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THÈSE

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« L’université n’entend ni approuver ni désapprouver les opinions particulières du candidat. »

Abstract

The aim of this thesis is to understand the ASEAN Protocol for the settlement of economic disputes, the so-called 2004 Protocol on an Enhanced Dispute Settlement Mechanism (EDSM) and the ASEAN Charter, which are all related to dispute instruments for the governments of all ASEAN member countries. The ASEAN Charter is also included in the analysis of this thesis, since this has failed to enhance the ASEAN's ability to achieve further economic integration and this failure appears to have blocked the ASEAN from moving toward deeper integration. An important question that has been raised since the adoption of the 2004 Protocol (EDSM) is why no ASEAN member state has ever brought a single dispute to be resolved through the EDSM, which means that the EDSM has never been tested. However, the ASEAN member states hesitate to make use of it because it has a number of weaknesses that may eventually undermine its efficiency. Based on sample cases, ASEAN member states prefer to use the World Trade Organisation (WTO) mechanism to settle their trade disputes. It is important to note that the ASEAN dispute settlement process is very similar to the WTO dispute settlement mechanism. This similarly affects the ASEAN mechanism in other fora organisations, which ASEAN member states prefer to choose to settle disputes apart from its own mechanism. Moreover, it has also led to increasing criticism of the ASEAN Dispute Settlement Mechanism (DSM) from both a procedural and substantial perspective; furthermore, its efficiency is still in question. The diverse political and legal system, the problem of the 'ASEAN Way' and the procedure of the ASEAN free trade agreement dispute settlement itself are also perceived as barriers to the regional integration of the ASEAN Community.

In addition, this thesis illustrates the establishment and evolution of a variety of different dispute resolution regimes applied to trade disputes based on a discussion of how a multilateral and regional trade organisations develop a dispute resolution mechanism. A brief overview of the relevant procedures and structures will be provided

before making a more detailed examination of the disputes that may arise between state parties. Furthermore, the functioning of these dispute resolution mechanisms will be explained in this thesis, especially those involving foreign investment and some that relate to disputes among state parties over the application and interpretation of free trade agreements. The General Agreement of Trade Tariffs (GATT) and the World Trade Organisation (WTO) will provide an example of multilateral institutionalised trading systems. The regional perspective will be also addressed in this thesis, which will focus on three major regional organisations: the European Union (EU), the Southern Common Market or (Mercado Comun del Sur or MERCOSUR) and the North American Free Trade Agreement (NAFTA). It should be noted that MERCOSUR has been included as an example in this thesis of an effective organisation that has resolved trade disputes. This is because MERCOSUR is similar to ASEAN in the sense that member states are developing countries. An analysis of the different background elements and a comparative perspective of the five examples of dispute settlement mechanisms of the GATT, the WTO, the EU, NAFTA and MECOSUR may be beneficial for the ASEAN. The design of trade dispute settlement regimes can provide a reference for many comparative examples to encourage trade liberalisation and bilateral trading concepts that could be functionally implemented in the context of the ASEAN. A study of these mechanisms will be useful for the development of an ASEAN trade dispute settlement mechanism.

The failure of ASEAN member states to resort to this mechanism can be attributed to many factors. Recommendations and basic suggestions for the future direction of the ASEAN trade dispute settlement model, particularly with regard to the ASEAN dispute settlement mechanism pillar, and a clear direction for efforts to reform the ASEAN DSM are addressed in the context of the establishment of the ASEAN Economic Community (AEC). Interestingly, not a single dispute has been handled by this mechanism to date and it is uncertain whether or when it will be used in the future. It will be difficult for the AEC to be effective in future if the problem of non-use of DSM cannot be resolved.

Table of Contents

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List of Figures, Flowcharts and Tables

Figures

Flowcharts

Tables

Abbreviations

AC	ASEAN Community
ACB	ASEAN Compliance Body
ACMB	ASEAN Compliance Monitoring Body
ACIA	ASEAN Comprehensive Investment Agreement
ACT	ASEAN Consultative to Solve Trade and Investment issue
AD	Antidumping
AEC	ASEAN Economic Community
AEM	ASEAN Economic Ministers
AFAS	ASEAN Framework Agreement on Services
AFTA	ASEAN Free Trade AREA
AIA	ASEAN Investment Area
AICO	ASEAN Industrial Cooperation Scheme
AMM	ASEAN Ministerial Meeting
APSC	ASEAN Political-Security Community
ARF	ASEAN Regional Forum
ASC	ASEAN Security Community
ASCC	ASEAN Socio-Cultural Community
ASEAN	Association of Southeast Asian Nations
ASEAN+3	ASEAN plus People's Republic of China, Japan, Republic of Korea
ASEAN-6	Brunei Darussalam, Indonesia, Malaysia, Philippines, Singapore and Thailand
ATIGA	ASEAN Trade in Goods Agreement
Bali Concord	Declaration of ASEAN Concord
Bali Concord II	Declaration of ASEAN Concord II
BIT	Bilateral Investment Agreement
CEPT	Common Preferential Tariff
CLMV	Cambodia, Laos, Myanmar and Vietnam
CVD	Countervailing duty
DSB	Dispute Settlement Body
DSM	Dispute Settlement Mechanism
DSU	Dispute Settlement Understanding/ Understanding on Rules & Procedures Governing the Settlement of Dispute
ECJ	European Court of Justice

EDSM	Enhanced Dispute Settlement Mechanism or the 2004 Protocol or the Vientiane Protocol
EEC	European Economic Community
EPG	Eminent Persons Group
EU	European Union
FDI	foreign Direct Investment
FTA	Free Trade Agreement
GATS	General Agreement on Trade in Services
GATT	General Agreement on Tariffs and Trade
GDP	Gross Domestic Product
HTLF	High Level Task Force
ICJ	International Court of Justice
ICSID	International Centre for Settlement of Investment Disputes
IMF	International Monetary Fund
ISEAS	Institute of Southeast Asian Studies
ITO	International Trade Organisation
MERCOSUR	*Mercado Común de Sur*/ Southern Common Market
NAFTA	North American Free Trade Agreement
NGOs	Non-governmental organisations
PTA	Preferential Trading Agreement
RTA	Regional trade agreement
SEOM	Senior Economic Official Meeting
TAC	Treaty of Amity and Cooperation
WTO	World Trade Organisation
ZOPFAN	Zone of Peace, Freedom and Neutrality Declaration

Table of Treaties and Declarations

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ASEAN Protocol on Enhanced Dispute Settlement Mechanism, 29 November 2004, http://agreement.asean.org/media/download/20141217102933.pdf

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ASEAN Timelines

Date and Event

8 August 1967 - Bangkok Declaration by the five original member countries established ASEAN; namely, Indonesia, Malaysia, the Philippines, Singapore and Thailand.

23-24 February 1967 - First ASEAN Summit convened in Bali, Indonesia.

1976- The Declaration of ASEAN Concord formally adopted political co-operation.

1977- Preferential Trade Agreement (PTAs) launched.

1978 - First ASEAN-European Economic Community ministerial meeting held in Brussels.

8 January 1984 - Brunei Darussalam joined ASEAN.

28 January 1992 - ASEAN Free Trade Area (FTA) / Signing of the Common Effective Preferential Tariff Scheme (CEPT).

1994 - ASEAN established the ASEAN Regional Forum (ARF), focused on security independence in the Asia-Pacific region.

28 July 1995 - Vietnam joined ASEAN.

1995 - ASEAN Framework Agreement on Services (AFAS).

1996 - ASEAN Industrial Co-operation Scheme (AICO) and the 1996 Protocol.

1997 - Lao PDR and Myanmar joined ASEAN. The first meeting of ASEAN Plus Three, with counterparts from East Asia - China, Japan and South Korea.

15 December 1997 - The ASEAN Vision 2020.

30 April 1999 - Cambodia joined ASEAN.

2000 - Establishment of the e-ASEAN Framework for e-commerce.

7 October 2003 - ASEAN Economic Community launched; a coherent structure and organisation for ASEAN Vision 2020 and the three pillars for community (ASEAN Security Community, ASEAN Economic Community and ASEAN Socio-cultural Community) were established.

2004 - The Vientiane Action Program (2004-2010) and the ASEAN EDSM.

2005 – First meeting of ASEAN Plus Six (The East Asia Summit), comprising the ASEAN countries plus China, Japan, South Korea, India, Australia and New Zealand.

2006-2007 - The Acceleration of ASEAN Community to 2015, which advanced the target year from the original 2020 and ASEAN Charter drafted and ASEAN economic Blueprint launched by ASEAN leaders in Singapore.

2007 - ASEAN Charter signed giving its 10 member states a legal identity, a first step towards its aim of establishing a free trade area by 2015.

2009 - ASEAN Political Community and Social-Cultural Community Blueprint and roadmap for an ASEAN community (2009-2015).

2010 - ASEAN Trade in Goods Agreement (ATIGA) entered into force and was ratified by all ASEAN member states.

2015 - 31 December 2015 the ASEAN Economic Community (AEC) was launched.

2018 - Deadline for Non-Tariff Barriers (NTB) within ASEAN to be eliminated.

2020 - Original date for the full implementation of the ASEAN Community

2030 - A realistic date for the realisation of the full benefits from the AEC as presently constituted.

INTRODUCTION

PREAMBLE OF INTRODUCTION AND SCOPE OF STUDY

As we know, the Association of Southeast Asian Nations (ASEAN) is a regional organisation, which was established in Southeast Asia that aims to promote and foster political agreement as well as economic collaboration among its ten members, namely, Brunei, Cambodia, Indonesia, Laos, Malaysia, Myanmar (Burma), the Philippines, Singapore, Thailand, and Vietnam. An overview of the ASEAN economic agreement is based-on cooperation at a bilateral level with the objectives of accelerating economic growth and bringing more social progress and cultural development to the region, as well as attempting to reduce conflicts and fostering regional peace and stability without any intervention in countries' domestic affairs. [1] Following the successful implementation of the ASEAN free trade area, the ASEAN intensified the launch of the ASEAN Economic Community (AEC) by 2015. However, the 2015 timeline for the AEC was just the beginning. The heart of the ASEAN's community efforts was to achieve regional integration by peaceful means and to create a stable and prosperous community oriented towards regional and international peace and security. In moving towards the ASEAN Economic Community, the ASEAN should institute new measures in order to strengthen its institutional mechanisms. The ASEAN leaders signed the Declaration of ASEAN Concord II in 2003, with the aim of creating an ASEAN Economic Community as a way to achieve the goal of economic integration by 2020. However, although they had originally intended to create the AEC by 2020, they advanced the deadline to 2015. There are multiple sectoral agreements for the realisation of the

[1] Kriengsak Chareonwongsak, 'Lessons from ASEAN's economic integration' (2004) 24(2) Assumption Journal http://www.assumptionjournal.au.edu/index.php/abacjournal/article/view/632 accessed 1 June 2015

objectives of the AEC. The trade agreements for economic integration established by the ASEAN are firstly, the 1992 ASEAN Free Trade Area (AFTA), which covers trade in goods, with the abolition of tariffs and the main scheme, namely, the Agreement on the Common Effective Preferential Tariff Scheme (CEPT). Secondly, these are complemented by the 1995 ASEAN Framework Agreement on Services (AFAS), known as Agreements on the free flow of services. Thirdly, the ASEAN Industrial Cooperation Scheme (AICO) which was signed in 1996. Fourthly, there are the 1998 ASEAN Investment Area (AIA agreement) and the ASEAN Comprehensive Investment Agreement of 2009 (ACIA), which liberalise the investment regime. The last is the ASEAN Trade on Goods Agreement of 2009 (ATIGA). Since the AEC is focused on the single market, the performance of these economic integration frameworks will be generally discussed in this thesis, apart from one element of the Economic Community, which relates to the main previous ASEAN Free Trade Area (AFTA), namely, the free flow of goods.

An AEC cannot be established without the existence of some means of settling conflicts among the member states. The success of the ASEAN Economic Community depends on the implementation of an effective mechanism to settle trade disputes among member countries and an opportunity to test its performance. The increase in the number of free trade agreements also leads to an increasing number of dispute settlement mechanisms that cover compliance and enforcement associated with institutional involvement, particularly trade disputes.[2] This raises the question of how the disputes that arise from these agreements can be resolved based on the effectiveness of the settlement mechanisms.

The aim of this thesis is to understand the ASEAN Protocol for the settlement of economic disputes, the so-called 2004 Protocol on an Enhanced Dispute Settlement Mechanism (EDSM) and the ASEAN Charter, which are all related to dispute instruments for the governments of all ASEAN member countries. The limitations of the ASEAN trade dispute settlement are explored in this thesis, as well as the problematic relationship

[2] Songying Fang, 'The strategic use of international institutions in dispute settlement' (2010) Quarterly journal of political science, page 109

between the ASEAN Charter and the ASEAN trade dispute settlement mechanism. Not only do the problems with the ASEAN Charter contradict the legal framework, but also the use of the 'ASEAN Way', since the principle of resolution by consensus and the ASEAN dispute resolution mechanism do not go well together. Fifty years after its establishment, the ASEAN has not yet applied its own formal dispute settlement or conflict resolution mechanism. The reasons why the ASEAN member states have not yet put the trade dispute resolution mechanism into effective use and why the dispute resolution mechanism has never been used within the ASEAN have been examined in this thesis. The ASEAN Charter is also included in the analysis of this thesis, since this has failed to enhance the ASEAN's ability to achieve further economic integration, and this failure appears to have blocked the ASEAN from moving towards deeper integration. Regarding the ASEAN Charter itself, the weakness of the ASEAN Secretariat is the failure of having an effective task force on the dispute settlement mechanism, the problem of insufficient judicial, as well as the limited authority of its committee roles have also created the problem. Some designations of this ASEAN EDSM have even gone beyond the 'ASEAN Way' and the passage of the ASEAN Charter has led to the ASEAN being criticised for ineffectiveness due to its requirement of consensus for decision-making.[3]

A comparative examination of the dispute settlement mechanisms of international organisations is the key to evaluating the efficiency of the ASEAN's dispute settlement system and resolving any problematic issues. The World Trade Organisation (WTO), the North American Free Trade Agreement (NAFTA), and the European Union (The EU) are examples of reliable mechanisms for the settlement of trade disputes which have been proved to be effective in other parts of the world, and they can act as a useful guide for the ASEAN. The most important lesson to be learned from the NAFTA is the difference between developed and developing countries. Additionally, MERCOSUR is also included in this research because it is similar to the ASEAN in the sense that its member states are developing countries. One can see that there are very important

[3] Yan Luo, 'Dispute settlement in the Proposed East Asia FTA' in Lornard Bartels and Federico Ortino, *Regional trade agreements and the WTO legal system* (Oxford University Press 2006), page 425

issues to be discussed in order to bring about the successful implementation of the ASEAN Community as a whole by 2020. An analysis of some of the different background elements of an international organisation mentioned above may illustrate the comparative benefits for the improvements of the ASEAN institutional dispute settlement and its structure.

CHAPTER I

OVERVIEW OF THE STRUCTURE AND UNDERSTANDING OF THE ASEAN

"We must think not only of our national interests but posit them against regional interests: that is a new way of thinking about our problem"[4]

S. Rajaratnam
Ex-Minister of Foreign Affairs of Singapore,
One of the ASEAN founding father,
Bangkok, August 1967

"What we have decided today is only a small beginning of what we hope will be a long and continuous sequence of accomplishments of which we ourselves, those who will join us late and the generations to come, can be proud."[5]

Thanat Khoman
Ex-Minister of Foreign Affairs, Thailand,
One of the ASEAN founding father, Bangkok,
August 1967

Section 1.1 Introduction

The Association of Southeast Asian Nations (ASEAN) is a regional organisation in Southeast Asia that aims to promote and foster political agreement and economic collaboration among its ten members, namely, Brunei, Cambodia, Indonesia, Laos, Malaysia, Myanmar (Burma), the Philippines, Singapore, Thailand and Vietnam. The

[4] Upon the signing of the Bangkok Declaration at Saranrom Palace in Bangkok, Mr. S. Rajaratnam gave the following remarks, 8 August 1967, http://asean.org/asean/about-asean/history/ accessed 1 May 2016
[5] Upon the signing of the Bangkok Declaration at Saranrom Palace in Bangkok, Mr. Thanat Khoman gave the following remarks, 8 August 1967, http://asean.org/asean/about-asean/history/ accessed 1 May 2016

ASEAN was established as an organisation of non-communist countries in August 1967,[6] with five founding members, namely, Indonesia, Malaysia, the Philippines, Singapore and Thailand[7] with the aim of regional cooperation to foster peace, stability, progress and prosperity in the region. The original purpose of the ASEAN was to achieve three main goals: (1) to overcome tension between member states, (2) to form a bloc to protect regional interests against the influence of outsider(s) and (3) to enhance the socio-economic conditions of member states.[8]

Within the context of the ASEAN, the focus is on consensual decision-making rather than legally-binding agreements, since there is a lack of sanctions for non-compliance.[9] Since 1976,[10] the concept of dispute settlement mechanisms in the ASEAN has developed from a relatively simple political concept to include structures in Southeast Asia based on diplomatic co-operation. Trade and the economy were not among the founding pillars of the ASEAN until 2007, the year of the first ASEAN Charter Agreement[11], which aimed for deeper integration in the future in a common attempt to enhance economic growth and political cooperation among member states.[12]

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[6] Micheal Leifer, 'The ASEAN peace process: a category mistake' (1999) 12 (1) <http://www.tandfonline.com/doi/pdf/10.1080/09512749908719276> accessed 27 July 2013

[7] The history of ASEAN can conveniently be obtained from the ASEAN Secretariat website at <http://www.asean.org/asean/about-asean/history> accessed 16 September 2013

[8] Shaun Narine , 'Forty years of ASEAN: a historical review' (2008) 21(4) <http://www.tandfonline.com/doi/abs/10.1080/09512740802294689> accessed 27 July 2013

[9] Clara Portela, 'The Association of Southeast Asian Nations (ASEAN): Integration, internal dynamics and external relations' (2013) EXPO/B/AFET/FWC/2009-01/Lot2/13<http://www.europarl.europa.eu/RegData/etudes/note/join/2013/433713/EXPO-AFET_NT(2013)433713_EN.pdf> accessed 28 July 2013

[10] The first mention of general provisions for settlement of disputes was not mention before since the signing of Bangkok Declaration, which established ASEAN in 1967. The Treaty of Amity and Cooperation in 1976 is the clearest expression to encourage peaceful relation with each other and limited external interference read more in; Micheal Ewing-Chow and Tan Hsien-Li, 'The role of the rule of law in ASEAN integration' (2013) 2013(16) EUI working paper, page 5 http://cil.nus.edu.sg/wp/wp-content/uploads/2010/10/Ewing-Chow-TanHsien-Li-The-Role-of-the-Rule-of-Law-in-ASEAN-Integration.pdf accessed 1 May 2015

[11] More information about the ASEAN Charter Agreement <http://www.asean.org/archive/publications/ASEAN-Charter.pdf> accessed 1June 2013

[12] Lin Chun Hung, 'ASEAN Charter: deeper regional integration under international law?' (2010) Chinese JIL http://chinesejil.oxfordjournals.org/content/9/4/821.abstract accessed 1 May 2015, pages 1-2

The ASEAN had operated without a formal Charter since its formation, but as it continued to become more integrated in order to build a community, structures were needed to manage and improve its response to a wide range of "political challenges, legislation challenges, institution challenges and government structure challenges".[13] It is necessary to study the history of the ASEAN and its evolution over decades in order to understand its progress and the additional work required for the creation of an ASEAN Community (AC).

The formation and evolution of the ASEAN will be explained in the next three sections, together with its characteristics Finally, the general idea of how the ASEAN works to settle its disputes will be discussed in section five to conclude the chapter.

Section 1.2 Formation of the ASEAN

Thanat Khoman, a former Thai diplomatic and politician,[14] states that "the formation of the ASEAN, the first successful attempt at foreign regional co-operation, was actually inspired and guided by past events in many areas of the world, including Southeast Asia itself."[15] The ASEAN was formed in an effort to provide a stable structure for managing and containing the tensions between ASEAN governments in order to respond to political relations, as well as to serve as a diplomatic device for wider purposes.[16] The ASEAN existed as an informal institution for the first thirty years,[17]

[13] The ASEAN Challenges to addresses will be discussed in more details in chapter six of this thesis.
[14] Thanat Khoman is a former Thai diplomat and politician. He was Foreign Minister from 1959 to 1971, chairman Chairman of the Democrat Party from 1979 to 1982, and Deputy Prime Minister from 1980 to 1982.
[15] Thanat Khoman, 'ASEAN conception and evolution' (1992) <http://www.asean.org/asean/about-asean/history/item/asean-conception-and-evolution-by-thanat-khoman> accessed 30 June 2013.
[16] Mely Caballero Anthony, *Southeast Asia beyond the ASEAN Way* (1st, ISEAS publication 2005).
[17] Funitaka Furuoka, Beatrice Lim, Roslinah Mahmud and Khairul Harim Pazim, 'Making of the ASEAN community: economic integration and its impact on workers in Southeast Asia' (2012) 1(1) IJDDS, page 17 <http:// www.rcmss.org/ijdds/Vol.1/No.1/.pdf >accessed 5 January 2013.

operating as a form of regional cooperative security.[18] It also played a crucial diplomatic role, especially in the resolution of the 1975 Indochina conflict.[19] The continuous nature of territorial and political disputes[20] demonstrates the need for a regional organisation that can deal with such tensions.

Indonesia, Malaysia, the Philippines, Singapore and Thailand were the five founding members of the ASEAN in 1967.[21] Brunei joined in 1984 after it had achieved its independence. Myanmar (Burma), Vietnam, Laos and Cambodia were reluctant to join the ASEAN as a result of the military aggression that had taken place in Indochina[22] since 1989.[23]

In the past, the original purposes of the ASEAN were political rather than economic. It was faced by communist regimes in 1967, [24] as well as the old British, French and Dutch colonial empires. Subsequently, the ASEAN tried to co-ordinate action against the communist regimes and attempted to foster economic growth by means of

[18] ASEAN is a diplomatic association for political and security cooperation that is focused on conflict management and conflict avoidance. For further detailed discussion on this issue read more in chapter 5.

[19] The reduction of the American presence in the region following the Vietnam War (1973) and the subsequent Vietnamese aggressions in Indochina, ASEAN also made little effort to push for greater in trade liberalisation. Although there were reasons to build a regional grouping, Southeast Asian countries were not deprived of problems. See, Joshua Kurlantzick, 'ASEAN's future and Asian integration' (2012) IIGG working paper http://www.cfr.org/asia-and-pacific/aseans-future-asian-integration/p29247 accessed 17 February 2017, page 2.

[20] Referring to the Cambodia case, since December 1978 Vietnam intervened and occupied Cambodia ASEAN made the effort to solve the dispute with diplomatic resolution. Later, the Treaty of Amity and Cooperation was initiated, which stressed upon the inviolability of national sovereignty, territorial integrity and the peaceful settlement of disputes, see Shankari Sundararaman, 'ASEAN Diplomacy in Conflict Resolution: The Cambodian Case' http://www.idsa-india.org/an-oct-7.html accessed 23 November 2015.

[21] Since 1967 when the ASEAN was established with original five finding members, Dr. Thanat Khoman, the Thai diplomat and politician- invited his counterparts from Indonesia, Malaysia, the Philippine and Singapore for informal talk at the Thai Prime Minister's residence in the coastal town of Bang Saen that lead to an agreement to establish the Association of Southeast Asian Nations (ASEAN) with the Bangkok Declaration being signed on 8 August 1967.

[22] The Indochina countries consists of Vietnam, Cambodia and Laos and the two super power countries, United States and China.

[23] Antonia Hussey, 'Regional Development and Cooperation through ASEAN' (1991) 81(1) *Geographical Review* <http://www.jstor.org/stable/215178> accessed 1 January 2013

[24] Hung, above 12, page 3.

co-ordinating industrial projects.[25] Then, in 1984, Brunei became a member after it gained its independent from Britain. Vietnam joined the group as its seventh member in 1995. The inclusion of Vietnam, a communist country, within the ASEAN was a significant move because it helped to ease the political tension between communist and non-communist nations within the region.[26] Laos and Myanmar became members in July 1997 during the course of celebrating its 30th anniversary,[27] and Cambodia became the ASEAN's tenth member in 1999.

As stated in the ASEAN declaration signed in Bangkok in 1967, the organisation's goal is to accelerate economic growth, social progress and cultural development. The declaration also aims to foster peaceful relationships and greater equality among the ASEAN countries.[28] Unfortunately, the dispute settlement mechanism in the ASEAN needs to be further developed in order to meet and better manage challenges.[29] Nevertheless, Helen Nesadurai describes the progress of co-operation among the ASEAN economies as slow, difficult and comparatively insignificant.[30] This slothful progress is largely based on the history of the ASEAN members being politically confrontational.[31] As an ASEAN scholar pointed out, there are many internal conflicts and external

[25] Richard Promfret, 'ASEAN's new frontiers: integrating the newest members into the ASEAN economic community' (2013) 8, Issue 1 AEPR, page 25.
[26] Donale E. Weatherbee, *International relations in Southeast ASIA: The struggle for autonomy* (2nd Rowman & Littlefield Publisher 2005)
[27] http://www.state.gov/p/eap/regional/asean/
[28] ASEAN Secretariat, 'The ASEAN Declaration (Bangkok Declaration)' (1967) <htttp://www.aseansec.org/1212.htm> access 1 January 2013
[29] Gino J Naldi, 'The ASEAN Protocol on Dispute Settlement Mechanisms : An Appraisal' <http://jids.oxfordjournals.org/content/early/2014/01/31/jnlids.idt031.abstract> accessed 1 January 2013
[30] Helen E. S. Nesadurai, 'The Association of Southeast Asian Nation(ASEAN) Global Monotor New Political economy' (2008) 13(2) Routledge taylor& francis group
[31] At the time of ASEAN's founding ASEAN members were deeply fractured in many ways. For instance, Indonesia had just emerged from a massive domestic confrontation with Malaysia and Singapore. The territory dispute between Malaysia and the Philippines over Sabah was facing. Vietnam was divided and the war between North Vietnam and South Vietnam. ASEAN was faced with communist regimes, which created a serious security threat. Read more in Rodolfo C. Severino, 'ASEAN: building the peace in Southeast Asia' the fourth high-level meeting between the United Nations and Regional organisations on cooperation for peace-building United Nations, New York (2001) <http://asean.org/?static_post=asean-building-the-peace-in-southeast-asia> accessed 17 February 2017

pressures, which tend to make them nationalistic and inward looking.[32] More details of the overview of the economic aspects of the ASEAN economy will be discussed in Chapter two.

Section 1.3 Evolution of the ASEAN

The establishment of the Bangkok Declaration in 1967[33], also called "the ASEAN Declaration"[34], is considered to be the ASEAN's founding document with a loose organisational structure. The ASEAN's status in this Declaration reflects the differing views of the definition of a treaty, as defined by the Vienna Convention on the Law of Treaties of 1969.[35] Although the ASEAN Declaration did not claim to be a strong treaty, it can be argued to be a treaty nonetheless. The Bangkok Declaration did not create an organisation that was tasked with establishing a mechanism to foster mutual trust among the original five founder states[36] because the Bangkok Declaration was intended to create a legal relationship among the signatories[37] in order to achieve the aims set forth in the Declaration.[38] The objective of the ASEAN is to try to support the region's

[32] Pearlie M. C Koh, 'Enhancing economic co-operation: a regional arbitration center from ASEAN' (2000) 49(2) <http://www.Jstor.org/stable/761685> 390 accessed 15 February 2013

[33] More information about the 'Bangkok Declaration in 1967' <http://cil.nus.edu.sg/rp/pdf/1967%20ASEAN%20Declaration-pdf.pdf> accessed 1 September 2013

[34] The heads of State or Government were not involved in signing the Bangkok Declaration. It was signed in Bangkok by the Foreign Ministers of Indonesia (Mr Adam Malik), Malaysia (Tun Abdul Razak, who was Deputy Prime Minister rather than Foreign Miniter), The Philippines (Mr Narciso Ramos), Singapore (Mr S Rajaratnam) and Thailand (Mr Thanat Khoman).

[35] The Vienna Convention on the law of treaty defined the definition of "treaty" as an international agreement concluded between States in written form and governed by international law that is intended to create binding legal relation among parties to the agreement. See more Paul J. Davidson, *The legal framework for international economic relation ASEAN and Canada*, (1st ed Institute of Southeast Asian studied 1997)

[36] Jean-Claude Piris and Walter Woon, *Towards a rules-based community: an ASEAN legal service* (Cambridge University Press 2015), pages 6-7

[37] The ASEAN was formed when the foreign ministers, Adam Malik of Indonesia, Narciso Ramos of the Philippines, Tun Abdul Razak of Malaysia, S. Rajaratnam of Singapore and Tun Thanat Khoman of Thailand, signed the ASEAN Declaration

[38] Walter Woon, 'Dispute settlement the ASEAN way' (2012) <http://cil.nus.edu.sg/wp/wp-content/uploads/2010/01/WalterWoon-Dispute-Settlement-the-ASEAN-Way-2012.pdf> accessed 1 June 2013

economic growth and members' social and cultural development by strengthening the equality of the community and creating mutual trust among the member nations, as evidenced in the Bangkok Declaration.[39]

Now, the new ASEAN members include Brunei, Vietnam, Laos, Myanmar and Cambodia, plus the five founding members (Thailand, Singapore, the Philippines, Indonesia and Malaysia), which means that the number of signatory countries slightly increased during the period from 1983-1999 after the decline of Cold War tensions. They saw the ASEAN as a potentially valuable way to promote economic development. The reason Cambodia was the last country to join the ASEAN was because of a violent internal coup in Phnom Penh and the stabilisation of its government.[40] Therefore, the ASEAN is now the representative of all ten Southeast Asian nations.

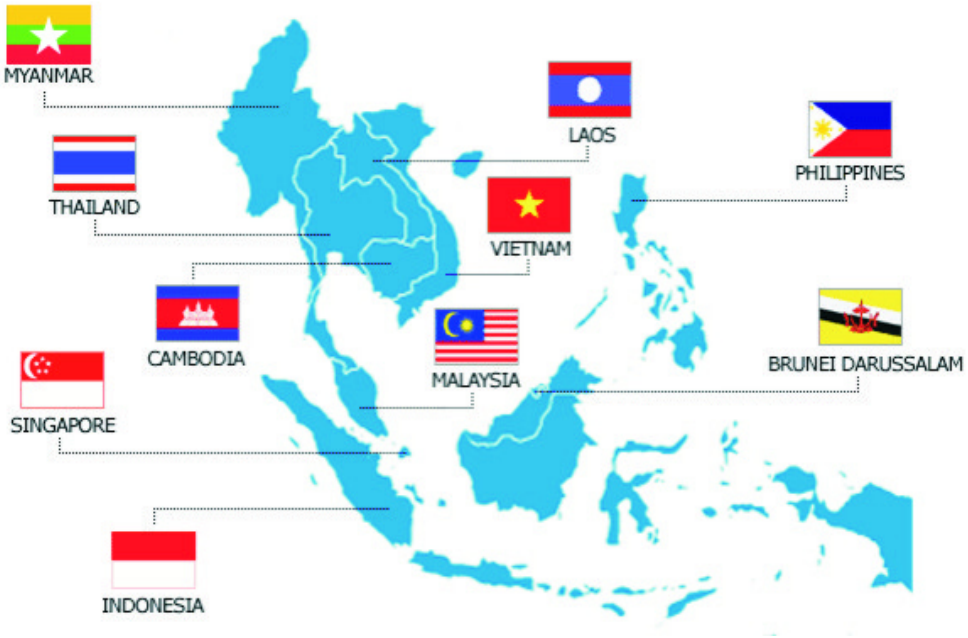

Figure 1.1: Map of the ten ASEAN member countries.[41]

[39] ASEAN Secretariat, 'The ASEAN Declaration (Bangkok Declaration)' (1967) <htttp://www.aseansec.org/1212.htm> access 1 January 2013

[40] Leifer, above 6, page 160

[41] (1) Brunei Darussalam, Head of State: His Majesty Sultan Haji Hassanal Bolkiah Mu'izzaddin Waddaulah capital: Bandar Seri Begawan, Languages: Malay and English Currency: Brunei Dollar, (2) Cambodia, Head of

At the time of its foundation, the common interest among the ASEAN members was influenced by external powers who had influence in Southeast Asia, and the fact that Western powers like France and Britain had a stake in the region.[42] The presence of the British military had important security implications for Singapore and Malaysia,[43] and this was why the ASEAN would not deal directly with military matters. The ASEAN is

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State : His Majesty King Norodom Sihamoni, Head of Government : Prime Minister Hun Sen, capital: Phnom Penh, Language : Khmer, Currency : Riel (3) Indonesia, Head of State : President Joko Widodo, Capital : Jakarta, Language : Indonesian, Currency : Rupiah (4) Lao PDR, Head of State : President Choummaly Sayasone, Head of Government : Prime Minister Thongsing Thammavong, Capital : Vientiane, Language : Lao, Currency : Kip (5) Malaysia, Head of State : His Majesty The King Almu'tasimu Billahi Muhibbuddin Tuanku Al-Haj Abdul Halim Mu'adzam Shah ibni Almarhum Sultan Badlishah, Head of Government : The Honourable Dato' Sri Mohd Najib bin Tun Abdul Razak, Capital : Kuala Lumpur, Language(s) : Malay, English, Chinese, Tamil, Currency : Ringgit (6) Myanamr, Head of State : President Thein Sein, Capital : Nay Pyi Taw, Language : Myanmar, Currency : Kyat (7) Philippine, Head of State : President Benigno S. Aquino III, Capital : Manila, Language(s) : Filipino, English, Spanish, Currency : Peso (8) Singapore, Head of State: President Tony Tan Keng Yam, Head of Government: Prime Minister Lee Hsien Loong, Capital: Singapore, Language(s) : English, Malay, Mandarin, Tamil, Currency : Singapore Dollar, (9) Thailand, Head of State : His Majesty King Bhumibol Adulyadej, Head of Government : Prime Minister General Prayut Chan-o-cha, Capital : Bangkok, Language : Thai, Currency : Baht (10) Vietnam, Head of State : President Truong Tan Sang, Head of Government : Prime Minister Nguyen Tan Dung, Capital : Ha Noi, Language : Vietnamese, Currency : Dong source from <http://www.asean.org/asean/asean-member-states> The ASEAN region has a population of about 567 million, a total area of 4.464 million square kilometers, a combined Gross Domestic Product (GDP) of roughly 1073 billion US dollar and a total trade about 1405 billion US dollar see more ASEAN Secretariat website. In term of population, the largest country in ASEAN is Indonesia with 231 million of population; Philippine has 92 million Vietnam with population of 87 million. In term of smallest countries starting with, Brunei has only 0.4 million of population, followed by Singapore with population of 4.9 million and Laos with population of 5.9 million. In term of total area, the largest country in ASEAN is Indonesia with total area of 1.860 million square kilometers. Myanmar has 0.676 million square kilometers, Thailand has 0.513 million square kilometers, followed by Singapore with total area only 0.7 thousand square kilometers and Brunei has total area of 4 thousand square kilometers. See http://asean.org/asean/asean-member-states/, <http:// www.rcmss.org/ijdds/Vol.1/No.1/.pdf >accessed 5 January 2013, and http://www.cfr.org/asia-and-pacific/asean-association-southeast-asian-nations/p18616

[42] Thailand is the only country in ASEAN that was never colonised. With the exception of Thailand, all ASEAN member countries were former colonies. There were five countries; Spain, the Netherlands, Great British, France and the United States, had colonies in Southeast Asia. List of colonies in ASEAN; between 1565 and 1571 Spain ruled the Philippines over Cebu and Manila. The Philippines gained independence from Spain on 12 June1898 and later, the Americans occupied the country. The Philippines granted full independence on 4 July 1946. Singapore declared its independence from the Great British on 3 August 1963. Vietnam gained independence from France on 2 September 1945. Laos achieved complete independence from France on 22 October 1953. Cambodia gained independence on 9 November 1953. The Dutch officially transferred sovereignty and following a 4 years for independence in Indonesia. Currently, all of ASEAN countries attain complete independence from Western nations.

[43] At the time of ASEAN's founding periods, Malaysia was formed in 1963, which comprised the Federation of Malaya and the former British colonies in Southeast Asia, namely, Singapore, British North Borneo over Sabah and Sarawak. Besides, their mutual concern over Indonesia, Malaysia and Singapore were deeply suspicious of each other. ASEAN was an opportunity to enhance their national prestige over the Philippine and Malaysia with the counterbalancing with the United States; obviously ASEAN was not a security-oriented structure. More details, ibid, above 6.

considered to be the first successful attempt at forging regional cooperation for the creation of institutionalised co-operative security in Southeast Asia.[44] The conflict management part of the ASEAN was originally established in order to avoid the use of force and violence.[45]

The ASEAN has now moved toward adopting an increasingly legalistic, adjudicatory, judicial or quasi-legal mechanism for the settlement of trade disputes with the aim of avoiding conflict between members in order to prevent them from using force or threats to deal with bilateral problems. Many significant changes have occurred in the transition from the old regionalism to the new regionalism of the ASEAN. During the cold war period (1947-1991), the ASEAN was perceived as a political and diplomatic body that had been created by governments for specific, exclusive, inward-looking political purposes only. In this early period of ASEAN regionalism, it was related to diplomatic factors that were leading to communist subversion in the Southeast Asia context. This was a new challenge to develop from this early period and adapt to the growth of a new regionalism and the ASEAN faced organisational tensions and difficulties in attempting to overcome it.[46]

The development of the new regionalism included the adoption of the ASEAN Charter in 2007[47] to serve as a legal and institutional framework, mainly in terms of cooperating in the consolidation of treaties, agreements and conventions, the creation of a dispute settlement mechanism and compliance, and the creation of new positions at senior management level. The second development entailed the adoption of "ASEAN

[44] L. Cuyvers and R. Tummers, 'the road to an ASEAN economic Community: how far still to go?' (2007) CAS discussion paper no: 57, page 6
[45] Ibid, page 28
[46] Leszek Buszynski, 'ASEAN's New Challenges' (1997-1998) 70 (4) <http://www.jstor.org/stable/2761323> accessed 01/08/2014
[47] The ASEAN Charter supports the strengthening of ASEAN by committing member states to "intensify community building through enhanced regional cooperation and integration more details provide in the Bali Declaration of ASEAN Concord II website: <http://www.mfa.go.th/asean/contents/files/other-20130527-164513-046340.pdf> accessed 22 March 2014

Blueprints",[48] which provided for the institutional complexity and formation of three communities, namely the Economic Community, the Political-Security Community and the Socio-Cultural Community.[49]

Section 1.4 Characteristics of the ASEAN

The ASEAN is still a traditional international organisation in the sense that it has a purely inter-governmental structure without any formal inter-governmental decision-making mechanisms.[50] Indeed, the decision-making power remains in the hands of member states, who make equal contributions. This means that decisions cannot be made against the interests and wishes of all member states. The ASEAN is not a supranational power because it does not have a commission that acts as an independent organ of the member states, which has been adopted as a legal body, and which acts directly in ways that are binding on member states. Unlike similar organisations such as the European Union (EU), the ASEAN does not have a regional parliament or a council of ministers with law-making powers, or any power of enforcement, and it has no judicial system under international law.[51] This lack of any supranational element means that the ASEAN has to adopt an ASEAN Summit declaration to formulate a policy. The ASEAN has no capacity to impose legal acts with direct effects on member states and it cannot make a decision binding on member states. The ASEAN has never had any intention of delegating supranational powers since the 15th December 2008 when the ASEAN Charter came into force, and this policy

[48] The ASEAN Blueprint made at the 12th ASEAN Summit in Cebu, the Philippines, on 13 January 2007, to accelerate the establishment of the ASEAN Economic Community (AEC) by 2020, but the AEC deadline was accelerated to 2015. The AEC Blueprint is the document describes how the AEC will operate and defines the goal of economic integration as the free movement of goods, services, investment and skilled labour and the free flow of capital among the member countries by 2015.

[49] The Bali Declaration of ASEAN Concord II website: http://www.mfa.go.th/asean/contents/files/other-20130527-164513-046340.pdf

[50] Lee Leviter, 'The ASEAN Charter: ASEAN failure or member failure' (2010) 43(159) International Law and Politics < http://nyujilp.org/wp-content/uploads/2013/02/43.1-Leviter.pdf> accessed 1 March 2016

[51] Simon Chesternam , 'Does ASEAN exist?' (2010) 12 Sybil pages, 199-211 <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1113612> accessed 3 March 2012

remains unchanged today.[52] This lack of intention is due to the declaration of the Charter, in which it commits itself to the great institutionalisation of the ASEAN and it does not want to encourage the taking of strong action by the ASEAN Secretariat. This may imply that the ASEAN seems to be more concerned with promoting a national agenda than a supranational one.[53] Moreover, Chng Meng-Kng, a former ASEAN Secretariat-General, notes that the reason the ASEAN does not intend to develop as a supranational body is that, by nature, it is a purely intergovernmental association without any supranational objectives. This is consistent with the view that the lack of a supranational body will be the greatest characteristic and evolution of the ASEAN machinery.[54] For further discussion of the possibility of the ASEAN adopts supranational regime will explain in Chapter 7.

The major development of this institution focuses on the organisational structure of the ASEAN.[55] In summary, the ASEAN is an intergovernmental regional organisation[56] to co-ordinate the involvement of the regional leaders. As detailed below, there is no way the ASEAN can take legally binding decisions independent of its political organ to impose binding legal acts on member states.[57]

[52] Rodolfo Severino, the former Secretary-General of ASEAN stated that ASEAN is not and was not meant to be a supranational entity acting independently of its members. This is because ASEAN has no regional parliament or council of ministers with law-making powers as well as no power of enforcement and no judicial system. Read more in Redolfo Severino, 'Asia Policy Lecture: What ASEAN is and what it stands for' (The research institute for Asia and the Pacific, University of Sydney, Australia, 22 October 1998) and Simon Chesterman, 'From community to compliance? The evolution of monitoring obligations in ASEAN' Cambridge University Press (2015), page 12.

[53] Amitav Acharya, 'ASEAN institutional reform and strengthening'<http://www.amitavacharya.com/sites/default/files/ADBI%20ASEAN%20Institutional%20Reform%20Paper.pdf> accessed 23 May 2015

[54] Chng Meng Kng, 'ASEAN's institutional structure and economic co-operation' (1990) 6(3) ASEAN economic bulletin, page 270 and Willem van der Muur, 'The legal nature of the ASEAN economic community 2015' (Master thesis Public International Law) (2012) University of Amsterdam, page 14.

[55] Suthiphand Chirathivan, Chumporn Pachusanond and Patcharawalai Wongboonsin, 'ASEAN Prospects for Regional Integration and the Implications for the ASEAN Legislative and Institutional Framework' (1999) 16 (1) ASEAN Economic Bulletin 28.

[56] Article 3, Chapter II of the ASEAN Charter.

[57] Willem Van der Muur, 'The legal nature of the ASEAN Economic Community 2015' (Master thesis Public International Law) (2012) University of Amsterdam pages 13-14.

1.4.1 Structure of the ASEAN

The ASEAN Charter established and formalised institutions to enable the ASEAN to develop deeper community integration. The ASEAN consists of seven main structures, namely the ASEAN Summit, the ASEAN Coordinating Council, the ASEAN Community Councils, the ASEAN Sectorial Ministerial Bodies, the Committee of Permanent Representatives to ASEAN, the ASEAN National Secretariat, the ASEAN Secretary-General and the ASEAN Secretariat. Each structure will be further elaborated in the following subsections. However, it should be noted that they will not be studied in detail, since their roles and functions are too subject-specific and, in some cases, they are not related to the overall functioning of the ASEAN.

A) The ASEAN Summit

The ASEAN Summit is the ASEAN's supreme policy-making body. This is the highest decision-making body of the ASEAN, which includes the heads of states and the governments of the ten member countries. The duty of the summit is to establish the direction of ASEAN policies and objectives. This is the final decision-making body referred to by the ministerial bodies or the Secretary General. The ASEAN summit is an institutionalised mechanism designed to promote political collaboration among member states. The summit as an organisation holds meetings between the heads of each of the governments to discuss and resolve regional issues and promote external relations with outside countries.[58] The first meeting, in Bali, Indonesia, in 1976 aimed to improve the ASEAN organisational structure by giving it more authority to facilitate economic co-operation and by the establishment of the AFTA (ASEAN Free Trade Area).

The ASEAN summit is one of the methods by which the ASEAN can strengthen its institutions. It is the highest decision-making body and it meets once every year. The

[58] Audier & Partners, 'The ASEAN Regional Trade Agreement and the WTO legal and trading system' Seminar Master of International Economic Law-Toulouse University

Summit acts as the policy-making body of the ASEAN[59] and it plays a significant role in making decisions when a consensus cannot be reached, as stated in Article 20(2) of the ASEAN Charter.[60] Moreover, Chapter VIII states that the ASEAN Summit must act like an appellate body when a dispute remains unresolved. This enables the parties to request the ASEAN Summit to make a decision using the recommendations from an ASEAN dispute settlement mechanism, referred to under Article 26 of the ASEAN Charter. The ASEAN summit is the final adjudicator. The decision itself is binding on the membership, but the ASEAN Charter does not provide the precise terms for the implementation of this decision by the member states. Moreover, the ASEAN Summit decision-making powers leave room for non-consensual methods of reaching an agreement.[61]

Additionally, the ASEAN Summit also has the duty to enforce decisions based on the ASEAN's dispute settlement mechanisms. Any serious breach of the Charter or any form of non-compliance can be referred to the ASEAN Summit for a decision.[62] Moreover, the ASEAN Summit acts as the policy-making body referred to under Article 7(2)(b),[63] and it also have the duty to appoint a Secretariat.

However, the ASEAN Summit, *per se*, is not a court or an arbitration tribunal.[64] In practice, if it is unable to settle a dispute, the ASEAN Summit can refer the matter to international arbitration, such as the United Nations,[65] or the parties can bring their case to the International Court of Justice in the Hague, the Netherlands, based on the fact that the Summit is not a judicial body.[66]

[59] ASEAN Charter Art 7(2)(b)
[60] ASEAN Charter Art 20(2)
[61] Problems and the limits of the ASEAN Summit under the ASEAN Charter will further explain in Chapter 6
[62] ASEAN Charter Art 20(4)
[63] ASEAN Charter Article 7(2)(b)
[64] Audier & Partners, above 58, page186
[65] Member states have the right to use dispute settlement regime 'Article 33(1)' of the United Nations to applies as indicates in the Article 28 of the ASEAN Charter
[66] Eugene K.B. Tan, 'The ASEAN Charter has legs to go places: ideational norms and pragmatic legalism in community building in Southeast Asia' (2010) 12 SYBIL, page 171

There are ministerial-level meetings below the ASEAN Summit with an annual Ministerial Meeting, in which all the policies of the different ASEAN working units are coordinated. In the stage of the meeting that occurs between the Annual Ministerial Meetings, the ASEAN's activities are conducted by the ASEAN Standing Committee (ASC) to continue the primary decision-making without interruption. Furthermore, the ASEAN Economic Ministers (AEM), one of the ministerial groups, has the necessary independence to oversee economic cooperation.[67]

Other organs, such as the ASEAN Coordinating Councils, exist to ensure the implementation of the relevant decisions of the ASEAN Summit and to co-ordinate the work of the different sectors on particular issues.[68] Likewise, the ASEAN Community Councils also need to certify and enhance the policy coherence, efficiency and cooperation among these institutions. There are three councils, namely, the Council for the ASEAN Security Community; the Council for the ASEAN Economic Community, which is responsible for the international trade of hosting member states, and the Council for the ASEAN Socio-Cultural Community, which is responsible for the education and culture of the hosting member states.[69] Each member state can choose its own national representative for each ASEAN Community Council Meeting. The ASEAN Sectorial Ministerial bodies help to strengthen cooperation in order to support ASEAN integration and community building. Their function is to help to implement the agreements and decisions of the ASEAN Summit, but they also make recommendations to their respective community Councils, such as the Senior Official Meeting (SOM)[70] or the ASEAN Committee on Women.

[67] Overview ASEAN, http://www.aseansec.org.64.html accessed 1 April 2014
[68] ASEAN Charter Art 9
[69] Carolina G. Hernandez, 'Institution building through an ASEAN Charter' (2003) CSIS SIIA < http://www.kas.de/upload/auslandshomepages/singapore/Hernandez_AseanCharta.pdf> 8 October 2012
[70] The ASEAN Ministerial Meeting (AMM) established Senior Official Meeting (SOM) in November 1971 as the another institution, consists of senior Foreign Ministry officials, but it is still outside the formal structure of ASEAN, read more Rizal Sukma, 'ASEAN beyond 2015: the imperatives for further institutional changes' (2014) ERIA-DP-2014-01

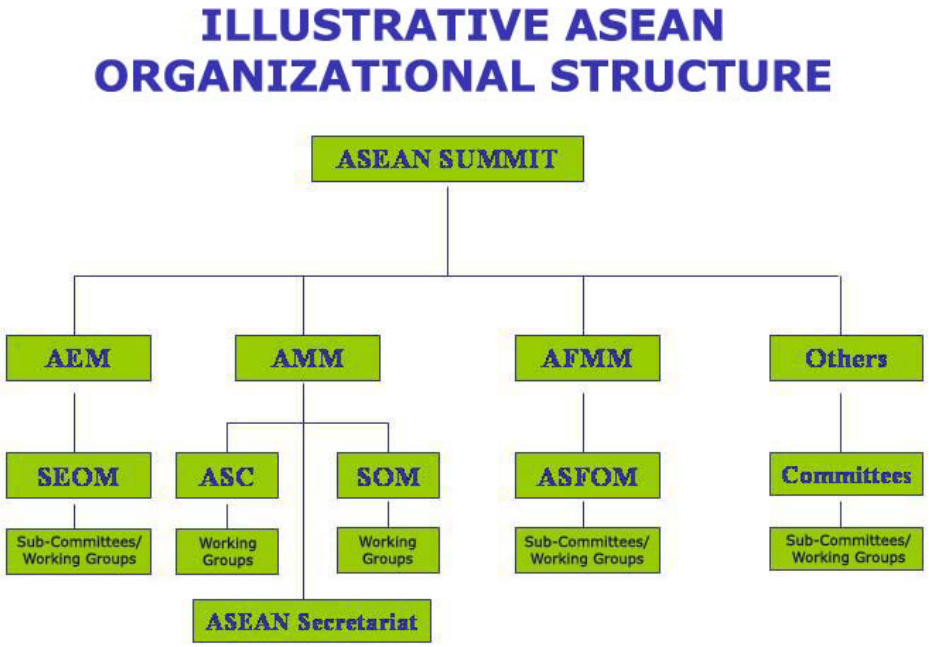

Figure 1.2: ASEAN organisational structure[71]

AEM: ASEAN Economic Ministers[72]
AMM: ASEAN Ministerial Meeting[73]
AFMM: ASEAN Finance Ministers Meeting[74]
SEOM: Senior Economic Officials Meeting[75]
ASC: ASEAN Standing Committee[76]
SOM: Senior Officials Meeting[77]

[71] The ASEAN structure from figure 1.2 shows the ASEAN Summit is president forum, ASEAN Coordination Council is foreign ministerial forum, ASEAN Community Councils is coordinate pillars minister level, ASEAN Sectoral ministerial bodies is minister level, Committee of permanent representatives is ASEAN's ambassador, The National secretariats is administrative officers and last one is committees abroad which is forum outside Asia. See more website; http://www.asean.org/asean/asean-structure

[72] The AEM is the highest decision-making body for economic matters. The AEM is responsible for the recommendations on ASEAN economic co-operation and consultation between member countries on all aspects of ASEAN economic co-operation.

