

# THE ANALYSIS OF TENDENCY ON CHOICE OF FORUM IN THE SETTLEMENT OF DISPUTE OF INTERNATIONAL TRADE AMONG ASEAN COUNTRIES

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## **Abstrak**

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Praktek penyelesaian sengketa antara Indonesia dan Vietnam dalam sengketa of safeguard on iron or steel products secara tidak langsung terlaksana atas dasar keambiguan norma interpretasi ASEAN Charter 2008 yang menyebabkan pilihan choice of forum ASEAN sebagian besar tertuju kepada World Trade Organization Dispute Settlement Understanding (WTO DSU) tanpa melalui penyelesaian sengketa regional yang tersedia berdasar the ASEAN Protocol on Enhanced Dispute Settlement Mechanism (EDSM) terlebih dahulu. Teori yang digunakan untuk menjawab isu hukum tersebut ialah Teori Efektivitas Hukum oleh Berl Kutchinsky. Perbedaan pengaturan statuta antara EDSM dan WTO DSU menjadi indikator penting bagi negara anggota ASEAN untuk mempertimbangkan choice of forum. Walau prosedur yang dimiliki protokol EDSM sama seperti WTO DSU, negara anggota ASEAN berpatokan pada efektivitas prosedur dalam menyelesaikan sengketa. Efektivitas tersebut dilihat dari intensitas penggunaan mekanisme tersebut, pihak-pihak yang ikut serta sebagai panel, peranan DSB dan SEOM, maupun pengaturan pendukung seperti adanya perlakuan khusus yang disediakan WTO DSU bagi negara yang kurang berkembang

**Kata Kunci:** ASEAN, Pilihan Forum, Pemahaman Penyelesaian Sengketa

## **Abstract**

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*The practice between Indonesia and Vietnam in disputes of safeguards on iron or steel products is indirectly implemented on the basis of ambiguity of the 2008 ASEAN Charter interpretation norms related to dispute resolution mechanisms led to the World Trade Organization Dispute Settlement Understanding (WTO DSU) without going through regional dispute resolution available based on the ASEAN Protocol on Enhanced Dispute Settlement Mechanism (EDSM). The difference in statute arrangements between the dispute resolution mechanisms by EDSM and the WTO DSU are important indicators for ASEAN member countries to consider the choice of forum. Thus, even though the procedure by EDSM is the same as the procedure by the WTO DSU, ASEAN member countries rely on the effectiveness of the procedure. The effectiveness can be seen from the intensity of the use of the mechanism, the parties participating as a panel, the role of the DSB and SEOM, as well as the special treatment provided by the WTO DSU for less developed countries.*

**Key words:** ASEAN, Choice of Forum, Dispute Settlement Understanding

## INTRODUCTION

### 1. Research Background

ASEAN is a rules-based international organization based on the rules. It is supported by the form of the ASEAN Charter in 2008 that was established as a legal framework for ASEAN as rules-based organization. A rules-based organization entails a mechanisms of dispute settlement as one of the basic tools to fulfill the rights and obligations of the member states. The mechanism of dispute settlement is crucial to resolve disputes between members of ASEAN.

The establishment of dispute settlement mechanisms in ASEAN was first mentioned in the ASEAN 1<sup>st</sup> Conference (KTT I ASEAN) in Bali in 1976. At that time, ASEAN members agreed to sign the Declaration of ASEAN Concord and Treaty of Amity and Cooperation in South East Asia. As mentioned in Article 14 and 15 of Treaty of Amity and Cooperation in South East Asia, the High Councils was established as one of the mechanisms of dispute settlement in ASEAN. A dispute relating to specific schemes in ASEAN would be settled based on mechanisms and procedures that have been set up in its schemes or regulation, while the dispute which is not related to any kind of interpretation or application of ASEAN schemes or regulation will be solved peacefully by the Treaty of Amity and Cooperation and the implementing rules. If it is not specifically regulated, then the

dispute related to interpretation or application of agreements on economic matters in the ASEAN will be settled based on the ASEAN Protocol on Enhanced Dispute Settlement Mechanism (EDSM). Rodolfo C. Severino in the journal of "South East Asia Background Series No. 10" mentioned that the creation of the ASEAN dispute settlement mechanisms show seriousness of ASEAN to improve security, peace, and political stability in Southeast Asia. The mechanism in resolving the dispute between members of ASEAN through the process of negotiation and merits another good, clear out of tune with the aim of ASEAN to ensure that the settlement of disputes between members of ASEAN should be resolved in a peaceful manner.<sup>1</sup>

Basically ASEAN has developed four key mechanisms of dispute settlement, namely implementation Amity and Cooperation (TAC), 1976, Protocol for Dispute Settlement Mechanism (EDSM) 2004, ASEAN Charter, and ASEAN Way. Until now, both the High Council of the TAC and EDSM has never been used by member states in resolving the dispute. On the other hand, the dispute going on between ASEAN member states in the field of trade would be resolved through the World Trade Organization (WTO) Dispute Settlement Understanding (DSU). Given the importance of the rules impacts both in the field of economic or other sectors, it is not surprising if a member of the WTO does not always agree with the interpretation or

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1 Rodolfo C. Severino, *South East Asia Background Series No.10:ASEAN*, (Singapore: ISEAS Publication, 2008), p.12

application of this regulation. Disputes may occur when a country decides a certain trade policy as opposed to its commitment in WTO, or when a country makes an entry barrier to others which related to disadvantage policy which could harms the others.<sup>2</sup> That is why the WTO DSU was established and becomes a ‘trend’ in the settlement of international trading dispute choice of forum between ASEAN countries. One of the examples of the dispute over trademark intra ASEAN which is not resolved in advance through the ASEAN dispute settlement is the dispute between Indonesia and Vietnam about Safeguard on Certain the Iron or Steel Products.<sup>3</sup> As for disputes over trade between Malaysia and Singapore about Prohibition of Imports of Polyethylene, the dispute between Indonesia and Vietnam was immediately be resolved through the WTO DSU without going through a series of alternative dispute settlement has been provided internally by ASEAN.

