IF YOU BUILD IT THEY STILL WILL NOT COME: ASEAN TRADE DISPUTE SETTLEMENT MECHANISM

By Michael Ewing-Chow and Ranyta Yusran

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A. Introduction

The Association of Southeast Asian Nations (ASEAN) was established in 1967 amid regional security tensions among its Founding Members, Indonesia, Malaysia, Singapore, Philippines and Thailand.[1] ASEAN initially was not conceptualised as an economic grouping but rather more as a confidence-building and political-security forum. Therefore, the early ASEAN agreement on dispute settlement, the Treaty of Amity and Cooperation in Southeast Asia (TAC), reflects this focus.[2] It was only in 1977 that ASEAN started to focus on regional economic integration[3] and finally adopted the 1996 Protocol on Dispute Settlement Mechanism, which later would be succeeded by the 2004 Protocol Enhanced Dispute Settlement Mechanism (EDSM) to address intra-ASEAN disputes arising from the interpretation or application certain ASEAN economic agreements, including trade disputes. However, the legalisation of ASEAN only started in late 2008 after the entry into force of the Charter of the ASEAN (ASEAN Charter).[4] The ASEAN Charter then prescribes a number of dispute settlement mechanisms to cover disputes that may arise from all fields of ASEAN cooperation.[5] It affirms the continuance of the application of the EDSM and expands its coverage to disputes arising from *all* ASEAN economic agreements including agreements on free trade area and the liberalisation of goods and services.[6]

If one takes the entry into force of the ASEAN Charter as the effective beginning of the legalisation of ASEAN, it is not surprising that none of ASEAN dispute settlement mechanisms have ever been invoked as there has not been a lot of time for legal disputes to develop. However, we think that beyond the limited time for disputes to have been brought

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[1] ASEAN Declaration, Bangkok, Thailand, 8 August 1967. Today ASEAN comprises of ten Member States namely Brunei, Cambodia, Indonesia, Laos, Malaysia, Myanmar, Philippines, Singapore, Thailand and Viet Nam.

[2] Treaty of Amity and Cooperation in Southeast Asia (TAC), 1st ASEAN Summit, Bali, Indonesia, 24 February 1976.

[3] On 24 February 1977, ASEAN adopted the Agreement on ASEAN Preferential Trading Arrangements. It is the first ASEAN economic agreement since its inception in 1967. It is the root agreement for the establishment of ASEAN Free Trade Area.

[4] Charter of the Association of Southeast Asian Nations (ASEAN Charter), 13th ASEAN Summit, Singapore, 20 November 2007.

[5] Ibid, Arts. 24 – 25.

[6] Ibid, Art. 54(2).

there exists some pathologies in ASEAN that mitigate against disputes being resolved by any of the ASEAN dispute settlement mechanisms. Bearing in mind the limited number of intra-ASEAN trade disputes (out of seven intra-ASEAN disputes that were brought before third-party dispute settlement mechanisms, only two relate to trade), it is our opinion that it is therefore worthwhile to also consider the ASEAN culture relating to dispute settlement and management in general, including non-trade disputes.

B. ASEAN Dispute Settlement Mechanisms and Their Lack of Usage

As a general rule under the ASEAN Charter, all disputes pertaining to the interpretation or application of a specific ASEAN instrument shall be settled through the dispute settlement mechanism specifically provided under such instrument.[7] The Charter prescribes the use of the High Council of the TAC,[8] the ASEAN Protocol on Enhanced Dispute Settlement Mechanism (EDSM)[9] and the Protocol to the ASEAN Charter on Dispute Settlement Mechanisms (DSMP)[10] to address disputes falling outside the general rule. The EDSM is the only ASEAN dispute settlement mechanism that addresses intra-ASEAN disputes pertaining to economic cooperation, including trade. To date, none of these mechanisms have been invoked.

1. 1976 Treaty of Amity and Cooperation in Southeast Asia

The TAC was signed on 24 February 1976 at the first ASEAN Summit.[11] It is ASEAN's first dispute settlement and principal political-security treaty of the region.[12] The TAC codifies for the first time the Association's guiding principles on international relations, which includes ASEAN's revered principle of non-interference in the internal affairs of one another.[13] Initially the TAC might apply to any kind of disputes 'likely to disturb regional peace and security'[14] however, the 2006 Eminent Person Group Report suggested limiting the application of the TAC to political-security disputes.[15] The ASEAN Charter later specified that

[7] Ibid, Art. 24(1).

[8] Ibid, Art. 24(2).

[9] Ibid, Art. 24(3).

[10] Ibid, Art. 25.

[11] Treaty of Amity and Cooperation in Southeast Asia (TAC), 1st ASEAN Summit, Bali, Indonesia, 24 February 1976.

[12] The TAC also allows ratifications by non-ASEAN States making it the only regional dispute settlement that can be used for disputes arising between an ASEAN State and a non-ASEAN State.

[13] TAC, Art. 2

[14] Ibid, Art. 13.

[15] 2006 Report of the Eminent Persons Group, p. 46. The Eminent Persons Group was established to prepare the drafting of the ASEAN Charter.

the TAC should be used to address intra-ASEAN disputes unrelated with the interpretation and application of the Charter and ASEAN economic agreements.[16]

Under the TAC, States are obliged to settle their disputes through friendly negotiations.[17] If the disputes remain unresolved, such disputes may be brought before the High Council – a political body consists of Foreign Ministers of all ASEAN Member States.[18] The decision to submit a dispute to the High Council must be agreed by all parties to the dispute. The High Council then recommends to the disputing parties appropriate means to settle the dispute, including the High Council's good offices or, with the agreement of the parties, constitute itself into a mediation committee, inquiry or conciliation.[19] It should be noted that the TAC does not provide a time frame within which the High Council shall render its decisions. The High Council shall make its decisions by consensus but;[20] nothing in the TAC obliges State Parties to comply with the decisions of the Council.

Despite nearly fifty years of existence, the TAC has never been utilised. In the event of disputes among State Parties, they show a high preference to utilise other third-party international dispute settlement mechanisms rather than the TAC. The State Parties' reluctance to utilise the TAC dispute settlement is most likely due to the political nature of the High Council and the lack of confidence in TAC procedures. The fact that disputing parties are also part of the High Council and that any decision must be taken by consensus make it less likely that any satisfactory outcome can emerge as such procedures would only further politicise such sensitive disputes instead of resolving them.

2. 2004 Protocol on Enhanced Dispute Settlement Mechanism

The EDSM was signed on 29 November 2004 and supersedes the 1996 Protocol on Dispute Settlement Mechanism.[21] It is the main mechanism for trade dispute resolution and Article 1 stipulates that the EDSM applies to disputes arising from the interpretation and application of forty-six ASEAN economic agreements listed under Appendix I of the EDSM. It also applies automatically to disputes arising from ASEAN economic agreements adopted after 2004.[22] In 2008, the ASEAN Charter expanded the applicability of the EDSM to include disputes arising from *all* ASEAN economic agreements.[23] The Charter provides that all disputes arising from

[16] ASEAN Charter, Art. 24(1).

[17] TAC, Art. 13.

[18] Rules of Procedure of the High Council of the treaty of Amity and Cooperation in Southeast Asia, 34th ASEAN Ministerial Meeting, Hanoi, Viet Nam, 23 July 2001, Rule 3. In the event of a dispute involving a non-ASEAN State then a representative of that State will also sit in the High-Council.

[19] TAC, Art. 15.

[20] Rules of Procedure of the TAC High Council, Rule 19.

[21] Protocol on Enhanced Dispute Settlement Mechanism (EDSM), 10th ASEAN Summit, 10th ASEAN Economic Minister Meeting, Vientiane, Lao PDR, 29 November 2004.

[22] Ibid, Art. 1(1).

[23] ASEAN Charter, Art. 24(2).

all ASEAN economic agreements shall be resolved through the EDSM.[24] The EDSM is the only dispute settlement regime to address State-to-State disputes arising from 1992 Agreement on the Common Effective Preferential Tariff Scheme for the ASEAN Free Trade Area (CEPT-AFTA). The system adopted under the EDSM is modelled on that of the World Trade Organization's (WTO) Dispute Settlement Understanding, albeit with even shorter timelines. However, recourse to the EDSM is without prejudice to the rights of ASEAN Member States to bring their disputes before other dispute settlement mechanisms.[25]

a. Adjudication

The ASEAN Senior Economic Officials Meeting (SEOM), roughly analogous to the WTO DSB if not modelled on it, is responsible in administering the EDSM. It has the authority to establish panels, adopt panel and Appellate Body reports, monitor the implementation of findings and recommendations of panel and Appellate Body and authorise suspension of concessions and other obligations under ASEAN economic agreements.[26] Similar to the WTO DSB, the SEOM operates by 'Negative Consensus'.[27] This means, unless SEOM decides by consensus *not* to establish a panel and to adopt a report of the panel and/or the Appellate Body, the SEOM will establish and adopt the reports within the timeframe prescribes in the EDSM. The application of negative consensus limits the possibility of blockage by any party to the dispute. It is interesting to note that the EDSM specifically provides that non-reply by any member of the SEOM is taken as an agreement to the establishment of a panel. The inclusion of this WTO DSU practice may represent ASEAN's intention to address the organisation's well-known culture of dispute avoidance by invoking the consensus rule.

Central to the mechanism under the EDSM is the automatic process involving a panel established by the Senior Economic Officials Meeting (SEOM) to consider disputes that cannot be resolved through consultation.[28] Unlike other ASEAN dispute settlement mechanisms, the SEOM has the power to establish the panel based only on the request of a party to the dispute within forty-five (45) days upon the receipt of the request. Appendix II of the EDSM provides that after the establishment of the panel, the parties are given ten days to decide on the individuals who will sit on the panel.[29] The panel is composed of three or five panellists, subject to the agreement of the parties. If the parties fail to reach an agreement on appointment of panellists, within twenty (20) days after the establishment of

[24] Ibid. Prior to the Charter, the EDSM allowed Member States to have their economic disputes, including those arising from ASEAN economic agreements, resolved in other forum outside of ASEAN (see Art. 1(3) of the EDSM).

[25] EDSM, Art. 1(3).

[26] Ibid, Art. 2(2). This provision is applied in parallel with Article 24(2) of the ASEAN Charter.

[27] Ibid, Arts. 5(2), 9(1), and 12(13).