[73] The formation of ASEAN was not found by a gathering of heads of governments. It was a gather of foreign ministers of member countries to set the plans for the group. That body, later known as ASEAN Ministerial Meeting (AMM), served as the central institution of the Association, responds for policy formulation, coordination of activities in all intra-ASEAN cooperation and review of decisions of the lower level committees. Website: <http://www.asean.org/communities/asean-political-security-community /category/asean-ministerial-meeting-amm>

[74] In 1997, the ASEAN Finance Ministers' Meeting (AFMM) preceded by an informal ASEAN Senior Finance and Central Bank, held to discuss the causes of the Asian debt crisis and restore economic and financial stability in the region. See more the text at Joint Ministerial Statement of the Special AFMM, Kuala Lumpur, 1 December 1997 website <http://www.asean.org/asean-economic-community/asean-finance-ministers-meeting-afmm/ >accessed 1 May 2014

[75] The Senior Economic Official Meeting (SEOM) is a meeting of senior officials from economic ministries in all matters relating to ASEAN economic cooperation.

[76] The ASEAN Standing Committee (ASC) is a coordination organ between ASEAN, the AMM and the bodies to carries on the work of the committees with a view to implementing policy guidelines of the Association in the inter-session between AMMs.

As illustrated in Figure 1.2 above, the ASEAN organisation is composed of several bodies rather than one supranational body. The advantage of this type of structure is that it allows for flexibility in relation to changes and adaption. However, this type of organisational structure also has disadvantages based on the lack of an integrated decision-making structure, which may generate institutional and procedural deficiencies. For example, the ASEAN consists of more than a hundred committees that need to be consulted and reach a consensus at all levels of decision making. This process may be highly inefficient and the decision making will be an extremely complicated and lengthy process.[78]

It is evident from the ASEAN Charter provisions that the ASEAN lacks any institutional mechanisms, as well as there being an inability and unwillingness to co-operate, and there is still a lack of clarity in terms of how their functions and roles relate to each other.[79] Moreover, there are no sanctions in the event of a serious breach of the Charter.[80] The role of the ASEAN Summit as an arbitrator is very weak because it does not mention any arbitration ability in this capacity to adopt a consensual approach. Furthermore, the ASEAN Summit does not bind any of the member states to its decisions. This is the main barrier that the parties need to clarify in the future in order to facilitate an agreement among them.[81] The ASEAN summit has the final decision-making power, despite the fear that its decisions will inevitably be politically driven.

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[77] The Senior Official Meeting (SOM) is a meeting of senior official at the Permanent Secretary or equivalent level, from the foreign ministries of each member country. It meets to discuss political matters pertaining to the activities of the AMM.

[78] More detail see, Muthiah Alagappa, 'Institutional framework: recommendations for changes' in K.S. Sandhu et al (eds*) The ASEAN reade*r, (1992), page 65

[79] Avery D. H. Poole, 'Cooperation in Contention: The Evolution of ASEAN Norms' (2007) YCISS Working Paper Number 44, page 1

[80] Tan, above 66, page 186

[81] Michael Ewing-Chow, 'Culture club or chameleon: should ASEAN adopt legalization for economic integration?' (2008) 12 SYBIL, page 225

Furthermore, there is no mention in the ASEAN Charter regarding the decisions the ASEAN Summit can make. This lack of guidelines begs the question of whether such decisions could also refer to international agreements entered into by the ASEAN.[82]

B) The ASEAN Secretariat

The ASEAN leaders held their first meeting in 1976 with the aim of creating and strengthening political solidarity and consolidating economic cooperation. The first proposal was to create the ASEAN Secretariat.[83] This is the most important organ for facilitating the ASEAN's organisation and structure. It is appointed by the ASEAN Summit for a 5-year term without renewal. The Secretariat-General (SG) is selected from ASEAN member states on the basis of alphabetical rotation.[84] The Secretariat's function is to coordinate all the ASEAN's functions and activities in order to assume a greater role of monitoring regional integration. The ASEAN decided to build an ASEAN Free Trade Area in 1992 as a means of enlarging and giving more power to the Secretariat-General.[85] It has the power to provide greater efficiency in the co-ordination of other ASEAN organs in order to make the implementation of ASEAN activities more effective, such as ensuring that meetings are held each year to authorise the signing of agreements on behalf of the ASEAN, but only in non-sensitive areas[86] and to represent the ASEAN at the United Nations (UN), where it only has observer status. The responsibilities of the ASEAN SG are explained in the ASEAN Charter, in which it is stated that the Secretary-General shall "carry out the duties and responsibilities of the high office in accordance

[82] Zatil Aqilah Metassan, 'Implementation of international agreements in the realization of the ASEAN Charter', (2012) http://www.aseanlawassociation.org/11GAdocs/workshop4-brunei.pdf, page 9 accessed 12 January 2014

[83] The ASEAN Secretariat would be renamed from the ASEAN Secretariat to the 'Secretary-General of ASEAN' asserted in the Singapore Declaration

[84] http://www.asean.org/asean/asean-secretariat/secretary-general-of-asean

[85] Rodolfo C. Severino, *Southeast Asia in search of an ASEAN community insights from the former ASEAN Secretary-general* (1st ISEAS publishing Singapore 2006)

[86] Non-sensitive area means excluding security and foreign policy issues

with the provisions of this Charter and relevant to ASEAN instruments, protocols and established practices."[87]

According to Article 11 paragraph (b), the ASEAN Secretariat-General has the duty to facilitate and monitor the progress of the implementation of all ASEAN agreements and decisions and then submit the work of the ASEAN reports to the ASEAN Summit. The most important role of the ASEAN Secretariat-General is to participate in meetings of the ASEAN Summit, the three ASEAN Community Councils, the ASEAN Coordinating Council, and the ASEAN Sectorial Ministerial Bodies.[88]

The ASEAN Secretariat's role in dispute settlement is explained in Article 23 Paragraph 2 of the ASEAN Charter: "parties to the dispute may request the Chairman of ASEAN or the Secretary-General of ASEAN to provide good offices, conciliation or mediation by acting in an ex-officio capacity".[89] The Secretariat-General of the ASEAN also has a duty to submit a report to the ASEAN Summit about the findings, recommendations or decisions resulting from an ASEAN dispute settlement mechanism only in a non-compliance situation, excluding any disputes inside any member state or bilateral disputes such as territorial claims among ASEAN member states, as listed in Article 27 Paragraph 2 of the ASEAN Charter.[90]

The Secretariat-General is currently located in Jakarta, Indonesia in the Department of the Federal Government Office.[91] The Secretary-General of the ASEAN 2013 -2017 is His Excellency Le Luong Minh from Vietnam.[92]

[87] ASEAN Charter Art 11
[88] ASEAN Charter Art 11 paragraph c
[89] ASEAN Charter Art 23 paragraph 2
[90] ASEAN Charter Art 27 paragraph 2
[91] There are four compositions: Secretary-General, three Bureau Directors, a Foreign Trade and Economic Relations Officer, an Administrative Officer, a Public Information Officer and an Assistant to the Secretary-General for more detail visit: http://www.asean.org/asean/asean-secretariat/basic-documents/item/asean-secretariat-basic-documents-asean-secretariat-basic-mandate-2
[92] http://www.asean.org/asean/asean-secretariat/secretary-general-of-asean

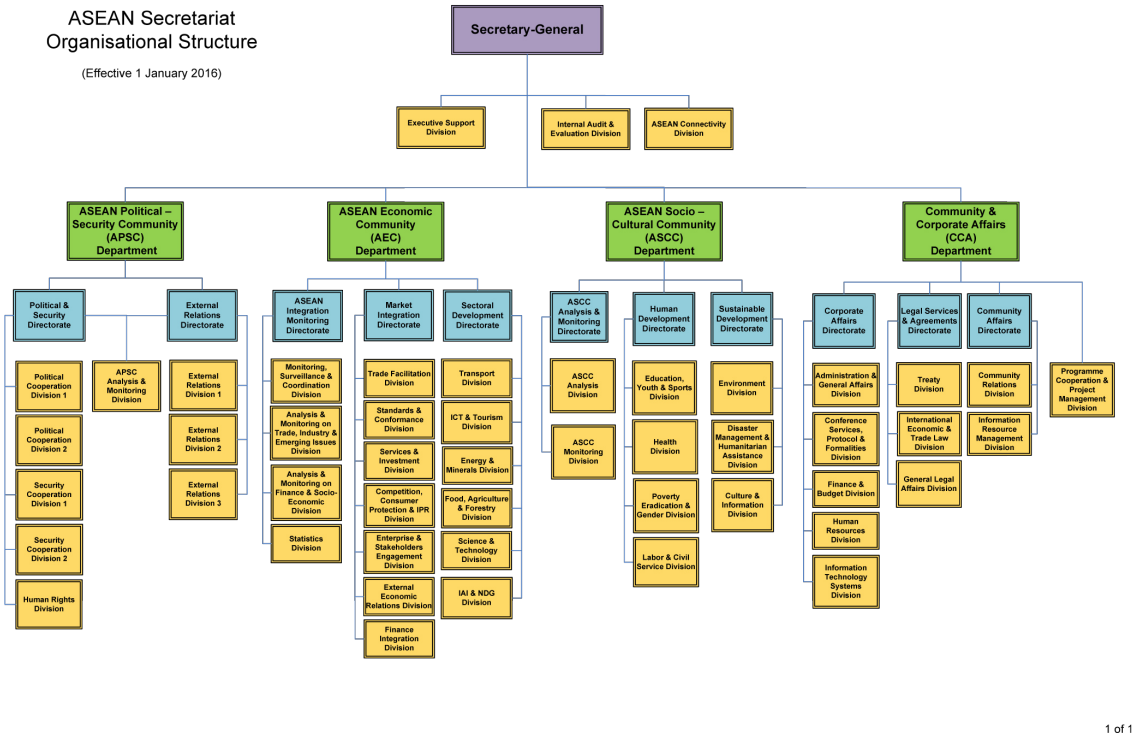

Figure 1.3: the ASEAN Secretariat structure[93]

Unfortunately, despite these important roles, the Secretariat-General is weak due to its limited authority, the absence of its committee roles, and due to there being no budget for research and no power to implement agreements, and no action plan due to the lack of political support.[94] Moreover, there is no structure and no specific task to enforce the implementation of a dispute settlement mechanism.[95] The limitation of the ASEAN Secretariat' s role will further explain in Chapter 6.

[93] The Secretariat now consists of four departments (one of each for ASEAN Political-Security Community (APSC) Department, ASEAN Economic Community (AEC) Department, ASEAN Socio-Cultural Community (ASCC) Department and Community and Corporate Affairs (CCA) Department ASEAN website http://asean.org/asean/asean-structure/organisational-structure-2/ accessed 17 February 2017

[94]"The ASEAN Experience: Insights for regional political cooperation" South centre SC/GGDP/AN/REG/1 February 2007, page 11

[95] Acharya, above 53, page 5

The establishment of the ASEAN Secretariat in Jakarta in 1977 gave it the authority to directly address contracting parties and communicate formally to give them advice, to coordinate the organs of the ASEAN and enable the more effective implementation of all ASEAN activities.[96] It is headed by the Secretary General of the ASEAN Secretariat. The main reason the ASEAN Secretariat can do nothing more than enforce limited duties is because member countries are reluctant to give any meaningful power to the Secretary-General of the ASEAN.[97]

The ASEAN Secretariat has been able to take the initiative since 1992 at the Singapore Summit,[98] when it was given enhanced power in practice to operate effectively and ostensibly professionally in any circumstances.[99] However, its power to do so is limited based on the fact that it cannot authorise calls for compliance with ASEAN agreements or take any action related to the ASEAN's purpose.[100] The Secretariat itself has no legal authority to resolve disputes, neither does it have the power to bind member states to decisions. The ASEAN Secretariat has no legal authority to resolve disputes among member states and its formal powers are weak. This powerless Secretariat cannot even handle administrative work. It has no delegated authority to punish members for non-compliance[101] with ASEAN agreements or ensure compliance

[96] For more detail about functions and power of the ASEAN secretariat visit http://cil.nus.edu.sg/rp/pdf/1976%20Agreement%20on%20the%20Establishment%20of%20the%20ASEAN%20Secretariat-pdf.pdf

[97] After the ASEAN was established in 1967, it did not set regional organisations any task in the context of institution structures, which makes it dysfunctional and very slow. The ASEAN lacked fixed institutions in the formative year and the ASEAN Secretariat is still the only standing centralised institution. However, the ASEAN Charter is regarded to be somewhat deficient and this has led to a number of attempts to strengthen the ASEAN Secretariat recently, since it is perceived to be the major weakness of the Charter. For the criticisms of the ASEAN Charter in relatively inefficient institutional structures read more Chapter 6 Section 6.2.3 (d)

[98] The Singapore Summit of 1992 and the 25th ASEAN Ministerial Meeting in Manila in 1992 agreed to strengthen the Secretariat that could carry out more effective functions and powers of the Secretariat, which appears in Annex 2 of the Protocol amending the Agreement on the Establishment of the ASEAN Secretariat (the Manila Protocol) See, ASEAN website http://asean.org/?static_post=asean-secretariat-basic-documents-asean-secretariat-basic-mandate-2

[99] Piris and Woon, above 33, pages 29-31

[100] Rodolfo C. Severino, 'Framing the ASEAN Charter: An ISEAS perspective' (ISEAS 2005), page 6

[101] Rodolfo C. Severino, Omkar Lal Shrestha and Jayant Menon, *The ASEAN economic Community: A work in progress* (ISEAS 2013)

with their ASEAN economic community commitments and it has no power to initiate arrangements to advance and uphold the purposes of the ASEAN.[102] As Termsak Chalermpalanupap, Director of the Political Security Directorate at the ASEAN Secretariat, puts it, "[a] serious problem of the ASEAN Secretariat is a lack of coordination that also leads to the ASEAN coordination of economic integration.[103]

C) The ASEAN National Secretariat

Article 13 of the ASEAN Charter states that 'the ASEAN National Secretariat is to be established by each of the ASEAN member states and it would serve as a national focal point for all ASEAN matters and coordinating the implementation of ASEAN decisions at the national level.'[104] Moreover, Article 13 sub-paragraph (c) gives the ASEAN National Secretariats the task of coordinating the implementation of ASEAN decisions at the national level, which could also cover the implementation of international agreements at the national level.[105] The ASEAN National Secretariats are currently located in each ASEAN country[106]with the respective Foreign Ministry.

The ASEAN National Secretariats serve at the domestic level within the territory of each state, having been established to act as national central points to provide all ASEAN information at the national level. An ASEAN National Secretariat has been established in each member country to undertake the work of the Association on behalf of that country. A Director General heads each ASEAN National Secretariat and the National Secretariat of the ASEAN for Malaysia for example shall; i) serve as the national focal point; ii) be the repository of information on all ASEAN matters at the national

[102] Chun Hung Lin, "EU-style Integration? Future of Southeast Asian Countries after ASEAN Charter" <http://saopaulo2011.ipsa.org/paper/eu-style-integration-future-southeast-asian-countries-after-asean-charter> accessed 17 November 2014
[103] Severino, above 100, page13
[104] ASEAN Charter Art 13
[105] Metassan, above 82, page 9
[106] For more details of the lists of ASEAN directors-general in national secretariats visit http://asean.org/storage/2012/05/List-of-ASEAN-Directors-General-Jan-2017-for-CRD.pdf

level; iii) coordinate the implementation of ASEAN decisions at the national level; iv) coordinate and support the national preparation of ASEAN meetings; v) promote ASEAN identity and awareness at the national level, and vi) contribute to the building of the ASEAN community.[107] The Ministry of Foreign Affairs, ASEAN Department, serves as the ASEAN National Secretariat of Malaysia and the Office of ASEAN Affairs in the Philippines serves as the ASEAN National Secretariat. It is organised and designed to implement ASEAN-related activities at country level. Moreover, the ASEAN National Secretariat in the Philippines is also responsible for providing policy guidance and staff support in negotiations, integration, reports and operations of the national governments in the ASEAN.[108]

1.4.2 Decision-making structure

Decision-making processes are central to the effective functioning of international organisations, since the possibility of reaching an international agreement depends on them. Decisions can be reached in international and regional organisations by applying various methods, such as majority, unanimity and consensus.[109] The ASEAN follows the "ASEAN Way" in recognition of the decision-making process based on the relationship among member states. There are many approaches that need to be considered regarding the ASEAN and its decision-making process, as shown below.

[107] ASEAN-Malaysia national Secretariat visit, http://www.kln.gov.my/web/guest/dd-asean_malaysia

[108] ASEAN-Philippine national Secretariat http://www.dfa.gov.ph/main/index.php/office-of-the-undersecretary-for-policy

[109] Sanae Suzuki, 'Chairship system and decision making by consensus in international agreements: the case of ASEAN' (2014) IDS discussion paper (471), page 1 https://ir.ide.go.jp/dspace/bitstream/2344/1376/1/ARRIDE_Discussion_No.471_suzuki.pdf accessed 22 February 2017

a) The *musyawarah and mufakat*

The first decision-making approach is called "*musyawarah (consultation) and mufakat (consensus)*".[110] This means that the process of decision-making is based on discussion and consultation. The *musyawarah* and *mufakat*[111] approach relies on consensus as an important feature of managing conflict in the ASEAN. This decision-making style evolved from village practices in Indonesia in order to prevent conflict, based on Indonesia's cultural traditions that have developed within the ASEAN.[112] Consensus is considered to be the best decision-making approach in many Asian societies, such as the Javanese village society in Indonesia.[113] Koentjaraningrat describes the concept of *musyawarah and mufakat* as follows;

> "The concept involves the processes that develop general agreement and consensus in village as the unanimous decision or *mufakat.* This unanimous decision can be reached by a process in term of majority and the minorities approach each other, based on their respective viewpoints, or an integration of the contrasting standpoints into a new concept synthesis".[114]

[110] The 'Musyawarah and Mufakat' approach are customary practices of traditional decision making as a democratic stability in Indonesia which has often been observed not only in village meetings but also in national parliament as well. See more detail, Koichi Kawamura, "Consensus and democracy in Indonesia: Musyawarah and mufakat revisited", IDE discussion paper no. 308.2011.9

[111] The 'Musyawarah and Mufakat' words are of Indo. According to some literature, it could have been introduced together with Islam via India. See, Pushpa Thambipillai and J. Savaranamuttu, ASEAN negotiations: two insights (Singapore: Institute of Southeast Asian Studies 1985), page 11

[112] Ramses Amer, 'Conflict Management and Constructive Engagement in ASEAN's Expansion'(1999) 20(5) Third world quarterly http://www.jstor.org/stable/3993610 accessed 27 July 2014

[113] The Javanese Village case showed that the consensus is used by a village leader makes important decision affecting social life in the village, more details see Amitav Acharya,, 'Ideas, identity and institution-building: Making sense of the Asia Pacific Way' The conference paper provide for national strategies in the Asia-Pacific: the effects of interacting trade, industrial, and defence policies', by the National bureau of Asian research and the centre of trade and commercial diplomacy, Monterey institute of international studies, March 28-29, 1996, California

[114] Koesrianti, 'the development of the ASEAN trade dispute settlement mechanism: from diplomacy to legalism' PhD thesis University of New South Wales (2005), page 33; See also, Mely Caballero-Anthony, 'Mechanisms of dispute settlement: the ASEAN experience' (1998) Contemporary Southeast Asia, page 58 and Pushpa Thambipillai and J. Savaranamuttu, ASEAN negotiations: two insights (Singapore: Institute of Southeast Asian Studies 1985), page 11

The concept of *musyawarah* is a simple process, which avoids confrontation between the parties. It begins with intensive informal and discrete discussions behind-the scenes and ends with a general consensus among the parties.[115] More importantly, this consensus approach has become known as the ASEAN Way and is reflected in the processes and structure of the ASEAN.[116] Moreover, the ASEAN's decision-making process is inspired by the practice of *musyawarah and mufakat,* as explained below. [117]

b) The ASEAN Way: Consensus in the ASEAN

The "ASEAN Way" is characterised by close co-operation, the concept and practice of consensus, decision-making, the principle of non-interference, and the principle of non-intervention. According to the 1976 Treaty of Amity and Cooperation (TAC),[118] these characteristics are firstly, mutual respect for all nations' independence, sovereignty, equality, territorial integrity and national identity; secondly, the right of every state to its national existence free from external interference; thirdly, non-interference in the internal affairs of member countries; fourthly, creating a peaceful settlement of conflicts between members; fifthly, connecting to the outside world; and sixthly, engaging in close consultation and consensus in decision-making.[119] The last characteristic is the voluntary enforcement of regional decisions, which thus reinforces the protection of sovereignty.[120] All these characteristics have led the ASEAN to develop what is known as the "ASEAN Way" of cooperation.

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[115] Ibid, page 34

[116] Davidson, above 35, page 167

[117] Atena S. Feraru, 'ASEAN decision-making process: before and after the ASEAN Charter' (2015) 4(1) Asian development policy review, page 29 www.aessweb.com/download.php?id=3535 accessed 22 February 2017

[118] Treaty of Amity and Cooperation in Southeast Asia (TAC), 24 February 1976, at http://asean.org/treaty-amity-cooperation-southeast-asia-indonesia-24-february-1976/

[119] Amitav Acharya, 'ASEAN at 40 : Mid-Life Rejuvenation?' (2007) foreignaffairs < <https://www.foreignaffairs.com/articles/asia/2007-08-15/asean-40-mid-life-rejuvenation> accessed 1 November 2012, page 3

[120] Sheldon Simon, 'ASEAN and Multilateralism : the long, bumpy road to community' (2008) 30 (2) ISEAS 264

The positive case for applying the "ASEAN Way" principle is that leaders will work together in the 'ASEAN Way', according to which decisions are made by consensus, thus avoiding any interference in each other's domestic affairs.[121] In other words, the traditional consultation and consensus style in the ASEAN is based on initiating the full support of its members so that no member state will feel discriminated against. Shaun Nurine[122] defines the ASEAN Way as member states having the same attitude, which entails the adoption of the tradition whereby member states agree or disagree in their approach to problems among them in order to maintain the illusion of ASEAN unity. She adds that the ASEAN way is a set of diplomatic norms shared by members.[123]

Without any official definition of the term, other scholars, such as Acharya Amitav, have stressed that the main characteristic of the "ASEAN Way" is to achieve compromise without any specific modality for a successful result[124] and consultation in building a consensus, ambiguity and the rejection of hard legalisation with non-confrontational bargaining styles.[125] The ideas of both Nurine and Amitav are similar to those identified by Hiro Katsumata[126] as the four elements of the "ASEAN Way". He clarified the concept of an "ASEAN Way" by explaining that it is composed of the principle of non-interference, based on diplomacy, together with the non-use of force through consensual decision-making.[127] Furthermore, Kim Hyung Jong claims that the

[121] Christopher B. Roberts, 'ASEAN regionalism: cooperation, values, and institutionalisation' (2014) 36(1) ISEAS <www.tandfonline.com> accessed 11 December 2014

[122] Shaun Narine who is Associate Professor in Department of Political Science, St. Thomas University Canada.

[123] Shaun Narine, *explaining ASEAN: Regionalism in Southeast Asia* (1st , Lynne Rienner Publishers 2002)

[124] Kim Hyung Jong 'ASEAN Way and its implications and challenges for regional integration in Southeast Asia' (2007) 12 JATI, page 17

[125] Ibid, pages17-18

[126] Hiro Katsumata is an Assistant Professor at the Waseda University Institute of Asia-Pacific Studies, Japan

[127] Kai He 'Does ASEAN Matter? International Relations Theories, Institutional Realism and ASEAN' (2006) 2(3) Asian security <http://www.tandfonline.com/doi/abs/10.1080/14799850600920460> accessed 1 January 2014, pages 17-18

"ASEAN way" often refers to a mechanism of dispute management conducted via the process of consensus and consultation.[128]

The consensus is based on broad agreements achieved behind closed doors with limited members' choices in public divisions and legalistic procedures. The consensus decision-making process is described in Article 20 of the Charter as follows;

1) As a basic principle, decision-making in the ASEAN shall be based on consultation and consensus;

2) Where consensus cannot be achieved, the ASEAN Summit may decide how a specific decision can be made;

3) Nothing in paragraphs 1 and 2 of this Article shall affect the modes of decision-making as contained in the relevant ASEAN legal instruments.[129]

The ASEAN's style of building a consensus is based on the 10-X principle in regional economic initiatives that does not require the concurrence of all the members.[130] The 10-X principle means that, when nine members agree to a certain scheme and one does not, this can be considered as a consensus, which can be beneficial for all participants without damaging the others.[131] From this perspective, the ASEAN consensus does not require a total 100 percent agreement by all actors.[132] That means that all members must agree before a decision can be made based on the opinion of President Tran Dai Quang of Vietnam. Consensus-based decision-making does not imply unanimity nor does it involve voting, since it does not require all members to explicitly agree with the proposal being discussed and that no members vote against

[128] Ibid, pages 17-18
[129] Article 20 of the ASEAN Charter
[130] Rajshree Jetly, 'Conflict management strategies in ASEAN' (2010) 16(1) The Pacific review, page 53
[131] Acharya, above 119, page 26
[132] Ibid, page 27

it.[133] More importantly, the requirement that all decisions be reached by consensus means that further negotiations will continue if just one member country disagrees with the proposal.[134]

As mentioned above, the ASEAN Summit is the ASEAN's supreme policy-making body, comprising the Heads of State or Government of the member states, as stated in Article 7 of the ASEAN Charter. The ASEAN Summit can be seen to be the highest decision-making body. According to Article 20 (2) of the ASEAN Charter, one of the tasks of the ASEAN Summit is to decide on matters referred to it under Chapter VII. It is important to note that, in cases where a consensus cannot be reached, the Charter provides for the ASEAN Summit to choose an alternative decision-making method or decide how a specific decision can be made. However, the principle of consensus is limited, as can be observed from Article 7 of the ASEAN Charter, in which it is stated that the ASEAN Summit may decide an alternative method for decision-making to arrive at a specific decision in the event of non-consensus. The provision in Chapter VII of the ASEAN Charter does not clarify whether the decision made by the ASEAN Summit has to be reached via a unanimous consensus; furthermore, there is no information that relates to the ASEAN Summit referring the matter if it is unable to reach a consensus.[135] The limitations of the ASEAN Way in terms of decision-making and suggestions will be further discussed in Chapters 6 and 7.

A consensus is arrived at through consultations between governments. The decision-making processes in the ASEAN take place at both national and regional levels and a consensus is required at both levels, which facilitates a group consensus at official meetings. At the national level this involves decisions being made by the staff of the Ministry of Foreign Affairs, such as, trade, labour, and industrial ministers, including all

[133] Feraru, above 117, page 29
[134] Koesrianti, above 114, page 34
[135] Michael Ewing-Chow and Tan Hsien-Li, 'The role of the rule of law in ASEAN integration' RSCAS (2013), page 17

senior officials and technical officials of each country.[136] Clearly, a consensus must exist at the national level before a particular matter is adopted and introduced at the regional level,[137] and at the regional level, a consensus must be reached at each level from Committee to Ministerial. The ASEAN's consensus-based decision-making is conducted by heads of state/leaders' summit or their ministers. For example, if a committee reaches a consensual decision, it must then be agreed by the respective Ministries and Standing Committee, and then finalised at the annual meeting of regional Ministers. If an issue is brought to the regional level, it must be discussed, prepared and adjusted by members on the basis of compromise through all informal channels.[138] Therefore**,** this process leads to slow progress to reach a final decision whereby a consensus is acceptable to all member states.[139] In some cases, lower-level committees make administrative decisions, which are then brought to a higher level for approval.[140] However, not only is the progress to reach a consensus at the regional level slow, but the size of the country also affects the speed of the decision-making. To explain, it will be more difficult for a large country, which has complex functions and activities, and the different sectors themselves, to agree a national policy. On the other hand, parties will be able to reach an agreement faster in a small country, which has less complex functions.[141]

The structure of the ASEAN dispute settlement mechanism follows the peace-seeking cultural norms and traditions of the ASEAN Way in developing a legal framework to prevent and settle conflict for economic cooperation in the ASEAN.[142] The "ASEAN Way" is a more effective method to resolve disputes in South East Asia based on its

[136] Feraru, above 117, page 31
[137] Koesrianti, above 114, page 35
[138] Koesrianti, above 114, page 35
[139] Ibid, pages 35-36
[140] Ibid, page 35
[141] Thambipillai and Saravanamuttu, above 114, page 14
[142] Paul J. Davison, 'The ASEAN Way and the role of law in ASEAN Economic cooperation' (2004) SYBIL (8), page 166

2010 official proclamation,[143] "we dare to dream, and we care to share, for that's the way of the ASEAN".[144] As explained by Lee Leviter, the ASEAN Way is a set of diplomatic norms shared by member states in an informal discussion, which is meant to facilitate a consensus-based decision at subsequent official meetings.[145] On this point, the ASEAN Way is important to reduce tension,[146] since consultation and consensus particularly emphasise non-interference in each other's internal affairs, thereby avoiding conflict rather than resolving it.[147] The process enables members to determine a small area of agreement and achieve a better understanding of the issue; thus, the agreement is not delayed by disputes.[148]

The economic dispute settlement mechanism in the ASEAN is defined as a protocol[149]rather than a treaty, which limits its enforcement. It is a specific combination of consultation, consensus building and rarely-mixed diplomacy, which is called the "ASEAN Way".[150] ASEAN decisions are currently typically reached by consensus, and according to Rodolfo Severino, most scholars consider that consensus in the ASEAN does not require unanimity. A consensus will have been reached when enough members support it. For example, this may be six, seven, eight or nine members, and there is no specific document to specify the number of many members that have to vote. The votes will be eliminated in a case where there is something sufficiently injurious to their national interests for them to vote against it.

[143] It has been marked that this official proclamation is the guidelines on the use of the ASEAN Anthem, which were adopted at ASEAN sixth meeting in Hanoi on 8 April 2010. 'ASEAN Anthem', ASEAN website at http://asean.org/asean/about-asean/asean-anthem/

[144] Michael Ewing-Chow, 'Culture club or chameleon: Should ASEAN adopt legalisation for economic integration?'(2008) 12 SYBIL, page 225

[145] Leviter, above 50, page 167

[146] Barriers in the ASEAN Economic Integration will be more explained in Chapter six

[147] Leviter, above 50, page 161

[148] Ibid, page 167

[149] This Protocol refer to the 2004 Enhanced dispute settlement mechanism (EDSM). For further discussion about ASEAN's dispute settlement mechanism and the limitation of the ASEAN Way read more in Chapter 5 and Chapter 6

[150] He, above 127

Unless a consensus cannot be reached by setting aside the parties' disagreements, the decision-making process will help to link both officials and political leaders. This means that the ASEAN member states are able to negotiate with one voice on issues that are important to their region.[151]

Therefore, the "ASEAN Way" is an amicable means based on informality to settle any conflicts between member states. The "ASEAN way" is the main characteristic of the ASEAN on this issue, which explains the process of ASEAN interaction and also refers to the relationship among member states based on their history and culture.[152]

The other meaning of the "ASEAN Way" is a method of interaction among member states, which involves the use of intensive consultation and the building of a consensus to improve their internal solidarity.[153] The "ASEAN Way" is a key aspect of the ASEAN Charter, which is formulated and acknowledged[154] in paragraph 7 of the Preamble of the Charter.[155]

What is more, according to Professor Paul Davidson,[156] the "ASEAN Way" supports more achievement in economic co-operation through discussion, consultation and consensus.[157] The consensus-building model of decision-making is extensively explained as being one of the advantages of the "ASEAN Way", together with the principle of informal diplomacy and the ASEAN's non-intrusive nature, which are the

[151] David B. H. Denoon and Evelyn Colbert, 'Challenges for the Association of Southeast Asian Nations (ASEAN) Pacific Affairs' (1998-1999) 71 (4), page 506 http://www.jstor.org/stable/2761082

[152] Paul J. Davidson, 'ASEAN features 'the ASEAN way and the role of law in ASEAN economic cooperation' (2004) 8 SYBIL < http://www.commonlii.org/sg/journals/SGYrBkIntLaw/2004/10.pdf> 8 October 2012

[153] Shaun Narine, 'ASEAN and the ARF: The Limits of the ASEAN way' (1997) 37(1) Asian Survey <http://www.jstor.org/stable/2645616> accessed 5 October 2012

[154] Acharya, above 119

[155] In paragraph 7 of the Preamble of the ASEAN Charter states that 'respecting the fundamental importance of amity and cooperation, and the principles of sovereignty, equality, territorial integrity, non-interference, consensus and unity in diversity. See also the importance of peace as addresses in the 'proposes' in Article 1 of Chapter one of the ASEAN Charter and the 'principles' in Article 2 of the ASEAN Charter

[156] Davidson is holly professor of excellence, emeritus at the university of Tennessee in Knoxville, Tennessee and he has taught economics at Bristol University and the university of Cambridge

[157] Davidson, above 152

main aspects of the so-called 'ASEAN way'. The achievement of the ASEAN Way applies to decisions and consultations and consensus achieved through relation-based governance rather than rules and regulations.[158] On the one hand, it means searching for the most acceptable views of each and every member state.[159] Additionally, the "ASEAN Way" is based on the principle of consensus decision-making, as well as respect for national sovereignty.[160] The challenges that arose after the Asian Financial Crisis in 1997[161] were due to the fact that the "ASEAN Way" was under pressure based on its outdated style of conflict management. By its nature, the "ASEAN Way" involves a lack of formal dispute settlement mechanisms, being based on compromise through informal meetings, which avoids the strict reciprocity of legalisation.

Nevertheless, due to the application of the ASEAN Way, the consensus approach brings ASEAN member countries closer and this means that direct conflict is avoided.[162] Hence, all decision-making processes are based on consensus, which is a negotiation and political or diplomatic style, rather than a legal one.[163] However, there are some problems at present based on the fact that the ASEAN Way, *per se,* is an informal decision-making organ, which lacks any form and is fully flexible. Some scholars criticise

[158] Paul J. Davidson, 'The role of International Law in the governance of international economic relations in ASEAN' (2008) 12 S.Y.B.I.L., page 213

[159] Acharya, above 119, page 3

[160] 'The ASEAN Experience: Insights for Regional Political Cooperation' (2007) SC GGDP AN REG 1

[161] The 1997-1998 Asian financial crisis happened because of domestic economic weakness, that is, was caused by in various macroeconomic imbalance as well as structural deficiencies in the financial sectors and the failures in political and corporate governance. Indonesia and Thailand were seriously affected by the crisis. The main cause of the crisis was that Thailand's central bank announced the floating of the Thai baht (Thai currency) after failing to protect the Thai currency and other local currencies. Further explanation about the Asian financial crisis read more in chapter 2 section 3 the expansion of ASEAN's economic cooperation.

[162] The influence of the ASEAN Way, indeed, during its first twenty years ASEAN could better stand against the spectre of communism as ASEAN existed primarily to improve diplomatic relations among its member states. For example, in the case of Vietnam when it was under the Communist control, which they wanted to occupy Cambodia. ASEAN encouraged the United Nations not to recognise the new Cambodia government under the Vietnamese Communist regime, which was settled through diplomatic means. See, Lee Leviter, 'The ASEAN Charter: ASEAN failure or member failure?' (2010) 43(159) International law and politic, page 169 and Shaun Narine, 'ASEAN and the ARF: the limits of the ASEAN Way', (1997) Asian survey 37(10), page 970

[163] Krit Kraichitti, Dispute settlement mechanisms for ASEAN Community: experiences, challenges and way forward' Workshop on trade and investment ASEAN Law Association (2015), Page 11

the "ASEAN Way" on the grounds that it suffers from a lack of speed and results. This means that it no longer works and needs to be changed and reformed. [164] A strengthening of the institutions has been suggested, as will be pointed out in Chapter 7 of this thesis with regard to a proposal for a newly-designed ASEAN.

Moreover, the ASEAN Way also motivates its members to work together on contentious issues, to agree or disagree, and to pursue their individual interests when consultation cannot create a consensus. [165] However, the ASEAN decision-making process is totally different from the European Union's voting system.[166] To explain, the style of decision making in the ASEAN is based on consensus and avoids voting, while the EU adopts a legally-binding, supranational, and democratic decision-making process, as mentioned above.

Some experts disagree with the idea that the ASEAN is unable to move beyond the ASEAN Way of informality, consensus and the protection of national sovereignty,[167] as was stated by Mely Caballero-Anthony.[168] As a result of the ASEAN Way, there are no powers for research or the implementation of agreements, or action plans, especially in terms of the ASEAN Secretariat.

In conclusion, the ASEAN Way is evidently the approach to the settlement of general disputes and making of rules within the ASEAN Charter and it is based on consultation and consensus. This explains the characteristics of the ASEAN approach to the management of conflicts and how it helps to maintain peace and security in Southeast Asia.

[164] Acharya, above 119, page 4
[165] Shuan Narine, 'ASEAN into the twenty-first century: problems and prospects' (1999) 12(3) The pacific review <http://dx.doi.org/10.1080/09512749908719296> accessed 1 October 2012
[166] Kiki Verico, *The future of ASEAN Economic integration* (Palgrave Macmillan 2017), page 122
[167] Hussey, above 23, pages 56-57
[168] Mely Caballero-Anthony is Associate Professor and Head of the Centre for Non-Traditional Security (NTS) Studies at the S. Rajaratnam School of International Studies (RSIS), Nanyang Technological University, Singapore

1.4.3 Legal Personality of the ASEAN

Every international organisation has a legal personality, and in every legal system, certain entities are regarded as a person or entity that enters into legal relationships and possesses rights and duties that are enforceable by law.[169] Only legal persons can enjoy and enforce legal rights and obligations.[170]However, there is evidence to show that, although the ASEAN was founded in 1976, it was denied the possession of a legal personality in 1998 as a result of the Asian Economic Crisis.[171] Rodolfo Severino describes this as an event that shocked the region,[172] and adds that the ASEAN lacks any juridical personality or legal standing under international law, since it is intended to be a 'social community' rather than a 'legal' one.[173] However, the ASEAN asserted its own international legal personality in late 2007 after the adoption of the Charter.[174] The legal personality provided in Article 3 of the Charter clearly states that the ASEAN is intended to be an international organisation with its own legal personality, which is distinctive and separate from that of its members. Therefore, the question that arises is whether the ASEAN has a legal personality. In attempting to answer this question, firstly Ian Brownlie[175] points out that there are three major concepts to test for an international legal personality. The organisation must possess attributes based on three components, the first of which is a permanent association of states with lawful objective organs. The second is that the legal powers and purposes between the organisation and its member states should be distinctive, and lastly, the power should exist on an international plane and not solely within the national systems of one or more states.[176]

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[169] Ian Brownlie, Principles of Public International Law, 5th ed. (Oxford: Clarendon Press, 1998), page 57
[170] S. Tiwari, *ASEAN Life After the Charter* (ISEAS 2010), pages 2-3
[171] The seriousness of the economic situation in 1997 in ASEAN was underestimated at the beginning of the currency crisis. See, above 161 More details visit website: http://www.asean.org/resources/item/asean-economic-co-operation-adjusting-to-the-crisis-by-suthad-setboonsarng
[172] Rodolfo Severino, the former Secretary-General of ASEAN
[173] Paul J. Davidson, *ASEAN: The evolving legal framework for economic cooperation* (Singapore: Times Academic Press, 2002), page 29
[174]Severino, above 85, page 28
[175] Ian Brownlie was a British practicing barrister, specialising in international law.
[176] Chesterman, above 51, page 199

Applying Ian Brownlie's concept to the ASEAN leads to the conclusion that the ASEAN was certainly a permanent association of states with lawful objects before the adoption of the ASEAN Charter; however, the ASEAN has developed extensive national actors. Yet, there are some limited independent organs that still do not exist; for example, there is no mechanism for ASEAN officials to travel using their national passport.[177] There is no distinction between the organisation and member states in terms of legal powers and purposes. The ASEAN has only addressed some goals and announced an annual meeting of foreign ministers, as stated in its foundation document, the 1967 Bangkok Declaration.[178]

The other question that arises is whether the ASEAN represents a juridical personality or legal standing at some level under international law. To answer this question, according to the concept of international law, the meaning of a "legal personality" defines an international organisation that creates rights concerning privileges and immunities by registering its Charter and treaties, as well as participating in proceedings as an entity and applying international law in relation to the organisation and other issues of international law.[179] In terms of the ASEAN, Locknie Hsu adds that the ASEAN Charter aims to relatively and subjectively express recognition among member states under the framework of the Bangkok Declaration, which creates a legal status and enables the ASEAN to enter treaties with its member states.[180] This implies that member states are responsible for treating third parties as an international

[177] Ibid, pages 199 and 205

[178] The Bangkok Declaration, supra note 2

[179] Article 102 of the United Nation Charter explains the definition of legal personality as 1) Every treaty and every international agreement entered into by any Member of the United Nations after the present Charter comes into force shall as soon as possible be registered with the Secretariat and published by it. 2) No party to any such treaty or international agreement which has not been registered in accordance with the provisions of paragraph 1 of this Article may invoke that treaty or agreement before any organ of the United Nations.

[180] Locknie Hsu, The ASAEN Charter: some Thoughts from the legal perspective, in Rodolfo C. Severino (ed.), *Framing the ASEAN Charter* (Singapore: ISEAN publishing, 2005), pages 45-52

organisation. Based on this perspective, it can be proved that the ASEAN Charter has strengthened its legal personality under international law.[181]

The ASEAN's legal personality has been characterised as the legal personality of an inter-governmental organisation[182] by the enactment of the ASEAN Charter. The enactment of such a rule makes the ASEAN Charter a constitutional document,[183] which contains norms, statements on sovereignty, rights, obligations and powers in legislative and judicial processes, as stated by Locknie Hsu. Under international law, the ASEAN's legal personality stands for its organisational personality, the immunities and privileges of its officials, as well as its self-binding rules and decisions.[184] The ASEAN is largely able to determine its own legal personality and powers since it is an inter-governmental organisation, which is beneficial for the ASEAN in terms of economic, security and political gains. The legal personality of the ASEAN creates duties and obligations as a subject of law, including its the legal capacity, and gives it the power to act as a subject of law with rights and obligations under both international law and the domestic law of member states and non-member states.[185] Moreover, attention should be focused on the ASEAN's functionality or its operationalisation to exercise its legal personality. For example, the objective of the ASEAN community is to establish a single economic market, where the ASEAN can effectively achieve its goal, and it is also imperative for the ASEAN to have a greater international personality to achieve its objectives.[186]

This legal personality means that ASEAN has the legal capacity to enter into international agreements with other state organisations by acting in its public capacity.

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[181] Ibid, pages 45-52

[182] ASEAN Charter Article 3

[183] A constitutional document may contain norms, statements on sovereignty, rights and obligations and powers in legislative, executive judicial processes. Read more; Lin Chun Hung, 'ASEAN Charter: deeper regional integration under international law?' (2010) Chinese JIL http://chinesejil.oxfordjournals.org/content/9/4/821.abstract accessed 1 May 2015, page 5

[184] Lin, above 102

[185] Hikmahanto Juwana and Sari Aziz, 'ASEAN's legal personality' *The Jakarta post* (Jakarta, 26 August 2010) <http://www.thejakartapost.com/news/2010/08/26/asean%E2%80%99s-legal-personality.html#sthash.y7pI3rbf.dpuf> accessed 3 March 2013

[186] Hsu, above 180, pages 45-52

The ASEAN is allowed to enter into international agreements, but it is still limited in its capacity to act on behalf of member states. This is due to the fact that the ASEAN is not intended to be a supranational government acting independently of ASEAN members. The ASEAN does not have a single governing institution, such as a Council with law-making powers, a regional parliament, a power of enforcement, or a judicial system, and it is this lack of power that differentiates the ASEAN from the EU.[187] ASEAN member states must individually sign all the agreements concluded by the ASEAN with other international legal persons regarding an important topic or one that binds the member states. The members can sign and ratify such agreements based on their individual capacity.[188] This means that the ASEAN can create and accept legal obligations if the ASEAN organisation can enter into treaties in its own right.[189]

Furthermore, the ASEAN's legal personality helps to ensure its compliance with agreements signed by individual ASEAN member states and to facilitate the development of a dispute settlement mechanism. The power of a legal personality in ASEAN regional integration influences the direction of inter-state dispute resolution and collaboration. The ASEAN is able to enter treaties and act separately from its member states and enforce agreements against members with its international legal personality. Rodolfo Severino adds that the ASEAN can use its international legal personality to sue in national courts or purchase property and enjoy the tax benefits in the host country.[190]

[187] The face of ASEAN and the EU are very different orientations both two organisations were slightly difference by nature, structure and legal means. The EU has a role model whereas the ASEAN sometime is a counter model in the regional integration. According to both historical backgrounds the EU and ASEAN differ in natural partners together with regional power centres. Besides, the most significant difference between ASEAN and the EU is the scope of power the organisation. This means that the European Union is more a supranational organisation, which the government among members are committed to a bigger entity As can be seen, The EU is more institutionalised while ASEAN is not. In this topic will be discussed more in Chapter V of this thesis

[188] Chesterman, above, 51, page 199

[189] This appears under the Charter though the Eminent Person groups recommended that the Secretary-General can be delegated the authority to sign non-sensitive agreements on behalf of ASEAN member states see ASEAN Charter Art 41(7)

[190] Severino, above 85, pages 47-48.

1.4.4 Sovereign Equality

ASEAN members have been reluctant to interfere with each another's business or share their sovereignty with ASEAN regional institutions. The ASEAN was not designed as a sovereign body, but as a regional grouping of sovereign nations. The sovereign equality of nation-states is based on the principle of non-interference in domestic affairs or the principle of non-intervention. The principle of non-interference was one of the ASEAN's goals at the time it was founded and it is stated in the preamble of the first declaration of the ASEAN (the 1967 Bangkok Declaration) that member states are determined to prevent external interference in order to ensure domestic and regional stability.[191]

The ASEAN's commitment to non-interference is reflected in several of the association's founding documents and declarations.[192] The principle of non-interference, or so-called non-intervention, is the principle that provides that governments can only attempt to influence other countries through established diplomatic channels.

The principle of non-interference of member states, combined with respect for national sovereignty, was created to prevent foreign intervention in domestic affairs. This protection from outside intervention guarantees the independence and sovereignty of member states.[193] However, the 1967 declaration did not provide any scope of conflict management and conflict prevention, as well as limiting increased co-operation, which is why the ASEAN needed to evolve. The Treaty of Amity and Cooperation (TAC) created the guidelines of conflict prevention and conflict management, which emphasised the settling of disputes and non-interference in each other's internal affairs. The TAC appears to be an informal guide because it lacks any conclusive binding legality

[191] Mieke Molthof, 'ASEAN and the principle of non-interference', (2012) <http://www.e-ir.info/2012/02/08/asean-and-the-principle-of-non-interference/> accessed 18 December 2015

[192] Non-interference in the internal affairs is one of the principle in Article 2 of 1976 Treaty of Amity and Cooperation in Southeast Asia see website http://www.asean.org/news/item/treaty-of-amity-and-cooperation-in-southeast-asia-indonesia-24-february-1976-3

[193] Molthof, above 191

and countries related to ASEAN states have not informally adopted an operational mechanism. The ASEAN is currently trying to combine different national cultures with an informal organisation that lacks a structure or procedural rules, and its success is based on the free experience of co-operation as a common regional issue, as stated by Malaysia's Prime Minister, Husein Onn.[194]

It is necessary to understand what the non-interference principle means and what it does not mean in order to clarify it because it does not define itself.[195] There is no member state in the ASEAN context that pursues a course of action that affects the interests of the group. This is because the ASEAN was formed to protect their mutual political, economic and security interests rather than creating an excuse for one country to threaten the prosperity and security of the rest of the region.

The ASEAN is also referred to as the ASEAN Way, which supports the non-intervention principle.[196] The remaining feature of the principle of non-interference is to ensure that smaller states are not brushed aside by larger ones. This principle brought disparate states together when the ASEAN began and it still plays this role today.

Section 1.5 How does the ASEAN work to settle disputes?

