

FOR A MORE EFFECTIVE AND COMPETITIVE ASEAN DISPUTE SETTLEMENT MECHANISM

Paper for WTI/SECO Project

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Background

Association of South East Asia Nations (**ASEAN**) was established on 8 August 1967 in Bangkok by the five original Member Countries and since 1999 the Membership expanded into 10 Member Countries.¹ After more than 46 years of its existence, as of May 2014, there are around 88 ASEAN Treaties/Agreements existed covering the three pillars of ASEAN Community, namely the ASEAN Political-Security Community, ASEAN Economic Community and ASEAN Socio-Cultural Community.² Having population of 620 million people and a combined GDP of more than \$2.2 trillion,³ ASEAN is one of the emerging markets in the world. Not only ASEAN countries compete to the world market, amongst ASEAN countries they are also competing with each other in ASEAN market. Intra ASEAN trade has been increasing for more than 4 times since the past 10 years. Based on the ASEAN Community in Figures 2010⁴, the number 1 rank in ASEAN trade dependency and ASEAN trade with selected partners is with ASEAN Countries itself. Liberalization as the result of ASEAN economic integration has also cut down the average tariffs amongst ASEAN Members from almost 5% in 2000 to 1.06% in 2010. The number of items in the CEPT inclusion list with zero tariffs in ASEAN increased significantly in 2003 and continued to increase until 2010. Based on experiences of the World Trade Organization (**WTO**) reduction of tariffs, expansion of issues being regulated under the organization, competition amongst Members as a result of more liberal market are the recipe for potential disputes amongst competing Members. The odd is increasingly higher if the Members producing competing or substituting products instead of complimentary products.

ASEAN is also a rules-based organization like WTO. The existence of the ASEAN Charter was designed to create the legal framework for ASEAN as a rules-based organisation.⁵ As a rules based organization ASEAN dispute settlement mechanism stands as a fundamental tool in preserving the rights and obligations of Members under any agreements signed by ASEAN members as well as to resolve any dispute between Members.

¹ *The Founding of ASEAN*, can be accessed through <http://www.asean.org/asean/about-asean/history>, last access on 30 September 2013; http://unctad.org/en/docs/edmmisc232add29_en.pdf, page 5.

² www.aseansec.org/wp-content/uploads/2013/06/Ratification.pdf

³ ASEAN, can be accessed through <http://www.ustr.gov/countries-regions/southeast-asia-pacific/association-southeast-asian-nations-asean>, last access on 30 June 2014.

⁴ *ASEAN Community in Figures (ACIF) 2010*, can be accessed through <http://www.asean.org/resources/item/asean-community-in-figures-acif-2010>, last access on 30 June 2014.

⁵ <http://www.asean.org/asean/asean-charter>

Interestingly, from the date of establishment up until now there is no single case every being brought to ASEAN dispute settlement system. Why?

This is certainly not because it is “taboo” to bring dispute between ASEAN countries. In fact the first WTO dispute DS001 was between Singapore and Malaysia regarding Prohibition of Imports of Polyethylene and Polypropylene.⁶ More recently in WTO Dispute Settlement we have the Philippines fighting against Thailand in DS371 regarding customs and fiscal measures on cigarettes from the Philippines.⁷ We have even more cases to involve ASEAN countries as either complainant, respondent or third parties in WTO dispute settlement. For example, Indonesia has been complainant in 8 cases, as respondent in 2 cases and as third party in 8 cases.⁸ Thailand has been complainant in 13 cases, as respondent in 3 cases and as third party in 56 cases while Philippines has been complainant in 5 cases, as respondent in 6 cases and as third party in 14 cases.⁹ See Annex 1 for the details.

So it is not in nature, culture or way of life as well that ASEAN countries never confronted other countries in formal dispute settlement mechanism. Majority of ASEAN covered agreements particularly on the trade field incorporate the same basic principles as what has been regulated in the WTO (even more).

This is “the million-dollar question” that we hope we could shed some light by writing this paper. We try to see from different angles to find out the answer. *First*, we would analyze whether there are lacking in the rules and procedures of the ASEAN Dispute Settlement System. *Second*, we will see whether the problem is in the dispute settlement system infrastructures. *Third*, we will explore whether ASEAN culture is the reason behind the zero dispute. *Fourth*, is there any financial constraint underlying the untested dispute settlement mechanism. *Fifth*, we would explore the possibility of Members not resorting to ASEAN DSM is because the lack of legal certainty or case precedence. *Sixth*, whether the lack of expertise or experts in ASEAN laws or ASEAN Dispute Settlement might be one of the reasons. *Seventh*, whether the very short

⁶ http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds1_e.htm, last access on September 30, 2013.

⁷ http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds371_e.htm, last access on 2 July 2014.

⁸ http://www.wto.org/english/tratop_e/dispu_e/dispu_by_country_e.htm; WTO Dispute Settlement: One-Page Case Summaries from 1995-2012 available at http://www.wto.org/English/res_e/booksp_e/dispu_settl_1995_2012

⁹ http://www.wto.org/english/tratop_e/dispu_e/dispu_by_country_e.htm; WTO Dispute Settlement: One-Page Case Summaries from 1995-2012 available at http://www.wto.org/English/res_e/booksp_e/dispu_settl_1995_2012

and ambitious timeframe makes Members hesitant to utilize this mechanism. *Eight*, the low utilization is in fact happens everywhere in other RTAs/FTAs and not just ASEAN.

Rules and Procedures of ASEAN Dispute Settlement

Dispute Settlement Mechanism has been around since 1971. The earliest mention of dispute settlement in an ASEAN agreement was in the 1971 Declaration on the Zone of Peace, Freedom and Neutrality (PP3), which recognized the aims and objectives of the United Nations, including the peaceful settlement of international disputes.¹⁰ The 1976 Declaration of ASEAN Concord subsequently committed member states to “rely exclusively on peaceful processes in the settlement of intra-regional differences”, and included in its program of action the “settlement of intra-regional disputes by peaceful means as soon as possible”.

On this basis, ASEAN has developed some key mechanisms for dispute settlement: the 1976 Treaty of Amity and Cooperation, the 1996 Protocol on Dispute Settlement Mechanism and subsequently the 2004 Protocol for Enhanced Dispute Settlement Mechanism, and the Protocol to the ASEAN Charter on Dispute Settlement Mechanism that serve as an overarching framework for dispute settlement in ASEAN.¹¹ The Protocol indicates the ASEAN’s movement towards a legalistic, rule-based institution.¹² Further by improving the dispute settlement mechanism, it is targeted to reinforce ASEAN’s legitimacy as a vehicle for bringing predictable, transparent, pro-trade regulation to business in the region.¹³

1. Treaty of Amity and Cooperation (TAC)

The TAC was signed in conjunction with the 1976 Declaration of ASEAN Concord. It is a landmark agreement as it sets out peaceful settlement of disputes as a fundamental principle of ASEAN, commits member states to refrain from the threat or use of force and settle any disputes through friendly negotiations.¹⁴ To address unresolved disputes in the region, the TAC establishes a High Council comprising ministerial representatives of all contracting parties. Provided that all parties to the dispute agree to apply the TAC to their case, the High Council’s role is to recommend appropriate means of dispute settlement to the

¹⁰ <http://cil.nus.edu.sg/dispute-settlement-in-asean/>

¹¹ <http://cil.nus.edu.sg/dispute-settlement-in-asean/>

¹² Yan Luo, *Dispute Settlement in the Proposed East Asia Free Trade Agreement: Lessons Learned from the ASEAN, NAFTA and EU*. Published in *Regional Trade Agreements and the WTO Legal System*. New York Oxford, 2010. Page 431.

¹³ *Managing Trade Rules via the Enhanced ASEAN Dispute Settlement Mechanism*, can be accessed through http://www.asean.org/archive/apris2/file_pdf/result/Flyer%20%20-%20Managing%20trade%20rules%20via%20the%20Enhanced%20ASEAN%20Dispute%20Settlement%20Mechanism.pdf

¹⁴ <http://cil.nus.edu.sg/dispute-settlement-in-asean/>, last access on 30 September 2013; Rodolfo C. Severino, *ASEAN on the Road to Recovery*. Published in *ASEAN: Rises to the Challenge*. ASEAN Secretariat 1999. Page 79.

disputing parties, which could include the High Council offering its good offices, or constituting a committee of mediation, inquiry or conciliation. The TAC does not preclude recourse to modes of dispute settlement contained in Article 33(1) of the United Nations Charter. Rules of procedure for the High Council were agreed upon in 2001. As the TAC has now taken on non-ASEAN signatories, the 2001 rules of procedure for the High Council state that it shall comprise of representatives from all ASEAN member states and one representative from only the non-ASEAN states who are involved in the dispute.¹⁵

There are three weaknesses in the scheme set up in Chapter IV of the TAC. Firstly and most significantly, Articles 14 and 15 do not apply unless the parties to the dispute agree. Any dispute settlement under the TAC will have to be consensual. There is no means to force an unwilling party to settle a dispute under the TAC. This means that one of the parties can block the use of the dispute settlement mechanism because of voluntary nature. The non-mandatory nature of the procedure means that this mechanism will be used only if there is a significant change in the political mindset of the High Contracting Parties in favor of objective dispute settlement.

It should also be recalled that the High Council has never been set up after the TAC was established in 1976. The closest to which the High Council was about to be established was during the dispute between Indonesia and Malaysia over the Sipadan islands. However, the High Council was never established to resolve this dispute because Malaysia eventually referred the case to the ICJ.

The solution to any dispute threatening to disturb peace and harmony in the region will be political. The second weakness is that there is no explicit provision for arbitration or adjudication by a court or tribunal. Good offices, mediation, inquiry and conciliation essentially are non-legal modes of dispute settlement, and they supplements direct political negotiations. The third weakness as far as ASEAN member states are concerned is that under rule 14 of the Rules of Procedure non-ASEAN member states may be represented as observers at meetings of the High Council. One suspects that this is driven by real politic. International courts and arbitrators cannot be controlled by governments. In countries where the rule of law is not really strong and reliable, it is too much to expect that a government would willingly cede the power to decide an international political dispute to neutral outside parties.

This means that the non-ASEAN states will be able to observe and deliver their opinion - with the permission of the High Council - at meetings. Washing of dirty linen in public is bad enough; washing it in

¹⁵ <http://cil.nus.edu.sg/dispute-settlement-in-asean/>, last access on 2 July 2014.

full view of people outside the family is worse.¹⁶ There is a view among some ASEAN members during the negotiations of the ASEAN Charter that outsiders should not be part of any dispute settlement mechanisms. This view did not command the unanimous agreement of all the ASEAN members, but it remains strongly held in some quarters. As long as such a sentiment exists, the TAC dispute settlement mechanism is likely to remain unused.

The TAC might have been invoked in the dispute between Malaysia and Indonesia over the islands of Sipadan and Ligitan. In the end the dispute was referred to the ICJ instead.¹⁷ A more recent occasion for possible invocation of the TAC was the dispute between Thailand and Cambodia over the area surrounding the temple of Preah Vihear. In July 2008 Singapore held the Chairmanship of ASEAN where the foreign ministers met informally in Singapore to discuss the issue. The possibility of using the TAC was raised but not accepted by the parties. Without the cooperation of the disputing parties, ASEAN could do nothing further. The issue was ultimately decided by the ICJ.¹⁸

The TAC dealt with the second component of security in the region. The TAC's goals are to promote perpetual peace, everlasting unity, and cooperation among the people which would contribute to their strength, solidarity and closer relationship.¹⁹ The TAC explicitly allows for the accession of non-ASEAN states, and obliges its signatories to settle disputes peacefully through consultation. It aims to promote cooperation in many different areas, with the objective of furthering economic development, peace, and stability in Southeast Asia.²⁰ It also codifies respect for the independence, sovereignty, equality, territorial integrity, and national identity of all nations.²¹

The TAC mechanism is not likely to be used to settle disputes between ASEAN member states. The process is too public, involving the convening of a High Council at which non-ASEAN High Contracting Parties may be represented as observers. Rather, the TAC is likely to be used as an inspirational document,

¹⁶ Walter Woon. *Dispute Settlement The ASEAN Way*. Can be accessed through <http://cil.nus.edu.sg/wp/wp-content/uploads/2010/01/WalterWoon-Dispute-Settlement-the-ASEAN-Way-2012.pdf>, page 13.

¹⁷ Sovereignty over Pulau Ligitan and Pulau Sipadan (Indonesia/Malaysia), can be accessed through <http://www.icj-cij.org/presscom/index.php?pr=343&pt=1&p1=6&p2=1>, last access on September 30, 2013; International Court Finds That Sovereignty over Islands of Ligitan And Sipadan Belongs to Malaysia, can be accessed through <http://www.un.org/News/Press/docs/2002/ICJ605.doc.htm>, last access on September 30, 2013.

¹⁸ UN Court Rules for Cambodia in Preah Vihear Temple Dispute With Thailand, can be accessed through <http://www.un.org/apps/news/story.asp?NewsID=46461&Cr=court+of+justice&Cr1=#.U7KoXo2Sz6k>

¹⁹ Shaun Narine. *ASEAN and the ARF: The Limits of the "ASEAN way"*. Page 969.

²⁰ Ibid.

²¹ Ibid, page 967.

committing the High Contracting Parties to peaceful settlement of their disputes.²² The Heads of Government and the ASEAN Foreign Ministers, who meet more than once a year, discuss developments affecting the region. At these meetings, they have often reiterated their determination to continue to work for the promotion of peace, stability and progress in South-East Asia, thus contributing towards world peace and harmony.²³

2. 2004 ASEAN Protocol on Enhanced Dispute Settlement Mechanism

An early reference to the requirement for amicable settlement of economic disputes can be found in the 1987 Agreement for the Promotion and Protection of Investments - which further specifies that disputes that cannot be settled shall be submitted to the ASEAN Economic Ministers for resolution.²⁴ The 1996 Protocol on Dispute Settlement Mechanism and subsequently the 2004 ASEAN Protocol for Enhanced Dispute Settlement Mechanism (“**Vientiane Protocol**”) signed in Vientiane by the economic ministers at the 11th ASEAN Summit.

The Vientiane Protocol regime is noteworthy for its level of ambition.²⁵ According to Article 1(1) of the Vientiane Protocol, it applies to a list of specified ASEAN economic agreements and, more importantly, to all future ASEAN economic agreements. At the heart of the Vientiane Protocol is a mandatory dispute settlement process involving panel and appellate body to assess disputes that cannot be settled through good offices, mediation or conciliation.²⁶ The aim of good offices, conciliation or mediation is to achieve an amicable settlement of the dispute, and to prevent neither party loses face.

