on Enhanced Dispute Settlement Mechanism (ASEAN EDSM) was signed on the 29th of November, 2004 in Vientiane, Lao PDR. The new protocol amendments included those related to any disputes or differences raised by member states concerning the interpretation or application of the Agreement, especially economic commitments in ASEAN. EDSM, therefore, was a mandatory dispute settlement process that included panels and an Appellate Body which was to assess disputes that were unable to be settled through good office, mediation or conciliation. The findings by the panels and the Appellate Body would determine the measures that parties would need to undertake to conform to ASEAN economic agreements. If such measures could not be completed within a specified time, parties would be able to file a complaint to start negotiations for compensation or to suspend any concession.

Commonly known as the Enhanced Dispute Settlement Mechanism (EDSM), the second protocol was lauded for its sophistication and well-disciplined in terms of procedure and time. It offered resolutions on matters affecting the implementation, interpretation or application of the Agreement (ASEANSecretariat, 2018b). The EDSM was to be administered by the Senior Economic Official Meeting (SEOM) while the Secretary General of ASEAN was to be empowered with roles to facilitate settling disputes. The protocol also allowed for non-legal methods of settlement such as good offices, conciliation, negotiation, and mediation. Inspired by the World Trade Organization Dispute Settlement Understanding (WTO DSU), the ASEAN EDSM provided both formal and informal channels within the protocol, a strict timeline and provisions ensuring parties adopt the report and implement the decisions made (Woon, 2012; Sunida, 2022).

The informal channel recognized by the protocol is voluntary and non-binding in practice. The informal channel can be taken by requesting the High-Level Task Force on ASEAN Economic Integration to recommend the setting up of an ASEAN Compliance Monitoring Body which is tasked to review the case and make findings within a stipulated timeframe. Generally, this body comprises non-dispute parties to avoid any conflicts of interest. Should the findings lead to non-compliance, the perpetrating state was to be responsible for resolving the situation. Otherwise, it was to go to the formal dispute settlement channel. (See Figure 2)

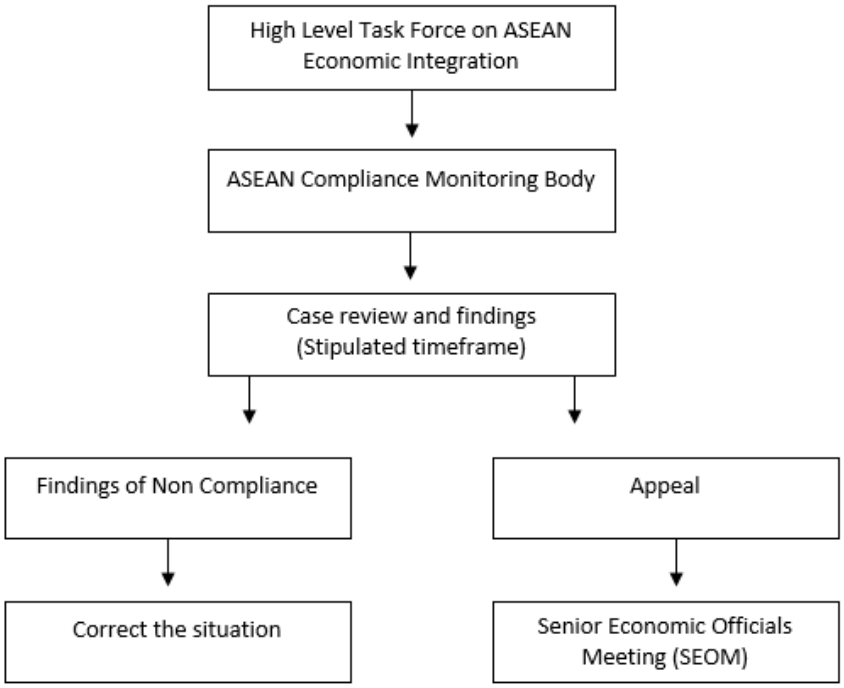

Figure 2 ASEAN Compliance Monitoring Body Instrument, ACMB (Informal EDSM)

Source: the author adapted from Woon (2012)