The first thirty years of ASEAN were characterised by the growth of its membership. As indicated above, the formation of the ASEAN was primarily based on

[194] R. P. ANAND, *ASEAN identity, development and culture* (1st , U.P. Law centre and East-West centre culture learning institute 1981)

[195] David Ginn, 'The abused notion of non-interference' *Burmanet News* (Burma, 21 July 2006) < http://www.burmanet.org/news/2006/07/21/asean-inter-parliamentary-myanmar-caucus-asean-abused-the-notion-of-non-interference-it-doesn%E2%80%99t-mean-silence-says-aipmc/> accessed 1 November 2014

[196] John Funston, 'ASEAN and the principle of non-intervention practice and prospects' (2000) Institute of Southeast Asian studies < http://www.kysd.org/ngosplatform/wp-content/uploads/2012/12/002-12-Asean-and-the-Principle-of-Non-Intervention-Pratice-and-Prospects-www.iseas_.edu_.sg_.pdf> accessed 9 March 2013

regional security and political co-operation within Southeast Asia.[197] The aims and objectives of the United Nations Charter,[198] which inspired the ASEAN, were issued in the ZOPFAN Declaration in 1971[199] after the establishment of the 1967 Bangkok Declaration in which the principle of respect for the sovereignty and territorial integrity of all members was created.[200] Furthermore, the ZOPFAN provided the first reference to the concept of international dispute settlement in the ASEAN,[201] although no mechanism for the peaceful settlement of disputes was initially established. If a dispute occurred, ASEAN members normally settled it by diplomatic means.[202] For example, when there was a dispute between Malaysia and the Philippines over Sabah in North Borneo[203] in 1968, the two countries resolved it by means of peaceful diplomatic negotiations.[204] Yet, some scholars have proposed that the objectives and goals of this

[197] Philip Andrews-Speed, 'ASEAN The 45 Year Evolution of a Regional Institution' (2012) 61 Polinares working paper 1, page 5

[198] The aims were inspired by the principles of respect for the sovereignty and territorial integration of all states, abstention from threat or use of force, peaceful settlement of international disputes, equal rights and self-termination and non-interference in affairs of states under the United nation as can be seen in the preamble of ZOPFAN Declaration, online: http://www.icnl.org/research/library/files/Transnational/zone.pdf

[199] The Zone of Peace, Freedom and Neutrality (ZOPFAN) is a declaration signed by the Foreign Ministers of the ASEAN member states (Indonesia, Malaysia, the Philippines, Singapore and Thailand) on 1971 in Kuala Lumpur, Malaysia. See, http://www.icnl.org/research/library/files/Transnational/zone.pdf

[200] The Zone of Peace, Freedom and Neutrality Declaration (ZOPFAN) in 1971 see more from website: <http://www.icnl.org/research/library/files/Transnational/zone.pdf>

[201] Regarding to the respect for ZOPFAN, in the Declaration of Bali Concord in Bali on 24 February 1976 agreed to sign a Treaty of Amity and Cooperation (TAC) to settle intra-regional dispute as well as improve the ASEAN machinery to strengthen political cooperation. See Hasjim Djalal, 'Rethinking the Zone of Peace, Freedom and neutrality (ZOPFAN) in the post-Cold War Era', (2001) Asia-Pacific round 30 May- 1 June 2011, Kuala Lumpur, Malaysia

[202] Although ASEAN did not have the legal and institutional to mediate over this dispute and the effort of ASEAN showed at diplomatic persuasion to exercise restraint. See more; Paolao R. Vergano, 'The ASEAN Dispute Settlement Mechanism and its Role in a Rules-Based Community: Overview and Critical Comparison' (2009) Asian International Economic Law Network (AIELN) Inaugural Conference

[203] The boundary dispute between Malaysia and the Philippines over Sabah (formerly British ruled North Borneo which had opted to join the Malaysia federation when the latter got its independence from Britain), the problem is both countries are claimed on. The dispute between Malaysia and the Philippines over Sabah shows the ASEAN's approach to conflict avoidance with the non-use of force as indicated of ASEAN's informal and non-legalistic style of conflict management see more; Amitav Acharya, Constructing a security community in Southeast Asia ASEAN and the problem of regional order (3rd edn, Routledge 2014), page 5

[204] Walter Woon, *'Dispute settlement in ASEAN'* National University of Singapore (2011) website: <http://cil.nus.edu.sg/wp/wp-content/uploads/2010/08/DISPUTE-SETTLEMENT-IN-ASEAN-KSIL-ProfWalterWoon.pdf> accessed 1 May 2014

ASEAN association were largely misunderstood. According to the ASEAN, they were not to promote economic co-operation or political integration, but to promote the stability and security of the community. Others argue that the ASEAN needs to be a harmonious community that can encompass all political spheres, including security, economic and social-cultural aspects.[205]

The achievement of a settlement using the ASEAN's alternative dispute resolution (ADR) mechanism cannot currently relate to international economic laws in this part of the world.[206] The practical way of settling disputes in Asia is consensual, which entails trying to reach a harmonious solution, while preserving the relationship between the parties. On the contrary, the adoption of a confrontational approach is sometimes legalistic and formalistic and may adversely affect the relationship between the parties.

The settlement of international trade, financial and investment disputes still pose many problems in many Asian countries. Although many Asian countries have not lagged behind in the recent global movement toward the modernisation and internationalisation of arbitration, they have faced various challenges in the context of arbitration. For example, in the case of 'the harmonisation of arbitral procedures'- legal developments in each ASEAN country', in practice there are ten countries with different jurisdictions due to their different legal systems and approaches.[207] The ASEAN dispute settlement mechanisms show their effort at economic integration following the principles of the ASEAN Way.

The in-depth details of the dispute settlement mechanism in the ASEAN are shown in Chapter five, entitled "settlement of disputes" of the ASEAN Charter. It is stated in this chapter that all members should establish and maintain a dispute settlement regime in relation to ASEAN co-operation, which is provided in Article 25 of

[205] Ibid, page 3
[206] Ibid, page 5
[207] For more detail will be discussed in this thesis the topic of "Implementation challenges of ASEAN DSM" see chapter VII

the Charter to settle a dispute concerning the interpretation or application of the Charter and other ASEAN instruments.[208]

The ASEAN trade dispute settlement methods have been criticised by some scholars for being clumsy and inefficient with a lack of technical committees to create a community of institutional machinery.[209] They argue that the parties prefer to solve their disputes by using the methods of the World Trade Organisation (WTO), which have involved ASEAN countries as either complainants, respondents or third parties[210] in the settlement of WTO disputes.[211] In the trade disputes between ASEAN member states, they have never confronted other countries in the formal trade dispute settlement area; thus, they apply the general principles borrowed from the dispute settlement mechanism of the WTO.[212] (More details of the ASEAN trade dispute settlement mechanism will be provided in the other chapters in this thesis). Disputes among ASEAN members have only been resolved through the use of political factors.[213]

After studying the background of dispute settlement within the ASEAN,[214] the ASEAN protocols and the reasons the ASEAN institutionalised system has been very loose and flexible will now be analysed, based on the notions of non-confrontation, non-interference, and respect for national sovereignty, as a result of the "ASEAN Way".

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[208] Article 22 and 25 of the ASEAN charter see supra chapter eight

[209] Hussey, above 23, page 88

[210] Participation in WTO dispute settlement by ASEAN member statistic of total of WTO dispute are; Indonesia 5 as complainant, 4 as respondent and 4 as a third party, Philippine 5 as complainant, 5 as respondent, 5 as a third party, Thailand 13 as a complainant, 3 as respondent and 5 as a third party, Malaysia, 1 as a complainant, 1 as respondent and 2 as a third party, Singapore 1 as complainant, 4 as a third party, Vietnam 1 as complainant, 3 as a third party, Cambodia, Myanmar and Brunei are none. See more; https://www.wto.org/english/tratop_e/dispu_e/dispu_by_country_e.htm accessed 20 December 2015

[211] Joseph wira Koesnaidi, Jerry Shalmont, Yunita Fransisca and Putri Anindita Sahari
'For a more effective and competitive ASEAN dispute settlement mechanism' (2004) WTI/SECO Project 1, page 3

[212] Ibid, page 4

[213] Paola R Vergano, 'The ASEAN Dispute Settlement Mechanism and its Role in a Rules-Based Community; Overview and Critical Comparison' (2009) AIELN 1

[214] The ASEAN trade disputes consist of the following instrument; The framework Agreement on Enhancing ASEAN economic cooperation 1992, The Protocol on Dispute settlement mechanism 1996, The Protocol on Dispute settlement mechanism 2004 and the ASEAN Charter

Members have to rely on relation-based dispute settlement or focus on traditional modes (in the form of diplomatic approaches together with the concept of non-adjudicative methods), consultation, good offices, mediation and conciliation, which do not proceed through the courts.[215] Furthermore, the development resolution of the ASEAN dispute settlement mechanisms in the past will be explained,[216] and an attempt will be made to identify the dispute settlement regime within the ASEAN in each period. Additionally, the reason the dispute settlement mechanism has not yet been utilised will be addressed, as well as the reason the ASEAN has not been successful in preventing trade disputes. Moreover, the emergence of disputes must be discussed in relation to the commitment to interpret and implement the 2004 Enhanced Protocol on dispute settlement and the ASEAN Charter. There is no clear indication of whether the dispute settlement mechanism can be utilised in practice, as a result of the various social and economic indicators within the ASEAN.[217] Further details will primarily be given in the other chapters of this thesis.

Besides, the reasons why no trade disputes have so far been brought to be settled by the ASEAN dispute settlement mechanism are also evaluated in this paper and how the ASEAN interprets trade disputes under the ASEAN trade agreement[218] in order to apply the ASEAN dispute settlement mechanism such as the ASEAN jurisdiction (type of dispute and parties to the dispute that can apply to the ASEAN mechanism), the enforcement and the right to appeal. Some suggestions will be made to improve the dispute settlement mechanism and the kind of ASEAN model that should be formed. In this context, some questions deserve a further analysis. Firstly, should all ASEAN decisions continue to be made by the decision-making method of consensus? What are the impacts of the ASEAN Way on the dispute resolution mechanism in the ASEAN, as well as should the principle of non-interference continue to exist? More ideas for the

[215] Gino J Naldi, 'The ASEAN protocol on dispute settlement mechanism: an appraisal' (2004) 6(3) <http://jids.oxfordjournals.org/content/early/2014/01/31/jnlids.idt031.abstract> accessed 15 July 2013
[216] The framework Agreement on Enhancing ASEAN economic cooperation 1992, The Protocol on Dispute settlement mechanism 1996, The Protocol on Dispute settlement mechanism 2004
[217] Cuyvers and Tummers, above 44, page 3
[218] For example ASEAN free trade agreement, ASEAN trade in good, ASEAN trade in services

development of the ASEAN will be discussed by adding more state sanctions and establishing a more rule-based, institutionalised and centralised organisation, which could provide a solution to avoiding trade conflicts. According to the above discussion of the research question, the required improvements in their protocols show that the ASEAN needs to move away from informality and the supremacy of national sovereignty to generate more political and economic integration. [219] These suggestions, opportunities, challenges and the ASEAN's ability to settle trade disputes will be further explained in subsequent chapters.

Section 1.6 Conclusion

During its first four decades, the ASEAN cooperation proceeded with little formal legal means. It only functioned based on the 'founding document', the Bangkok Declaration of 1967, which did not require any formal ratification and had no binding or legal nature. This is why the ASEAN cooperation has been loose and informal. The ASEAN has also initiated two international treaties and the Treaty of Amity and Cooperation (TAC), and it has also succeeded in developing a number of concepts, such as the Zone of Peace, Freedom and Neutrality (ZOPFAN Declaration). The ASEAN Charter also clarifies the organisation's structure, provides the ASEAN with certain immunities and privileges, which largely reflect the status of the ASEAN.

To achieve a better understanding of the emergence of the trade dispute settlement mechanism in the ASEAN, it is very important to have some background knowledge of the structure of the ASEAN. As discussed and explained in this chapter, the ASEAN is a political association that is trying to shift from a diplomatic structure to a legal mechanism. The ASEAN is an inter-governmental association with no supranational body, as determined by its characteristics and evolution. The ASEAN is based on an

[219] Markus Hund, 'From neighbourhood watch group to community' (2002) 56(1) Australian Journal of international affairs, page 99

informal, strictly inter-governmental decision-making process, which is referred to as the "ASEAN Way", as well as being based on the principle of non-interference. Nevertheless, it should also move toward becoming a more regional organisation to initiate a "regional community-building" process consisting of three main pillars, namely political and security cooperation, economic cooperation, and socio-cultural cooperation.[220] This plan reflects the ASEAN's intention to initiate a 'regional community building" process, with the main agenda of regional cooperation. The date for implementing these three pillars was initially set at 2020, and later brought forward to 2015.

In 2015, the ASEAN moved to become a single market and production base, known as the ASEAN Economic Community (AEC). The AEC operates with the free flow of goods, services, investment, business, professional people and capital as a consequence of economic integration, which is linked through free trade agreements and comprehensive economic partnership agreements, such as the ASEAN trade in goods and the ASEAN trade in services. The objective of creating an ASEAN economic community is that it is a major step for the ASEAN to move forward in the global economy. The establishment of the ASEAN community in 2015 demonstrated deeper economic integration and deeper institutions followed by the preamble and the purpose of the ASEAN Charter. However, making the ASEAN into a community involves many challenges and barriers. Rules and good management are very important to fully establish an ASEAN Community with three main pillars by 2020.

Therefore, the development of the ASEAN economic region will be examined in the next chapter, together with the trade relations between ASEAN member states. The ASEAN concept of regional economic organisation will also be discussed in the next chapter.

[220] Sukma, above 70

CHAPTER II

THE ASEAN ECONOMIC COMMUNITY

"One Vision, One Identity, One Community"

Statement, 11th ASEAN Summit, Kuala Lumpur,
December 2005

ASEAN Vision 2020 would be the ultimate end-goal the ASEAN Economic Community aims to achieve in which there would be free flow of skilled labour, trade, investments, capital, equitable development, reduction in poverty and socio-economic disparities within ASEAN in the year 2020.

Declaration of ASEAN concord II, Bali,
October 2003[221]

Section 2.1 Introduction

The ASEAN has made slow progress toward achieving economic integration since it was formed in 1967,[222] mainly due to the fact that many of the schemes and initiatives in this process have been ineffectively implemented.[223] In 1976, ASEAN leaders had

[221] Declaration of ASEAN Concord II (Bali Concord II), 2003 http://asean.org/?static_post=declaration-of-asean-concord-ii-bali-concord-ii accessed 1 May 2016

[222] This is evidenced by the annual meetings of ASEAN foreign ministers showed that ASEAN economic ministers and heads of government did not begin to discuss in the area of economic till the formation of Bangkok Declaration in 1967, states the goals of ASEAN as to accelerate the economic growth, social progress and culture development in the region and to promote regional peace and stability among the countries of the region. Further information see Chia Siow Yue, 'The ASEAN free trade area' (1998) 11(2) the Pacific review <http://dx.doi.org/10.1080/09512749808719254> accessed 25 November 2015 and Deborah A. Haas, 'Out of others' shadows: ASEAN movers toward greater regional cooperation in the face of the EC and NAFTA' (1993-1994) 9(809), UJ Int'L and Policy, page 812

[223] Chia Siow Yue, 'Accelerating ASEAN trade and investment cooperation and integration: progress and challenges' in Philippe Gugler and Julien Chaisse (ed), *Competitiveness of the ASEAN Countries: corporate and regulatory drivers,* (Edward Elgar Publishing limited 2010)

adopted the Declaration of ASEAN Concord,[224] which contains the basic rules for the operation of co-operative activities in industrial and trade development within the region. The ASEAN Concord, [225] which contains the rules for the adoption of regional strategies for social, cultural and political fields and economic cooperation, was declared in Bali in Indonesia on the 24th February 1976. The achievements of the ASEAN are consolidated in the ASEAN Concord by deepening intra-regional integration based on the formation of a variety of cooperative arrangements between member countries with the aim of pursuing individual trade accord.[226] The ASEAN economic agreement is based on co-operation at a bilateral level with the objectives of accelerating economic growth and bringing more social progress and cultural development to the region, as well as attempting to reduce conflicts and fostering regional peace and stability without any intervention in countries' domestic affairs.[227] An overview of the ASEAN economy during the 1990s, before the ASEAN economic crisis in 1997, is a matter for political consideration; nevertheless, attention has been turning to economic considerations since the 1990s.[228] This slow economic progress is the result of the liberalisation of trade, services and investment, and sub-regional economic cooperation.

Furthermore, the development of each member country of the ASEAN is slightly different based on a mixture of highly-developed countries, like Singapore and Brunei and developing countries like Thailand, the Philippines, and Indonesia, and the less

[224] The Bali Summit is the first ministerial meeting, which ASEAN members created to support trade and security in the ASEAN. The Declaration of ASEAN Concord also signed at the Bali Summit in 1967 to enhanced ASEAN effort to increase economic activity such as supporting the preferential trading arrangement project and promoting of intra-ASEAN trade generally. Copy can be obtained from http://asean.org/?static_post=declaration-of-asean-concord-indonesia-24-february-1976

[225] More details of the ASEAN Concord see http://www.asean.org/?static_post=declaration-of-asean-concord-indonesia-24-february-1976

[226] About the ASEAN Concord visits, http://www.asean.org/?static_post=declaration-of-asean-concord-indonesia-24-february-1976

[227] Kriengsak Chareonwongsak, 'Lessons from ASEAN's economic integration' (2004) Assumption Journal <http://www.assumptionjournal.au.edu/index.php/abacjournal/article/view/632> accessed 27 July 2014

[228] Until the late 1990s showed the growing of intra-regional trade in the region took place with informal framework of economic cooperation. Then, they continue more emphasis on formal economic cooperation as a free trade agreement between two or more countries. See Kriengsak Chareonwongsak, 'Lessons from ASEAN's economic integration' (2004) Assumption Journal. <http://www.assumptionjournal.au.edu/index.php/abacjournal/article/view/632> accessed 27 July 2014

developed countries seem to be disadvantaged by this development gap. Regional conflicts can arise as a result of the differences in size, levels of development, natural and human resources, histories, languages, [229] religions and cultures, [230] races, economics[231] and social institutions, apart from the different social systems, values and traditions.[232] The competition between member countries also hinders progress in economic development.

The ASEAN lacks a competent leader,[233] who can act as a central figure in ensuring that rules, regulations, and policies are strongly coordinated and effectively implemented, and this is also a disadvantage of the association. No single member has the bargaining power to persuade the others to follow the ASEAN regional projects, or even to follow group opinion in order to receive the support of other member countries.[234]

Since the scope of economic development in the ASEAN primarily emphasises the establishment of regional harmony, trade liberalisation and facilitation will be discussed in this chapter, since they are highly relevant in the context of ASEAN regional integration. The chapter is divided into four sections. Section I contains an overview of the ASEAN economies, especially between 1967 and 1976, when the ASEAN was formed.

[229] The national languages o Brunei is both Malay and English. Cambodia speaks Khmer. The official language of Indonesia is Bahasa Indonesia. Laos speaks Lao. Malaysia's national language is Bahasa Melayu, Myanmar's official language is Burnese. For the Philippines, Filipino is the national language and English is also widely used and is the medium of instruction in higher education. Chinese, Malay, Tamil and English are the national language of Singapore. About Thailand, Thai is the first language and English is a second language. Vietnamese is the official language of Vietnam and English is a second language. Vietnam speaks other languages such as French, Chinese and Khmer. Moreover, they also speak Colonial languages, including French, Dutch, Portuguese, Spanish and English are also spoken.

[230] Islam is the largest religion in the ASEAN, official appears in Brunei, Indonesia and Malaysia. The Buddhist of the ASEAN countries consists of Thailand, Cambodia, Laos, Myanmar, Vietnam and Singapore. The Philippine is the only Catholic country in ASEAN.

[231] Rodolfo C. Severino, *ASEAN faces the future: collection of speeches of Rodolfo C. Severino*, (The ASEAN Secretariat 2001) page 15

[232] http://www.asean.org/resources/2012-02-10-08-47-56/speeches-statements-of-the-former-secretaries-general-of-asean/item/asia-policy-lecture-what-asean-is-and-what-it-stands-for-by-rodolfo-c-severino-secretary-general-of-asean-at-the-research-institute-for-asia-and-the-pacific-university-of-sydney-australia-22-october-1998

[233] For detailed discussion see, chapter 7 section 7.4.6 Government and Leadership challenges

[234] Chareonwongsak, above 227, pages 37-38

It is found that the ASEAN was mainly concerned with the political area during this period and the discussion of economic cooperation was non-existent. The experience of intra-ASEAN economic cooperation between 1967 and 2003, which was an initial attempt at regional economic cooperation and the building of economic and political bases for economic integration with tariff reduction, is examined in Section II, together with the progress of the AFTA (ASEAN Free Trade Area), which was constructed by the ASEAN member countries. Section III contains a discussion of the acceleration phase, from late 2003 to the present day, when the ASEAN attempted to achieve economic integration with the creation of a single market and production base. Section IV contains details of the latest development of ASEAN economic cooperation toward an increase in ASEAN regional cooperation in the form of economic growth and the strengthening of the ASEAN community. The thesis then continues with an explanation of the characteristics of the ASEAN Economic Community in terms of economic integration in both intra- and extra-regional trade. Moreover, an example of ASEAN external economic relationships with areas outside ASEAN countries and with non-ASEAN members, particularly those in its major export markets, is also provided in this chapter. The chapter ends with a summary of these analyses and the proposed future direction of the ASEAN.

Section 2.2 Overview of ASEAN economies

ASEAN economic cooperation currently covers the areas of trade, investment, industry, services, finance, agriculture, forestry, energy, transportation, communication, intellectual property, small and medium enterprises, and tourism.[235] The ASEAN member countries can also be categorised into two types based on their economic power. The first group includes Indonesia, Malaysia, the Philippines, Singapore, Thailand

[235] ASEAN Economic Community, www. asean.org and Kofi Annan, Secretary-General of United Nations in the topic of "Overview Association of Southeast Asian Nations" (16 February 2000) http://www.eppo.go.th/inter/asean/asean-sec/ASEAN-Overview.htm

and Brunei, while the second consists of Cambodia, Laos, Myanmar and Vietnam (ASEAN-CLMV). The latter group are known as less developed members,[236]but besides being defined as underdeveloped[237] compared to their ASEAN counterparts, the ASEAN-CLMV are much more diverse in terms of their level of economic development, economic structure and economic institutional framework. The variety of trade regimes among ASEAN countries also leads to differences in the benefits and costs of economic integration.[238] The main problems for the new member countries, namely, Cambodia, Laos, Myanmar, and Vietnam (CLMV) are the domestic gap, such as the poor capacity for mobilising resources, the lack of coordination in the private sector and of networks and institution building. The CLMV's development gap means that more physical and institutional infrastructure needs to be built, which represents a much larger work programme to be completed to facilitate integration.[239]

Different member countries of the ASEAN enjoy trade benefits based on diverse income-generating economies.[240] All the ASEAN countries generally have similar exports of natural resources and labour-intensive manufacturing. For example, Brunei has oil and gas resources, and these fossil fuels have provided it with a high income for many years. Although Brunei is currently enjoying a high income from its oil and gas resources,

[236] This is because the CLMV in an attempt for economic development remains a large gab between the CLMV country and other countries within ASEAN. See, Siow Yue Chia and Michael G. Plummer, *ASEAN economic cooperation and integration: progress, challenges and future directions* (Cambridge University Press 2015), page 5 and L. Cuyvers and R. Tummers, 'The road to an ASEAN community: how far still to go?' (2007) CAS discussion paper no: 57, page 3. See also the data presented is the economic diversity of ASEAN countries in footnote 28 shows their national income and Gross Domestic Product (GDP) (World bank source)

[237] ASEAN, 'Bridging the development gap among members of ASEAN' (2012) http://asean.org/?static_post=bridging-the-development-gap-among-members-of-asean accessed 1 May 2016

[238] Cuyvers and Tummers, above 236, page 8

[239] Severino, above 231, page 15

[240] This means that economic support and income generating activities are difference in each country. For example, the good economic status can increase the income potential. In other word, the increase of income will be followed by a rise in the economic development. It depends on various factors; the principal factor affecting the development of economy such as the national resources, agriculture market, economic system and conditions in foreign trade. Read more http://www.chforum.org/library/xc123.shtml and http://www.yourarticlelibrary.com/economics/factors-that-influence-the-economic-development-of-a-country/5942/ access 17 February 2016

it needs to be mindful of the fact that these resources will not last forever and the country may face an uncertain future without alternative income-generating activities. Indonesia is rich in agricultural and mineral resources, and low-cost labour and large domestic markets help the country to attract both foreign and domestic investors. Malaysia's economy is based on agricultural resources, particularly palm oil, exports and minerals, while The Philippines is rich in natural and human resources. Singapore has one of the world's strongest economies, but although this island nation has an efficient bureaucratic system and a stable political environment, it has a limited domestic market, with high labour and land costs, together with a lack of national resources. Therefore, Singapore's economy heavily depends on foreign trade with high external condition charges. Thailand has many agricultural and textile resources but it continues to lack a highly skilled labour force. Similarly, while it is enjoying the benefits of its tourism industry, there is a lack of economic opportunities in the urban sector.[241] An overview of the Vietnamese economy highlights its agricultural potential. The volume of its agricultural exports continues to increase, since Vietnam is one of the top exporters of rice, rubber, coffee, pepper, cashew nuts, wood products and fisheries. Laos is a small land-locked country with natural resources, such as timber, agricultural land, hydropower and minerals. Its stock market is one of the smallest in the world. Myanmar's natural resources include gems, industrial minerals, oil and offshore natural gas reserves, which constitute its major exports. However, Myanmar suffers from a "resource curse" because its natural gas and mining projects are damaging the environment and people's livelihood. Finally, Cambodia is one of the poorest nations in Southeast Asia. Its economy has always depended on agriculture and natural resources. Textile goods, footwear, natural rubber and fish are Cambodia's dominant exports, and the supply of these resources continues to increase.[242]

[241] Jose L. Tongzon, *The economies of Southeast Asia: before and after the crisis*, (2nd ed, Edward Elgar publishing limited, 2002), page 14

[242] All of this information come from the Asian Development Bank (ADB) http://www.adb.org/ accessed 1 December 2015

The common economic characteristics within the ASEAN are all those of a market-based economy with a high degree of export-orientated products. This is because a large number of ASEAN residents live in rural environments and continue to engage in agricultural activities.[243] Most of the members' exports are based on agricultural products, such as sugar, rice, rubber, metals and palm oil.[244] Some members also export electronic products, textiles, leatherwear and computer parts.[245] Similar export products constitute an impediment to regional integration due to the existence of similar natural resource products, similar manufacturing techniques and similar low technological capability.

The benefit of an economic community is generally described as its capacity for enhancing its members' economic performance by minimising government intervention and trade barriers. Regional integration is one of the factors that supports an economic community and this has led to the improvement of social and cultural solidarity and unity in the ASEAN.[246] The economic development of the ASEAN can be defined as economic progress accompanied by domestic stability, as well as regime security for member countries, and these have always been the elements that constitute the central pillar of ASEAN regionalism.[247] Of course, economic development also includes the improvement of the standard of living and welfare of the population of a nation or region, and this has been a core aspiration of many of the ASEAN's regional integration

[243] Tongzon, above 241, page 14

[244] The ASEAN's top 10 exports are: electronics and electrical machinery (20.2%) (in Malaysia, Singapore, the Philippines and Thailand), mineral fuels and oils (18.4%), nuclear reactors, machinery and appliances (10.9%), rubber (4.2%), business services and miscellaneous repairs (4.1%), animal and vegetable oils product (3.8%), plastics (3.0%), vehicle (2.5%) and precious stones and jewelry (2.1%) See, ASEANstats, ASEAN Secretariat, ASEAN trade Statistics Databases, assessed 1 January 2017 and Krit Krsichitti, 'ASEAN free trade agreements: policy and legal considerations for development' <www.aseanlawassociation.org/9GAdocs/w3_Thailand.pdf> accessed 10 October 2015

[245] Ibid, pages 1-2

[246] Yang Hanmo, 'The achievability of an ASEAN community through regional integration – in comparison with the European Union', (2014) Hong Kong Baptist University undergraduate research, page 5

[247] Christopher B. Roberts, *ASEAN regionalism: cooperation, values and institutionalisation,* (New York: Routledge publishing, 2012) pages 90-91

initiatives.[248] The approaches to economic cooperation and integration in the ASEAN include reducing barriers to intra-regional trade to make it more effective in the international market.[249] ASEAN members such as Singapore, Thailand, Indonesia and Malaysia have developed their economies based on trade liberalisation rather than economic cooperation. Besides, global trade, foreign direct investment and trade volume all illustrate the economic growth of the ASEAN. The major economies in the region, namely, Thailand, Malaysia, Singapore, Brunei and Indonesia, achieved high levels of economic growth in 2009 compared to their national income and Gross Domestic Product (GDP).[250] The World Bank forecast that Myanmar, Laos, Cambodia, Vietnam, the Philippines and Indonesia[251] would be the ASEAN's strongest-growing economies in 2015-2016, whereas the growth of GDP in Malaysia and Thailand was predicted to be slow.[252] This illustrates that some scholars perceive a wider income gap between the rich and poor countries in the ASEAN region.[253] Indeed, the development

[248] Alexander C. Chandra, 'The pursuit of sustainable development through regional economic integration' (2009) IISD 1 <http://www.iisd.org> accessed 1 January 2015

[249] Chia and Plummer, above 236, page 15

[250] In term of total national income, Indonesia has the largest Gross domestic Product (GDP) in ASEAN and it amounted to US$ 546 billion in 2009. Thailand has second largest GDP and it amounted to US$ 264 billion, followed by Malaysia and its GDP amounted to US$193 in the same year. While Laos has the smallest GDP in ASEAN and it amounted to only US$ 5.5 billion in 2009. Cambodia has the second smallest GDP and it amounted to US$ 10.3 billion, followed by Brunei and its GDP amounted to US$ 10.7 in the same year. Singapore is the wealthiest country in ASEAN and its per capital GDP amounted to US$ 36.631 in 2009. The second wealthiest country is Brunei and its per capita income amounted to US$ 26,486, followed by Malaysia and its per capital income amounted to US$ 6,822 in same year. On the other hand, Myanmar is the least wealthy country in ASEAN and its per capita GDP amounted to only US$ 419 in 2009. The second least wealthy country is Cambodia and its per capita income amounted to US$692m followed by Laos and its per capita income amounted to US$ 910 in same year. Further information available at World bank source

[251] Looking at the year ahead the World Bank forecasts the GDP at market prices (2010 US$); Starting with the economic growth in Myanmar by 6.5 in 2015 to 7.8 in 2016. Lao PDR expands by 6.4 in 2015 and forecasts moves to 7.0 in 2016. Cambodia is expected to be the same amount of the GDP in 2016 with the same expansion by 6.9 in 2015. Vietnam's GDP is slightly increased from 6.5 in 2015 to 6.6 in 2016. The Philippines and Indonesia dramatically increased from 5.8 in the year 2015 to 6.4 in the year 2016, and from 4.7 in 2015 to 5.3 in 2016 respectively. More details visit http://aecnewstoday.com/2016/thailand-weakest-asean-economy-in-2016-world-bank/#axzz3xwy7fsKI accessed 21 January 2016

[252] The World Bank forecasts Thailand is weakest ASEAN economy in 2016 with expands only 2.5 in 2015 and 2.0 in 2016. Malaysia has second weakest ASEAN economy in 2016 with expands only 4.5 in 2015 and 4.5 in 2016. More details visit http://aecnewstoday.com/2016/thailand-weakest-asean-economy-in-2016-world-bank/#axzz3xwy7fsKI accessed 21 January 2016

[253] John Ravenhill, 'Economic cooperation in Southeast Asia' (1995) 35 (9) ASEAN Survey <http://www.jstor.org/stable/2645786 > accessed 20 October 2015

gap among ASEAN member states is a barrier to ASEAN economic integration and community-building.[254] The wide differences among ASEAN countries have particularly affected the building of a consensus, the speed of economic liberalisation and the implementation of specific measures.[255]

2.2.1 Formation period of the ASEAN economies from 1967 to 1976

An overview of the ASEAN economy was not anticipated in the Bangkok Declaration in 1967, which focused on political and diplomatic co-operation in Southeast Asia.[256] For a period of time (1967-1976) after the Bangkok Declaration, the ASEAN only emphasised 'cooperation' without the term 'integration' being mentioned by ASEAN policy-makers, who were not prepared to consider either a free-trade area or a custom union.[257] Economic integration was limited by low trade integration[258] and a lack of regional connectivity within the region during the first decade of the ASEAN's regional integration.[259]

The ASEAN economic growth only began to rapidly develop from the mid-1970s, when the ASEAN began to introduce several initiatives with the aim of expanding intra-regional economic cooperation. Within this period, it was agreed to establish an ASEAN

[254] See also, Chapter 6 Section 6.2.5 Diversity and ASEAN value – different political and legal systems
[255] Chia and Plummer, above 236, page 7
[256] In the past, the original purposes of ASEAN were political rather than economic as a result from ASEAN was faced with the communist regimes as well as those from the old colonial empire of the British, French, Dutch, See chapter 1 and see, also footnote number 2.
[257] Yue, above 223
[258] Biswa Nath Bhattacharyay, 'Prospects and challenges of integrating South and Southeast Asia' (2014) International Journal of development and conflict 4, page 40
[259] Studies on ASEAN showed that ASEAN states requested the UN to conduct research on the regional potentials for future economic cooperation. In 1973, the UN presented the Robinson report on possibilities of future ASEAN economic cooperation. The report recommended ASEAN countries to arrange industrial cooperation projects and preferential trade agreement to increase intra-regional trade. See more Meidi Kosandi, 'Parallel evolution of practice and research on ASEAN economic integration: from paradigm contestation to eclectic theorization' (2012) 11(1347-8241) Ritsumeikan Annual review of international studies <http://www.ritsumei.ac.jp/acd/cg/ir/college/bulletin/e-vol.11/04_Meidi.pdf> accessed 27 July 2015 pages 112-113

Industrial Projects Scheme (AIPs)[260] to make more effective use of the regional demands of each member. Most of the members responded to this project by focusing on national industrial development and trying to export more products; however, all the member countries were producing similar tradable goods and were at the same level of development. Therefore, the industrial cooperation was considered to be insignificant during the 1970s due to the private sector's refusal to cooperate and the failure of these AIPs.[261]

[260] Tan Lay Hong and Anil Samtani, 'The shifting paradigm in regional economic integration: the ASEAN perspective' (2002) (2) TLH <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=325484> accessed 1 January 2016

[261] Yue, above 223, page 2

	Table 2.1: The ASEAN period in the process of economic cooperation,[262] 1993-2015
1992	- ASEAN Free Trade Agreement - Signing of the Common Effective Preferential Tariff Scheme (CEPT)
1993	- ASEAN Free Trade Area (FTA) came into force - AFTA's Common Effective Preferential Tariff (CEPT) scheme implemented
1995	- ASEAN Framework Agreement on Services (AFAS) signed and implemented
1996	- ASEAN Industrial Co-operation Scheme (AICO) adopted
1997-1998	- Economic crisis and acceleration of economic integration (ASEAN Vision 2020)
1998	- Framework Agreement on the ASEAN Investment Area (AIA) signed and implemented
2000	- Establish of the e-ASEAN Framework for e-commerce
2003	- Bali Concord II, the launch of ASEAN Community by 2020 - a coherent structure and organisation to the ASEAN Vision 2020 and the three pillars for community (ASEAN Security Community, ASEAN Economic Community and ASEAN Socio-cultural Community)
2004	- The Vientiane Action Program (2004-2010)
2005	- The Launce of ASEAN Charter Process
2006-2007	- The Acceleration of ASEAN Community to 2015, which advancing the target year from the original 2020
2007	- ASEAN Charter drafting and ASEAN economic Blueprint by ASEAN leaders in Singapore
2008	- ASEAN Charter Ratification
2009	- ASEAN Political Community and Social-Cultural Community Blueprint and roadmap for an ASEAN community (2009-2015)
2010	- ASEAN Trade in Goods Agreement (ATIGA) entered into force
2012	- ASEAN Comprehensive Investment (ACIA) entered into force
2015	- The formal establishment of the AEC starts on 31 December 2015. ASEAN Community, including the AEC, launched
2016-2025	- AEC Blueprint 2025
2018	- Deadline for Non-Tariff Barriers (NTB) within ASEAN to be eliminated
2020	- Original date for full implementation of the AEC
2030	- A realistic view of the realisation of the full benefit from the AEC as presently constituted

[262] Complied from ASEAN documents, http://www.aseansec.org

2.2.2 Intra- ASEAN Economic Cooperation from 1976 to 2003

The progress of the evolution of a framework for economic co-operation at the regional level in order to support the ASEAN's trade liberalisation will be discussed in this section, which can be divided into different stages. The first began in 1980, when the ASEAN started to develop economic and financial liberalisation policies in response to the pressure from external countries.[263] The ASEAN not only cooperated in outward-orientated trade and investment, but it also overcame its disparities in order to reduce the tariff structures and in line with the diverse levels of industrialisation within member countries.[264]

The second stage of the ASEAN regional economic integration was between 1976 and 1992 or the so-called pre-AFTA (ASEAN Free Trade Area) period, when economic cooperation improved. As the first steps toward economic integration, the ASEAN held an economic ministerial meeting in 1976, where the ASEAN Industrial Projects (AIP) was signed.[265] The ASEAN Preferential Trading Arrangement (PTA) was signed in 1977,[266] but economic integration really began with the 1992 ASEAN Free Trade Area (AFTA) that covered trade in goods, which was accompanied by the 1995 ASEAN Framework Agreement on Services (AFAS) and the 1998 ASEAN Investment Area (AIA agreement).

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[263] Such as China, Russia is the most powerful trade relations to ASEAN see more Pearlie M.C. Koh, 'Enhancing economic co-operation: A regional arbitration centre for ASEAN?' (2000) 49 Int'l & Comp. L.Q, page 390 www.jstor.org/stable/761685 accessed 16 September 2015

[264] Ibid, pages 392-393

[265] See, Basic agreement on ASEAN Industrial Projects, http://agreement.asean.org/media/download/20140119162416.pdf accessed 9 May 2014.
The development of ASEAN Industrial Projects (AIPs) is an agreement for ASEAN members to allocate an industrial project to each member and it was assigned government-initiated industrial projects to a different location in each member country that each member would host at least one such project serving the entire ASEAN market. Under this agreement, it required that the host country subscribe sixty percent of the equity capital needed for the project, with the remaining forty percent supplied from the other four countries. This project is not successful because of each country preferred national industrial development and the members wanted to export products to the broader world market. Read more in, Deborah A. Haas, 'Out of others' shadows: ASEAN movers toward greater regional cooperation in the face of the EC and NAFTA' (1993-1994) 9(809), UJ Int'L and Policy, page 812

[266] Kosandi, above 259, page 112

2.2.2.1 Early Attempt of ASEAN economic integration (in the pre-ASEAN Free Trade Area Period)

a) ASEAN Preferential Trading Arrangements Agreement

The idea of a closer economic collaboration was considered prior to 1977 and the focus was on economic cooperation, which was characterised by the ASEAN Preferential Trading Arrangements (PTAs) and industrial cooperation schemes.[267] This was the first attempt of the ASEAN to promote intra-regional trade. This strictly regional agreement, which contained the implications for foreign companies who wanted to trade with the ASEAN or invest in it, was known as "the Agreement on ASEAN Preferential Trading Arrangements (PTAs)".[268] The PTAs constituted one of the earliest ASEAN agreements to contain legal obligations. Under this scheme, the ASEAN members agreed to allocate an industrial project to each member;[269] thus, the ASEAN PTAs realised trade liberalisation within the ASEAN association. This was the main instrument to promote intra-regional trade for the next fifteen years (until 1992). The ASEAN PTAs constituted an agreement to "offer preferential tariff treatment to products originating in ASEAN countries".[270] The aim of these preferential trading arrangements was to create a trading area in which ASEAN members could take advantage of a preferential tariff, not to create a customs union.[271] It was intended to make the ASEAN more accessible to its member countries and more integrated. Based on the PTAs, it was an attempt to support the objective of forming a Free Trade Area, which would lead to economic integration, a customs union and an economic community. Thus, the PTAs represented the first attempt to promote intra-ASEAN trade based on institutional

[267] Chia and Plummer, above 236
[268] Hong and Samtani, above 260, page 3
[269] The five original projects included a diesel engines project in Singapore, two urea projects in Indonesia and Malaysia, Soda ash in Thailand and superphosphate fertilizer project in the Philippines. See Tan Lay Hong and Anil Samtani, 'The shifting paradigm in regional economic integration: the ASEAN perspective' (2002) (2) TLH <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=325484> accessed 1 January 2016
[270] See, The Preferential Trade Agreements Agreement was signed by the ASEAN Foreign Ministers on 24 February 1977 in Manila and came into force in 1978.
[271] Custom Union is that all member countries will remove the tariffs on member countries' products.

integration[272] and regional trade preferences.[273] However, the tariff concessions granted by the ASEAN within the framework of the PTAs were too small. There was a development gap among the member states since, in the event, some of the members chose to adopt import substitution strategies.

Since too few member countries made use of the Preferential Trading Agreements to stimulate the ASEAN's trade,[274] the initial impact of the PTAs was disappointing[275] and this made the ASEAN less attractive for regional economic integration studies. The failure of inter-regional trade based on the PTAs project meant that it had little effect on economic co-operation in the ASEAN, mainly due to the exclusion of significant industrial sectors.[276] Progress was also slow because of the goal of the PTAs to reduce the trade barriers on selected products,[277] limited product coverage[278] and a broad exclusion list that tended to cover a large proportion of traded products.[279] Moreover, the PTAs were unsuccessful and too insignificant to measure integration,[280] because of factors such as the long exclusion list, the excessively low preference margin, and the lack of importance of the product groups that were eligible for the preferential treatment.[281] There were some problems such as the absence of a provision for the private sector to enter the decision-making process. Also, the lack of commitment of the political leaders of member states to implement the agreement at

[272] Refer to chapter VI article 13 of the PTA agreement showed the institution arrangements concerning decision of the committee by method of consensus and showed some ASEAN Secretariat power for monitor the implementation of the Agreement. Further information visits, http://agreement.asean.org/media/download/20140119163517.pdf

[273] http://agreement.asean.org/media/download/20140119163517.pdf

[274] Sherry M. Stepheson, 'ASEAN and the multilateral trading system' (1994) Law and Pol'y Int'l Bus, page 441

[275] Kosandi, above 259, page 129

[276] Robert J. R. Elliot and Kengo Ikemoto, 'AFTA and the Asian Crisis: help or hindrance to ASEAN intra-regional trade?' (2003) http://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.201.6586&rep=rep1&type=pdf accessed 1 December 2015

[277] The PTAs products cover with such as rice and crude oil. Furthermore, it also covers products of the expansion of intra-ASEAN trade and other products of interest to member countries.

[278] Stepheson, above 274, page 441

[279] Shaun Narine, *Explaining ASEAN: Regionalism in Southeast Asia* (Lynne Rienner Publishers, 2002), pages 24-31

[280] Kosandi, above 259, page 129

[281] L. Cuyvers and R. Tummers, above 236, page 4

the regional level led to the preferential treatment of goods that were of no interest or use to ASEAN traders and consumers.[282] Another reason for the failure of the PTAs was the development of the political economy.[283] However, despite this lack of success, the ASEAN ministers still adopted the basic framework of the PTAs in the new ASEAN Free Trade Area framework,[284] as discussed below.

2.2.2.2 Economic integration in the ASEAN regional context

The development of economic integration with a focus on the integration of trade within ASEAN will be discussed in this section for a holistic understanding of ASEAN integration. The ASEAN's efforts toward greater integration in order to increase regional trade will be stressed. From the late 1980s, external developments[285] began to drive the ASEAN toward faster and deeper progress in terms of the economic integration of its member countries, which suggested the need for stronger ASEAN cooperation. Three factors contributed to the ASEAN's increased interest in regional economic integration. The first was the need to balance China's economic power, as well as that of the former Soviet Union and Eastern Europe and the competition for foreign investment. The second was the fear that future exports would be affected by the formation of the North American Free Trade Agreement (NAFTA) and the European Union (EU) in terms of market access and foreign direct investment. Finally, the third factor was the perceived convergence of the regional competition trading regime in order to maintain the regional liberalisation after the reorganisation of the General Agreement on Trade and Tariffs (GATT) into the World Trade Organisation (WTO).

[282] Malcolm H. Dunn and Katrin Kahrs, 'ASEAN Co-operation: problems and prospects' http://www.uni-potsdam.de/fileadmin/projects/wirtschaftspolitik/assets/Publikationen_Malcolm/Asean_Co-operations._Problems_and_Prospects.pdf accessed 1 May 2015, page 268

[283] L. Cuyvers and R. Tummers, above 236, page 4

[284] Haas, above 222, page 820

[285] The externals development from this situation for example, China is fast becoming a major market for exports and imports of specialised components from Southeast Asia see Denis Hew, 'Economic integration in East Asia: an ASEAN perspective' (2006) UNISCI discussion papers 11 p.49 https://www.ucm.es/data/cont/media/www/pag-72530/UNISCI11Hew.pdf accessed 2 December 2015

Furthermore, fearing that the ASEAN market may begin to look less attractive to foreign investors, ASEAN members attempted to increase trade liberalisation in the hope that it might lead to progress.[286] These were the factors that led to the decision to establish the ASEAN Free Trade Area (AFTA), the ASEAN Framework Agreement on Services (AFAS) and the ASEAN Investment Area (AIA) in the 1990s.

The definition of ASEAN economic integration in ASEAN Vision 2020[287] is 'a stable, prosperous and highly competitive ASEAN economic region in which there is a free flow of goods, services and investment, besides a freer flow of capital'.[288] There are several benefits to be derived from regional economic integration, including an enlarged market with economies of scale and scope, improved resource allocation with free movement of factors of production, improved resource pools with inflows of capital, investment and labour, and increased competition leading to improved efficiency and the elimination of barriers to trade among member countries.[289]

The amount of national support illustrates that ASEAN member countries are ready for increased integration. Thailand is one of the strongest proponents of integration and the key connecting point for economic development in the ASEAN.[290] Malaysia also continues to promote integration and cooperation among member states, since it envisions being an important member of the Industrial Projects and part of AFTA. The Philippines' development of economic liberalisation has been severely hampered by periods of rampant governmental corruption. Indeed, The Philippines believes that the economic advancement of Southeast Asia based on the integration of the ASEAN nations will improve its competitiveness and this can deepen its economic integration. Singapore is fully committed to regional economic integration in Southeast Asia by means of its ASEAN membership. It also contributes to united efforts to promote the

[286] Hong and Samtani, above 260, page 11
[287] More details about ASEAN Vision 2020 read more 2.3.2 of this chapter
[288] More about ASEAN Vision 2020 visits http://www.asean.org/?static_post=asean-vision-2020
[289] Miroslav N. Jovanovic*, Internaitonal handbook on the economics of integration,* Volume 2 (1st edn Edward Elgar publishing 2011) for an overview
[290]Megan R. Williams, 'ASEAN: do progress and effectiveness require a judiciary' (2007) 30(2), Suffolk transnational law review, page 442

advancement of the region.[291] Brunei has become formally integrated into the economic activities of other countries in the ASEAN since it joined in 1984. The Bruneian government is interested in strengthening ASEAN integration and supports it to ensure the economic advancement of its members.[292] Vietnam is currently preparing for Asian economic integration. Vietnam has made great advances in trade, investment and general cooperation and these have given Vietnam's economy more opportunity to do business with attractive markets. Laos supports the efforts within the ASEAN to integrate the region, since economic integration offers great potential for improving access to the regional market in order to increase its capacity to manage the integration process. [293] Laos believes that development can be further aided by increased integration in the region and by following the goals proposed in ASEAN Vision 2020. However, Myanmar is not a strong proponent of integration due to the fact that it is slowly increasing its regional participation and some measure of integration. It wants to reap the economic benefits of the ASEAN without losing any of its sovereignty as a result of political tensions and a deeply troubled economy.[294] Cambodia is completing its attempt to integrate its own economy within the region, which involves increasing support and continued preparations for ASEAN economic initiatives, such as participation in the free trade area. However, the political instability within the Cambodian nation makes increased regional commitment extremely difficult.[295]

There are multiple sectoral agreements for the realisation of the objectives of the AEC. The trade agreements for economic integration established by the ASEAN are firstly, the 1992 ASEAN Free Trade Area (AFTA) which covers trade in goods, with the

[291] Overview of Singapore economic integration read more, Hank Lim, 'Singapore' Singapore Institution of International Affairs http://www.eria.org/publications/research_project_reports/images/pdf/PDF%20No1-1/No.1-1-part2-SINGAPORE.pdf accessed 27 December 2015

[292] Saiful Islam, 'Brunei economy and its integration in the regional economic activities' (2011) no. 387 For more information visits http://www.biwako.shiga-u.ac.jp/eml/Ronso/387/Islam.pdf

[293] Christoph Kneer, 'Regional economic integration for Laos into ASEAN, trade and entrepreneurship development' (2014) at https://www.giz.de/en/worldwide/17473.html accessed 1 July 2015

[294] Hla Theingi and Nang Sarm Siri, 'Opportunities, challenges and preparations: Myanmar and ASEAN Economic Community' (2011) Research Gate conference paper visits file:///Users/admin/Downloads/Theingi%20and%20Siri%20EBMM%202011%20(1).pdf

[295] Read more, http://www.cdri.org.kh/webdata/download/conpap/cp3e.pdf

abolition of tariffs and the main scheme, namely, the Agreement on the Common Effective Preferential Tariff Scheme (CEPT). Secondly, these are complemented by the 1995 ASEAN Framework Agreement on Services (AFAS) known as Agreements on the free flow of services. Thirdly, the ASEAN Industrial Cooperation Scheme (AICO) was signed in 1996. Fourthly, there are the 1998 ASEAN Investment Area (AIA agreement) and the ASEAN Comprehensive Investment Agreement of 2009 (ACIA), which liberalise the investment regime. The last is the ASEAN Trade on Goods Agreement of 2009 (ATIGA). Since the AEC is focused on the single market, the performance of these economic integration frameworks will be generally discussed in this thesis apart from one element of the Economic Community, which relates to the main previous ASEAN Free Trade Area (AFTA), namely, the free flow of goods.

a) The ASEAN Free Trade Area (AFTA)

The ASEAN members agreed to establish a free trade area at the Fourth ASEAN Summit in Singapore, which was officially launched in January 1992.[296] The ASEAN leaders created the AFTA to stimulate intra-ASEAN trade in an effort to accomplish economic integration in the ASEAN with a detailed schedule and implementation schemes covering the political processes and institutionalisation, providing more room for studies on regionalism.[297] The notion of "free trade" in the ASEAN was not strictly defined. The AFTA promoted the increase of the ASEAN's trade liberalisation efforts to a higher level by allowing tariffs within the range of zero to five percent and exceptions for a few classes of sensitive goods.[298] On the one hand, the ASEAN free trade area

[296] The Singapore Declaration of 1992 and the Framework Agreement on Enhancing ASEAN economic Co-operation are initial documents to established AFTA. Copies of the documents can be obtained from the ASEAN Secretariat website at http://www.asean.org/communities/asean-economic-community/item /regional-business-development-in-asean-afta

[297] Kosandi, above 259, page 117

[298] Rosabel B Guettero, 'Regional integration: the ASEAN Vision in 2020' IFC Bulletin no.32 <http://www.bis.org/ifc/publ/ifcb32c.pdf> accessed 1 December 2015

(AFTA) called for the reduction of tariffs, non-tariff barriers,[299] quantitative restrictions and other cross-border measures[300]on all intra-ASEAN trade in manufactured materials, processed agricultural products and capital goods.[301] The main purposes of ASEAN economic integration based on the AFTA were to create larger markets to take advantage of economies of scale in the production and export of goods and services, to increase employment and stimulate the free flow of capital across borders. These larger markets would contribute to the economic and social development of the countries that were party to the agreement.[302] Some scholars believe that the motive of the AFTA was to intensify co-operation and increase international competitiveness and integration among ASEAN members, as well as simulating intra-ASEAN trade.[303] The reasons for the establishment of the AFTA were to establish a single market, while attempting to change the ASEAN economies into a single production base[304] within Southeast Asia. Secondly, the AFTA would attract multinational corporations to invest and lead to increased regionalism based on international trade and investment among ASEAN countries by using the free trade agreement to secure access to the market.[305]

The original agreements creating the AFTA were contained in three documents issued at the fourth ASEAN Summit in 1992. The first document, the Singapore

[299] ASEAN leader recognised that non-tariff barriers remain a major obstacle in the process of arriving at a free flow of goods within the region.