Based on the findings of the panel or appellate body, a member state may be requested to take measures to bring itself into conformity with an ASEAN economic agreement. Where the findings or recommendations are not implemented within a specified time, a complaining party may negotiate for compensation or suspend concessions towards the other party.²⁷

If there is any dispute under these agreements, the complaining party will request consultations. Consultations represent a compulsory first step in the process of referring a dispute for adjudication by a

²² Walter Woon. *Dispute Settlement The ASEAN Way*. Page 1. <http://cil.nus.edu.sg/wp/wp-content/uploads/2010/01/Walter-Dispute-Settlement-the-ASEAN-Way-2012.pdf>.

²³ UNCTAD. *Regional Approaches: ASEAN*. Can be accessed through http://unctad.org/en/Docs/edmmisc232add29_en.pdf, page 17.

²⁴ <http://cil.nus.edu.sg/dispute-settlement-in-asean/>, last access on 2 July 2014.

²⁵ Lionel Yee Woon Chin. *Implementation of International Agreements in the Realisation of the ASEAN Charter*. Page 5. Can be accessed through <http://www.aseanlawassociation.org/11GAdocs/workshop4-sg.pdf>, last access on 30 September 2013.

²⁶ <http://cil.nus.edu.sg/dispute-settlement-in-asean/>, last access on 2 July 2014.

²⁷ <http://cil.nus.edu.sg/dispute-settlement-in-asean/>, last access on 2 July 2014.

panel.²⁸ This request formally initiates the ASEAN DSM and triggers the application of this Protocol. 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. If the consultations fail to settle the dispute, the complainant may raise the matter to Senior Economic Officials Meeting (SEOM).²⁹ In addition to consultations, resort to which is mandatory, the Vientiane Protocol provides for voluntary use of three other mechanisms which are good offices, conciliation and mediation. Good offices consist primarily of providing logistical support to help the parties negotiate in a productive atmosphere. Conciliation additionally involves the direct participation of an outside person in the discussions and negotiations between the parties. In a mediation process, the mediator does not only participate and contribute to the discussions and negotiations, but also propose a solution to the parties.³⁰ However, it should be noted that the parties would not be obliged to accept this proposal.

Similarly, the complaining party may go to SEOM if consultations fail to settle the dispute within 60 days. Once the dispute is raised to SEOM, a panel will be established unless SEOM decides by consensus not to do so.³¹ Basically, SEOM has 45 days to decide. The decision will be taken either at a SEOM meeting or by circulation. It is specifically provided that non-reply by any member is taken as agreement to the establishment of a panel. This is to avoid the well-known tactic of keeping silent and hoping that the problem will go away.

The Panel should prepare a report to SEOM by having objectively considered the facts and provisions of the relevant agreements.³² According to Article 8.2 of the Protocol, the Panel shall submit its findings and recommendations within 60 days after its establishment. 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.³³ If the decision to adopt is not done at a formal meeting, it will be done by circulation and a non-reply is again treated as agreement to

²⁸ Peter van den Bossche and Paolo Vergano, *The Enhanced Dispute Settlement Mechanism of ASEAN: A Report on Possible Improvements*, page 12.

²⁹ Article 5.1 of ASEAN Protocol on Enhanced Dispute Settlement Mechanism, can be assessed through <http://www.asean.org/news/item/asean-protocol-on-enhanced-dispute-settlement-mechanism>, last access on 2 July 2014.

³⁰ Peter van den Bossche and Paolo Vergano, *The Enhanced Dispute Settlement Mechanism of ASEAN: A Report on Possible Improvements*, page 12.

³¹ Article 5.1 of ASEAN Protocol on Enhanced Dispute Settlement Mechanism, can be assessed through <http://www.asean.org/news/item/asean-protocol-on-enhanced-dispute-settlement-mechanism>, last access on 2 July 2014.

³² http://unctad.org/en/docs/edmmisc232add29_en.pdf, page 10.

³³ Article 9.1 of ASEAN Protocol on Enhanced Dispute Settlement Mechanism, can be assessed through <http://www.asean.org/news/item/asean-protocol-on-enhanced-dispute-settlement-mechanism>, last access on 2 July 2014.

adopt. Appeals go to an appellate body established by the ASEAN Economic Ministers (“AEM”).³⁴ The appeal of the panel report is limited to the issues of law covered in the report and to the legal interpretations developed by the panel.³⁵ An appeal must not exceed within 60 days from the date a party to the dispute formally notifies its decision to appeal.³⁶ Appeals are limited to issues of law and interpretation which means the Appellate Body should not make their assessment based on the facts. The Appellate Body report shall be adopted by SEOM within 30 days unless there is a consensus not to do so. The disputing parties are obliged to accept the report unconditionally and comply within 60 days of the report of the panel or Appellate Body, as the case may be. On this matter, SEOM will oversee the compliance by the losing party. Further the Protocol also placed the issue of implementation on the agenda of every SEOM meeting until it has been resolved. Article 15.1 of the Protocol gives the right to the parties to the dispute to agree on longer timeframe for implementation. In the case of non-compliance, SEOM has the right to impose sanctions. The Vientiane Protocol has clear similarities to the dispute settlement procedure of the WTO, especially with its strict timelines and provisions to ensure that the panel and appellate reports are adopted unless there is a consensus against it. Such a mechanism is vital if the ASEAN Free Trade Area is to function properly. However, it should be noted that this mechanism has never been invoked, thus no assessment of its effectiveness can be made.

3. Protocol to the ASEAN Charter on Dispute Settlement Mechanisms³⁷

ASEAN has shifted its dispute settlement mechanism from a diplomatic to a legal mechanism. Before 2004, ASEAN dispute settlement mechanism was only an agreement to engage in consensus as its member states avoided formalized dispute resolution mechanism for over a decade.³⁸ Even after 2004, ASEAN dispute settlement mechanism allows members to engage in conciliation or mediation. Therefore, it remains as an option rather than a mandate.

³⁴ Article 12.1 of ASEAN Protocol on Enhanced Dispute Settlement Mechanism, can be assessed through <http://www.asean.org/news/item/asean-protocol-on-enhanced-dispute-settlement-mechanism>, last access on 2 July 2014.

³⁵ Peter van den Bossche and Paolo Vergano, *The Enhanced Dispute Settlement Mechanism of ASEAN: A Report on Possible Improvements*, page 12.

³⁶ Article 12.5 of ASEAN Protocol on Enhanced Dispute Settlement Mechanism, can be assessed through <http://www.asean.org/news/item/asean-protocol-on-enhanced-dispute-settlement-mechanism>, last access on 2 July 2014.

³⁷ ASEAN Protocol on Enhanced Dispute Settlement Mechanism, can be accessed through <http://www.asean.org/news/item/asean-protocol-on-enhanced-dispute-settlement-mechanism>.

³⁸ Lee Leviter, *The ASEAN Charter: ASEAN Failure or Member Failure?*, New York University Journal of International Law & Politics; Fall 2010, Vol. 43 Issue 1, Page 178.

The ASEAN Charter serves as a firm foundation in achieving the ASEAN Community by providing legal status and institutional framework for ASEAN. It also codifies ASEAN norms, rules and values; sets clear targets for ASEAN; and presents accountability and compliance. With the entry into force of the ASEAN Charter, ASEAN will henceforth operate under a new legal framework and establish a number of new organs to boost its community-building process.

It is specifically stated in Article 22(2) of the ASEAN Charter that dispute settlement mechanism must be established in all fields of ASEAN cooperation. In order to pursue this goal, the High Level Experts Group (HLEG) was set up as a follow up to the ASEAN Charter to study issues relating to legal personality of ASEAN, dispute settlement mechanisms, privileges, immunities and other legal issues.³⁹ The HLEG's recommendations resulted in the Protocol to the ASEAN Charter on Dispute Settlement Mechanisms ("**DSM Protocol**"), signed by the foreign ministers of the ASEAN states on 8 April 2010 in Hanoi. Central to this ambition were the dispute settlement mechanisms in Chapter VIII. When drafting the Charter the High Level Task Force (HLTF) was conscious that there were existing dispute settlement mechanisms in the TAC and Vientiane Protocol. The decision was taken to use these as the basis for Chapter VIII, filling in the gaps as necessary.

The DSM Protocol covers other disputes that do not fall within the TAC or the Vientiane Protocol. The TAC essentially commits parties to peaceful settlement of disputes. In disputes on matters affecting Member States directly, especially disputes likely to disturb regional peace and harmony, the TAC requires Member States to refrain from the threat or use of force and to settle such disputes among themselves through friendly negotiations. The Charter reinforces the TAC's principle of the resolution of disputes between ASEAN members in a peaceful and timely manner through dialogue, consultation and negotiation. The ASEAN Charter adds that the Chairman of ASEAN or the Secretary-General may be called upon to offer their good offices, conciliation or mediation. The Charter further mandates dispute settlement mechanisms for all fields of ASEAN cooperation. Moreover, disputes not related with the application or interpretation of ASEAN agreements are to be resolved in accordance with the TAC, while the disputes relating to ASEAN economic agreements are covered by the Vientiane Protocol, and ASEAN agreements with their own built-in dispute settlement measures shall continue to apply.

³⁹ ASEAN, *Annual Report 2008-2009: Implementing the Roadmap for An ASEAN Community 2015*, can be accessed through http://eurosoutheastasia-ict.org/files/2010/03/ASEAN_roadmap_2008_09.pdf, last access on 2 July 2014.

The creation of an ASEAN community will be driven by economic integration. Economic integration cannot happen without some means of binding dispute settlement. Hence, there is a pressure for the creation of an effective dispute settlement mechanism in the economic field. The Vientiane Protocol was meant to ensure that legally-binding decisions could be made and expeditiously enforced, a vital prerequisite for the creation of an economic community.

The DSM Protocol is based on the Vientiane Protocol. It provides for consultations within a fixed timeframe, failing which the complainant may request the appointment of an arbitral tribunal. If the respondent does not agree to the appointment of an arbitral tribunal, the matter will be referred to the ASEAN Coordinating Council, which consists of the foreign ministers of the ASEAN members. Further, the ASEAN Coordinating Council can direct the parties to settle the dispute by good offices, conciliation, mediation or arbitration. The DSM Protocol provides rules for these matters in the annexes.

Article 24 of the ASEAN Charter is the key provision - where the dispute arises in relation to a specific ASEAN instrument, it shall be settled in accordance with the mechanism provided in that instrument. According to Article 25, if there is no effective dispute settlement mechanism, it provides that appropriate dispute settlement mechanisms, including arbitration, shall be established for disputes which concern the interpretation or application of this Charter and other ASEAN instruments. The establishment of a default dispute settlement regime which extends to all remaining ASEAN instruments is arguably the biggest change that the ASEAN Charter has made with respect to the adjudication of disputes.

The DSM Protocol provides for consultations within a fixed timeframe and the possibility to convene an arbitral tribunal.⁴⁰ Unresolved disputes and non-compliance with the findings of dispute settlement mechanisms are to be referred to the ASEAN Summit for a decision. The Charter maintains member states' right of recourse to the modes of dispute settlement listed in the United Nations Charter.

The scheme of Chapter VIII can be classified to some main stages: firstly, Article 23 states that the parties may agree to resort to good offices, conciliation or mediation. The parties may request the Chairman of ASEAN or the Secretary-General to provide such good offices, conciliation and mediation. This is the

⁴⁰ <http://cil.nus.edu.sg/dispute-settlement-in-asean/>, last access on 2 July 2014.

same mechanism to the scheme under the TAC and the Vientiane Protocol. Unlike in the Vientiane Protocol, however, the Secretary-General cannot of his own accord offer to assist; it was felt by some that an activist Secretary-General might prove to be too ready to intervene. However, one suspects that in practice the Secretary-General would make clear to the disputing parties his readiness to offer good offices, conciliation or mediation if requested. The inclusion of the Chairman of ASEAN gives a greater significance to the role of the ASEAN Chair. This rotates among the member states in alphabetical order. The effectiveness of the Chair depends largely on the personality of the foreign minister and head of government of the country that holds it, effectiveness is not a function of size alone.

In term of jurisdiction of ASEAN Dispute Settlement System, Article 1.1 of the DSM Protocol provides that:

“The rules and procedures of this Protocol shall apply to disputes brought pursuant to the consultation and dispute settlement provisions of the Agreement as well as the agreements listed in Appendix I and future ASEAN economic agreements (the ‘covered agreements’).”

The lists of the covered agreements are contained in Appendix I of the Protocol. This will be the responsibility of the ASEAN Secretariat to keep the list up to date, because currently it appears that there is a considerable degree of legal uncertainty as to the exact scope of jurisdiction of the ASEAN dispute settlement mechanism. Over 50% of the agreements that the ASEAN Secretariat considers to be ‘covered agreements’ have not yet been formally listed in Appendix 1.

Further, in addressing the issue of exclusive jurisdiction and forum shopping, Article 1.3 of the DSM Protocol provides that:

“The provisions of this Protocol are without prejudice to the rights of Member States to seek recourse to other fore for the settlement of disputes involving other Member States. A Member State involved in a dispute settlement can resort to other fora at any stage before a party has made a request to the SEOM to establish a panel pursuant to paragraph 1 Article 5 of this Protocol.”

Based on the above provision, jurisdiction of the DSM Protocol is not exclusive and Members are allowed to take their dispute to another forum other than the ASEAN DSM until the time that a request for the establishment of an ASEAN panel is filed. This flexibility might undermine ASEAN DSM because it does not impose any obligation for exclusivity. ASEAN Member has access to the ASEAN DSM whenever it considers that a benefit accruing under any of the ASEAN covered agreement is being nullified or impaired or if the attainment of an objective of an ASEAN covered agreement is being impeded, which may be the result of the failure of an ASEAN Member to carry out its obligations under a covered agreement or the existence of any other situation.

ASEAN Dispute Settlement Infrastructure

Similar to the WTO, ASEAN has its own dispute settlement infrastructures that support the dispute settlement mechanism. The relevant organs are:

1. Panel
2. Appellate Body
3. ASEAN Secretariat: Legal Affairs and Treaty
4. Senior Economic Officers Meeting (SEOM)

Panels

Similar to the WTO DSM, the role of the panel is to make an objective assessment of the dispute. This duty includes making an objective assessment of the facts which are brought fourth by the parties and also assess the applicability and conformity with the ASEAN law, especially sections of the Agreement and any other covered agreements. This duty is explicitly provided for in Article 7 of the Protocol, which mirrors exactly that of Article 11 DSU.