[28] Ibid, Art. 5(1). Similar to the WTO DSU, the panel mechanism of EDSM will only be triggered if consultation failed to solve the dispute within sixty (60) days after the receipt of request for consultation or the responding party failed to response to such request within ten (10) days or failed to enter into consultation within thirty (30) days.

[29] Ibid, Appendix II: Working Procedures of the Panel, I. Composition of Panels (Appendix II.1), pt. 5.

the panel a party may request the Secretary-General of ASEAN to determine the composition of the panel.[30] The Secretary-General is then given ten (10) days to determine the composition of the panel by appointing panellists whom the Secretary-General considers most appropriate after consulting with the SEOM and the parties in the dispute.

The function of the panel is to make an objective assessment of the dispute brought before it and to make its findings and recommendations in relation to the case.[31] The working procedures of the panel are similar to those provided under the WTO DSU.[32] After assessing such disputes, the panel is required to deliver its findings and recommendations to SEOM within sixty (60) days of its establishment.[33] The panel may seek an additional ten (10) days to submit its report to SEOM. The panel shall give adequate time to the parties to review the report prior to submitting it to SEOM.[34] Unless SEOM, by consensus, refuses to adopt the Panel's report or a party decides to file an appeal, SEOM has to adopt the panel's report within 30 days of its submission.[35]

The EDSM prescribes for the establishment of a standing Appellate Body by the ASEAN Economic Minister Meeting (AEM).[36] The Appellate Body is to be composed of seven persons, three of whom shall serve on any appeal case on a rotation basis. All members of the Appellate Body will be appointed by the AEM for a four-year term.[37] The working procedures of the Appellate Body will be drafted by the SEOM and any subsequent changes and additions shall be decided by the Appellate Body in consultation with the SEOM and the Secretary-General of ASEAN.[38] Only parties to a dispute may appeal a panel report.[39] The Appellate Body will decide on the issues of law and legal interpretation in the panel's report within sixty days after the appeal request was filed.[40] The Appellate Body will also inform the SEOM if it believes it cannot deliver its report within sixty (60) days but in no case may the proceedings exceed ninety (90) days. The Appellate Body's report shall be adopted by SEOM and unconditionally accepted by parties to the dispute, unless the SEOM decides by consensus not to adopt the report.[41] ASEAN has yet to establish the Appellate Body,

[30] Ibid, Appendix II.1, pt. 7.

[31] Ibid, Art. 7.

[32] Ibid, Appendix II.2. The procedures are similar to Appendix III of the WTO DSU.

[33] Ibid, Art. 8(2). In exceptional cases, the panel may take an additional ten (10) days to submit the report to SEOM.

[34] Ibid, Art. 8(3).

[35] Ibid, Art. 9.

[36] Ibid, Art. 12(1).

[37] Ibid, Art. 12(2).

[38] Ibid, Art. 12(8).

[39] Ibid, Art. 12(4).

[40] Ibid, Art. 12(5) and (6).

[41] Ibid, Art. 12(13).

however, a list comprising of qualified individuals from all ASEAN Member States has been procured.[42]

b. Compliance

The implementation procedure of the EDSM also includes a compliance phase and compensation or the suspension of concessions. Article 15 of the EDSM stipulates that parties to the dispute are required to comply with the findings and recommendations of panel or Appellate Body within sixty (60) days after their adoption by the SEOM. Parties to the dispute may decide on a longer time period for compliance and this decision for extended timelines must be made within fourteen (14) days after SEOM's adoption of the reports.

The EDSM applies specific rules, which differ from the WTO DSU, with regard to a request for a longer time period for compliance. The EDSM stipulates that when a party to a dispute requests for a longer period of time for compliance, the other party will take into account the circumstances of the case and consider the complexity of actions required to comply with the findings and recommendations of panel and Appellate Body adopted by the SEOM. The request shall not be unreasonable denied.[43] Furthermore, when compliance requires the passing of a national legislation, a longer period appropriate for that purpose shall be accorded.

Similar to Article 21(5) of the WTO DSU, the EDSM also provides a compliance adjudication process which shall not exceed ninety (90) days.[44] Issues with regard to compliance may be raised at the SEOM meeting and, unless the SEOM refuses to consider them, the issues shall remain in SEOM agenda until they are resolved. In this case, parties are required to provide the SEOM with regular status reports of their progress in implementing the findings and recommendations of panel and Appellate Body. The meetings of the SEOM itself are governed by Article 20(1) of the ASEAN Charter, which stipulates that every decision of an ASEAN organ shall be made based on consultation and consensus. However, Article 16(1) of the EDSM provides that if the SEOM fails to resolve these issues within sixty (60) days or within the longer time period agreed by the parties in accordance with Article 15 then the concerned party of the dispute may trigger the process of compensation and the suspension of concessions.

The EDSM provides compensation and suspension of concessions or other obligations as temporary measures that may be taken in the event of non-implementation of the findings and recommendations of panel and Appellate Body reports.[45] The procedures for resorting

[42] This information is collected during the Workshop on ASEAN Enhanced Dispute Settlement Mechanism at the ASEAN Secretariat, Jakarta, Indonesia, on 30 October 2012. This information is still valid based on our interview with an ASEAN Secretariat official on 27 September 2014.

[43] EDSM, Art. 15(2).

[44] Ibid, Art. 15(5).

[45] Ibid, Art. 16.

to as well as the criteria for the granting of these measures under the EDSM are very similar to those of the WTO DSU. Arbitration is provided under Article 16 of the EDSM to resolve disputes arising from suspension of concessions.

The Arbitration process under Article 16 is similar to that of the WTO DSU. The arbitration will be carried out by the original panel or by an arbitrator appointed by the ASEAN Secretary-General. The arbitration needs to be completed within sixty days after the date of expiry of the sixty days (or longer, as agreed) time period to comply with the panel and Appellate Body reports adopted by the SEOM provided under Article 15. The parties shall accept the arbitration decision as final and promptly notify the SEOM. Upon a request, the SEOM will grant authorisation to suspend concessions or other obligations in accordance with the decision of the arbitration, unless it decides to reject the request by consensus.

c. Selection of Panellist and Members of the Appellate Body

Appendix II of the EDSM stipulates that preference is to be given to nationals of ASEAN States to be appointed as panellists. They are required to be well-qualified and experienced legal professionals or academics in the field of international trade law and policy. Nationals of any of the disputing parties cannot serve on a panel concerned with that dispute. The ASEAN Secretariat is responsible for maintaining the indicative list of qualified individuals from which members of a panel may be drawn. Member States may periodically suggest names of governmental and non-governmental individuals to be included in the indicative list, providing relevant information on their knowledge and experience of international trade and of the ASEAN economic agreements. The list shall indicate specific experience or expertise of each individual in the ASEAN economic agreements. Member States shall undertake to permit their officials to serve as panellists.

Article 12 set out the requirements of Appellate Body's members. Members of the Appellate Body shall consist of individuals of recognised authority and shall demonstrate expertise in law, international trade and subject matter of ASEAN economic agreements. These individuals shall not be affiliated with any government. A member will be appointed by AEM for a four-year term and may be reappointed once.

d. Administrative Body, Funding and Cost

The Secretariat of ASEAN is tasked with the secretarial duties for the purposes of the EDSM. Under Articles 17 and 19 of the EDSM, the ASEAN Secretariat is responsible for 1) administering the ASEAN DSM Fund for the purpose of the EDSM; 2) assisting the panels and Appellate Body, especially on the legal and procedural aspects, and providing secretariat and technical support; 3) assisting SEOM to monitor and maintain surveillance of the findings and recommendations of the panel and Appellate Body reports; and 4) receiving all documentations pertaining to disputes. Apart from these, the ASEAN Secretariat is responsible in maintaining an indicative list of qualified individuals for the purpose of

creation of a panel. It is also has a duty to propose nominations of the panel to the parties to the dispute and inform all member States of the composition of a panel thus formed.[46]

As of 2009, ASEAN has already established the ASEAN DSM Fund as required under Article 17 of the EDSM.[47] The EDSM applies a rather innovative approach to the financing of its application; the EDSM stipulates that the ASEAN DSM Fund shall be a revolving fund and the initial sum of the Fund shall be contributed equally by all the Member States. Any drawdown from the Fund shall be replenished by the parties to the dispute. The Fund will be used to meet the expenses of the panels, Appellate Body and any related administration costs of the ASEAN Secretariat. In relation to the replenishing of the Fund by the parties to a dispute, the panel and the Appellate Body will also make recommendations about the expenses to be borne by the parties as part of their findings and recommendations.[48] They may apportion the expenses in a manner appropriate to a particular dispute. The AEM shall approve a set of criteria on which subsistence allowance and other expenses of the panel and the Appellate Body shall be based.

e. Issues

Similar to other ASEAN dispute settlement mechanisms, the EDSM has never been invoked by any ASEAN Member State. This is not because ASEAN States are particularly averse to bringing their dispute before third-party adjudication or because there is no economic disputes among ASEAN States. The first trade dispute brought before the WTO was in fact a dispute between two ASEAN Member States, Malaysia and Singapore in 1995 regarding Malaysia's prohibition on the importation of polyethylene and polypropylene.[49] Another trade dispute brought before the WTO DSU in 2008 concerned Thai fiscal and custom measures affecting cigarettes from the Philippines.[50] The former could not be brought before the EDSM since it was not in existence in 1995, the later however, could have been brought before the EDSM.

[46] EDSM, Appendix II.A, pts. 6 – 7.

[47] ASEAN Secretariat, "ASEAN Dispute Settlement System – Fact Sheet", 24 February 2009, retrieved on 18 September 2014 from the ASEAN Secretariat's official website: <www.asean.org>.

[48] EDSM, Art. 14(3).

[49] Malaysia - Prohibition of Imports of Polyethylene and Polypropylene, Singapore v. Malaysia, Dispute DS1, WTO Dispute Settlement Body (request was withdrawn on 19 July 1995). The parties finally resolved their dispute through consultation. Since Singapore already requested the establishment of a panel, Singapore announced that it withdrew its complaint completely.

[50] Thailand – Cigarettes (Philippines) (*Philippines v. Thailand*), WTO Dispute Settlement Understanding, Dispute DS371, Appellate Body Report, 17 June 2011. In the past Singapore and Malaysia had also brought their dispute before the WTO Dispute Settlement Understanding, notwithstanding the fact that there was no ASEAN dispute settlement mechanism in place. At the end the two States resolved the dispute through consultation. See Malaysia – Prohibition of Imports of Plyethylene and Plypropylene, Request for Consultations under Art. XIII: 1 of the GATT 1994 by Singapore, WT/DS1/1. 13 January 1995.