For the formal dispute settlement channel, it was to be a mandatory procedure as stipulated in the protocol. The formal dispute settlement practices and procedures would begin when the complainant state submitted a request to a respondent. The respondent was required to reply within ten days. Once the respondent acknowledged the request, the consultation process would begin within thirty days. The dispute would have to be settled within sixty days from entering consultations. In the case of break down, the case was to be transferred to the SEOM. (See Figure 3)

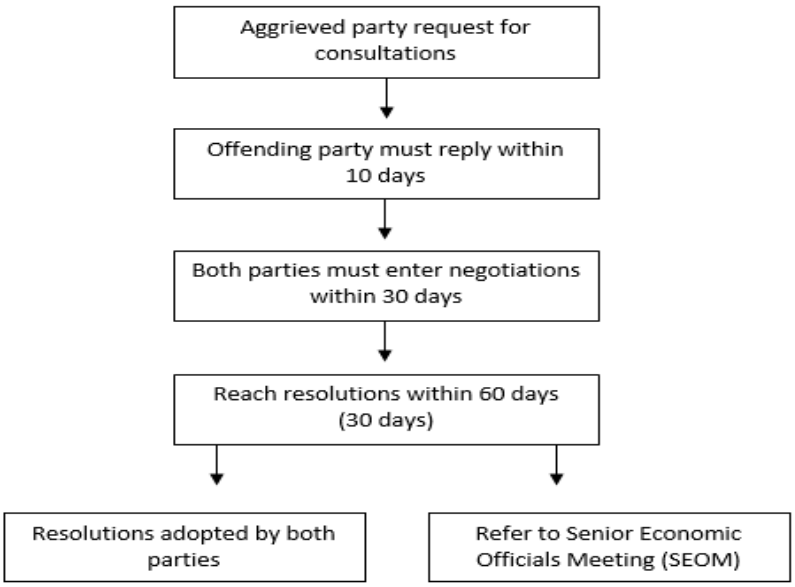

Figure 3 First Step in Formal EDSM

Source: the author adapted from Woon (2012)

The SEOM would have to make their decision either to set up a panel within forty-five days[5] through consensus or acquiesce to the decision. Any silent parties would be taken as agreeing to the formation of the panel. The panel's main responsibility would be to prepare a case report through fact findings and reviewing all provision in relevant agreements. The reports would have to be submitted to SEOM within sixty days. The SEOM was to make a ruling based on the reports within thirty days. In normal circumstances, there were two possible outcomes, an acceptance of the decision (a party that kept silent would be interpreted as agreeing to the decision) and an appeal. An appeal was to go to the Appellate Body under the supervision of the ASEAN Economic Ministers Meeting. The whole process was to involve only issues related to law and interpretation. The case should be concluded within sixty days. When the report by the Appellate Body would be ready, the SEOM would have to make a decision within thirty days. The decision would have to be accepted by disputing parties unconditionally and they would have to comply within sixty days from the day the decision was made. Compensation would have to be made by the perpetrating state, while the SEOM would act as a compliance enforcer. In cases where the disputing parties disagreed with the decision, the matter would then be passed to the ASEAN Summit. (See Figure 4)s