[300] Ludo Cuyvers, Philippe De Lombaerde and Stijn Verherstraeten, 'From AFTA towards and ASEAN economic community and beyond' (2005) UNU-CRIS Working papers, 4 http://www.cris.unu.edu/UNU-CRIS-Working-Papers.19.0.html?&tx_ttnews%5Btt_news%5D=83&cHash=2156052ddda685d731f21d0f444b2178 accessed 13 August 2015

[301] ASEAN economic into-view (A quarterly bulletin of the Bureau of economic co-operation, ASEAN Secretariat)2, no.1 (September 1994), page 10

[302] Kraichitti, above 244, page 3

[303] Hong and Samtani, above 260, page 10

[304] The aim of the ASEAN integration is to create a stable single market and production base, stated in paragraph 5 of Article 1 of the Charter. The Single market is for goods, services, labor, investment and capital, and the single production base is to create products for export. Going towards an ASEAN economic community, it is trying to move from an ASEAN free trade area to a single market and to eliminate all barriers to the free flow of goods, services and investment in order to develop regional economic integration in a market economy.

[305] Man Pham Binh, 'ASEAN's economic integration opportunities and challenges for Vietnam' (1999) Weatherhead center for international affairs Harvard University, page 14

Declaration of 1992,[306] contained a broad outline of a programme for economic integration to create the AFTA in 15 years. The AFTA is also one aspect of the scheme for economic cooperation explained in the second document, the Framework Agreement on Enhancing ASEAN Economic Cooperation (Framework Agreement),[307] which contains an outline of a scheme for economic cooperation, and the AFTA was implemented based on the third document entitled the Agreement on the Common Effective Preferential Tariffs (CEPT-AFTA Agreement).[308]

The so-called ASEAN-6 witnessed the birth of the AFTA agreement and signed it, namely, Brunei, Indonesia, Malaysia, the Philippines, Singapore and Thailand. Cambodia, Myanmar, Laos and Vietnam subsequently agreed to sign it by 2015.[309] The AFTA target was tariff elimination,[310]which meant achieving zero tariffs on all products for the ASEAN-6 by 2010.[311] The new, less-developed members (Myanmar, Laos, Cambodia and Vietnam) were given more time to reduce their tariffs than the ASEAN-6. They agreed to achieve the zero-tariff target by 2015 with flexible time up to 2018.[312] At the time of

[306] Singapore Declaration of 1992 see http://cil.nus.edu.sg/rp/pdf/1992%20Singapore%20Declaration-pdf.pdf

[307] Framework Agreement on Enhancing ASEAN Economic Cooperation see http://wits.worldbank.org/GPTAD/PDF/annexes/ASEAN%20framework%20AEC.pdf

[308] Binh, above 305, page 13

[309] The extension timeframes for the CLMV because when the AFTA agreement in 1992 was original signed, ASEAN has only six members (Brunei, Indonesia, Malaysia, the Philippines, Singapore, and Thailand – ASEAN-6) Later, when the CLMV joined ASEAN, the countries have not fully met AFTA's obligations, but they were required to sign the agreement upon entry into ASEAN. Therefore, they were given longer time frames in which to meet AFTA's tariff reduction obligations. See, http://www.asean.org/communities/asean-economic-community/item/regional-business-development-in-asean-afta

[310] Walter Lohman and Anthony B. Kim, 'Enabling ASEAN's Economic Vision' (2008) the heritage foundation 3

[311] Noted that Brunei, Indonesia, Malaysia, Philippines, Singapore and Thailand have completed the transfer of this product in Inclusion List in 2000. Tariffs will be at maximum of 5% in 2003. Tariff on 60% of these products will be eliminated by end of 2003. Duties on the remaining item will be eliminated by 2010 see, Kosandi, above 259, page 117

[312] This different tariff reduction timelines for the CLMV states shows that it will be fair for the CLMV states to have capacity or willingness to open their economies as slowly as the newer states. See, Lee Leviter, 'The ASEAN Charter: ASEAN failure or member failure' (2010) 43(159) International Law and Politics, page 204 < http://nyujilp.org/wp-content/uploads/2013/02/43.1-Leviter.pdf> accessed 1 March 2015

writing, tariffs have only been eliminated on 71.44% of the products on the list[313] of the ASEAN-6. Although the ASEAN Secretariat claims that there are many difficulties, it is evident that the road to achieving zero tariff rates is still a very long one and necessitates additional efforts.[314]

Moreover, ASEAN leaders agreed to eliminate high tariffs in the intra-ASEAN trade in goods [315] and to eliminate all import duties by 2010 or 2015 for the CLMV countries.[316] This refers to the sale of products between ASEAN countries without any tariffs or other trade barriers. For example, the AFTA tries to reduce tariff rates, expects to reduce import duties and the elimination of all tariffs is supposed to be accomplished by the 31 December 2015 based on the plan of the ASEAN Economic Community with the flexibility of up to 2018 for sensitive products. There is already an ASEAN free trade area, but the ASEAN Economic Community would be likely to succeed in broadening its implementation. Many measures to facilitate free trade among ASEAN member states are currently being implemented and the ASEAN FTA also promotes FTAs with external trading partners such as China, Korea and Japan, who are all interested in doing more free trade deals with the ASEAN. These FTAs require all member states to introduce harmonised rules in order to benefit fully from free trade with PTA partners. From this perspective, the ASEAN has achieved the 2015 plan.[317]

The ASEAN Free Trade Area can be advanced by the Common Effective Preferential Tariff (CEPT) scheme as the main instrument of tariff liberalisation under

[313] Inclusion list covers products offered for tariff reduction and are essentially all manufactured and processes agricultural products and some unprocessed agricultural products. Importantly, even tariffs for selected agricultural products previously deemed sensitive have been reduced to 5%. Rice, sugar, and some livestock products remain protected, and will not go down to zero tariff in 2015.
[314] ASEAN secretary 2002 and 2007b
[315] Narongchai Akrasanee and Jutamas Arunanondchai, 'Institutional reforms to achieve ASEAN economic integration', page 63 in Denis Hew, *Roadmap to an ASEAN Economic Community* (ISEAS 2005)
[316] The Blueprint, para 14
[317] Ong Keng Yong, 'ASEAN's post agenda: strengthening and deepening community building' (2014) 28th Asia-Pacific roundtable 2-4June, Kuala Lumpur, Malaysia

the AFTA.[318] This scheme embodied the commitment of the ASEAN-6 member states to establish a free trade area within fifteen years. The CEPT agreement included all manufacturing products, capital goods and agricultural products,[319]and products that were ready for tariff reduction were placed on the Inclusion List.[320] The ASEAN-6 countries succeeded in lowering intra-regional tariffs under the CEPT agreement, which meant that most of the tariff rates on trade of more than 99 percent of all products in the CEPT inclusion list[321] were reduced to within a range of zero to five percent by the 1st January 2010. Thus, the ASEAN members had a common effective tariff among themselves in the AFTA, but the level of tariffs with non-ASEAN countries continued to be determined on an individual basis. The CEPT was designed to help to achieve trade liberalisation through preferential trade mechanisms based on the AFTA with the creation of a new trading arrangement. In other words, the CEPT scheme was the main method for the AFTA to help the ASEAN to successfully liberalise trade by removing both tariff and non-tariff barriers.[322] The CEPT scheme was presented in order to implement the AFTA Agreement in practice, and the ASEAN-6 countries have been able to effectively reduce the tariff on 99.77% of the CEPT Inclusion List to 0-6 percent to date.[323]

There are three kinds of exclusion list under the CEPT agreement, namely, a general exception list, a temporary exclusion list and a sensitive list. It is explained in the framework agreement on enhancing ASEAN economic cooperation that 'the exception list' in Article 12 of the agreement will not prevent any member state from taking action and adopting measures that it considers to be necessary for the protection of national

[318] Paul J Davidson, *The legal framework for international economic relations: ASEAN and Canada* (Institute of Southeast Asian Studies 1997) page 160
[319] Cuyvers and Tummer, above 236, page 5
[320] Inclusion List means products in this list are for immediate transfers to the CEPT Scheme.
[321] The rules of origin and tariffs rates are defined in the inclusion list of the CEPT scheme (available online at the ASEAN Secretariat)
[322] Shandre M. Thangavelu and Aekapol Chongvilaivan, 'Free trade agreements, regional integration and growth in ASEAN' (2009) JEL 1
[323] Nguyen Anh Thu and Nguyen Thi Mai Anh, 'ASEAN and EU economic integration: a comparative analysis, ICIRD, page 6 www.icird.com/publications?task=file&action=download&path=%5BDIR accessed 1 March 2017

security, public morals, human, animal or plant life and health, and articles of artistic, historical or archaeological importance.[324] The 'temporary exclusion' list covers products that need to be temporarily protected by a delay in tariff reduction or products that are not yet ready for liberalisation,[325] while the 'sensitive' list covers unprocessed agricultural goods that are given a longer period of time for integration into the free trade area. It should be noted that the CEPT allows each of the member countries to decide which products should be added to the general exception list, the temporary exclusion list and the sensitive list.[326]

However, several aspects of the 1992 CEPT Agreement have been severely criticised, especially its long timeframe of fifteen years to accomplish free trade in the ASEAN. The reasons for forming a free trade area in the ASEAN are that internal trade has not responded to both political and economic external and domestic changes. Moreover, all the member countries of the ASEAN produce similar products for the same export markets. Furthermore, the AFTA is under-utilised based on the fact that its application procedure is unclear and insufficiently publicised. The marginal saving over the standard most favoured nation rate does not cover the processing costs, which also causes trouble.[327]

As mentioned above, the Singapore Declaration was signed by the ASEAN member countries in 1992 with the aim of using the AFTA to reduce tariffs by 2008. However, the fifteen-year timeframe was perceived to be too long; therefore, it was moved forward by five years in 1995 to 2003 and the AFTA became fully operational on the 1st January 2003. A financial crisis in the ASEAN between 1997 and 1998[328] made the ASEAN leaders decide to advance the target to the beginning of 2002. Moreover, in 1999, the ASEAN leaders had agreed to eliminate all import duties among the ASEAN-6

[324] Article 12 general exception in the framework agreement on enhancing ASEAN economic cooperation further details visit <http://www.icnl.org/research/library/files/Transnational/ASEANtrade.pdf>
[325] For example, Malaysia invoked
[326] Hong and Samtani, above 260, page 6
[327] Lohman and Kim, above 310, page 4
[328] The financial crisis explains in 2.3.1 of this chapter.

by 2010, apart from the CMLV countries, which were given until 2015 to implement the reduced tariff rates.

Although the CEPT-AFTA is the main mechanism for the AFTA, the PTA Agreement can be used for products that are not covered by this scheme.[329] The two were linked after examining the relationship between the Preferential Trading Arrangements Agreement (PTAs) and the Common Effective Preferential Tariff (CEPT). The PTA was the first agreement for economic co-operation within the region which enabled trade liberalisation; meanwhile, it is stated in the CEPT agreement that the PTA agreement provides for the adoption of instruments on trade liberalisation on a preferential basis as an improvement on the ASEAN PTA in terms of the ASEAN's international commitments. On the one hand, it can be said that the CEPT is an instrument for the implementation of the PTA;[330] nevertheless, there are some differences between the PTA and the CEPT in terms of the implementation and applications. The implementation of preferential tariffs needs to be negotiated and agreed by all the ASEAN member states, whereas the CEPT scheme is a set of mandatory rules that automatically apply to a wide range of products with specific timeframes to achieve the goal of creating a free trade area. Moreover, the AFTA not only increases the number of jobs, but also helps to improve the quality of products and enhances the competition of local manufacturing in all the ASEAN countries. This makes the trade among ASEAN countries more effective and increases the ASEAN's regional economic efforts.

b) The ASEAN Framework Agreement on Services (AFAS)

The ASEAN Framework on Services was signed by the ASEAN Economic Ministers during the 5th ASEAN Summit in Bangkok in 1995 and implemented in December 1995. It has four main objectives: (1) to enhance co-operation in services among member states

[329] AFTA Framework Agreement Article 2.2
[330] Hong and Samtani, above 260, pages 3 and 5

in order to improve their efficiency and competitiveness and to diversify the production capacity and the supply and distribution of service providers within and outside the ASEAN; (2) to eliminate restrictions on trade in services; (3) to liberalise trade in services among the ASEAN; and (4) to liberalise trade in services.[331] The aim of the AFAS is to provide wider and deeper market access for the substantive coverage of the service sector.[332] Since 1995, ASEAN member states have made commitments covering the following services: business, financial, environmental, professional, healthcare, construction, maritime transport, logistics, telecommunication, education, tourism and e-ASEAN commerce. The ASEAN adopted a Common Sub-Sector Approach between 1999 and 2001, which was defined as a sub-sector in which four or more member states made a commitment under AFAS packages.[333] The AFAS negotiations progressed even further between 2002 and 2009, when the ASEAN member states agreed to schedule commitments to liberalisation based on the targets and timelines outlined in the AEC blueprint.[334]

However, the progress of liberalising the trade in services under the AFAS has been slow. ASEAN countries have been very careful in committing themselves to the AFAS, which has resulted in little progress being made toward liberalising trade in services at the regional level.[335] The objective is to allow services to move freely and strengthen the regional cooperation on services by 2015. After the signing of the ASEAN Framework on Services on the 15th December 2015, the ASEAN ambitiously looked forward to a greater impetus that would further broaden and deepen the service integration process, thereby benefitting the entire ASEAN Community. Seven service

[331] Article 1 of the ASEAN framework agreement for services. A copy can be obtained from website at http://investasean.asean.org/files/upload/Doc%2008%20-%20AFAS.pdf
[332] Lohman and Kim, above 310, page 5
[333] see also section J (pages 17-20) ASEAN economic policies related to services at http://www.asean.org/storage/2015/12/AFAS-Publication-(2009.08).pdf
[334] Read more ASEAN integration in services at http://www.asean.org/storage/2015/12/AFAS-Publication-(2009.08).pdf
[335] Ooi Kee Beng, *the 3rd ASEAN reader* (ISEAS publishing, 2015) pages 224-225

sectors are liberalised by the AFAS, namely, maritime transport, telecommunications, business services, construction, air transport, tourism and financial services.[336]

c) The ASEAN Industrial Cooperation Scheme (AICO)

The Basic Agreement on the ASEAN Industrial Cooperation Scheme (AICO) was introduced in 1996 and the Protocol to Amend the AICO Agreement by providing a new preferential rate was signed by the ASEAN Economic Ministers on the 21st April 2004. The AICO scheme offered preferential tariff rates of a maximum of five percent on all the products identified in the AICO arrangement. Member states could decide the application of each AICO individually. The objectives of the AICO scheme were: (1) To enhance the industrial competitive position of ASEAN companies;[337] (2) To maintain the attractiveness of the region as an investment area based on the complementation of industrial activities such as the car manufacturing industry,[338] electronics, food packing, plastics products, rubber products and petrochemical sectors;[339] (3) To improve the ASEAN market in terms of the overall trade and investment prospects in the ASEAN by utilising the principles of economies of scale and scope in the manufacturing process.

An AICO scheme was a cooperative arrangement that consisted of two or more participating companies from two different countries. This scheme proved to be very successful with 74 AICO projects approved as of the 19th March 2014.[340] AICO appears to have been most successful in achieving its goal in the automotive sector, where it demonstrated the accomplishment of the ASEAN's integration initiative by supporting the electronics and automotive aspects of the industry in the adoption of effective production networks. The main beneficiaries of the AICO arrangements were Thailand,

[336] Thu and Anh, above 323, page 7
[337] Minimums of two companies in two different ASEAN countries are required to form an ASEAN Industrial Cooperation Arrangement.
[338] AICO was concentrated on the car manufactures industrial such as Ford, Toyota and Nissan are taking advantage of this mechanism. See more participation company at http://www.tariffcommission.gov.ph/previous-website/asean.html accesses 1 December 2015
[339] Lohman and Kim, above 310, page 5
[340] Hong and Samtani, above 260, pages 6 and 7

Malaysia, Indonesia and the Philippines, and this especially applied to the Toyota Car Company because Japanese companies used the AICO scheme to derive cost savings from the reduced import duty.[341] However, ASEAN members agreed to terminate the AICO in favour of the ATIGA[342] as a result of internal pressure; therefore, there was no longer any more practical advantage in using the AICO than the ATIGA to achieve the ASEAN style of consensus building.[343]

d) The ASEAN Investment Area (AIA)

The Framework Agreement of the ASEAN Investment Area (AIA), which was agreed and signed by all the member countries on the 7th October 1998 in Makati in the Philippines, promotes itself as a liberal investment area. The AIA is the formal foreign direct investment (FDI) regionalisation policy among the member countries, which is vital for the ASEAN's economic growth. The AIA turned the ASEAN into an attractive sphere of investment for both ASEAN and non-ASEAN investors,[344] and after signing it, all the participating countries were required to reduce and remove all investment barriers and offer national treatment to all members of the ASEAN.[345] Under the AIA agreement, national treatment was to fully applied to ASEAN investors in the manufacturing sector six months after the date of signing (7th October 1998), subject to certain exclusions.[346] Six member states agreed to remove these temporary exclusions

[341] Michael Ewing-Chow and Tan Hsien- Li, 'The role of the rule of law in ASEAN integration' (2013) ESCAS 2013/2016 page 9

[342] More detail about ATIGA read (e) page 71 of chapter 2 in this thesis

[343] Edmund Sim, ASEAN Economic Community Blog, at http://aseanec.blogspot.sg/2011/06/celebrating-life-and-death-of-aico.html accessed 20 February 2016

[344] Thu and Anh, above 323, page 6

[345] Ibid, page 6

[346] The Council tasked the Coordinating Committee on Investment (CCI) to begin work on AIA, especially on the submission of the Temporary Exclusion List (TEL) and Sensitive List (SL) for opening up of sectors for investment and the granting of National Treatment. The initial package of TEL and SL were be submitted within six months after the signing of the AIA Agreement for opening up investment in manufacturing sector for ASEAN investors. The other sectors would be gradually open and all industries would be opened by the year 2003 for ASEAN investors and by the year 2010 for all investors. Therefore, even though AIA provided for the opening up of all industries for investment to ASEAN investors by 2003 (initially 2010) and to all investors by 2010 (initially 2020), they are subject to the Temporary Exclusion

for ASEAN investors in manufacturing by 2003 instead of 2010 as initially agreed, and others by 2020. The political leaders hoped that this agreement to grant national treatment[347] to all investors, with a longer timeframe for CLMV, would greatly increase the confidence of investors in the ASEAN.[348]

The ASEAN members agreed to liberalise their investment regimes in the non-service sectors, including the manufacturing, agriculture, forestry, fisheries and mining sectors, by the provision of national treatment to investors and investment in the ASEAN countries by liberalising investment. This entailed formulating a regional investment arrangement to enhance the attractiveness of the region for the flow of direct investment by launching the ASEAN Investment Area (AIA).[349] The AIA also attracted sustainable levels of FDI into the ASEAN and increased the flow of FDI from both ASEAN and non-ASEAN members by means of an attractive, competitive and open economic regime.[350] However, the AIA went much further than short-term measures. Under the framework agreement, it bound member countries to eliminate investment barriers and liberalise investment rules, as well as supported the industrial and manufacturing sectors.[351]

The ASEAN Comprehensive Investment Agreement (ACIA) was implemented in 2012 by integrating two earlier initiatives, namely, the 1989 ASEAN Investment Guarantee Agreement (AIGA)[352] and the 1998 Framework Agreement on the ASEAN

Lists (TEL) and Sensitive List (SL). Read more Lawan Thanadsillapakul, 'Framework agreement on the ASEAN investment area (AIA)' Thailand law forum visits website http://www.thailawforum.com/articles/lawanaia.html

[347] For example, some exceptions as specified in the Temporary Exclusion list such as agriculture, mining, forestry and fishery and the Sensitive List

[348] Myanmar will also join the six ASEAN countries to fully implement the obligation in 2003 instead of the year 2015. Vietnam and Laos will exert their best efforts to achieve the early realisation of AIA in 2010 instead of 2013 and 2015 respectively. Visits website http://www.thailawforum.com/articles/lawanaia.html Further information concerning the AIA is available from http://www.aseansec.org/6480.htm

[349] Lohman and Kim, above 310, page 5

[350] Thanadsillapakul, above 346

[351] Further information concerning the AIA is available from http://www.aseansec.org/6480.html

[352] The AIGA aimed at promoting intra-ASEAN FDI through a legal framework, which protects investment on the premise of MFN treatment, but not national treatment.

Investment Area (AIA). The establishment of the ACIA was focused on investment liberalisation, protection, promotion, and facilitation. More specifically, it encompassed less restrictive investment regions, higher protection for investors and their investment based on MFN and national treatment, greater transparency in investment rule-making, and investor-state dispute settlement mechanisms.[353]

e) The ASEAN Trade in Goods Agreement of 2009-2010 (ATIGA)

The ASEAN Trade in Goods Agreement (ATIGA) entered into force on the 17th May 2010. The ATIGA was an enhancement of the CETP-AFTA into a more comprehensive legal instrument whereby certain ASEAN agreements related to the trade in goods,[354] such as the CEPT Agreement and selected Protocols would be superseded by the ATIGA. The tariff liberalisation commitments under the ATIGA were to be implemented retroactively from the 1st January 2010.[355] The ATIGA built on existing initiatives related to the trade in goods, such as the CEPT-AFTA, non-tariff measures, customs and mutual recognition agreements. Its goal was to achieve the free flow of goods in order to establish a single market and production base, making it possible to realise the AEC by 2015. The ATIGA contained several new elements to ensure the realisation of the free flow of goods within the ASEAN, including tariff reductions, the removal of non-tariff barriers, rules of origin, trade facilitation, customs, standards and conformance, and sanitary and phytosanitary measures. The ATIGA[356]referred to documents on trade, a single legal instrument covering various areas, such as tariff liberalisation until 2015 (chapter 2), its origin (chapter3), non-tariff

[353] Masahiro Kawai and Kanda Naknoi, 'ASEAN Economic integration through trade and foreign direct investment: long-term challenges' (2015) (545) Asian Development Bank Institute, Page 13

[354] The ATIGA is covering all trade in goods between ASEAN countries, with some trade exceptions. Those exceptions can be seen where trade restrictions are necessary to protect public morals, to protect human, animal, plant life, health and the culture treasures. Moreover, these exceptions cover on only special circumstance such as trade in gold and silver and in some limited scenarios and natural resources. The full details of those exceptions are described in the text of the agreement available at http://www.asean.org/storage/images/2013/economic/afta/atiga%20interactive%20rev4.pdf

[355] http://www.insis.com/free-trade-agreements/AFTA.pdf

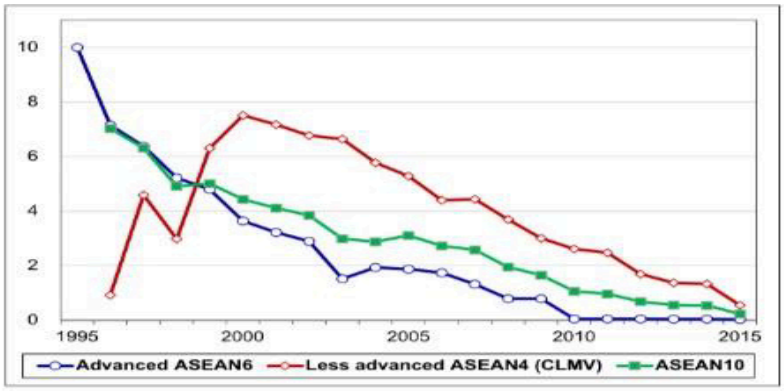
[356] http://investasean.asean.org/files/upload/Doc%2002%20-%20ATIGA.pdf

measures (chapters 4, 7 and 8), trade facilitation (chapter 5), customs procedure (chapter 6) and trade remedy measures (chapter 9). It also provided for the classical dispute settlement mechanism, as well as the establishment of a supporting AFTA Council (Chapter 10).

The ASEAN Trade in Goods Agreement (ATIGA) replaced the Common Effective Preferential Tariff (CEPT) Scheme in order to support the realisation of the AEC. The ATIGA is currently applied in the ASEAN to address non-tariff measures that could cause a barrier to the region's trade and business activities.[357] The full tariff reduction plan under the ATIGA is that member states will have completely eliminated import duty on all products traded between them by 2010 for ASEAN-6 and by 2015 for the CLMV countries with flexibility up to 2018.[358] Based on the ATIGA, Brunei, Indonesia, Malaysia, the Philippines, Singapore, and Thailand have eliminated intra-ASEAN import duties on 99.65 percent of their tariff lines. Cambodia, Lao PDR, Myanmar, and Vietnam have reduced their import duties to 0-5 percent on 98.86 percent of their tariff lines.[359] It can be seen from Figure 1 below that the ASEAN member states have substantially reduced their intra-ASEAN tariff rates over time under the CEPT and the ATIGA. The ASEAN-6 have already achieved virtually zero tariff rates on imports from other ASEAN countries and the CLMV countries have also made efforts to reduce their tariffs. Figure 2.1 (below) shows the great success of the ASEAN Free Trade Area. However, the ATIGA imposes a strong reduction, but not the total and unconditional elimination of all customs and non-tariff barriers. Importantly, the ATIGA has not yet imposed the establishment of an ASEAN customs union or a real internal market as in Europe. However, there may be a roadmap for the completion of the ASEAN single market in the next stage.[360]

[357] More detail see; http://investasean.asean.org/index.php/page/view/asean-free-trade-area-agreements/view/757/newsid/872/asean-trade-in-goods-agreement.html
[358] Article 19(1) of the ATIGA
[359] ASEAN, 'Thinking globally, prospering regionally: ASEAN Economic community 2015' (2014) Jakarta, Indonesia, page 4 http://asean.org/storage/2016/06/4.-March-2015-Thinking-Globally-Prospering-Regionally-%E2%80%93-The-AEC-2015-Messaging-for-Our-Future-2nd-Reprint.pdf accessed 1 March 2017
[360] Thomas Schmitz, 'The ASEAN Economic Community and the rule of law' (2014), page 3

Figure 2.1: Intra-ASEAN Tariff Rates under the CEPT and ATIGA, 1995-2015.[361]



ASEAN = Association of Southeast Asian Nations; CLMV = Cambodia, Myanmar, Lao People's Democratic Republic, and Viet Nam.
Source: ASEAN Secretariat.

Section 2.3 Expansion of the ASEAN's economic cooperation

The key factors that can be attributed to have supported the expansion of the ASEAN's economic cooperation are described below.

2.3.1 Asian Financial Crisis

The most significant factor that facilitated regional economic cooperation was the Asian financial crisis of 1997-1998, which was the result of weak domestic economies. In other words, the financial crisis was caused by various macroeconomic imbalances, structural deficiencies in the financial sectors and failures in political and corporate governance,[362] as well as the rise of regionalism in Asia.[363] Indonesia and

[361] The static of intra-ASEAN tariff rates provide in Masahiro Kawai and Kanda Naknoi, 'ASEAN economic integration through trade and foreign direct investment: long-term challenges' (2015) ADBI working paper, page 13 https://www.adb.org/sites/default/files/publication/174835/adbi-wp545.pdf accessed 8 March 2017
[362] Etel Solingen, 'Crisis and Transformation: ASEAN in the new ERA' (2001) 16 RSIS working papers 1
[363] Ibid, pages 2 and 3

Thailand were the most seriously affected by the crisis, which was mainly caused[364] by Thailand's central bank announcing the floating of the Thai Baht (Thai currency) after failing to protect it. However, the whole ASEAN faced a huge problem in the Asian financial crisis, which had a significantly negative effect on the ASEAN and caused a slowdown of the region's economic development from 1996-1997 because Indonesia, Malaysia, the Philippines and Thailand were enjoying an inflow of foreign capital, especially from the private sector.[365] These loans came from commercial banks and non-bank creditors, who were borrowing in dollars at low interest rates cheaper than they could exchange in their national currencies. This was a good incentive for countries with no exchange rate and they could borrow a little or hedge a number of loans. As a consequence, their goods became expensive and their exports decreased whereas their imports increased, and when foreign investors began to move their money out of Indonesia, the Philippines, Malaysia and Thailand because they did not trust their ability to repay their debts, it caused a crisis for these countries. The Asian financial crisis provided proof that crises like these will always affect neighbouring countries. The ASEAN tried to recover its trade and relieve the pressure by discussing a response to the financial crisis by becoming committed to future ASEAN cooperation by 2020.[366] This

[364] Moreover, the reasons behind the expansion of ASEAN regional economic cooperation, including the global economic shocks, such as the collapse of the United States subprime mortgage market and the euro zone debt crisis as well as financial difficulties, including reduced aggregate and job losses) See, Riyad Febrian Anwar, 'Single market: revisiting rules and strategies on the enforcement of free flow of goods in ASEAN' (2015) 1(2) HALREV, page 115 http://pasca.unhas.ac.id/ojs/index.php/halrev accessed 1 May 2016 and Robert J.R. Elliott and Kengo Ikemoto, 'AFTA and the Asian crisis: help or hindrance to ASEAN intra-regional trade' (2003), page 5 https://ideas.repec.org/p/man/sespap/0311.html accessed 1 June 2016.

[365] Shaun Narine explained that the influx of the money into Southeast Asia as the result of; 1) domestic financial deregulation; 2) An increased loan volume from Japan and the West; and 3) domestic inflation fueled by monetary arrangements with the United Stated. Read more in Shaun Narine, *Explaining ASEAN: Regionalism in Southeast Asia,* (2002) Lynne Rienner Publishers, pages 141-143 Moreover, Dick Nanto added that the Asian financial crisis happened from; 1) a shortage of foreign exchange that has caused the value of currencies and equities in Thailand, Indonesia, South Korea and other Asian countries to fall dramatically, 2) lack of developed financial sectors and mechanisms to solve this kind of problem, 3) effects of the crisis on both the United States and the world, 4) the role and replenishment of funds of the International Monetary Fund IMF). Read more in, Dick K. Nanto, 'The 1997-98 Asian financial crisis' (1998) Congressional research service report see http://fas.org/man/crs/crs-asia2.htm accessed 1 May 2016

[366] For example, ASEAN starts discussing the Road Map for financial and Monetary Integration in four principle domains; the development of capital markets, the liberalisation of capital accounts and financial sectors, and cooperation in monetary affair. See, Laurence Henry, 'The ASEAN Way and community integration: two different models of regionalism', (2007) European Law Journal 13(6) page 871

was due to a fall in exports, as well as the massive borrowing of large amounts of foreign currency to finance property development in Thailand.[367] The crisis also meant that stock and property markets were falling under pressure due to the decline in stock prices and exports had slowed down and become cheaper to outsiders.[368] The fall of the Thai Baht spread to the Malaysian ringgit and the Filipino peso.[369] The Philippines and Malaysian governments scrambled to defend their own currencies and Singapore became involved. The International Monetary Fund (IMF) has explained that, from its perspective, the crisis was the result of weak corporate governance, poor standards of disclosure, lack of transparency, and corruption.[370]

This crisis painfully showed the weakness of ASEAN integration.[371] The Asian financial crisis highlighted the institutional weaknesses of the ASEAN and the region.[372] The impacts of this financial crisis forced the ASEAN member countries to engage in closer cooperation and economic integration. It compelled the ASEAN to liberalise quickly in order to attract investment as well as ensure the recovery of the regional economy. However, the financial crisis also led to the loss of attractiveness of the ASEAN to some foreign investors,[373] who became scared and did not trust it because it was unable to resolve the 1997 financial currency problem, which served to demonstrate its ineffectiveness.[374] They were particularly concerned that the ASEAN lacked an economic policy to control emergency financing.[375] Moreover, in 1998, after the crisis, it became

[367] Roberts, above 247, page 91

[368] David Richardson, 'Economic, commerce and industrial relations group' (1998) current issues brief 23 1997-1998, see http://www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/Publications_Archive/CIB/CIB9798/98cib23 accessed 1 August 2015

[369] Krishna Gidwani, 'Korea and the Asian financial crisis' see http://web.stanford.edu/class/e297c/trade_environment/global/hkorea.html accessed 25 May 2015

[370] Roberts, above 247, page 91

[371] Ade M Wirasenjaya and Ratih Herningtyas, 'The problem of State-Led Regionalism in ASEAN's transformation toward the ASEAN community in 2015' ICIRD 1

[372] Lee Leviter,'The ASEAN Charter member failures', (2010) 43(159) International Law and Politics, page 173 http://nyujilp.org/wp-content/uploads/2013/02/43.1-Leviter.pdf accessed 12 May 2014

[373] Zaenal Mutaqin and Masaru Ichihashi, 'Widening and deepening economic integration impact on bilateral trade in the Eurozone and ASEAN' (2013) IDEC 1

[374] Binh, above 305, page 11

[375] Teofilo C. Daquila, 'Economic regionalism in Southeast Asia: ASEAN at 45' (2012) 12th Asia-Pacific economic and business history conference 16-18 February 2012

clear that the ASEAN's financial structure had suffered significantly from factors that included a reduction of its economic growth and rising unemployment.

This crisis convinced investors that the ASEAN needed a regional mechanism to more effectively avoid a repetition. Therefore, the former ASEAN Secretary-General Rodolfo Soverino suggested that the ASEAN should move from a relationship-based mechanism to a more rules-based market-driven one.[376]

2.3.2 The ASEAN Vision 2020

The ASEAN sought various measures to cope with this economic crisis and the issue of further economic cooperation was emphasised at the ASEAN informal Summit held in Kuala Lumpur (Malaysia) from the 14th to the 16th December 1997. The "ASEAN Vision for 2020", which called for a long-term goal to improve the situation of the ASEAN after being faced with the financial crisis by intensifying the cooperation among the member states, was approved in 1997.[377] ASEAN Vision 2020 would be the ultimate end-goal the ASEAN Economic Community aimed to achieve, in which there would be a free flow of skilled labour, trade, investment, capital, equitable development and the reduction of poverty and socio-economic disparities within the ASEAN. "ASEAN Vision 2020" was based on four concepts: (1) to maintain regional macroeconomic and financial stability by promoting closer consultation on macroeconomic and financial policies; (2) to further liberalise the financial services sector; (3) to closely cooperate in the money and capital market, tax, insurance and customs matters; and (4) to establish international financial measures, deepen capital markets, and improve corporate

https://apebh2012.files.wordpress.com/2011/05/daquila-asean-at-45-12th-apebh-conference.pdf accessed 13 August 2015

[376] Ibid, pages 6-7

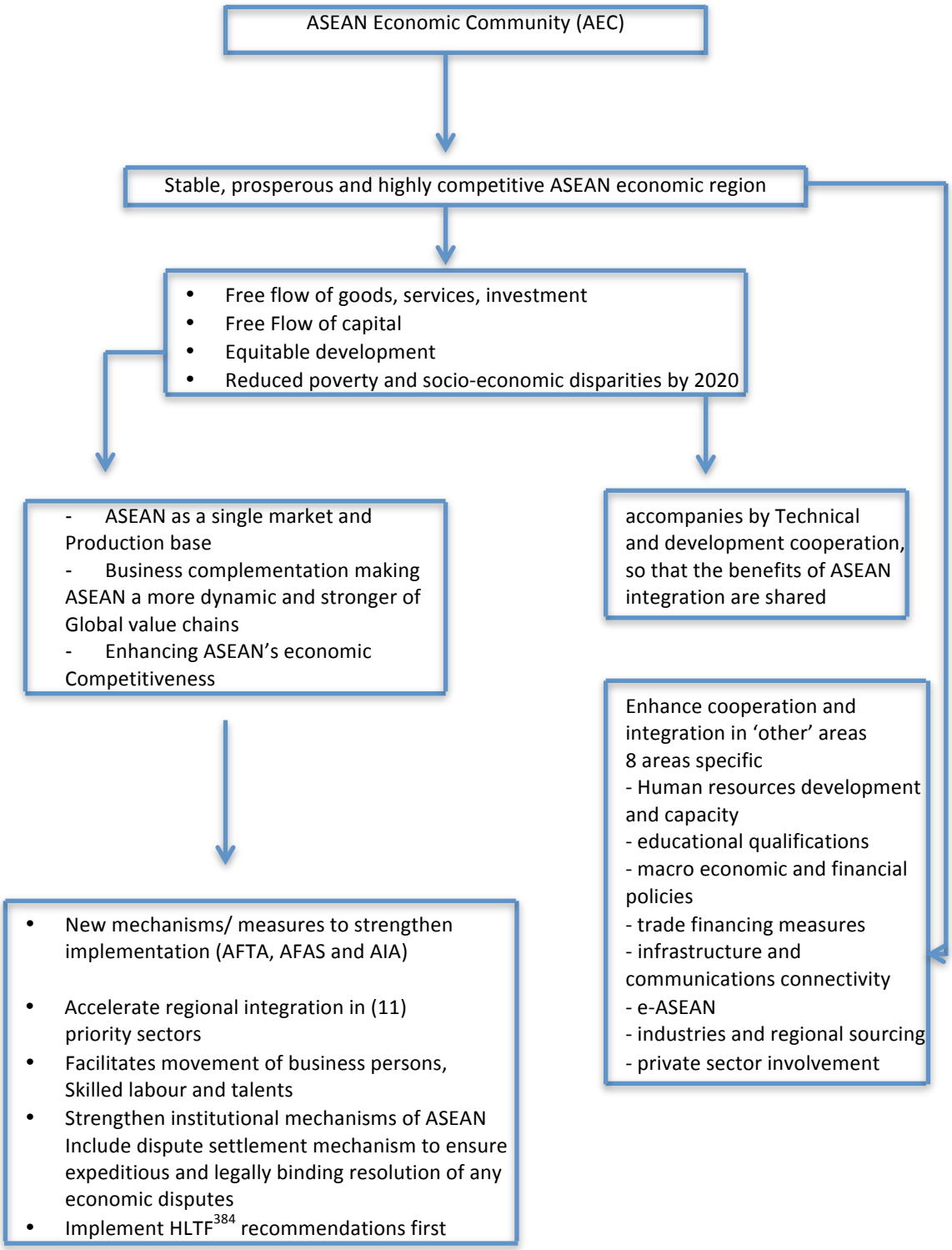
[377] Shandre M. Thangavelu and Aekapol Chongvilaivan, 'Free trade agreements, regional integration and growth in ASEAN' (2009) ISEAS http://paftad.org/files/33/Thangavelu%20&%20Chongvilaivan.pdf accessed 13 August 2015

governance.[378] Moreover, the ASEAN (in ASEAN Vision 2020) agreed the following: (i) institute new mechanisms and measures to strengthen the implementation of existing economic initiatives, such as the AFTA, the ASEAN Framework Agreement on Services (AFAS) and the ASEAN Investment Area (AIA), which will enhance the attractiveness of region based on the application of investment laws and policies; (ii) accelerate regional integration by 2010 in the priority sectors of healthcare, rubber-based products, textiles, and apparel; (iii) facilitate the movement of business persons, skilled labourers and talents; and (iv) strengthen the institutional mechanisms of the ASEAN, including improving the existing ASEAN DSM to ensure the expeditious and legally-binding resolution of any economic disputes.[379] In adopting this Vision, the ASEAN declared its goal to become a community in which disputes are resolved peacefully, support closer economic integration, and be bound by a common regional identity by 2020.

Moreover, the Vision called for an ASEAN Partnership in Dynamic Development with respect to further and better economic development with the aim of bringing closer economic integration within the ASEAN. It recognised the fact that the creation of a stable, prosperous, and highly competitive ASEAN economic could only be achieved by the free flow of goods, services, investment and capital, as well as the reduction of poverty and socio-economic disparities.[380] The Declaration of Bali Concord II was guided by ASEAN Vision 2020 to establish the ASEAN Community by 2020,[381] there would need to be a free flow of goods, service, investments and equitable economic development, a reduction in poverty and socio-economic disparities to make the ASEAN Economic Region highly competitive. It should be noted that the ASEAN Vision 2020 was a declaration of the commitment of ASEAN member states to future cooperation in 2020.[382] In other words, the ASEAN vision responded to the ASEAN crisis by taking economic cooperation within the ASEAN in a new direction.

[378] ASEAN Vision 2020 see http://www.asean.org/?static_post=asean-vision-2020
[379] Guettero, above 298, page 54
[380] Koesrianti, page 39
[381] For the discussion on the ASEAN Economic Community, see section 2.4.1 below
[382] ASEAN Vision 2020 see http://www.asean.org/?static_post=asean-vision-2020

Table 2.2: Bali Vision of the ASEAN Economic Community[383]



[383] Jacques Pelkmans, *The ASEAN economic community: a conceptual approach* (Cambridge University press 2016), page 75

[384] HLTF means High Level Task Force

Table 2.3: Characteristic of the ASEAN Economic Community

Free trade in goods	- Eliminate all tariffs -Remove non-tariff barriers, including subsidies, restrictions, and sensitive industry classification -Create simplified, harmonised, and standardised trade and customs processes and procedures
Free trade in services	- Facilitate cross-border interactions, subject to domestic regulations - Eliminate intra- regional trade restrictions, and expand liberalisation in services, especially in financial services, transport, tourism, telecommunications, and professional business services
Free flow of skilled labour[385]	- Manage mobility limited to only people engaged in trade in goods, services, and investments, subject to domestic regulations -This skilled labour provides the employment opportunities by enabling people to move from country to country to work - Expedite issuance of work permits and other related documents
Free flow of investment	- Open up all industries for ASEAN investors with limitation to some Sensitive industries - Harmonise and streamline investment policies and procedures - Increase support among government
Free flow of capital	- Strengthen domestic capital markets through better market access and Increased market liquidity - Create progressive capital account liberalisation, and standardise capital market's rules and regulations - Connect ASEAN's individual capital markets on a common platform

Section 2.4 New developments of intra-ASEAN economic cooperation toward an ASEAN Economic Community from 2003 to the present day

The ASEAN's concepts of regional organisation, cooperation and regionalism are also discussed in the context of international relationships, international organisations and regional integration. The combination of regionalisation and regionalism leads to regional integration. Regionalism has a different meaning and purpose for each nation when it becomes part of any regional organisation. In most cases, there are certain basic differences

[385] According to Plummer, the free flow of all labour, including unskilled labour, was deemed too politically difficult to consider in the AEC. See, Michael G. Plummer and Erik Jones, 'International Economic integration and Asia' (2006) (3) International economic integration studies, Singapore, page 5

between states that are engaged in a regional cooperation mechanism, since most regional cooperation is limited to economic cooperation based on a free trade agreement.[386] Some scholars tend to use the term "regionalism" to refer to any kind of regional cooperation, while others focus more on using "integration" when they mean economic integration. The former ASEAN Secretary-General, Surin Pitsuwan, stated that "Regional cooperation and economic integration to build the ASEAN Community will go into a higher gear after the ASEAN Charter enters into force", which is an expression of this point of view.[387]

The concept of "regional" includes cultural appendence, political system, security arrangement and economic policy.[388] The word "community" refers to the member states of the ASEAN.[389] Not only are they a political unit, but they also consist of institutions and practices of people, who anticipate the resolution of disputes by a peaceful change based on institutionalised procedures without the use of force.[390] A regional community requires its members to transfer their national sovereignty to a regional institution under a group of associated charters[391] within the community field in order for all member countries to enjoy the benefits. It must be borne in mind that the ASEAN has not yet fully developed into a regional group that can be regarded as a separate entity.[392]

2.4.1 The ASEAN Economic Community (AEC)

As a final topic in this analysis of the history of the ASEAN, it is necessary to consider the projected plan to succeed in becoming an economic community. Following the successful implementation of the AFTA, the ASEAN intensified its efforts to establish

[386] Zahid Shahab AHMED- Stuti BHATNAGAR, 'Interstate conflicts and regionalism in South Asia: Prospects and challenges' (2008) perceptions Spring and Summer, page 5
[387] Tony Hotland, 'ASEAN Charter ushers in historic new era for region' (20018) The Jakarta Post, Jakarta Headlines news <http://www.thejakartapost.com/news/2008/12/16/asean-charter-ushers-historic-new-era-region.html> accessed 3 March 2013
[388] Shaun Narine, *Explaining ASEAN: regionalism in Southeast Asia* (Lynne Rienner Publisher 2002), pages 196 and 197
[389] Mely Caballero Anthony (9), *Regional Security in Southeast Asia beyond the ASEAN Way* (1st, ISEAS publication 2005), page 6
[390] Mie Oba, 'ASEAN and the creation of a regional community' (2014) 21(1) Asia-Pacific review, page 65
[391] Charter means a formal statement of an organisation under groups agreed by a ruler or governments.
[392] Davidson, above 318, page 44

the AEC by 2015. The heart of the ASEAN community's efforts was to achieve regional integration by peaceful means and to create a stable and prosperous community orientated toward regional and international peace and security. In moving toward the ASEAN Economic Community, the ASEAN should institute new measures in order to strengthen its institutional mechanisms. The ASEAN leaders signed the Declaration of ASEAN Concord II in 2003 with the aim of creating an ASEAN Economic Community as a way to achieve the goal of economic integration by 2020. However, although they had originally intended to create the AEC by 2020, they advanced the deadline to 2015 in early 2007. The ASEAN's response to the new challenges involved in promoting and achieving regional cooperation was to establish an ASEAN Economic Community (AEC) by adopting the Declaration of ASEAN Concord II at the Ninth Summit. Member States became committed to following the principle of "adherence to multilateral trade rules and ASEAN's rules-based regimes for the effective implementation of economic commitments and progressive reduction towards the elimination of all barriers to regional economic integration" in the Bali Declaration of the ASEAN Concord II.[393] This Declaration changed the ASEAN's economic structure with a plan to create an ASEAN Community that would contain three pillars: (1) The ASEAN Economic Community (AEC); (2) the ASEAN Security Community (ASC); and (3) The ASEAN Socio-cultural Community (ASCC) with the ASEAN Economic Community (AEC) being the most important pillar. The main concept of the AEC[394] was to create a stable, prosperous and highly competitive ASEAN economic region, characterised by the free flow of goods, services, investment, and expanded opportunities for skilled labour migration. There should also be equitable economic development and reduced poverty and socio-economic disparities by the year 2020."[395]

[393] Article 2(2)(n) the Bali Declaration of ASEAN Concord II

[394] However, the reasons behind to create the AEC are many, including; i) the desire to create a comprehensive post-AFTA agenda; ii) the perceived need to deepen economic integration within ASEAN given the new international commercial environment, especially the dominance of free-trade areas; iii) cooperation in both real and financial sectors after the 1997 Asian financial crisis. See, Michael G. Plummer, 'The ASEAN Economic Community and the European experience' (2006) Asian Development Bank Working paper series on regional economic integration (1), page 7

[395] Further information concerns the Declaration of ASEAN Concord II visit website, http://www.mfa.go.th/asean/contents/files/other-20130527-164513-046340.pdf Moreover, the AEC 2015, the key achievements are; i) more liberalised market; ii) reduce trade costs; iii) improved

After the ASEAN Concord II called for the building of an ASEAN Community in 2003, a schedule was developed to build it by the end of 2015. The ASEAN Community was to be formed from three pillars that focused on the concept of a regional community: a political and security pillar, an economic pillar and a socio-cultural pillar. From this perspective, it can be seen that this was to be a co-operation within the field of economics with the aim of creating an ASEAN Economic Community (AEC), which is one of the three ASEAN community councils. The ASEAN began with 6 members and it now has 10 after Cambodia, Laos, Myanmar and Vietnam (CLMV) were accepted as members. They began the process of accomplishing an ASEAN FTA and intended to form a Common Market[396] by preparing for the creation of an ASEAN Economic Community by 2015.[397] The ASEAN's regional economic integration efforts were all geared towards creating this ASEAN Economic Community (AEC).