Unlike the WTO Panels, the Panels in ASEAN are duly instructed to follow the working procedures as provided for in the Protocol. They are not allowed to derogate from the provisions which have been stipulated in the Protocol as mandated by Article 8.1 of the Protocol and Paragraph II.1. In the WTO DSM, Panels are also instructed to follow the working procedures in Appendix 3, however, the Panel are allowed to develop their own *ad hoc* working procedures.

By virtue of Article 8.2 of the Protocol, the Panel must complete its work and submits report to the SEOM around 60-70 days after the establishment of the panel. Prominent academics such as Van Den Bossche, have argued that this stringent timeframe is neither “realistic nor logical” because it is unexceptionally quick.⁴¹ Even after the establishment of a panel, the Panel itself must still be composed and this will take some time to complete - by also taking into consideration the disagreement that parties will have as to the composition of the panel and also the difficult in finding appropriate panelists.

⁴¹ Peter Van den Bossche and Paolo R. Vergano, *The Enhanced Dispute Settlement of ASEAN: A Report On Possible Improvements*, page 44.

Currently, there is a roster of panelists that the ASEAN Secretariat has.⁴² However, this is merely listed down but there is no appointment yet because the appointment of panelists is on an *ad hoc* basis, just like in the WTO. There is no standing body of panelists unlike for the Appellate Body members.

Pursuant to the Working Procedures of the Panel that is laid out in Appendix II of the Protocol, those who are qualified to become members of the panel must have these following qualifications: “well-qualified governmental and/or nongovernmental individuals, including persons who have served on or presented a case to a panel, served in the Secretariat, taught or published on international trade law or policy, or served as a senior trade policy official of a Member State”.⁴³ This provision mirrors exactly that of Article 8 of the DSU. However, the main distinguishing difference is with regards as to whether nationals could serve as panelists. In the ASEAN DSM, nationals of third parties could serve on the panel, without express approval by the parties to the dispute.

Appellate Body

Article 12.1 of the Protocol stipulates that the AB members shall be established by the ASEAN Economic Ministers (AEC). Each AB member shall serve for a period of four year and each person may only be reappointed once. The task of the AB is primarily to adjudicate over a dispute that has been appealed by the member state.

It should also be noted that the timeframe for appellate proceedings, like the panel proceedings is also illogical. The appellate proceedings are given longer timeframe – the proceedings takes place within 60-90 days, as stipulated in Article 12.5 of the Protocol. Thus, it is actually longer than the panel proceedings. Van Den Bossche have argued that this timeframe “defies logic” because panel proceedings should normally take a more lengthy process since they deal with more legal issues and must make findings on the facts before it.⁴⁴

Parties to the dispute may request for the dispute to be appealed to the AB. However, unlike in the WTO DSM, ASEAN members is not at liberty to contemplate within a grace period to consider whether they want the case to be appealed or not. As provided by Article 9.1 of the Protocol, if parties wish to appeal

⁴² Interview with Sindy Hermawati from the ASEAN Legal Services and Agreements Division on June 2014.

⁴³ Paragraph I of Appendix of the Protocol.

⁴⁴ Appendix II of the Vientiane Protocol.

the case, it must do so before the SEOM has adopted the Panel report. This is because the SEOM must adopt its report within 30 days of its submission. On the contrary, in the WTO, the DSB must not adopt the panel report until 20 days of the circulation to the Members. This provides more flexibility for the parties to the dispute to contemplate whether they want to appeal the case or not. Therefore, the timeframe of proceeding may contribute to the reluctance to settle disputes through the dispute settlement process with ASEAN.

There has not been any AB Members appointed, thus far. The appointment is crucial to ensure the operation of the appeal process. ASEAN DSM cannot wait until the existence of the first case is being brought to ASEAN DSM to appoint its AB Members because the selection and the concurrence of all Members for AB Members are far then simple. AB Members have a very crucial role in ensuring the security and predictability of the system as well as the consistency and continuity of the system. There can only be one appeal and whatever the AB rules can only be revoked if all SEOM Members decided not to adopt the AB report including the representation of the winning party.

SEOM

The Senior Economic Officers Meeting or more commonly referred to as SEOM, is an institution which closely resembles the Dispute Settlement Body (DSB) in the WTO DSM.⁴⁵ The SEOM is comprised on senior capital-based government officials who meet a minimum of four times a year. Additional meetings are allowed but are not required by the Protocol.

Regular meetings between senior ministers and officials are a prominent feature of ASEAN. In addition, around 230 meetings are held each year under its auspices, covering subjects ranging from science and technology to environment and culture.⁴⁶ Such functions underpin the organization's most notable achievements: community building and conflict management.⁴⁷

The main tasks of the SEOM include establishing panels and adopt reports issued by the Panel and the AB. There are currently around 20-25 individuals who work with the SEOM. However, the Protocol does not provide for any sort of limitations regarding the number of people who may work with the SEOM. Therefore, the SEOM welcomes a lot more people to assist them in executing their functions.

⁴⁵ Article 2.1 of the Protocol

⁴⁶ Shaun Narine. *ASEAN and the ARF: The Limits of the "ASEAN way"*. Asian Survey Vol 37 no 10. Page 967.

⁴⁷ Ibid.

ASEAN Secretariat

Similar to the WTO, ASEAN also has Secretariat that provides multifunction assistance the implementation of ASEAN agreements and decisions. In particular, Article 19 of the Protocol also entrusts the Secretariat with tasks involve the settlement of dispute among member states. They have the responsibility to assists panels and the AB members with regards to matters concerning legal, historical and procedural aspects. Additionally, Article 19.2 of the Protocol stipulates that the Secretariat must also assist the SEOM in the overseeing the implementation of panel and AB reports. There are approximately around 185 people who are currently working in the ASEAN Secretariat. However, this exclude those who work in the Secretariat on a project basis which normally consists of people from the New Zealand, Japan and other countries.

The ASEAN Secretariat is also equipped with the Legal Services and Agreements Division (LSAD). The LSAD must assist the ASEAN Secretariat in interpreting the Charter as well as the facilitation of all ASEAN documents. This division mirrors the Legal Affairs Division (LAD) in the WTO. The LSAD handles issues regarding the multilateral agreements, which also includes technical agreements *inter alia* consultancy agreements, administrative agreements, procurement agreements and vendor agreements.⁴⁸ However, unlike the LAD, the LSAD within ASEAN has a very small support staff. Currently, there are only six people who are working in the LSAD (1 director, 2 senior lawyers, 3 Technical Assistance).

Like the WTO LAD, LSAD will also have the crucial role to assist panels or even AB Members in the dispute settlement proceeding because there is no AB Secretariat yet. Unlike AB panels are *ad hoc* and many of them do not have legal background or experience in Dispute Settlement Proceeding. Thus, the role of LSAD is indispensable, not to drive or dictate the panels but rather to give panelists better understanding of substantive and procedural issues so they could give a good ruling. If the time comes for the first case being launched to ASEAN DSM, can this heavy task being performed by 6 people that also doing other works?

⁴⁸ An interview with Sندی Hermawati who works with the ASEAN Legal Services and Agreements Division on June 2014.

ASEAN Culture

One of the distinguishing difference between the ASEAN and WTO or other regional dispute settlement forums, is that ASEAN members have an inherent non-confrontational spirit. Unlike members of the WTO, MERCOSUR, NAFTA or SACD, ASEAN members have a preference over negotiations and political diplomacy in resolving conflict. ASEAN way involves the use of extensive consultation and consensus-building to develop intramural solidarity.⁴⁹ The "ASEAN process" is about the management and containment of problems. It is a method of interaction that is still evolving, and it is a "consultative process" primarily motivated by the desire to create a stable intra- mural environment.⁵⁰

This type of preference encourages the ASEAN members to resort to alternative ways to resolve disputes rather than through adjudicative processes, thereby undermining the strength of the ASEAN Dispute Settlement Mechanism. Therefore, consultations and the achievement of a solution based on consensus among parties are preferred over court or quasi-judicial procedures and legally-binding rulings such as through the ASEAN Compliance Monitory Body, ASEAN Consultation to Solve Trade and Investment Issues and the use of good offices and mediation.⁵¹

This ASEAN culture is envisaged explicitly in the ASEAN Charter. Article 1(1) of the ASEAN Charter stipulates that ASEAN exists in order to “maintain and enhance peace, security and stability and further strengthen peace-oriented values in the region”. Therefore, ASEAN’s reason of existence is not simply to collectively organize South-East Asian countries together within this organization but rather, it aims to create “a sense that each of us belongs to a family of countries in Southeast Asia, interlinked economically, politically and culturally”.⁵²

⁴⁹ Shaun Narine. *ASEAN and the ARF: The Limits of the “ASEAN way”*. Asian Survey Vol 37 no 10. Page 962.

⁵⁰ Ibid, page 964.

⁵¹ Peter Van den Bossche and Paolo R. Vergano, *The Enhanced Dispute Settlement of ASEAN: A Report On Possible Improvements*, page 66.

⁵² Walter Woon. *The ASEAN Charter Dispute Settlement Mechanisms*, can be accessed through <http://www.aseanlawassociation.org/10GAdocs/Singapore2.pdf>, page 1.

Moreover, ASEAN members greatly fear that initiating disputes against other ASEAN members will inevitably result in a “tit for tat” outcome.⁵³ Rather than finding a mutually acceptable solution between the disputing members, it will lead to continuous process of finger pointing. Therefore, it will complicate the process even further and delay finding an acceptable solution between the two countries.

Other writers such as Lee Leviter have also recognized the importance of the ASEAN way. Leviter characterizes the ASEAN Way into two elements⁵⁴: 1) diplomatic strategy based on consultations and consensus 2) six principles inscribed in the TAC: i. respect for state sovereignty ii. Freedom from external interference iii. Non-interference in internal affairs iv. Peaceful dispute settlement v. renunciation of the use of force vi. Cooperation.

Unlike in the WTO, ASEAN is more focused relations-based system and soft law rather than through a rules-based system. In a rules-based system, the members must adhere to binding norms and resolve disputes through formalized processes whereas in a relations-based system, agreements are made mostly through mutual trust, knowledge and familiarity.⁵⁵

The ASEAN Way has largely been influenced through ASEAN’s history. During its first twenty years of existence, ASEAN’s existence is to solidify the relationship between member states to prevent from falling into the hands of communism. Therefore, ASEAN existed essentially to enable members to mutually assist each other’s political, economic and cultural development, while still avoiding dominance by a single state to maintain regional balance of power.⁵⁶

There are three key ASEAN principles that all member states must adhere to in order to ensure the organization's success: restraint, respect, and responsibility. "Restraint" refers to a commitment to noninterference in each other's internal affairs, "respect" between states is indicated by frequent consultation, and "responsibility" is the consideration of each member's interests and concerns.⁵⁷

⁵³ Peter Van den Bossche and Paolo R. Vergano, *The Enhanced Dispute Settlement of ASEAN: A Report On Possible Improvements*, Page 11

⁵⁴ Lee Leviter, *The ASEAN Charter: ASEAN Failure or Member Failure?*, *New York University Journal of International Law & Politics*; Fall 2010, Vol. 43 Issue 1, Page 161.

⁵⁵ Lee Leviter, *The ASEAN Charter: ASEAN Failure or Member Failure?*, *New York University Journal of International Law & Politics*; Fall 2010, Vol. 43 Issue 1, Page 168.

⁵⁶ The World Factbook: Laos, CIA, can be accessed through <https://www.cia.gov/library/publications/the-world-factbook/geos/la.html>, last access on 3 October 2013.

⁵⁷ Shaun Narine. *ASEAN and the ARF: The Limits of the “ASEAN way”*. Asian Survey Vol 37 no 10. Page 964.

The case of Vietnam when it was under the Communist control – wanted to occupy Cambodia – the issue was settled through diplomatic initiatives. The ASEAN managed to lobby the UN and encourage the UN not to recognize the new Cambodia government under the Vietnamese Communist regime. Moreover, also sponsored the Jakarta Informal Meetings (JIMs) helped resolve the Cambodian conflict through diplomatic rather than legal means.⁵⁸

ASEAN is also inherently stable and peaceful. Even the organization was not active, by virtue of its existence it influenced peaceful relationships among members and provided a forum where national leaders could emphasize cooperation rather than differences.⁵⁹ ASEAN's regional stability is displayed at how the ASEAN dealt with the issue of the threat of communism of Vietnam in Cambodia.

Another in which ASEAN members are able to prevent the emergence of conflict is their ability to exercise a great deal of self-restraint. This is reflected in the case whereby the Singapore executed two Indonesian marines who had conducted subversive activities during the Indonesian period of *confrontation*.⁶⁰

Prior to the formation of ASEAN, member-states perceived each other like strangers as there was no regional institution for discussion and consultation. Over the years, the habit of consultation among the ASEAN countries has gradually developed with an increasing number of meetings and discussions (currently up to 230 every year) among ASEAN officials at various levels and it "has become part of an institutional culture that helps avoid and control conflicts". Through these talks and meetings, ASEAN members get to know one another, learn about each other's interests and sensitivities, and explore possibilities for expanded co-operation.⁶¹

In the past, growing consultation had helped the ASEAN states arrive at consensus on a number of major issues such as the agreement on the establishment of a Zone of Peace, Freedom and Neutrality (ZOPFAN) in Southeast Asia; the withdrawal of Vietnamese forces from Cambodia; increased regional economic co-operation in the form of the ASEAN Free Trade Area (AFTA), and so forth.

⁵⁸ Shaun Narine. *ASEAN and the ARF: The Limits of the "ASEAN way"*. Page 970

⁵⁹ Antonia Hussey, *Regional Development and Cooperation Through ASEAN*, Geographical Review, Vol. 81 No.1 (Jan, 1991), Page 96.

⁶⁰ Hoang Anh Tuah, *ASEAN Dispute Management: Implications for Vietnam and an Expanded ASEAN*, Contemporary Southeast Asia, Vol. 18 No 1 (June 1996), Page 66.

⁶¹ Ibid, page 67.