[5] This panel is similar to WTO DSU

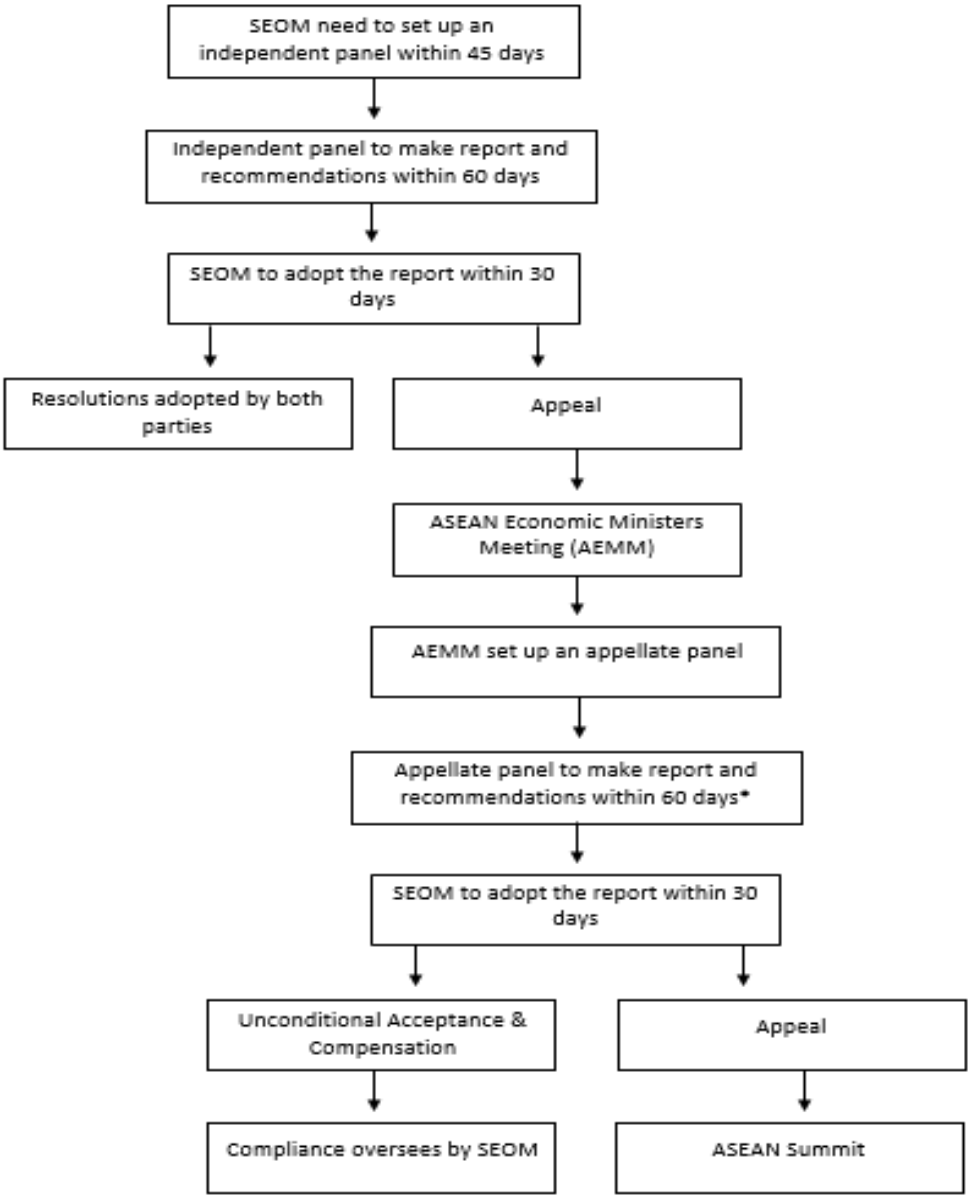

Figure 4 Second and Third Step of EDSM

Source: the author adapted from Woon (2012)

As can be seen from the above description, ASEAN's current Enhanced Dispute Settlement mechanism is the most updated and well-structured dispute settlement mechanism in the Association's history. Modeled after the WTO's dispute settlement mechanism, the EDSM is undoubtedly a mechanism that fits ASEAN's needs for economic

dispute settlement best and can be a useful catalyst for ASEAN's economic integration efforts.

In May 2010, after the institutionalization of EDSM, ASEAN member countries signed the ASEAN Trade in Goods Agreement (ATIGA). This agreement superseded other agreements related to trade in goods, for example, the January 1992 Agreement on the Common Effective Preferential Tariff (CEPT FTA). ATIGA provided an annex of full tariff reduction schedules for each member state. To achieve trade liberalization, the agreement included elements that ensure free flow of goods, tariff liberalization, and the removal of non-tariff barriers as well as trade facilitation. It also covered mechanisms for implementation and institutional arrangements. Through ATIGA, measures were codified and monitored to ensure the elimination of non-tariff barrier commitments. ATIGA represented another step forward for ASEAN in liberalizing trade in the region, after it had been slowed down for the past two decades. However, the signing of ATIGA also became a source of economic conflict, especially with regards to application, interpretation or breaking of commitments by another member state. The implementation of the ASEAN's EDSM will be discussed in the next section.

Enhanced Dispute Settlement and Its Implementation

ASEAN had gradually developed the DSM over the course of the nineteen-eighties and nineteen-nineties. However, the implementation of a DSM over this and the succeeding period, was hardly ever realized. With this regard, case studies of dispute settlement and actual challenges to a proper functioning DSM will be examined.