Setting this issue temporarily aside, although the EDSM procedures closely resembles the procedures of the WTO DSU, there are several features in the EDSM which may raise concerns when the EDSM is finally invoked.

i. Limited Timeframe for the Adjudication Process

As mentioned before, the EDSM adjudication process is supposed to run on a very strict and limited timeframe. The whole process of dispute settlement under the EDSM, from the moment a party files a request for consultation until the adoption of the report of the Appellate Body by SEOM (in the event of an appeal); should only take up to 325 days or about eleven months.[51] By contrast, the WTO DSU, it provides a timeframe of almost sixteen (16) months from the time a party files a request for consultation until the adoption of the Appellate Body report by the WTO Dispute Settlement Body (DSB).[52]

The most striking difference in relation to the issue of timeframe is the time period allocated for the panel process. A panel under the EDSM has seventy (70) days at the most[53] since its establishment to deliver its report to the SEOM. Effectively, the panel only has sixty (60) days for deliberations and submission of report. The first ten (10) days is carved from the panel timeframe for the appointment of panellists process [54] However, if the parties cannot agree on the appointment of the parties then after twenty (20) days of the establishment of the panel, a party may ask the Secretary-General of ASEAN to appoint the panellists within the next ten (10) days.[55] In this case, the panel will only have forty (40) days at maximum for deliberations and submission of report. Within this timeframe somehow the panel is required to fit in, among others, two rounds of submissions by the parties,[56] two rounds of meetings,[57] an interim review of the report[58] and, when necessary, expert advice.[59] Again by contrast, in the WTO DSU process the timeframe accorded to the panel is an ample nine-month, which only kicked started after panellists are selected.

The Appellate Body, on the other hand, is given a longer period of time to deliver its report to the SEOM up to ninety (90) days. Although this is the standard given to the WTO DSU

[51] EDSM, Arts. 3, 5, 8 and 12.

[52] WTO DSU, Arts. 4(7), 7, 12(9) and 17(14). According to these provisions, the WTO process takes exactly 12 months and 115 days. See also WTO, "Flowchart of the Dispute Settlement Process", retrieved on 12 September 2014 from the official website of the WTO: <www.wto.org>.

[53] EDSM, Art. 8(2). Compared this to the timeframe granted to a panel of WTO DSU, up to nine months *after* the selection of panelists. See WTO, "Flowchart of the Dispute Settlement Process", retrieved on 12 September 2014 from the official website of the WTO: <www.wto.org>.

[54] Ibid, Appendix II.1, pt. 5.

[55] Ibid, pt. 7.

[56] Ibid, Appendix II.2, pts. 4 and 7.

[57] Ibid, pts. 5 and 7.

[58] Ibid, Art. 8(3)

[59] Ibid, Art. 8(4)

Appellate Body, it is normally the case that a panel process is afforded more time then the appeal process considering the bulk of work that the panel has to do. Additionally, the EDSM does not provide for a grace period after the submission of the panel report for the parties to decide whether any of them wants to appeal the panel report.[60] As a comparison, the WTO DSU procedures provide for a twenty-day period for the parties to consider the panel report and during this period, the report will not be considered for adoption by the DSB.[61] If the parties decide not to appeal the report, the DSU provides another sixty (60) days for the DSB to consider the adoption of the report.[62]

Thus, the timeframe accorded under EDSM appears to be unachievable, especially if we consider that in the WTO even a timeframe of nearly 16 months, on occasions, is not sufficient. For example, the *Boeing v. Airbus* disputes took more than five years before the WTO Appellate Body's Report was circulated.[63] This overly ambitious timeframe and the inflexibility of the EDSM may cause a major obstacle to the application of EDSM when Member States decide to invoke it or these considerations may even dissuade Member States from bringing their disputes to the EDSM at all.

ii. The ASEAN DSM Fund

Article 17 of the EDSM established the ASEAN DSM Fund. The purpose of the Fund is to cover all expenses arising from the functions of the panellists and members of the Appellate Body and administrative costs of the ASEAN Secretariat. All Member States are required to contribute equally to the initial sum of the Fund. The Fund is a revolving one and any drawdown from it shall be replenished by the disputing parties. At first glance, Article 17 appears to be an innovative approach to the financing of dispute settlement mechanism especially if we consider the ASEAN culture of dispute management. However, this provision comes with a number of problems. The first problem is the absence of a provision that stipulates the amount that each Member State has to contribute to the Fund or a method through which the amount of contribution will be decided. In the WTO, on the other hand, there is a detailed method to calculate the amount of contribution that each Member State should give.[64]

[60] Ibid, Art. 9(1). The EDSM only provides 30 days timeframe for the consideration of the report by SEOM.

[61] WTO DSU, Art. 16(2).

[62] Ibid, Art. 16(4).

[63] European Communities – Measures Affecting Trade in large Civil Aircraft *(United States v. European Communities, France, Germany, Spain, United Kingdom)*, Dispute DS316, retrieved on 22 September 2014 from the official website of the WTO: <www.wto.org>; and United States – Measures Affecting Trade in Large Civil Aircraft – Second Complaint, *(European Community v. United States)*, Dispute DS353, retrieved on 22 September 2014 from the official website of the WTO: <www.wto.org>.

[64] Joint WTO/GATT Committee on Budget, Finance and Administration, "Method of Calculation of Contributions Assessed on Members of the WTO", WTO Secretariat, retrieved on 27 September 2014 from the official website of the WTO: <www.wto.org>.

Second, considering the level of economic development of every ASEAN State, equal contribution to the ASEAN DSM Fund means that the Fund will be determined by the lowest offer by a Member State. As a comparison, in the WTO the amount of a Member State's contribution to the WTO budget is determined according to that member's share of international trade for the last five years.[65] This leads to an important question on the ASEAN DSM Fund will the equal contributions of all Member States to the ASEAN DSM Fund be sufficient to cover the costs associated with panellists, Appellate Body and administrative cost of the ASEAN Secretariat? The answer is, unfortunately, unclear. According to the ASEAN Secretariat, ASEAN has established the ASEAN DSM Fund as of 2009.[66] However, the amount of the initial Fund is not public. A number of sources have informed us that the ASEAN DSM Fund has reached US$ 345,000. It is unlikely that this amount will be sufficient to cover all expenses of the panel, Appellate Body and the ASEAN Secretariat in the course of a dispute. We estimate at a minimum the administrative cost to ASEAN for a dispute would be in the region of US$ 55,000 per case.[67] This is based on an estimate of the time cost of a technical officer in ASEAN to manage the case and an estimate of the administrative cost for the period of fifteen (15) months (from the time a party file a request for consultation to the time of implementation of the reports). If the estimate of the administrative cost incurred by a dispute already consumes about 20% of the total ASEAN DSM Fund, it is most likely that the ASEA DSM Fund will not be sufficient to cover all expenses occurring from panels and Appellate Body proceedings.

The third problem is related to the obligation of the parties to a dispute to replenish the Fund in accordance with the panels and Appellate Body's apportioning of the expenses. The obligation to replenish the ASEAN DSM Fund might prove to be a deterrent factor for Member States to utilise EDSM procedures, especially for the economically less-developed Member States. This problem, combined with the potential insufficiency of the ASEAN DSM Fund to cover the cost of the Panel, Appellate Body and the Secretariat, might also contribute to Member States' preference to bring their disputes before the WTO DSU as the costs of dispute settlement are covered by the budget of the WTO.[68]

With regard to the role of the panel and Appellate Body in apportioning the expenses of the dispute, the EDSM does not provide any guidelines on how panels and the Appellate Body should apportion the expenses of the dispute appropriately. Lastly, indeed the EDSM expressly stipulates that parties to the dispute shall replenish the Fund. However; it is silent on the proportion of the sum that each party should bear.

[65] Ibid.

[66] ASEAN Secretariat, "ASEAN Dispute Settlement System – Fact Sheet", 24 February 2009, retrieved on 18 September 2014 from the ASEAN Secretariat's official website: <www.asean.org>.

[67] This estimate is based on the average salary of a mid-level technical officer at the ASEAN Secretariat, which is US$ 3,000 per month and minimum administrative expenses in 15 months.

[68] WTO DSU, Art. 8(11).

Finally, there is nothing in Article 17 and the EDSM in general that suggests any other source of funding to maintain the Appellate Body, which is a standing body under Article 12 of the EDSM. It seems that there is a significant gap in the set-up with regard to this and it needs to be addressed before ASEAN establishes the EDSM Appellate Body.

3. 2010 Protocol to the ASEAN Charter on Dispute Settlement Mechanisms

The Protocol to the ASEAN Charter on Dispute Settlement Mechanisms (DSMP) applies to disputes arising from the interpretation or application of the ASEAN Charter and other ASEAN instruments, which do not have any specific means of resolving disputes and do not fall within the ambit of the TAC and the EDSM.[69] It is unlikely but not impossible that a trade dispute may be characterised in a manner which would necessitate recourse to the DSMP. The DSMP also applies to other ASEAN instruments, which expressly provide for the application of the DSMP. Taking the EDSM as a template, the DSMP operates on strict time periods, which cannot be modified by parties to a dispute.[70] The means of resolving dispute under DSMP consist of consultation, good offices, mediation and conciliation, and arbitration as means of resolving disputes.[71] The DSMP is also equipped with rules of good offices, mediation, conciliation and arbitration in its Annexes 1 – 4. Unlike the EDSM, the DSMP does not establish a standing body for dispute settlement. Any means of dispute settlement, including arbitration, that a Member State may invoke will operate on an *ad hoc* basis. Therefore, there are no specific Fund and secretariat dedicated on a permanent basis to support the functions of the DSMP. We think it is useful nonetheless to sketch out the DSMP as a context for the ASEAN dispute management discussion later.

a. <u>Arbitration Process</u>

Article 5 provides, in case of a dispute, a complaining party may request consultation with a responding party. The responding party shall reply to such request within thirty days from the date of receipt and shall enter into consultation within sixty days upon receiving such request. The consultation shall be completed within ninety days from the date of receipt of the request for consultation. If, and only if, the responding party fails to respond or enter into consultation or the consultation fails to settle the dispute, the complaining party may, by written notice to the responding party, request for the establishment of an arbitral tribunal.[72] The responding party is given up to thirty days after the date of the written notice to express its consent to the establishment of an arbitral tribunal. The establishment of an arbitral tribunal is only possible when both parties agree to it.

