

# **WORKSHOP ON ASEAN ENHANCED DISPUTE SETTLEMENT MECHANISMS**

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## **Dispute Settlement Mechanisms and Compliance with ASEAN Agreements**

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# Organization of Presentation

- 1. Dispute Settlement under the ASEAN Charter**
- 2. Relationship between DSMs and Compliance**
- 3. Mechanisms to Promote Compliance with Global Conventions**
- 4. ASEAN Charter Provisions on the Implementation of ASEAN Instruments**
- 5. Compliance Mechanisms in ASEAN Instruments**
- 6. Conclusions**

# Part 1

# Dispute Settlement under the 2007 ASEAN Charter

# **ASEAN Charter, Chapter VIII, Settlement of Disputes**

- **Article 22. General Principles**
- **Article 23. Good Office, Conciliation and Mediation**
- **Article 24. Dispute Settlement Mechanisms in Specific Instruments**
- **Article 25. Establishment of Dispute Settlement Mechanisms**
- **Article 26. Unresolved Disputes**
- **Article 27. Compliance**
- **Article 28. UN Charter Provisions and Other Relevant International Procedures**

## **Article 24. Dispute Settlement Mechanisms in Specific Instruments**

- 1. Disputes relating to specific ASEAN instruments shall be settled through the mechanisms and procedures provided for in such instruments.
- 3. Where not otherwise provided, disputes which concern the interpretation or application of ASEAN economic agreements shall be settled in accordance with the 2004 ASEAN Protocol on Enhanced Dispute Settlement Mechanism.

## **Art 26. Unresolved Disputes**

- **If the dispute remains unresolved, it may be referred to the ASEAN Summit**
- **The ASEAN Summit is likely to resolve the dispute the “ASEAN Way” – decisions “made by consultation and consensus will likely be the guiding principle**

# Common Dispute Settlement clauses in non-economic ASEAN Instruments

- **2011 Agreement on the Establishment of the ASEAN Coordinating Centre for Humanitarian Assistance on Disaster Management:**  
Article 15. Settlement of Disputes – Any dispute between Parties concerning the interpretation or application of, or compliance with this Agreement shall be settled amicably by consultation or negotiation.
- **2009 Agreement on the Privileges and Immunities of the Association of Southeast Asian Nations:**  
Article 11. Settlement of Disputes – Disputes arising out of the interpretation or application of this Agreement shall be resolved amicably in accordance with Chapter VIII of the ASEAN Charter.
- **2002 ASEAN Agreement on Transboundary Haze Pollution:**
  - Art 27: Any dispute between Parties as to the interpretation or application of, or compliance with, this Agreement or any Protocol thereto, shall be settled amicably or by consultation.



## Article 25. Establishment of Dispute Settlement Mechanisms

- Where not otherwise specifically provided, appropriate dispute settlement mechanisms, including arbitration, shall be established for disputes which concern the interpretation or application of this Charter and other ASEAN instruments.
- Where not specified, disputes involving ASEAN non-economic agreements may be settled by the **2010 Protocol to the ASEAN Charter on Dispute Settlement Mechanism**, which provides for consultation within a fixed time frame, and the possibility to convene an arbitral tribunal.



# 2010 Protocol to the ASEAN Charter on Dispute Settlement Mechanisms

- Drafted by the High Level Experts Group (HLEG) and the ASEAN SOM Working Group.
- Consultation within fixed time frame, failing which the complainant may request the appointment of an arbitral tribunal
- If the respondent does not agree to arbitration, the matter may be referred to the **ASEAN Coordinating Council**, which consists of the foreign ministers of the ASEAN member States
- ASEAN Coordinating Council can direct the parties to settle the dispute by good offices, conciliation, mediation or arbitration in accordance with rules set out in the Protocol
- If the ACC is unable to come up with a decision, any party may refer the dispute to the ASEAN Summit as an unresolved dispute (Annex 5)

## **Article 27. Compliance with results of an ASEAN Dispute Settlement Mechanism**

- 1. The Secretary-General of ASEAN, assisted by the ASEAN Secretariat or any other designated ASEAN body, shall monitor the compliance with the findings, recommendations or decisions resulting from an ASEAN dispute settlement mechanism, and submit a report to the ASEAN Summit.**
- 2. Any Member State affected by non-compliance with the findings, recommendations or decisions resulting from an ASEAN dispute settlement mechanism, may refer the matter to the ASEAN Summit for a decision (Annex 6 of the 2010 DSMP for disputes of non-economic nature).**

# Part 2

## Relationship between Dispute Settlement Mechanisms and Compliance

## Arguments that DSMs Promote Compliance

- Underlying assumption is that if a State knows that other State parties have recourse to DSM, it is more likely to comply with its obligations and more likely to not breach its obligations
- Assumption is that the disputes will arise in which the DSM applies, and that other States Parties will be willing to invoke the DSM when the dispute arises
- Example: ICJ judgment (Avena, 2004) - by abiding with the ICJ judgment, the US complied with its obligations under the Vienna Convention on Consular Relations

# Studies on Treaty Compliance

- Most academic studies on treaty compliance analyze why States comply with treaty obligations or fail to comply with them
- These studies do not link compliance with the existence of DSMs

# Factors questioning the link

- **DSMs only apply if there is a dispute between two parties on the interpretation or application of a provision in a treaty**
- **If one party has failed to take the measures it has agreed to take under a treaty, this may not give rise to a dispute with another party on the interpretation or application of a provision in the treaty**
- **Furthermore, if the other State party has not been injured, they are unlikely to invoke a DSM**

# Factors against invoking DSM

- Even when a State has not complied with its obligations under a Treaty, and a dispute arises, a party to the dispute may be reluctant to invoke the DSM
- Invoking a formal DSM, such as arbitration, may be considered an unfriendly act which is not consistent with “The ASEAN Way”



# Part 3

## Mechanisms to Promote Compliance with Global Conventions

# Reporting Mechanisms

- Many mechanisms have been built into Global Conventions to promote compliance by States Parties
- Reporting mechanism require States Parties to submit a report within a certain period after it becomes a party, outlining the steps it has taken to implement the treaty.
- Ideally, the “time deadlines” for such reports is to ensure that States parties make an effort to comply so that they are not embarrassed
- Additionally, some reporting mechanisms open the possibility for other interested parties to submit shadow reports.