The practice of the dispute settlement of trade between Indonesia and Vietnam in this case is not directly caused by the *vague van normen* in interpreting the article of ASEAN Charter 2008 relating to the policy of dispute settlement mechanism between ASEAN members. The general principle of ASEAN dispute settlement mechanism is stated in the Article 22 of ASEAN Charter 2008 as follows:

“Member states shall endeavor to resolve peacefully all dispute in a

timely manner through dialogue, consultation, and negotiation.”

The main problem is that there is uncertainty or vagueness in the article, especially with the phrase ‘resolve peacefully’ which does not mention any authority that will be responsible to resolve the dispute between members state of ASEAN – whether it is must be settled by the Secretary-General ASEAN or by the WTO DSB. In practice, ASEAN Charter cannot provide certain choice of forum for Indonesia and Vietnam as members of both the ASEAN and the WTO. The dispute settlement in the case of safeguards on certain iron or steel products should have been settled by dispute settlement mechanism by ASEAN based on its Regional Trade Agreement (RTA) which binds regionally between ASEAN members.

Based on the matters discussed as mentioned above, the writer found a legal issue in the form of norm vagueness in the ASEAN Charter related to the choice of forum dispute settlement mechanism between member states of ASEAN. Therefore, the issue discussed in this article is **“The Analysis of Trend on Choice of Forum in the Settlement of Dispute on International Trade among ASEAN Countries.”**

## 2. Problem Identification

What are the differences between World Trade Organization Dispute Settlement Mechanism (WTO DSU) and Regional

2 Peter van den Bossche, *The Law and Policy of the World Trade Organization*, (New York: Cambridge University, 2005), p.173

3 WTO, “Indonesia — Safeguard on Certain Iron or Steel Products”, [https://www.wto.org/english/tratop\\_e/dispu\\_e/cases\\_e/ds496\\_e.htm](https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds496_e.htm), accessed 15 January 2019

Trade Agreement (RTA) Dispute Settlement Mechanism in ASEAN?

### 3. Research Method

The type of this research paper is a normative legal research (doctrinal legal research), as the issue discussed is the vagueness of the norm regarding rules in the ASEAN Charter 2008 on dispute settlement mechanism between ASEAN member states. According to Hartono Sunaryati, a legal normative research is a research which utilizes literature study as the concept in order to collect legal materials. The purpose of normative legal research is to explain how the law works on a particular matter, using various secondary data such as regulations, legal theory, and also experts' opinion.<sup>4</sup>

There are three legal materials in this article. The types of legal material that are used this paper are primary, secondary, and tertiary legal materials. Primary legal materials are legally binding and consisting of regulations or statutes that is associated to the object of the research. Primary legal materials in this paper consists of ASEAN Charter 2008, General Agreement on Trade and Tariffs (GATT), WTO panel report No.WT/DS496/AB/ about Safeguard on Certain Iron or Steel Products, ASEAN Protocol on Enhanced Dispute Settlement Mechanism (EDSM), and World Trade Organization Understanding on Rules and Procedures Governing the

Settlement Disputes (WTO SDU). Secondary legal materials are legal materials which are not legally binding but it supports the primary legal materials in explaining the legal issues in the research. These materials consists of expert opinions, books, journal articles and papers about ASEAN dispute settlement mechanism. Tertiary legal materials are the ones that supports primary and secondary legal materials relating to the issue discussed in this article which includes reliable sources on the internet and the Great Indonesian Dictionary (*Kamus Besar Bahasa Indonesia*).

The legal materials were collected by card system and snowball collecting technique. According to Soerjono Soekanto, a card system is done by making direct quotes from the book, articles, and regulations that are concerned to the problems which are studied by. Cards that need to be prepared are cards used as notes of the source from which the data are obtained (the name of author or writer, the title of the book or article, press, pages, and so on).<sup>5</sup>

Meanwhile, according to I Made Pasek Diantha, a snowball technique is a technique that works similarly to the card system. The difference is that this technique is not based on the hierarchy of legislation but based on the concept of law that is required for the discussion and description in the second, third and fourth chapter of a paper or article. The snowball technique can be applied at secondary

4 C.F.G. Hartono Sunaryati, *Penelitian Hukum di Indonesia Pada Akhir Abad Ke 20*, (Bandung: Alumni, 2006), p.140.

5 Soerjono Soekanto, *Penelitian Hukum Normatif*, (Jakarta: Rajawali Pers, 2011), p. 60.

legal material, especially in the form of book of law which has listed bibliography or the literature on it.<sup>6</sup>

In this article, the analysis of the legal materials is done by the prescriptive analysis technique. The purpose of prescriptive analysis technique is to provide argument as the result of the study, especially on the question of what is right according to the law concerning the facts or issues discussed in the study.<sup>7</sup>

## DISCUSSION

### 1. The Differences on the Regulation between World Trade Organization Dispute Settlement Mechanism (WTO SDU) and Regional Trade Agreement (RTA) Dispute Settlement Mechanism in ASEAN

International dispute settlement has long been perceived as something more akin to a diplomatic and political endeavor, being aspirational in character. The aspirational nature of international dispute settlement is visible from the excessive focus in the history of international dispute settlement, both in politics and scholarship, on the exclusive question of whether there is a need for a compulsory method to settle disputes.