In the event that the responding party does not agree to such request or fail to respond to such request within thirty days, the complaining party may refer the dispute to the ASEAN

[69] ASEAN Charter, Art. 25; and DSMP, Art. 2.

[70] DSMP, Art. 4

[71] Ibid, Arts. 5 – 8.

[72] Ibid, Art. 8.

Coordinating Council (ACC)[73] – an organ of ASEAN, which consists of foreign ministers of all ASEAN States.[74] The ACC then has forty-five days to make a decision in which it shall direct the parties to resolve their dispute through good offices, mediation, conciliation or arbitration. Since the DSMP is silent on how the ACC should arrive on a decision, under Article 20 of the ASEAN Charter the ACC shall make its decision based on consultation and consensus. Where the ACC is unable to reach a decision on how the dispute is to be resolved within forty-five days, any party to the dispute may refer the dispute to the ASEAN Summit as an unresolved dispute pursuance to Article 26 of the ASEAN Charter. Article 16 of the DSMP stipulates that parties shall comply with the arbitral awards and settlement agreements produced under the DSMP. Any Member States affected by non-compliance with an arbitral awards or settlement agreement may refer the matter to the ASEAN Summit for a decision.[75]

b. Administrative Body, Funding and Costs

The DSMP does not provide for a standing secretariat. If a Member State decides to request consultation, good offices, mediation or conciliation to resolve a dispute, the Secretary-General of ASEAN shall act as a point of notification who will then notify all other ASEAN Member States of such request[76] or, in the case of good offices, mediation and conciliation, keep record of settlement agreement.[77] The Secretary-General is tasked to be the point of notification in relation to a request for arbitration and subsequent communications relating to arbitration.[78] The Secretary-General is also responsible to maintain a list of individuals who may serve as mediators, conciliators or arbitrators.[79]In relation to compliance, the Secretary-General and the ASEAN Secretariat are responsible to monitor compliance[80] and all parties to a dispute are obliged to provide the Secretary-General with a status report on the extent of their compliance with an arbitral award or settlement agreement.[81]

In the case of a dispute brought before DSMP arbitration, the ASEAN Secretariat is tasked in assisting the arbitral tribunals with providing legal, historical and procedural aspects of the matters arbitral tribunals are dealing with.[82] It is also responsible to provide secretariat and technical support. The expenses of the Secretariat shall be borne by the parties to the dispute. The office of the ASEAN Secretariat will be the seat of arbitral tribunals, unless

[73] Ibid, Arts. 8(4) and 9.

[74] ASEAN Charter, Art. 8.

[75] EDSM, Annex 6 – Rules for Reference of Non-Compliance to the ASEAN Summit, Rule 1(b).

[76] Ibid, Art. 5(2).

[77] Ibid, Art. 7(4).

[78] Ibid, Art. 8(2 – 3).

[79] Ibid, Annex 4 – Rules of Arbitration, Rule 5.

[80] ASEAN Charter, Art. 27(1).

[81] DSPM, Art. 16(2).

[82] Ibid, Art. 18.

parties decide otherwise.[83] With regard to the costs of arbitration proceedings, the cost of the Chair of the arbitral tribunal and other costs associated with the conduct of the arbitral proceedings shall be borne equally by the parties.[84] Each party shall bear the cost of arbitrator appointed by it.

c. Issues

It is notable that the DSMP enables a Member State to lodge a claim against another Member State without needing to seek the consent of the latter first. However, this does not mean that the DSMP is a compulsory mechanism. Unlike the EDSM, any means to resolve dispute under DSMP is only triggered when all parties to the dispute agree to use it. Although the ACC has the power to direct disputing parties to resolve their dispute through arbitration, the ACC is less likely to do so since it has to base its decision on consensus. A consensus to direct disputing parties is very unlikely to be achieved since the representative of the party that refuses to be brought to arbitration, in all likelihood, will not agree to such decision. The DSMP has yet to enter into force and to date; Vietnam is the only ASEAN State that has ratified the DSPM.[85]

Even if the DSMP finally enters into force it would still be doubtful that ASEAN States would invoke any dispute settlement mechanism under the DSMP since ASEAN States still avoid using ASEAN dispute mechanisms. This problem of the DSMP automaticity was demonstrated in 2010 when Cambodia attempted to activate the good offices of the ASEAN Chair (at that time, Viet Nam) to mediate between Cambodia and Thailand in the dispute concerning the temple Preah Vihear.[86] The attempt failed, since consensus of all disputing parties was needed to activate the good offices of the ASEAN Chair and Thailand refused. Even though the ASEAN Chair's good office to mediate was finally activated in 2011 when Indonesia held the ASEAN Chair, it was most likely due to the perceived referent authority of Indonesia as the largest of the ASEAN States rather than the authority vested in an organ of ASEAN (the ASEAN Chair).[87]

4. The ASEAN Summit – Unresolved Disputes and Non-Compliance with ASEAN DSM Findings and Recommendations

Under Article 26 of the ASEAN Charter, in the event a dispute 'remains unresolved', after the parties have utilised the mechanisms available within the Charter, they can refer such an unresolved dispute to the ASEAN Summit for its decision. Article 27 further stipulates that the ASEAN Summit also decides on the case of non-compliance with findings and recommendations resulting from an ASEAN dispute settlement mechanism. In this sense,

[83] Ibid, Annex 4 – Rules of Arbitration, Rule 12.

[84] Ibid, Rule 11.

[85] The DSMP needs all ASEAN States' ratifications to enter into force.

[86] ASEAN Charter, Art. 23.

[87] Walter Woon, 'Dispute Settlement in ASEAN,' Conference Paper, 17 October 2011

ASEAN framework positions the ASEAN Summit as the final *de facto* arbitrator and enforcer of a decision that has been reached any ASEAN dispute settlement mechanism. Additionally, the ASEAN Summit is also to decide in the case of serious breaches of the Charter or non-compliance.

The supposed roles of the ASEAN Summit as a final arbitrator and enforcer may provide political reassurance to ASEAN Member States. However, it creates structural uncertainties on how the ASEAN Summit should apply its power to address the abovementioned matters. First, nothing in the Charter prescribes any mechanism enabling the ASEAN Summit to make its decision on the matters explained above. Second, even if the Summit is to make its decision based on consensus in accordance with Article 20 of the ASEAN Charter, the Charter is still silent on how the Summit should make its decision where consensus cannot be reached. Finally, nothing in the Charter explicitly obliges Member States to comply with the Summit's decisions and the consequences of non-compliance to a Summit decision. So far no Member State has brought any of the abovementioned matter to the attention of the ASEAN Summit.

C. Why are ASEAN Dispute Settlement Mechanisms still not used?

The fact that the ASEAN dispute settlement mechanisms have never been used does not mean that intra-ASEAN disputes do not exist. However, ASEAN Member States seem to prefer bringing their disputes to third-party dispute settlement mechanism outside of ASEAN. We believe that there are a number of pathologies in ASEAN that mitigate against disputes being resolved by any of ASEAN dispute settlement mechanisms, including the EDSM. Since these pathologies are also pervasive in other ASEAN dispute settlement mechanisms and considering the very small number of intra-ASEAN trade disputes that had been brought in any fora, it is in our opinion that it will be worthwhile to consider the ASEAN culture relating to dispute settlement in general including non-trade disputes. While we recognise that the dynamics of non-trade disputes are different from trade disputes, we believe that they provide extra evidence of a regional culture of dispute management within ASEAN and hence worth exploring. Below is a table of known ASEAN disputes that were brought before third–party dispute settlement fora:

No	Dispute	Parties	Year	Third-Party Dispute Settlement	Base of Jurisdiction
1.	Request for Interpretation of the Judgment of 15 June 1962 in the Case concerning the Temple Preah Vihear (Cambodia v.	Cambodia v. Thailand	2010–2013	ICJ	Art. 60 of the ICJ Statute – interpretation of a judgment upon the request of a party

No	Dispute	Parties	Year	Third-Party Dispute Settlement	Base of Jurisdiction
	Thailand)[88]				
2.	Thailand – Cigarettes (Philippines)[89]	Philippines v. Thailand	2008–2011	WTO DSB	WTO Dispute Settlement Understanding
3.	Land Reclamation by Singapore in and around the Straits of Johor[90]	Malaysia v. Singapore	2003	Ad Hoc Tribunal	Annex VII of UNCLOS
4.	Sovereignty over Pedra Branca/Pulau Batu Puteh, Middle Rocks and South Ledge[91]	Malaysia/ Singapore	2003–2008	ICJ	Special Agreement made under Art. 36(1) of the ICJ Statute
5.	Sovereignty over Pulau Sipadan and Pulau Ligitan[92]	Indonesia/ Malaysia	1998–2002	ICJ	Special Agreement made under Art. 36(1) of the ICJ Statute
6.	Malaysia – Prohibition of Imports of Polyethylene and Polypropylene[93]	Singapore v. Malaysia	1995	WTO DSB	WTO Dispute Settlement Understanding

[88] Request for Interpretation of the Judgment of 15 June 1962 in the case concerning Temple of Preah Vihear (Cambodia v. Thailand), Cambodia v. Thailand, 2013 ICJ Rep. 151.

[89] Thailand – Customs and Fiscal measures on Cigarettes from the Philippines, Philippines v. Thailand, Dispute DS371, Appellate Report, WTO Dispute Settlement Body, 17 June 2011. This is the second dispute brought by an ASEAN State against another ASEAN State before the WTO DSB.

[90] Land Reclamation by Singapore in and around the Straits of Johor, Malaysia v. Singapore, Provisional Measures, 2003 ITLOS Rep. 10. Malaysia and Singapore signed a settlement agreement in 2005 and thereafter jointly submitted a letter to ITLOS requesting ITLOS to deliver a final binding award in the terms set out in the settlement agreement.

[91] Sovereignty over Pedra Branca/Pulau Batu Puteh, Middle Rocks and South Ledge, Malaysia/Singapore, 2008 ICJ Rep. 12.

[92] Sovereignty over Pulau Sipadan and Pulau Ligitan, Indonesia/Malaysia, 2002 ICJ Rep. 625.