Dispute Cases Reported to ASEAN

Since the EDSM came into effect in 2004, it has never been invoked despite there being continual disputes among ASEAN member states especially after the creation of AFTA in 1992. The Agreement on Common Effective Preferential Tariff Scheme for ASEAN FTA (AFTA) requires all members to reduce tax on both agricultural and non-agricultural products to between nought percent and five percent by 2008. Because of this ambitious target, there has consequently been a mixture of optimism, doubt, and to a certain extent, resistance among members in opening up certain sensitive industries or products under the Agreement on the Common Effective Preferential Tariff Scheme (CEPT) for ASEAN FTA so as to protect their producers and industries. Evidence for this can be seen from rice trade disputes between Thailand, Indonesia, Malaysia, and the Philippines where a series of non-legal binding negotiations were chosen over EDSM to solve the conflicts.

The trade dispute over rice between Thailand, Indonesia, Malaysia and the Philippines began when the 26th ASEAN Economic Minister Meetings ratified the inclusion of all unprocessed agricultural products tariff reductions under the CEPT scheme in 1994.

Thailand has been the world's top rice exporter for decades. Therefore, she was at an advantage with rice proposed to be included in one of the three original product categories of tariff reduction lists[6] which all members agreed to set since the establishment of AFTA in 1992. The tariff cut in rice would certainly benefit Thailand who was eager to break into the ASEAN market. Indonesia, Malaysia, and the Philippines, on the other hand, wanted to include rice in a new category that would be able to provide a longer period for tariff reductions than the original ones. The series of negotiations on creating a new product category for rice, determining the final tariff rate, and setting a tariff reduction time line continued until Thailand agreed to ratify the ASEAN Trade in Good Agreement (ATIGA) at the 16th AEM Retreat in February 2010. For decades, the process of negotiation for settlement and remedies was in the form of bilateral consultations between disputing parties. Despite gaining the institutionalization tool of the EDSM along the way from 2004, ASEAN member states chose to negotiate their path to settlement through the existing legal means to best protect their nation interests. (Sunida, 2014)

ASEAN member states not only chose to settle their disputes this way with trade in agricultural products, but also in industrial or manufactured goods. According to Chiou, after the 1997 Financial Crisis in Asia, despite there being an urgent need to realize the FTA in order to restore investors' confidence in the region, many governments felt uneasy about opening markets for certain industries or products further (Chiou, 2010). This feeling of discomfort happened in ASEAN as well. Malaysia delayed the tariff reduction on 218 automotive items in the Temporary Exclusion List (TEL) in which Malaysia had to transfer to the Inclusion List by January 2000 in the original commitment. As Malaysia appeared to back down from its commitment, the ASEAN members tackled this problem by reverting to formalized flexibility, issuing the Protocol Regarding the Implementation of the CEPT Scheme Temporary Exclusion List at the 32nd AEM in 2000[7]. The Protocol stated that counterparts were to enter into consultation sessions within 180 days from the date of receipt of the submission to invoke the provisions of this Protocol and had to submit the report to the different levels of the ASEAN meetings. Thailand, as a substantial supplier, sought compensation for the economic damage caused by Malaysia's tax reduction deferment. This was done through many rounds of negotiation between February to July 2001. However, approaching the deadline set by the Protocol, the two countries could not reach agreement

[6] Three product categories in Tariff reduction lists are Inclusion List, Temporary Exclusion List, and Sensitive List. Products under Immediate inclusion list will reduce its tariff gradually starting 2003. While products under temporary exclusion will starts tariff reduction after 10 years (2003). As for the sensitive products, members are encouraged to keep the tariff at the minimum as possible.

[7] ASEAN Secretariat, "Joint Press Statement of the 32nd AEM in 2000," www.aseansec.org (accessed February 20, 2019)

and the debate continued over the compensation adjustment measures through 2003 to 2004. In the end, Malaysia did not offer the compensation adjustment measures for Thailand as it stated that Thailand did not have substantial supplier interests in the Malaysian market and did not suffer a loss from this deferment. This dispute ended when Malaysia began tax reduction on vehicles and parts in 2005 and Thailand could no longer ask for any compensation. The Philippines followed a similar course by transferring its petrochemical and automobile products from the CEPT scheme by invoking the Protocol Regarding the Implementation of CEPT Scheme Temporary Exclusion List in 2000 (Sunida, 2020). Subsequently, Thailand and Singapore asked for compensation from the Philippines and this matter was settled bilaterally (BusinessWorld, 2003).