Supporters considered that there was such a need, inspired by a sense of justice for those states whose rights had been breached, by the idea that dispute settlement was necessary to avoid recourse to war or, by the less philanthropic idea, that dispute settlement or more broadly, enforcement, was necessary in order for international law to be considered law.<sup>8</sup>

ASEAN, as the regional organization of Southeast Asia, does not have any 'strong' organ as its counterparts in Europe do, which can adopt laws that are legally binding on the member states. Meanwhile, ASEAN only emphasizes the main principle to respect and honor the sovereignty and the independency of each of the member states. It also avoids to be involved in any domestic affairs of its members. Besides, ASEAN has encouraged the implementation of the rule of law, the good governance, the principles of democracy and constitutional governance. This gives the ASEAN Secretary General limitations in giving recommendation, guidance or choices in the ASEAN fora. The ASEAN Charter itself does not give a certain authority to the Secretary General to order or to force the member states to settle the dispute through ASEAN fora. The trend of the choices of dispute settlement proves that ASEAN has little power to make its member states

6 I Made Pasek Diantha, *Metodelogi Penelitian Hukum Normatif dalam Justifikasi Teori Hukum*, (Jakarta: Prenamedia Group, 2017), p. 149

7 Dr.Mukti Fajar ND., *Dualisme Penelitian Hukum Normatif dan Empiris*, (Yogyakarta: Pustaka Pelajar, 2017), p. 184

8 Eric De Brabandere, "International Dispute Settlement from Practice to Legal Discipline", *Leiden Journal of International Law Vol 31 Issue 3*, (2018): 1



comply to the mechanisms. The Secretary General once asked advices from the United Nations to provide solutions to the failure of the Secretary General in optimizing their dispute settlement mechanism. However, this measure did little favor to ASEAN's needs to improve itself as an organization, which is to have more powerful and effective dispute settlement mechanisms. In fact, there are differences in ASEAN members' intention and motivation in improving the ASEAN organization, considering their differences in political systems and culture which also influence their choices to settle disputes.

The jurisdiction of the governing law and the choice of forum need not be the same, and parties may take advantage of the benefits of Alberta's substantive laws while submitting to the procedural laws of another jurisdiction. However, in most cases, the parties in disputes select a governing law and forum from a single jurisdiction. While the words "attorn" and "submit" are often used in conjunction in a jurisdiction clauses, Canadian statutes and international treaties commonly refer to "submitting" to a jurisdiction. Furthermore, the use of "attorn" originated from a real property context and can confuse international parties. When choosing a forum, the parties may submit to either exclusive or non-exclusive jurisdiction. Exclusive jurisdiction means that an action can be commenced only in the chosen forum. Meanwhile, non-exclusive jurisdiction provides some flexibility to the parties as it authorizes more than one jurisdiction to hear the action. Parties intending exclusive

jurisdiction must clearly indicate it in the clause.

The courts may not enforce an exclusive jurisdiction provision if a party can demonstrate a strong cause for an alternate forum, such as the convenience of the forum, the governing law agreed upon by the parties, the strength of jurisdictional connections of the parties and whether there are public policy reasons to deny the forum. In cases where the parties reside in different jurisdictions, consider adding a provision to this clause appointing an agent for each party for service of process in relation to any disputes arising under the agreement. There is an argument to be made, both with respect to the choice of law and the choice of forum, that this wording will only cover claims based in contract and will not automatically cover a claim based in tort. If tort claims are intended to be covered, it may be advisable to include additional wording to ensure that they are covered.

A forum selection provision allows the parties to designate one or more courts which will adjudicate a dispute between the parties. Basically, the parties convey to those courts' personal jurisdiction over the parties with respect to controversies that relate to the agreement. This provision is distinct from a choice of law provision which, as discussed above, designates which state's substantive law will govern disputes. When considering which forum should be applied in litigating any dispute arising under an agreement, the parties must consider several factors:

1. First, the geographical convenience of litigating in a particular jurisdiction is often an important issue. Quite simply, a company generally prefers to send witnesses, documents, and otherwise handle litigation in a place that is geographically convenient.
2. There are also some benefits to litigating in a forum that is well known to the party involved in litigation and its counsel. This is the so-called “home court advantage” where attorneys are more familiar with the local law and courts in the particular forum. One aspect of this advantage is knowing which courts tend to decide in favor of which issues. This tendency can be the result of the particular judge overseeing the proceeding or of the type of jury likely to be selected in that forum.
3. Additional consideration should be used as to whether federal or state courts are better able to handle a dispute in the most favorable manner and whether jurisdiction should be permissive or mandatory as discussed below.

The ratio of the choice of forum through WTO as a trend can be seen in the number of disputes that have been settled for almost 23 years. To date, WTO has settled almost 500 cases involving 104 members.<sup>9</sup> This number is higher compared to the number cases that have been settled by GATT in 47 years, which is about 300 cases, and also

compared to the International Court of Justice (ICJ) which has settled 162 cases in 23 years. If it is compared to the dispute settlement mechanism of EDSM, the EDSM has never been used by the ASEAN member countries since it was formed in 2004. Moreover, if it is compared to the total number of the usages between protocol of EDSM to WTO DSU, the ratio would reach a ratio of 0 in every 500 disputes (0:500). Some of the international trading disputes involving ASEAN members that have been settled through WTO DSU are the case of safeguard on certain iron or steel products Indonesia and Vietnam, the case between Malaysia and Singapore, and even another trading cases that involves a member state and a non-member such as Indonesia and the United States.