The ASEAN DSM has not been utilized for the possible reason that its members feel that there is no need to resort to formal, legalistic means to resolve their disputes but rather by the SEOM informal approach or through the step-by-step CCCA/SEOM/AFTA Council approach. Another possible reason is that the SEOM does not have much trust in the WTO legalistic approach – whereby the final decision rests on the panel as well as the AB. Dispute settlement should be conducted in a “special accommodating way and in a cooperative manner” – not by “legalistic people who are not appreciative of our own ASEAN journey”.⁶² A case to reflect this ASEAN sentiment is case involving Malaysia’s automobile products. Thailand, Indonesia and the Philippines were interested parties. Malaysia and Thailand were not able to agree on the principal or substantial supplying interest qualifications and the consultation dragged on – without resorting to the legalistic means in the ASEAN DSM. Eventually, Malaysia and Thailand reached a mutual agreement between Malaysia and Indonesia and Malaysia and the Philippines.⁶³

The ASEAN DSM for economic arrangement is also influenced by the principles of the ASEAN Way. Therefore, member states have avoided a formalized DSM – although they have created a DSM in 2004, it remains as an “option” rather than a “mandate”.⁶⁴ This again reinforces the idea that the ASEAN Way focuses more on relations-based system rather through a rules-based system.

⁶² David Chin Soon Siong: *Trade Dispute Settlement within ASEAN (ASEAN Matters! Reflecting on the ASEAN edited by Lee Yoong Yoong*, Page 114

⁶³ Ibid, page 115.

⁶⁴ Lee Leviter, *The ASEAN Charter: ASEAN Failure or Member Failure?*, *New York University Journal of International Law & Politics*; Fall 2010, Vol. 43 Issue 1, page 178.

Budget and Financial Issues

The costs associated with the Panelists, the AB members and administrative costs of the ASEAN Secretariat are financed through the ASEAN DSM Fund. This is specifically provided for under Article 17 of the Protocol. The initial contribution to the fund is borne equally by all of the ASEAN member states. Subsequently after that, the parties and third parties to the disputes will have to borne the costs associated with the dispute.⁶⁵ The costs associated with regards to the dispute proceedings are particularly alarming for developing countries. Consequently, the members less-developed status will be discouraged to submit their dispute through legal proceedings because the expenses will be burdensome on their economy since not only will they have to cover the expenses associated with the dispute but they must also reimburse the fees incurred for legal representation.

Another issue related to the ASEAN DSM fund is the apportioning of the costs. In the WTO, there is clear guidance for the members' share of contribution. The WTO must contribute to the WTO Secretariat Budget and the Budget for the AB and the WTO Secretariat. Their share of contribution is apportioned by based on formula that depends on their share of international trade in goods and services.⁶⁶ However, in the ASEAN DSM, the formula for apportioning the costs that must be borne by the members remains unclear. The Protocol does not specifically provide any clear guidance on the issue of the apportionment of costs to the parties involved in the dispute.

The expenses and payment for an ad hoc panel process typically depend on whether the process is supported by a secretariat. The parties can set a standard scale for panelists' fees and expenses, eliminating fee competition between them and making costs more predictable.⁶⁷ An existing secretariat, where there is one, may provide dispute settlement support from its budget. This support affords extra benefits to those who make more frequent use of dispute settlement (but also provides public goods for other PTA parties). PTAs can also budget and pay for dispute settlement separately or case by case.⁶⁸

⁶⁵ Peter Van den Bossche and Paolo R. Vergano, *The Enhanced Dispute Settlement of ASEAN: A Report On Possible Improvements*, Page 10

⁶⁶ Ibid.

⁶⁷ Amelia Porges, *Dispute Settlement*, can be accessed through <http://siteresources.worldbank.org/INTRANETTRADE/Resources/PTAch22.pdf>, page 479.

⁶⁸ Ibid, page 480.

Legal Certainty

One of the possible considerations of ASEAN Members to restrain themselves in using ASEAN DSM is the absence of legal certainty in the system due to a lack of precedence. Currently, the ASEAN DSM has never resolved any disputes between the ASEAN members through the process of adjudication. There has never been a dispute between ASEAN member states that has not been resolved through the process of consultations. The issue between the member states was merely a misunderstanding that did not rise to a level of serious dispute necessitating adjudication by the panel or the AB.⁶⁹

In 1995, Singapore initiated a request for consultations with Malaysia because its rights under the WTO covered agreements, in particular, the GATT, have been nullified and impaired. Singapore contends that Malaysia has enacted restrictive trade policies with regards to prohibition of imports of polyethylene and polypropylene. However, it should be noted that subsequently after that, Singapore withdrew its Panel request even after failure to reach a mutually agreed solution through the process of consultations. A week after Singapore has requested for the establishment of a Panel, Malaysia managed to convince Singapore. Malaysia was able to convince Singapore that it would modify its non-automatic licensing regime into an automatic licensing regime whereby the permits for imports would be issued freely irrespective of the grade and quantity of the imported products. This is reflective of the fact that the WTO DSM is better suited to handle disputes rather than the ASEAN DSM. The ASEAN members have greater confidence in resolving their disputes with the WTO DSM. According to the statement made by Mr. Kenyon, Chairman of the DSB, “the greater predictability and automaticity in the DSU rules is encouraging the early settlement of disputes and this is clearly consistent with the intent of the new rules.”⁷⁰

Another case involving ASEAN members are again submitted before the WTO DSM, is the *Thailand – Cigarettes* case.⁷¹ The complainant in this dispute is the Philippines and the respondent is Thailand. Thailand enacted a customs and tax measure whereby it prohibits cigarettes imported from the Philippines. Unlike the case with Singapore and Malaysia, the case was actually adjudicated by the Panel in the WTO DSM.

⁶⁹ An interview with Sindy Hermawati who works with the ASEAN Legal Services and Agreements Division on June 2014.

⁷⁰ Statement by H.E. Mr D Kenyon (Australia), Chairman of the Dispute Settlement Body and as cited in Consultation Within WTO Dispute Settlement: A Chinese Perspective by Qi Zhang, page 251; WT/DSB(96)/ST/1

⁷¹ *Thailand – Customs and Fiscal Measures on Cigarettes from the Philippines* (DS371)

Complainants prefer the WTO for several reasons including the large body of cases (with appellate review), which offers greater clarity and certainty about WTO obligations, and greater predictability about the likely outcome of a dispute.⁷²

⁷² Amelia Porges, *Dispute Settlement*, can be accessed through <http://siteresources.worldbank.org/INTRANETTRADE/Resources/PTAch22.pdf>, page 478.

Lack of Expertise in ASEAN Laws or ASEAN Dispute Settlement

Compared with the existence of the WTO DSM, the ASEAN DSM is a relatively new creature in being. Part of the reason why there is a reluctance to utilize the ASEAN DSM is because its members are not as familiar with the ASEAN Laws as they are with the rules under the WTO. The Vientiane Protocol establishing the ASEAN DSM only came into force 2004, whereas the WTO DSM was established at the end of 1995. Therefore, ASEAN members are more familiar with WTO rules, especially since there is already an extensive number of case law that has been developed under the auspices of the WTO.

One of the reasons in which the ASEAN DSM has never been invoked is partly due to a lack of awareness of the ASEAN laws regarding the settlement of disputes. Members often resort to the WTO DSM because they are more familiarized with the rules under that multilateral treaty. However, as a part of their work plan, the ASEAN LSAD is working towards building awareness to ensure that each of the members are equipped with the relevant dispute settlement rules under ASEAN.⁷³

⁷³ An interview with Sendy Hermawati who works in the ASEAN Legal Services and Agreements Division (LSAD) on June 2014.

Utilization of Dispute Settlement Mechanism at other RTAs/FTAs

Apart from ASEAN, there are other RTAs which also have its build-in dispute settlement mechanism. For the purposes of this paper, the focus will be on MERCOSUR, NAFTA and the SADC.

MERCOSUR is a custom union that consists of five developing countries: Argentina, Brazil, Paraguay, Uruguay and Venezuela.⁷⁴ MERCOSUR is established with a view to create a common market for those South American countries through integrated commercial policies. Similar to the ASEAN DSM, MERCOSUR DSM also adopts a consensus approach with regards to adopting decisions. The political arrangement is vital because the MERCOSUR lacks a supranational governing body. Thus, the DSM plays a significant role in resolving disputes concerning political breakdowns and inconsistencies.⁷⁵ The DSM's origin in the MERCOSUR is founded in the Protocol of Brasilia of 1991.

Like in the ASEAN DSM, when there is a dispute, the first step to resolve the matter is through direct consultations with the other member state. The consultation is held at the maximum of 15 days. If no resolution is reached, the matter is then referred to the GMC (Common Market Group) for discussion. After 30 days, failure to reach an agreement requires the formation of an arbitrary tribunal to hear. After 30 days, failure to reach an agreement requires the formation of an arbitrary tribunal to hear the case. The tribunal consists of three members. Each conflicted party selects one member and the third is designated by the Secretariat and must be from a neutral state (not necessarily from a MERCOSUR country). The neutral arbitrator acts as the presiding member of the panel. All arbitrators are selected from an existing roster submitted by each state at the inception of the treaty. The tribunal must pass a judgment within a 60-day period, with the possibility for an additional 30-day extension. The decision reached must be in accordance to the Treaty of Asuncion, other pertinent trade agreements, CMC decisions, GMC resolutions, CCM directives, and international law standards. The decision of the Panel is final and binding. Unlike the ASEAN, WTO and NAFTA DSM, there exists no right to appeal. However, unlike the ASEAN DSM, the

⁷⁴ It was established in 1991 by the Treaty of Asunción between Argentina, Brazil, Paraguay and Uruguay. Venezuela became a full member since 2012. Bolivia is currently in the process of becoming a member after signing an accession protocol in December 2012.

⁷⁵ Christopher Vignoles, *The MERCOSUR Dispute Settlement System*, can be accessed from <http://www.learningace.com/doc/2034381/cae41bb4611b442f72f56ff63ceff603/vignoles>, page 3.

MERCOSUR DSM has been invoked by their members.⁷⁶ From the time of its creation, the MERCOSUR DSM has been successful in hearing a total of ten cases.⁷⁷

A case that displays the tension between the MERCOSUR and the WTO is the *Brazil – Retreaded Tyres* case.⁷⁸ The MERCOSUR tribunals have issued two separate decisions finding that the import ban violates MERCOSUR provisions. Moreover, the EU has subsequently filed the case before the WTO adjudicating bodies. The WTO panel has ruled that Brazil's ban on retreaded tire imports also violates WTO provisions.⁷⁹ However, the MERCOSUR differs with the WTO in the sense that the MERCOSUR is equipped with a number of legal instruments that directly addresses environmental policies. For example, in 1992, the Presidents of the MERCOSUR countries have signed the Canela Declaration, which imposes a shared responsibility for environmental problems and subsequently after, MERCOSUR countries have signed the Cooperation Agreement on Environmental Issues which establishes a Commission on Environmental Cooperation to harmonize environmental laws and regulations and to create programs to monitor regional environmental quality.⁸⁰

NAFTA consists of the United States, Canada and Mexico. Unlike the MERCOSUR, NAFTA's primary aim is to create a free trade area rather than a common market. NAFTA's ambition is to maintain its trade policy in such a way that is consistent with the General Agreement on Tariffs and Trade (GATT). Therefore, NAFTA does not mandate a supranational governing body and its DSM's does require much authority. Unlike, the MERCOSUR, there are different chapters within NAFTA that governs the rules for the DSM, chapter 20 being its main body. Chapter 11 governs investment disputes and chapter 14 governs disputes concerning financial services. Similar to the ASEAN and MERCOSUR DSM, the first step in resolving a dispute within the NAFTA is through consultations and attempt to arrive at a mutually acceptable solution. NAFTA allows longer period for consultation than MERCOSUR, which is a maximum 45-day period. NAFTA DSM then allows members to direct the conflict to the Free Trade Commission meeting for discussion. The time limitation for this step is 30 days. If the dispute is not resolved through the

⁷⁶ Christopher Vignoles, *The MERCOSUR Dispute Settlement System*, page 7.

⁷⁷ The full list of cases can be accessed through http://www.mercosur.int/t_generic.jsp?contentid=375&site=1&channel=secretaria&seccion=5

⁷⁸ *Brazil – Measures Affecting Retreaded Tyres* (DS332).

⁷⁹ Fabio Costa Morosini, *The MERCOSUR and the WTO Retreaded Tires Dispute: Rehabilitating Regulatory Competition in International Trade*, page 2, can be accessed through <http://repositories.lib.utexas.edu/bitstream/handle/2152/3641/morosinif23759.pdf?sequence=2>, last access on 30 June 2014.

⁸⁰ *Decreto Presidencial No. 2.241, de 2 de junho de 1997, D.O.U. de 03.06.1997 (Brazil), art. 4*

Fabio Costa Morosini, *The MERCOSUR and the WTO Retreaded Tires Dispute: Rehabilitating Regulatory Competition in International Trade*, page 59.

Free Trade Commission meeting, an arbitrary panel is established to hear the case. All decisions must be made by the Panel within 315 days of the arbitration request. Similar to the ASEAN and WTO DSM, decisions made by the Panel are appealable to the Extraordinary Challenge Committee (EEC).

*Mexico - Soft drinks*⁸¹ is a case that displays the tension between WTO DSM and NAFTA DSM. The US brought fourth a case with Mexico over certain tax measures imposed by Mexico on soft drinks and other beverages that use any sweetener other than cane sugar. Although NAFTA has a similar provision with WTO for automatically selecting panelists, but in practice – like in this case, the US authorities have refused for more than four years to appoint panelists. The case until now is still pending. This reinforces the idea that the dispute mechanism within RTAs works well in theory since it is modeled closely with the WTO DSM.

For the SADC, the settlement of disputes is governed in Annex VI of the SADC Trade Protocol. The SADC DSM also adopts similar provisions with that of the WTO. It is important to note that Annex VI differs from the dispute settlement rules that are governed by the Protocol on the Tribunal. Annex VI specifically covers issues relating to trade disputes. The trade DSM was designed and conceived as a specialized tribunal, staffed by trade experts (both legal and non-legal), whereas the Tribunal is expected to be a more 'general' tribunal, dealing with questions covering the entire scope of SADC law.⁸² As of 2005, like the ASEAN DSM, no trade cases have been filled either in the SADC Tribunal or in the SADC Trade Protocol. This could be partly attributed to the fact that the possibility of submitting a case before both adjudicatory bodies might lead to forum shopping and consequently, it undermines legal certainty.

Article 14 of the Tribunal Protocol introduces the possibility of bring trade cases before the panel in Annex VI but the Tribunal could also hear it. Similar to the ASEAN DSM, Annex VI method of resolving disputes does not obliged the DSM to have an exclusive jurisdiction. Consequently, this contributes to a lack of usage of Annex VI DSM to resolve trade disputes between SADC member states.

