

***If You Build It They still will not Come:
ASEAN Trade Dispute Settlement Mechanism***

**International Trade Tribunals: Legitimacy
PluriCourts**

Geneva, Switzerland, 17 – 18 October 2014

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The Map of ASEAN



The Association of Southeast Asian Nations (ASEAN)

- Established in 1967 after the *Konfrontasi*
- However it was only in 2007 that it adopted its constituent document, the ASEAN Charter.
- ASEAN is in a **transition period from** a group that has always been regarded to operate based on informal understanding and impose no binding obligation **to** an organisation based on clear legal obligations
- Setting up its own dispute settlement mechanisms is a part of this legalisation effort (the Charter, Arts 24 – 25 and 27)
 - 2004 EDSM
 - 2010 DSMP
 - 1976 TAC
 - The ASEAN Summit

Buchanan and Keohane on Legitimacy

Substantive criteria of global governance institutions

1. Minimal moral acceptability;
2. Comparative benefit ; and
3. Institutional integrity

The more of them an institution satisfies, and the higher the degree to which it satisfies them, the stronger its claim to legitimacy

Overview

1

**ASEAN dispute settlement
mechanisms**

2

Why are they not used?

3

Will they ever be used?

ASEAN Dispute Settlement Mechanisms

2004 EDSM: Process – WTO Plus (faster)

Duration	Process and Action
60 days	Consultations
45 days	SEOM establishes panel and disputants appoint panelists
60 – 70 days	Panel assessment and reports to be submitted to the SEOM
30 days	The SEOM to decide on the adoption of the panel's report
60 – 90 days	The EDSM Appellate Body – Appeal proceedings and submission of report to the SEOM
30 days	The SEOM to decide on the adoption of the Appellate Body's report
60 days	Compliance by disputing parties to the report's findings and recommendations (may decide on a longer period)

2004 EDSM (*Continued*)

- Covers disputes arising from interpretation or application of ASEAN economic agreements, including trade disputes;
- The SEOM applies **Negative Consensus**;
- *Ad hoc* panels and a standing Appellate Body;
- Reports of panels and the Appellate Body shall be accepted unconditionally;
- ASEAN DSM Fund:
 - Covers expenses of panels, Appellate Body and Secretariat
 - All ASEAN States contribute equally to the initial sum for the Fund
 - Any drawdown will be replenished by the parties to a dispute
- Secretariat functions – ASEAN Secretariat;
- Provides for compliance adjudication process; and
- Provides temporary measures.

2004 EDSM – Issues (*Continued*)

1. Limited timeframe for the adjudication process
 - Less than 11 months for the whole process;
 - Panel has effectively 40 days after the appointment of panelists;
 - No grace period for parties to consider the panel's report
2. ASEAN DSM Fund
 - Equal contribution = lowest offer by a an ASEAN State
 - The obligation to replenish the Fund, may be a deterrent factor
 - Method of panels and the Appellate Body on expenses apportionment
3. General lack of resources at Secretariat (*more below*)

Other ASEAN Dispute Settlement Mechanisms

- **1976 TAC**
 - Covers disputes which do not concern the interpretation or application of any ASEAN instrument.
 - High Council: political body, non-binding decision, consensus decision-making.
- **2010 DSMP (*yet to enter into force*)**
 - Covers disputes that do not fall within the ambit of TAC and EDSM and disputes that arise from the interpretation and application of the ASEAN Charter
 - Arbitration may be requested by an aggrieved party after consultation failed and a panel may only be established based on consensus of all disputing parties. Unresolved disputes will go to the ASEAN Summit
- **ASEAN Summit – Unresolved Disputes**
 - No decision-making mechanisms available for the ASEAN Summit to resolve an unresolved disputes
 - If consensus is to be used, the Charter is silent on how the Summit should make its decision where consensus cannot be reached.

Intra-ASEAN Disputes do Exist

Dispute	Parties	Period	Forum
Temple of Preah Vihear	Cambodia v. Thailand	2010 – 2013	ICJ
Thailand Cigarettes	Philippines v. Thailand	2008 – 2011	WTO DSB
Land Reclamation	Malaysia v. Singapore	2003	Ad hoc tribunal under UNCLOS
Pedra Branca	Malaysia/Singapore	2003 – 2008	ICJ
Sipadan-Ligitan	Indonesia/Malaysia	1998 – 2002	ICJ
Polyethylene and Polypropylene	Singapore v. Malaysia	1995	WTO DSB
Temple of Preah Vihear	Cambodia v. Thailand	1959 – 1962	ICJ

Why are They not Used? Some Pathologies

Some Pathologies

1. ASEAN States' preference for managing intra-ASEAN disputes by negotiations
2. Preference to utilise dispute settlement mechanisms outside of ASEAN mechanisms
3. Uncertainty about ASEAN organs

1. ASEAN States' Preference for Managing Intra-ASEAN Disputes by Negotiations

'ASEAN Way' of diplomacy

- Key features: consultation and consensus in decision-making, non-confrontation, informality, closed-door policy and non-involvement of third party
- Intra-ASEAN trade disputes are likely to be solved through negotiations:
 - Measures against petrochemical products (alleged violations of the CEPT-AFTA), Singapore v. Philippines (2002)
 - Measures against cars and automotive products (alleged violation of CEPT-AFTA), Thailand v. Malaysia (2002)
- If negotiation failed?
 - Attempt to obtain consensus for third-party adjudication: *Sipadan-Ligitan case and Pedra Branca case*.
 - Implicitly avoid the dispute altogether: *Sabah dispute (Philippines & Malaysia)*

Negotiations (continued)

Regular Meetings of ASEAN Organs on implementation, monitoring or review of ASEAN agreements, including trade agreements

- Issues on interpretation or implementation of an ASEAN instrument:
 - ✓ Potential irregular items in a meeting's agenda
 - ✓ Subject to approval by all States' representatives
 - If accepted, negotiations will commence
 - If not, a closed door limited meeting will commence
- Intra-ASEAN disputes such as those concerning alleged violations of CEPT-AFTA in 2002 were resolved through the use of ASEAN organs' regular meetings.

2. Preference to Utilise DSM outside of ASEAN DSM

- No exclusive jurisdiction for ASEAN DSM
- Proven track record in resolving disputes on the basis of international law
- Costs and expenses
- Incomprehensive trade provisions – ASEAN free trade framework

3. Uncertainty about ASEAN Organs

- **The ASEAN Secretariat**
 - Handles overall administrative, monitoring and reviewing functions of ASEAN and most ASEAN agreements
 - Lack of resources and severe shortage of funding
 - Lack of legal professionals
- **The Senior Economic Officials Meeting (SEOM)**
 - Members are non-residents
 - SEOM does not exclusively deal with free trade issues
 - SEOM practice – Unknown (will it be similar to the WTO v. reliance to the ASEAN Way of consultation and negotiation?)

Will they ever be used?

The Future of ASEAN DSM

1. WTO + obligations (after long-drawn negotiations)
2. ACIA investor-State dispute mechanism
3. Domestic implementation through direct application of international treaties

Thanks for Your Attention

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