#### **a. The Dispute Settlement of the Safeguard on Certain Iron or Steel Products Case between Indonesia and Vietnam by WTO**

The most crucial source of the international trade law is the agreement or contract that made by the traders themselves. Contract is a law regulating the parties and it is valid for both sides (*pacta sunt servanda*). The main procedure under the Chapter 4 of the WTO DSU regulates that prior to taking the dispute to the next stage, the parties must consult each other. If the consultation is not successful, as in the Indonesia and Vietnam case, the parties can submit a request for the formation of a

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<sup>9</sup> Kementerian Perdagangan RI, , *Mekanisme Penyelesaian Sengketa WTO dan Sengketa-Sengketa Dagang*, (Jakarta: Kementerian Perdagangan RI, 2017), hlm.8

panel. The panel is tasked with providing an objective assessment of the dispute submitted including the assessment of the facts found in the dispute. The panel members in the Indonesia vs. Vietnam case were Australia, China, the European Union, India, Russian Federation, Ukraine and the United States. In the WTO DSU, parties who object to the panel's assessment can appeal to the appellate review stage, as done by Indonesia in this case.

In the panel's report, as circulated to the WTO members on 18 August 2017, the panel found that Indonesia did not enforce safeguard measures that were following the understanding as Chapter 1 of the Agreement on Safeguards in the galvalume importing. Furthermore, the panel also found that there is an inconsistency between Indonesian regulations and the treatment of Most-Favored Nation (MFN) in Chapter I: 1 of GATT 1994. The panel found that there was no legal basis for linking state statements complainant countries under Agreement on Safeguards and GATT 1994 with specific tasks as a safeguard measure. The panel stated that Indonesia did not acted in accordance with Chapter I paragraph 1 of GATT 1994 which states:

“With respect to customs duties and charges of any kind imposed on or in connection with importation or exportation or imposed on the international transfer of payments for imports or exports, and with respect to the method of levying such duties

and charges, and with respect to all rules and formalities in connection with importation and exportation, and with respect to all matters referred to in paragraph 2 and 4 of Article III, any advantage, favour, privilege or immunity granted by any other country shall be accorded immediately and unconditionally to the like product originating in or destined for the territories of all other contracting parties.”<sup>10</sup>

Based on the panel decision No. *WT/DS496/AB/R*, the application of specific task in galvalume imports from all countries, except 120 registered countries in Indonesia Minister of Finance's Regulations No. 137.1/PMK.011/2014, was not consistent with the Most Favoured Nation (MFN) in Chapter 1 GATT 1994, then The Appellate Body of the WTO recommended Dispute Settlement Body WTO to ask Indonesia to revise the Minister Regulation in accordance with the Chapter 1 of GATT 1994.

The choice of forum that has been determined by Vietnam and Indonesia to settle the dispute in the WTO forum in itself does not violate the provisions in the ASEAN Charter. Chapter 22 of the ASEAN Charter does not clearly state whose authority it is to settle the dispute if it occurs within ASEAN. In other words, there are flexibilities in the dispute settlement mechanisms for the member states. The member states does not have to prioritize the forum of settlement available under the auspices of ASEAN or the ones under

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10 Article I:1 The General Agreement on Tariffs and Trade 1994



their regional agreement (Regional Trade Agreement). For example, in the Indonesia vs. Vietnam case, both parties actually has consulted the Secretary General on the choices of dispute settlement. However, both parties finally resorted to the WTO forum, when this measure actually has no basis in the ASEAN Charter but is in accordance with the WTO DSU and the GATT. This also considers the fact that all ASEAN member states are also WTO member states, on the contrary, not all WTO member countries are ASEAN member states. Therefore, Vietnam and Indonesia are both bound by the regulations of the ASEAN as well as the WTO, which is the largest trade organization in the world that has the authority to make decisions on multilateral trade policies that occur among its member states.

Berl Kutchinsky argues that “a strong legal consciousness is sometimes considered the cause of adherence to law (sometimes it is just another word for that) while a weak consciousness is considered to cause of crime and evil.”<sup>11</sup> Indonesia and Vietnam’s choice of forum as ASEAN member states is not fully wrong according to Kutchinsky’s theory of law effectiveness. Vietnam and Indonesia are bound to be aware of the EDSM, but this does not automatically mean that the parties are familiar with the procedures. Consequently, they chose WTO mechanism instead. This is consistent with Kutchinsky as he states,

“knowledge about law is neither a necessary nor a sufficient condition for conformity to the law.”<sup>12</sup> There is no guarantee that the existing regulations, even if it is also known to the public, will be complied by them. It is the same as in dispute settlement among ASEAN member states, especially in the Indonesia vs. Vietnam case. Despite the available mechanisms provided by both EDSM and WTO DSU, this case suggested that the final choice on the settlement lies on the disputing parties.

#### **b. The Comparison of Dispute Settlement Mechanism by the ASEAN Protocol on Enhanced Dispute Settlement Mechanism (EDSM) and World Trade Organization Dispute Settlement Understanding (WTO DSU)**

The Protocol is implemented by ASEAN Senior Economic Officials Meeting (SEOM) which establishes Panels, adopts reports and authorizes counter measures. The EDSM also includes the Appellate Body of seven persons established by the ASEAN Economic Ministerial Meeting (AEM), similar to the dispute settlement mechanism under the World Trade Organization (WTO) which also comprises Panels and Appellate Body (Annex 2 of the WTO Agreement: Understanding on Rules and Procedures Governing the Settlement of Disputes) with some specific modifications.