Similar to the ASEAN DSM, SADC is also faced with a shortage and lack of expertise of the panelists. The SADC model for DSM adopts an *ad hoc* panel. This means that for each dispute, there will be a new composition of panelists. This will run the risk of not having an available composition of panelists

⁸¹ Appellate Body Report, *Mexico – Tax Measures on Softdrinks and Other Beverages*, DS308

⁸² Jan Bohanes, *A Few Reflections on Annex VI to the SADC Protocol*, can be accessed through http://www.tralac.org/wp-content/blogs.dir/12/files/2011/uploads/tralac_WP3.2005_Bohanes_Jan.pdf, page 7.

when a dispute emerges between the SADC members.⁸³ Having a permanent tribunal will have more advantages than an *ad hoc* tribunal namely that the panelists have good communication with each other so that they will be able to interpret the treaty provisions in a uniform manner⁸⁴. Alternatively, because they work full time, it is easier to ensure their independence and position for a longer period of time.⁸⁵

In 2010, the SADC Tribunal was suspended by the Summit. The SADC Tribunal's suspension is attributed to the case in which the Tribunal ruled against Zimbabwe for human rights violations.⁸⁶ In this case, Zimbabwe had refused to comply with the judgment of the Tribunal. Consequently, the Tribunal had to refer the issue to the Summit for implementation. This dispute revealed an inherent weakness in the dispute settlement mechanism of the SADC due to the concept of consensus in decision making. Therefore, members are ultimately judges of their own cases because they can always block the consensus.⁸⁷ Gerard Erasmus have advocated for a restructuring of the SADC dispute settlement system through changing the consensus based decision making into one which is a reverse consensus to prevent members from vetoing judgments against it.⁸⁸ Thus, it is advisable for the SADC Tribunal to adopt the WTO DSM process of decision making, which is the reverse consensus principle. If a consensus decision making system is still adopted by the SADC, it will foster uncertainty and unpredictability.⁸⁹ Consequently, the rules-based system will be undermined.

See Annex 2 for the table of comparison for the 4 dispute settlement systems i.e. ASEAN, MERCOSUR, NAFTA and SADC.

Moreover, for each these RTAs they are also equipped with a support staff that assists them in dealing with disputes that arises between member states. For instance, the ASEAN Secretariat provides support to the ASEAN Enhanced Dispute Settlement Mechanism; the Mercosur Administrative Secretariat supports Mercosur dispute settlement; and each national section of the NAFTA Secretariat provides support for dispute settlement under NAFTA Chapters 19 and 20. This approach can foster consistency of approach and build common knowledge. PTAs can also have each panelist arrange his or her own support services on

⁸³ Ibid, page 11.

⁸⁴ Tamio Nakamura, *East Asian Regionalism from a Legal Perspective: Current Features and a Vision For the Future*, [East Asia Volume 27, Issue 4](#), page 182.

⁸⁵ Ibid.

⁸⁶ Gerard Erasmus, *Does It Matter Whether SADC Has a Tribunal?*, can be accessed through <http://www.tralac.org/discussions/article/5572-does-it-matter-whether-sadc-has-a-tribunal.html>, last access on 30 June 2014.

⁸⁷ Ibid.

⁸⁸ Ibid.

⁸⁹ Ibid.

a reimbursable basis in the event of a dispute; this approach is more economical in the short run but can lead to uneven or legally inconsistent results from case to case.⁹⁰

According to the World Bank report surveying RTAs, in 2011, there have been only 25 known decisions RTA DS panels relating to 16 disputes.⁹¹

⁹⁰ Amelia Porges, *Dispute Settlement*, can be accessed through <http://siteresources.worldbank.org/INTRANETTRADE/Resources/PTAch22.pdf>, page 479.

⁹¹ Felicity Hammond, A Balancing Act: Using WTO Dispute Settlement to Resolve Regional Trade Agreements Disputes, *Trade, Law and Development*, Vol 4, No 2 (2012), page 429.

Short Time Frame for Dispute Settlement

Unlike the WTO DSM, the procedure for resolving dispute under the ASEAN DSM is even for prompt. It should also be noted that during the Panel proceedings, the Panel is not allowed to deviate from the working procedures (unlike in the WTO – whereby it allows the Panel a greater degree of flexibility to depart from its default working procedure as provided by Appendix 3 of the DSU and create *ad hoc* working procedures to accommodate to the needs of the members initiating the dispute). In the ASEAN DSM, the Panel is not allowed to create its own working procedures and depart from Appendix II of the Protocol.

To add to the rigidity of the system of the ASEAN DSM, the process of panel proceeding is not “realistic or logical”.⁹² The Protocol thus allows an ASEAN panel 60 to 70 days from the day of its establishment to complete its work and submit its report to the SEOM – compare with the WO (Section II.B, Article 8.2 of the Protocol). In the WTO, the Panel normally takes an average of 14 months between establishment of a panel and circulation of the report.⁹³ Moreover, this timeframe is not fitting to resolve disputes because the Protocol allows the Panel to consult experts (Art 8.4 of the Protocol). However, difficulty might arise in during the consultation of experts in the sense that they may not always be available and this process of consulting expert in itself is time-consuming.

Similar to the WTO DSM, the ASEAN DSM allows members to appeal their case for appellate review. However, the stark difference is again, with the short time frame allowed. Art 9.1 of the Protocol stipulates that appeal of an ASEAN panel report must thus be filed before the SEOM adopts the report. The same rule applies in the context of WTO dispute settlement. Unlike the WTO DSM, there is no grace period/20 days (Art 16 DSU) prior to the adoption of the Panel report to decide whether or not the parties want to appeal. In the ASEAN DSM, the Protocol does not provide for such right. If the report is submitted by the panel to the SEOM on day 1 and on day 3 a meeting of the SEOM is scheduled, then parties will have to decide on day 2 or early day 3 whether to appeal to the panel report. This will provide little time for careful consideration.

⁹² Peter Van den Bossche and Paolo R. Vergano, *The Enhanced Dispute Settlement of ASEAN: A Report On Possible Improvements*, page 44.

⁹³ Paolo R. Vergano, *The ASEAN Dispute Settlement Mechanism and its Role in a Rules-Based Community: Overview and Critical Comparison*, page 9.

Unlike the WTO, the ASEAN DSM does not have exclusive jurisdiction (Article 1.3 of the Protocol) – it has a choice of forum clause. The provision bears a similarity to that of the NAFTA DSM. The provisions of this Protocol are without prejudice to the rights of Member States to seek recourse to other fora for the settlement of disputes involving other Member States. A Member State involved in a dispute can resort to other fora at any stage before a party has made a request to the SEOM to establish a panel pursuant to paragraph 1 Article 5 of this Protocol. However, once the Member has decided to resort to other fora, they are prevented from making a request to the SEOM to establish a panel. Unlike the WTO, this does not entail exclusive jurisdiction and provides for more flexibility.⁹⁴ Therefore, the availability to resolve the dispute through other international fora, such as the WTO, is another disincentive for members to resort to the ASEAN DSM.

This provision allows the possibility to have recourse to other DSM in order for ASEAN members to resolve their disputes. For example, subject to the agreement of the parties to the dispute, they resort to the modes of dispute settlement procedure as provided for in the TAC. The dispute that threatens peace will be adjudicated by the High Council, which consists of representatives from each of the High Contracting Parties. Alternatively, the parties to the dispute may refer the case to another international tribunal, which is the International Court of Justice as provided for in Article 33 (1) of the Charter of the United Nations. As mentioned earlier in this paper, Malaysia and Indonesia referred their dispute to the ICJ over the Sipadan/Ligatan area.

Under the NAFTA DSM, there is a similar provision, but it is more commonly understood as a waiver. Pursuant to Article 1121 of NAFTA, members “waive their right to initiate or continue before any administrative tribunal or court under the law of any Party, or other dispute settlement procedures, any proceedings with respect to the measure of the disputing Party that is alleged to be a breach...except for proceedings for injunctive, declaratory or other extraordinary relief, not involving the payment of damages, before an administrative tribunal or court under the law of the disputing Party”.

Consequently, this leaves open the possibility for members to engage in “forum shopping”. This is because Art 1.3 of the Protocol allows ASEAN member states to submit their disputes within the ASEAN context to other for a prior to the establishment of a panel. Although this provision enables a degree of

⁹⁴ Van Den Bossche, page 19.

flexibility because the ASEAN DSM does not have exclusive jurisdiction, it undermines the authority of the ASEAN DSM.

Moreover, the relationship between the Protocol and the ASEAN Charter further discourages ASEAN member states to resort to the process of adjudication in as provided for in the ASEAN DSM. This is because the ASEAN Charter includes the possibility for members to submit the dispute to the ASEAN Summit. Article 26 stipulates that “when a dispute remains unsolved, after the application of the preceding provisions of this Chapter, this dispute shall be referred to the ASEAN Summit, for its decision”. ASEAN member states may refer their unresolved disputes to the ASEAN Summit after they have exhausted their remedies. Therefore, this introduces a possibility to settle disputes through political rather than legal means.⁹⁵

⁹⁵ Paolo R. Vergano, *The ASEAN Dispute Settlement Mechanism and its Role in a Rules-Based Community: Overview and Critical Comparison*, page 8.

Conclusions

One of the main reason why disputes have never been lodged to the ASEAN DSM is not so much with the inherent weakness of the DSM itself but rather the aim and purpose of the ASEAN differs to the WTO or other RTAs. ASEAN members are not merely concerned with the liberalization of trade and economic integration but more concerned with maintaining peace and stability in the region.⁹⁶ Therefore, this heavily influences an ASEAN member's decision when contemplating whether to lodge a dispute through legalistic means or not. Which is why the dispute involves mostly political matters which could be resolved through diplomacy rather than through legal means. This is duly reflected by the fact that disputes (only one until this day) could be resolved through effective consultations because the issue is a mere misunderstanding that does not require the settlement through legalistic means. It could then be concluded that ASEAN members have a genuine peace seeking nature when conducting relations with other member states.

A second reason for the lack of usage of the ASEAN DSM is ingrained in the characteristic of the ASEAN DSM because it does not have exclusive and compulsory jurisdiction. Similar to other RTAs like NAFTA, ASEAN members, when faced with disputes covering ASEAN rules, are not mandated to resort to using the ASEAN DSM. They have the option to lodge the case either in the ASEAN DSM or WTO DSM. Therefore, this discourages members to submit the case to the ASEAN DSM.

A third reason that contributes to the absence of any disputes being adjudicated by the ASEAN DSM is a lack of awareness of the member states regarding the dispute settlement mechanism rules in ASEAN. Although the provisions in the ASEAN DSM mirrors the WTO DSM, but members are unaware of this. Also, members have a lot more confidence with the WTO DSM because it has existed for a much longer period than the ASEAN DSM. Hence, there is already a heavy load of case law that has been developed by the Panel and the AB members. As a comparison, the ASEAN DSM has only come into force since 2004 and members are yet familiar with its rules and procedures.

⁹⁶ Bilson Kurus, *Understanding ASEAN: Benefits and Reason D'Etre*, Asian Survey 33, 8 (Aug.1993), page 820.

Recommendations

From the research that we have conducted, we would suggest the following recommendations to further enhance the ASEAN DSM.

Firstly, there should be more transparency. One of the ways in which this could be achieved is through improving the ASEAN website to encourage greater public participation. Moreover, transparency should also be encouraged with regards to the panel and appellate body proceedings. The proceedings should be open to the public as a means to raise awareness for the public.

Second, there should be more people working specifically in the LSAD. Currently, there are only six people who are working in this division. The LSAD is a key division that assists the Secretariat in carrying out its functions. Therefore, there should be a larger support staff that ensures that is able to execute its duties efficiently and also to provide legal assistance to members with issues dealing with resolving disputes. This could be achieved perhaps through more training and or capacitation, with the assistance of those working in the WTO or other RTAs.

Third, there should be an improvement with the rules and procedures on resolving disputes between member states. The ASEAN DSM should be a more rules-based regime rather than relations-based system. The ASEAN Way is a norm of relations-based behavior, all member state relations continue to fall into ASEAN's purview. And because consensus remains the basis for decision-making, ASEAN effectively serves as an impediment to member states' foreign policy goals, to the extent that those goals require critique of or pressure on neighboring states.⁹⁷ It continues to do exactly what soft law and relations based governance is supposed to do: it ensures that ASEAN develops only those instruments with which all member states are comfortable, and it quarantines disagreements so that states may focus their energies on mutually agreeable commitments.⁹⁸

Fourth, there should be permanent AB members. Currently, there is no standing body of AB members. The list of members is merely being discussed but appointment has not been conducted. Moreover, there is another issue that needs to be resolved urgently – which is to decide whether there should

⁹⁷ Lee Leviter, *The ASEAN Charter: ASEAN Failure or Member Failure?*, *New York University Journal of International Law & Politics*; Fall 2010, Vol. 43 Issue 1, page 208.

⁹⁸ *Ibid*, page 209.

be three or five AB members. This will act as an impediment when an appeal takes place because it could potentially delay the proceedings and prevent a prompt settlement of disputes that is envisioned by the ASEAN DSM.

Fifth, the allocation of costs when resolving disputes through the DSM should be revised. Budgeting is an important issue because most of the ASEAN members are developing or least developing countries. A suggestion is to follow the WTO system of apportioning costs. Costs should be shared equally by all members rather than simply the parties to the dispute. Moreover, ASEAN should also include a legal Assistance for litigation body like ACWL in the WTO. This will be especially helpful for LDC countries who do not have a means to afford legal support.

Lastly, balance should be restored between WTO and RTA dispute settlement mechanism. Joost Pauwelyn suggests to keep the jurisdiction of the WTO limited to determining violation claims under the relevant treaty but allowing WTO dispute settlement panels to interpret and apply WTO rules with reference to regional arrangements agreed by both parties through an approach of “interaction and dialogue”.⁹⁹ Through this approach the two DSM will remain at a separate institutional level. This way – it will treat the WTO DSM as parallel rather than hierarchical to the ASEAN DSM.

⁹⁹ Felicity Hammond, *A Balancing Act : Using WTO Dispute Settlement to Resolve Regional Trade Agreements*, can be accessed through <http://www.tradelawdevelopment.com/index.php/tld/article/viewFile/4%282%29%20TL%26D%20421%20%282012%29/145> , page 432

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Mr. Joseph Wira Koesnaidi is an admitted Indonesian Advocate (PERADI). He obtained his bachelor degree at University of Indonesia (S.H.) in 2003. He continued his master program at University of Maastricht, the Netherlands (LL.M) with DELTA Scholarship in 2006.

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In 2010, Mr. Koesnaidi has the opportunity to work in the Legal Affairs Division at the World Trade Organization (WTO) and was involved in 3 different panel cases in different stage of proceedings. In 2007-2009, he was a Trade Lawyer for the Indonesia Trade Assistance Project (ITAP) - a capacity building project under the auspices of USAID.