It is worth nothing that all disputes in ASEAN were settled through bilateral negotiations. Even though ASEAN had a DSM or EDSM in place, it had never been resorted to. ASEAN member states opted for other means, bilateral negotiation in particular, to deal with conflict situations. When consensus was reached, a new and specific protocol was issued. This is an indication of how ASEAN member states continue to solve problems in the "ASEAN way", attempting to avoid further conflict, to avoid intervening in others' affairs, with settlements resting upon non-binding bases. There is always room to negotiate no matter how long it would take to solve a conflict. ASEAN as a legal institution merely acts as a facilitator for these diplomatic negotiations with no authority or desire to enforce anything upon members. As Chow and Tan (2013) have argued, diplomacy, rather than law, has been a key to govern and drive activities within ASEAN since its establishment. ASEAN activities and political relations have been handled using consultation, consensus, and declaratory statements (Chow and Tan, 2013; Sunida, 2022) Binding legal obligations were almost non-existent as well as clear compensation adjustment measures, remedies, or even penalties due to the diplomatic method of handling the dispute. Indeed, even if the EDSM had been invoked and activated, and a binding resolution with proper remedies laid out, it is highly questionable whether compliance could actually be enforced with the likelihood that diplomacy once more might be resorted to.

Dispute Cases Reported to World Trade Organization (WTO)

Instead of using the ASEAN DSM to settle economic disputes, members have chosen the World Trade Organisation Dispute Settlement Understanding (WTO DSU) as the preferred method for cases that require deeper review on the implementation, interpretation or application of trade agreements among ASEAN member countries.

The first such case occurred prior to the establishment of the first protocol in 1996. In 1995, an economic conflict arose between Singapore and Malaysia. Singapore filed a complaint to the WTO DSU over Malaysia's prohibition of imports of polyethylene and polypropylene which Singapore believed was unfair treatment (WTO, 2018b). However, the

matter took a dramatic turn when both parties managed to find a resolution. As a result, Singapore withdrew the complaint completely. Bringing the matter to the WTO DSU had been a common practice because ASEAN's DSM on economic conflict had not yet been realized.

A case in which ASEAN member states brought the matter to the WTO DSU instead of the now available ASEAN EDSM was the dispute between Vietnam and Indonesia over the issue of iron and steel products in 2015. Vietnam believed that Indonesia imposed unfair restrictions on foreign iron and steel manufacturers to protect its own domestic sector (WTO, 2018d). This case went all the way to Appellate Body. The case ended when Indonesia agreed to adopt the decision and both countries agreed to implement the recommendations within the stipulated timeframe. However, at that time, the EDSM was already available and this case could well have been brought to the EDSM. If the EDSM had been invoked, the viability and effectiveness of the mechanism would have been tested. On the WTO's timeline, the case had taken four years to reach its conclusion. Under the EDSM, the matter could have been shortened to one year at the maximum.

Another dispute case among ASEAN members submitted to the WTO DSU took an even longer time. The Philippines issued a complaint against Thailand over Customs and Fiscal Measures on Cigarette (WTO, 2018c) in 2008. It went all the way to the Appellate Body and the report was made public in 2011. Thailand complied and implemented the resolution over the next three years. The Philippines complained that Thailand had not done enough with reference to the said issues. A second complaint was filed in 2014 querying whether Thailand had complied with all the report's recommendations. When the report came out in 2011, many scholars expressed their view that the EDSM, if invoked, could have resolved this conflict more satisfactorily than the WTO DSU (Woon, 2012). With the implementation of the EDSM, the same conclusion could have been reached in a shorter period of time and could have delivered compliance more effectively in this case. Due to compliance issues, this case continued to simmer on for a decade. This lack of comprehensive resolution in the use of an outside forum indicates that the regionally-intimate EDSM could have been a better, more efficient alternative to settling such disputes among ASEAN members.

These phenomena bring into a crucial question as to why ASEAN member states choose other means or mechanisms than the EDSM to solve their conflicts. Could it be they know that the WTO DSU is more effective in making conflicting parties comply with the final decision? Or is it that, at the ASEAN table, there is an understanding that punishment will lead to loss of face in front of other members, an important cultural factor in the region? Whatever the reasoning in the minds of members, this evasion of an ASEAN DSM is certainly a result of being ASEAN. Therefore, in the next section, the challenges of utilizing a

dispute settlement mechanism in ASEAN will be investigated to help us fully understand these phenomena.