11 Otje Salman, *Beberapa Aspek Sosiologi Hukum*, (Bandung: Alumni, 2012), hlm.53

12 Soerjono Soekanto, *Kesadaran Hukum dan Kepatuhan Hukum*, (Jakarta: CV Rajawali, 1982) , hlm.141

Under the EDSM, the DSM is initiated by a request for consultation by an AMS. Such consultation is a mandatory and prerequisite step to provide an opportunity for the parties to discuss the issue towards a mutually acceptable solution before entering litigation processes, and should be done within sixty days from the receipt of the request unless the parties agree otherwise. If the consultation fails to settle the dispute in such time frame, the matter shall be raised to the SEOM by a request from the complaining party to establish a panel. The SEOM shall then establish a panel unless the SEOM decides otherwise by consensus (the so-called “reverse consensus.”) The recourse under the EDSM, however, does not prevent AMS from resort to other voluntary DSM methods such as good offices, conciliation and mediation.<sup>13</sup>

The ASEAN panel of three or five panelists is obliged to submit a written report with findings and recommendations within sixty days from its establishment, with ten additional days permitted in exceptional cases. The report will be adopted by the SEOM within thirty days of its submission unless an AMS decides to appeal or the SEOM decides not to adopt the report by consensus.<sup>14</sup> Under the EDSM, disputing parties do not need to pay the costs of dispute settlement as it will be supported by ASEAN DSM Fund under the Protocol, whose contributions are made by all

AMS. EDSM also provides compliance system such as temporary measures in the form of compensation and suspension of concessions in case parties do not comply with the findings and recommendations within sixty days from the date of its adoption, unless a longer time period has been agreed.

There are also some of impractical natures of ASEAN Dispute Settlement Mechanism. Some impractical natures of ASEAN DSM can be summarized as follows:

- Short timeframes in each process of ASEAN DSM are difficult to be met in practice. For example, the sixty-day time frame for the panel to submit reports is unrealistic, especially when compared with those of WTO practice which normally takes up to fourteen months from panel establishment to the circulation of the report. Since the panel will have to go through many procedural steps from its establishment, exchange of written submissions, meetings with the parties, and drafting an interim report before submitting it to the SEOM. Also, there may be the case where the panel wishes to seek expert advice which may take more time.
- Under Article 26 of the ASEAN Charter, a dispute which remains unresolved after the application of ASEAN DSM shall be referred to the ASEAN Summit, a political

13 Krit Kraichitti, *Dispute Settlement Mechanisms for ASEAN Community : Experiences, Challenges and Way Forward*, (Manila: ASEAN Law Association, 2015), p.6

14 Joseph Wira Koesnaldi, *For a More Effective and Competitive ASEAN Dispute Settlement Mechanism*, (ASEAN: Paper for WTI/SECO Project, 2014), p.4

body held merely twice a year, where the final decision will be made by consensus hence give an opportunity for a review of the dispute. These conditions are also said to slow down the process. Moreover, it would give the ASEAN Summit a difficult task to consider complicated, detailed and sensitive matters within a short time frame of their meetings.

- Under Article 27 of the ASEAN Charter, any AMS affected by non-compliance of the findings, recommendations or decisions resulting from ASEAN DSM is also allowed to refer the dispute to the ASEAN Summit for a political solution, which will in the same way give the same uncertainty as Article 26 thereof.
- Appeals under EDSM are limited since the Appellate Body can only consider matters on interpretation of legal issues but not factual matters. These structures make ASEAN DSM a political mechanism for dispute resolution because consensus is unlikely to be reached in practice. Although such flexibility may be appropriate for AMS who possess different government systems, development levels, religions and cultures, finally a rule-based mechanism is needed to enhance the reliability, efficiency and transparency to the DSM such as those of the WTO and ICJ.

Article 17 of the EDSM provides that costs covered by ASEAN DSM Fund are those of panels, Appellate Body and related administrative costs of the ASEAN Secretariat, but not including other expenses incurred by each party such as legal representation and shall be borne by each party. Therefore, it is unlikely that a country with limited resources will be able resort to the mechanism under the Protocol. In contrast, the costs of WTO DSM are overall covered by the budget of WTO Secretariat which is contributed by all WTO members according to the formula based on their share of international trade in goods and services, which guarantees fairness of such proportion.

The dispute settlement mechanism contained in the EDSM mechanism is divided into several forms of dispute settlement, which include consultation, good offices, conciliation, mediation, and the formation of panels along with appellate reviews. Based on Chapter 3 point 2 of the ASEAN Protocol on Enhanced Dispute Settlement Mechanism (EDSM), there are 3 bases for ASEAN member states to be able to resort to the EDSM: the existence of an action from one member state which results in disruption or losing advantages that member countries should get, delayed or hampered achievement of the goals of ASEAN member states due to negligence of the others to fulfill their obligations, and

other conditions.<sup>7</sup> The disputing parties can use a good office, conciliation, or mediation at any time with mutual agreement, if the parties cannot agree on the dispute settlement mechanism, it can cancel the agreement at any time. After the procedure for good office, mediation, conciliation is terminated, the party who is not satisfied may submit a request to the Senior Economic Officials Meeting (SEOM) to form a panel. The concept of EDSM replaces previous regional dispute settlement mechanism namely the 1996 Protocol on DSM (Dispute Settlement Mechanism). The EDSM protocol is expected to solve the dispute between the member states of ASEAN peacefully and fairly. This is crucial since each member state has distinct characteristics and vision.<sup>15</sup>

Dispute settlement through the WTO DSU is carried out through several stages, namely: consultation, panel process, appeals process, adoption and supervision of implementation.<sup>16</sup> The first step in the WTO dispute settlement procedure is consultation. Consultation is a request from member countries accused of violating WTO provisions or which result in the loss of the profits of their country. Consultation is carried out with the aim of providing the parties with an initial understanding of the factual conditions and the legal bases to be

submitted in more depth, and striving to not continue the dispute at a later stage. At this stage there are opportunities to involve peaceful dispute settlement mechanisms with good offices, mediation, conciliation, and arbitration methods as stipulated in the Article 5 of the WTO DSU. Good offices, conciliation and mediation is a voluntary procedure provided that the parties agree to take this step. Good offices, conciliation, and mediation can be submitted at any time by any party in the dispute, so can also be started and terminated at any time. When the procedure has been terminated and the complaining state can submit a request to form a panel.