The AEC Blueprint[398] was the plan for the implementation of the ASEAN Economic Community (AEC). It described how the AEC would operate and defined the goal of economic integration as the free movement of goods, services, investment and skilled labour and the free flow of capital among the ASEAN member countries to formally establish the AEC on the 31st December 2015.[399] According to the Blueprint, the AEC economic integration would create 1) a single market and production base;[400] 2) a

investment regimes; iv) enhance mobility of skilled people; v) free trade and comprehensive economic partnership agreements; vi) a business-friendly and innovation-supportive environment; vii) physical improvements in transportation and other infrastructure networks and viii) narrowing the development gap within ASEAN see, ASEAN factsheet

[396] Recently progress ASEAN has been taking effective measures to set up common market for ASEAN states. It is a work in progress step to strengthen trade within ASEAN members. It is also important to plan ahead to what ASEAN still need to do too advance ASEAN's community build process based on the economic fundamentals and strengthen the capacities of ASEAN institutions and our member states. See more Ong Keng Yong, 'ASEAN's post agenda: strengthening and deepening community building' (2014) 28th Asia-Pacific roundtable 2-4June, Kuala Lumpur, Malaysia

[397] Zaenal Mutaqin and Masaru Ichihashi, 'Widening and deepening economic integration impact on bilateral trade in the Eurozone and ASEAN' (2013) IDEC, page 1

[398] The ASEAN Economic Blueprint made at the 12th ASEAN Summit in Cebu, the Philippines, on 13 January 2007, to accelerate the establishment of the ASEAN Economic Community by 2020, but at the 11th summit in December 2005, the AEC deadline was accelerated to 2015.

[399] ASEAN, 'ASEAN Economic Community Blueprint', 20 November 2007 section I

[400] The single market is that a single market combines deep and far-reaching cross border liberlaisation, based on the fundamental obligation to ensure market access and non-discrimination. The concept of the

highly competitive economic region; 3) a region of equitable economic development; and 4) a region that was fully integrated into the global economy.[401]

The AEC was based on four pillars, [402]the first of which was a single market and production base[403] in which all the Southeast Asian states would retain their national sovereignty, but they would virtually eliminate all tariffs and open their borders to the free flow of trade, capital, investment and labour and apply the regulations and customs of the ASEAN. On the one hand, a single market and production base was to be achieved based on the cross-border movement of goods, services, capital and labour within the ASEAN. In the context of the ASEAN Blueprint, the concept of a single market was defined as an integrated market with reduced barriers to trade and investment. This integrated market would benefit ASEAN countries by enabling investors to move freely in the region and have greater access to capital, and allowing goods to move easily across borders.[404] Currently, more than 70% of intra-regional trade is now free from tariffs.[405] In the Asian Development Bank Outlook report 2014, it was shown that Indonesia, Malaysia, the Philippines, Singapore and Thailand had achieved tariff reduction, whereas there was some delay in applying tariff reductions in Cambodia, Laos, Myanmar and Vietnam. The second pillar entailed increasing competitiveness throughout this economic region with fair competition. Various measures were designed to attract new investors and encourage them to do business. These included infrastructure development projects, better consumer rights and intellectual property laws and policies designed to foster competition. The third pillar involved promoting equal economic development based on policies designed to avoid a development gap

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ASEAN production based can be implied as the intra-ASEAN liberalization and facilitation. See, Jacques Pelkmans, *The ASEAN Economic Community a conceptual approach* (Cambridge University Press, 2016)

[401] ASEAN, 'ASEAN Economic Community Blueprint', 20 November 2007 section II

[402] Declaration on the ASEAN Economic Community Blueprint http://www.asean.org/wp-content/uploads/archive/5187-10.pdf, the AEC Blueprint, Action plan 9

[403] Five core principles of the ASEAN Single market and production base are free flow of goods, free flow of services, free flow of investment, free flow of capital and free flow of skilled labour.

[404] The ASEAN, AEC Blueprint, Action Plan 6

[405] The statistic from ASEAN, 'the ASEAN Economic Community Scorecard' (2012), Jakarta

between the region's richest and poorest members.[406] The last pillar entailed become fully integrated into the global economy by concluding free trade agreements with external powers for further economic relationships.[407] The most recent situation is that the ASEAN has already created Free Trade Agreements (FTAs) with major trading partners, such as Australia, New Zealand, China, India and Korea.

Table 2.4: The Four Pillars of the ASEAN Economic Community

Single Market and Production Base	Competitive economic region	Equitable economic development within the region	Integration into the global economy
-Free flow of goods -Free flow of services -Free flow of investments -Free flow of capital -Free flow of skilled labour	-Develop competition policy -Strength consumer protection -Intellectual property rights -Promote infrastructural development and e-commerce -Reduce double-taxation	-Accelerate the development of small and medium enterprises (SME's) -Enhance ASEAN integration to reduce development gap between member countries	-Develop coherent approach towards external economic relations -Form and manage Free trade agreement (FTAs) and Comprehensive Economic Partnerships (CEPs) -Enhanced participation in global supply network

There are different perceptions of the legal basis of free trade areas, customs unions, single markets and integration in the ASEAN Economic Community. According to Balassa,[408] economic integration can be categorised into the following six stages;

[406] Such as Singapore and Brunei are two of the richest countries in the world in terms of per capita income, while Myanmar and Cambodia are among the poorest countries in Asia, see Willem Van der Muur, 'The legal nature of the ASEAN Economic Community 2015' (Master thesis Public International Law) (2012) University of Amsterdam page 3. These huge diversities in the levels of income for instance Singapore's GDP per capital is more than 30 times higher than in Laos and more than 50 times higher than in Myanmar and Cambodia. Read more, 'ASEAN 2015- opportunities and challenges' Clifford Chance Note November 2014, page 2

[407] Sanchita Basu Das, *Achieving the ASEAN Economic Community 2015 Challenges for member countries and businesses* (ISEAS publishing preface 2012)

[408] Bela Balassa, The theory of economic integration, (Homewood: Richard D. Irwin, 1961), page 68

(1) Free trade areas (FTA): The main characteristic of a FTA is that all the member countries will remove their tariff and non-tariff (quota) barriers so that customs, quantitative import-export restrictions are eliminated between members of the integration, but each country determines its own individual external tariffs, such as national tariffs or quotas which it imposes on non-members.

(2) Custom Unions (CU): The main characteristic of a Custom Union is that all the member countries will remove their tariffs on other member countries' products. At the same time, all member countries will impose the same tariffs on non-member countries' products. This tariff is called the "Common External Tariff" (CET). There must be no discrimination among members in product markets, with a common external tariff structure against non-members. A Customs Union differs from a free trade area in that members treat all non-members similarly.

(3) Common Market (CM) or Single Market: Countries remove all barriers to trade and the free movement of goods, persons, capital and services between themselves. The common market policy is that all member countries will remove their tariffs on member countries and adopt the "Common External Tariff" (CET). At the same time, member countries must remove all barriers to movement among member countries. This means that labour and capital will move freely in the CM without any barriers. Moreover, there must be some degree of harmonisation of the national economic policies among the common market countries in order to remove any discrimination that may have resulted from the disparity in these policies.[409]

(4) Economic Union: The main point is that all member countries will remove all barriers to the free movement of goods, services, labour and capital and adopt the CET. At the same time, all member countries are required to unify

[409] The example of the Common Market is the MERCOSUR. For detailed discussion see, Chapter 4

their economic institutions, adopt common economic policies, harmonise their tax and monetary policy and create a common currency.

(5) Economic and Monetary Union: A single economic policy plus a single currency.[410]

(6) Complete economic integration or total economic integration: this involves the unification of monetary, fiscal, social and countercyclical policies. A supranational authority is established to make decisions that are binding for member states. A vision of a centralist and unitary state is contemplated here. In other words, total economic integration consists of a single monetary, fiscal and social policy, as well as a common rule of law in order to establish a supranational body.

Based on the above six stages of economic integration, the ASEAN remains at the first stage of the Free Trade Area (AFTA). However, the creation of an ASEAN community would not produce a complete Common Market in which all the member countries would remove all barriers for goods, services, labour and capital. In other words, the ASEAN Community would be a single market in which all the member countries would remove barriers for goods, services and capital before 2020. The AEC is neither a customs union with a common external commercial policy nor a full common market with the free mobility of capital and labour and some policy harmonisation. The

[410] The European Monetary Union such as, the European Union (EU), which is managing implication of the euro except Britain, Denmark and Sweden that are opting out of the Euro. European experience shows that ambitious projects of one of their fundamental goals in the form of market integration are widely regarded as the most example of regional integration. The successful examples of EU lies in the integration of they are strictly based on the law and democracy between European Union members. Moreover, the EU's institution is secured by strong and efficient mechanisms of law enforcement and legal protection under the supranational regime where the regional law is directly binding in the member states. Furthermore, the roles of a regional court help to ensure the uniform interpretation of the regional law and the national court to apply and enforce the regional law in the context of the national legal system. Further discussion reads more in Chapter 4 section 4.2.1 The European Union. See also, Thomas Schnitz, 'the ASEAN Economic Community and the rule of law), page 1 and Michael G. Plummer, 'East Asian economic integration and Europe: can ASEAN learn from the EU' (2006) JSPS-NRCT Conference, page 5

creation of a single market and production base should enable the ASEAN to benefit from economies of scale and efficiency in a networked production process. It should be noted that the AEC does not aim to be a customs union or common market like the EU;[411] rather, it was created to realise the real competition among its members with the aim of achieving the free circulation of goods and capital and a free flow of investment and services. Applying these levels of integration to the current status of the ASEAN, it is now between the first and second level of integration, while the EU is between the third and the fourth.[412]

The ASEAN Economic Community (AEC) was created in 2015, which meant that it was now defined as a 'community' rather than an 'association'. The AEC relied on the foundation of regional economic integration. The ASEAN Economic Community's December 2015 deadline appeared to show that ASEAN was definitely a work in progress rather than 2015 being a hard target year for its transformation. According to Ong Keng Yong, a former ASEAN Secretary, ASEAN economic integration and community-building would not end on the 31st December 2015. He added that the ASEAN was already working on developing a Post-2015 Vision to succeed these initial community-building goals. A report by the Asian Development Bank (ADB) shows that the ASEAN had no prospect of coming close to a single market by the deadline. There were some very important trade issues that needed to be addressed if the ASEAN was

[411] The most famous single market, the European Union were developed and formed by the Treaty of Rome in 1957 and merged with the European Coal and Steel Community in 1967. Continually, from the Treaty of Rome in 1968, they developed into a Custom Union; then to the Single Market in 1992, by removing the barriers to free movement of capital, labour, goods and services. In the same year, an economic and monetary union was established and the members. In 1999, the Euro was launched as the single currency as a successful outcome of regional economic integration. Then, the Treaty of Lisbon in 2009 made important amendments to the initial Maastricht Treaty on European Union. Further discussion see Chapter 4 section 4.2.2.1 an overview of the dispute settlement regime in the European Union. See also, Michael Ewing-Chow and Tan Hsien-Li, 'The role of the rule of law in ASEAN integration' (2013) RSCAS 2013/16, page 6, Shahriar Kabir and Ruhul A Salim, 'Parallel integration and ASEAN-EU trade potential: an empirical analysis' (2011) 24(4) Journal of economic integration and Rodolfo C. Severino, *Southeast Asia in search of an ASEAN community insights from the former ASEAN Secretary-General* (ISEAS 2006), page 5. Unlike the European Union, ASEAN leaders lacked the political will to advance beyond a free trade area. Secondly, ASEAN leaders put national policies over and above regionalism. For example, there would be difficulty even in obtaining the consensus to form a customs union see Tan Lay Hong and Anil Samtani, 'The shifting paradigm in regional economic integration: the ASEAN perspective'

[412] Henry, above 366, page 870

to achieve the successful implementation of the community as a whole by 2020. It faced more challenges and there were further things it would have to do. Iwan Azis, head of the Office of Regional Economic Integration at the Asian Development Bank, gave his opinion on this point, saying that the general success of the ASEAN, together with the four pillars, can basically be defined by its integration into the global economy; however, the ASEAN community would not be a complete common market until all the member countries had removed all the barriers to the flow of goods, services, labour and capital. In other words, the ASEAN Community would be a single market when all the member countries had removed all the barriers for goods, services and capital. He added that the creation of a single market and production base in the form of the first pillar was the most difficult aspect for the AEC.[413]

The AEC model of economic integration is still far from that of the European Union (EU);[414] however, there are several useful lessons the ASEAN can learn about a successful economic integration from the EU's experience. Firstly, the EU has achieved the highest level of economic integration,[415]some of which are suggested here for the ASEAN to adopt for the AEC. Firstly, the legal foundations of the European internal market lie in the strong institutional, procedural and substantive provisions in the EU Treaty, while the ASEAN Charter has no legal foundations. Secondly, although the ASEAN Economic Community Council has been established in Article 9(4) of the ASEAN Charter, this subordinated institution ensures the implementation of the relevant decisions of the ASEAN Summit, coordinates work and submit reports and recommendations to the ASEAN Summit in order to realise the objectives of the AEC, but it does not make decisions itself.[416] Thirdly, the EU and the ASEAN are different in nature. For example, the EU countries are economically compatible because their level of economic development varies and they have similar goals, values and market economy systems. In contrast, the member countries of the ASEAN have diverse

[413] http://www.thailand-business-news.com/asean/51585-aseans-real-work-comes-post-2015.html
[414] Akrasanee and Arunanondchai, above 315, page 66
[415] Akrasanee and Arunanondchai, above 315, page 66
[416] Schmitz, above 360, page 3

backgrounds, cultures and political systems, as well as there being a development gap between well-developed and less-developed members, which makes it more difficult to develop the ASEAN among member states.[417] The motto of the ASEAN is "One Vision one identity one community". The "one identity" means a united value that all member states agree on and are willing to achieve, even at expense of their individual identity. Interestingly, the EU's motto is "United in diversity", which emphasises both the goal of being united and the reality of their disparity, but it results in a more united community than the ASEAN.[418] In order to achieve a highly integrated community, the ASEAN needs to have stronger power to influence all the other member states and bring all ten countries together to build a common identity.[419]

The leaders of the ten Southeast Asia economies announced the formation of the ASEAN Community on the 31st December 2015; however, the 2015 timeline for the AEC was just the beginning for the ASEAN. Currently, in 2017, since the deadline for the ASEAN passed in 2015, an ASEAN Economic Community (AEC) exists and the intra-ASEAN trade in goods is no longer blocked by high tariffs and import duty. Many measures to facilitate free trade have been implemented or are in the process of being implemented.[420] However, while the AEC exists, a progress report by the Asian Development Bank (ADB) and the Institute of Southeast Asian Studies concluded that the ASEAN "had no prospect of coming close to a single market by the 2015 deadline", and it did not expect to see the ASEAN suddenly transformed even by 2017 or by 2020. The ASEAN 2015 deadline should be seen as a milestone year and a measure of a work in progress.[421] Therefore, the ASEAN leaders decided that the ASEAN should go ahead with its vision of a Community and the negotiation process to achieve the ASEAN

[417] See, Chapter 6 section 6.2.5 Diversity and ASEAN values
[418] Hanmo, above 246 page 4
[419] Ibid, page 4
[420] Jayant Menon and Anna Cassandra Melendez, 'Realising an ASEAN Economic community: progress and remaining challenges' (2015) ADB economics working paper no. 432, page 15 https://www.adb.org/publications/realizing-asean-economic-community-progress-and-remaining-challenges accessed 1 June 2016
[421] Ibid, page 15

Community's development goals was clarified in the "ASEAN's Post-2015 Agenda:[422] strengthening and deepening community building", in which it is stated that the main task is to reduce any uncertainty. The ASEAN Leaders recognised that the 31st December 2015 was a milestone in a long community-building process which would specifically focus on economic integration rather than political or socio-cultural cooperation. However, the establishment of the AEC in 2015 was not a static end-goal, since some processes would need to continue in order to maintain its relevance in an evolving global economy and this required the true commitment of every member. Challenges would appear as a result of the fact that the ASEAN member states have different characteristics, which reflects the complexity of the attempt to bring ten countries together within an ASEAN identity.[423]

In terms of the ASEAN Economic Community, ASEAN leaders need to follow the "Kuala Lumpur Declaration on the ASEAN Vision 2025: Forging Ahead Together",[424] which was proposed during the 27th ASEAN Summit held in Kuala Lumpur, Malaysia in 2015 as a guide for ASEAN economic integration from 2016 to 2025. Based on the AEC Blueprint 2025,[425] the ASEAN will continue its reinvention while it attempts to maintain its relevance in an evolving global economy with the following objectives: (1) to measure and straighten out the ASEAN Trade in Goods Agreement (ATIGA); (2) to strengthen the integration of financial services; (3) to develop an ASEAN-wide settlement system; and (4) to enhance the competition laws in the ASEAN and create a mechanism for a cross-border policy.[426] From this perspective, a strong AEC, which will be able to meet new

[422] For more detail in ASEAN's Post 2015 see; http://www.asean.org/storage/images/archive/23rdASEANSummit/bsb%20declaration%20on%20the%20asean%20communitys%20post%202015%20vision%20-%20final.pdf

[423] ASEAN nations are at the different stages of development. Not only the gap of levels of different incomes, but also different in political systems, languages, and etc.

[424] For more information about the Kuala Lumpur Declaration on ASEAN Vision 2025 visits http://www.asean.org/storage/2015/12/ASEAN-2025-Forging-Ahead-Together-final.pdf

[425] ASEAN Economic Blueprint see http://astnet.asean.org/docs/AEC-Blueprint-2025-FINAL.pdf

[426] Moreover, a stronger AEC is envisaged by 2025 with the following characteristics: a) A highly integrated and cohesive economy; b) a competitive, innovative, and dynamic ASEAN; c) enhanced connectivity and sectoral cooperation; d) a resilient, inclusive and people-oriented, people-Centred ASEAN and, a global ASEAN. See, ASEAN Economic Community, Jakarta: ASEAN Secretariat (2015)

opportunities and challenges, is envisaged by 2025. The Post-2015 Agenda included a clear strategy to address any unfinished business from the AEC 2015, which was deemed critical for deepening regional economic integration.[427] Furthermore, efficient planning was imperative to ensure the successful outcome of the community building process beyond the establishment of the AEC in 2015. ASEAN member states would continue to operate in significantly less than full regional economic integration for the foreseeable future. Thus, although the AEC 2015 has already succeeded in establishing key frameworks and other fundamental elements for the effective functioning of an economic community, this is not the end of the journey. AEC 2025 will see an ASEAN that is more proactive, working with efficient planning and further engagement in competitive innovation in order to meet any challenges and create a fully functional AEC.[428] Nevertheless, this is a long-term goal that the ASEAN should strive to achieve.[429]

2.4.2 ASEAN Security Community (ASC)

The ASEAN leaders expressed their intention to establish the second pillar of the ASEAN Community, the ASEAN Security Community (ASC), with the adoption of the Bali Concord II in 2003. The aim of the ASC is to ensure that countries in the region live in peace, both with each another and the world at large in a just, democratic and harmonious environment.[430] Besides, the ASC envisages the establishment of political and security cooperation within the region to ensure that this aim is achieved.

The ASEAN Security Community Plan of Action (ASCPA) was adopted at the 10th ASEAN Summit in November 2004 to coordinate the process of cooperation in moving

[427] Fact sheet – ASEAN Economic Community, Jakarta: ASEAN Secretariat, (2015) ASEAN Secretariat http://www.asean.org/storage/2012/05/56.-December-2015-Fact-Sheet-on-ASEAN-Economic-Community-AEC-1.pdf
[428] A Blueprint for Growth ASEAN Economic Community 2015: progress and key achievement, The ASEAN Secretariat (2015), Jakarta, page 30
[429] Hew, above 285, page 55
[430] Guettero, above 298, page, 54

toward an ASC. The plan contains six components, namely, political development, the shaping and sharing of norms, conflict prevention, conflict resolution, post-conflict peace building and implementation mechanisms.

The ASCPA is vague and unambitious, with several problems still remaining because the ASEAN Blueprint has no legal force and there is no recommendations for action by member states. For example, the lukewarm response from other ASEAN countries to the military-run Myanmar demonstrates that these goals will not be easy to achieve. The suggested measures are generally not sufficiently specific and have no expected outcomes; yet, there are some issues that should be prioritised, such as anti-corruption measures and counter terrorism initiatives.

2.4.3 ASEAN Social-Cultural Community (ASCC)

The ASEAN Socio-Cultural Community is one of the goals set by the Declaration of ASEAN Concord II. The ASCC Plan of Action, declared at the 10th ASEAN Summit in Vientiane, Laos in 2004, consists of four core elements: to build a community of caring societies, to manage the social impact of economic integration, to enhance environmental sustainability, and to strengthen the foundations of regional social cohesion. After all, forming a community is very difficult without any ASEAN socio-cultural awareness. The governments of the ASEAN have also paid great attention to the task of enhancing functional cooperation in relation to social development with the aim of enhancing the quality of life of ASEAN citizens in order to strengthen their cultural identity and achieve a more sustainable use of natural resources, raising their standard of living,[431] and narrowing the development gap among all sectors of society, particularly women, youths and local communities. The ASCC covers various fields, such as education, culture, health, labour, the environment, social welfare, science and

[431] Such as higher education, job creation, more training, etc.

technology.[432] However, so far, it is the weakest pillar of the ASEAN Community, being more of an aspiration than an objective.

Section 2.5 ASEAN's external relationships

While working to integrate its own internal market, the ASEAN will develop friendly relationships and cooperation with external regional economies within Southeast Asia and East Asia.[433] The status of external parties in the conduct of the ASEAN's external relationships is explained in Article 44 of the ASEAN Charter, in which it is stated that "In conducting ASEAN's external relations, the ASEAN foreign Ministers Meeting may confer on an external party the formal status of Dialogue Partner, Sectoral Dialogue Partner, Development Partner, Special Observer, Guest, or other status that may be established".[434] The ASEAN has a relationship with its eleven dialogue partners, namely, Australia, Canada, China, the European Union, India, Japan, Republic of Korea, New Zealand, the United Nations, Russia and the United States of America (the USA).[435]

[432] Guettero, above 298, page 54

[433] ASEAN has taken several cooperation with regional countries both in Southeast Asia and East Asia. It has established the Asian Regional Forum, the East Asia Summit and ASEAN+3 partners with China, Japan and South Korea. Moreover, ASEAN has also established free trade agreements with China, Japan, Australia and New Zealand. From this point of view, ASEAN could increase the ASEAN relationship with its external partners in East Asia. See more Beginda Pakpahan, 'ASEAN regional stabiliser in Southeast Asia' East Asia forum (2012) http://www.eastasiaforum.org/2012/10/12/asean-regional-stabiliser-in-southeast-and-east-asia/ accessed 20 February 2016

[434] Article 44 of the ASEAN Charter provides for the designation of dialogue partners

[435] In intra-regional ASEAN context, the EU is the most important single market for four ASEAN countries (Singapore, Laos, Myanmar, and Vietnam), The United States was the largest market for there countries (Malaysia, Thailand and Cambodia, and Japan was the largest market for three countries (Indonesia, the Philippines, and Brunei) See, Michael G. Plummer and Reid W. Click, 'The ASEAN Economic Community and the European Experience' (2006) HWWI Research. There are external relations done through the framework of ASEAN with its 11 dialogue partners such as 1) ASEAN-Australia Dialogue Relations established in 1974; 2) ASEAN-New-Zealand Dialogue Relations established in 1975; 3) ASEAN-Canada Dialogue Relations established in 1977; 4) ASEAN-EU Dialogue Relations established in 1977; 5) ASEAN-Japan Dialogue Relations established in 1977; 6) ASEAN- Un Dialogue Relations established in 1977; 7) ASEAN-US Dialogue Relations established in 1977; 8) ASEAN- the Republic of Korea Dialogue Relations established in 1991; 9) ASEAN-India Dialogue Relations established in 1995; 10) ASEAN-China Dialogue Relations established in 1996; 11) ASEAN-Russia Dialogue Relations established in 1996, see ASEAN Secretariat's information paper http://www.asean.org/

It has recently entered into free trade agreements to work toward regional economic integration. This process of economic integration gives Southeast Asia the strength to engage more deeply with a number of its major regional trading partners,[436]including the United States, China,[437] Japan, India and Australia and New Zealand.[438]

Relationships with countries outside the region make regional integration more complex; for instance, some Asian countries, such as Korea, Singapore and Japan would not want such initiatives to undermine their relationship with the United States. Moreover, the ASEAN may particularly not want to exclude Australia and New Zealand in terms of the AFTA agreement because of their extensive trade ties. Moreover, the ASEAN is faced with slow trade integration with the addition of the poorer countries like Cambodia or Laos and the adoption of free trade between countries like Thailand and richer ones like Singapore. In addition, their frontier-free markets are problems for external countries in cases where the border has been closed due to problems among the members states. Although this does not have a direct effect, it has a non-direct effect on the country if the border is closed due to a lack of capacity to handle crises that have erupted in the ASEAN. Above all, the ASEAN needs to maintain its unity and engage with all external powers on an equal and transparent basis.

[436] The statistic of the number of exporting goods from ASEAN to its major FTA partners showed that China (63 %), Japan (48%), India (47%), Korea (47%) and a joint agreement with Australia and New Zealand (45%) see http://www.rappler.com/world/regions/asia-pacific/39481-apb-survey-asean-economic-integration

[437] Moreover, the external threat from the economic rise of the China and India, led to the decision to form the AEC in 2003. Both China and India are large countries with huge domestic markets, while ASEAN comprises 10 small markets, unless an ASEAN regional market could be developed.

[438] Joshua Kurlantzick, 'ASEAN's future and Asian integration' (2012) International institutions and global governance program http://www.cfr.org/asia-and-pacific/aseans-future-asian-integration/p29247 accessed 13 August 2015

Section 2.6 Conclusion

The ASEAN has both widened and deepened its economic activities[439] in an attempt to promote closer economic cooperation and enhance its efforts to move toward regional ASEAN integration. The ASEAN Economic Community was the final step in the ASEAN's regional economic integration plan, which was followed by the initiation of the Free Trade Agreement in 1992, the developed Free Trade Area (AFTA) and ASEAN Investment Area (AIA). The AFTA was established to reduce all the tariff barriers among the member states and bring more economic integration in order to form a competitive production base for both the regional markets within countries and the global market. The Asian Financial Crisis highlighted the need for regional integration and the expansion of the ASEAN's economic cooperation. The ASEAN community will include three pillars by the year 2020, namely, the ASEAN Security Community, the ASEAN Economic Community and the ASEAN Socio-Cultural Community. The ASEAN is moving forward with ASEAN connectivity, as can be seen from its achievements in the period from 1967 until the present day. The ASEAN has now achieved economic integration and regional integration and it will move forward to succeed in implementing the ASEAN Community as a whole by 2020. Firstly, the ASEAN should think about producing a good action plan to derive a strong commitment from all its members. The AFTA issues have become major and powerful topics for discussion to ensure the strengthening of economic integration for the ASEAN Community. The realisation of the aim of total economic integration and the emergence of the ASEAN community will greatly enhance the opportunities for business, trade and investment in terms of an increased volume of trade, more Foreign Direct Investment (FDI) and greater industrial capacity.[440] However, the ASEAN Economic Community still has a long way to go to become a single market with the free flow of goods, services, investment, capital and skilled labour.

[439] Teofilo C. Daquila, 'Economic regionalism in Southeast Asia: ASEAN at 45' (2012) 12th Asia-Pacific economic and business history conference 16-18 Feb 2012
[440] Yue, above 223, page 107

At this point in time, the ASEAN is faced with difficulties due to the number of gaps in the development of each country's economy based on their relative underdevelopment. The ASEAN has been one of the fastest-growing areas in the world and has adopted several free trade agreements in the last decade. Each FTA has been different because the members have had different objectives when they negotiated them. The successful management of the integration process has enhanced the procedures for regional trade with the improvement of the regulatory framework, as well as supporting the private sector to enable it to benefit from the AEC. The Free Trade Agreement as the first major step of ASEAN economic integration and the adoption of the ASEAN Trade in Goods Agreement (ATIGA) toward an ASEAN Economic community as the ultimate goal in 2020 demonstrate that the ASEAN is making every effort to improve and strengthen the rules that govern the implementation of integration schemes, to make it more attractive to regional investors, as can be seen in the trade agreement relationship between the ASEAN and external partners in both the areas of import and export. The ASEAN's largest export markets, namely, the United States, the European Union and Japan, are the largest sources of ASEAN imports. The ASEAN's economic integration has regained its upward trend and it is still making every effort to continue its cooperation with other countries.

As can be seen, the formation of the AFTA was one of the ASEAN's objectives to achieve change in the international political economy and a raise the influence of the business interests throughout the ASEAN region by taking steps to introduce regional trade liberalisation measures. The ASEAN has adopted economic cooperation in the form of more than 50 agreements aimed at covering trade and investment with the creation of an ASEAN Free Trade Area (AFTA), ASEAN industrial joint ventures and projects, the protection of investment, services and intellectual property, and cooperation in food and agriculture, fisheries and forestry, tourism, air services and energy. The agreement on Trade in Goods is the oldest of the ASEAN's trade agreements. Not only has the ASEAN established an Agreement on Trade in Goods, but also a Common Effective Preferential Tariff (CEPT) scheme.

The severity of the 1997-1998 economic crisis in the ASEAN was caused by a variety of domestic problems, such as a lack of transparency and uncontrolled capital flows. Furthermore, it had a devastating effect in the form of currency devaluation, bankruptcies and job losses, which led to a lack of confidence among foreign and domestic investors. Faced by the impact of a financial crisis, governments are required to focus more on domestic problems. However, there are some obstacles for the ASEAN to overcome in the event of trade disputes, which can create more tension among members. However, the initial period in the 1970s and 1980s showed the ASEAN's preference for regional economic cooperation, rather than deep integration, which reflects the reluctance of some ASEAN countries to undertake trade liberalisation. Also, the limitations of import have become increasingly apparent. Regional integration benefits the ASEAN Community based on higher levels of trade between member states and the ASEAN also tends to work closer together in order to eliminate trade barriers in smaller countries like Cambodia, Laos, Vietnam and Myanmar, which may make it easier for them to negotiate. Moreover, the creation of the ASEAN Economic Community improves its economic behaviour, which enables member states to gain a more effective regional market and become more competitive in the global arena.[441]

The establishment of the AEC in 2015 was not a static end-goal. The ASEAN has now begun the process of following the post-2015 agenda by pursuing a key priority of the ASEAN Economic Blueprint to strengthen its implementation. ASEAN member states will continue in significantly less than full regional economic integration for the foreseeable future, since some processes need to be continued to maintain its relevance in an evolving global economy, which requires the true commitment of every member. It is important to note that the AEC is one of the pillars of the ASEAN Community; therefore, ASEAN member states must ensure the progress of the ASEAN Community by not only focusing on the AEC but also the other two pillars, namely, the ASEAN Political-

[441] Hanmo, above 246, page 5

Security and the ASEAN Socio-Cultural Community in order to successfully implement the ASEAN Community as a whole.

Moreover, the AEC entails higher levels of trade between ASEAN members, which increases specialisation, efficiency, and consumption, and raises standards of living. This means the number of trade disputes will increase significantly as the ASEAN moves toward a higher level of economic integration and a creative and flexible trade dispute settlement mechanism will also be required to achieve the goal of the Association. As the ASEAN works toward its goal of building an ASEAN Economic Community, it needs to pay close attention to the context of trade dispute settlements within global organisations. Therefore, the development of trade dispute settlement mechanisms both by the World Trade Organisation (WTO) at a multilateral level and other regional international organisations will be examined in the next chapter.

CHAPTER III

TRADE DISPUTE SETTLEMENT MECHANISMS UNDER THE GATT AND THE WTO MULTILATERAL TRADING SYSTEM

Section 3.1 Introduction

Many developed and developing countries have concluded trade agreements creating free trade areas (also known as FTAs) or custom unions among themselves.[442] The advantage of these economic groupings is that a cooperating group of countries can achieve a better economic integration that helps them to strengthen their economic institutions. To mutually benefit from these trade arrangements and to promote greater economic cooperation, the contracting nations have to agree to liberalise their economies by increasing bargaining powers, expanding markets, and eliminating trade barriers among themselves, such as tariffs and non-tariff barriers.[443] The purpose of this chapter is to address common systems and procedures that are utilised in effective dispute resolution mechanisms in the multilateral trading system. Moreover, the parties need to be aware of their sovereign equality without any use of force, so as to promote peaceful dispute settlement.[444] An effective dispute mechanism can prevent trade conflicts and lay down the foundations for liberalisation commitments. The use of dispute settlement methods by states has increased dramatically in recent years. It involves the development of specialised rules, procedures related to the subject matter

[442] For a good definition of free trade area (FTA) and custom union, read chapter 2.

[443] Read more, European Bank 'regional trade integration: benefits and challenges' (2012) chapter 4 transition report http://tr.ebrd.com/tr12/index.php/chapter-4/regional-trade-integration-benefits-and-challenges accessed 1 January 2015

[444] Henry Bensurto, 'Role of International Law in Managing Disputes in the South China Sea' (2013) CSIS http://csis.org/files/attachments/130606_Bensurto_ConferencePaper.pdf accessed 1 January 2016

and the parties involved, and the creation of specialised forums to deal with separable categories of disputes.[445]

There are many problems that arise in the interpretation and implementation of different trade provisions. In accordance with the variable styles of treaty framing, most trade agreements are lengthy and wordy documents consisting of general terms that can be interpreted differently.[446] Consequently, interpretive problems, such as those arising from vagueness and ambiguity, inevitably come from the implementation of these agreements and lead to disputes among the member states. The other situation is when sovereign states seek to maximise their own advantages while providing minimal benefits to the others under the co-operation agreements, which also leads to trade disputes.[447] Moreover, there are trade disputes which arise as to whether a country has breached its trade agreement obligations. When this occurs, member states usually bring such disputes to the relevant trade organisation[448] to be resolved.[449] Economic actors need an effective dispute settlement procedure where both the state and other economic actors will be honoured in the breach.[450] There are three levels of trade governance: multilateral, regional and bilateral. These three levels also originate different models of dispute settlement provisions, which are arranged so as to enable the parties to discuss and find the best solutions to problems of multilateral, regional

[445] Anna T. Katselas, 'International arbitration vs. international adjudication for the settlement of disputes between states and international organisation' a seminar paper University of Vienna Law School (2001) http://ils.univie.ac.at/fileadmin/user_upload/legal_studies/student_paper/Anna_T._Katselas__International_Arbitration_vs._International_Adjudication_for_the_Settlement_of_Disputes_Between_States_and_International_Organizations.pdf accessed 11 January 2016

[446] General ideas of problem in interpretation, see Lawrence M. Solan, 'Linguistic issues in statutory interpretation' (2011) 254 Brooklyn Law school, Legal Studies, file:///Users/admin/Downloads/SSRN-id1950310.pdf accessed 1 March 2016

[447] Koesrianti, 'The development of the ASEAN trade dispute settlement mechanism: from diplomacy to legalism' (2005) A thesis submitted at University of New South Wales, page 103

[448] Trade organisation deals with the rules of trade between nations which helps to ensure trade flows, smoothly and predictably such as World Trade Organisation, ASEAN, NAFTA read more; http://www.trade.gov/mas/ian/referenceinfo/tg_ian_001874.asp

[449] Ibid, page 3

[450] Such as the EU through its supranational court system, and the NAFTA through its arbitration panels, which provide for dispute settlement. See, Stefano Inama and Edmund W. Sim, *The foundation of the ASEAN Economic Community: an institutional and legal profile* (Cambridge University Press 2015), page 130

integration and bilateral trade. As part of the multilateral trading system in the concept of the dispute settlement model, the purpose of this chapter is to address the common systems and procedures that are utilised in effective dispute resolution mechanisms. The General Agreement of Trade Tariffs (GATT)[451] and the World Trade Organisation (WTO) will provide an example of multilateral institutionalised trading systems. The regional perspective will be addressed in the next chapter of this thesis (chapter IV), which will focus on three major regional organisations: the European Union (EU), the Southern Common Market or (Mercado Común del Sur or MERCOSUR) and the North American Free Trade Agreement (NAFTA).[452] It should be noted that MERCOSUR has been included as an example in this thesis of an effective organisation that has resolved trade disputes. This is because MERCOSUR is similar to the ASEAN in the sense that member states are developing countries.

Under international law, the international adjudication regime is one of the structural regimes for resolving disputes between states. In the area of trade, since the 1940s, there has been an evolution from a power based-system to a rule-based system, which institutionalises a legalistic adjudication mechanism. The GATT dispute settlement mechanism is in evidence for settling disputes through diplomatic negotiations. The diplomatic negotiations were quite successful in resolving disputes satisfactorily between the GATT's contracting parties,[453] continually the World Trade Organisation's

[451] The GATT as it is an agreement not in the terms of 'organisations'. The GATT is included in this discussion as it was the predecessor of WTO. In this sense, it will provide more understanding in the development of ASEAN dispute settlement mechanism as the development of dispute settlement mechanism from the GATT into the WTO that also occur in ASEAN. Over year ago ASEAN countries played a small role as a collective in dealing with the GATT system which ASEAN trade is conducted. For example, in the Uruguay round, ASEAN put together a united approach on a number of issues as well as individual positions of each country. The relation between the GATT and ASEAN is the benefit of the Generalised System of Preferences scheme, which is an important exception to the normal GATT obligation of most-favoured-nation (MFN) treatment. It allows developing countries to be gotten preferential tariff treatment. Not only the GATT allows ASEAN countries to be accorded preferential tariff treatment, but the GATT also controls many aspects of the trade relationship between ASEAN and third countries.

[452] At the regional level, the European Union, the NAFTA and the MERCOSUR are provided more information in Chapter four.

[453] Geert De Baere and Jan Wouters (ed.), *The contribution of international and supranational courts to the rule of law* (Edward Elgar Publishing 2015), page 181

(WTO) rules-based system for settling disputes through adjudication.[454] The creation of reliable dispute settlement mechanisms has been essential to utilise and create predictable trading arrangements which meet the expectations of the member states.

Following this introduction, section two of this Chapter discusses types of trade agreements, followed by the characteristics of the trade dispute settlement mechanism in global terms, as describes in section three. In addition, it deals with the GATT system of settling trade disputes, and provides an analysis of multilateral dispute settlement mechanisms by focusing on the WTO. To assess the effectiveness of the dispute settlement system of the WTO, it is necessary to evaluate the compatibility of the operation of the WTO dispute settlement system, the concept of which is briefly outlined, with particular emphasis on the overall time taken by the various stages. The final section makes concluding comments on the relative efficacy of the GATT and the WTO dispute settlement systems. With regard to the above discussion, the chapter will only analysis important features that will be used for a comparison in the later chapters with the mechanisms that have been adopted by the ASEAN[455].

Section 3.2 The variable types of trade agreement

The definition of a 'trade agreement' is a formal agreement between two or more countries which improves trade with each other. Some trade agreements are signed among countries with similar levels of economic development, while other trade agreements are signed between countries with different levels of development - developed and underdeveloped economies. Trade agreements aim to bring a balance

[454] Andrea Schneider, 'Getting Along: the evolution of dispute resolution regimes in international trade organisations' (1999) 20(4) Michigan journal of international law http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1295562 accessed 1 January 2016

[455] For further detailed discussion ASEAN in today's context regarding to the ASEAN trade dispute settlement read more in Chapter V of the thesis

between flexibility and commitment.[456] Countries around the world have increasingly embraced trade agreements as contractual arrangements concerning their trade relationship at the bilateral, regional or multilateral level. Each of these creates international obligations at the respective level that must accord with the obligations existing at the other levels. The following section of this part will consider the obligations at each of these levels.

3.2.1 The bilateral level

Bilateral trade agreements give preference to certain countries in commercial relationships, facilitating trade and investment between the home country and the partner country by reducing or eliminating tariffs and import quotas between them. A bilateral trade agreement is an exchange agreement between two nations that gives each party a favoured trade status to expanded access to each other's markets in the form of the removal of trade barriers, such as tariffs, quotas and other forms of trade-related concessions. Examples of a bilateral agreement can be seen in a free trade agreement (FTA) or in a bilateral investment treaty (BIT).[457] Furthermore, the agreement of bilateral trade can take place in commercial relationships, trade facilitation and financial investment. The benefits of bilateral trade agreements are their tendency to promote structural reform, stability and security in the partner countries. The goal is to give them expanded access to each other's markets and to increase economic growth. Bilateral trade agreements themselves are easier to negotiate than those at a multilateral level, the former being more likely to be created between two countries to work together and achieve outcomes between them. Experience has shown that the benefits of a liberalised trade agreement at a bilateral level can come into effect more

[456] World Trade report 2009 section II-B flexibility in trade agreements

[457] Trade organisation and impact on what type of dispute resolution regime read more, Andrea Schneider, 'Getting Along: the evolution of dispute resolution regimes in international trade organisations' (1999) 20(4) Michigan journal of international law http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1295562 accessed 1 January 2016 page 741-743

rapidly. One example of bilateral co-operation is the ASEAN bilateral trade agreements with third countries, so-called 'dialogue partners' relationships with Australia, Canada, Japan and the United States.[458]

3.2.2 The regional level

A regional trade agreement is defined as a trade agreement entered into between two or more partners, which are formed with the objective of reducing barriers to trade. Among the regional trade agreements, the large majority of them are integration agreements. The level of regional trade integration can be broadly divided into five categories: Preferential Trade Agreements, Free Trade Agreements, Customs Unions, Common Markets and Economic Unions.[459] Regional trade agreements cover both trade in goods, regarding the meaning of commitments to tariff, non-tariff barriers, and trade in services, and they also deal with issues such as the protection of intellectual property.[460] Safeguard and trade remedy provision[461] areas are likely to cause disputes.[462]

Bilateral and regional trade agreements are sometimes referred to as preferential trade agreements, because they are only beneficial to the particular states or countries to which they relate.[463] The clearest examples of Trade Agreements are the

[458] More information of ASEAN dialogue partners read chapter 2 ASEAN and the external relation.
[459] For more explanation of level of economic integration read more chapter 2 pages 84-85
[460] Regional Economic Integration (FTA or Customs Union) also covers with the context of 'fairness' of how the regional organisation agreement works for a given country are evitable. Read more, Blake Wand, 'Beyond multilateralism and regionalism- analysis of the review process of global trade dispute resolution' (National Taipei University) http://www.iilj.org/gal/documents/V5.Wang.pdf accessed 4 January 2016
[461] Safeguard and trade remedy provision can be caused disputes for example, the WTO safeguard measure and dumped imports goods
[462] Blake Wang, 'Beyond multilateralism and regionalism- analysis of the review process of global trade dispute resolution' (National Taipei University) (2009) 5th Global Administrative Law Seminar, Viterbo Italy on 12-13 June 2009 http://www.iilj.org/gal/documents/V5.Wang.pdf accessed 4 January 2016
[463] Ibid, page 1

European Union,[464] the ASEAN Free Trade Area, and the North American Free Trade Area (NAFTA)[465]. MERCOSUR is an example of a Customs Union[466]. These explanations of the regional trade agreement of the European Union, the NAFTA and the MERCOSUR will be analysed in chapter four.

3.2.3 The multilateral level

The nature of the multilateral level framework is to regulate trade and investment over all the parties with the same rules for various political and economic factors. Bilateral and regional trade agreements are a feature of a global trading system alongside multilateral trade agreements.[467] The first multilateral trade agreement was the General Agreement on Trade and Tariff in 1947 (known as GATT).[468] The GATT created a multilateral trading system which is now promoted by the WTO and which has resulted in the removal of trade barriers around the world and the creation of a global market place.[469] The WTO, created in 1995, is the largest type of trade organisation at the multilateral level of the global treaties, which has the Dispute Settlement Understanding designed to provide a dispute settlement procedure for almost all the Uruguay Round texts.[470] The judicial function is performed by the dispute settlement

[464] The example of the European Union as an economically successful trade agreement which is no doubt an excellent example for further integrated region such as Customs Union, Single Market, and Common Market.
[465] The North American Free Trade Agreement was entered into between Canada, Mexico, and the United States of America and came into effect on 1 January 1994. Furthermore, NAFTA chapter 19 and 20 also sets out a good model of provisional design for many FTAs.
[466] More definition of Custom Unions read chapter 2 section 2.4.1.
[467] See, understanding on Rules and Procedures Governing the Settlement of Dispute (Understanding) art 3 para2
[468] GATT was signed by 23 nations in Geneva on 30 October 1947 and took effect on 1 January 1948. Later, in the Uruguay Round Agreements GATT was signed by 123 nations in Marrakesh on 14 April 1994, which established the World Trade Organisation (WTO) on 1 January 1995. The original GATT text (GATT 1947) is still in effect under the WTO framework, subject to the modifications of GATT 1994. For the text of the GATT see, https://www.wto.org/english/docs_e/legal_e/gatt47_e.pdf
[469] WTO Secretariat, *World Trade Organisation: a handbook on the WTO dispute settlement system* (Cambridge University Press 2004), page 12
[470] Wang, above 462, page 1

under the WTO and is one of the features of the multilateral trade system, or as it has also been called 'the back bone' of the multilateral trading system.[471]

Bilateral and regional trade agreements have increasingly become a prominent feature of international trade over the last two decades. Statistics that are available on the WTO website show that 320 bilateral and regional trade agreements were in force in July 2007, and by 2010 to February 2017, it is estimated that this number had increased to approximately 635.[472] The proliferation of bilateral and regional trade agreements in recent years has resulted in a significant debate as to the effect that ´regionalism' will have on the multilateral trading system. These debates raise questions beyond the subject specific area of trade law. Whether or not regionalism brings an advantage or a disadvantage point, instead members should be looking at the way that bilateral and regional trade agreements operate and the new economic opportunities that are arising as a result.[473]

The multilateral principles of WTO trading system rules were developed to support the regulation of international trade and investment, which are not the only elements of the international legal framework. Sometimes it was adopted in terms of the international legal framework at the regional level among different groupings of countries who wanted to develop regional rules of international law to govern their relations.[474] If the negotiations at the multilateral level fail, then the nations will start to discuss the possibility of a bilateral agreement instead.

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[471] Marc Busch and Eric Reinhardt, 'The Evolution of GATT and WTO dispute settlement' http://faculty.georgetown.edu/mlb66/TPR2003_Busch_Reinhardt.pdf accessed 20 December 2015

[472] Statistics that are available on the WTO website visit; https://www.wto.org/english/tratop_e/region_e/region_e.htm and https://www.wto.org/english/tratop_e/region_e/regfac_e.htm#top

[473] Director-General Pascal Lamy speaking at the Conference on "Multilateralising Regionalism" on 10 September 2007 in Geneva – information sourced from the WTO website (http://www.wto.org/english/news_e/sppl_e/sppl67_e.htm).

[474] Paul J. Davidson, 'ASEAN: the legal framework for its trade relations' (1994) 49(3) international journal XLIX, page 588

Section 3.3 The general characteristics of the global trade dispute settlement mechanism

There are two types of peaceful settlement for international disputes. The first type is the settlement by negotiation and agreement with reference to the relative power of the parties. The second type is the settlement by negotiation or decision with reference to norms or rules that are agreed by both parties.[475] These two types of settlement can be implied as 'the power-based system' and 'the rules-based system' respectively. The power-based system means that disputes are addressed through government-to-government negotiation. The outcomes of these negotiations can be the relationship between two states, both in the areas of economic relations, as well as non-economic relations.[476] Settlement of power-based disputes takes place under the power disparity.[477] In contrast, the rule-based system is a system that gives participating members of an international organisation or individual nation-states, the opportunity to establish a dispute settlement regime by referring to rules and norms. A rule-based system is not related to the power position of resources of the disputant. The application rules should be the framework for settlement.[478]

There are many tribunals that have set out their own rules and procedures for settling disputes. The key procedures of those different tribunals reflect their different characteristics, such as their scope, *ad hoc* tribunals, or the subject matter of the dispute.[479] In the international trade regime, there are six legal factors involved in classifying a number of key procedural issues that have arisen and that are central to the effectiveness of functioning of trade dispute settlement mechanisms. These six factors are jurisdiction, institutional features, binding effects and enforcement, standing of non-

[475] Wang, above 462, page 2
[476] Rachel Brewster, 'Rules-based dispute resolution in international trade law', (2006) 92(251) Virginia Law Review, 251
[477] Wang, above 462, page 2
[478] Ibid, page 2
[479] The subject matter of the dispute may raise issues of jurisdiction, territorial claims, diplomatic protection or trade conflicts

state actors, enforceability of awards in national courts, and transparency of proceedings. Other concepts of dispute settlement mechanisms effectiveness are the need for them to be inexpensive mechanisms, particularly in the context of developing countries. The cost of resorting to dispute settlement proceedings should be substantially lower than the cost of tolerating the disputed measures.[480]

Oran Young and Marc Levy discuss that within the broadest conceptualisation of regime effectiveness there is a need to distinguish between several different types of effectiveness, including problem solving, legal[481], normative[482] and the political aspect. A 'satisfactory outcome'[483] also leads to effectiveness in the settlement of disputes. Furthermore, the demand for greater effectiveness of dispute settlement mechanisms means the rapid growth of the number of cases which are considered under that dispute settlement system. This section will explain in general terms, the effectiveness of legal mechanisms, while the effectiveness of the dispute settlement mechanisms of the GATT and the WTO will be mentioned wherever applicable below.

