

# The Enhanced Dispute Settlement Mechanism of ASEAN

Presentation by

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## Importance of the Dispute Settlement System of the ASEAN Economic Community

- Rules-based Community: a reliable, effective and efficient dispute settlement system is critical to secure compliance with, and enforcement of, contracted obligations and commitments;
- Economic integration: fostered through the security and predictability of the legal framework, the preservation of rights and obligations of AMSs and clarification of rights and obligations through interpretation.

## Importance of the Dispute Settlement System of the ASEAN Economic Community (cont.)

- Important to attract investments inasmuch as a reliable dispute settlement is seen as a normal feature of trade policy and inter-governmental relations;
- Tool for settling disputes within a more limited regional context, as opposed to exposing AMSs to WTO and multilateral remedies.

## General Features of the ASEAN EDSM

- Substantially inspired by the WTO dispute settlement system. It attempted to transpose the WTO model within a smaller regional environment;
- Decisions (*i.e.*, reports) are taken by “*panels*”, bodies constituted *ad hoc* and composed of experts. Possibility of an appeal review by the Appellate Body;
- Legally binding decisions. Reports are binding once adopted by the SEOM. “*Reverse consensus*” rule applies for the adoption of reports;
- Possibility of adopting “*counter-measures*” in case of non-compliance by an AMS with the decisions and rulings adopted by the SEOM.

## General Features of the ASEAN EDSM (cont.)

- The ASEAN EDSM has so far never been triggered by AMSs, despite a few commercial disputes having occurred between them and having had an ASEAN scope;
- There is a number of apparent shortcomings in the ASEAN EDSM system, which stand to undermine its attractiveness *vis-à-vis* the WTO dispute settlement mechanism (or other “competing” dispute settlement systems);
- Was the 2004 reform a lost opportunity to further improve ASEAN’s regional system of dispute settlement stock-taking from the WTO experience? Can things still be improved or addressed?

## Jurisdictional and Institutional Issues

- Jurisdiction: the ASEAN EDSM covers disputes brought pursuant to the consultations and dispute settlement provisions of the Protocol, as well as the “*covered Agreements*”;
- Definition of “*covered Agreements*”:
  - The Framework Agreement on Enhancing ASEAN Economic Cooperation signed in Singapore on 28 January 1992;
  - The 46 ASEAN agreements listed in Appendix I of the Protocol; and
  - Future ASEAN economic agreements.

## Jurisdictional and Institutional Issues (cont.)

### Critical aspects relating to the scope of the jurisdiction:

- Uncertainties as to the scope of the ASEAN EDSM jurisdiction, due to the undefined concept of “*future economic agreements*”; and
- The EDSM Protocol is not included within the list of “*covered Agreements*”.



## Jurisdictional and Institutional Issues (cont.)

- The rules and procedures of the Protocol apply subject to special or additional rules and procedures contained in the “*covered Agreements*”. The special or additional rules and procedures shall prevail when there is a difference;
- The absence of a list of “*special or additional rules and procedures*” may create potential issues as to which rules apply;
- Non-exclusive jurisdiction: possibility of referring the dispute to other dispute settlement *fora*: until the request for the establishment of a panel.

## Jurisdictional and Institutional Issues (cont.)

- SEOM: competent for the administration of the Protocol and of the dispute settlement provisions of the covered agreements. The SEOM:
  - Establishes panels;
  - Adopts panel and Appellate Body Reports issued in dispute settlement cases; and
  - Authorizes the suspension of concessions and other obligations under the covered agreements.
- Composed of senior capital-based government officials that meet about four times per year. Why not to entrust the Committee of Permanent Representatives with SEOM's functions?

## Jurisdictional and Institutional Issues (cont.)

- The responsibilities of the ASEC in handling the ASEAN EDSM are set out in Article 19 of the EDSM Protocol. The ASEC:
  - Assists the panels and the Appellate Body, especially on the legal, historical and procedural aspects of the matters dealt with, and provides secretarial and technical support;
  - Assists the SEOM to monitor and maintain surveillance of the implementation of the findings and recommendations of the panel and Appellate Body reports adopted by it;
  - Serves as the institutional focal point to receive all documentations in relation to disputes and deals with them as appropriate; and
  - In consultation with the SEOM, it periodically administratively updates the list of covered agreements in Appendix I to the EDSM Protocol.
- In addition, it must facilitate the correct implementation of ASEAN Agreements (Article 11 of the ASEAN Charter).