**Table 1. The Differences of Dispute Settlement Mechanism by WTO and EDSM<sup>17</sup>**

No.	WTO DSU	EDSM
1	Only can be used for disputes arise between WTO member countries.	Only can be used for disputes arise among ASEAN member countries.
2	Held a meeting to form a panel	No need to held a meeting to form a panel
3	Specific treatment for developing countries	No specific treatment for developing countries.
4	Used to resolve the dispute numeral times	Never used to resolve the dispute.

<sup>15</sup> Desy Kristine, "ASEAN Protocol on Enhanced Dispute Settlement Mechanism", *Jurnal Hukum Internasional Vol. 6 No 2*, (Januari 2009): 266

<sup>16</sup> John H. Jackson, "Dispute Settlement and the WTO", *Journal of International Economic Law Vol. 1, Issue.3*, (February 2008): 329-351

<sup>17</sup> According to the writer

**Table 2. The Similarity of EDSM and WTO DSU<sup>18</sup>**

No.	EDSM and WTO DSU
1.	Are used to solve economic disputes
2.	Are used to solve economic disputes among countries
3.	Dispute settlement mechanism: (a) consultation and alternative dispute settlement as good offices, conciliation, and mediation (b) dispute settlement by panel establishment, and (c) appellate review
4.	Suspension concession

The equation can be found in that both instruments of dispute settlement mechanisms that used to resolve economic disputes. EDSM mechanism used to resolve economic disputes between ASEAN member countries, while World Trade Organization Understanding on Rules and procedures of the Governing the Settlement of Dispute (WTO DSU) is used to resolve economic disputes between WTO member countries. In addition, these two dispute resolution mechanisms only be used to resolve inter-state disputes, can't be used to resolve disputes involving legal entities other than the Country. The two mechanisms of dispute resolution procedures have many similarities. First, consultation is used as the first choice of forum option. EDSM protocol provides consultation as the first choice for disputed Country to resolve their dispute. DSU WTO also the case, stated in Chapter 4 of the WTO DSU before entering the next

stage of dispute resolution, side's dispute must carry out consultations first. EDSM and WTO DSU protocols provide dispute resolution through the formation of panels. Only in EDSM protocol are authorized to form ASEAN SEOM panel, while in WTO DSU authorized to form the panel is WTO Dispute Settlement Body (WTO DSB). WTO DSU and EDSM panels have duty to assist SEOM or WTO DSB to make decisions on a dispute by conducting research and examination of legal aspects in the dispute.

The main difference between WTO DSU and EDSM dispute resolution mechanism is its effectiveness in solving the problems of ASEAN member countries. Although EDSM protocol made with the same stages and mechanisms as those of WTO DSU. in reality EDSM protocol never been used to resolve trade disputes in ASEAN member countries. In contrast, the dispute settlement mechanism by WTO DSU has been used repeatedly in resolving disputes, such as the galvalume import dispute between Indonesia and Vietnam. In addition, another difference is in WTO DSU, there is specific treatment for less developed countries, while this is not contained in EDSM protocol. The sides that authorized to be involved as a panel in WTO DSU also consist of WTO member countries, while the panel in EDSM protocol only be formed by ASEAN member countries. Intensity of the choice of forum by WTO DSU among ASEAN member countries is indirectly applicable in

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18 *Ibid.*,



accordance with The Effectiveness Theory of Law by Berl Kutchinsky. There are 5 requirements in assessing the effectiveness of the law, including: the intelligibility of its legal system, high level public knowledge of the content of the legal rules, efficient and effective mobilization of legal rules (committed administration, citizen involvement and participation in the mobilization process, dispute settlement mechanisms that are both easily accessible to the public and effective in their dispute resolution, and a widely shared perception by individuals of the effectiveness of the legal rules and institutions<sup>19</sup> Even though the ASEAN Charter states that the disputing country can request the assistance of ASEAN Secretary General, in reality the forum provided by WTO is more used. The difference in statute settings between dispute resolution mechanisms by EDSM and WTO DSU is an important indicator for ASEAN Member States to consider the choice of forum they will choose. Thus, even though the procedures of the EDSM protocol are the same as the problem solving procedures by WTO DSU, ASEAN member countries are based on effectiveness of procedures in resolving disputes. The effectiveness is seen from the intensity of the application of the mechanism, the participating sides as panels, the function of DSB and SEOM, and a special treatment

for developing country which is provided by WTO DSU.

EDSM in enforcement mechanisms includes the Enhanced ASEAN Dispute Settlement Mechanism (EDSM). The EDSM would be modeled after the WTO DSU in resolving the trade disputes. It ensures the binding decisions which based solely on legal considerations in order to depoliticize the entire process (Annex 1 Enhanced ASEAN DSM (2)). The detail of the entire process of EDSM will be explained deeply below here.

#### 1. Consultation

In article 3 of EDSM, the compulsory first step of the process should begin with writing consultations which indicates the legal basis for the complaint. Then, SEOM will notify the request submission for consultation. Member States who have any benefit directly or indirectly can make representations or proposals to the other Member States concerned. The representations or proposals shall be given to consideration.<sup>20</sup> Then, the other party must reply within 10 days after the date of receipt of the request and shall enter into consultations within a period of 30 days after the date of receipt of the request. The protocol permits the parties to the dispute may at any time to agree or terminate the three other mechanisms which are good offices, conciliation and mediation depending on the request of the party. In article 4 of EDSM,

19 Clarence J. Dias, *Research on Legal Service and Poverty: its Relevance to the Design of Legal Service Program in Developing Countries*, (Washington: Washington U.L., 1975), p.150

20 Natthada Termudomchai, "ASEAN Dispute Settlement Mechanism: a Study of its Ineffectiveness in Resolving Economic Disputes", *Assumption University Law Journal Vol.7 No.2*, (2016): 34

once procedures for good offices, conciliation or mediation are terminated, a complaining party may then proceed with a request to the SEOM for the establishment of a panel.