# Monitoring Mechanisms

- **Monitoring Mechanisms place a responsibility on the Treaty Secretariat or on another body to monitor whether States Parties are complying, and to issue reports**
- **Ideally, Monitoring Mechanisms, like Reporting Mechanisms, ensure that States take compliance seriously because they do not want to be embarrassed by a report stating they have failed to comply**

# Financial & Technical Assistance

- Often States parties do not comply with their treaty obligations because of a lack of technical or legal capacity or financial resources
- Therefore, some global conventions create mechanisms to provide technical, legal or financial assistance to States who want to comply but lack the capacity and/or resources to do so

## Grace Period for Less Developed States

- **Some global conventions give less developed States a grace period by allowing them to the option delay the time when certain provisions will enter into force for them**
- **By giving States additional time to implement their obligations, it encourages them to ratify and implement the treaty**

## Part 4

# ASEAN Charter Provisions on the Implementation of ASEAN Instruments

# **ASEAN Charter, Articles 8 & 10.**

## **Article 8. ASEAN Coordinating Council**

2. The ASEAN Coordinating Council shall:

- (b) coordinate the implementation of agreements and decisions of the ASEAN Summit;

## **Article 10. ASEAN Sectoral Ministerial Bodies**

1. ASEAN Sectoral Ministerial Bodies shall:

- (b) implement the agreements and decisions of the ASEAN Summit under their respective purview;



# ASEAN Charter, Article 11

## Article 11. Secretary-General and ASEAN Secretariat

2. The Secretary-General shall:

- (b) facilitate and monitor progress in the implementation of ASEAN agreements and decisions, and submit an annual report on the work of ASEAN to the ASEAN Summit;

## Part 5

# Reporting Requirements in other ASEAN Instruments

# Reporting Requirements in ASEAN Instruments

## 2012 Protocol 6 Railways Border and Interchange Stations:

### *Article 7. Institutional Arrangements:*

1. **The ASEAN Senior Transport Officials Meeting** shall be the responsible body for the **monitoring, review, coordination and supervision** of all aspects relating to the effective implementation of this Protocol.
2. **The ASEAN Senior Transport Officials Meeting** shall **submit**, through the ASEAN Secretariat, **regular reports** of the progress of implementation of this Protocol **to the Transit Transport Coordinating Board** established pursuant to Article 29.2 of the Agreement, for further action.
3. The ASEAN Secretariat shall provide the necessary technical support and assistance to the ASEAN Senior Transport Officials Meeting in its functions and responsibilities under this Protocol.

# Reporting Requirements in ASEAN Instruments

## 2012 ASEAN Agreement on Customs

### *Article 53. Institutional Arrangements:*

1. The **ASEAN Directors-General of Customs Meeting ...**, shall **supervise, review and coordinate all aspects relating to the implementation of this Agreement...**
2. The **ASEAN Directors-General of Customs Meeting shall conduct periodic evaluation** of the progress of implementation of this Agreement ... **The report will be presented to the AFMM.**
3. The **ASEAN Secretariat shall: (a) provide support** to the AFMM, ASEAN Directors-General of Customs Meeting...; and **(b) monitor and regularly report** to the **ASEAN Directors-General of Customs Meeting** on the progress of the implementation of this Agreement.

# Part 6

# Conclusions

# DSM and Compliance

- **DSM is one of the tools which can promote compliance with ASEAN treaties**
- **To ensure clarity, Standard DSM clauses should be drafted for the ASEAN Economic Agreements and for other ASEAN agreements**
- **Compliance can also be promoted by other measures such as monitoring and reporting mechanisms, technical assistance, etc.**

# **SOP for Monitoring & Reporting on compliance with ASEAN Treaties**

- ASEAN should adopt standard operating procedures for reporting requirements & for monitoring the implementation of ASEAN agreements
- If ASEAN instruments give ASEC the responsibility to supervise and monitor the implementation of an instrument, ASEAN member States should be required to submit reports to ASEC
- If ASEAN instruments give a Sectoral Body the responsibility to supervise and monitor the implementation of an instrument
  1. ASEAN member States should be required to submit reports to the Sectoral Body
  2. The Sectoral Body should be required to submit an annual report to the ASEAN SG so that the SG can complete his annual report to the ASEAN Summit on the implementation of ASEAN agreements



# Strengthening Capacity of ASEC

- **ASEC will require additional professional staff, especially legally-trained staff, to carry out its responsibilities :**
  - 1. to monitor certain ASEAN agreements**
  - 2. to assist the SG in facilitating and monitoring ASEAN agreements and decisions**
  - 3. to assist the SG preparing his annual report to the ASEAN Summit**
  - 4. to provide necessary technical support to sectoral bodies monitoring the implementation of ASEAN instruments; and**
  - 5. to provide support for DSM**
  - 6. to interpret the ASEAN Charter upon the request of AMS**

# Thanks for Your Attention

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