## Overview of the Process in an ASEAN Dispute Settlement Case

- There are two main ways to settle a dispute once a complaint has been filed within the ASEAN EDSM framework:
  - By means of a mutually agreed solution; or
  - Through adjudication, including the subsequent implementation of the panel and/or Appellate Body reports, which are binding upon the parties once adopted by the SEOM.

## Overview of the Process in an ASEAN Dispute Settlement Case (cont.)

- There are three main stages in the ASEAN dispute settlement process:
  - Consultations between the parties;
  - Adjudication by panels and, if necessary, by the Appellate Body; and
  - Implementation of the ruling, which includes the possibility of resorting to “*counter-measures*” in the event of failure by the “*losing*” party to implement the ruling.
- Total possible duration of a dispute, including the implementation stage until the (eventual) arbitration for determining the level of suspension of concessions: it must not exceed 445 days.

## Overview of the Process in an ASEAN Dispute Settlement Case (cont.)

- Consultations, good offices, conciliation and mediation are the so-called non-adjudicatory mechanisms provided for in the Protocol;
- Consultations: diplomatic stage of the dispute settlement procedure. They give parties to a dispute an opportunity to discuss the matter and to find a satisfactory solution without resorting to litigation.

## Overview of the Process in an ASEAN Dispute Settlement Case (cont.)

- Triggered in instances of perceived nullification and impairment of benefits accruing under the covered agreements ... or when the attainment of an objective is being impeded. Therefore:
- Under the Protocol, nullification or impairment or impediment may be the result of:
  - The failure of an ASEAN Member State to carry out its obligations under a covered agreement (i.e., ASEAN “violation complaints”); or
  - The existence of any other situation (i.e., ASEAN “situation complaints”, which include both non-violation complaints and situation complaints, in WTO terms).

## Overview of the Process in an ASEAN Dispute Settlement Case (cont.)

- Need to accord “*adequate opportunity*” to consultations requested by other AMS(s);
- Resort to consultations triggers the application of the Protocol (*i.e.*, “*the clock starts ticking*”) and is mandatory in ASEAN EDSM disputes;
- Differences vis-à-vis the WTO DSU:
  - No provision requiring that mutually agreed solutions reached through consultations be ASEAN-consistent; and
  - No provision for the confidentiality of consultations.



## Overview of the Process in an ASEAN Dispute Settlement Case (cont.)

- Alternative dispute resolution mechanisms are provided by the Protocol:
  - Good offices;
  - Conciliation; and
  - Mediation.
- These mechanisms do not result in legally-binding conclusions, but are intended to assist in reaching a mutually agreed solution and to resolve the controversy while avoiding full-fledged dispute settlement;
- Not resorted to in the WTO. More useful in the ASEAN context?

## Overview of the Process in an ASEAN Dispute Settlement Case (cont.)

- Panel proceedings: adjudicatory phase triggered by the request for the establishment of an ASEAN EDSM panel;
- The panel stage offers the complainant the possibility to uphold its rights or to protect its benefits under the ASEAN agreements; and
- This procedure is equally important for the respondent as an opportunity to defend itself in a due process context before an impartial “*judge*”.

## Overview of the Process in an ASEAN Dispute Settlement Case (cont.)

- The adjudicative stage of dispute settlement is intended to resolve a commercial and legal dispute when consultations failed to solve the matter;
- Rulings are legally binding on the parties to the dispute once adopted by the SEOM (parties are always able to settle the dispute amicably at any stage of the procedure before adoption of the ruling);
- “*Reverse consensus*” rule applies for the adoption of panel reports.

## **Overview of the Process in an ASEAN Dispute Settlement Case (cont.)**

- The panel phase may be sub-divided in the following stages:
  - The request for the establishment of a Panel;
  - The decision on the establishment of a Panel and composition of the Panel;
  - The panel proceedings and the submission of the Panel report to the SEOM; and
  - The adoption of the Panel report.

## Overview of the Process in an ASEAN Dispute Settlement Case (cont.)

- ASEAN panels: non-permanent bodies composed of three persons (unless the parties to the dispute agree, within 10 days from the establishment of the panel, to a panel composed of five panellists);
- The function of the panel is to make: (i) an objective assessment of the dispute before it (which includes an examination of the facts of the case and the applicability of, and conformity with, the covered agreements); and (ii) its findings and recommendations in relation to the case.