## 2. Panel Process

In article 5 of EDSM, it stipulates that the panel shall be established by the SEOM, unless the SEOM decides by consensus not to establish a panel. If the consultations failed, the complainant may raise the dispute to the Senior Economic Official Meeting (SEOM) within 45 days after the receipt of the request and circulation. The panel shall compose of three or five panelists depending on the agreement of the parties. According to Appendix II of the Protocol, it stipulated the selection of those who are qualified to become members of the panel must have these following qualifications:

1. Well-qualified governmental and/or non-governmental individuals
2. Legal professionals or academics in the field of international trade law and ASEAN economic agreements.

ASEAN secretariat is responsible for listing the qualified individuals which members of a panel may be drawn. The list shall indicate the specific experience or expertise. The function of the panel is to make an objective assessment of the dispute before it, examine the facts of the case and conform to the sections of the Agreement or any covered agreements, and rule out the findings and recommendations in

relation to the case.<sup>21</sup> The panel shall submit its findings and recommendations to the SEOM in the form of a written report within 60 days of its establishment (EDSM Article 8). Moreover, before submitting the findings and recommendations to the SEOM, the panel shall equally provide opportunity to the parties to the dispute to review the report. A panel shall have the right to seek information and technical advice from any appropriate individual or body. The panel deliberation shall meet in closed session and shall be kept confidential. SEOM must adopt the report within 30 days unless there is a consensus not to do so or a party notifies its decision to appeal.<sup>22</sup>

A non-reply shall be considered as accepting the decision into the panel report. The findings and recommendations of panel should be adopted within 60 days of its establishment in order to ensure the effective resolution of disputes (EDSM Article If the party asks for the time extension to conform to its obligation, SEOM should give a decision within 14 days from the SEOM's adoption of the findings and recommendations of the Appellate Body's reports Before the first meeting of the panel, the parties to the dispute shall submit the written submissions to the panel (EDSM App II, Article II (4)). During the first meeting, the panel shall ask the complaining party to present its case (EDSM App II Article II (5)). The third parties who

21 (ASEAN Protocol Article 7

22 ASEAN Protocol Enhanced Dispute Settlement Mechanism Article 9.1

related with the interest of the dispute shall be invited to present its case in writing in the first meeting (EDSM App II, Article II (6)). The parties shall have the right to submit the rebuttals to the panel in the first meetings but the formal rebuttals shall be made at a second meeting of the panel (EDSM App II, Article II (7)). Any member state who has a substantial interest shall notify to the panel in written submissions before transferring to SEOM (EDSM, Article 11 (2)).

### 3. Appellate Review

An appellate body established by the ASEAN Economic Ministers (“AEM”). It shall be composed of 7 people, 3 of whom shall serve on any one case (ASEAN Protocol, Article 12.1). The AEM shall appoint person to serve on the Appellate Body for a four-year term, and the term may renew once.<sup>23</sup> The requirement of the appellate body shall consist of individuals of recognized with demonstrated expertise in international trade law and the subject matter to the covered agreements (EDSM, Article 12 (3)). And they shall not participate in the consideration of any disputes that would create a direct or indirect conflict of interest (EDSM, Article 12 (3)). Only parties to a dispute can appeal a panel report (EDSM, Article 12 (4)).

An appellate body will decide the panel’s report within 60 days after the appeal request was filed but an appeal must not exceed within 90 days (EDSM, Article 12 (5)). Appeals are

limited to issues of law and interpretation which means the Appellate Body should not made their assessment based on the facts.<sup>24</sup> The proceedings of the Appellate Body shall be confidential (EDSM, Article 12 (9)). The Appellate Body may uphold, modify or reverse the legal findings and conclusions of the panel (EDSM, Article 12 (12)). The Appellate Body report shall be adopted by SEOM within 30 days following its circulation to the Member States, unless SEOM decided by the consensus not to do so (EDSM, Article 12 (13)). A non-reply, within 30 days after the report has been adopted, shall be considered as an acceptance of the Appellate Body report. The adoption process shall be completed within 30 days irrespective of whether it is settled at the SEOM or by circulation. The disputing parties should accept the report and comply within 60 days; otherwise SEOM has the right to impose sanctions (EDSM, Article 16 (2)). However, the parties shall have the right to request for the longer timeframe for implementation the report of the Appellate Body. The decision of the time extension shall be made within 14 days from the SEOM’s adoption of the Appellate Body’s reports.

In EDSM, it also stipulated the remedy in case the non-implementation of the findings and recommendations of panel and Appellate Body reports. When neither compensation nor the suspension of concessions or other obligations which provided by SEOM fails

<sup>23</sup> ESDM, Article 12 (2)

<sup>24</sup> *Ibid*, p. 36

to resolve the issues within 60 days or within the period agreed by the party, the concerned party may trigger the process of compensation and the suspension of concessions (EDSM, Article 16). The process under this article 16 of EDSM is similar to WTO DSU.

Before the WTO, dispute settlement matters were regulated in Articles XXII and XXIII of GATT 1947, which gave priority to making a satisfactory adjustment for the nullification or impairment of the benefits of a contracting party. Only when no satisfactory adjustment was realized could the matter be referred to the Contracting Parties.<sup>25</sup> Although the GATT also facilitated panels to hear disputes, there was no formal mechanism for dispute settlement in the GATT system. Additionally, due to the principle of consensus, any party could block the dispute settlement process, refuse to adopt or implement the panel's report, and block authorization to suspend concessions. For these reasons, dispute settlement under GATT exhibited distinct diplomatic and power-oriented features that garnered considerable criticism and eventually resulted in several proposals for reform. At the end of the Uruguay Round Negotiation, the parties signed the Marrakesh Agreement Establishing the World Trade Organization ("Marrakesh Agreement"). The WTO incorporated an effective dispute settlement system, which is stipulated in Annex 2 of the Marrakesh Agreement, i.e.,

the Understanding on Rules and Procedures Governing the Settlement of Disputes or DSU. The DSU applies to all of the WTO- covered agreements and is administered by the DSB, which consists of representatives from all WTO members.