The Effective legal mechanisms [484] for settling disputes consist of the performance of two essential functions. Firstly, these mechanisms can be used to manage disputes by providing norms of conduct and by clarifying the claims, rights, entitlements, and obligations of the parties in a way that is designed to prevent disputes. The use of an impartial legal system for trade dispute settlement helps to prevent a trade problem, such as those arising from trade barriers, tensions arising from political

[480] Wang, above 462, page 92
[481] Legal effectiveness refers to compliance
[482] Normative effectiveness refers to fairness or justice and participation
[483] Keisuke Lida explained the categories of a satisfactory outcome as being that the parties have implemented the rulings and the parties have settled the dispute between themselves, with or without adjudication. Read more in Keisuke Lida, 'Is WTO dispute settlement effective?' Global Governance 10 (2004) 207
[484] The legal mechanisms should be referred to the function of a dispute settlement mechanism within the context of a trade agreement. These trade dispute settlement mechanisms may differ in various type of dispute settlement mechanisms depending on the basis of the substantive standards and principles agreed by those parties and stated in the treaty.

roles[485] and from being affected by other non-trade considerations. Secondly, these mechanisms help to provide a sufficient basis for the economic players to engage in economic activities at the international level.[486] The features of trade dispute settlement mechanisms required for them to operate effectively consist of being speedy, effective and inexpensive. The existence of a speedy process helps to determine the outcome quickly and also to avoid lengthy interruptions. Normally, such an expeditious process involves relatively simple cases with a small economy.[487]

The concept of the transparency of a dispute resolution system is important in the dispute resolution process. Greater transparency in dispute resolution will bring greater confidence to its member states that the systems have the ability to settle disputes fairly.[488] Transparency refers to the clarity of procedures and decisions, and it is related to fair processes, which means that the procedures and decisions are made public due to the freedom of information.[489] Transparent rules and clear decisions encourage states or private actors to get involved in dispute resolution regimes. Overall, transparency increases the legitimacy of the regime, and it clearly contributes to the effectiveness and the legitimacy of the international organisations regime.[490] Confidentially negotiated agreements and arbitration awards should be thought of as well in order to encourage regularly published tribunal decisions. The level of transparency of the dispute resolution regimes can be defined in three ways:[491] publicity, precedent[492] and predictability.[493] Publicity describes the level of public knowledge about the dispute resolution regimes. For example, when results are

[485] The interpretation of compliance with the obligations established under economic integration agreements has tended to be treated as a problem. In some cases, the settling of trade disputes was originally designed as processes of political consultation.
[486] 'Regional institutions and dispute settlement mechanisms' in *Beyond Border the new regionalism in Latin America* (Economic and social progress in Latin America 2002), page 91
[487] Ibid, page 92
[488] Schneider, above 454, 703.
[489] Ibid, page 703
[490] Ibid, pages 709-710
[491] Ibid, page, 709
[492] Precedent refers to the ability of dispute resolution regimes to provide persuasive or binding authority.
[493] The predictability of a dispute resolution regime is very important to its user because it creates confidence in the system.

published, the processes are clear and the decisions are explained, so that member states are more likely to comply with those rulings. Costs and delays bring out the disadvantages of enhanced transparency. Such costs are covered in the process of making information available to be published, and these might become substantial if the hearings are broadcast. Delays can happen, for instance, in posting information on a website, or delays may occur in translating documents. The issue of transparency can apply in a number of ways, such as transparency of procedures, transparency of decisions and decision making processed in dispute settlement mechanisms.

Types of enforcement and punishment are also one of the important factors in creating the dispute resolution regimes. Enforcement measures based upon its compliance record also bring out the effectiveness of any international organisation. Particularly, in the area of trade, it has long been argued that having a system of enforcement is important to promote trade.[494] The dispute resolution regimes provide opportunities for enforcement at three different levels. The first level is when the trade agreement includes no formal adjudicatory procedure to remedy non-compliance. Any dispute about compliance would require additional negotiations or a new trade agreement. The second level is when the trade agreement has created some body (government) to hear disputes over non-compliance depending on states or private actors, which may have the ability to bring cases under the trade agreement to enforce the agreement. The third level of enforcement is that of states or private parties who can bring cases for non-compliance with a decision of the dispute settlement body.[495] Dispute resolution also includes types of punishment to enforce trade agreements. The penalty or threat must be sufficiently plausible to ensure the credibility, and thus the effectiveness of the dispute settlement system.

[494] Schneider, above 454, page 711
[495] Ibid, pages 710-711

Section 3.4 Trade dispute settlement mechanisms at the multilateral level

3.4.1 The General Agreement of Trade Tariffs (GATT)

3.4.1.1 An overview of the dispute settlement regime in the General Agreement of Trade Tariffs

The General Agreement on Tariffs and Trade (GATT) is the multilateral agreement providing the legal framework for the regulation of international trade, and was limited to trade in goods.[496] In the preamble of the GATT, the goals were to pursue the 'substantial reduction of tariffs and other barriers to trade and also eliminate the discriminatory treatment in international commerce among themselves.[497] The GATT (1947)[498] was originally envisioned as a part of the Havana Charter for the creation of the International Trade Organisation (ITO). [499] It became the centre point for international action in the field due to the lack of ratifications of the Havana Charter. The GATT (1994) currently forms an integral part of the WTO without having passed through significant changes. GATT was the heart of multilateral trade in international agreements, although it is not an organisation *per se*.[500] GATT was never intended to be an independent international organisation. Instead it was expected that GATT would be

[496] Peter Van den Bossche and Werner Zdouc, *The law and policy of the world trade organisation: text, cases and materials* (3th ed.) (Cambridge University Press 2013), page 42

[497] The preamble of the GATT see, https://www.wto.org/english/docs_e/legal_e/gatt47_e.pdf

[498] The Articles of the General Agreement on Tariffs & Trade (GATT) were originally agreed in 1947 (referred to as GATT 1947) and subsequently, with some revisions, in 1994 (referred to as GATT 1994) as part of the Uruguay Round negotiations that created the World Trade Organization (WTO).

[499] The formation of an International Trade Organisation (ITO), during a series of negotiations at establishing the ITO, the discussion were followed; i) the draft of an ITO charter; ii) prepare chain of schedules of tariff reductions and iii) prepare a multilateral treaty containing general principles of trade, namely the General Agreement on Tariffs and Trade (GATT). See, Mitsuo Matsushita, Thomas J. Schoenbaum and Petros C. Mavroidis, *The World Trade Organisation: Law, practice, and policy*, (Oxford University Press 2003), page 2

[500] Locknie Hsu, 'Application of WTO in ASEAN' (2003) Singapore http://www.aseanlawassociation.org/docs/w7_sing.pdf accessed 20 December 2015

subsumed under the umbrella of the ITO.[501] Consequently, the General Agreement does not provide an organisational structure for GATT, all of the contracting parties[502] may, in certain circumstances, meet and take action,[503] where conducted in a special time limited round of negotiations covering a wide range of issues.[504] The GATT Dispute Settlement is a combination of the distinction between a ruled-oriented approach based on norms and rules through the agreement between the parties prior to the dispute, and the power-oriented approach, focused on negotiations with explicit or implicit agreement relying on the power of both the disputants.[505] Article XXIII of the GATT 1947 and the Dispute Settlement Understanding (DSU) of the WTO provide a platform to which countries bring their grievances, claiming that other participating countries have violated the agreed-upon rules-of-trade.[506] There is a slight difference between the rule-oriented and the power-oriented approaches, which is the formality of the mechanism. This is because a formal mechanism acts as an institutional structure aimed at minimising disputes through a rule-based system, while an informal mechanism acts as an institutional mechanism through power negotiations or consensus. Panels were created in 1952, which have duties for resolving the disputes to help them become more adjudicatory. GATT's procedures operated on customary principles until 1979. It has continued to follow negotiation and consultation procedures after the Tokyo

[501] By the end of 1947 negotiations on tariff reduction had been completed and states were enjoyed the benefits of free trade without waiting for the formal establishment of the ITO. Moreover, the ITO Charter never entered into force because the US Congress did not approve its ratification this means the GATT became the default agreement governing international trade due to the ITO never could into existence. See, ibid, 371-373 and Mitsuo Matsushita, Thomas J. Schoenbaum and Petros C. Mavroidis, *The World Trade Organisation: Law, practice, and policy*, (Oxford University Press 2003), page 3. See also, Koesrianti, 'The development of the ASEAN trade dispute settlement mechanism: from diplomacy to legalism' (2005) A thesis submitted at University of New South Wales, page 118

[502] Contracting parties means the countries that were members of the GATT The nations signing the GATT were: Australia, Belgium, Brazil, Myanmar (Burma), Canada, Ceylon, Chile, China, Cuba, Czechoslovakia, France, India, Lebanon, Luxembourg the Netherlands, New Zealand, Norway, Pakistan, Southern Rhodesia, Syria, South Africa, the United Kingdom, and the United States.

[503] William J. Davey, 'Dispute settlement in GATT' (1987) 11(1) Fordham international law journal, 52

[504] Peter Van den Bossche and Werner Zdouc, *The law and policy of the world trade organisation: text, cases and materials* (3th ed.) (Cambridge University Press 2013), page 87

[505] Niklas Swanstrom, 'Regional Cooperation and conflict management: lessons from the Pacific Rim' (2002) the department of peace and conflict research Uppsala University, 25

[506] Chad P. Bown, 'The economics of trade disputes, the GATT's Article XXIII, and the WTO's dispute settlement understanding' (2002) 14 Peterson Institute Journal of international economics and politics http://papers.ssrn.com/sol3/papers.cfm?abstract_id=342555 accessed 1 December 2015

Round.[507] If disputes cannot be resolved, the parties could request the establishment of a panel to hear the dispute and to decide on a conclusion regarding the validity measure under the GATT 1947. The GATT council has approved the panel report in order for it to have legal effect.[508] The Tokyo Round of trade negotiations has given the GATT dispute settlement function a new and added importance. Not only have the procedures for dispute settlement changed, but the types of issues which are likely to be considered by the dispute settlement panels have been significantly expanded. The Tokyo Round laid down a new GATT authority to resolve disagreements among its members.[509]

When the GATT was signed, the intention was that it would be a provisional arrangement until the establishment of an International Trade Organisation (ITO) as a specialised agency of the United Nations.[510] GATT, therefore, was the only existing multilateral trade agreement that governed international trade between 1948 and 1995 (when the WTO was established).

Since its inception, the GATT has been designed to promote the gradual dissolution of trade barriers between the major mercantile countries of the world.[511] In the early years of GATT, most of the progress in reducing trade barriers focused on trade in goods and in reducing or eliminating the tariff levels on those goods.

The Contracting Parties were governments, which applied the Agreement, either as original contracting parties of the 1947 GATT, or those who had acceded to it thereafter. GATT, however, dealt only with trade in goods.[512] The GATT dispute

[507] Palle Krishna Rao, *WTO text and cases* (Excel Books 2008), pages 3-5 see also, Patrick Specht, 'The dispute settlements of WTO and NAFTA-analysis and comparison' (1998) 27(57) GA. J. Int'L&ComP. L. http://digitalcommons.law.uga.edu/cgi/viewcontent.cgi?article=1314&context=gjicl accessed 1 November 2015

[508] Ibid, 75

[509] Palle Krishna Rao, *WTO text and cases* (Excel Books 2008), page 3 and Bown, above 506

[510] The ITO Charter was agreed in Havana in March 1948, but was never fully ratified and so the International Trade Organisation never became operational.

[511] Donald E. Dekieffer, 'GATT dispute settlements: a new beginning in international and U.S. trade law', (1980) 2(2) Nw. J. Int'L.&Bus page 317

[512] While the GATT 1994 covers among other matters: trade in services and some aspects of foreign direct investment and intellectual property rights, agreement on agriculture and textiles.

settlement system was intended to solve two types of disputes that may arise among GATT members: first, claims by one party that another has violated the provisions of the General Agreement and, second, objections by one party to practices of another that are not prohibited by their effects on the objecting party. These types of disputes are relatively different, and the role of the dispute settlement system changes, depending on which type of dispute is under consideration.[513] Legal scholars, such as Kenneth Dam have added that to maintain a balance of obligations, the GATT system is structured so that countries that are injured by rule violations are authorised to threaten retaliation under the dispute settlement mechanism. The main and principle mechanism for dealing with these problems was diplomatic consultation, which would have been a less confusing and more user-friendly legal instrument without too strict a legal ruling.[514] Later the GATT mechanism developed into a more rule-based mechanism, as explained in the Dispute Settlement Understanding (DSU) of the WTO. From this point of view, this type of transformation is relevant to the ASEAN, and more explanations will be provided in Chapter 5 of the ASEAN dispute settlement mechanism.

The General Agreement contains many provisions designed to resolve trade disputes between its contracting parties. The GATT contains only two formal provisions dealing with dispute resolution - Article XXII and XXIII. It provides initial rules for consultations between the contending parties. If the parties are unable to settle their dispute through negotiations, they may resort to GATT Article XXIII, which is GATT's basic dispute settlement mechanism. GATT principles on dispute settlement are

[513] Of these 254 trade disputes, over 81 percent involve such a claim: a country has violated the GATT rules in order to provide excessive import protection. The most common infractions were countries using quantitative restrictions to limited trade (violations of Article XI), but countries have also failed to observe the rules on MFN (Article I), national treatment (Article III), subsidies (Article XVI) or the various Codes of the Tokyo Round, or have failed to implement lower negotiated tariffs thereby nullifying expected benefits (Article II). The other 48 cases primarily involve the use of subsidy policies for export promotion (violating Article XVI) read more Chad P. Bown, 'The economics of trade disputes, the GATT's Article XXIII, and the WTO's dispute settlement understanding pages 2-3

[514] Peter Van den Bossche and Werner Zdouc, *The law and policy of the world trade organisation: text, cases and materials* (3th ed.) (Cambridge University Press 2013), page 25

explained in Articles XXII[515] on Consultation and XXII[516] on Nullification or Impairment, as discussed below.[517]

3.4.1.2 Effectiveness of the GATT

The implementation of the GATT procedure was desultory at best.[518] Contracting parties relied upon good faith among their trading partners. They also regarded the GATT itself as being self-enforcing. Some critical scholars have expressed the opinion that the GATT Dispute Settlement system has been reasonably successful in resolving recent trade disputes. Its effectiveness however, has been limited by several

[515] 1. Each CONTRACTING PARTY shall accord sympathetic consideration to, and shall afford adequate opportunity for consultation regarding, such representations as may be made by another contracting party with respect to any matter affecting the operation of this Agreement. 2. The CONTRACTING PARTIES may, at the request of a contracting party, consult with any contracting party or parties in respect of any matter for which it has not been possible to find a satisfactory solution under paragraph 1.

[516] 1.If any CONTRACTING PARTY should consider that any benefit accruing to it... under this Agreement is being nullified or impaired **...**as the result of (a) the failure of another CONTRACTING PARTY to carry out its obligations under this Agreement, or (b) the application by another CON- TRACTING PARTY of any measure, whether or not it conflicts with the provisions of this Agreement, or (c) the existence of any other situation, the contracting party may, with a view to the satisfactory adjustment of the matter, make written representations of proposals to the other contracting party or parties which it considers to be concerned. Any contracting party thus approached shall give sympathetic consideration to the representations or proposals made to it.
2. If no satisfactory adjustment is effected between the contracting parties concerned within a reasonable time .... the matter may be referred to the CONTRACTING PARTIES. The CONTRACTING PARTIES shall promptly investigate any matter so referred to them and shall make appropriate recommendations to the contracting parties which they consider to be concerned, or give a ruling on the matter, as appropriate ... If the CON- TRACTING PARTIES consider that the circumstances are serious enough to justify such action, they may authorize a contracting party or parties to suspend the application to any contracting party or parties of such concessions or other obligations under this Agreement as they determine to be appropriate in the circumstances. If the application to any contracting party of any concession or other obligation is in fact suspended, that contracting party shall then be free ...to give written notice to the Executive Secretary to the CONTRACTING PARTIES of its intention to withdraw from this Agreement.

[517] Patrick F.J. Macrory, Arthur E. Appleton and Michael G. Plummer (ed.), *The World Trade organisation: legal, economic and political analysis volume I* (Springer 2005), page 169. See, also, Sherry M. Stephenson, 'ASEAN and the multilateral trading system' (1993-1994) 25 Law and policy in International Business, page 446

[518] It was generally viewed as effective during the first decade of GATT's existence, but during the ensuring twenty years, its reputation declined significantly. Nicholas Perdikis and Robert Read (ed.), The WTO and the regulation of International trade recent trade disputes between the European Union and the United States, (Edward Elgar 2005), page 33

weaknesses[519], and there are a number of suggestions for its improvement. Dam has suggested that trade disputes may occur because GATT's dispute settlement mechanism is ineffective in preventing countries from violating their obligations.[520] On the other hand, GATT dispute settlement lacks not only 'teeth', but a consistent set of rules more generally, in the opinion of by Marc L. Busch and Eric Reinhardt.[521]

Some scholars, such as William have stated that the GATT principle was ineffective. First, the original 1947 GATT agreement was resolvable only through negotiations or as a diplomatic model. Sometimes, it stressed judicial solutions to the problems. Second, the system has become irrelevant, since the GATT article was brief and did not specify clear objectives and procedures as mechanisms for resolving disputes among the contracting parties. This is because it was not used[522] and it was impractical to expand its usage.[523] Third, the system was inefficient because of the long delays and because of its inability to ensure the implementation of its decisions.[524] One of the primary complaints about the GATT dispute settlement system has been the supposedly excessive amount of time that it takes to process a dispute.[525] This excessive amount of time can be explained in terms of three situations. They are (1) the delays in appointing a panel, (2) the delays in the panel's consideration of a case, and (3)

[519] Professor Jackson lays out the 'birth defects' of GATT in detail: 1) 'provisional' GATT application; 2) flaws in amending provisions; 3) the relationship to GATT of many side agreements; 4) the relationship of the GATT treaty system to domestic law (transparency); 5) problems related to 'contracting party status'; 6) 'consensus approach' of decision-making mechanism including dispute settlement processes see John H. Jackson,' Legal problems of International economic relations' (3d ed. 1995)

[520] As an example, he states, and even retaliation itself may prove to be a relatively weak sanction when the injured contracting party is not a major customer for a major product of the offending contracting party. Many less-developed countries have felt powerless to influence the restrictive commercial policies of developed countries because they did not consume enough of any of the latters' exports. Read more in Kenneth W. Dam, 'The GATT law and International economic organisation' (1970) , page 368.

[521] Marc L. Busch and Eric Reinhardt, 'Transatlantic trade conflicts and GATT/WTO dispute settlement' (2002) Conference on dispute prevention and dispute settlement in the transatlantic partnership European university institute/Robert Schuman Centre, Florence Italy http://faculty.georgetown.edu/mlb66/florence.pdf accessed 1 December 2015

[522] Moreover, lack of use in GATT dispute settlement has also pointed as problems. There were some criticisms against the GATT dispute settlement system prior to the Tokyo Round was that it was used by few nations.

[523] Such as that settlement relied upon the creation of ad hoc processes.

[524] Davey, above 503, page 65

[525] Ibid, page 83

the delays caused by the failure of the Council to adopt panel reports.[526] In relation to the adoption under the Council, there is no guarantee that a respondent, whose measures are found to be inconsistent with the GATT, would comply with the GATT, or pay compensation to the complaining party or parties. There is also no guarantee for the Council to authorise the complaining party or parties to withdraw their retaliation. The lack of a reviewing body often led to inconsistent decisions.[527] Besides, there is no procedure for the GATT Council to ensure the monitoring of the action or inaction of a party whose measures are inconsistent with the GATT, unless the initiative of the party that challenged the measures is prompted.[528]

Delays and uncertainly in the dispute settlement process are given as the cause that there was no right to a panel, and no hard time constraints on any aspect of the proceedings. The delay in establishing a panel and its direct effects on the adoption of the panel report would be blocked and delayed and thus produce partial non-compliance with a panel ruling.[529] Additionally, there were no time limits imposed during the panel process, and the sanctioning system in the case of non-compliance did not work effectively with the panel report. On the one hand, the quality and neutrality of a panel is sometimes still questioned, stated Robert Read.[530] He added that there was no mechanism to survey the implementation of the panel reports, and sometimes this meant that panel reports were ambiguous and inconsistent.[531] Furthermore, the contracting countries ignored the findings of panels, leading to a lack of confidence. It had no mechanism for reviewing legal issues reported by panels, and did not provide

[526] The DISC case is an example which it took almost three years to agree on the composition of a panel and the Council did not adopt the panel's report for another five years read more Davey, above 58, 84 and For further explanation about DISC case read more in John H. Jackson The jurisprudence of GATT and the WTO (Cambridge University Press 2000), pages 115-116

[527] Patrick F.J. Macrory, Arthur E. Appleton and Michael G. Plummer (ed.), *The World Trade organisation: legal, economic and political analysis volume I* (Springer 2005), page 168

[528] Steve Suranovic, 'The dispute resolution mechanism' International economic study center, George Washington University http://internationalecon.com/wto/ch2.php accessed 2 December 2015

[529] Robert Read, 'Trade dispute settlement mechanisms: the WTO dispute settlement understanding in the wake of the GATT' (2005) Lancaster University working paper 2005/012 http://www.pf.uni-lj.si/media/wto.dispute.pdf accessed 1 December 2015

[530] Ibid, page 2

[531] Specht, above 507, pages 75-76

any guarantee for the disputes to adapt to the decisions made by the unmodified panels.[532] The effectiveness and credibility of the GATT dispute settlement system was being very seriously questioned. Moreover, the GATT system is ambiguous concerning the role of consensus. The consensus requirement was one of several weaknesses of the system leading to growing frustration with its failure to resolve trade conflicts among GATT members, leading to delays and uncertainty.[533] The failure of the GATT system is its failure to enforce a satisfactory resolution.[534] To solve many of the GATT's weaknesses, the WTO emerged during the Uruguay Round to the GATT, with a more legalistic dispute settlement system which will be explained below.

3.4.1.3 The process of General Agreement of Trade Tariffs dispute settlement

a) Consultation

The first step in the GATT dispute settlement process consists of consultations concerning the alleged GATT violation[535] among the countries that are party to the dispute[536] or in cases where the parties felt they had been wronged by another member's policies. Diplomatic consultation under GATT utilised non-adjudicative mechanisms to solve disputes. The dispute settlement system was founded upon the principle of consensus between GATT contracting parties, i.e. at a meeting of all the contracting parties, and it was resolved with a basic ruling from the chairperson for that session of the contracting parties, but was not required to make a legal judgment.[537] The serious disputes would still be settled on an *ad hoc* basis by the parties themselves. This

[532] Read, above 529, pages 1-2, 70-71
[533] ibid, pages 71-72
[534] Ibid, page 2
[535] The violation of the GATT are as varied as the ingenuity of traders seeking commercial advantage Legal scholars such as Dam (1970) have emphasised that the GATT system is structured so that countries that are injured by rules violations are authorised to threaten retaliation under the dispute settlement mechanism so that the agreements may maintain a balance of obligations.
[536] I.e. the countries that were members of the GATT
[537] Nicholas Perdikis and Robert Read (ed.), The WTO and the regulation of Internatioanal trade recent trade disputes between the European Union and the United States, (Edward Elgar 2005), page 32

required both parties to a trade dispute to accept the outcome of any finding. GATT[538] might be invoked with respect to any matters arising from the application of those provisions of Article XXIV[539] relating to customs unions, free trade areas, or interim agreements leading to the formation of a customs union or free trade area.[540]

When a dispute arose between contracting parties, in the event of disputes over the application of the GATT rules, Article XXII of the GATT was concerned primarily with consultation. Paragraph 1 states that:

> Each contracting party shall accord sympathetic consideration to, and shall afford adequate opportunity for consultation regarding, such representations as may be made by another contracting party with respect to any matter affecting the operation of this Agreement.[541]

As it stands the scope of the paragraph is wider and the objective of the consultations is broader.[542] However, this article establishes that GATT contracting parties have an obligation to engage in consultations in the first instance to resolve possible trade conflicts.

Paragraphs 2 and 3 of Article XXII state that:

> The contracting parties may, at the request of a contracting party, consult with any contracting party or parties in respect of any matter for which it has not been possible to find a satisfactory solution through consultation under paragraph 1.[543]

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[538] The provisions of Articles XXII and XXIII of the GATT 1994 will apply by the Understanding on Rules and Procedures Governing the settlement of Disputes

[539] Understanding, article XXIV see https://www.wto.org/english/docs_e/legal_e/10-24.pdf

[540] Understanding *supra* note 6, art. XXIV

[541] Article 22 of the GATT 1994 see more, https://www.wto.org/english/res_e/booksp_e/analytic_index_e/gatt1994_08_e.htm#article22

[542] Rosine M. Plank-Brumback, *Constructing an effective dispute settlement system: relevant experiences in the GATT and WTO* Organization of American States Trade Unit (1998), page 3

[543] Article 22 of the GATT 1994

Paragraph 2 extends the breadth of the obligation of consultation established in Paragraph 1 to all contracting parties. This includes the possibility of mediation by Third Parties or the staff of the GATT Secretariat. If the consultation between contracting parties fails to resolve a dispute, the claimants may have recourse to the provisions of Article XXII for its nullification or impairment. This article will benefit those whose members under the Agreement are being nullified or impaired by the failure of other members so that they may make representations and seek satisfactory means to fulfil their obligations.[544]

GATT Article XXIII: Nullification or impairment

Article XXIII.1 stands at the centre of the GATT dispute settlement system; its paragraphs define the conditions under which violation of the GATT rules permit contracting parties to seek redress and the means of compensation.[545]

Article XXIII.1 states that:

> If any contracting party should consider that any benefit accruing to it directly or indirectly under this Agreement is being nullified or impaired or that the attainment of any objective of the Agreement is being impeded as the result of
>
> (a) the failure of another contracting party to carry out its obligations under this Agreement, or
>
> (b) the application by another contracting party of any measure, whether or not it conflicts with the provisions of this Agreement, or
>
> (c) the existence of any other situation,
>
> the contracting party may, with a view to the satisfactory adjustment of the matter, make written representations or proposals to the other contracting party or parties which it considers to be concerned. Any contracting party thus approached shall give sympathetic consideration to the representations or proposals made to it.[546]

[544] Read, above 529, pages 2-3
[545] Read, above 529, page 3
[546] Article 23.1 of the GATT 1994 see more, https://www.wto.org/english/res_e/booksp_e/analytic_index_e/gatt1994_08_e.htm#article23

Article XXIII only outlines how disputes are to be processed in the GATT system. It does not establish any formal procedures for handling them.[547] The use of Article XXIII as an adjudicatory dispute settlement system is fundamentally inconsistent with the basic nature of GATT, which it is claimed can operate effectively only by a voluntary consensus arrived at through negotiation.

There are three circumstances under which the GATT Article XXIII can be explained as having violated the GATT rules. Firstly, there has to be no specific violation of a GATT provision referring to paragraph 1(b) which mentions only what are referred to as non-violation nullification or impairment complaints. This played an important role in dealing with government measures that distorted the outcomes of previous negotiations. Secondly, the second paragraph of Article XXIII[548] states that if no satisfactory adjustment is effected between the contracting parties over their benefits, the contracting parties' claims to redress under GATT are nullified or impaired.

Article XXIII.2[549] can be identified in terms of three key provisions. Firstly, the dispute settlement system can be invoked on the grounds of the nullification or impairment of benefits expected under the Agreement, and does not depend upon any actual breach of legal obligations. Secondly, the GATT provision has powers, not only to investigate and recommend action, but also to rule on the matter. Thirdly, the GATT is

[547] Read, above 529, pages 3-4.

[548] If no satisfactory adjustment is effected between the contracting parties concerned within a reasonable time….the matter may be referred to the CONTRACTING PARTIES. The CONTRACTING PARTIES shall promptly investigate any matter so referred to them and shall make appropriate recommendations to the contracting parties which they consider to be concerned, or give a ruling on the matter, as appropriate. If the CONTRACTING PARTIES consider that the circumstances are serious enough to justify such action, they may authorize a contracting party or parties to suspend the application to any other contracting party or parties of such concessions or other obligations under this Agreement as they determine to be appropriate in the circumstances. If the application to any contracting party of any concession or other obligation is in fact suspended, that contracting party shall then be free, not later than sixty days after such action is taken, to give written notice to the Executive Secretary to the Contracting Parties of its intention to withdraw from this Agreement.

[549] Article 23.2 of the GATT 1994 see more, https://www.wto.org/english/res_e/booksp_e/analytic_index_e/gatt1994_08_e.htm

empowered to authorise contracting parties to suspend GATT obligations to other contracting parties.[550]

b) Panels

Since the creation of the GATT in 1946, the GATT dispute settlement procedures settled disputes were generally arranged through diplomatic negotiations and resolved with a basic procedure. Later, the 'inter-sessional committees' were established; the committees consisted of subsidiary bodies and working groups who settled their disputes and delegated the task of exercising tribunal functions.[551]

The key innovation was the introduction of GATT panels in 1955. This represented a shift away from negotiated dispute resolution to an approach which became the usual procedure for resolving disputes, and which relied more upon arbitration and judicial processes.[552] The composition of these panels differs from a working party.[553] A working party is composed of representatives of individual contracting parties, whereas a panel is comprised of individuals chosen for their personal capacities and for their personal qualities.[554] Later, the Working Party changed into 'a modified form of third-party adjudication.[555] Following the inability of two contracting parties to resolve a dispute through consultations and negotiations, a disputant party may request the appointment of a panel to adjudicate the dispute. There is no absolute right to have a panel appointed. The request is made to the GATT

[550] Read, above 529, page 4
[551] Valerie Hughes, The WTO dispute settlement system: past, present and future' (2013) RIETI, page 1
[552] Read, above 529, page 5
[553] In the early GATT, dispute were referred to Working Party which is a small group of countries, were nominated to settle the disputes and a number of interested parties See, Valerie Hughes, The WTO dispute settlement system: past, present and future' (2013) RIETI, page 1, See also, Koesrianti, 'The development of the ASEAN trade dispute settlement mechanism: from diplomacy to legalism' (2005) A thesis submitted at University of New South Wales, page 123
[554] Kenneth W Dam, 'The GATT law and international economic organisation' (1970), page 365
[555] Koesrianti, 'The development of the ASEAN trade dispute settlement mechanism: from diplomacy to legalism' (2005) A thesis submitted at University of New South Wales, page 123

Director-General.[556] After obtaining an agreement with the disputant parties, the Director-General proposes three to five members who will compose the panel for the approval of the Contracting Parties.[557] With regard to the appointment of panel members, these persons were drawn from permanent delegations to GATT as well as from government officials connected with the work of the GATT. Panel members were to act in their own independent capacities rather than as representatives of their respective countries, or to carry out a function assigned to their obligations. The function of a panel was to make "an objective assessment of the matter before it, including an objective assessment of the facts of the case, and the applicability of and conformity with the General Agreement."[558] The panels were avoiding determination on sensitive issues.

c) Private parties' rights

GATT did not specifically provide for any rights of any parties to sue other private parties as a result of the nature of the GATT agreement as an intergovernmental agreement. In addition, GATT had no clear procedural mechanism for dealing with disputes among contracting parties.[559] Since the member states alone had rights and obligations under the agreements, it followed accordingly, that only their representative governments had the standing to request formal consultations and dispute settlements. Private citizens thus, did not have any standing to bring complaints in the GATT.

[556] According to the 1979 understanding, the Director-General was to maintain informal indicative list of governmental and non-governmental persons who were qualified in the fields of trade relations, economic development or other matters covered by the GATT. The Director-General is a body open to all GATT members, which meets every month or so and which has been delegated the authority to act on behalf of the contracting parties as a whole.
[557] GATT Understanding 1979 para 10
[558] GATT Understanding 1979 para 16
[559] Koesrianti, above 555, page 125

d) Decisions and the adoption of decisions

If a consensus accepted a panel report, its findings became binding on the parties involved. The panel reports were then presented to the GATT Council for ratification. Countries defending a complaint however, could veto the ratification procedure and thereby avoid being obliged to bring their trade policy into GATT compliance. Panel reports under the GATT had no binding effect until the Contracting Parties adopted them. The words of the panel reports became part of GATT law after their adoption by the GATT contracting parties.[560] Moreover, the adoption of the panels reports by the GATT Council were only legally binding on the parties to the dispute for that particular case, it had no binding effect on future panels or future disputes.[561]

Under the GATT 1947 Agreement, an early year of the GATT, Article XXV.4 of the GATT stated that; 'except as otherwise provided for this Agreement, decisions of contracting parties shall be taken by a majority of the votes cast'.[562] This means that panel reports were adopted by majority vote. Later, in the 1950s, panel reports were only adopted by consensus.[563] With regard to this situation, the procedure enabled any contracting party, as well as the losing parties, to block the adoption. Later still, in 1982, the contracting parties agreed that 'obstruction in the process of dispute settlement should be avoided'. The avoidance of obstruction in the process of dispute settlement led to a failure to prevent the blocking or delaying of the adoption of panel reports. If a panel report was not adopted, the contracting parties had no legal obligation to implement the panel's recommendations.[564] In addition, from the 1950s to 1987, the panel reports were not adopted, which meant that there would be no official

[560] Davey, above 503, page 67
[561] Koesrianti, above 555, page 126
[562] Robert Hudec, *Enforcing international trade law: the evolution of the modern GATT legal system* (Butterworth Legal Publishers 1993)
[563] Under the previous GATT procedure, the panel reports were adopted by consensus, which means that a single objection could block the adoption. See, WTO website, 'A unique contribution' https://www.wto.org/english/thewto_e/whatis_e/tif_e/disp1_e.htm accessed 1 January 2016
[564]Koesrianti, above 555, page 126

publication of the reports.[565] Almost 40 per cent remained unadopted by the GATT Council because of the failure of the GATT dispute settlement system. In this regard, the system that existed under the GATT could not guarantee fairness and unbiased outcomes, with a loss of confidence by the contracting parties.[566]

e) The enforceability of decisions under the GATT

Panels were required to deliver their recommendations and findings without undue delay, and, once adopted, these recommendations and findings would become those of a collective body of the contracting party.[567] The contracting parties had to secure the withdrawal of the measures in cases where respondent party's measures were found to be in breach of the obligations under GATT, and in cases where a finding of nullification and impairment was adopted.[568] No further action was required of the infringing party if the measures were withdrawn. If the withdrawal of the measures were to be impractical, the offending party would need to provide compensation as a temporary measure. However, the GATT does not mention any provision concerning an obligation on infringing parties to provide compensation for any past trade damage.[569]

The implementation of decisions was one of the problems of the GATT dispute settlement system. It has been unsuccessful in ultimately resolving disputes, because panel decisions may never be adopted. Even if they are adopted, panel decisions may not be effectively implemented.[570] There are three circumstances which show that the panel decision process is ineffective in its implementation. First, there are cases where the panel report is adopted but the recommendations are not implemented. Second, there are cases where the panel report is not adopted, and the recommendations are

[565] Rosine Plank, 'An unofficial description of how a GATT panel works and does not', (1987) Journal of international arbitration 53, page 152
[566] Koesrianti, above 555, page127
[567] Ibid, page 127
[568] Davey, above 503, page 85
[569] Ibid, page 85
[570] Review of the effectiveness of trade dispute settlement under the GATT and the Tokyo Round Agreement

not implemented. Third, there are cases where the panel report is not adopted but the recommendations are implemented. [571] The issue of the implementation of recommendations or rulings could be raised in the General Council by any member state at any time after the adoption of the panel report.[572] It is important to note that, if the Council does not adopt the panel report, the system seems to fail. For example, those cases where the report is not adopted[573] after a complainant has prevailed and no settlement is reached to represent a clear failure of the dispute settlement system. However, if the settlement of the dispute is due to the lack of adoption of a panel report, then the settlement process does get slowed down. The fact is that if settlements are usually reached by the automatic adoption of panel reports, that would encourage quicker settlements.[574]

3.4.2 THE WORLD TRADE ORGANISATION (WTO)

3.4.2.1 An overview of the dispute settlement system in the WTO

The World Trade Organisation (WTO) was established[575] in 1994, after the conclusion of the Uruguay Round (1986-1994)[576] multilateral trade negotiations. In other words, the parties may use the dispute settlement mechanism of the WTO to

[571] Davey, above 503, pages 85-86
[572] Ibid, page 86
[573] In a number of cases, the contracting parties such as the United States and the EC had taken retaliatory and counter-retaliatory in respect of panel report had not been adopted. The General Council in the early years of GATT, however, had not authorised any retaliation because each side would block the other in the Council and it was very rare event for the contracting parties to seek retaliatory measures. See more, Davey, above 503, pages 87-88
[574] Ibid, page 88
[575] Marrakech Agreement, of 15 April 1994, establishing the World Trade Oganisation
[576] There were eight rounds under GATT, namely Geneva (1947), Annecy (1949), Torquay (1950), Geneva (1956), Dillion (1960-61), Kennedy (1962-67), Tokyo (1973-79), Uruguay (1986-94) show the development of the WTO agreement through the channel of trade negotiation rounds. To be noted that the names of the round or negotiation are based on the name of the place where the negotiations took place or the name of the person who initiated the negotiation. See Mitsuo Matsushita, Thomas J. Schoenbaum and Petros C. Mavroidis, The World Trade Organisation: law, practices, and policy, (2003), page2

assert their rights under multilateral trade agreements.[577] The purpose of the WTO is to create a new and more effective system for dealing with international trade disputes, known as the WTO Dispute Settlement Understanding (DSU).[578] The WTO officially came into existence on 1 January 1995. It is regarded as being one of the central achievements of the Uruguay Round negotiations and is the successor to the GATT.[579] The current WTO rules are the outcome of the Uruguay Round that includes an innovative and further development revision of the original GATT rules,[580] which had been transformed from the diplomatic to the rules-oriented, rather than one more based on power and negotiated settlement by the parties.[581] Today, the WTO has 164 member countries since July 2016. It also includes developing countries, the least developed countries, socialist states such as China, and European countries.[582] The three

[577] Rafael Leal-Arcas, 'Comparative analysis of NAFTA's Chapter 20 and the WTO's Dispute Settlement Understanding' (2011) Transnational dispute management 8(3), page 3 https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1969827 accessed 12 January 2017

[578] Understanding on Rules and Procedures Governing the Settlement of Disputes (1994), Marrakesh Agreement Establishing the World Trade Organisation, Annex 2, Legal Instruments-Results of the Uruguay Round.

[579] In the Uruguay Round Negotiations, there was a general consensus among the GATT contracting parties that the dispute settlement system required reform as stated in the 'Punte del Este Declaration' as "To assure prompt and effective resolution of disputes to the benefit of all contracting parties, negotiations shall aim to improve and strengthen the rules and procedures of the dispute settlement process, while recognising the contribution that would be made by more effective and enforceable GATT rules and disciplines. Negotiations shall include the development of adequate arrangements for overseeing and monitoring of the procedures that would facilitate compliance with adopted recommendations.

[580] What is new in the WTO? Firstly, the new dispute settlement is more detailed than the GATT. It comprises 27 sections with total of 147 paragraphs and four appendices. Secondly, the GATT Council was replaced with the Dispute Settlement Body (DSB). Thirdly, there has been a change to a negative consensus system, which ensures that the losing party cannot block the formation of the panel decision. Fifthly, it has an Appellate Body provides for appeal from the panel decisions and fifthly, the complaining party can seek authorisation to take retaliatory action should the losing party fail to implement the panel recommendation within a reasonable period of time. See, Rafael Leal-Arcas, 'Comparative analysis of NAFTA's Chapter 20 and the WTO's Dispute Settlement Understanding' (2011) Transnational dispute management 8(3), page 6 https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1969827 accessed 12 January 2017

[581] Ibid, page 4

[582] Some countries still under negotiation process to become the WTO members. Members and observers of the WTO see; https://www.wto.org/english/thewto_e/whatis_e/tif_e/org6_e.htm

official WTO languages are English, Spanish and French.[583] Currently, 99 percent of the cases are conducted in English.

In the Preamble to the 1994 Marrakech Agreement establishing the WTO, it was stated that the objectives of the WTO are:

> 'to develop an integrated, more viable and durable multilateral trading system encompassing the General Agreement on Tariffs and Trade, the results of past trade liberalisation efforts, and all of the results of the Uruguay Round of Multilateral Trade Negotiations'[584]

Moreover, the Agreement also explains that the function of the WTO is to:

> 'provide the forum for negotiations among its members concerning their multilateral trade relations in matters dealt with in the Annexes under the agreements. It also provides a forum for further negotiations among its members concerning their multilateral trade relations, and a framework for the implementation of the results of such negotiations, as may be decided by the Ministerial Conference'[585]

The World Trade Organisation (WTO) has become one of the most controversial international institutions. It is divided into two major functions. Firstly, the dispute settlement system performs the judicial function. Secondly, the forum role of the WTO, known as the legislative function, has the task of reaching trade agreements and is concerned with the features of the multilateral trade system.[586] The objective of the WTO is the liberalisation of international trade through the various different agreement procedures designed to reduce and eliminate obstacles to trade imposed by

[583] Spanish language is one of the official WTO languages due to the participation of Latin American countries. It is important, therefore, to have Secretariat staff members who have special language skill because the submitted cases must be translated into one of the three official languages. See, Valerie Hughes, 'The WTO dispute settlement system: past, present and future' (2013) RIETI, page 4 http://www.rieti.go.jp/en/events/bbl/13103101.html accessed 1 March 2014

[584] The Marrakesh Agreement establishing the WTO, see https://www.wto.org/english/res_e/booksp_e/analytic_index_e/wto_agree_e.htm accessed 1 March 2016

[585] The Marrakesh Agreement establishing the WTO, art 3(2)

[586] Keisuke Lida, 'Is WTO Dispute Settlement Effective?' (2004) 10(2) Global Governance https://www.jstor.org/stable/27800522 accessed 1 December 2015

governments.[587] To that end, Article 3 (3) of the Marrakesh Agreement shows that the WTO is responsible for settling disputes. A dispute settlement mechanism is authorised when the agreements' provisions have been violated and this provides for member states to ask for benefits to be nullified or impaired.[588] The objective and purpose of the WTO dispute settlement system explains this in Article 23.1 of the DSU.[589]

The type of dispute case that is considered by the WTO can focus on two principal types of disputes – domestic regulation and trade defence, such as cases particularly concerned with anti-dumping measures, countervailing duties, and safeguard actions. Article 1.1 of the DSU states that the DSU applies to disputes concerning and brought under the 'covered agreement'; these are covered in the WTO Agreement[590] itself, the Multilateral Agreement on Trade in Goods (including GATT 1994), the GATs, the TRIPS Agreement, and the DSU itself. Peter Holmes focuses on two principal types of disputes; first the dispute concerned with domestic regulation; the second is trade defence.[591] Holmes adds that the statistical cases of all trade disputes from 1995 until now are still present, the particular experience of the GATT and the WTO dispute over trade deals with anti-dumping, countervailing duties and safeguard actions, and also covers certain kinds of measures, such as subsidies, technical barriers to trade, government procurement, investment measures, and intellectual property.[592]

[587] Carmen Otero Garcia- Castrillon, 'Private parties under the present WTO (bilateralist) competition regime' (2001) Journal of World Trade Law 35(1), page 99

[588] Article XXIII of the GATT, for the discussion of these articles; see *An overview of the dispute settlement regime in the General Agreement of Trade Tariffs* above.

[589] The objectives and the purpose of the WTO dispute settlement system is to settle a dispute between members of the WTO as Article 23.1 of the DSU states that 'When members seek the redress of a violation of obligations or other nullification or impairment of benefits under the covered agreements or an impediment to the attainment of any objective of the covered agreements, they shall have recourse to, and abide by, the rules and procedures of this understanding'

[590] The Multilateral Trade Agreements include with the Multilateral Agreements on trade in Goods, the General Agreement on Trade in Services (GATS), the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS), the DSU, and the Trade Policy Review Mechanism are covered in the annex and integral parts of the WTO Agreement. Legal texts of the WTO Agreements read more; https://www.wto.org/english/docs_e/legal_e/final_e.htm

[591] Read, above 529, page 15

[592] Ibid, page15

The WTO dispute settlement mechanism and GATT have helped resolve many trade dispute cases between governments. The dispute settlement system of the WTO is a central element in providing security and predictability to the multilateral trading system.[593] Furthermore, the dispute settlement system serves to preserve the rights and obligations of member states under the covered agreements and to clarify the existing provisions of those agreements'.[594] At a global level, the Dispute Settlement Body[595] under the WTO is the single and most unique platform for all its members to bring disputes into this system. The WTO's function is performed by the dispute settlement mechanism under the Understanding on Rules and Procedures Governing the Settlement of Disputes, commonly referred to as the Dispute Settlement Understanding, or "DSU".[596]

The WTO sets the regulations and rules of international trade that are unified by applying their own dispute settlement mechanism, which resembles a judicial system and still resembles a diplomatic model and the judicial characteristics[597] of trade dispute settlement. It provides a common institutional framework for it to work as a forum for multilateral trade negotiations relations among its members. The Uruguay Round Agreements are, the WTO Agreement, the Multilateral Trade Agreements, the Understanding on Rules and Procedures Governing the Settlement of Disputes, or DSU, and the trade policy review mechanism. Its own DSU is closest to the system of arbitration.[598] There is the dispute settlement body and a standing Appellate Body in

[593] William J. Davey, 'Implementation in WTO dispute settlement: introduction to the problems and possible solutions' (2005) RIETI Discussion paper series 05-E-013, page 1

[594] DSU, art. 3(2). Regard, Article 1.1 of the DSU, claims under the WTO agreements are the only claims that can be brought before panels and the Appellate Body. While, the Article 3.2 of the DSU purposes that the intention of the dispute settlement system is to clarify the existing provisions of those agreements in accordance with customary rules of international of public international law. Read more, Elnor Lissel, 'Waiwing rights under the dispute settlement understanding (DSU) using clauses on regional safeguard measures as an example',(2012) Lund University Faculty of Law http://www.etsg.org/ ETSG2012/Programme/Papers/233.pdf

[595] The DSB basically the WTO General Council, meeting in dispute settlement mode with its own chairperson. It has met regularly to carry out its functions.

[596] The Marrakesh Agreement establishing the WTO, art 3(3)

[597] Yasuhei Taniguchi, 'WTO Dispute resolution as arbitration' (2010) 3(1) Contemp. ASIA Arb. J,1

[598] Ibid, pages1-2

order to help the parties hear appeals on every issue. Recommendations are made by the Panels or the Appellate Body in order to resolve trade disputes between WTO members. Moreover, the Panels have a duty to make a Panel Report and to develop legal interpretations.[599] However, the Panels and the Appellate Body are not organised as independent decision-makers like the courts, but the Dispute Settlement Body (DSB) consists of the entire body of WTO member states as subordinate to it. The major aim of the Uruguay Round negotiations is to correct the weaknesses in the prior GATT system, and it has been described as an increasingly legalised and judicialised system for settling international trade disputes. The transformation of the nature of the system is the most significant change in the GATT Dispute Settlement System and the WTO Dispute Settlement system. The WTO can be more clearly explained as an increasingly legalised and judicial system for international trade dispute settlement. [600] New rules-based dispute resolutions were created to introduce the dispute settlement process, and parties can also submit their disputes to neutral third party panels to ask for an appellate review, and this is capable of being adopted by WTO members. However, the integration and the enforcement system of all the Uruguay Round agreements are attempts to strengthen the GATT's dispute settlement provisions.[601]

The reason for using the WTO rules of Dispute Settlement is because it only works if the WTO dispute settlement system is committed to protecting procedural fairness. The WTO trading system operates more impartially and equitably, and their interpretation by the panels and the appellate body appeal to justice as fairness, and responds to both developed and developing countries.[602] The terms of the consultations describe the process of attempting to settle a dispute amicably. There is no right under

[599] Arie Reich, "From Diplomacy to Law: The Juridicisation of International Trade Relations" (1996/97) 17 Nw.J.International Law and Business, page 775

[600] Michael Ewing-Chow, Alex W. S. Goh and Akshay Kolse Patil, 'Are Asian WTO members using the WTO DSU effectively?' (2013) 16(3) Journal of International Economic Law, page 669

[601] Jeffrey Kaplan, ' ASEAN's rubicon: a dispute settlement for FTA' (1996) 14 UCLA OAC. BASIN L.J., http://escholarship.org/uc/item/8635n2c5 accessed 1 March 2014

[602] Valerie Hughes, 'The WTO dispute settlement system: past, present and future' (2013) RIETI accessed 21 March 2016 http://www.rieti.go.jp/en/events/bbl/13103101.html and Lists of WTO disputes cases visit: https://www.wto.org/english/tratop_e/dispu_e/dispu_status_e.htm

the DSU in WTO law that requires consultations. A jurisdiction of the consultations process, by allowing for an intrusive Panel review of the consultations, could bring more equality into the relations between WTO members, but it would diminish the potential for reaching amicable solutions to disputes. Additionally, it would increase the resources devoted to litigation. The arrangement is patterned on the dispute settlement system of the WTO. All of the above falls under the central administration of the Dispute Settlement Body. The WTO and Regional Trade Dispute systems are distinguished as a result of their confidential nature. The panel and appellate body reports are not binding awards, which mean they will have to be adapted by a political body in order to approve of their judgments.[603] Moreover, the WTO dispute resolution system is a more unified and obligation-based system. The members trust that a GATT agreement brings benefits exclusively to WTO's DSM.