He has also been appointed as a visiting lecturer in the Master's in International Trade Law program at University of Indonesia and Masters of Law in Trade, Investment and Competition program at University of Pelita Harapan. He is also an associate fellow at the Institute for Globalization and International Regulation, University of Maastricht, the Netherlands.

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Jerry Shalmont completed her bachelor degree (S.H.) and masters degree focusing on international trade law at Universitas Pelita Harapan with cum laude predicate in 2010 and 2013. During her study in the

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Putri Anindita Sahari has obtained her bachelor degree taking law with business in University of Birmingham, UK in 2013. She is currently undertaking her second bachelor degree specializing in Indonesian law in Universitas Pelita Harapan. Her past experiences include participating in summer internship programs at several law firms and companies.

She has also actively participated in the 2013-2014 ELSA Moot Court Competition on WTO Law representing the Faculty of Law of Universitas Pelita Harapan where her team became the first ever to

advanced to the quarter-final rounds. She is currently interning in JWK Law Office where the firm specializes in trade remedies and other aspects of WTO law.

ANNEX 1

TABLE 1

LIST OF CASES ASEAN MEMBER AS COMPLAINANT IN WTO DSM

| NO | ASEAN COUNTRIES | CASE NAME | CASE NUMBER | ISSUES |
|----|-----------------|---|-------------|---|
| 1 | Indonesia | <i>Argentina – Safeguard Measures on Imports of Footwear</i> | DS 123 | Safeguard |
| 2 | Indonesia | <i>Continued Dumping and Subsidy Offset Act 2000</i> | DS 217 | Anti-dumping, CVD, Marakesh Agreement |
| 3 | Indonesia | <i>Korea – Antidumping Duties on Imports of Certain Paper from Indonesia</i> | DS 312 | Anti-dumping |
| 4 | Indonesia | <i>South Africa – Anti-Dumping Measures on Uncoated Woodfree Paper</i> | DS 374 | Anti-dumping |
| 5 | Indonesia | <i>United States – Measures Affecting the Production and Sale of Clove Cigarettes</i> | DS 406 | National treatment, SPS and TBT Agreement |
| 6 | Indonesia | <i>European Union – Anti Dumping Measures of Certain Fatty Alcohols from Indonesia</i> | DS 442 | Anti-dumping |
| 7 | Indonesia | <i>Australia – Certain Measures Concerning Trademarks, Geographical Indications and Other Plain Packaging Requirements Applicable to Tobacco Products and Packaging</i> | DS 467 | TBT and TRIPS Agreement |
| 8 | Indonesia | <i>Pakistan – Anti-Dumping and</i> | DS 470 | Publication and |

| | | | | |
|----|-------------|---|--------|---|
| | | <i>Countervailing Investigations Certain Paper Products from Indonesia</i> | | administration of trade regulation, quantitative restrictions, Anti-Dumping, Countervailing Duties |
| 9 | Malaysia | <i>United States – Prohibition of Certain Shrimp and Shrimp Products</i> | DS 58 | MFN, quantitative restrictions, |
| 10 | Philippines | <i>Brazil – Measures Affecting Desiccated Coconut</i> | DS 22 | Agriculture, Anti-dumping and countervailing duties |
| 11 | Philippines | <i>United States – Import Prohibition of Certain Shrimp and Shrimp Products</i> | DS 61 | MFN, Schedules of Concession, National Treatment, Fees and Formalities Connected with Importation and Exportation, Quantitative Restrictions, TBT Agreement |
| 12 | Philippines | <i>Australia – Certain Measures</i> | DS 270 | Quantitative |

| | | | | |
|----|-------------|--|--------|---|
| | | <i>Affecting the Importation of Fruit and Vegetables</i> | | Restrictions, Marrakesh Agreement, Import Licensing, SPS Agreement |
| 13 | Philippines | <i>Australia – Certain Measures Affecting the Importation of Fresh Pineapple</i> | DS 271 | Quantitative Restrictions, SPS Agreement |
| 14 | Philippines | <i>Thailand – Customs and Fiscal Measures</i> | DS 371 | Schedule of Concession, National Treatment, Valuation for Custom Purposes, Publication and Administration of Trade Regulations, |
| 15 | Thailand | <i>European Communities – Duties on Imports of Rice</i> | DS17 | MFN, Schedule of concessions, national treatment |
| 16 | Thailand | <i>Hungary – Export Subsidies In Respect of Agricultural Products</i> | DS35 | Agriculture |
| 17 | Thailand | <i>Turkey – Restrictions on Imports of Textile and Clothing Products</i> | DS47 | MFN, Schedule of concessions, quantitative restrictions, |

| | | | | |
|----|----------|---|-------|--|
| 18 | Thailand | <i>United States – Import Prohibition of Certain Shrimp and Shrimp Products</i> | DS58 | MFN, quantitative restrictions |
| 19 | Thailand | <i>Colombia – Safeguard Measure of Imports of Plain Polyester Filaments from Thailand</i> | DS191 | Textiles and clothing |
| 20 | Thailand | <i>Egypt – Import Prohibition on Canned Tuna with Soybean Oil</i> | DS205 | MFN, quantitative restriction |
| 21 | Thailand | <i>United States – Continued Dumping and Subsidy Offset Act of 2000</i> | DS217 | Anti-dumping and countervailing measures |
| 22 | Thailand | <i>European Communities – Generalized System of Preferences</i> | DS242 | MFN |
| 23 | Thailand | <i>European Communities – Export Subsidies on Sugar</i> | DS283 | Agriculture, national treatment, subsidies and countervailing measures |
| 24 | Thailand | <i>European Communities – Customs Classification of Frozen Boneless Chicken Cuts</i> | DS286 | Schedule of concessions, consultation |
| 25 | Thailand | <i>United States – Provisional Anti-Dumping Measures on Shrimp from Thailand</i> | DS324 | Anti-dumping |
| 26 | Thailand | <i>United States – Measures Relating to Shrimp from Thailand</i> | DS343 | Anti-dumping, MFN, schedule |

| | | | | of concessions national treatment |
|----|----------|--|-------|---|
| 27 | Thailand | <i>United – States Anti-Dumping Measures on Polyethylene Retail Carrier Bags from Thailand</i> | DS383 | Anti-dumping |
| 28 | Vietnam | <i>United States – Anti-Dumping Measures on Certain Shrimp from Vietnam</i> | DS404 | Anti-dumping |
| 29 | Vietnam | <i>United States – Anti-Dumping Measures on Certain Frozen Warmwater Shrimp From Vietnam</i> | DS429 | Anti-dumping |

TABLE 2
LIST OF CASES ASEAN MEMBER AS RESPONDENT IN WTO DSM

| NO | ASEAN COUNTRIES | CASE NAME | CASE NUMBER | ISSUES |
|----|-----------------|---|--|--|
| 1 | Indonesia | <i>Certain Measures Affecting the Automobile Industry</i> | DS 54, DS 55, DS 59, DS 64, | National treatment, Subsidies and Countervailing Measures, TRIMS |
| 2 | Indonesia | <i>Indonesia – Importation of Horticultural Products, Animals and Animal Products</i> | DS 455, DS 465, DS 466, DS 477, DS 478 | Administration and Publication of Trade Regulations Quantitative |

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| | | | | Restrictions, Agriculture, Import licensing |
| 3 | Malaysia | <i>Malaysia – Prohibition of Polyethylene and Polypropylene</i> | DS1 | Publication and administration of trade regulation, quantitative restrictions, governmental assistance to economic development |
| 4 | Philippines | <i>Philippines – Measures Affecting Pork and Poultry</i> | DS74 | Agriculture, Import licensing, Trade-related investment measures |
| 5 | Philippines | <i>Philippines – Measures Affecting Pork and Poultry</i> | DS102 | Agriculture, Import licensing, Trade-related investment measures |
| 6 | Philippines | <i>Philippines – Measures Affecting Trade and Investment in the Motor Vehicle Sector</i> | DS195 | National treatment, Subsidies and countervailing measures, Trade- related investment measures |

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| 7 | Philippines | <i>Philippines – Anti-Dumping Measures Regarding Polypropylene Resin from Korea</i> | DS215 | Anti-dumping and countervailing measures |
| 8 | Philippines | <i>Philippines – Taxes on Distilled Spirits</i> | DS396 | National treatment |
| 9 | Philippines | <i>Philippines – Taxes on Distilled Spirits</i> | DS403 | National treatment |
| 10 | Thailand | <i>Thailand – Anti-Dumping Duties on Angles, Shapes and Sections of Iron or Non-Alloy Steel and H Beams from Poland</i> | DS122 | Anti-Dumping |
| 11 | Thailand | <i>Thailand – Customs Valuation of Certain Products from the European Communities</i> | DS370 | Customs valuation |
| 12 | Thailand | <i>Thailand – Customs and Fiscal Measures on Cigarettes from the Philippines</i> | DS371 | Schedules of concessions, national treatment |

TABLE 3
LIST OF CASES ASEAN MEMBER AS 3RD PARTIES IN WTO DSM

| NO | ASEAN COUNTRIES | CASE NAME | CASE NUMBER | ISSUES |
|----|-----------------|---|-------------|---|
| 1 | Indonesia | <i>Brazil – Measures Affecting Desiccated Coconut</i> | DS 22 | Agriculture, Anti-Dumping and Countervailing Duties |
| 2 | Indonesia | <i>Argentina – Safeguards of</i> | DS 121 | Safeguards |

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| | | <i>Imports of Footwear</i> | | |
| 4 | Indonesia | <i>Argentina – Measures Affecting Imports of Footwear</i> | DS 164 | Safeguards |
| 5 | Indonesia | <i>United States - Continued Dumping and Subsidy Offset Act 2000</i> | DS 234 | Anti-dumping, CVD, Marakesh Agreement |
| 6 | Indonesia | <i>China – Measures Related to the Exportation of Rare Earths, Tungsten and Molybdenum</i> | DS 431, DS 432, DS 433 | Quantitative restrictions, fees and formalities connected with importation/exportation, publication and administration of trade regulations, quantitative restrictions |
| 7 | Indonesia | <i>Australia – Certain Measures Concerning Trademarks, Geographical Indications and Other Plain Packaging Requirements Applicable to Tobacco Products and Packaging</i> | DS 434, DS 435, DS 441, DS 458 | National treatment, MFN, TRIPS and TBT Agreement |
| 8 | Indonesia | <i>European Union – Anti-Dumping Measures on Biodiesel from Argentina</i> | DS 473 | Anti-Dumping and Marakesh Agreement |
| 9 | Malaysia | <i>Brazil – Measures Affecting Desiccated Coconut</i> | DS22 | Agriculture, Anti-Dumping and Countervailing Measures |

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| 10 | Malaysia | <i>United States – The Cuban Liberty and Democratic Solidarity Act</i> | DS38 | MFN, National Treatment, Transparency, Administration of trade measures affecting services, payments and transfers, safeguard balance of payments |
| 11 | Malaysia | <i>Australia – Certain Measures Concerning Trademarks and Other Plain Packaging Requirements Applicable to Tobacco Products and Packaging</i> | DS434 | Intellectual property, technical barriers to trade, national treatment |
| 12 | Malaysia | <i>Australia – Certain Measures Concerning Trademarks and Other Plain Packaging Requirements Applicable to Tobacco Products and Packaging</i> | DS435 | Intellectual property, technical barriers to trade |
| 13 | Malaysia | <i>Australia – Certain Measures Concerning Trademarks, Geographical Indications and Other Plain Packaging Requirements Applicable to Tobacco Products and Packaging</i> | DS441 | Intellectual property, technical barriers to trade |
| 14 | Malaysia | <i>European Union – Anti-</i> | DS442 | Anti-Dumping |

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|----|-------------|---|-------|--|
| | | <i>Dumping Measures on Imports of Certain Fatty Alcohols from Indonesia</i> | | |
| 15 | Malaysia | <i>India – Certain Measures Relating to Solar Cells and Solar Modules</i> | DS456 | National treatment, trade-related investment measures, subsidies and countervailing measures |
| 16 | Malaysia | <i>Australia – Certain Measures Concerning Trademarks, Geographical Indications and Other Plain Packaging Requirements Applicable to Tobacco Products and Packaging</i> | DS458 | Intellectual property, technical barriers to trade, national treatment |
| 17 | Malaysia | <i>Australia – Certain Measures Concerning Trademarks, Geographical Indications and Other Plain Packaging Requirements Applicable to Tobacco Products and Packaging</i> | DS467 | Technical barriers to trade, intellectual property rights |
| 18 | Malaysia | <i>European Union – Anti-Dumping Measures on Biodiesel from Argentina</i> | DS473 | Anti-dumping |
| 19 | Philippines | <i>Turkey – Restrictions on Imports of Textile and Clothing Products</i> | DS34 | Textiles and clothing, quantitative restrictions |
| 20 | Philippines | <i>European Communities – Regime for the Importation, Sale and Distribution of</i> | DS27 | Agriculture, Services, Import licensing, Trade-Related Investment |

| | | <i>Bananas</i> | | Measures |
|----|-------------|---|-------|---|
| 21 | Philippines | <i>United States – Import Prohibition of Certain Shrimp and Shrimp Products</i> | DS58 | Quantitative restrictions |
| 22 | Philippines | <i>United States – Rules of Origins for Textiles and Apparel Products</i> | DS243 | Rules of origins |
| 23 | Philippines | <i>Australia – Quarantine Regime for Imports</i> | DS287 | Sanitary and Phytosanitary Measures |
| 24 | Philippines | <i>European Communities and its Member States – Tariff Treatment of Certain Information Technology Products</i> | DS375 | Schedules of concessions, publication and administration of trade regulation, nullification or impairment |
| 25 | Philippines | <i>European Communities and its Member States – Tariff Treatment of Certain Information Technology Products</i> | DS376 | Schedules of concessions, publication and administration of trade regulation, nullification or impairment |
| 26 | Philippines | <i>European Communities and its Member States – Tariff Treatment of Certain Information Technology Products</i> | DS377 | Schedules of concessions, publication and administration of trade regulation, nullification or impairment |
| 27 | Philippines | <i>Australia – Certain Measures Concerning</i> | DS434 | Intellectual property, technical barriers to |