Challenges of Utilizing Dispute Settlement Mechanism

Since the establishment of the first protocol in 1996 to the most comprehensive and updated EDSM in 2004, this dispute settlement mechanism has never been invoked. It is evident that disputing ASEAN members have preferred other fora to settle their disputes. This does not come as a surprise, as such protocol-based settlements had evolved from the traditional method of diplomatic-based to rule-based systems of settlement. This development changed how things were done and affected the rules and behavior of international, inter-state relations of the region. Invoking the EDSM would inevitably pose a challenge to ASEAN in four different areas relating to the problem of ASEAN's exclusive jurisdiction and forum shopping, the impractical nature of the EDSM, funding, and the ASEAN Way of getting things done. All these areas are taken into consideration based on an assessment of the EDSM in comparison with WTO DSU and a close look into ASEAN Way of doing things, which create more challenges for effective utilization of EDSM.

The Problem of ASEAN's Exclusive Jurisdiction and Forum Shopping

Compared to other DSM in International Organization, the EDSM does not have an exclusive jurisdiction as the WTO Dispute Settlement mechanism has. This deficiency is due to a provision in Article 1.3 of the protocol that allows the members to '*…seek recourse to other fora for the settlement of disputes…*' (ASEANSecretariat, 2018b). This is in contrast with the WTO DSU of which Article 23 clearly states that WTO members are not allowed to take their case to other fora, or go 'forum shopping', to resolve their dispute. At the same time, this article emphasizes the need to abide by the rules and procedures of the WTO DSM (WTO, 2018a; Sunida, 2022). Some commentators have argued that requesting other fora will expedite the solution to the dispute, especially in matters that concern concrete matters with clear problems at hand. However, in the case of ASEAN, ASEAN members are using Article 1.3 as a pre-text for not choosing the EDSM. Therefore, this effectively undermines the authority of the ASEAN DSM due to its non-exclusive jurisdiction over the matter. This first challenge could be surmounted by granting the EDSM an exclusive jurisdiction, but at the same time allowing the flexibility to choose other fora conditionally, with the proviso that members must provide evidence that necessitates the referring of the dispute to other fora. This will help in restoring faith in the ASEAN protocol as well as forcing ASEAN members to utilize the EDSM before resorting to other mechanisms.

Impractical Nature of EDSM

In assessing the strength and credibility of EDSM, various impractical issues in the protocol become apparent. Firstly, Article 27 of the ASEAN Charter allows for the 'political' solution of disputes that cannot be concluded after they have been sent to the Appellate Body and this 'political' solution will happen only in the situation where all methods of resolving the conflict have been exhausted. Taking refuge in non - legal and non- binding means only reflects the triumph of diplomacy over rule of law or legal contexts. 'Political' solutions means that parties can challenge the decision and may choose not to comply, leaving the matter unresolved indefinitely (Vergano, 2009) or the 'solution' could sway according to the direction of the political wind, domestic or international, at that time. Without legally binding instruments to enforce commitment, any parties can see fit to do as they please according to their political situation. The conflict will never end until it reaches the point where everyone is contented with or tolerant of the status quo, which could take years, or it could potentially develop into hostility. Countries have to negotiate their way to remedies and compensation on a bilateral basis with other parties' inability to fulfill their commitments, which they might or might not get. The case of the dispute over inter-regional trade in rice and sugar in ASEAN provides an example of this haphazard negotiation. Indonesia, the Philippines, and Malaysia successfully deferred their original commitments and Thailand took that opportunity to average out between the gains from rice and the losses from sugar (Sunida, 2014). Rather than follow strict rules and an agreed timeline, ASEAN has chosen more flexible and less commitment-based means to deal with conflicts at hand. The economic integration process could progress faster if the member states chose the principles of regionalization over national interests. In the case of the dispute between Thailand and Malaysia in the automobile sector, without proper principles for the setting of remedies, there is no guarantee that losing parties would be awarded compensation. Unless ASEAN has a proper compliance instrument, members are likely to face the same challenges over and over again. Even diplomatic solutions at the multi-lateral regional level would be problematic. Kraichitti raised an interesting point that, the reality of bringing a dispute case for review at the ASEAN Summit would be difficult, with the challenge of considering such complicated issues within the short time period of a summit (Kraichitti, 2015). This would be the same for the compliance proceedings, which would be referred to the ASEAN Summit as stipulated in Article 27. Therefore, it would be more efficient for all members to utilize the rules-based EDSM rather than persevering with a hybrid mechanism which ends up as an unsatisfactory compromise between the diplomatic and legal context.