Indeed, DSU[604] is the most significant achievement of the Uruguay Round negotiations which consisted of Annex 2 of the WTO Agreement, which sets out the rules and procedures of the dispute settlement mechanism in the WTO. It consists of 27 articles and 4 appendices. The DSU constitutes as a central pillar of the WTO system. The new WTO principles were re-established to increase the reliability of the integration of the member states into the WTO conflict resolution process.[605]

The DSU replaces the previous framework for dispute settlement in the international trading system under Articles XXII and XXIII of the GATT.[606] Therefore, the WTO DSU system is a means to settle trade disputes between Members by means of bilateral consultations and mediation in the first instance. It is a new regime built upon the GATT Articles XXII and XXIII to provide security and predictability to the multilateral

[603] Chin Lim, 'East Asia's engagement with cosmopolitan ideals under its trade treaty dispute provisions' (2011) 56(4) McGill law journal, page 829

[604] Understanding on Rules and Procedures governing the settlement of disputes, see WTO Secretariat, the WTO dispute settlement procedures: A collective of the relevant legal text website https://www.wto.org/english/tratop_e/dispu_e/dsu_e.htm

[605] Specht, above 507, page 77

[606] More information of Article XXII and Article XXIII, see *An overview of the dispute settlement regime in the General Agreement of Trade Tariffs* above

trading system. The new WTO principles were re-established to increase the reliability of the member states and their integration into the WTO conflict resolution process.[607]

3.4.2.2 Effectiveness

Unlike the GATT, which was purely an agreement, the WTO was established as an integrated organisation which covers a wider range of trade, including Goods, Services and Intellectual Property. Many aspects of the WTO dispute settlement procedure were newly introduced by changing both the structure of the dispute settlement bodies and the procedure through which new methods of resolving disputes are settled. The theories of GATT and the WTO both emphasise the role of dispute settlement at the multilateral liberalisation sustainable level. The reason why the GATT was reformed and was transformed into the WTO was because the number of uses[608] by certain powerful member states, such as, the United States, Canada and the United Kingdom, France and Germany, had increased, and the failure of the GATT's legalistic approach was clearly not sufficiently responsive to these powerful states.[609] The WTO system is based on rules rather than on power. Decisions in the WTO are made by consensus. All WTO members have exactly the same right to seek redress if one of their trading partners is breaching WTO rules.[610] That means rich and poor countries alike have an equal right to challenge each other in the WTO's dispute settlement procedures. Thus, the mechanism protects weaker WTO members against arbitrary or unilateral action by the strongest members.[611]

[607] Specht, above 507, page 77
[608] The 148 members of the WTO show the credibility of the WTO has potential frequency to settle trade dispute.
[609] Schneider, above 454, page 732
[610] Rafael Leal-Arcas, 'Comparative analysis of NAFTA's Chapter 20 and the WTO's Dispute Settlement Understanding' (2011) Transnational dispute management 8(3), page 4 https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1969827 accessed 12 January 2017
[611] Ibid, page 4

The credibility of the WTO as a functioning international organisation essentially depends on ensuring the effectiveness of its dispute settlement function. One sign of the effectiveness of the WTO can be seen in the recent trends that the member states have adopted under the WTO.[612] The DSU sets out a dispute settlement system characterised by compulsory jurisdiction with a short time frame, and an appellate review process and enforcement mechanism.[613]

When disputes arise, the WTO system helps resolve these peacefully and constructively, which has been very effective in resolution of trade disputes. In its first seventeen years, the WTO DSU has seen 452 requests for consultations.[614] These requests resulted in 167 Panel Reports and 103 Appellate Body Reports. In nearly fifty years, from 1948 to 1994, a total of 432 complaints were filed under the GATT dispute resolution system, the DSB's predecessor, an average of 9.2 disputes a year. By contrast, approximately the same number, i.e. 424 disputes, have been brought to the new and improved DSB since it began operating in 1995, an average of approximately 27.4 disputes per year.[615] The high volume of cases certainly indicates that states are using and want to use the WTO system to resolve disputes. The WTO dispute settlement system has been used frequently and with great success, as noted by David Jacyk.[616]

The effectiveness of the WTO dispute settlement system can be seen in five areas. The WTO is actually solving disputes through developments both in reconciliation of trade and non-trade. Moreover, the balanced legislative and judicial functions have

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[612] Katselas, above 445, pages 6-7

[613] Peter Van den Bossche and Werner Zdouc, *The law and policy of the world trade organisation: text, cases and materials* (3th ed.) (Cambridge University Press 2013), page 45

[614] A list of all WTO disputes and their current status is available at https://www.wto.org/english/tratop_e/dispu_e/dispu_status_e.htm

[615] A list of all WTO disputes and their current status is available at https://www.wto.org/english/tratop_e/dispu_e/dispu_status_e.htm. Read more Marc Busch and Eric Reinhardt, 'the evolution of GATT and WTO dispute settlement' http://faculty.georgetown.edu/mlb66/TPR2003_Busch_Reinhardt.pdf

[616] David Jacyk, 'The integration of Article 25 Arbitration in WTO dispute settlement: the past, present and future' (2008) AUSTL International Law Journal, pages 235 and 236 http://www.austlii.edu.au/au/journals/AUIntLawJl/2008/11.pdf accessed 1 July 2016. See also, Felicity Hammong, 'A balancing act: using WTO dispute settlement to resolve regional trade agreement disputes' (2002) 4(2) Trade L.& DEV, page 426

also made the WTO organ effective, as well as the fact that the WTO DSM is fending off unilateralism and assuring many level playing fields.[617] Furthermore, the parties have implemented the WTO rulings, and the parties choose the WTO mechanism to settle their disputes, which means that the parties are satisfied by the dispute outcomes from applying the WTO regime.

The WTO's Dispute Settlement Understanding (DSU) evolved from the ineffective system used under GATT for settling disagreements among members. Some scholars agree that the new WTO dispute settlement procedure represents a step towards a more rule-oriented system, and that it improves on the GATT dispute resolution system. The new WTO legal system differs from its GATT predecessor in many ways. There is the slight adaption in the institutional procedures that were made from the previous GATT to the new WTO principles. In terms of dispute settlement, there are four major alterations which are involved in the changes in trade disputes which have affected firms and governments.

Firstly, all the dispute settlement procedures under GATT, and a variety of other trade-related agreements, are brought under a single dispute resolution process which is overseen by an institution called the WTO Dispute Settlement body (DSB).[618] Secondly, due to the speeding up of the WTO process, there is a strict timetable for proceedings at the WTO. Thirdly, there is a right to a panel, a new automatic adoption procedure of panel decisions through a negative consensus on the panel rules in the first instance for processing disputes, and the automatic adoption of the Appellate Body and a review of the legal issues by a permanently-constituted Appellate Body (AB), if a consensus is not reached within the DSB (Dispute Settlement Body). These speedier procedures, with stricter time limits, have brought about confidence in the DSU by delivering justice more promptly.[619] Furthermore, it is providing a rule-oriented adjudicative system with an effective enforcement mechanism. Fourthly, the participation of non-governmental

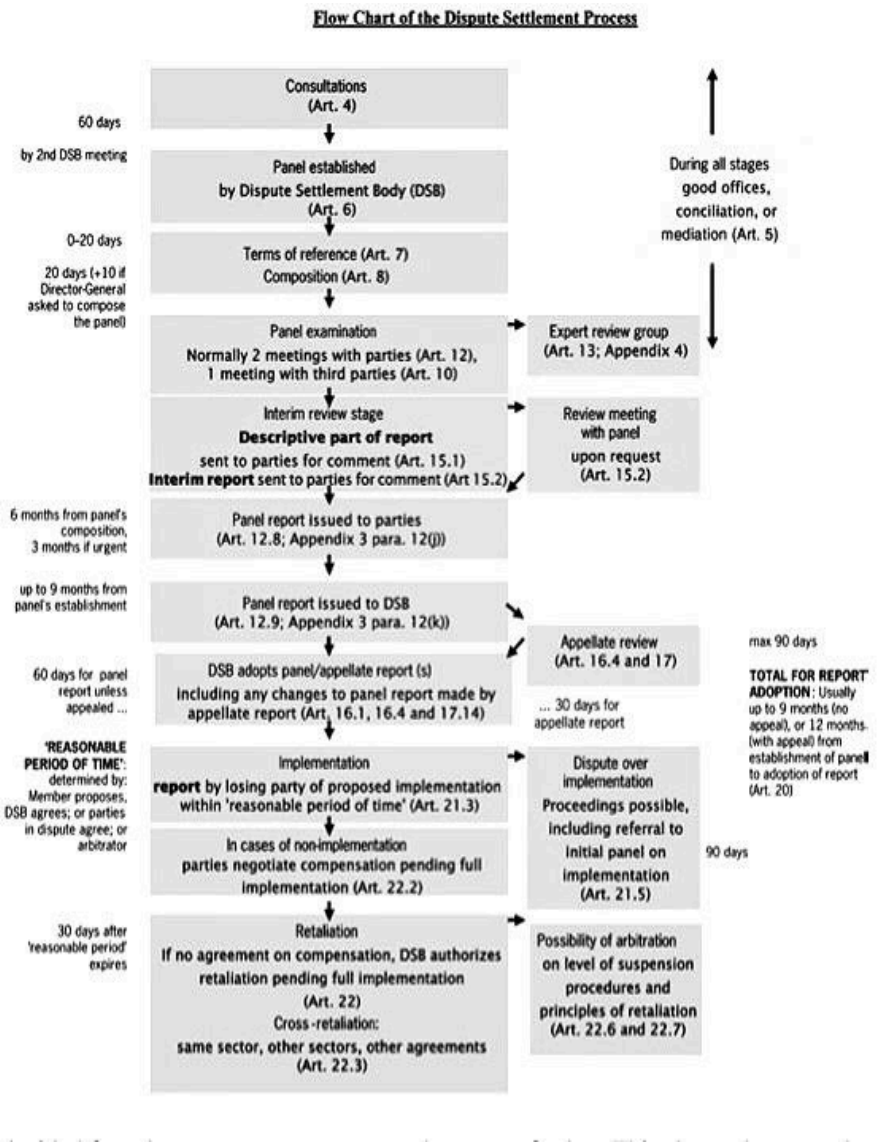
[617] Lida, above 586, page 211
[618] Busch and Reinhardt, above 521, pages 3-5
[619] Busch and Reinhardt, above 521, pages 3-5

organisations (NGOs) helps to make dispute settlement processes more transparent and accessible.[620] Moreover, Eric White, the EU's chief legal advisor on trade matters, goes further: he claims that The WTO Dispute Settlement System is a remarkable achievement. The WTO has succeeded in creating a frequently used compulsory dispute settlement system producing binding results that can be enforced. Nowhere else in international law are all these characteristics combined.[621]

Table 3.1 presents the WTO dispute settlement mechanisms under multilateral trading systems[622]

DSMs	World Trade Organisation
Coverage	Trade in Goods, Trade in Services, Intellectual Properties
Who can initiate?	Members
How do they initiate?	Compulsory
Interpretation	Panel and Appellate Body
Enforcement: Who monitors?	Collective and Surveillance
Enforcement: How enforced?	Compensation or Retaliation, full implementation Preferred

[620] Lida, above 483, pages 207-210
[621] Read, above 529, page 2
[622] Table 1 shows the features of the major dispute settlement in the WTO under the multilateral integrations. See, Fujio Kawashima, 'Judicialisation of the dispute settlement mechanisms in Asian economic integrations?: exceptation, reality and ways forward' (2011), page 7 www2.gsid.nagoya-u.ac.jp/blog/anda/publications/files/2011/08/8-kawashima.pdf accessed 12 July 2016



Flowchart 3.1 shows: Flow chart of the WTO Dispute Settlement Process[623]

Refer to the flow chart of the dispute settlement process under the WTO, table 3.2 will summarise the time periods within the dispute settlement mechanism.

[623] This timeframe is approximate and was constructed as follows: consultations (60 days – 2 months); panel establishment (30 days – 1 month); panel report (9 months); appeal (45 days – 1.5 months); appellate report (90 days – 3 months); adoption (15 days – 0.5 month); and reasonable period of time (9 months), for a total of 26 months, or two years and two months. https://www.wto.org/english/thewto_e/whatis_e/tif_e/disp2_e.htm

Table 3.2 provides a summary of time periods within the WTO dispute settlement mechanism.[624]

Time scale	Actions
60 days	Consultations, mediation, etc.
45 days	Establishment of panel and appointment of members
6 months	Panel presents its final report to parties
3 weeks	Panel presents its final report to WTO members
60 days	Dispute Settlement Body (DSB) adopts report (in the absence of appeal)
Total = 1 year	If no appeal
60 to 90 days	Appellate review report
30 days	DSB adopts the Appellate review
Total = 1 year and 3 months	If a party appeals

3.4.2.3 The process of the WTO dispute settlement system

There are four phases to dispute settlement: consultations, the panel process, the appeal and the surveillance of implementation. The following subsections will elaborate on these four.

a) Consultation

The pattern of the WTO's DSM mandates consultation, which is a first attempt at finding a solution, is as follows.[625] This process is an attempt to obtain a satisfactory

[624] Source: Understanding the WTO: settling disputes https://www.wto.org/english/thewto_e/whatis_e/tif_e/disp1_e.htm

[625] The specific guidelines and timetable for consultations to take place are provided in Article 4 of the DSU

adjustment of the matter. The consultation stage is a confidential process among the parties.[626] The consultation begins the dispute resolution process, with a written request being submitted to the Dispute Settlement Body (DSB) stating the reasons for the request, an identification of the trade measures at issue, and a statement of the legal basis for the complaint.[627]After a WTO member requests a consultation, the DSB[628] must be notified of the request to the DSB[629], the time frame requires ten days from the receipt of a request to the response of the WTO. The consultation extends to a 60-day period, with a maximum of 30 days to enter into consultations, and a minimum of 60 days to engage in the consultations.[630] However, there are some exceptional circumstances to provide longer time frames which may apply in cases for developing country defendants.[631] Members of the WTO must attempt to negotiate in good faith and manage the consultations in a confidential way at any time within the process of conciliation or mediation, and to reach a mutually satisfactory solution to the disputes; they are encouraged to reach a solution subject to their satisfying the need for consistency with the WTO rules. The solution must be consistent with the WTO Agreements.[632]

The primary objective of the WTO DSU system is to settle trade disputes between members by means of bilateral consultations and mediation in the first instance. The goal of the consultation stage is to enable the disputing parties to understand the relations between the factual situation and the legal claims in respect of

[626] DSU, art 4
[627] DSU, art 4.4
[628] For the operation of the DSB, see DSU, art.2
[629] Refer to Article IV.3 of the WTO agreement shows that the DSB is identical with the General Council. The General Council shall convene as appropriate to discharge the responsibilities of the DSB provided for in the DSU. The DSB have its own chairman and shall establish such rules of procedure, as it deems necessary for the fulfillment of those responsibilities. Current, Roberto Azevedo is the sixth Director-General of the WTO from 2013-2017 and The WTO members agreed by consensus to extend Roberto as Director-General for a second four-year term, starting on 1st September 2017. See, https://www.wto.org/english/thewto_e/dg_e/dg_e.htm
[630] DSU, art 4(3), 4(7)
[631] DSU, art 12.10
[632] A member-country may request consultations when it considers another member-country to have 'infringed upon the obligations assumed under a Covered Agreement' Jeffrey A. Kaplan, ASEAN's Rubicon: a dispute settlement mechanism for AFTA' (1996) UCLA Pacific Basin law journal 14(2)

the dispute. Many trade disputes never go any further than the consultation stage, particularly, given that WTO members are under an obligation to resolve their disputes by this means. As is stated in Article 3.4 of the DSU, 'any recommendations or rulings made by the Dispute Settlement Body (DSB) should be aimed at achieving a satisfactory settlement according to the rights and obligations under the DSU and covered agreement'.[633] Furthermore, the provisions permit third parties, including other member countries and the WTO Secretariat, to mediate in a dispute and to take part in the consultations. Third parties with a 'substantial trade interest'[634] in a dispute can also engage in the consultation process subject to the agreement of the respondent.[635] If a member does not meet one or more of these deadlines, a plaintiff may request the establishment of a panel immediately.[636] In practice, many parties to disputes often take considerably longer over the consultations than the minimum of 60 days.[637]

Moreover, the parties to a dispute may also make use of arbitration[638] as an alternative method. The use of arbitration is by mutual agreement between the parties to a dispute, and it is used to facilitate a solution concerning issues that are clearly defined by both parties;[639] a third party can become one of the parties to the arbitration upon the agreement of the parties that are having recourse to arbitration.[640] The outcome of the arbitration must be WTO-compatible and any award[641] for nullification or impairment is binding on the parties. Other diplomatic solutions which receive a gloss in the DSU are Good Offices, Conciliation and Mediation.[642] Unlike

[633] DSU, art 3.4
[634] If the third party is not allowed to join the consultations, it may request its own consultations, as states in Article 4.11 of the DSU
[635] Robert Read, 'Dispute Settlement, Compensation & Retaliation under the WTO' in William A Kerr and James D Gaisford(eds), *Handbook on international trade policy* (Edward Elgar Publishing 2007), page 5
[636] DSU, art. 4.7.
[637] Read, above 635, pages 5-6
[638] The principal alternative to a dispute panel is arbitration, the procedures for which are outlined in Article 25 of the DSU.
[639] DSU, art 25 para1
[640] DSU, art 25 para 3
[641] 'Arbitration awards shall be notified to the dispute settlement body and the council or committee of any relevant agreement where any member may raise any point relating thereto' Art 25 para 3
[642] DSU, art. 5.

consultation, in which 'a complainant has the power to force a respondent to reply and consult or face a panel', good offices, conciliation and mediation 'are undertaken voluntarily if the parties to the dispute so agree'.[643] No requirements on the form, time, or procedure for them exist.[644] Any party may initiate or terminate them at any time.[645] If the parties to the dispute jointly consider that the good offices, conciliation or mediation process has failed to settle the dispute, the complaining party may request the formation of a panel. In the WTO, the consultation stage is prominent. This means the parties to the dispute are mandatorily obliged to negotiate before requesting the establishment of a panel, unlike good offices, conciliation and mediation which are optional. In particular, disputants may agree to continue these diplomatic solutions during the panel process, and the Director-General may offer each of these resolution systems to the disputants.[646]

b) Panels

As mentioned earlier, the DSU replaces the previous GATT dispute settlement mechanism. The DSU sets out the procedure, the rules, and the timetable in each stage of the dispute processes, which helps make the dispute settlement mechanism more transparent and predictable. This panel stage is only adopted after the failure of the consultation or mediation process, so that a plaintiff may have recourse to the formal dispute provisions. The judicialisation of the GATT/WTO dispute settlement procedures is also characterised by an increasing legal mandate through a WTO panel, in which WTO members may seek proper enforcement of the covered agreement.[647] The WTO

[643] DSU, art 5 para1
[644] DSU, art 5 para 1
[645] DSU, art 5 para 3
[646] DSU, art. 5(5), (6)
[647] Bernhard Zangal, 'Judicialisation Matters! A Comparison of Dispute Settlement under GATT and the WTO' (2008) 52(4) Oxford Journal international studies quarterly, page 825

dispute system acts as a 'Law Court.'[648] Panels are the quasi-judicial bodies in charge of adjudicating disputes between members.[649]

Before a panel, prior to the initiation of the dispute settlement process, a consultation between the parties must occur. The functions of WTO Secretariat researchers include stating the practices under the existing rules, and they assist with the dispute settlement process by helping to form ad hoc panels under the WTO DSU and assist panels in carrying out their work.[650] Panel requests must be formulated in writing. Panels are in charge of adjudicating disputes between member states in the first instance. In the panel process of the DSU, parties write requests setting out the scope of the consultations, the issue measures are the subject of the complainant, and the legal basis for the complaint issues to begin the panel process.[651] The DSU system permits a WTO member that is not a complainant or respondent and which has a substantial interest in a case to participate as a third party. Any third party country with a 'substantial interest' in a trade dispute also has a right to make submissions to and be heard by a panel, even if they were not involved in the consultation process.[652]

The establishment of panels are set up in the event that a trade dispute is not resolved through consultation and the complaining party or parties[653] can then proceed to make a formal request for the establishment of a dispute panel to adjudicate on the

[648] Lim, above 603, page 825

[649] WTO Secretariat, *World Trade Organisation: a handbook on the WTO dispute settlement system* (Cambridge University Press 2004), page 21

[650] Their work is depending on the nature of the cases involving trade remedies such as dumping, subsidies, and safeguards.

[651] DSU, art 6(2),7.

[652] More than one party may join the proceedings. Third parties may make legal submissions in support of a particular view or in respect of a particular point of law in a case. Third party rights may involve in the WTO DSU, which help less developed members or any other smaller countries such as the ASEAN to participate as claimant or respondent. The nature of the third party under the WTO can be grouped in two functions. Firstly, third party country can attend and be heard by a panel and to make the submission brought by the main parties. Secondly, WTO permits a third country to bring an argument in any case WTO does not have the resources to claim itself. Locknie Hsu, 'Application of WTO in ASEAN' (2003) Singapore http://www.aseanlawassociation.org/docs/w7_sing.pdf accessed 20 December 2015, p376

[653] Added that, article 9.1 provides that Where there is more than one plaintiff in a case or where several Members file similar complaints for the establishment of a single panel 'whenever feasible'. Co- plaintiffs however, may request the publication of separate reports.

dispute. The establishment of panels is usually determined at the second meeting of the DSB where the panel request appears on the DSB's agenda, unless the DSB decides by consensus not to establish the panel.[654] A complainant may ask the DSB body to establish a panel to decide the dispute in only five situations. The first situation is where the party to which the request for consultations is made does not reply within ten days after the date of receiving the request for consultations.[655] The second situation is where the party to which the request of consultations is made in good faith does not respond within 30 days after the date of receipt.[656] The third situation is where consultations fail to settle the dispute within 60 days after the date of receipt.[657] The fourth situation is where the consulting parties jointly consider during the 60 days period that the consultations have failed to settle the dispute.[658] Finally, in cases of urgency, where the member to which the request of consultations is made does not enter into consultations within 10 days after the date of receipt, or where consultations have failed to settle the dispute within 20 days after the date of receipt.[659] The establishment of panels should take place no earlier than 60 days after the receipt of the request for consultation.[660] Such a request must be submitted in writing to the Chair of the Dispute Settlement Body (DSB) and the content of the request must state briefly and clearly the grounds for the complaint. The formal request document is then circulated to all WTO members in order to inform the respondent together with any interested third parties[661] who want to attend in the dispute. The content of the request is also included on the agenda for the next meeting of the DSB, as well as the defining and limiting of the dispute and the extent of the panel's jurisdiction.[662] Participation in panel procedures as a third party requires the DSB to be notified, in practice, within 10

[654] DSU, art 6.1
[655] DSU, art 4.3
[656] DSU, art 4.3
[657] DSU art 4.7
[658] DSU art 4.7
[659] Read, above 529 and DSU art 4.8
[660] DSU, art 4.7
[661] Any third parties may then make their own submissions. These tend to be shorter commentaries on specific aspects of a case. This is followed by a closed oral hearing involving all of the parties after which the parties exchange written rebuttals to each other's legal arguments.
[662] DSU, art 7.1

days of the establishment of a panel. In the event of the nullification or impairment of their benefits, third parties may also have recourse to the DSU.[663]

The functions and procedures of WTO dispute panels are laid out in Articles 7, 8 and 11 to 15 of the DSU. The DSU Article 11 sets out that the function of the panel is to make an objective assessment of the matter before it, including an objective assessment of the facts of the case and of the applicability of legal issues in order to assess their conformity with the relevant covered agreements invoked by the complainant.[664] The panels are thus required to investigate the evidence in the context of the relevant provisions of the WTO agreements cited by the parties of a dispute. They then make recommendations or rulings to the DSB with regard to the relevant WTO agreements. It is the normal function of a judge in a court of law. The principle function of WTO panels is to assist the DSB, as with their predecessor, i.e. GATT.[665] The first stage of the panel process closely resembles the old GATT system. The working procedures of the DSB dictate that the panels must meet in closed sessions; the deliberations are confidential and the public can have no access to the panel process.

After the panel is established by the DSB, it is necessary to select the three individuals who will serve as panellists, but in certain cases, there can be five.[666] Although an insistent complainant can ensure the composition of a panel within 30 days of its establishment, panel composition takes more time than this in almost all cases. Typically, panel positions[667] are open to both governmental and non-governmental

[663] Read, above 635, page 497-500
[664] DSU, art 11
[665] The principle of WTO panels, as with the predecessor GATT panels is the successor to the GATT council or Committee, in discharging its responsibility read more Curtis Reitz, 'Enforcement of the General Agreement on Tariffs and Trade', (1996) 17 university of Philadelphia Journal of international economic law, pages 555-560
[666] If the parties cannot agree on the identity of the panelists within 20 days of the panel's establishment, any party to the dispute may request the WTO Director-General to appoint the panel art. 8.7. On panelists generally, see DSU, art.8.
[667] Panelists are current or former government trade officials, although academics and practitioners sometimes are selected to serve as panelists.

individuals chosen from a roster of names kept by the Secretariat.[668] This means that the panellists are well qualified, independent and non-attributable, as stated in the Rules of Conduct section II par 1.[669] Importantly, there is no permanent panel in existence in the WTO; a different panel is composed for each dispute, as a result of this, they are normally selected on an ad hoc basis.[670] If an agreement on the selection of the panellists cannot be reached, either disputing party can ask the Director-General of the WTO to choose them, which must be done within 10 days of the request.[671] In disputes involving developing countries, at least one panellist from a developing country shall be included if the developing country members so request.[672]

Panellists are required to possess expertise appropriate to a case, but they may not be citizens of the parties or third parties to a dispute. Moreover, the nominated panellists are required to disclose any information that they may have through the whole procedure which may affect their independence in rendering decisions.[673] A Lack of transparency has been a big defect in the WTO for a long time.

The Secretariat proposes panellist nominations, which the disputants may challenge for compelling reasons.[674] In a dispute involving both developing and developed members, at least one panellist must be from a developing nation.[675] The procedures for the dispute panels are set out in Appendix 3 of the DSU, including a proposed timetable for panel deliberations, and it ends within six months of a request for the panel process, but it may extend to a maximum of nine months if a panel

[668] DSU, art 8.4
[669] The panelists are subject to Rules of Conduct, they are required to ' be independent and impartial, shall avoid direct or indirect conflicts of interest and shall respect the confidentiality of proceedings of bodies pursuant to the dispute settlement mechanism, so that through the observance of such standards of conduct the integrity and impartiality of the mechanism are preserved' see, section II par 1
[670] WTO Secretariat, *World Trade Organisation: a handbook on the WTO dispute settlement system* (Cambridge University Press 2004), page 21
[671] DSU, art 8.7
[672] DSU, art 8.10
[673] Rules of Conduct section VI par 2
[674] DSU, art 8.6
[675] DSU, art 8(10)

requests additional time to prepare its report and conduct its examination.[676] In general, most dispute cases undertake the panel process for up to twelve months from the establishment of a panel to the publication of its report.[677]

c) The Appellate Body

The appellate process commences when a disputant notifies the Dispute Settlement Body of its desire to appeal the panel report. The establishment of the Appellate Body (AB) has strengthened the dispute settlement process of the WTO, which is a standing body to hear appeals from panel decisions.[678] This appeal procedure in the WTO ensures the legality, fairness and capacity of the expert panels and the Appellate Body – to continue with high quality and timely outcomes[679] The Appellate Body (AB) hears appeals only from a party to a dispute, which does not include a third party. This process has sixty days[680] after the publication of a Final report to complete the appeal process.[681] An additional thirty days may be requested by the Appellate Body for it to produce its report.[682] Respondents and plaintiffs may appeal against the findings of a dispute panel with respect to the case in question. It is not unusual for parties to request clarification or reinterpretation of particular legal points with respect to their broader implications for future cases. The function of the Appellate Body requires that it has the power to modify or reverse the findings and recommendations of a Panel Report following procedural rules.[683] The Appellate Body shall consider only issues of law covered in the panel report and legal interpretations developed by the

[676] DSU, art 12(8),(9)
[677] DSU, art 12(12)
[678] See WTO website in Appellate procedures at https://www.wto.org/english/tratop_e/dispu_e/ab_procedures_e.htm
[679] Jonathan T. Fried, '2013 in WTO dispute settlement' (2013) see, WTO website at https://www.wto.org/english/tratop_e/dispu_e/jfried_13_e.htm accessed 1 March 2017
[680] In some case, Appellate Body reports have almost always the 90 days deadline.
[681] DSU, art 17(4),(5)
[682] DSU, art 17(5)
[683] Garbrielle Marceau and Julian Wyatt, 'Dispute settlement regimes intermingled: regional trade agreements and the WTO' (2010) 1(1) Journal of international dispute settlement, page 67

panel.[684] In the dispute settlement department, the Appellate body is permanent, unlike panels.[685] The DSB appoints the members by consensus.[686] The appeal is to the WTO Appellate Body, which consists of seven individuals (who do not belong to any government institution), three of whom shall serve on any one case[687], with a membership of recognised authorities in the relevant fields of law, and with demonstrated expertise in law, international trade and the subjects covered in other WTO agreements who are appointed by the DSB for four-year terms with the possibility of reappoint to one additional term[688], and who shall not be affiliated with any government. [689] The appellate proceedings shall be confidential and its report anonymous.[690]

The AB decisions, as well as the decisions of the dispute resolution panels (if the parties elect not to appeal), are formally binding under international law on the signatory states unless all the states (including the winner of the cases) vote 'unanimously' to overrule them.[691]

Decisions made by the Appellate Body may uphold, modify or reverse the legal findings and conclusion of the panels.[692] The DSB and the parties shall accept the report by the Appellate Body without any amendments within thirty days of its circulation to the members, unless a consensus of the members revokes the report.[693]

[684] DSU, art 17 para 6
[685] WTO Secretariat, *World Trade Organisation: a handbook on the WTO dispute settlement system* (Cambridge University Press 2004), page 22
[686] DSU, art 17.2
[687] DSU, art 17 para1
[688] DSU, art 17(1),(2),(3)
[689]DSU, art 17 para 3
[690] DSU, art 17 para 10
[691] Wang, above 462, page 3
[692] DSU, art 17 para 13
[693] DSU, art 17(14)

d) Private parties' rights

The lack of direct applicability between the WTO dispute settlement system and private parties' causes fundamental problems in the WTO system.[694] Private parties may not be able to bring complaints directly to the WTO DS system, only the member governments of the WTO are allowed to initiate and participate in disputes, either as parties to the dispute or as third parties to the dispute. Even if the private parties are aggrieved with the WTO's inconsistent measures of other WTO members, the private parties have to ask their own government to raise complaints on their behalf. However, the WTO mechanism does not set the function properly to bring a WTO complaint on their behalf in line with private parties' requests.[695] According to the international adjudication regime under the WTO, private actors (as exporters or importers) or companies, do not have any granted right directly to obtain access to the WTO dispute settlement system, even though they may be the ones who are most directly and adversely affected by measures that violated the WTO agreement. It follows then, that the WTO Secretariat, observer countries, regional or local governments, as well as non-governmental organisations, have no standing to initiate dispute proceedings regardless of whether they may have a general interest in a particular matter.[696]

e) Decisions and the adoption of decisions

A panel then drafts the report outlining the arguments of each party and summarises all the factual and legal arguments which are then circulated to the parties for comments and corrections. Again, the parties are permitted to make comments, request corrections, and ask the panel to review specific points. These amendments and elaborations are then incorporated to produce a Final Panel Report. When the process is finished, the panel reports are circulated to all WTO members and become public

[694] Dukgeun Ahn, 'WTO dispute settlements in East Asia' in Takatoshi Ito and Andrew K. Rose, *International Trade in East Asia* (University of Chicago Press 2003), page 320
[695] Ibid, page 320
[696] The Settlement System of DSU, see at https://www.wto.org/english/tratop_e/dispu_e/dsu_e.htm

documents. After the panel has completed its deliberations regarding the facts and arguments phase, the panel issues an "interim report", which contains its findings and recommendations. The parties are allowed to comment on some aspects of the interim report. After their comments have been received, the panel then issues its final report. Under the DSU, the reports issued by a panel and the Appellate Body, in order to be binding, they must be adopted by the DSB.[697] Similar to the decision to establish panels, unless all DSB parties by consensus agree not to adopt the report, it will be adopted.[698] The final panel report and its recommendations have no standing until it is adopted at a meeting of the DSB[699], unless a party to the dispute formally notifies the DSB of its decision to appeal to the WTO Appellate Body, or the DSB decides by consensus not to adopt the report.[700]

In the case of appeals, Appellate Body reports have no binding effect on the parties to the disputes unless and until the contracting parties adopt them. A final report issued by a panel or by the Appellate Body is submitted to the DSB to be adopted or rejected.[701] This so-called 'negative consensus'[702] rule means that the DSB has been equipped to facilitate the adoption of reports, and this has overcome the problem encountered in the GATT processes. The negative consensus rule is a fundamental change from the GATT dispute settlement system, where a positive consensus was needed to adopt a panel report, thus permitting a dissatisfied losing party to block any

[697] Felicity Hammong, 'A balancing act: using WTO dispute settlement to resolve regional trade agreement disputes' (2002) Trade L.& DEV 4(2), page 440

[698] DSU, art 17.14

[699] Now, the panel report is automatically adopted at the Dispute Settlement Body (DSB) meeting and placed on agenda

[700] The final report is referred to the DSB for formal adoption, which is to take place within 60 days unless there is a consensus not to adopt the report or an appeal of the report to the WTO Appellate Body. DSU, art 16(4)

[701] DSU, art 17.4

[702] The negative, inverted or reversed consensus means 'in order to reject a report of a panel or of the appellate body, all DSB members including those who agree with and have an interest in its finding as well as the winning party have to agree. Read more Kim Van Der Borght, 'Book review and Note: Dispute Settlement in the WTO', (2009) 94 American Journal of international law 427, note 16 Moreover, the negative consensus means that the implementation of panel finding can no longer be blocked by respondents. Read more Robert Read, 'Dispute settlement, compensation and retaliation under the WTO' in William Kerr and James Gaisford (eds), *Handbook on international trade policy* (Edward Elgar publishing 2007) Chapter 45

action taken by the dispute settlement process at any stage. As long as one member wants the report adopted, it will be adopted. This rule is considered to make the process virtually automatic.[703] The DSB has a duty to adopt a panel report in every case unless there is a consensus presented by all member states against such adoption. To date, the DSB has adopted all the panel and Appellate Body reports that have been submitted to it.

f) The enforceability of decisions

Once the panel decision, or that of an Appellate Body, has been adopted by the DSB, the dispute panel issues recommendations with suggestions which become binding on the parties to a dispute and on how the losing party is to bring its trade regime into compliance with the WTO rules. The DSU sets out procedures for implementing the recommendations of the Dispute Settlement Body along with authorisation for compensation and the suspension of concessions.[704] The losing party is given a 'reasonable period of time'[705] to implement the panel's recommendations and rulings as well as to bring inconsistent measures into conformity with its obligations under the WTO. If the losing party fails to do so within the determined reasonable period of time, the complainant may request negotiations for compensation.[706] In the event that there is dissatisfaction or disagreement concerning a respondent's compliance with the

[703] Marceau and Wyatt, above 683, page 68
[704] DSU, art 21,22
[705] To date, reasonable period of time, has ranged between six to fifteen months, if awarded by arbitrators and between four to eighteen months if agreed to between the parties to the dispute themselves, normally not exceeding 15 months from the date of adoption of the panel and Appellate Body report. Shorter or longer timeframe depends on the particular circumstances. Read more in, Geert De Baere and Jan Wouters (ed.), *The contribution of International and supranational courts to the rule of law* (Edward Elgar Publishing 2015), page 199 and Thomas J. Dillion, The world trade organisation : A new legal order for world trade, 16 Mich. J. Int'L L. 349 (1995) discussing the effectiveness of the WTO with a comparison of the lack f enforcement under compliance mechanisms of the IMF or the world bank.
[706] DSU, art 22 para 1

recommendations and rulings of the DSB, a winning party can seek further recourse to the dispute settlement procedures and a new Panel Report.[707]

The DSB is involved in every aspect of the implementation process. The DSB is responsible for the surveillance of the implementation of the adopted recommendations and rulings, and it also has the responsibility to supervise the implementation of the panel and Appellate Body report, which remains on the agenda until it is resolved.[708] Under Article 21, Surveillance of Implementation, losing respondents have 30 days after the adoption of a Report to inform the DSB of their intentions regarding the implementation of the Panel or Appellate Body recommendations. Prompt compliance with the recommendations or rulings of the DSB is essential to ensure the effective resolution of disputes to the benefit of all members.[709] It should be noted that in order to achieve prompt compliance, a violating party has to begin to implement the recommendation right after the adoption of a panel and Appellate report.

Section 3.5 Conclusion

The rapid expansion of international trade and the growth of market economies have been major factors contributing to the increasing globalisation of the world economy. The growth of economic transactions also increases the probability of disputes arising between governments and/or private parties. This means that the use of trade dispute settlement mechanisms has grown considerably. Major trade organisations (such as the WTO and the European Union) utilise various different types of mechanisms to resolve their disputes. These differences reflect the level of economic integration that has been attained by the participating countries in each organisation.

[707] DSU, art 21.5
[708] DSU, art 2
[709] DSU, art 21.1

Both developed and developing countries have concluded trade agreements between countries creating free trade areas or customs unions among themselves. The advantage of these economic integration groupings is that they reduce or eliminate barriers to trade. The importance of dispute settlement is a matter of settling disputes in a timely and structured manner. It can encourage national governments to apply their integration commitments to economic liberalisation. Furthermore, it helps to resolve international trade conflicts by settling disputes satisfactorily through the trading regime, which will be acceptable to the disputing parties. This chapter has analysed and described the rules and procedures under the GATT and the WTO dispute settlement systems. Dispute settlement under the GATT was not highly developed in the early days. This underdeveloped dispute settlement system was a result of the vagueness of its provisions, and the fact that the GATT was not a neutral decision-maker like the WTO. The system of dispute settlement of the GATT contains only two articles (Article XXII and Article XXIII) that deal directly with dispute resolution. As can be seen, the GATT dispute settlement system could resolve disputes through diplomatic methods of conciliation, negotiation, mediation and good offices between states to resolve trade conflicts. The GATT was never intended to constitute an enduring legal framework. Certainly, it worked without recourse to strict legal rulings for the resolution of trade disputes. Although the GATT system developed quasi-rules-based dispute settlement procedures, its effectiveness was critically undermined by the consensus requirement for respondents, such as delays or blocks in the establishment of panels, or the adoption of panel reports. In this manner, the WTO settlement system represents a significant improvement upon these weaknesses in the GATT dispute settlement system.

The creation of the WTO dispute settlement understanding was an element of the WTO Uruguay Round Agreement. The WTO dispute settlement has established a unified and enhanced commitment to a more effective and reliable dispute resolution mechanism covering all of the WTO agreements. The DSU rules and precedents were initially established under the GATT system of consensus which moved from a consensus-based procedure to utilise a rules-based judicial procedure. The WTO DSU

created a new rules-based procedure for the settlement of disputes over trade. Panel and Appellate Body decision-making processes have contributed to the judicial process of the creation of this dispute settlement system. The achievements of the WTO DSU can be seen in its success in creating a frequently used compulsory dispute settlement system with the enforcement of its binding decisions. The Appellate Body is also a feature of the WTO system that was not present under the GATT system that is responsible for examining the legal errors contained in resolutions by panels. The major innovations brought about by the DSU are covered by the establishment of a standing Dispute Settlement Body, the establishment of a new appellate process, including the negative consensus rule that replaces the positive consensus approach of the GATT, as well as the adoption of panel and appellate reports and the acceptance of appellate ruling.

As it currently stands, the DSU, therefore, represents a significant improvement upon the previous GATT dispute settlement systems. The dispute settlement of the WTO is the most interstate trade dispute mechanism that is currently being used. The credibility of the WTO Dispute Settlement Understanding is reflected in the increasing usage and the rapid growth of both the trade volume and the complexity of dispute cases. Since its inception in 1995, over 400 trade disputes have been referred to the WTO DSU. This statistic proves that many states have confidence in the system. The WTO dispute settlement system has strengthened the rule of law in dealing with trade disputes. Before turning to the development of the mechanism in the ASEAN context, the next chapter will analyse the key procedural issues that have arisen in regional contexts through the use of different forms of dispute settlement in the European Union, the NAFTA, and the MERCOSUR.

CHAPTER IV

REGIONAL TRADE ORGANISATIONS IN THE EU, NAFTA AND MERCOSUR AS AN EXAMPLE OF DISPUTE SETTLEMENT MECHANISMS

Section 4.1 Introduction

Regional and multilateral trade agreements have become an important topic when negotiating preferential trading areas. The creation of institutions and procedures among the signatory members can ensure the adoption of a dispute settlement mechanism that will be the most effective in resolving these disputes.[710] Different models of dispute settlement provisions should be discussed at the stage of regional integration and multilateral trade in order to find the best solutions for resolving conflicts. The purpose of including dispute settlement systems in international trade agreements is to 'guarantee respect for the agreement in responding to violations and legitimate expectations under such an agreement'.[711] As mentioned in Chapter 3 above, 'multilateralism' refers to the General Agreement of Trade Tariffs (GATT) and the World Trade Organisation (WTO) in terms of multilateral trade negotiations, which attempt to promote trade liberalisation and establish sufficient negotiating power to reduce illegal trade. The establishment of the WTO's regional trade agreements (RTAs) has led to more than 40 percent of the world's trade now being transacted based on those agreements.[712]

'Regionalism' refers to 'a violation of the non-discrimination principle in which one member of a regional trade agreement (RTA)[713] discriminates in its trade policies in

[710] Rafael Leal Arcas, 'Comparative analysis of NAFTA's Chapter 20 and the WTO's dispute settlement understanding' 2011 8(3) Queen Mary University of London research paper no. 94/2011, available at http://ssrn.com/abstract=1969827 accessed 29 April 2016

[711] Ibid, 1

[712] Lorand Bartels and Federico Ortino, *Regional trade agreements and the WTO legal system*, (Oxford University press 2006), page 23

[713] Over 150 RTAs exist. Types of regional trade agreements are: (1) Preferential Trade Area (PTA), which is an agreement on the part of a set of countries to reduce but not eliminate trade restrictions among themselves. (2) A Free Trade Area (FTA), which is an agreement on the part of a set of countries to

favour of another member of the RTA and against non-members'. Regionalism and regional integration are one of the most complex issues in the current international arena. The European Union (EU) provides for the settlement of disputes in Europe through its supranational court system, and the North American Free Trade Area (NAFTA) through its arbitration panels. The Mercado Común del Sur, also known as MERCOSUR, is one of the most important regional economic integration processes in the world, which has become the third-largest trading block after NAFTA and the EU.[714]

As can be seen, the different types of dispute settlement mechanisms in regional trade agreements are affected by five factors; 1) evolution over time; 2) level of economic development; 3) regional characteristics; 4) level of integration, i.e. free trade agreement or custom union; and 5) configuration, such as bilateral or plurilateral.[715] An analysis of the different background elements and a comparative perspective of the three examples of regional dispute settlement mechanisms of the EU, NAFTA and MECOSUR may be beneficial for the ASEAN. The design of regional trade dispute settlement regimes can provide a reference for many comparative examples to encourage trade liberalisation and bilateral trading concepts that could be functionally implemented in the context of the ASEAN. A study of these mechanisms will be useful for the development of an ASEAN trade dispute settlement mechanism, as will be explained in the next chapter.

The aim of this chapter is to illustrate the establishment and evolution of a variety of different dispute resolution regimes applied to trade disputes based on a

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eliminate trade restrictions among themselves. (3) Customs Union (CU), which is an agreement on the part of a set of countries to eliminate trade restrictions among themselves and to adopt a common external tariff. (4) A Common Market (CM), which is an agreement on the part of a set of countries to eliminate trade restrictions among themselves, to adopt a common external tariff, and to allow the free movement of labour and physical capital among member countries. To read more on regional trade agreements see chapter 2

[714] Rafael A. Porrata-Doria, 'MERCOSUR: the common market of the twenty-first century?' (2004) 32 (1) Georgia journal of international and comparative law, page 2

[715] Claude Chase, Alan Yanovich, Jo-Ann Crawford and Pamela Ugaz, 'Mapping of dispute settlement mechanisms in regional trade agreements – innovative or variations on a theme?' (2013) 2013(7) World Trade Organisations Economic research and statistics division, page 4 https://www.wto.org/english/res_e/reser_e/ersd201307_e.htm accessed 1 May 2016

discussion of how a regional trade organisation develops a dispute resolution mechanism. A brief overview of the relevant procedure and structures will be provided before making a more detailed examination of the disputes that may arise between state parties. Furthermore, the functioning of these dispute resolution mechanisms will be explained in this chapter, especially those involving foreign investment and some that relate to disputes among state parties over the application and interpretation of free trade agreements. The three selected free-trade regimes are the European Union (EU), the North American Free Trade Agreement (NAFTA) and the Southern Common Market or Mercado Comun del Sur (MERCOSUR).[716] After describing these three main dispute settlement mechanisms in detail, the disputes settled under each of them will be addressed. Some findings that relate to their strengths and weaknesses will also be presented in this chapter, which will conclude with some reflections on emerging conflicts based on the dispute settlement provisions in regional trade agreements.

Section 4.2 Trade dispute settlement mechanisms at the regional level

4.2.1 The European Union (EU)

4.2.2.1 Overview of the dispute settlement regime in the European Union (the EU)

The European Economic Community was developed and formed by the Treaty of Rome in 1957[717] and merged with the European Coal and Steel Community in 1967. The EEC developed into a Customs Union in 1968 and then to a Single Market in 1992.[718]

[716] MERCOSUR has been included in this study because as is the case with ASEAN (which will be further discussed in Chapter 5), its member states are developing countries. The experience of MERCOSUR may prove useful for ASEAN's own process of integration is several respects. For example, the development of partipatory mechanisms, the solution when the organisation face with some difficulties of transferring decision-making processes, the limited private sector participation and a lack of effective implementation of some cooperate projects. All of these will be discussed more detail in chapter 7

[717] The Treaty of Rome established the European Economic Community (EEC) on 25 March 1957, see http://ec.europa.eu/archives/emu_history/documents/treaties/rometreaty2.pdf accessed 1 January 2014

[718] Rodolfo C. Severino, 'Southeast Asia in search of an ASEAN Community Insights from the former ASEAN Secretary-general' (ISEAS publishing Singapore 2006), page 5

Therefore, the EU political and economic community of 28 European countries has its roots in the European Coal and Steel Community (ECSC)[719] and the European Economic Community (ECC).[720] The European Union was formalised in 1993 with the Maastricht Treaty and then amended in the Treaty of Lisbon in 2009. It is important to note that the Treaty of Maastricht created the EU and it modified the European Economic Community, which was renamed to become 'the European Community (the EC).' Then, the effective passing of the Treaty of Lisbon on the 1st December 2009 led to important amendments to the initial Maastricht Treaty on the European Union and the EC was developed into the European Union.[721] The European Union (EU) is the latest name for the European Economic Community or European Community (EC).[722]

At the first point of its birth, the EU attempted to promote regionalism over nationalism in Europe after the Second World War. In 1993, the Treaty of Maastricht was the means of an effective transition from the single market to the official formation of a common market in which all trade barriers and capital were to be removed.[723] After the creation of the European Union, the euro was adopted as the currency in the fourth level of economic integration - called a common currency.[724] The EU now consists of twenty-eight member countries.[725] All of these achievements were made in the 15 years after the end of the cold war.[726]

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[719] The Treaty of Paris established the ECSC, on 18 April 1951. The ECSC dealt with regulation of coal and steel industries. This was first step toward European integration by establishing a supranational authority whose independent insitutitons had the power to bind its constituent member states.

[720] The Treaty of Rome established the European Economic Community (EEC) on 25 March 1957. This Treaty known as Treaty of Rome or the EC Treaty (hereinafter EU Treaty), which concerned the EEC in the economic cooperation towards the formation of common market, see http://ec.europa.eu/archives/emu_history/documents/treaties/rometreaty2.pdf accessed 1 January 2014

[721] A citation manual for European Union Material' (2010-2011) 34 Fordham international law journal, page 6

[722] Paul Craig and Grainne de Búrca, *EU Law: Text, Cases, and Materials*, (6th ed) (Oxford University Press 2011), pages 3-6

[723] Trade among member countries is intra-community trade which means no tariff barriers among member countries, no quotas or other non-tariff-barriers and no equivalent barriers.

[724] Joaquin Roy, 'Reflections on the Treaty of Rome and today' EU' (2007) Jean Monnet/Robert Schuman paper series April 2007, page 1

[725] The EU members consist of Austria, Belgium, Bulgaria, Croatia, the Republic of Cyprus, the Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Ireland, Italy, Latvia, Lithuania,

The fulfilment of one of the EU's fundamental goals of market integration is widely regarded as the most successful example of regional integration.[727] The success of the European Union lies in the integration of a system of governance based on freedom, human rights and the rule of law and democracy between European Union members.[728] The provisions of the European Court of Justice (ECJ) can be found in Articles 251-281of the Treaty of the EC. Articles 251-253 focus on the Court of Justice, Articles 254-256 are concerned with the General Court, Article 257 contains the provisions on specialised courts which may be attached to the General Court, while the remaining Articles relate to opinions, actions, penalties, jurisdiction and similar matters.[729]

The European Union's institutions also need to be discussed before moving on to its dispute settlement mechanism. The four main institutions are: 1) the European Commission;[730] 2) the Council of the European Union;[731] 3) the European Parliament;[732] and 4) the Court of Justice.[733] The European Commission and the European Court of Justice (ECJ) are the main organs, the purpose of which is to promote integration and

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Luxembourg, Malta, the Netherlands, Poland, Portugal, Romania, Slovakia, Slovenia, Spain, Sweden and the United Kingdom. For further information on the EU member countries, a map and the entry year visit http://europa.eu/about-eu/countries/index_en.htm

[726] Roy, ibid 724, page 2

[727] Reuben Wong, 'Model power or reference point? The EU and The ASEAN Charter' Cambridge Review of international affairs 10 Oct 2012 page 670 http://dx.doi.org/10.1080/09557571.2012.678302

[728] Ibid, page 670

[729] Noted that The treaty Establishing the European Community has been renamed the 'Treaty on the Functioning of the Union' (TFEU). The provision on the European Court of Justice is set out in Section 5 in Article 251-281. The TFEU Article available on http://eur-lex.europa.eu/resource.html?uri=cellar:2bf140bf-a3f8-4ab2-b506-fd71826e6da6.0023.02/DOC_2&format=PDF

[730] The EU Commission is the central administrative structure of the EU. It proposes EU legislation, implements it and monitors compliance both in legislative and executive contexts. See http://ec.europa.eu/about/index_en.htm

[731] The Council of the European Union (the council) is represented the member state governments. The roles of the council are to coordinates the economic policies of the EU member countries, to approve the annual EU budget and to sign agreements with other countries. See http://www.consilium.europa.eu/en/home/

[732] The European Parliament has the law-making powers to debate legislation proposed by the commission and forwarded to it by the council. It is elected by the people in each of the member states every five years. See, http://www.europarl.europa.eu/portal/en

[733] The Court of Justice is the supreme appeals court for EU law. See, http://europa.eu/about-eu/institutions-bodies/court-justice/index_en.htm

uphold the rule of European law. The ECJ was designed to clarify the meaning of the treaty, enforce the treaty obligations and integrate the decisions made by the Commission. In addition to these institutions, there are others with different roles. The Court of Auditors and the Central European Bank are the organs concerned with financial matters and funding. Another important body is The European Council, the ultimate controlling authority within the EU, which sets the overall political direction and agenda.

The European Community adopts different types of dispute settlement concepts; for example, a judicial dispute settlement and an alternative dispute settlement, as well as some other mechanisms, which are designed to settle disputes. The traditional diplomatic approach to the settlement of disputes related to the implementation of the agreement essentially relies on consultations and diplomatic negotiations; however, legal adjudication, such as arbitration, is normally an available option which requires the agreement of the parties.