[93] Malaysia – Prohibition of Imports of Polyethylene and Polypropylene, Dispute DS1. It is the first dispute brought before the WTO DSU, the two parties managed to resolve their dispute through consultation and Singapore withdraw its complaint completely on 19 July 1995.

No	Dispute	Parties	Year	Third-Party Dispute Settlement	Base of Jurisdiction
7.	The Case concerning the Temple Preah Vihear[94]	Cambodia v. Thailand	1959–1962	ICJ	Optional Clause Declarations made under Art. 36(2) of the ICJ Statute

Table 1 – List of Disputes between ASEAN States before Third-Party Dispute Settlement

Based on our analysis of the case precedents described in Table 1 and ASEAN's practice in handling intra-ASEAN dispute, we list three possible explanations that may contribute to the non-utilisation of ASEAN dispute mechanisms. The first possible explanation is ASEAN States' persistent practice of dispute management through the exercise of the 'ASEAN Way' of diplomacy and the numerous regular meetings of ASEAN organs reduce the need for a legalised mechanism. Second, when diplomacy does not result in satisfactory resolution and when Member States indeed agree to bring their disputes before a formal and binding dispute settlement mechanism, they show a high degree of confidence in, and preference for, extra-ASEAN dispute settlement mechanism. Third, it appears that Member States realise the institutional and resource limitations of ASEAN organs, especially the ASEAN Secretariat, *vis-à-vis* the exercise of the functions of ASEAN dispute settlement mechanisms. With that said, data from other Free Trade Area dispute settlement mechanisms, which show a similar limited utilisation rate suggest that ASEAN is not alone in these pathologies.[95]

1. Dispute Management: ASEAN Way of Diplomacy and ASEAN Meetings

While ASEAN States are not averse to submitting their dispute before third-party dispute settlements outside of ASEAN dispute settlement mechanisms, dispute management still takes precedent in ASEAN. In the ASEAN context, dispute management is usually aimed at de-escalating the dispute.[96] The most common practice of dispute management in ASEAN is through the ASEAN Way of diplomacy; it is commonly used to address territorial sovereignty disputes, which may affect the region's peace and security.[97]Another possible method of

[94] The Case concerning the Temple of Preah Vihear, Cambodia v. Thailand, 1961 ICJ Rep. 24. Cambodia managed to bring Thailand before the ICJ based on optional clause declarations that both parties made under Article 36(2) of the ICJ Statute accepting the compulsory jurisdiction of the Court. After the Court rendered its judgment giving the sovereignty over the temple Preah Vihear to Cambodia, Thailand stopped renewing its declaration.

[95] Claude Chase, Alan Yanovich, Jo-Ann Crawford and Pamela Ugaz, "Mapping of Dispute Settlement Mechanisms in Regional trade Agreements – Innovative or Variations on a Theme?", WTO Economic Research and Statistic Division, Staff Working paper ERSD-2013-07 (10 June 2013).

[96] Hao Duy Phan, 'Procedures for Peace: Building Mechanisms for Dispute Settlement and Conflict Management within ASEAN', 20 *UC Davis Journal of International Law and Policy* 1 (2013), p. 49; Donald E. Weatherbee, *International Relations in Southeast Asia: the Struggle for Autonomy* (2nd Ed.) (Singapore: Institute for Southeast Asian Studies, 2010), pp. 131 – 132; and Mely Caballero-Anthony, 'Mechanisms for Dispute Settlement: the ASEAN Experience', 20 *Contemporary Southeast Asia* 1 (1998), pp. 39 and 51 – 53.

[97] Ibid.

dispute management in ASEAN is, theoretically, through the utilisation of numerous regular meetings of ASEAN organs as strategic forums of dispute management through continued discussion. This method may be utilised to manage disputes arising from interpretation and implementation of ASEAN instruments. As the following discussions will explain, ASEAN's prioritisation of dispute management might be as another reason why (possible) ASEAN disputes do not go before any of ASEAN dispute settlement mechanism.

a. 'ASEAN Way' of Diplomacy to Manage Intra-ASEAN Disputes

ASEAN is well known for its 'ASEAN Way' of diplomacy to manage disputes, which mainly consisted of three revered principles of ASEAN: reliance on consultation and consensus in decision-making, non-confrontation and non-interference in the internal affairs of one another.[98] Based on these principles, disputes among ASEAN States, especially territorial sovereignty, are settled through diplomacy (read: bilateral consultations).[99] Diplomacy as means to de-escalate disputes has been observed strictly by ASEAN Member States since the beginning of ASEAN. Informality and a closed-door policy are the key signatures of ASEAN Way of diplomacy and third-party involvement is strictly prohibited unless the disputing parties agreed otherwise.[100] The methods usually involved informal summits, instead of formal ASEAN meetings/forums, at the level of head of government/State or ministers of foreign affairs and discussions were usually conducted over cocktails or lunch.[101]

This practice kept on-going intra-ASEAN disputes from public attention and as a result, the general public only knew of an intra-ASEAN dispute when the disputing parties agreed to bring their dispute before a third-party dispute settlement forum or from bits and pieces of the dispute mentioned in newspaper coverage or books written by former diplomats. In the Thai-cigarette case, for instance, the three-year negotiation between Thailand and Philippines flew below the ASEAN public's radar until Philippines filed a request for consultation before the WTO in 2008. Similarly, in the Polyethylene and Polypropylene case between Singapore and Malaysia, the negotiation process was never revealed to public until Singapore brought the dispute before the WTO. This is not to say that this practice is an exclusive trait of ASEAN States but it is the persistence of ASEAN States to pursue negotiations and consensus-building before finally bringing their disputes before a third-

[98] ASEAN Charter, Arts. 2(2)(e) and 20. These principles have a long-standing history in Southeast Asia dated back to Maphiliindo in 1963. For further discussion on the ASEAN Way, see Noordin Sopiee, 'ASEAN and Regional Security', in KS Sandhu et al, *The ASEAN Reader* (Singapore: Institute of Southeast Asian Studies, 1992), pp. 391 – 392; Donald E. Weatherbee, *International Relations in Southeast Asia: the Struggle for Autonomy* 2nd Ed., (Singapore: Institute of Southeast Asian Studies, 2009), p. 128; and Shaun Narine, *Explaining ASEAN Regionalism in Southeast Asia* (London: Lynne Riener Publishers, 2002), pp. 31 - 33.

[99] Rodolfo C. Severino, *Southeast Asia in Search of an ASEAN Community: Insights from the Former ASEAN Secretary-General* (Singapore: Institute of Southeast Asian Studies, 2006), pp. 164 – 166.

[100] Shaun Narine, *Explaining ASEAN Regionalism in Southeast Asia*, p. 31; and Donald E. Weatherbee, *International Relations in Southeast Asia: the Struggle for Autonomy*, p. 131. Since 1967, parties to intra-ASEAN disputes never requested the involvement of a third party in the negotiation of their disputes. The only exception is the Preah Vihear dispute in 2010.

[101] Ibid.

party dispute settlement forum that marks the particularity of ASEAN culture in managing dispute.

There are also other intra-ASEAN trade disputes which were resolved through negotiations and not made public. Two cases that we are aware of are the Singapore-Philippines trade dispute concerning measures affecting petrochemical products and the dispute between Thailand and Malaysia on the delay in automotive tariff reductions.[102] In the dispute concerning petrochemical products between the Philippines and Singapore, Singapore sought compensation from Philippines due to measures affecting the importation of petrochemical resins and certain plastic products. The Philippines' Government issued an Executive Order in January 2003 which temporarily suspended the tariff set out under the 1992 ASEAN Agreement on the Common Effective Preferential Tariff Scheme for the ASEAN Free Trade Area (CEPT) in order to protect domestic production facilities. While the CEPT requires that tariff rates between ASEAN Member States on a broad range of products be reduced to 0% to 5%, the 2003 Executive Order raised rates on a number of products to 5% to 20%.[103] The dispute was settled through negotiations, which resulted in US$ 8 million compensation arrangement.[104] In the trade dispute between Thailand and Malaysia on measures affecting the importation of cars and automotive parts, Malaysia constantly refused to lower its automotive tariff in accordance with the CEPT's 2002 schedule.[105] As the biggest cars and automotive parts producer in the region, Thailand sought compensation from Malaysia as Malaysia's delay in reducing its automotive tariff was an impediment to the successful implementation of AFTA 2002.[106] This dispute was never brought before any third-party dispute settlement forum and it seems that this dispute was settled by negotiations. This is indicated by Malaysia's gradual automotive tariff reduction.[107] However, it is not clear whether Thailand received any compensation from Malaysia.

These disputes were settled far away from the eyes of the public and negotiations conducted behind closed doors in numerous ASEAN meetings.[108] It is interesting to note that

[102] Davinia Filza binte Abdul Aziz, Gerardine Goh Meishan and Ernest Lim Wee Kuan, "Southeast Asia and International Law: July – December 2001", 5 *Singapore Journal of International and Comparative Law* (2001), pp. 833 – 835; and Lisa Toohey, "When 'Failure' Indicates Success: Understanding Trade Disputes between ASEAN Members", in Ross P. Buckley et al, *East Asian Economic Integration: Law, Trade and Finance* (Northampton: Edward Elgar Publishing Limited, 2011), p. 165.

[103] Executive Office of the President of the United States of America, "2004 National Trade Estimate Report on Foreign Trade Barriers", Office of the United States Trade Representative, 31 March 2004, p. 378.

[104] "Singapore Agrees to Compensation Package in Petrochem Dispute with Philippines," retrieved on 28 September 2014 from Plastermart website: <www.plastemart.com>.

[105] ASEAN Agreement on the Common Effective Preferential Tariff Scheme for the ASEAN Free Trade Area, 4th ASEAN Summit, Singapore, 28 January 1992, Art. 4.

[106] "ASEAN must Get Serious about AFTA", *Straits Times* (Singapore), 17 July 2001, p. 6.

[107] Executive Office of the President of the United States of America, "2004 National Trade Estimate Report on Foreign Trade Barriers", Office of the United States Trade Representative, 31 March 2004, p. 320.