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|----|-------------|--|-------|---|
| | | <i>Trademarks and Other Plain Packaging Requirements to Tobacco Products and Packaging</i> | | trade |
| 28 | Philippines | <i>Australia – Certain Measures Concerning Trademarks, Geographical Indications and Other Plain Packaging Requirements to Tobacco Products and Packaging</i> | DS435 | Intellectual property, technical barriers to trade |
| 29 | Philippines | <i>Australia – Certain Measures Concerning Trademarks, Geographical Indications and Other Plain Packaging Requirements to Tobacco Products and Packaging</i> | DS441 | Intellectual property, technical barriers to trade |
| 30 | Philippines | <i>Australia – Certain Measures Concerning Trademarks, Geographical Indications and Other Plain Packaging Requirements to Tobacco Products and Packaging</i> | DS458 | Intellectual property, technical barriers to trade |
| 31 | Philippines | <i>Colombia – Measures Relating to the Importation of Textiles, Apparel and Footwear</i> | DS461 | Schedules of concessions, fees and formalities associated with importation and exportation, publication |

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| | | | | and administration of trade regulations |
| 32 | Philippines | <i>Australia – Certain Measures Concerning Trademarks, Geographical Indications and Other Plain Packaging Requirements to Tobacco Products and Packaging</i> | DS467 | Intellectual property, technical barriers to trade |
| 33 | Singapore | <i>United States – Import Prohibition on Certain Shrimp and Shrimp Products</i> | DS58 | Intellectual property, technical barriers to trade |
| 34 | Singapore | <i>European Communities – Customs Classification of Certain Computer Equipment</i> | DS62 | Schedules of concessions |
| 35 | Singapore | <i>United Kingdom – Customs Classification of Certain Computer Equipment</i> | DS67 | Nullification or impairment, schedules of concessions |
| 36 | Singapore | <i>Ireland – Customs Classification of Certain Computer Equipment</i> | DS68 | Schedules of concessions, nullification or impairment |
| 25 | Singapore | <i>European Communities and its Member States – Tariff Treatment of Certain Information Technology Products</i> | DS376 | Schedules of concessions, publication and administration of trade regulation, nullification or impairment |

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|----|-----------|--|-------|---|
| 26 | Singapore | <i>European Communities and its Member States – Tariff Treatment of Certain Information Technology Products</i> | DS376 | Schedules of concessions, publication and administration of trade regulation, nullification or impairment |
| 26 | Singapore | <i>European Communities and its Member States – Tariff Treatment of Certain Information Technology Products</i> | DS377 | Schedules of concessions, publication and administration of trade regulation, nullification or impairment |
| 27 | Singapore | <i>Australia – Certain Measures Concerning Trademarks and Other Plain Packaging Requirements to Tobacco Products and Packaging</i> | DS434 | Intellectual property, technical barriers to trade |
| 28 | Singapore | <i>Australia – Certain Measures Concerning Trademarks, Geographical Indications and Other Plain Packaging Requirements to Tobacco Products and Packaging</i> | DS435 | Intellectual property, technical barriers to trade |
| 29 | Singapore | <i>Australia – Certain Measures Concerning Trademarks, Geographical Indications and Other Plain Packaging Requirements to</i> | DS441 | Intellectual property, technical barriers to trade |

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| | | <i>Tobacco Products and Packaging</i> | | |
| 30 | Singapore | <i>Argentina – Measures Relating to Trade in Goods and Services</i> | DS453 | Market access, transparency, national treatment, MFN, |
| 31 | Singapore | <i>Australia – Certain Measures Concerning Trademarks, Geographical Indication and Other Plain Packaging Requirements to Tobacco Products and Packaging</i> | DS458 | Technical barriers to trade, intellectual property, national treatment |
| 32 | Singapore | <i>Australia – Certain Measures Concerning Trademarks, Geographical Indication and Other Plain Packaging Requirements to Tobacco Products and Packaging</i> | DS467 | Technical barriers to trade, intellectual property, national treatment |
| 33 | Thailand | <i>Turkey – Restrictions on Imports of Textile and Clothing Products</i> | DS34 | Quantitative restrictions, textiles and clothing |
| 34 | Thailand | <i>Hungary – Export Subsidies in Respect of Agricultural Products</i> | DS35 | Agriculture |
| 35 | Thailand | <i>United States – The Cuban Liberty and Democratic Solidarity Act</i> | DS38 | MFN, Schedule of concessions, national treatment, quantitative restrictions |
| 36 | Thailand | <i>United States – Import</i> | DS58 | MFN, quantitative |

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| | | <i>Prohibition of Certain Shrimp and Shrimp Products</i> | | restrictions |
| 37 | Thailand | <i>European Communities – Measures Affecting Importation of Certain Poultry Products</i> | DS69 | Agriculture, Schedule of concessions, national treatment, administration of trade regulations |
| 38 | Thailand | <i>Canada – Patent Protection of Pharmaceutical Products</i> | DS114 | Intellectual property |
| 39 | Thailand | <i>United States – Sections 301-310 of the Trade Act 1974</i> | DS152 | MFN, Schedule of concessions, national treatment, quantitative restrictions, fees and formalities connected with importation and exportation |
| 40 | Thailand | <i>Chile – Price Band System and Safeguard Measures Relating to Certain Agricultural Products</i> | DS207 | Agriculture, schedule of concessions, safeguards |
| 41 | Thailand | <i>United States – Continued Dumping and Subsidy Offset Act 200-</i> | DS234 | Anti-dumping and countervailing measures |
| 42 | Thailand | <i>United States – Definitive Safeguard Measures on Imports of Certain Steel Products</i> | DS248 | Safeguard, quantitative restrictions, schedule of concessions |
| 43 | Thailand | <i>United States – Definitive Safeguard Measures on</i> | DS249 | Safeguard, quantitative restrictions, schedule of |

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|----|----------|---|-------|---|
| | | <i>Imports of Certain Steel Products</i> | | concessions |
| 44 | Thailand | <i>United States – Definitive Safeguard Measures on Imports of Certain Steel Products</i> | DS251 | Safeguard, quantitative restrictions, schedule of concessions |
| 45 | Thailand | <i>United States – Definitive Safeguard Measures on Imports of Certain Steel Products</i> | DS252 | Safeguard, quantitative restrictions, schedule of concessions |
| 46 | Thailand | <i>United States – Definitive Safeguard Measures on Imports of Certain Steel Products</i> | DS253 | Safeguard, quantitative restrictions, schedule of concessions |
| 47 | Thailand | <i>United States – Definitive Safeguard Measures on Imports of Certain Steel Products</i> | DS254 | Safeguard, quantitative restrictions, schedule of concessions |
| 48 | Thailand | <i>United States – Definitive Safeguard Measures on Imports of Certain Steel Products</i> | DS258 | Safeguard, quantitative restrictions, schedule of concessions |
| 49 | Thailand | <i>United States – Definitive Safeguard Measures on Imports of Certain Steel Products</i> | DS259 | Safeguard, quantitative restrictions, schedule of concessions |
| 50 | Thailand | <i>United States – Final Dumping Determination on Softwood Lumber from Canada</i> | DS264 | Anti-dumping |

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| 51 | Thailand | <i>European Communities – Export Subsidies on Sugar</i> | DS265 | Agriculture, national treatment, subsidies |
| 52 | Thailand | <i>European Communities – Export Subsidies on Sugar</i> | DS266 | Agriculture, national treatment, subsidies |
| 53 | Thailand | <i>United States – Subsidies on Upland Cotton</i> | DS267 | Agriculture, national treatment, subsidies |
| 54 | Thailand | <i>European Communities – Customs Classification of Frozen Boneless Chicken Cuts</i> | DS269 | Schedule of concessions, nullification or impairment |
| 55 | Thailand | <i>Australia – Certain Measures Affecting the Importation of Fresh Fruit and Vegetables</i> | DS270 | Quantitative restrictions, import licensing, sanitary and phytosanitary measures |
| 56 | Thailand | <i>United States – Anti-Dumping Measures on Oil Country Tubular Goods (OCTG) from Mexico</i> | DS282 | Anti-dumping |
| 57 | Thailand | <i>Australia – Quarantine Regime for Imports</i> | DS287 | Sanitary and Phytosanitary Measures |
| 58 | Thailand | <i>European Communities – Measures Affecting the Approval and Marketing of Biotech Products</i> | DS291 | Agriculture, sanitary and phytosanitary measures, technical barriers to trade |
| 59 | Thailand | <i>European Communities – Measures Affecting the Approval and Marketing of Biotech Products</i> | DS292 | Agriculture, sanitary and phytosanitary measures, technical barriers to trade |
| 60 | Thailand | <i>European Communities – Measures Affecting the</i> | DS293 | Agriculture, sanitary and phytosanitary |

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| | | <i>Approval and Marketing of Biotech Products</i> | | measures, technical barriers to trade |
| 60 | Thailand | <i>United States – Laws, Regulations and Methodology for Calculating Dumping Margins (Zeroing)</i> | D294 | Anti-dumping |
| 61 | Thailand | <i>United States – Measures Relating to Zeroing and Sunset Reviews</i> | DS322 | Anti-dumping |
| 62 | Thailand | <i>Brazil – Measures Affecting Imports of Retreaded Tyres</i> | DS332 | MFN, national treatment, quantitative restrictions |
| 63 | Thailand | <i>Turkey – Measures Affecting the Importation of Rice</i> | DS334 | Agriculture, import licensing, trade-related investment measures |
| 64 | Thailand | <i><u>United States – Customs Bond Directive for Merchandise Subject to Anti-Dumping/Countervailing Duties</u></i> | DS345 | Anti-dumping and countervailing measures |
| 65 | Thailand | <i>United States – Continued Existence and Application of Zeroing Methodology</i> | DS350 | Anti-dumping |
| 66 | Thailand | <i>United States – Subsidies and Other Domestic Support for Corn and Other Agriculture Products</i> | DS357 | Agriculture, subsidies |
| 67 | Thailand | <i>European Communities and</i> | DS376 | Schedule of |

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|----|----------|--|-------|--|
| | | <i>its Member States – Tariff Treatment of Certain Information Technology Products</i> | | concessions, administration of trade regulations |
| 68 | Thailand | <i>European Communities and its Member States – Tariff Treatment of Certain Information Technology Products</i> | DS377 | Schedule of concessions, administration of trade regulations |
| 69 | Thailand | <i>United States – Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products</i> | DS381 | MFN, national treatment, technical barriers to trade |
| 70 | Thailand | <i>United States – Anti-Dumping Administrative Reviews and Other Measures Related to Imports of Certain Orange Juice from Brazil</i> | DS382 | Anti-dumping, schedule of concessions, |
| 71 | Thailand | <i>Philippines – Taxes on Distilled Spirits</i> | DS396 | National treatment |
| 72 | Thailand | <i>European Communities – Definitive Anti-Dumping Measures on Certain Iron or Steel Fasteners from China</i> | DS397 | Anti-dumping |
| 73 | Thailand | <i>United States – Use of Zeroing in Anti-Dumping Measures Involving Products from Korea</i> | DS402 | Anti-dumping |

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| 74 | Thailand | <i>Philippines – Taxes on Distilled Spirits</i> | DS403 | National treatment |
| 75 | Thailand | <i>United States – Anti-Dumping Measures on Certain Shrimp from Vietnam</i> | DS404 | Anti-dumping |
| 76 | Thailand | <i>United States – Anti-Dumping Measures on Corrosion-Resistant Carbon Steel Flat Products from Korea</i> | DS420 | Anti-dumping |
| 77 | Thailand | <i>United States – Anti-Dumping Measures on Shrimp and Diamond Sawblades from China</i> | DS422 | Anti-dumping |
| 78 | Thailand | <i>China – Definitive Anti-Dumping Duties on X-Ray Security Inspection Equipment from the European Union</i> | DS425 | Anti-dumping |
| 79 | Thailand | <i>China – Anti-Dumping and Countervailing Duty Measures on Broiler Products from the United States</i> | DS427 | Anti-dumping, subsidies |
| 80 | Thailand | <i>United States – Anti-Dumping Measures on Certain Frozen Warmwater Shrimp from Vietnam</i> | DS429 | Anti-dumping |
| 81 | Thailand | <i>Australia – Certain</i> | DS434 | Intellectual property, |

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|----|----------|---|-------|--|
| | | <i>Measures Concerning Trademarks and Other Plain Packaging Requirements Applicable to Tobacco Products and Packaging</i> | | technical barriers to trade, MFN, National treatment, technical barriers to trade |
| 82 | Thailand | <i>Australia – Certain Measures Concerning Trademarks and Other Plain Packaging Requirements Applicable to Tobacco Products and Packaging</i> | DS435 | Intellectual property, technical barriers to trade, MFN, National treatment, technical barriers to trade |
| 83 | Thailand | <i>Argentina – Measures Affecting the Importation of Goods</i> | DS438 | National treatment, administration of trade regulations, fees and formalities connected with importation and exportation |
| 84 | Thailand | <i>Australia – Certain Measures Concerning Trademarks and Other Plain Packaging Requirements Applicable to Tobacco Products and Packaging</i> | DS441 | Intellectual property, technical barriers to trade, MFN, National treatment, technical barriers to trade |
| 85 | Thailand | <i>European Union – Anti-Dumping Measures on Imports of Certain Fatty Alcohols from Indonesia</i> | DS442 | Anti-dumping |

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| 86 | Thailand | <i>Argentina – Measures Affecting the Importation of Goods</i> | DS444 | National treatment, administration of trade regulations, fees and formalities connected with importation and exportation |
| 87 | Thailand | <i>Argentina – Measures Affecting the Importation of Goods</i> | DS445 | National treatment, administration of trade regulations, fees and formalities connected with importation and exportation |
| 88 | Thailand | <i>Indonesia – Importation of Horticultural Products, Animals and Animal Products</i> | DS455 | Administration of trade regulations, quantitative restrictions, import licensing |
| 89 | Thailand | <i>Australia – Certain Measures Concerning Trademarks, Geographical Indications and Other Plain Packaging Requirements Applicable to Tobacco Products and Packaging</i> | DS458 | National treatment, technical barriers to trade, intellectual property |
| 90 | Thailand | <i>United States – Anti-Dumping and Countervailing Measures on Large Residential Washers from Korea</i> | DS464 | Anti-dumping and countervailing measures |
| 91 | Thailand | <i>Australia – Certain Measures Concerning</i> | DS467 | National treatment, technical barriers to |