Consultation is compulsory before a party may request the establishment of a panel. Unless, there is consensus to the contrary, the DSB is obligated to establish a panel at the request of any of the parties to the dispute. Additionally, if any of the parties is unsatisfied with the panel reports, it has the right to appeal to the Appellate Body, which is a permanent body under the WTO and consists of seven judges. In contrast to the GATT's principle of positive consensus, the WTO Dispute Settlement Body follows a rule of negative consensus, which signifies that, theoretically speaking, all panel and AB reports will be adopted because, at the very least, the winning party will be in favor of the report. The DSB is charged with the implementation of the rulings, but the enforcement powers are mainly held by the dispute parties themselves. In case of non-compliance, the dispute parties may initiate Article 21., which requires the original panel to determine if the losing party has fulfilled its obligation of implementation. As remedies for non-compliance, the dispute parties may seek compensation or take retaliatory measures. Thus, when compared with the GATT system, the WTO dispute

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25 Di Hao, "Compliance Problems Under WTO Disputes Settled By Mutually Agreed Solution", *Georgetown Journal of International Law*, (2018): 891

settlement mechanism is more like a judicial system and more powerful, as its rulings usually obtain compulsory enforcement. Symbolizing vast progress in international rule of law, the WTO dispute settlement mechanism is a key element in maintaining the stability and predictability of the multilateral trading system.

One of the indicators that supports the effectiveness of the WTO DSU is the existence of WTO DSB (Dispute Settlement Body) while processing the dispute settlement. Compare to the Senior Economic Officials Meeting (SEOM) based on EDSM protocol, the role of WTO DSB is more intensive here. WTO DSB has duty which is almost the same as SEOM, but is arranged in some different procedure, such as what is written on the article 25 WTO DSU that mentioned that WTO DSB has role in the steps below:

1. Pre-panel process, in this period the DSB in charge in the sustainability of the dispute process between parties by taking a part as a mediator and will give guidance to the parties who are seeking for dispute settlement through consultation, or mediation, or arbitration.
2. Panel process and the *appellate body*, in this period the DSB will help the parties that are involved in the dispute in processing the panel appointed, in determining things that relate to the panel process, and in deciding whether the panel report or the appellate body will be adopted or not.
3. Panel report implementation, in this period the DSB has responsibility to make sure the implementation of each recommendation or decision that is adopted by DSB and has power and authority to another WTO members who have to do the trading sanction.

Not only the role of DSB, but the existence of special and differential treatment to the developing country is also one of the effectiveness indicator for the WTO DSU. This treatment is also one of the biggest reason of why the member country of ASEAN prefer to settle their dispute in WTO DSU, where there are only Singapore and Brunei Darussalam have been listed as developed country from the total of 10 members country of ASEAN. The domination of the developing countries in the region of Southeast Asia affects the ability of countries in advocacy through the dispute settlement body. That is why, the ASEAN members prefer WTO DSU as a dispute settlement forum because this forum proves special treatment for the developing country. In the Article 4 Point 10 WTO DSU, regarding to the process of consultation that is applied to find the best solution, this article defines that since the process of consultation is being held by the WTO members, it must give attention specially to the problems that matter to the developing country. In the process of consultation that relates to the developing country, the parties in the dispute can set up the deal to extend the process of consultation up to 60 days. The WTO secretary must



have to provide the legal experts who are mastered in the field of trading specially for the developing countries who are needed and relating to the WTO disputes settlement for the cases which is facing by the developing country. These legal experts must have to give guidance to the developing countries in order to make sure that the WTO secretary has taken fair action to each country of the WTO members. Next, the legal experts can only take a part in the phase of pre-trial (before the trial held) for each disputes. This rule is also has been mentioned in the Article 27 point 2 of WTO DSU.

## CONCLUSION

### 1. Summary

ASEAN as a rules based organization has a trade dispute settlement mechanism, which is written in ASEAN Charter 2008 and in the ASEAN Protocol on Enhanced Dispute Settlement Mechanism (EDSM) related to the regional trade agreement of AFTA. In fact, trading disputes between ASEAN member states are mostly brought to a bigger forum, called WTO DSU. One of the cases which were settled by WTO DSU is the case of safeguard on certain iron or steel products between Indonesia and Vietnam. This condition happens because there is a vagueness norm in the Article 22 of ASEAN Charter 2008, which is not exactly mentioning specific forum that will be given authority

by ASEAN General Secretary to settle the trading dispute. The practice of dispute settlement procedure is carried out based on the Understanding on Rules and Procedures Governing the Settlement of Disputes (WTO) and by the EDSM must be totally different according to each member states of ASEAN. According to the Law Effectiveness Theory by Berl Kutchinsky, even though the EDSM protocol is regionally binding for ASEAN member states but it cannot secure that the EDSM would always be the only forum chosen by the countries. Based on this theory, the differences of statute settings between WTO DSU and EDSM protocol becomes a benchmark of its effectiveness to resolve the disputes between ASEAN members. Any fundamental differences between EDSM and WTO DSU are also found in the panel qualification, the intensity of its usages, the region, and the existence of special services for the developing countries.

### 2. Recommendations.

- a. The ASEAN General Secretary should revise the regulation of dispute settlement mechanism written in ASEAN Charter 2008 for maintaining its legal certainty.
- b. The ASEAN members should follow ASEAN's agreement to know and object to agreement in the region of Southeast Asia.

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