Secondly, the timeframe of the panel process is another challenge of the EDSM. The protocol requires the panel to submit their report within sixty days (section II.B, Article 8.2). This is illogical and unrealistic. (Sunida, 2022) For the panel, the given time period will

not allow a thorough investigation into the matter of the conflict. For dispute parties, it could be troublesome to prepare supporting data for the case in such a short time. In normal cases, the panel needs to complete its panel proceedings (two rounds of written submissions submitted by parties), two rounds of meetings and an interim review to be submitted to the SEOM. On top of that, the EDSM allows for a provision to seek the views of experts, which is normally a time-consuming process. Within the given ASEAN timeframe, such an option may not be possible. The same goes for the reports provided by the Appellate Body. It is unlikely that the EDSM would meet its deadline and there would be consequences for this failure. In contrast, at the WTO DSU, the panel will be given fourteen months to investigate the issues and submit the report. This could be one of the reasons why member states, when necessary, opt for the WTO DSU rather than using the EDSM.

Thirdly, unlike the independent panel, the appellate panel has no jurisdiction over the consideration of facts. Its jurisdictions are in the area of the implementation, interpretation or application of agreements. The resolution is apt to be ruled in accordance with its jurisdictions not over crucial facts.

Last but not least, the mechanism emphasizes reaching a consensus in decision making and is therefore practically difficult to achieve and may create unnecessary delays (Kraichitti, 2015). Such decision-making practices will undoubtedly open up more room for political plays and slow down closer integration efforts. Further improvements can be made in terms of resolving the impractical elements of the EDSM if ASEAN is serious about making it work.

Problems with Funding

Costs incurred in dispute settlement processes are another hindrance in utilizing the EDSM. In practice, an initial ASEAN DSM Fund was set up. Throughout the process, this fund would cover panel costs, the Appellate Body, and related administrative costs of the ASEAN Secretariat as stipulated in Article 17. However, there are other costs borne by the parties in disputes such as legal representation, and additional funding decided upon by the panel and the Appellate Body. (Sunida, 2022) More importantly, the EDSM does not state clearly the allocation of the incurred costs which can cause doubt. Either the costs incurred are properly decided upon, or they are as a 'punishment' imposed upon the losing party. This is somewhat discouraging when everything is ambiguous in terms of money. Unlike the EDSM, all costs incurred during the process are covered by the WTO Secretariat's budget, which come from contributions from all WTO members using the formula-based calculation to ensure equitable and fair contributions by all members, regardless of their development level (Kraichitti, 2015). Although WTO litigation is extremely costly (Sandhu, 2016), the inherent costs and additional costs of litigating countries during the disputes can roughly be known. Therefore, without any previous EDSM cases, ASEAN members face the difficulty of

estimating the exact litigation costs and measuring profits associated with market access benefits. This could be another reason why ASEAN member states prefer the WTO DSU channel to settle their economic conflicts.

ASEAN Way as an Obstacle for Effective Utilization of EDSM

Though the EDSM as a protocol has many weaknesses as stated earlier, the biggest challenge in utilizing EDSM turns out to be the way ASEAN prefers to do things, which is popularly known as the "ASEAN Way". Owing to the painful past of the countries of the region, the relationship between countries and the ways their regional organization handles things is somewhat unique. The relationship of ASEAN member states is based predominantly on diplomacy as this seems the safest way to avoid conflicts among themselves at all cost. Whether it be for the purpose of maintaining a stable, peaceful, and harmonious environment or preventing political or any other sort of intervention from powerful nations who wait for their opportunities to step in, ASEAN mainly utilizes political, diplomatic and relation-based dimensions to come to terms with each other, even in the matter of disputes among them since the establishment of the Association. This method, popularly known as ASEAN Way, is one in which member states recognize the principle of sovereignty of each member and will not interfere in the domestic affairs of each other. In doing so, ASEAN emphasizes consultation and consensus among them. Non-interference is understood in a sense that, issues regarding the sovereignty of each state are off the table. As a result, ASEAN has a loose institutional structure and ASEAN will not have over-arching power over the member states. This type of relationship makes it hard for the SEOM to enforce compliance within a loose structure. (Sunida, 2014) Because of this, ASEAN members would likely protest ASEAN DSM resolutions by claiming that it intrudes on their sovereignty. This "ASEAN Way" culture could be another reason why ASEAN members are reluctant to invoke ASEAN's own DSM.