## Overview of the Process in an ASEAN Dispute Settlement Case (cont.)

- Panel proceedings are articulated in a number of steps, defined by the Protocol and the working Procedures of the Panel;
- Timeframe: 60-70 days (!) from the establishment (and not from composition) of the panel;
- The composition alone can – and often will - take up to 30 days (i.e., 20 days for the parties to try to agree on the panellists and 10 days for the Secretary General to appoint panellists at the request of either party, in case of no agreement). Panel proceedings in 30-40 days...??!!

## Overview of the Process in an ASEAN Dispute Settlement Case (cont.)

- Appeal phase: review of the panel report limited to the issues of law covered in the report and to the legal interpretations developed by the panel;
- Appellate Body: standing body (or permanent group) of seven experts, three of whom serve on any given case. Persons serving on the Appellate Body shall serve on cases in rotation;
- Timeframe for the proceedings: 60 days (maximum 90) from the day of the notification of appeal [compare this with 30-40 days for the full panel process..!!]; and
- Adoption: “*reversed consensus*” rules applies.

## Overview of the Process in an ASEAN Dispute Settlement Case (cont.)

- Procedures at the implementation stage include a mechanism to monitor and verify compliance with the rulings adopted by the SEOM; and
- Mechanisms to enforce the rights, consisting in compensation and suspension of concessions and other obligations.
- These ensure the binding force of the ASEAN EDSM.



## Overview of the Process in an ASEAN Dispute Settlement Case (cont.)

- The compliance phase is characterised by:
  - The monitoring of the implementation of the rulings;
  - The determination of the reasonable period of time to comply (60 days from adoption of report unless longer period agreed by parties within 14 days from adoption of report); and
  - Possible dispute settlement proceedings on matters relating to implementation.
- Difference vis-à-vis the WTO DSU: no possibility of resorting to arbitration for determining the “reasonable time for compliance”.

## Overview of the Process in an ASEAN Dispute Settlement Case (cont.)

- Compliance disputes may concern:
  - Whether the specific measure(s) taken to comply is(are) sufficient to bring the (“*losing*”) AMS into compliance with the ruling; and
  - Whether such measure(s) is(are) consistent with any covered agreement.

## Overview of the Process in an ASEAN Dispute Settlement Case (cont.)

- Compensation and suspension of concessions: temporary measures are available in case of non-compliance with the rulings adopted by the SEOM;
- Main function: to encourage the respondent to implement the recommendation to bring a measure into ASEAN-conformity; and
- Full implementation of the recommendations to bring the measures into conformity is always the preferred outcome within the EDSM framework.

## Overview of the Process in an ASEAN Dispute Settlement Case (cont.)

- Compensation: voluntary undertaking, in principle preferable to the suspension of concessions as a trade-liberalising remedy. However, often difficult to “sell” to domestic constituencies; and
- Suspension of concessions: procedure allowing the party invoking the ASEAN EDSM procedures to apply trade sanctions (*i.e.*, “*retaliatory measures*”) against the respondent that has failed to implement the rulings.
- Non-unilateral nature of these measures.

## Budgetary Issues

- Funding costs of the EDSM: ASEAN DSM Fund to cover the expenses of the panels, the Appellate Body and any related administration costs of the ASEAN Secretariat;
- Initial contributions provided by all AMSs in equal parts, following which, the Fund is to be replenished by the parties and third parties to disputes;
- Obligation for panels and the Appellate Body to apportion the costs of dispute settlement to the parties and third parties.

## Budgetary Issues (cont.)

- The system *de facto* impairs access to the EDSM for less-developed AMSs = it frustrates the possibility of the EDSM to establish itself as a rules-based system;
- Practical issues as to the apportioning of the costs: what constitutes losing a dispute? How to apportion the costs to third parties? What about costs which are not linked to a particular dispute?
- Possible alternative examples: WTO; CARICOM.

## Conclusive Remarks

- Importance of EDSM in light of ASEAN's full development into a rule-based community by 2015;
- Importance of EDSM in order to develop a truly-integrated and well-functioning ASEAN "internal market" and regional economy;
- Importance for ASEAN to continue attracting FDI and to become a competitive FTA and beacon of regional stability and prosperity;
- Need for AMSs to effectively engage within the ASEAN High Level Task Force on EDSM to address as soon as possible the perceived shortcomings of the Protocol;

## Conclusive Remarks (cont.)

- Need to establish all EDSM bodies and facilities as soon as possible;
- Role of governments, business-community, civil-society, media, academia is ensuring that EDSM works and offers a positive contribution to ASEAN integration and socio-economic development; and
- Centrality of ASEC and urgency that it be provided with the institutional, human and financial resources to duly manage the disputes under the EDSM.



Thank you for your attention!

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