[108] Please see the discussion in the next section on "ASEAN Meetings to Manage Disputes Arising from Interpretation or Application of ASEAN Instruments."

unlike intra-ASEAN political disputes, that handling or settlement of economic disputes arising from interpretation or application of ASEAN economic agreements is more amenable to pressure by other ASEAN States not parties to the dispute. Kenevan and Winden even argue that peer pressure is likely to be a particularly effective element in the ASEAN Free Trade Area due to the widespread consensus among ASEAN Member States to maintain rapid economic growth.[109] Though the CEPT is lacked concrete dispute settlement provision, it was designed to encourage peer pressure to advance economic integration.[110] The CEPT has been replaced by the ASEAN Trade in Goods Agreement in 2009.

ASEAN experience shows that when bilateral consultations failed to contain or resolve a dispute to the satisfaction of the parties, the disputing parties will only bring their dispute before a third-party dispute settlement if they can reach a mutual agreement to do so. This was the case with both the Sipadan-Ligitan and Pedra Branca disputes. All disputing parties to those disputes spent decades in bilateral negotiations and consultations before they finally gave their consent to bring their disputes before the ICJ.[111] Another instance is the Thai-cigarette dispute. While it was Philippines that initiated the consultation, and finally panel process under the WTO DSU against Thailand; this was done after years of bilateral consultation between the two States consistent with the 'ASEAN Way' of diplomacy.[112] In the dispute between Singapore and Malaysia before the WTO DSU in 1995, Singapore even withdrew its request because the dispute had been settled through bilateral consultation.[113] This shows that even when an intra-ASEAN dispute has been brought before a dispute settlement mechanism, the ASEAN way of diplomacy may still continue to run its course.

If the disputing parties cannot reach a mutual agreement to bring the dispute before a third-party dispute settlement system and the dispute is so politically charged that it stirs up the domestic populations within both States, often ASEAN States will implicitly avoid the dispute altogether. By avoiding the dispute, the disputing States implicitly agree not to escalate the dispute and not to initiate any discussion with regard to the dispute in any forum, including an ASEAN forum, for an indeterminate period of time. An example of this practice is the

[109] Peter Kenevan and Andrew Winden, "Flexible Free Trade: the ASEAN Free Trade Area", 34 *Harvard International Law Journal* 1 (1993), pp. 228 – 229.

[110] Ibid, p. 229.

[111] Indonesia and Malaysia had conducted negotiations to resolve Sipadan-Ligitan dispute since 1969 before they finally brought the dispute before the ICJ in 1997. Similarly, Singapore and Malaysia negotiation process to resolve the Pedra Branca dispute had taken decades since the emergence of the dispute in 1979 until a decision was taken by both parties to bring the dispute to the ICJ. Even after a decision was taken to take the Pedra Branca dispute before the ICJ in 1995, it took another nine years before the parties finally ratified the Special Agreement. See S. Jayakumar and Tommy Koh, *Pedra Branca: the Road to the World Court* (Singapore: National University of Singapore Press, 2009), pp. 35 and 41; Rodman R. Bundy, 'Asian Perspective on Inter-State Litigation', in Natalie Klein (Ed.), *Litigating International Law Disputes: Weighing the Options*, pp. 157 – 159.

[112] International Centre for Trade and Sustainable Development, "Appellate Body Upholds Ruling against Thailand in Philippines Cigarette Dispute", 15 *Bridges* 23 (2011), retrieved on 23 September 2014 from the website of ICTSD: <www.ictsd.org>.

[113] Malaysia – Prohibition of Imports of Polyethylene and Polypropylene, Dispute DS1.

Sabah dispute between Philippines and Malaysia from 1968 to early 1970s.[114] After two "cooling-off" period and years of suspension of all ASEAN meetings during this period, Malaysia and Philippines still could not agree on a solution or on whether to bring their dispute before a dispute settlement body. In 1976, Philippines finally agreed not to raise its claim over Sabah in any ASEAN forum. This gesture was welcomed by Malaysia and Malaysia indicated this by attending the First ASEAN Summit, the first meeting that it attended together with the Philippines. Since then the Sabah dispute has never been raised in any ASEAN meeting and Malaysia and Philippines have long since normalised their diplomatic relations,[115] it appears that they tacitly agreed to put this dispute on the backburner indefinitely.

Since the adoption of the ASEAN Charter, however, ASEAN has evolved from informality to a more formal form of diplomacy within the framework of the Charter. As explained above, in 2010 Cambodia requested the good office of the ASEAN Chair of that year, Indonesia, to mediate in the temple of Preah Vihear dispute between Cambodia and Thailand. The request was made based on Article 23 of the ASEAN Charter, and Thailand agreed with the request.[116] The acceptance set an unprecedented move of invoking the good offices of an ASEAN organ to mediate an intra-ASEAN dispute.

b. <u>ASEAN Meetings to Manage Disputes Arising from Interpretation or Application of ASEAN instruments</u>

The ASEAN Secretariat organises more than 600 regular meetings of ASEAN organs every year.[117] These include meetings at the ministerial level down to sectoral bodies' meetings. Regular meetings of ASEAN organs may constitute yet another method of ASEAN dispute management, especially the meeting of organs that are responsible for the implementation, coordination, monitoring, review and/or evaluation of ASEAN instruments. From 1967 to date, the ASEAN Secretariat has recorded eighty-nine ASEAN umbrella and independent agreements and more than one hundred derivative and amendment protocols.[118] Almost all of these agreements have specific ASEAN organs that are responsible for their

[114] Details of the dispute can be found in: Rodolfo C. Severino, *Southeast Asia in Search of an ASEAN Community: Insights from the Former ASEAN Secretary-General* (Singapore: Institute of Southeast Asian Studies, 2006), pp. 164 – 166; Donald E. Weatherbee, *International Relations in Southeast Asia: the Struggle for Autonomy* (2nd Ed.) (Singapore: Institute for Southeast Asian Studies, 2010), pp. 131 – 132; and Mely Caballero-Anthony, 'Mechanisms for Dispute Settlement: the ASEAN Experience', 20 *Contemporary Southeast Asia* 1 (1998), pp. 53 – 55.

[115] Ibid.

[116] Hao Duy Phan, "Institutional Design and Its Constraints: Explaining ASEAN's Role in the Temple of Preah Vihear Dispute", *Asian Journal of International Law*, p. 4, available on CJO 2014 doi:10.1017/S2044251314000113.

[117] Surin Pitsuwan, "ASEAN's Challenge: Some Reflections and Recommendations on Strengthening the ASEAN Secretariat", Report submitted to H.E. Marty Natalegawa, Chair of ASEAN Coordinating Council, 2011, p. 26.

[118] ASEAN Secretariat, ASEAN Legal Instruments, retrieved on 30 August 2014 from the official website of the ASEAN Secretariat: <http://agreement.asean.org/home/index/18.html>.

implementation, coordination, monitoring and/or review.[119] Pursuant to these agreements, these bodies are required to hold regular meetings *vis-à-vis* their functions and responsibilities.[120]

In practice, these meetings take place within the timeframe of the ASEAN Summit.[121] The agenda of these meetings usually consists of regular items and irregular items.[122] The agenda is firstly distributed to all Member States' delegations for approval and such approval has to be reached by consensus. During this process, a Member State may raise an issue/dispute to be included as an irregular item in a particular meeting. If they cannot reach a consensus on the inclusion of such item then the item will not be included in the agenda or, depending on the gravity of the issue/dispute raised, the heads of delegation may hold a private informal meeting among them to discuss the issue/dispute.[123]

Considering that these meetings are closed to the public and, in the case of informal meetings, the meetings' reports are not always made public, it is hard to determine the number of issues/disputes arising from the interpretation or application of any ASEAN agreement that have been included as irregular items in any of these meetings. However, the inclusion of irregular items in the agenda of a regular meeting of an ASEAN organ may serve as a viable option for Member States to bring a dispute over the interpretation and implementation of an ASEAN agreement. We have been told by various officials involved in these processes that many disputes are resolved in this way. As mentioned before, the dispute between Singapore and Philippines in over measures affecting petrochemical resins and certain plastic products and the dispute between Thailand and Malaysia over automotive tariff serve as notable examples of disputes resolved through this mechanism.

2. Preference to Utilise International Third-Party Dispute Settlement Mechanisms

While no dispute has ever been filed under any ASEAN dispute settlement mechanism, ASEAN States are not averse in resorting to international third-party dispute settlement. ASEAN States' culture in managing disputes requires the disputing parties to undergo rigorous bilateral consultation to resolve their dispute and only when they consider that the dispute cannot be resolved through consultation will they begin *another* consultation to

[119] Centre for International Law, 'Table of ASEAN Provisions on Compliance (1967 – 2012)', draft as of 26 June 2014.

[120] Ibid.

[121] ASEAN Charter, Art. 7(3).

[122] Regular items include deliberation on the implementation of ASEAN instrument or any other functions that a particular ASEAN organ is required to perform under a certain ASEAN agreement. Irregular items may include questions that arise from implementation of an ASEAN agreement. To the knowledge of the authors so far ASEAN has not adopted any Rules of Procedures or Standard Operating Procedures pertaining to regular meetings of ASEAN organs. All information in this Article in relation to the practice of ASEAN meetings are based on information provided by former government officers of ASEAN States who attended regular meetings of ASEAN organs. The interviews were conducted between 22 and 24 July 2014.

[123] Ibid.

reach a consensus to submit their dispute to a dispute settlement body. The Singapore-Malaysia's Polyethylene and Polypropylene trade dispute demonstrated that consultation was actively pursued as a preferred solution.

Case precedents show that when it comes to disputes over territorial sovereignty and trade, ASEAN States have become more open to dispute resolution before international judicial bodies. Cambodia and the Philippines even still maintain their optional clause declaration accepting the compulsory jurisdiction of the ICJ indicating their readiness to resort to ICJ to solve their dispute.[124] ASEAN States are also not averse from bringing non-ASEAN States to third-party dispute settlement or participate as a third party for both territorial sovereignty and trade disputes as shown in the South China Sea dispute under Annex VII of UNCLOS between Philippines and China[125] and ASEAN States involvement in WTO disputes before the WTO DSB.[126]

So why do ASEAN States prefer to bring their disputes to international third-party dispute settlement notwithstanding the possibility that it is also possible to bring their disputes before an ASEAN dispute settlement mechanism? For instance, in the Thai cigarette dispute, Philippines filed for consultation and eventually for panel establishment due to Thai fiscal and custom measures affecting cigarettes from the Philippines. Philippines claimed that Thailand administered these measures in violation of the GATT. Though ASEAN trade agreements at this time were not comprehensive, Philippines still could have brought its complaint for possible breach of the 1997 ASEAN Agreement on Customs before the EDSM. Similarly, territorial sovereignty disputes such as the Sipadan-Ligitan and Pedra Branca disputes, ASEAN States could also have brought these disputes before the TAC High Council and yet chose not to.