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| | | <i>Trademarks, Geographical Indications and Other Plain Packaging Requirements Applicable to Tobacco Products and Packaging</i> | | trade, intellectual property |
| 92 | Thailand | <i>European Union – Measures on Atlanto-Scandian Herring</i> | DS469 | MFN, freedom of transit, quantitative restrictions |
| 93 | Vietnam | <i>United States – Measures Relating to Shrimp from Thailand</i> | DS343 | Anti-dumping, MFN, schedule of concessions, national treatment, quantitative restrictions |
| 94 | Vietnam | <i>India – Additional and Extra-Additional Duties on Imports from the United States</i> | DS360 | Schedule of concessions, national treatment |
| 95 | Vietnam | <i>European Communities and its Member States – Tariff Treatment of Certain Information Technology Products</i> | DS375 | Schedule of concessions, administration of trade regulations, nullification or impairment |
| 96 | Vietnam | <i>European Communities and its Member States – Tariff Treatment of Certain Information Technology Products</i> | DS376 | Schedule of concessions, administration of trade regulations, nullification or impairment |
| 97 | Vietnam | Schedule of concessions, | DS377 | Schedule of |

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| | | administration of trade regulations, nullification or impairment | | concessions, administration of trade regulations, nullification or impairment |
| 98 | Vietnam | <i>United States – Measures Affecting Imports of Certain Passenger Vehicle and Light Truck Tyres from China</i> | DS399 | MFN, schedule of concessions, emergency action on imports of particular products |
| 99 | Vietnam | <i>United States – Use of Zeroing in Anti-Dumping Measures Involving Products from Korea</i> | DS402 | Anti-dumping |
| 100 | Vietnam | <i>European Union – Anti-Dumping Measures on Certain Footwear from China</i> | DS405 | Anti-dumping, MFN |
| 101 | Vietnam | <i>China – Countervailing and Anti-Dumping Duties on Grain Oriented Flat-Rolled Electrical Steel from the United States</i> | DS414 | Anti-dumping |
| 102 | Vietnam | <i>United States – Anti-Dumping Measures on Shrimp and Diamond Sawblades from China</i> | DS422 | Anti-dumping |
| 103 | Vietnam | <i>India – Measures Concerning the Importation of Certain Agricultural Products from United States</i> | DS430 | Sanitary and phytosanitary measures, MFN, quantitative restrictions |

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| 104 | Vietnam | <i>China – Measures Related to the Exportation of Rare Earths, Tungsten and Molybdenum</i> | DS431 | Fees and formalities connected with import and export, quantitative restrictions, administration of trade regulations |
| 105 | Vietnam | <i>China – Measures Related to the Exportation of Rare Earths, Tungsten and Molybdenum</i> | DS432 | Fees and formalities connected with import and export, quantitative restrictions, administration of trade regulations |
| 106 | Vietnam | <i>China – Measures Related to the Exportation of Rare Earths, Tungsten and Molybdenum</i> | DS433 | Fees and formalities connected with import and export, quantitative restrictions, administration of trade regulations |
| 107 | Vietnam | <i>United States – Countervailing Duty Measures on Certain Products from China</i> | DS437 | Subsidies, nullification or impairment |
| 108 | Vietnam | <i>United States – Countervailing Duty Measures on Certain Products from China</i> | DS449 | Subsidies, nullification or impairment |
| 109 | Vietnam | <i>United States – Anti-Dumping and Countervailing Measures on Large Residential Washers</i> | DS464 | Anti-dumping |

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| | | <i>from Korea</i> | | |
| 110 | Vietnam | <i>United States – Certain Methodologies and their Application to Anti-Dumping Proceedings Involving China</i> | DS471 | Anti-dumping |

ANNEX 2

COMPARISON

| No. | Components | NAFTA | Mercosur | SADC | ASEAN | WTO |
|-----|---|---|---|---|---|--|
| 1. | Other Dispute Settlement Mechanisms (good offices, conciliation, mediation) | Yes | Yes, with the involvement of Common Market Group | Yes, should be done before the panel proceedings | Yes | Yes |
| 2. | Exclusive Jurisdiction – possibility to submit the case to another forum | The parties have an option to submit the case to another forum | <ul style="list-style-type: none"> The parties have an option to submit the case to another forum. Once a procedure has begun, none of the parties may request the mechanism established in the other fora. | No, SADC has exclusive jurisdiction over all cases in form of interpretation, application or validity of the Treaty, Protocols and other subsidiary instruments | No, Member have a right to bring disputes to other for a at any stage before the establishment of a panel by the SEOM | Yes, Article 23.1 of the DSU requires members to bring any dispute arising under the covered agreements to the WTO dispute settlement system |
| 3. | Time Frame | | | Determined by the President of the Tribunal | | |
| | a. Consultations | <ul style="list-style-type: none"> 15 days for perishable agricultural | 15 days for direct negotiation | No specific provision about this, but the time frame should be | Responding party must reply within 30 days of the | A member to which a request for consultations |

FOR A MORE EFFECTIVE AND COMPETITIVE ASEAN DISPUTE SETTLEMENT MECHANISM

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| | | goods • 30 days for non-perishable agricultural goods | since the parties agree to start dispute settlement proceedings | strict. | date of its receipt and enter into consultation within 50 days from the date of the receipt | is made must reply to the request within 10 days of its receipt and enter into consultations within a period not more than 30 days |
| | b. Commission – Good Offices, Conciliation and Mediation | shall be commenced within 10 days after the request delivery | - | No specific provision about this | Article 4 of the Protocol provides for this option May begin at anytime and terminated at anytime | <ul style="list-style-type: none"> May be requested at any time by any party to the dispute (Article 5.3 DSU) <p>Director-General may offer good offices, acting in an <i>ex officio</i> capacity (Article 5.6 DSU)</p> |
| | c. Panel | <ul style="list-style-type: none"> Should present an initial report to the disputing parties within 90 days Disputing party may submit written comments to the panel within 14 days after the report presentation Present a | - | <ul style="list-style-type: none"> The panel should be established not more than 20 days after request There are two stages in the panel proceedings. In the first stage, an initial report is required to be issued within 90 days. <p>The second stages announce its final report within 30 days after the presentation of initial report</p> | <ul style="list-style-type: none"> Complainants must request in writing to the SEOM. The SEOM will decide by consensus not to establish a panel Panel must submit its findings | <ul style="list-style-type: none"> After panel is composed, the panel will fix the timetable for its work (whenever possible a week of its composition) by following the proposed |

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| | | final report within 30 days after the initial report unless otherwise agree | | | and recommendations to the SEOM in a written report within 60 days of its establishment | <p>timetable as set out in Appendix 3 of the DSU</p> <ul style="list-style-type: none"> • Panel may also adopt <i>ad hoc</i> working procedures • Panel must consult with the parties first at the organizational meeting • Article 12.8 of DSU requires panels to conduct its examination not more than six months <p>Article 12.9 DSU states that in no case should the period from the establishment of the panel to the circulation of the report to the</p> |
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FOR A MORE EFFECTIVE AND COMPETITIVE ASEAN DISPUTE SETTLEMENT MECHANISM

| | | | | | | Members exceed nine months |
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| | d. Others | <ul style="list-style-type: none"> • The parties should submit the final report to the Commission • The report should be published 15 days after that | <ul style="list-style-type: none"> • The procedure before the CMG (Common Market Group) should not more than 30 days. • Parties will appoint 3 arbitrator within 15 days including the presiding arbitrator. • If failed, the Administrative Secretariat will appoint within 2 days since expiration term. • The arbitrators will issue an award | <ul style="list-style-type: none"> • Extension of time limits can be done by whoever prescribed it • The proceedings should be arranged by priority decided by the President. An urgent case may be proceed faster. | <ul style="list-style-type: none"> • In exceptional cases, Panel may take an additional 10 days to submit its findings and recommendations to the SEOM • Panel must provide interim report before submitting its findings and recommendations • No grace period of adoption of report unlike in WTO | <ul style="list-style-type: none"> • Each parties will submit two written submissions • Panel must issue interim report to parties as required by Article 15.2 of DSU. At this point the parties are given an opportunity to comment on each other's comments in the interim writing • Final panel report is firstly issued to the parties • Article 16.4 of DSU requires the panel report to be adopted by the DSB 60 days after the date of its circulation • Article 16.1 of DSU provides a grace period of 20 days in which a panel report cannot be adopted after it has been circulated to members |

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| | | | <p>within 60 days with max. 30 additional days from the date communication made between Administrative Secretariat and the parties and the presiding arbitrators accept his/her nomination.</p> <ul style="list-style-type: none"> • Parties can ask for review within 15 days since the notification thereof and the other party can file a reply within 15 days since notification. | | | |
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| | | | <ul style="list-style-type: none"> • The review will be decided by the Permanent Review Court within 30 days since the motion filed with possibility to extend 15 days • The parties can ask for clarification from competent court in 15 days since the award issued • The competent court can clarify within 15 days since the notification | | | |
| | e. Implementation | • No specific timeframe | • 30 days since the | • Should be adopted | • SEOM shall | Article 21.3 requires members |

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| | | for this | <p>decision made</p> <ul style="list-style-type: none"> • If a party wholly or partially failed in comply with the decision, the other party have one year since the expiration of 30 days to initiate temporary countervailing measures. | <p>within 15 days after the decision has been made.</p> <ul style="list-style-type: none"> • The parties can submit an appeal by notifying the CMT not more than 20 days after the decision. <p>If no satisfactory solution is reached within 20 days after expiry of the RPT, the complaining member state may request CMT to suspend the decision.</p> | <p>adopt panel report within 30 days of its submission unless a party to the dispute formally notifies the SEOM of its decisions to appeal</p> <ul style="list-style-type: none"> • Adoption of panel report shall be done by circulation • A non-reply shall be considered as acceptance of decision | <p>within 30 days of the adoption of the panel/appellate body report to inform the DSB of its intentions in respect of the implementation of the recommendation and rulings</p> |
| 4. | Stages | | | | | |
| | a. Consultations | A request should be made in writing and submitted to the Secretariat | Parties in dispute should start direct negotiation first | A request should be made in writing and copied to CMT, through the Registrar of the Tribunal, and to all other member states. | Request made in writing by the complainant to the SEOM | A request for consultations must be submitted in writing and are to be notified to the DSB by the member requesting the consultations |
| | b. Commission – Good Offices, Conciliation | A request should be made in writing and submitted to | If direct negotiation fails, the CMG (Common | Chairperson of the CMT or other person designated by the Chairperson can offer to parties in dispute. | Article 6 of the Protocol states that their use could be made at anytime and may | Article 5 of DSU stipulates that their use may be requested at any time by any party |

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| | ion and Mediation | the Commission | Market Group) will mediate (Optional). | | begin and terminated at anytime | and may begin at any time and be terminated at any time |
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| | c. Panel | <ul style="list-style-type: none"> • A request should be made in writing and submitted to the Secretariat • Consist of 5 members – expert with same nationality may serve as panellist except the chair position • The roster panel members are appointed for 3 years term and may be reappointed by consensus. • The panellists will be selected from the roster. | - | <ul style="list-style-type: none"> • A request should be made in writing and stated that consultations have been held. • Consist of 3 panellists, selected from an indicative roster, compiled and updated subsequently by the registrar upon suggestion from member states | <ul style="list-style-type: none"> • If consultations are unsuccessful (after 60 days) then the complainant may request to the SEOM to establish a panel • Panel shall be composed on three panellists unless parties to the dispute agree, within 10 days from the establishment of a panel, to a composition of 5 panellists <p>Nationals of third parties are not banned from serving as panellists</p> | <ul style="list-style-type: none"> • If consultations are unsuccessful, complainant may request to the DSB to establish a panel • The DSB establishes a panel by reverse consensus at the second meeting <p>Nationals of parties and nationals of third parties to the dispute are banned from serving as panellists</p> |
| | d. Others | | <ul style="list-style-type: none"> • If no agreement | <ul style="list-style-type: none"> • One of the parties in dispute can | <ul style="list-style-type: none"> • If there is no agreement on | <ul style="list-style-type: none"> • Then the parties must |

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| | | | <p>is reached through negotiations, the party may proceed to the arbitration proceedings.</p> <ul style="list-style-type: none"> • Ad-hoc Arbitration Tribunal, consists of 3 arbitrators appointed by disputing states - the presiding arbitrator must have different nationality . • Parties should make written position and do presentation in ad-hoc arbitration tribunal. • Appeal to be submitted to Permanent Review • Decision made by Permanent Review | <p>appeal to the panel decision.</p> <ul style="list-style-type: none"> • Third party is not allowed to appeal any decision, but can attend the proceedings if they have substantial interests, after notification to the registrar. | <p>panelists, then within 20 days of the establishment of a panel, either party may request the ASEAN Secretary-General (in consultation with SEOM) to compose the</p> | <p>agree on panel composition , if no agreement is reached, then within 20 days of the establishment by the DSB, either party may request the Director-General will decide</p> <ul style="list-style-type: none"> • Within 10 days of such request, the Director-General appoint panelists |
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| | | | <p>Tribunal are not subject to appeal.</p> <ul style="list-style-type: none"> Parties may submit the case directly to the Permanent Review Court | | | |
| | e. Implementation | <ul style="list-style-type: none"> Failure to comply with the recommendations will make the losing party has an obligation to pay compensation | <p>Failure to comply with the decision will allow other party to initiate temporary countervailing measures within one year.</p> | <p>Implementation will be effective within 15 days, except if one party has notified the CMT for an appeal.</p> | <p>Reasonable period of time for implementation of rulings and recommendations is 60 days from the date of the adoption of the report, unless parties agree on a longer time period</p> <p>Allows for temporary measures for failure to comply with recommendations and rulings such as voluntary compensation and suspension of concessions or other obligations</p> | <ul style="list-style-type: none"> Failure to implement recommendations within a reasonable period of time, then the respondent will enter into negotiations with complainant to come to an agreement for mutually acceptable solutions (20 days). After 20 days, if there is no agreement then the |

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| | | | | | | complainant may request DSB to suspend the application to the respondent of concessions or other obligations under the covered agreements |
| 5. | Third party involvement | <ul style="list-style-type: none"> • Possible, as long as the party can prove they have a substantial interest towards the case • The request should be made in writing to the Secretariat – to be able to attend all hearings, prepare written and oral submissions to the panel and receive written submissions of the disputing | - | <ul style="list-style-type: none"> • Possible, as long as the party can prove they have a substantial interest towards the case • The request should be made in writing to the registrar. • Third party does not have any right to appeal, or interfere the proceedings | <ul style="list-style-type: none"> • Possible, must notify the SEOM at the latest within 10 days of the establishment of panel • May also have extended third party rights if they have notified SEOM and prove that they have substantial interest, they may make written submissions | <ul style="list-style-type: none"> • For consultations, if a member chooses to have open consultations then third parties may participate – depends whether consultations is requested pursuant to Article XXII or XIII of GATT • Allowed so long as they can prove that they |

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| | | parties | | | | have a substantial interest and must notify their interest in a timely manner to the DSB |
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