Secondly, under consensus (or the *muafakat*) method of decision making, ASEAN members prefer to reach consensus to decide on a matter. However, recognizing the challenges of doing that, the Association developed the 10 minus X formula which meant that any members that were ready to agree on an agenda would be able to move forward while the rest could accede later. This led to a disjuncture whereby it allowed different tariff reduction schedules and caused unequal treatment between other members. An example of this can be found in the case of the rice and sugar interregional trade during the implementation of the AFTA. Additionally, a series of protocols and a weak enforcing body has led to a repeated breach of deadlines while member states have been continuously entering countless negotiations to postpone the opening of their sensitive sectors and products. This is due to the non-binding commitment nature of ASEAN, whereby, this non-binding culture becomes a means for limiting the roles of ASEAN in pressing members to

commit while giving more flexibility to members until such a time when they are ready to open up. (Sunida, 2014) This impractical formula has become a norm in a relationship-based ASEAN.

On the other hand, consultation is a key lifeline for ASEAN. In order to reach the decision and/or agreements, ASEAN prefers diplomatic means by way of negotiations rather than relying on rules and regulations as a guideline. The real negotiations are usually done in informal settings while ratifying is done in the meeting room. (Sunida, 2014) Such an approach is no less controversial, but ASEAN has adopted this method skillfully. In relation to ASEAN's DSM, this back-room dealing is where the leaky protocol comes into conflict with the envisioned rules-based mechanism, because it is natural for the members not to invoke the EDSM because of its 'strict business conduct', which is not how things are done in ASEAN. There exists a feeling of uneasiness among members to conceive of ASEAN as a rules-based organization, which will leave little room for members to maneuver (Vergano, 2009). If ASEAN were to become a truly rules-based organization, ASEAN would effectively have to get rid of numerous ambiguous clauses and provisions in its charters, agreements and protocols. This would help alleviate the problems of implementation, interpretation and application of agreements, which comprise the largest number of problematic cases (Nattapat, 2016). It will also enhance the role of the SEOM as enforcer of resolutions which may help the SEOM to supervise the compliance more effectively than it is today. The European Union is the model example for what can be achieved through becoming a truly rules-based institution. However, as long as member states choose not to concede their sovereignty to ASEAN, the problems of conflict resolution will continue to haunt the Association for years to come.

Conclusion

The development of ASEAN's DSM for economic conflict resolution examined in this paper aimed at illustrating the unique institutional configuration of ASEAN. For more than two decades, the regional body's own DSM evolved in the context of huge region-wide economic change and new challenges which resulted in the development of its own mechanism to settle economic disputes between ASEAN members. This change ostensibly comprised a shift from the traditional method of a diplomatic-based system to a rules-based system, and which was realized in the ASEAN Protocol on Enhanced Dispute Settlement Mechanism, which entered into force in 2004.

Despite having the DSM-related protocol for twenty years, it has never been invoked. The continued disputes among ASEAN member states especially after the creation of AFTA in 1992 were settled by a series of non-legally binding negotiations or were brought to the WTO DSU instead. Four obstructive factors have been identified as the core challenges for the successful activation of the ASEAN DSM, the lack of the protocol's

exclusive jurisdiction and permission for forum shopping, the impractical nature of the EDSM procedure, deficient funding, and the preference among members for a less binding “ASEAN Way”.

In terms of envisioning and creating a rules-based DSM, ASEAN has come a long way and yet still has to go a long way to improve its dispute settlement mechanism. Although there are underlying reasons for it having never been invoked, ASEAN needs to reflect on its history and its purpose, and review and reassess the protocol in light of current regional and global economic conditions, so that improvements can be made. There is a high probability that, if the protocol is tightened up correctly, it will not go unused and even benefit ASEAN more than it is currently expected to do.

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