There are certain reasons why ASEAN States prefer to utilise extra-ASEAN dispute settlement mechanisms. First, prior to the entry into force of the ASEAN Charter, there was nothing in any ASEAN's instrument on dispute settlement mechanism, which gives exclusive jurisdiction to the respective mechanism to address disputes arising from ASEAN agreements or intra-ASEAN disputes. On the contrary, there is a standard clause in the TAC and the EDSM, which gives free reign to ASEAN States to decide on the mode and forum to settle their disputes.[127] Therefore, nothing obliges ASEAN States to bring their trade disputes or territorial sovereignty disputes before ASEAN dispute settlement bodies. While this was the case prior to the entry into force of the Charter, the Charter strengthens the jurisdiction of these mechanisms by making them applicable to all disputes arising from the

[124] International Court of Justice, Declarations Recognizing the Jurisdiction of the Court as Compulsory, retrieved on 26 August 2014 from the ICJ official website: <www.icj-cij.org>.

[125] Maritime Jurisdiction of the Philippines in the West Philippines Sea, Philippines v. China, 22 January 2013, Ad Hoc Arbitration under Annex VII of UNCLOS. The dispute is still pending, it is scheduled to receive China's counter-memorial on 15 December 2014.

[126] WTO Dispute Settlement, Dispute by Country/Territory, retrieved on 26 August 2014 from WTO official website: <www.wto.org>.

[127] Article 17 of the TAC and Article 1(3) of the EDSM.

interpretation and application of all ASEAN agreements. The Charter even goes so far to oblige Member States to bring *all* intra-ASEAN disputes, which do not arise from the interpretation and application of ASEAN agreements, to the TAC for settlement.[128] It will be interesting to know how this seemingly exclusive provision affects the dynamics of post-Charter intra-ASEAN disputes.

The second reason is related to the reputation, proven track record and/or higher enforceability of particular extra-ASEAN dispute settlement mechanisms. Compared to the untried ASEAN dispute settlement mechanisms, the option of bringing intra-ASEAN disputes to external fore seems to offer more assurance for the disputing parties. To start with, these mechanisms have a proven track record in resolving disputes on the basis of international law and they have built a body of case law, which might provide disputing parties with more assurance about the predictability of the outcomes.[129] Another aspect that may also be of crucial consideration of the States in this regard is the issue of costs. Especially for trade disputes, bringing trade disputes to the WTO will possibly cost less rather than bringing disputes to the EDSM. While the WTO DSU provides that the costs of a panel and secretariat will be covered by the budget of the WTO Secretariat, under the EDSM the disputing parties are basically required to pay for the costs of the panel, Appellate Body and Secretariat.

The third reason relates particularly to ASEAN trade agreements. It appears that in the period prior to the adoption of 2009 ATIGA,[130] ASEAN trade provisions were not as comprehensive as the provisions of the WTO. For instance, to our knowledge until the adoption of ATIGA ASEAN Free Trade Area, ASEAN did not have any provision on National Treatment. Therefore, it does not come as a surprise that ASEAN States preferred to bring their trade disputes to the WTO and this is what happened in the Thai cigarettes dispute. While various scholars have suggested that the Philippines could have resorted to the EDSM procedures,[131] it is pertinent to note that at this time the only relevant ASEAN instrument on goods was CEPT, which dealt with the reduction of tariff rates on certain products but the CEPT did not include a national treatment clause, unlike the GATT. Arguably a claim could have been brought under the ASEAN economic agreements for breaches of 1997 ASEAN Agreement on Customs, which in Article 5 incorporates the GATT Article VII on custom valuation. Of course, while this would have dealt with the Philippines' concern with regard to custom valuation and tariff rates, it would not have resolved the problem of behind the border measures by Thailand namely the excise tax and other non-tariff measures affecting

[128] ASEAN Charter, Art. 24(2).

[129] M. Lewis and P. van den Bossche, "What to do when Disagreement Strikes? The Complexity of Dispute Settlement under Trade Agreements", in S. Frankel and M. Lewis (Eds.), *Trade Agreements at the Crossroads* (New York: Routledge, 2014), p. 15; and Rodman R. Bundy, 'Asian Perspective on Inter-State Litigation', in Natalie Klein (Ed.), *Litigating International Law Disputes: Weighing the Options*, pp. 159 – 160.

[130] 2009 ASEAN Trade in Goods Agreement (ATIGA), 14th ASEAN Summit, Cha-am, Thailand, 26 February 2009. The ATIGA entered into force on 30 April 2010.

[131] Walter Woon, 'Dispute Settlement in ASEAN,' Conference Paper, 17 October 2011.

Philippines cigarettes.[132] Thus, beyond the institutional advantages, reputational gains and high compliance likelihood provided by bringing a dispute to the WTO there were clear legal advantages to do so as well.

The fourth consideration is with regard to the presence of the political content in some aspects of ASEAN dispute settlement mechanisms. The starkest example of this is the TAC's High Council, which is practically a political body[133] instead of an adjudicative one. An example of Member States' reluctance to utilise the TAC due to this consideration can be illustrated through the experience of Sipadan-Ligitan dispute. Prior to bringing the Sipadan-Ligitan dispute to the ICJ Indonesia suggested to Malaysia to bring the dispute to the TAC. However, the suggestion was met with a refusal. The main reason of Malaysia's refusal was because Malaysia feared that a number of ASEAN States would be partial to Indonesia's claim.[134] Malaysia's fear was a reasonable one since at that time Malaysia had territorial disputes with all of its immediate neighbours.[135] It might be perceived that due to these reasons the proceeding would be biased and highly charged with various political interests. By jointly submitting their disputes to the ICJ, ASEAN States had most likely agreed to separate the legal and political aspects of the disputes[136] hence delipoliticising the disputes and conceivably making its judgment more acceptable to both parties. It is also worth mentioning that depoliticisation also form as a part of ASEAN consideration to establish the EDSM.[137] Though practice suggests that they still prefer the even more depoliticised processes of the WTO.

3. The Lack of Capacity of ASEAN Organs vis-à-vis The Exercise of the Functions of ASEAN Dispute Settlement Mechanisms

Notwithstanding the similarities of the EDSM procedures with WTO DSU, there are significant capacity issues for the organs of the EDSM. Limited capacity and a lack of resources especially on the part of the ASEAN Secretariat constitute some of ASEAN's infamous constraints. While it is hard to determine how far these issues might affect Member States' decisions on dispute settlement mechanisms, these problems impose great constraints in the execution of ASEAN organs' functions in general, and dispute settlement in particular.

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[132] Thailand – Cigarettes (Philippines) (*Philippines v. Thailand*), WTO Dispute Settlement Understanding, Dispute DS371, Appellate Body Report, 17 June 2011.

[133] See discussion on the membership of TAC above.

[134] Rodolfo C. Severino, *Southeast Asia in Search of an ASEAN Community: Insights from the Former ASEAN Secretary-General* (Singapore: Institute of Southeast Asian Studies, 2006), p. 12.

[135] Ibid, p. 13.

[136] For discussion on depoliticisation of international disputes through international court see: JG Merrills, *International Dispute Settlement* (Cambridge: Cambridge University Press), 5th Ed., pp. 152 – 156.

[137] High-level Task Force on ASEAN Economic Integration, "Recommendations of the High-Level Task Force on ASEAN Economic Integration", retrieved on 24 September 2014 from the official website of the ASEAN Secretariat: <www.asean.org>.

a. The ASEAN Secretariat – Obligations and Implementation

The ASEAN Secretariat plays significant roles and functions under the ASEAN Charter and hundreds of ASEAN agreements. The Secretariat's functions under the EDSM only constitute a small part of the Secretariat's responsibilities, a fact that most observers tend to overlook when they compare the ASEAN Secretariat with the WTO Secretariat. Under the Charter alone, the Secretary-General of ASEAN and the Secretariat are responsible for, among other roles, facilitating and monitoring progress in the implementation of all ASEAN agreements, maintaining treaty records and depository of ratifications, monitoring Member States' compliance with decisions of ASEAN dispute settlement bodies, preparing for ASEAN meetings, administrative matters of the Association and providing an interpretation of the Charter upon the request of any Member States.[138] The ASEAN Secretariat is also charged with responsibilities specific to certain ASEAN agreements from all fields of cooperation namely political-security, economic and socio-cultural.[139] A number of the Secretariat's functions demand for a certain degree of legal expertise. For instance, the secretariat role as the Association's depository requires sound knowledge of the law of treaties and treaty management and its role to support the EDSM panel in conducting legal research requires in-depth knowledge on international and regional trade law and policy. However, despite these responsibilities the Secretariat has not been provided with the financial resources to match and the Secretariat's capacity is currently more limited particularly with regard to legal expertise.

The Secretariat has been facing constant problems of the lack of resources and a severe shortage of funds.[140] As the issue of the ASEAN DSM Fund has been discussed above, this part will focus solely on the ASEAN Secretariat's lack of resources to perform its administrative duties under the EDSM and lack of legal professionals to provide legal support for the EDSM panels and Appellate Body. As of May 2011, the ASEAN Secretariat employs about 260 staff including seventy-nine openly recruited from all Member States.[141] They are responsible for the execution of the Secretariat's administrative functions as well as other functions in all fields of ASEAN cooperation. To illustrate the overly-burdened workload of the Secretariat we take the example of the Secretariat's responsibility to administer all ASEAN meetings.[142] Every year, the Secretariat organises more than 600

[138] ASEAN Charter, Arts. 11, 27 and 51.

[139] For instance, under the 2009 ASEAN Political-Security Community Blueprint, the ASEAN Secretary-General, supported by the Secretariat, is responsible to conduct monitoring of the implementation of the Blueprint and to report back to the ASEAN Summit. Another example is the 2009 ASEAN Trade in Goods Agreement, which tasks the Secretariat to monitor and report on the implementation of the Agreement.

[140] Surin Pitsuwan, "ASEAN's Challenge: Some Reflections and Recommendations on Strengthening the ASEAN Secretariat", Report submitted to H.E. Marty Natalegawa, Chair of ASEAN Coordinating Council, 2011, pp. 26 and 34.

[141] Kavi Shongkittavorn, "ASEAN Secretariat Must be Empowered", *The Nation*, 21 May 2012, retrieved on 26 September 2014 from the news website: <www.nationmultimedia.com>. Most staff at the Secretariat are appointed by Member States.

[142] ASEAN Charter, Art. 11(3).

meetings of ASEAN organs, most of which are regular meetings, this means on average there are two ASEAN formal meetings every day all year round.[143] Considering the amount of work that these staff have to do to prepare for every meeting and the limited number of staff, it is hard to imagine how the ASEAN Secretariat could manage to perform even its administrative functions under the EDSM properly in the event of a dispute. By contrast, the WTO Secretariat employs more than 600 staff to handle *only* trade cooperation and disputes, albeit for a larger pool of members.[144]

Turning to the issue of a lack of legal professionals, the Legal Services and Agreements Division (LSAD) was initially established to provide legal advice on trade disputes and, consequently, assist the ASEAN Secretariat in executing its functions under the EDSM.[145] However, in reality the LSAD, being the only legal division in the ASEAN Secretariat, ends up taking on more responsibilities then those initially assigned to it. According to our latest interviews with the ASEAN Secretariat, the LSAD is at present also tasked with assisting the Secretariat in interpreting the Charter, giving legal opinions on matters outside of economic cooperation and issues pertaining to technical commercial agreements (e.g. consultancy, procurement and vendor agreements).[146]

In relation to the functions of the Secretariat under the EDSM, the LSAD basically mirrors the Legal Affairs Division (LAD) of the WTO but with an extra responsibility to assist the Appellate Body.[147] However, unlike its counterpart, the LSAD only consists of a very small team. While the LAD has seventeen lawyers specifically dedicated to provide legal advice to the WTO dispute settlement panels, other WTO bodies and WTO members,[148] the LSAD only employs in total five staff (two senior officers and three technical assistants)[149] to provide legal advice to the EDSM panels and Appellate Body and to various other ASEAN bodies, and at times, ASEAN Member States on various legal issues arising from ASEAN commitments.[150]

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[143] Surin Pitsuwan, "ASEAN's Challenge: Some Reflections and Recommendations on Strengthening the ASEAN Secretariat", Report submitted to H.E. Marty Natalegawa, Chair of ASEAN Coordinating Council, 2011, p. 26.

[144] WTO, "Overview of the WTO Secretariat", retrieved on 26 September 2014 from the official website of the WTO: <www.wto.org>.

[145] High-level Task Force on ASEAN Economic Integration, "Recommendations of the High-Level Task Force on ASEAN Economic Integration", retrieved on 24 September 2014 from the official website of the ASEAN Secretariat: <www.asean.org>.

[146] Interview with an ASEAN Secretariat official on 27 September 2014.

[147] This is because, unlike the WTO DSU that provides for a separate secretariat for the WTO Appellate Body, the EDSM does not provide for a specific secretariat to assist its Appellate Body hence it falls to the ASEAN Secretariat to assist both EDSM panel and Appellate Body.

[148] WTO, "Overview of the WTO Secretariat", retrieved on 26 September 2014 from the official website of the WTO: <www.wto.org>; and WTO, "Divisions", retrieved on 26 September 2014 from the official website of the WTO: <www.wto.org>.

[149] Ibid.

[150] High-level Task Force on ASEAN Economic Integration, "Recommendations of the High-Level Task Force on ASEAN Economic Integration", retrieved on 24 September 2014 from the official website of the ASEAN Secretariat: <www.asean.org>; and an Interview with an ASEAN Secretariat official on 27 September 2014.

When a dispute actually appears before the EDSM it is hard to imagine how the five staff of LSAD might cope.

b. The Senior Economic Officials Meeting (SEOM)

Under the Agreement Establishing the WTO, the DSB is a session of the General Council of the WTO on dispute settlement.[151] The DSB is consisted of representatives, usually ambassadors or equivalent, of all WTO Member States who are specifically appointed to deal with WTO issues. In contrast, not much is known about the SEOM on paper. The composition and qualification of the SEOM is unclear. However; secondary sources suggest that ASEAN States' representatives sitting in the SEOM are at the level of deputy-directors of international relations within the trade and investment ministries.[152] Members of the SEOM are not exclusively assigned to the SEOM; they hold other formal positions in other ASEAN organs and in their home countries. There is nothing in ASEAN instruments that describes the procedures of meetings of the SEOM.

The fundamental difference between the SEOM and the WTO DSB is that members of SEOM are not residents (exclusively assigned to the SEOM); they resemble the Ministerial Meeting of the WTO but with more frequent meetings. Since they are not residents, meetings of the SEOM do not by themselves evidence an internally developed culture similar to that of the WTO DSB. Members of SEOM do not spend any time in residence in Jakarta and only met each other briefly at twice a year. While this is obviously more than the Ministerial Meeting of the WTO, it is significantly less than the General Council and the DSB in Geneva.

All roads lead to the SEOM, complains are initiated by submissions to the SEOM, panels are composed by the SEOM, appeals to the Appellate are made to the SEOM, requests for arbitration for non-compliance are made to the SEOM and reports from the arbitration are also authorised by the SEOM. This is not dissimilar to the WTO DSB, indeed the adoption of negative consensus rule for the empanelment of a case, the adoption of reports and the authorisation of retaliations make the process even more like that of the WTO. It remains to be seen whether the practice will be more similar to that of the WTO DSB or because of the cultural preferences and more limited legal capacity in ASEAN that the SEOM will rely more on the ASEAN Way to resolve disputes. We predict that so long as capacity within ASEAN States and within the ASEAN Secretariat is limited, despite the clear legalised process found in the EDSM, SEOM would probably operate more by way of consultation and negotiation than by strictly relying on the letter of the law.

[151] Marrakesh Agreement Establishing the World Trade Organisation, 15 April 1994, Art. IV(3)

[152] Lisa Toohey, "When 'Failure' Indicates Success: Understanding Trade Disputes between ASEAN Members", in Ross P. Buckley et al, *East Asian Economic Integration: Law, Trade and Finance* (Northampton: Edward Elgar Publishing Limited, 2011), p. 175.

D. The Future of ASEAN Dispute Settlement Mechanisms

The fact that the EDSM has never been used in the past does not mean that it will not be used in the future. While we have suggested that the ASEAN Member States do not have significant confidence in an untried dispute settlement mechanism, this does not mean that they may not forced in the future to rely on the EDSM. We have referred to the culture in ASEAN preferring to manage dispute rather than litigate them. We have also provided examples of situations where the ASEAN States have been able to avail themselves of extra-ASEAN dispute settlement mechanisms such as those provided by the WTO. However, as ASEAN economies integrate more it is not hard to imagine a situation where the dispute is about a WTO plus commitment found in an ASEAN agreement such as a WTO plus tariff reduction or a WTO plus services market access concession where the ASEAN State would not be able to rely on the WTO system for a resolution of dispute. As suggested by some scholars, "the WTO dispute settlement mechanism may not be available to enforce deeper RTA commitments (WTO+) or commitments in areas not currently covered by the WTO (WTO-X)."[153] In such a situation, while the ASEAN States may well acknowledge and recognise the imperfection and limitations of the EDSM, they may have no choice than to refer the dispute for settlement within the EDSM. It will only be then that the EDSM will be tested.

We also believe that not all disputes, even on WTO+ and WTO-X issues need to be resolved at the State-to-State level. The ASEAN economic community also has the ASEAN Comprehensive Investment Agreement (ACIA) which allows investors to bring claims directly against States for breaches of the obligations found in the ACIA.[154] Thus, investors affected by measures which are in violation of National Treatment clause of the ACIA may prefer to bring their claims directly against the State for this rather than seeking their home State's espousal of their claims. Indeed, the one intra-ASEAN case which finally resulted in a third party adjudicated award was the well-known case of *Yaung Chi Oo Trading Pte. Ltd. v. Myanmar*, which involved a Singapore incorporated investor bringing claims against the Myanmar Government for, among others, an expropriation of the investor's properties and assets in Myanmar.[155]

Finally, some domestic jurisdictions in ASEAN have become more receptive towards submissions that suggest that international treaties are directly applicable in those jurisdictions. The acceptance of claims on violations of international human rights by courts

[153] Claude Chase, Alan Yanovich, Jo-Ann Crawford and Pamela Ugaz, "Mapping of Dispute Settlement Mechanisms in Regional trade Agreements – Innovative or Variations on a Theme?", WTO Economic Research and Statistic Division, Staff Working paper ERSD-2013-07 (10 June 2013), p. 8.

[154] ASEAN Comprehensive Investment Agreement, 14th ASEAN Summit, Cha-am, Thailand, 26 February 2009, Art. 29.

[155] 42 ILM 540 (2003).

in Indonesia, Malaysia and Philippines are notable examples of this.[156] We predict that the trend in these jurisdictions will lead to arguments and maybe even greater acceptance of arguments that ASEAN agreements are directly applicable in these jurisdictions. If so, it is likely that aggrieved individuals would choose the most efficient mechanism to resolve their disputes with ASEAN governments, which in this case, could include recourse to the domestic courts of some ASEAN jurisdictions.

With that said, we believe that the creation of these State-to-State dispute settlement mechanisms in ASEAN is not in vain. These mechanisms provide a tool kit or options for individuals and States to enforce bargains made by ASEAN States. The fact that they may not be directly used belies their value in putting pressure on the ASEAN States during dispute management negotiations to resolve a dispute. The more effective mechanism is and the more likely that a party that is aware that it is in breach of an obligation, the more likely that party will be receptive to a reasonable solution or compromise. Under the shadow of litigation and third-party adjudication, parties are often more conciliatory. What is important is for all parties to be aware and knowledgeable of their obligations, the options for the enforcement of those obligations and the need to promote the rule of law within ASEAN. As one of the authors of this paper once said in a previous paper: "Education and the rule of law are great equalizers"[157]

[156] Law No. 37 of 1999 on Human Rights, Art. 7 (for Indonesia); High Court of Malaysia, *Noorfadilla binti Ahmad Saikin v. Chayed bin Basirun and Ors (2012)*, 1 CLJ 769; and Special Civil Actions of the Rules of Court of the Philippines, Rule 65.

[157] Michael Ewing-Chow, Goh Wei Sien Alex and Akshay Kolse Patil, "Are Asian WTO Members Using the WTO DSU 'Effectively'?", 16 *journal of International Economic Law* 3 (2013), p. 705.