The European Union's Court of Justice (ECJ)[734] has the power to rule on disputes between institutions, situations and member states about the extent of their respective powers, and on the rights and obligations of member states and citizens under European law.[735] It serves as a permanent court for the European Economic Community (EEC), the European Coal and Steel Community (ECSC) and the European Atomic Energy Community (EURATOM). The ECJ has a variety of functions, the first of which entails reviewing Community acts or the inaction of Community institutions in cases brought by member states and by EC institutions. Within this framework the jurisdiction of the ECJ ensures that the EC law in the EC Treaty will be interpreted and applied correctly by the

[734] The Court of Justice of the European Union (CJEU) is the collective name for the judicial branch of the EU. The CJEU consists of three distinct judicial entitles, include the highest is the European Court of Justice (ECJ). The General Court and the Civil Service Tribunal are two subordinate courts. It shall ensure that in the interpretation and application of the treaties the law is observed. See, Elspeth Berry, Matthew Homewood and Barbara Bogusz, *EU Law: text, cases and material* (2nd ed.) (Oxford University Press 2015), page 45

[735] Jean-Claude Piris and Walter Woon, *Towards a Rules-Based Community: An Asean Legal Service* (Oxford University press 2015), page 115

EC institutions and member states.[736] Secondly, the establishment of the ECJ is a way to determine disputes among member states, including trade disputes. Thirdly, the ECJ acts to secure that the objectives and rules of law are met and to preserve the balance between the Community and member states. The decisions of the ECJ are based on the legality of the Community, its legislation, the preservation of its institutional balance, the national competences of its members, and the protection of fundamental rights.[737] Fourthly, the ECJ has been established as a permanent court to ensure the uniform application of Community law within the framework of the preliminary questions referred to it by the national courts, or it can appeal against a judgment made by the Court of the First Instance (CFI).[738] Moreover, the Advocate General also assists the function of the ECJ, which consists of one judge from each member state, based on its own statute and rules of procedure. Lastly, one of the powers of the ECJ is also to provide opinions or preliminary rulings on the implementation of the articles of the treaties.[739] Furthermore, the ECJ has developed two main principles, the direct effect and the supremacy doctrine, through which it facilitates the enforcement of the harmonisation of the EU legal order. It is important to note that the focus of this section will only be the scope of jurisdiction of the ECJ in the area of trade disputes, which has become a major aspect of the use of a 'quasi-judicial' approach to settle trade disputes.

[736] Article 220 of EC Treaty

[737] Ellen Vos, 'Regional integration through dispute settlement: the European Union experience' (2005) Maastricht faculty of law working paper 2005(7) http://papers.ssrn.com/sol3/papers.cfm?abstract_id=977450 accessed 1 May 2016 page 4

[738] Ellen Vos, 'Regional integration through dispute settlement: the European Union experience' (2005) Maastricht faculty of law working paper 2005(7) http://papers.ssrn.com/sol3/papers.cfm?abstract_id=977450 accessed 1 May 2016 page 4

[739] Prof. Dr. Ellen Vos adds that the ECJ may also give opinions, for example, on the compatibility of international agreements that have to be conducted by the Community. Read more in, Ellen Vos, 'Regional integration through dispute settlement: the European Union experience' (2005) Maastricht faculty of law working paper 2005(7) http://papers.ssrn.com/sol3/papers.cfm?abstract_id=977450 accessed 1 May 2016 page 4 page 8. Added that, when a national court in any case encounters a question of community law which needs to be resolved before judgment for the case can be given, it can refer the issue to the ECJ which in turn, will deliver an answer (preliminary ruling) to the reformed.

4.2.1.2 European Community dispute settlement regime

a) Structure and composition

The European union court's dispute settlement mechanism consists of two different bodies, namely, the European Court of Justice (the ECJ) and the Court of first instance (the CFI), each of which has its own jurisdiction in order to ensure the interpretation and application of the EC Treaty.[740] The members of the Court of Justice of the European Union [741] are the Court of Justice with one judge from each EU country and 8 Advocate-Generals,[742] the General Court with one judge from each EU country, and the Civil Service Tribunal with 7 judges. These independent judicial officers are chosen by the 'common accord' of member state governments from persons whose 'independence is beyond doubt' and who have 'the qualifications required for the highest judicial office in their respective jurisdiction.[743] Overall, ECJ is composed of 28 judges[744] and 8 Advocate-Generals.[745] The governments of the member states appoint these judges based on the joint agreement of the governments of the member states[746] with a renewable term of six years, after which they may be reappointed for one or two further periods of three years.[747] This means that both the judges and Advocate-

[740] Article 220 of EC Treaty

[741] The title of the European Court of Justice, with the abbreviation ECJ, is still used in preference to CJEU.

[742] Refer to paragraph one of article 252 of the Treaty on the Functioning of the European Union (TFEU), the Court of Justice should seek to increase the number of Advocates General by three persons (i.e. eleven instead of eight) Advocated-General assists the ECJ in its task. They deliver reasoned opinions in all cases with complete impartiality and independence to assist the ECJ in making its decisions. Advocates-General work independently of the judges. They determine the facts of the cases and investigate case law relate to solution of the dispute. The opinions made by the Advocates-General are not binding upon the judges issuing the final judgment. See, Ellen Vos, 'Regional integration through dispute settlement: the European Union experience' (2005) Maastricht faculty of law working paper 2005(7), page 6

[743] Elspeth Berry, Matthew Homewood and Barbara Bogusz, *EU Law: text, cases and material* (2nd ed.) (Oxford University Press 2015), page 45

[744] Article 223 of the EC Treaty (TFEU 253)

[745] Article 222 of the EC Treaty (TFEU 252). Noted that every three years, an alternative thirteen or twelve judges are partially replaced. Read more in Ellen Vos, 'Regional integration through dispute settlement: the European Union experience' (2005) Maastricht faculty of law working paper 2005(7) http://papers.ssrn.com/sol3/papers.cfm?abstract_id=977450 accessed 1 May 2016 page 5

[746]Article 223 of the EC Treaty (TFEU 253)

[747] Article 223 of the EC Treaty (TFEU 253)

Generals are replaced every three years in accordance with the conditions specified in the Statue of the Court of Justice in order to ensure the consistency and continuing functioning of the institution.[748] The ECJ is sub-divided into six Chambers[749] in order to cope with the workload of the Court. The court may sit as a full court in a Grand Chamber of 13 Judges, or in Chambers of three or five judges. The Presidents of the Chambers of five judges are elected for three years, and those of the Chambers of three judges for one year.[750] In most cases, the ECJ sits in smaller chambers, while the larger ones are reserved for special ones.[751]

The judges are legal experts chosen from those who occupy the highest judicial offices in their respective countries and who possess the recognised competences.[752] The duties of the Advocate-Generals are to assist the ECJ by giving their opinion on all cases as well as to apply Community law.[753] Moreover, they deliver their judgment in open court with complete impartiality and independent of the judge, to which it may be added that the Advocate-Generals examine the facts of the case and investigate any case law that is relevant to the solution of the dispute. The opinions expressed by

[748] Koesrianti, 'The development of the ASEAN trade dispute settlement mechanism: from diplomacy to legalism' A thesis submitted to the University of New South Wales (2005), page 108

[749] The word of Chamber is a French word which means a division or section of the court

[750] See, CJUE- The Court of Justice: Composition, jurisdiction and procedures (2010) http://curia.europa.eu/jcms/upload/docs/application/pdf/2012-05/cjue_en.pdf accessed 17 March 2017

[751] The larger chambers are provided for special types of cases, such as when member states or an institution which is a partly of the litigation or to the proceedings so request, and in particularly complex or important cases. Ibid, page 1

[752] Under Article 223 the EC treaty (TFEU 253) states that 'the judges and Advocates-General of the Court of Justice shall be chosen from persons whose independence is beyond doubt and have to pass the qualifications required for appointment to the highest judicial officers in their respective countries. Some member states have appointed academics as judges, whilst others have nominated existing national judges or practicing advocates as judges of the ECJ. Currently, after a long period f only male presence, there are now also some female judges in both the ECJ and the CFI. Read more in, Ellen Vos, 'Regional integration through dispute settlement: the European Union experience' (2005) Maastricht faculty of law working paper 2005(7), page 5

[753] An opinion expressed by an Advocated-General should be given at the end of the oral proceedings which are related to legal issues and advice on how the case should be resolved. The task of an Advocate-General not only provides opinions of all cases, but also has a duty to prepare opinion on the case, in which they examine the facts of the case as well as applicable of community law.

Advocate-Generals are not binding on the court until the judge has issued the final judgment.[754]

The Court of the First Instance is composed of 28 judges, one from each member state.[755] The judges are appointed by the governments of the member states with a renewable term of six years.[756] Unlike the ECJ, the CFI does not have a separate body of Advocate-Generals, but any judge can be called upon to act as an Advocate-General. The CFI can establish its own rules to apply to its service under an agreement with the ECJ. The ECJ is assisted by the CFI in matters concerning administrative institutions and competition law. All the cases heard at the Court of the First Instance may only be subject to an appeal to the ECJ on questions of law.

b) Panels

A judicial panel can be created to hear and determine cases at the first instance in some specific areas. According to Article 225a of the EC Treaty,[757] the decisions made by the judicial panel should follow the rules of procedure in agreement with the ECJ and the extent of the jurisdiction conferred upon it.[758] The members of judicial panels are selected from independent persons who meet the criteria and have the ability to be appointed to the judicial office.[759]

Decisions made by judicial panels can only be appealed in relation to points of law. Furthermore, the right of appeal can be exercised on matters of fact before the

[754] Ellen Vos, 'Regional integration through dispute settlement: the European Union experience' (2005) Maastricht faculty of law working paper 2005(7), page 6 http://papers.ssrn.com/sol3/papers.cfm?abstract_id=977450 accessed 1 May 2016
[755] The CIF sits in chambers of three or five judges. In certain cases, there is only a single judge and particularly, in important cases, the CIF may also sit as a Grand Chamber of the full court. Ibid, page 7
[756] Article 224 of the EC Treaty
[757] TFEU (257)
[758] Article 225a of the EC Treaty (TFEU255)
[759] The qualifications of judicial panels are not as high as in the European Court.

Court of the First Instance; however, it is not possible to appeal against its final binding decision or any judgment made by the ECJ.

c) **Private parties' rights**

Some individuals can bring a claim if the acts they are complaining of concern them individually and specifically.[760] The EU's legal system also provides private actors with the opportunity to bring cases directly before the ECJ or indirectly through their domestic courts to challenge illegal, unfair and invalid EC administrative actions.[761] Such rights are not given to enable private parties to challenge the regulations or directives.[762] The persons, i.e. companies, individuals, private litigants, etc., who are affected by the decision, can make a claim based on these effects.[763]

At the national level Article 234 of the EC Treaty[764] gives the power to the Court of Justice to give a preliminary ruling[765] from the National Courts of the member states.[766] A request can be made to the Court of Justice to give a ruling if a question has been raised before any court of any member state and an answer to this question is

[760] Philippe Sands, The International Court of justice and the European court of justice, Jacob Werksman in *Greening institutions* 2009 (Taylor & Francis), page 219
[761] Ibid, pages 219-220
[762] Ibid, page 220
[763] The situation for the people who can bring the claims is limited only to the people who are affected by different circumstances that make them different from all other persons.
[764] TFEU (267)
[765] The ECJ shall have jurisdiction to give a preliminary rulings concerning: a) the interpretation of the Treaties and b) the validity and interpretation of acts of the institutions, bodies, offices or agencies of the Union. Moreover, one of the powers of the ECJ is also to give the preliminary rulings to reference from national courts of the member states. This system gives individuals the power to raise matters before the ECJ via reference from the national courts. For example, when a national court encounters a question of Community law which needs to be resolved before judgment, it can refer the issue to the ECJ. The ECJ will delivery an answer – knows as the preliminary ruling to the referred question. For the detailed discussion see, Jean-Claude Piris and Walter Woon, *Towards a rules-based community: an ASEAN legal service integration through law: the role of law and the rule of law in ASEAN integration* (Cambridge University Press 2015), page 119 and see also, Koesrianti, above 748, page 111
[766] Article 234 of the EC Treaty (Article 267 TFEU) explains that The Court of Justice shall have jurisdiction to give preliminary ruling concerning: a) the interpretation of this Treaty; b) the validity and interpretation of acts of the institutions of the Community and of the ECJ; c) the interpretation of the status of bodies established by an act of the Council.

necessary to give a judgment.[767] This system gives the power to individuals to raise matters before the ECJ by referring to the national courts and any preliminary ruling rendered by the ECJ. The ECJ has the status of interpreted Community law, which the national courts must apply to the facts of the case.[768] Moreover, Article 230 of the EC Treaty enables member states and Community institutions, as well as individuals, to bring actions against any institution of the Community (the European Parliament and the Council, the Council of the Commission and of the ECJ), when those recommendations and opinions are intended to have a legal effect. The proceedings must be instituted within two months of the legal effect. Then, the ECJ has the jurisdiction to review the legality of Community acts and impose sanctions when the Community institutions refuse to do so.[769]

d) Enforcement of judgments

The EC Treaty contains different procedures for dealing with member states' non-compliance. Three articles attempt to provide a reasoned opinion on the enforcement of Community law. Article 226[770] gives the Commission the power to bring a case to court when it is considered that a member state (represented by legal and natural persons) has failed to fulfil an obligation under this Treaty. The issuing of a 'formal notice' is the first procedural step in the first paragraph of Article 226.[771] The Commission must provide the member state with a notice of the suspected breach and give it the opportunity to submit its observations. Then, the Commission will deliver a reasoned opinion on the matter and give the related State an opportunity to submit its observations. If the state fails to comply with the opinion within the period of time

[767] Article 234 of EC the Treaty (Article 267 TFEU)
[768] Koesrianti, above 748, page 111
[769] Article 230 of EC treaty (Article 263 TFEU) added that legal effects as the case may be such as two months of the publication of the measure, or of its notification to the plaintiff, or, in the absence thereof, of the day on which it came to the knowledge of the latter.
[770] TFEU (258)
[771] TFEU (258)

specified by the Commission, the latter may bring an action before the Court of Justice.[772]

Member states can bring a case to court when they consider that another member state has failed to fulfil an obligation under this Treaty so that the matter can be referred to the Court of Justice. Moreover, a member state that considers that another member state has failed to fulfil an obligation due to an alleged infringement should bring the matter before the Commission. The Commission will provide a reasoned opinion, both orally and in writing, after each of the States concerned has been given the opportunity to submit its own case and make observations on the other party's case. In circumstances where the Commission has not delivered an opinion within three months of the date on which the matter was brought before it, the absence of such an opinion shall not prevent the matter from being brought before the Court of Justice, as is explained in Article 227 of the EC Treaty.[773]

Not only can the Commission and the member states bring a case to court, but the Court of Justice itself is required to take the necessary measures to comply with the judgment when they find that a member state has failed to fulfil an obligation under this Treaty. In other words, the Commission can sue a member state in the European Court of Justice. Penalties or fines can be imposed when the related Member State fails to take the necessary measures to comply with the Court's judgment within the time limit specified by the Commission, as indicated in Article 228 of the EC Treaty[774] It should be noted that monetary penalties are proposed by the Commission and decided by the ECJ.[775] The fines cannot be higher than those proposed by the Commission and the obligation to pay shall take effect on the date set by the Court in its judgment. the ECJ imposed a financial penalty in the case of *the Commission of the European Communities*

[772] Alberto J. Gil Ibanez, 'The standard administrative procedure for supervising and enforcing EC law: EC Treaty article 226 and 228' (2004) 68(135) Law and contemporary problems, page 136
[773] TFEU (259)
[774] TFEU (260)
[775] Jonas Tallberg and James Mccall Smith, 'Dispute settlement in world politics: state, supranational prosecutors and compliance' (2014) 20(1) European International relations, page 127

v. Hellenic Republic, when Greece failed to fulfil its obligation under Article 228 of the EU Treaty.[776] The court instructed a penalty to be paid for each day of delay in implementing the measures to comply with the judgment from the day of the decision until compliance.[777]

e) Effectiveness of the EU

The European Union is a good example of a regional economic institution that has was established to manage conflict, as is evident from the number of cases related to dispute settlement that have been brought before the ECJ. According to statistics for the year 2013-2014, the ECJ completed 701 cases as opposed to 595 in 2012.[778] Moreover, 713 cases were brought in 2015, representing an increase of fifteen percent compared to 622 cases in 2014. Around 111 appeals were lodged in 2014, but this number increased significantly to 215 in 2015. In summary, the ECJ completed 616 cases in 2015 and there were 884 cases still pending.[779] The high volume of cases indicates that the ECJ sustained its productivity and efficiency.

One of the most effective ways in which the European Union actively works to settle disputes is to force member states to resolve conflicts among themselves, which it calls 'direct action[780] and supremacy.'[781] Ignacion Garcia Bercero, who is a director at the Directorate General for Trade of the European Commission, adds that the success of the EU regime is based on the legally binding nature of its decisions and its strong level

[776] TFEU (260)
[777] Koesrianti, above 748, page 116
[778] Eric Davies, ' Court of Justice of the European Union' (2013) ESO information consultant, Cardiff University, page 12
[779] Statistics and the number of cases brought for the Court of Justice of the European Union read more in, http://curia.europa.eu/jcms/upload/docs/application/pdf/2016-03/cp160034en.pdf
[780] The principle of EU law known as Direct effect is the first court established in the case of Van Gend en Loos vs. Netherland in 1963
[781] The concept of supremacy is established in the case of Costa v ENEL in 1964.

of compliance.[782] This contributes to a degree of implementation that makes the EU dispute settlement mechanism an efficient system and strengthens the process of EU economic integration. Moreover, the European Union allows states, supranational organisations, non-governmental organisations and private parties to bring cases to the ECJ, which ensures that its procedures are transparent.

The direct effect is that the binding rules on nations and citizens made by the ECJ follow the principles of the EU law, which start and end at the European Court without any appeal.[783] The principle of direct effect is that EU law creates rights for individuals that must be upheld by the national courts. In the other words, the EU has a direct effect on the national legal systems of all its member states. On the other hand, this direct effect can be characterised by 'provisions, which are applicable to their nationals and to the member states themselves'.[784] Under this doctrine, individuals can use direct action to bring a case to their national courts and tribunals based on EU law, including the following;

i) *Proceeding for failure to fulfil obligations, infringement or enforcement procedures*. The ECJ is assigned competence to judge when it has reason to prove that a member state is failing to fulfil its obligation under EU law, the initial proceeding can be brought by the European Commission.[785]

ii) *Requests for a preliminary ruling*. A preliminary ruling reference is made by a national court or tribunal which needs a decision on a question of Community law before it itself can give a judgment.

[782] Ignacion Garcia Bercero 'Dispute settlement in EU free trade agreements' in Lorand Bartels and Federico Ortino, *regional trade agreements and the WTO legal system*, Oxford University press (2006), pages 391-393

[783] In the case of the ECJ, there is no possibility for an appeal or any other kind of judicial remedy against its final and binding decision, stated by Ellen Vos, a Professor of European Union law.

[784] Sophie Robin-Olivier, 'The evolution of direct effect in the EU: stocktaking, problems and protections' (2014) 12(1) Oxford University press and New York University school of law, pages 165-166 http://icon.oxfordjournals.org/content/12/1/165.full.pdf+html accesses 11 September 2016

[785] Eric Davies, ' Court of Justice of the European Union' (2013) ESO information consultant, Cardiff University, page 9

iii) *Action for annulment.* In an action for annulment, the application requests review of a measure adopted by a Community institution (regulation, directives and decisions) These proceedings for annulment can also be used by private individuals who want the Court to cancel a particular law because it directly and adversely affects them as individuals.[786]

iv) *Failure to act*- the Treaty requires the European Parliament, the Council and the Commissions to make certain decisions under certain circumstances. If they fail to do so, the Member States, the other EU institutions and individuals or companies can lodge a complaint with the Court so as to have this violation officially recorded.[787]

This supranational character[788] is due to the fact that the court and its rulings are clearly superior to national laws when the ECJ has jurisdiction. The supranational court rulings need to be followed by the domestic courts, legislatures and executive branches. In the other words, the ECJ alone makes the ruling under the EU law, followed by the domestic courts, which then render the final decision by applying their judgment to the facts under EU law. Moreover, the EU has a strong enforcement mechanism under the supranational court regime because the supranational court under the EU acts like a domestic court, which ensures that awards are made directly to the complaining party or aggrieved individuals.[789] As a supranational court, the EU has created a single institutional framework known as a 'single court', which is intended to cover all agreements in order to serve the entire EU community.[790]

[786] Article 230 of EU Treaty adds that a member state, community institutions, or individuals to whom the measure contested is addressed, or is of direct and individual concern, may bring an action for annulment before the European Court.

[787] Eric Davies, ' Court of Justice of the European Union' (2013) ESO information consultant, Cardiff University, page 8

[788] Many said that the EU is not international organisation at all since its power are so much greater than the general run of such organisation. They prefer to call it a Supranational organisation is 'to indicate that it does not merely operate in relations between States, but has power over them. See Trevor C. Harley, *European Union Law in a Global Context: Text, cases and Materials*, (Cambridge University Press 2004), page 1

[789] Yves Bonzon, 'Comparative analysis of transparency and public participation mechanisms in regional trade agreements and other international regimes' (2008) EGDE workshop 14th March 2008, page6

[790] Yan Luo, 'Dispute settlement in the proposed East Asia free trade agreement: lessons learned from the ASEAN, the NAFTA and the EU' in Lorand Bartels and Federico Ortino, *Regional trade agreements and the WTO legal system,* Oxford University press (2006), page 438

4.2.2 North American Free Trade Agreement (NAFTA)

4.2.2.1 Overview of the dispute settlement mechanism in the North American Free Trade Agreement regime

North America consists of only three countries, namely, the United States of America (US), the United Mexico States (Mexico)[791] and Canada. Therefore, the NAFTA is a free trade agreement between two developed countries (the US and Canada) and a developing country (Mexico) and its provisions only apply to trade between Canada, the United States and Mexico. The NAFTA is a regional organisation, which is considered as a North American Organisation. It came into force in 1994, and was designed to promote economic growth and investment from both domestic and foreign sources based on fair competition.[792] The objective of the NAFTA was to create new business opportunities for companies to operate in the USA, Mexico and Canada in the role of international markets and its aim was to establish a free trade zone[793] between the US, Canada and Mexico, as the world's largest free trade area, by 2005.[794] Moreover, the NAFTA provides a stable and predictable political environment for investors and improves the political relationship among member countries by promoting fair

[791] However, before Mexico will ratify NAFTA important political, culture and legal differences affecting the trade relations between the respective nations must be addressed, resolved and reflected in the resultant agreement. This reason brought the impending of NAFTA to the grow interdependence in trade relations between Mexico and United States. Read; Sharon D. Fitch, 'dispute settlement under the North American Free Trade Agreement: will the political, cultural and legal differences between the United States and Mexico inhibit the establishment of fair dispute settlement procedure' (1991) 22(2) California Western international law journal http://scholarlycommons.law.cwsl.edu/cgi/viewcontent.cgi?article =1397&context=cwilj accessed 1 May 2016

[792] Additional, NAFTA is considered in the following areas: Trade in goods, financial services, transportation, telecommunications, foreign direct investment, intellectual property rights, and government procurement and dispute settlement mechanism.

[793] Free Trade zone in the meaning of NAFTA means that eliminated trade barriers without establishing a common external tariff among its three signatories.

[794] Inter-American Development Bank, Beyond Borders: *the new regionalism in Latin America: economic and social progress in Latin America* (the Johns Hopkins University press 2002), page 1

competition. It also contains an effective mechanism to settle any disputes that may arise during the course of its implementation.[795]

It is necessary to introduce the NAFTA institutions that are involved in the dispute settlement mechanisms before discussing the system itself. The Free Trade Commission[796] and the Secretariat are the two core entities of the NAFTA institution. The NAFTA Free Trade Commission, which comprises cabinet-level officers, is responsible for the overall political supervision of the implementation of the NAFTA agreement. The Commission must attempt to settle disputes without delay and it may 1) seek the advice of technical consultants or create working groups or group of experts; 2) have recourse to good offices, conciliation, mediation and other procedures for the settlement of disputes; or 3) issue recommendations to enable the disputing parties to resolve the dispute to their mutual satisfaction. All the decisions of the Commission must be based on consensus.[797] The role of the Secretariat[798] is to assist the Commission and support the dispute resolution panels and the other committees provided for by the Agreement.[799] In Chapter 20, the NAFTA Secretariat serves the Commission[800] by administering the agreement, especially with regard to the dispute settlement panels.

[795] Article 102 of NAFTA. The full text of NAFTA can be found at https://www.nafta-sec-alena.org/Home/Legal-Texts/North-American-Free-Trade-Agreement

[796] The NAFTA establishes a Trade Commission with cabinet level official made up of representatives of the three Parties.

[797] Hector Rojas, 'The dispute resolution process under NAFTA' 1993 1(19) U.S.-Mex page 20

[798] The Secretariat has a National Section office in each country. The Canadian Section located in Ottawa, the Mexican Section located in Mexico City and the United States Section located in Washington see https://www.nafta-sec-alena.org/Home/About-the-NAFTA-Secretariat

[799] Hector Rojas, 'The dispute resolution process under NAFTA' 1993 1(19) U.S.-Mex page 20

[800] Trade Commission is composed of cabinet-level representatives of the three parties or their designees. The tasks of the commission are 1) it supervises implementation of the Agreement; 2) it oversees further elaboration; 3) it resolves disputes that may arise regarding the interpretation and application of the Agreement: 4) it supervises the work of all committees and working groups established under the Agreement. Also, the Commission may establish and delegate responsibilities to ad hoc or standing committees, working groups. Hector Rojas, 'the dispute resolution process under NAFTA' 1993 1(19) U.S.-Mex L.J. page 20

The NAFTA contains six dispute settlement mechanisms,[801] each of which has a different purpose. The structure of this distinctive dispute resolution mechanism is relatively complex. Chapter 11 of the NAFTA is designed to settle disputes that arise between investors and states based on property rights in investments and to ensure equal treatment for all the investors. Chapter 11 represents a huge innovation of the NAFTA, since it established an international mechanism for settling investment disputes.[802] This meant that foreign investors had no recourse to diplomatic protection or the court of their home states. Chapter14 contains special provisions for handling disputes in the financial sector, while Chapter 19 provides for the application of the domestic law of the importing NAFTA party to review administrative determinations in trade remedy cases. Chapter 19 is of benefit to exporters of the member parties as a review mechanism to ensure the application of the NAFTA in the areas of antidumping (AD)[803] and countervailing duty (CVD).[804] Chapter 19 is unique in being the only mechanism for resolving AD and CVD trade disputes with binational panels.[805] Chapter 20 contains the dispute settlement process and provides for government-to-government mechanisms (a state-to-state process) for consultation and the resolution

[801] The primary models for the NAFTA's dispute settlement mechanism are the Canada-United States Free Trade Agreement (CUSFTA), became effective on 1st January 1989 and the General Agreement on Tariffs and Trade (GATT). The CUSFTA provision is modeled after the DSM of the GATT which provided a similar framework such as consultation stage, negotiation, consensus referral to arbitration.

[802] Gary Clyde Hufbauer and Jeffrey J. Schott, 'NAFTA dispute settlement systems' (2005) Institute for international economics, page 4

[803] 'Dumping' is an unfair trade practice, whereby products of one country are exported to another country at below cost or at less than the domestic price of the product. See David Lopez 'Dispute resolution under NAFTA (1997) 32(163) Texas international law journal, page 173

[804] 'Antidumping or countervailing duties' are special duties applied at the point of importation to offset the unfair price differential. See David Lopez 'Dispute resolution under NAFTA (1997) 32(163) Texas international law journal page 173. For antidumping cases occurring by comparing transactions in the importing market against some measure of fail or normal value. Both antidumping and countervailing duty cases occur when the imports are a significant cause of injury or potential cause of injury. See, Bruce A Blonigen, 'The effects of NAFTA on antidumping and countervailing duty activity' (2005) 19(3) The World Bank economic review, page 410

[805] Gary Clyde Hufbauer and Jeffrey J. Schott, 'NAFTA dispute settlement systems' Institute for international economics page, 28. Under this system, AD and CVD determinations made by NAFTA countries' government agencies are appealable to ad hoc panels of private individuals from both countries affected, rather than impartial national courts. The international panels do not interpret agreed NAFTA AD or CVD rules: rather they review agency determinations solely for consistency with national law. Read more Jennifer Danner Riccardi, 'The failure of Chapter 19 in design and practice: An opportunity to reform' (2002) 28(3) Ohio Northern University law review, page 727

of disputes within the general agreement in relation to its interpretation and application. Chapter 20 of the NAFTA contains the overall institutional framework for its implementation.[806] Additionally, it provides a mechanism to settle disputes related to environmental cooperation and labour law, respectively.[807] The only chapters examined here are Chapters 11, 19 and 20, since they contain the most important elements of the NAFTA dispute resolution mechanism.

4.2.2.2 Process of the NAFTA dispute settlement mechanism

a) Consultation

The NAFTA displays both the rule of law and the role of law through which economic actors can obtain access to both governments and courts at the national level and to the NAFTA dispute resolution mechanism.[808] Trade within the NAFTA region is also discussed. The quantitative enhancement of intra-regional trade can be seen to arise from the increase in the volume of trade due to economic growth. When a dispute arises, the parties can resolve it by means of consultation, but if this fails, they can use the dispute settlement mechanism. The NAFTA contains several different adjudication systems, as discussed below.

There are three separate arbitration procedures in Chapter 11 of the NAFTA, namely, the ICSID, the ICSID's 'Additional Facility' and the UNCITRAL. This enables private investors[809] to seek a binding arbitration of disputes with NAFTA governments in

[806] Article 2012 explains the substantive law issues under Chapter 20 as the issues include the interpretation of the NAFTA itself, domestic measures of a party that may be consistent with the Agreement, and national measures that might cause 'nullification or impairment' of benefits arising under the Agreement.

[807] In addition, the NAFTA partners created interstate dispute mechanism regarding domestic environmental and labor laws under the North American Agreement on Environmental Cooperation (NAAEC) and the North American Agreement on Labor Cooperation (NAALC)

[808] Stefano Inama and Edmund W. Sim, *The foundation of ASEAN Economic Community: an institutional and legal profile* (Cambridge University Press 2015), page 43

[809] Article 1102 and 1103 of NAFTA stipulate that a host country must treat foreign investors and their investments 'no less favorably' than domestic investors or investors from any other country.

the event that the state breaches one of the provisions in Article 20 of Chapter 11 of the NAFTA, which gives investors the power to initiate an *ad hoc* arbitration tribunal. The tribunals operate under the arbitration rules of either the International Centre for the Settlement of Investment Disputes (ICSID) or the United Nations Commission on International Trade Law (UNCITRAL). The function of the ICSID is similar to that of the NAFTA in terms of private claims as an opening mechanism for individuals in disputes with private sectors and States. Individuals can use international dispute settlement procedures in the area of Settlement of Investment Disputes between States and Nationals of Other States. This is good for the ASEAN to study with the specific aim of developing arbitration and conciliation procedures that welcome foreign investors without political protection. Moreover, cases where there was no jurisdiction to arbitrate disputes between two states or between two private individuals should also be studied.

No consultation stage or Free Trade Commission review is necessary for Chapter 19, because it refers to cases of appeal of rulings by government agencies that dumping has occurred and harmed the domestic industry.[810] Therefore, the dispute resolution in Chapter 19 begins with a request for an arbitral panel.

According to Chapter 20, the NAFTA consultation process is a means by which countries or parties can agree to consult at the request of any country or else on an annual basis. The parties can agree the interpretation and application of the NAFTA agreement[811] and make every attempt to reach an agreement by means of co-operation

[810] David Lopez 'Dispute resolution under NAFTA'1997 32(163) Texas international law journal, page 174

[811] Chapter 20 concerns disputes between member states, relating to i) the interpretation of its provisions and the non-performance by one of the parties of its obligations under the Agreement; ii) the application by one party of an actual or proposed measure that the other party or parties consider inconsistent with the agreement; or iii) the application by one party of an actual or proposed measure consistent with the Agreement that the other party or parties consider to cause nullification or impairment, as stated in Article 2004 of NAFTA. For instance, such disputes cover all the areas contemplated by the Agreement, including market access, non-tariff barriers, rules of origin, standard-related measures, government procurement, financial services and intellectual property. See, UNCTAD, 'Dispute Settlement regional approaches: NAFTA' (2003) United Nations conference on trade and development, page 7 http://unctad.org/en/docs/edmmisc232add24_en.pdf accessed 20 March 2017

and consultation at all times in order to achieve a mutually satisfactory resolution. Chapter 20 is similar to the WTO[812] consultation process in that it consists of a three-stage dispute resolution process that involves a consultation, a meeting of the Commission, and non-binding arbitration.[813] Chapter 20 emphasises the resolution of disputes using a variety of means: interstate (state-to-state) consultation or consultation within the Free Trade Commission (hereafter, the Commission) in an attempt to arrive at a mutually-satisfactory resolution.[814] As the highest institution, the Commission may refer to advisers or independent experts.[815] The Commission uses consultation, good offices, conciliation and mediation to negotiate arbitration and make recommendations at the consultation stage, which consists of representatives of the ministries of trade of each party, or their deputies.[816] If consultation fails to resolve the matter within 15-45 days, a party may request a meeting of the Free Trade Commission,[817] which is directed to convene within 10 days of the delivery of the request to try to settle the dispute promptly. The Free Trade Commission conducts a political consultation of the matters arising from the implementation or interpretation of the NAFTA obligations or the issues

[812] A main difference between the WTO's and the NAFTA's dispute settlement systems are the NAFTA's definite reliance on diplomatic solutions. Read more in, Rafael Leal-Arcas, 'Comparative analysis of NAFTA's chapter 20 and the WTO's dispute settlement understanding' (2011) 8(3) Transnational dispute management, file:///Users/admin/Downloads/SSRN-id1969827%20(1).pdf

[813] Chapter 20-consultation procedure is similar to the WTO consultation procedures in the GATT Article 22 and 23. The initial stages of the NAFTA Chapter 20 and the WTO dispute process are similar. The WTO dispute resolution process begins with a consultation stage between disputing parties. Read more, consultation stage under the WTO in Chapter 3 of this thesis. Despite the similarities with the WTO procedure, the NAFTA's dispute settlement procedures are based on 'cooperation and consultation' between the NAFTA countries, and focus on bilateral, negotiated solutions to disputes. Read, Rafael Leal-Arcas, 'Comparative analysis of NAFTA's chapter 20 and the WTO's dispute settlement understanding' (2011) 8(3) Transnational dispute management, file:///Users/admin/Downloads/SSRN-id1969827%20(1).pdf

[814] In order to arrive a mutually satisfactory resolution, Article 2006 of NAFTA states that the parties have three duties in the consultation stage. Firstly, the Parties has to provide the other parties with sufficient information of how the proposed measure might affect the operation of NAFTA. Secondly, the parties have responsibilities to protect confidential or proprietary information as well as to avoid resolution that affected the interests under NAFTA of any other party.

[815] Gary Clyde Hufbauer and Jeffrey J. Schott, 'NAFTA dispute settlement systems' Institute for international economics, page 17

[816] UNCTAD, 'Dispute Settlement regional approaches: NAFTA' (2003) United Nations conference on trade and development, page 6 http://unctad.org/en/docs/edmmisc232add24_en.pdf accessed 20 March 2017

[817] Article 2008 of NAFTA

that affect the operation of the NAFTA.[818] All the decisions of the Commission will be consensual[819] and if it is unable to resolve the matter within 30 days,[820] any consulting party may request the establishment of a non-binding arbitral panel to address matters related to the agreement.[821]

b) Arbitral Panel Proceedings

The panellists in the NAFTA tend to be small groups, depending on the chapter.[822] NAFTA panellists and committee members are not permanent arbitrators; rather, they are established on an ad hoc basic.[823] There is no standing supranational body; instead, panels are established in each case in accordance with special rules.[824] Complaints are resolved under Chapter 11 based on sets of rules of institutional arbitration[825] disputing investors can choose when submitting a claim. There is an International Centre for the Settlement of Investment Disputes (ICSID) and arbitration rules of the United Nations Commission on International Trade Law (UNCITRAL). Each NAFTA party to the dispute appoints a panel which consists of an *ad hoc* three-member

[818] The issues affect NAFTA's operation such as the changes in domestic or multilateral trade rules. Read more, Gary Clyde Hufbauer and Jeffrey J. Schott, 'NAFTA dispute settlement systems' Institute for

[819] Article 2001(4) of NAFTA

[820] The Commission is expected to resolve the matter within 30 days, or within such other period as the parties may agree.

[821] Article 2006 of NAFTA

[822] Chapter 11 maintains a roster of 45 panellists appointed from the ICSID Panel of Arbitrators; Chapter 19 maintains a roster of 75 individual and Chapter 20 maintains a roster of up to 30 members appointed by consensus for a 3 years term. See more detail at https://www.nafta-sec-alena.org/Home/Dispute-Settlement/Roster-Members (accessed 1 January 2015)

[823] See, the overview of NAFTA dispute settlement provisions at https://www.nafta-sec-alena.org/Home/Dispute-Settlement/Overview-of-the-Dispute-Settlement-Provisions

[824] See, 'Dispute settlement regional approaches: NAFTA' United Nations conference on trade and development, (2003), page 2

[825] Gabriel Cavazos Villanueva and Luis F. Martinez Serna address some of the benefits of institution are; 1) a rule-oriented and not power-oriented mechanism; 2) reduction of the perceived notion that national court decide in favor of their own nationals and international institutional forums are more likely provide an expertise to resolve the dispute than local court. Read more, Gabriel Cavazos Villanueva and Luis F. Martinez Serna, ' Private parties in the NAFTA dispute settlement mechanisms: the Mexican experience' (2002) Tulane Latin American law institute, page 13

tribunal.[826] The arbitrators[827] are appointed by the consensus of the disputants or by the ICSID Secretary-General without regard to nationality.[828] Chapter 11 contains strict time limits on what disputing parties must do to initiate or respond to the proceedings, but no time limits are set on the actual arbitration.[829]

With regard to Chapter 19, in terms of disputes of antidumping and countervailing duty, if dumping has occurred and this has injured a domestic industry, the complaining party may request that this matter be referred to a binational panel.[830] It should be noted that dispute resolution under Chapter 19 begins with a request for an arbitral panel. A consultation stage or Free Trade Commission review are unnecessary. Chapter 19 panels are independent of the institutional panels and a permanent secretariat is established to facilitate their operation.[831] The NAFTA panels, particularly Chapter 19 binational panels, are limited to five panellists who review both countervailing and anti-dumping cases. Within thirty days of the request for a panel, each party chooses two expert lawyers,[832] which are mainly international trade lawyers, who have to agree on the panellists within fifty-five days, and the panellists themselves choose a fifth within twenty-five days of agreeing on the selection of the fifth panellist.

[826] The panelists under Chapter 11 appointed by the disputing parties and the third arbitrator appointed by the agreement of both the disputing parties refer to Article 1123 of NAFTA. An ad hoc three members tribunal is selected from legal experts on the ICSID roster. The status of the third arbitrator acts, as an arbitrator and it cannot be a national of either of the disputing parties.

[827] The qualifications of the arbitrators are that they should be experienced in international law and investment and must meet the qualifications of the ICSID Convention as well as the UNCITRAL Arbitration Rules.

[828] If NAFTA disputing parties fail to agree upon the presiding arbitrator, the Secretary-General will select and has the authority to appoint an arbitrator from among a roster of 45 individuals agreed upon by the NAFTA government.

[829] In some cases these have taken four years or more such as the case of MARVIN Feldman, Loewen Group. Read more in, Gary Clyde Hufbauer and Jeffrey J. Schott, 'NAFTA dispute settlement systems' Institute for international economics, page 24

[830] Article 1903(1) of NAFTA

[831] Article 1909 of NAFTA

[832] A majority of the panelists and the chair of the panel must be lawyers in good standing refer to Article 1901.2 (2) of NAFTA.

The panellists have 315 days to submit their final decision.[833] The panellists may uphold the final determination or refer it to the party for reform.[834]

Chapter 20 contains very specific arbitration procedures for selecting the panel.[835] The arbitration concept of the NAFTA is similar to the dispute settlement mechanism of the WTO.[836] An arbitral panel is composed of five members.[837] Firstly, chairperson is selected from a neutral country[838] and then two panellists are selected from the citizens of each disputing party.[839] These individuals will normally not be nationals of either of the disputing parties. This procedure ensures a right to at least one hearing before the panel, written submissions[840] and rebuttal arguments. The duty of the panel is to examine the relevant issues regarding the Agreement and the matter referred to the Commission, and make determinations and recommendations.[841] Arbitral panels under NAFTA Chapter 20 can only provide non-binding recommendations. In this sense, they have no direct effect on national domestic law and state governments are not bound by their findings or recommendations. Moreover, there is no appellate review of Chapter 20 panels.

[833] Article 1904(14) of NAFTA
[834] Article 1904(8) of NAFTA
[835] Article 2011 of NAFTA
[836] Fujio Kawashima, 'Judicialization of the Dispute Settlement Mechanisms in Asian Economic Integration? Expectation, Reality and Ways Forward' (save file 8-Kawashima)
[837] Article 2011 of NAFTA explains that 'each disputing party chooses two individuals who are nationals of the other party and the parties agree on a chair that the individual will normally not be a national of either of the disputing parties'.
[838] Parties agree to choose a chair within 15 days of the date when a panel request is delivered. And, within the next 15 days, each party chooses two additional panelists from the other party. In one case in April 2003, the disputing parties could not agree on a chair, so they had to choose from a non-national panellist.
[839] Article 2011 of NAFTA
[840] The panel has to present an initial written declaratory opinion to the two parties within 90 days. Thirty days after the issuance of this initial report, the panel must issue a final report. If the parties do not request a reconsideration, the initial opinion will become the final declaratory opinion as explained in Article 2016(2) of NAFTA. Parties may request reconsideration before the publication of the final opinion, which cannot be appealed. All submissions reports should contain; (1) its findings of fact; (2) its recommendations for the resolution of the disputes and the determination of the issue which would be inconsistent with the NAFTA obligations. Read more in, Marc Sher, 'Chapter 20 dispute resolution under NAFTA: fact or fiction' (2003) 35 The George Washington international law review, page 1008
[841] Article 2012(3) of NAFTA

In terms of third contracting parties, Article 2003 of Chapter 20 allows them to participate in hearings and have the opportunity to make written and oral submissions. Article 2020 of Chapter 20 allows a party to seek an interpretation or application of the agreement arising from any domestic judicial or administrative proceeding, or for a court administrative body to solicit the views of the party in order to notify the Secretariat.

c) Private Parties' rights

Importantly, the NAFTA countries have negotiated a specific mechanism that not only allows for inter-state remedies, but also enables private parties to participate. With respect to the resolution of international commercial disputes between private parties in the free trade area, the NAFTA provisions permit private investors to take governments to binding arbitration over any violation of their treaty obligations. Only the Chapter 11 dispute settlement mechanism allows private parties or individuals to participate directly in the arbitral proceedings without the government being involved.[842] Section B in Chapter 11 relates to the dispute settlement mechanism for investment disputes. It provides direct access to foreign investors who want to submit a claim for arbitration under the NAFTA dispute settlement procedure[843] if another party has damaged them in a manner that violated their rights, which is inconsistent with the party's obligations. Private parties may also participate in a dispute that relates to antidumping or countervailing duty. Any person or industry that would otherwise be entitled, under the law of the importing party, to commence domestic procedures for a judicial review of the final determination of the importing party's investigative authority, can request a review by a binational panel based on Articles 1116 and 1117 of Chapter 19 of the NAFTA.[844] When the arbitral panel has rendered its decision and a final award

[842] Article 1116 of NAFTA
[843] Donald McRae and John Siwiec, 'NAFTA dispute settlement: success of failure' (2010) UNAM, page 363
[844] The Chapter 11 mechanism provides for access to an arbitral panel if after six months the relevant government has not responded to an investor's notice of intent to submit a claim.

has been made against the party, the disputing investor may present the decision in the national courts of the disputing party for enforcement.[845]

It is expressly stated in Chapter 19 that 'no party may provide in its domestic legislation for an appeal from a panel decision to its domestic courts'.[846] In other words, a domestic appeal against the determination of a binational panel is prohibited.[847] The extraordinary procedure of an appeal may only be employed in limited situations, such as when a panellist has violated the Code of Conduct, when there is bias or a serious conflict of interests, when the panel has manifestly exceeded its power, or when some action has affected the panel's decision and threatens the integrity of the entire binational review.[848] It is clear from the above statement that the aim of the extraordinary procedure is not to appeal against the substance of the panel's determination, but to review the panel proceedings, which may be affected by the material violation of the procedural rights of the parties.[849]

In contrast to the dispute settlement mechanisms of NAFTA Chapter 20, which only allow governments to participate (state-to state disputes), this procedure involves the participation of private parties. This means that private parties are excluded from any direct access or initiation process. Article 2021 of NAFTA provides more explanation, stating that ' No party may provide any right of action under its domestic law against any other Party on any measure of another Party that is inconsistent with this Agreement'. Although private parties have no standing or ability to bring claims, they are encouraged to 'use arbitration and other means of alternative dispute resolution (ADR) to resolve commercial disputes among themselves.[850]

[845] Blake Wang, 'Beyond multilateralism and regionalism- analysis of the review process of global trade dispute resolution' 2009 the 5th Global Administrative Law Seminar 12-13 June 2009 page 9
[846] Article 1904(11) of NAFTA
[847] Article 1904 of NAFTA
[848] Article 1904(13) of NAFTA
[849] 'Regional approaches: NAFTA' (2003) the United Nations conference on trade and development, http://unctad.org/en/docs/edmmisc232add24_en.pdf
[850] Article 2022(1) of NAFTA

d) Decisions and their adoption

Only Chapters 11 and 19 provide for arbitral reports that are binding. According to Chapter 11, an arbitral award is only binding on the disputing parties in that particular case and it has to be complied with 'without delay'.[851] The award for each party is stipulated in Article 1135 (4) of the NAFTA, and a NAFTA Chapter 20 panel may be established if a party fails to abide by or comply with the terms of the final award.[852]

The decisions of panels under Chapter 19 are by majority vote and are binding on all the parties involved. In this sense the binding nature of panel decisions directly affects[853] the domestic laws of the countries concerned, as is stated in Article 1904(9). As explained in Articles 1905(1), 1905(2) and 1905(3)-(5), this means that a complaining party may accept the panel's decision as binding if the importing parties fail to do so and this will serve as a replacement for a domestic judicial review of the administrative determination of antidumping or countervailing duty. The complaining party may then request a consultation with the importing party and if the consultation also fails, the complaining party may request a 'special committee'[854] to resolve the matter. Panel decisions are focused on high quality, timeliness and impartiality. According to Article 1904(11) of the NAFTA, no party can legislate to allow for appeals or reviews of panel decisions, and the decisions have no precedential value with binding effect on other bi-national panels or on the domestic courts of the parties.[855] The great advantage of Chapter 19 is that the panel resolutions automatically impose an international obligation under the national law.[856]

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[851] Article 1136 (1)-(2) of NAFTA

[852] Art 1135(5) stated that 'the Commission shall establish a panel under Article 2008 (for an Arbitral panel) which the requesting party may seek in such proceedings that the failure to comply with the final award is inconsistent with the obligation of NAFTA and a recommendation that the party abide with the final award.'

[853] 'Directly affect' generally means that no domestic legislation is necessary to apply this law directly to the citizens of that country, see also the example of direct effect in the section 2.1.2 (effectiveness) above

[854] The special committee must be formed within fifteen days after the request, which consists of three persons selected from a roster of fifteen current or formal federal judges from the NAFTA member states.

[855] Article 1904(11) of NAFTA

[856] Gabriel Cavazos Villanueva and Luis F. Martinez Serna, ' Private parties in the NAFTA dispute settlement mechanisms: the Mexican experience' (2002) Tulane Latin American law institute, page 11

According to Chapter 20, the final report[857] of the arbitral panel provides the basis for an agreement between the parties on the resolution of the dispute. The report contains the facts of the findings and a determination of the issues that would be inconsistent with a party's obligations under the Agreement. Additionally, the panel needs to recommend ways to resolve the dispute.[858] In the event of failure to agree, the winning party can ask for benefits that have an equivalent effect from the other party if it fails to implement the panel decision stated in Articles 2018 and 2019 of the NAFTA.

The implementation of the panel's final report is the last aspect of Chapter 20's dispute resolution mechanism. On receipt of this report, the disputing parties are required to agree a resolution, 'which normally shall conform with the determinations and recommendations of the panel.[859] Should the parties fail to agree a "mutually satisfactory resolution" within thirty days of receipt of the final report, the complaining party may suspend the offending party's NAFTA benefits until such time as they reach an agreed settlement of the dispute.[860]

e) Enforceability of decisions under the NAFTA

The NAFTA dispute settlement mechanisms are independent of national legislatives or document courts. Although the NAFTA does not create any legislative or judicial institutions, the Free Trade Commission is an institutional infrastructure that

[857] Within 30 days, the panel will present its final report, which will explain how the votes were cast, if there was not a unanimous vote. However, the identity of the panelists voting for or against will not be disclosed. The disputing Parties will transmit the final report to the Commission by confidential communications, including all relevant annexes, and the report will be published within 15 days after it is received by the Commission as addressed in the Article 2016 and Article 2017 of NAFTA.

[858] It is important to note that between the legal status of an arbitral award and a final report should be distinguished. The panel's report determines the legitimacy or illegitimacy of the claims of the disputing parties and makes recommendations, while the arbitral award has executive character and puts an end to the dispute. See, UNCTAD, 'Dispute Settlement regional approaches: NAFTA' (2003) United Nations conference on trade and development, page 16 http://unctad.org/en/docs/edmmisc232add24_en.pdf accessed 20 March 2017

[859] Article 2018(1) of NAFTA

[860] Article 2019(1) of NAFTA

supervises the implementation of the agreement and resolves disputes related to its interpretation or application.[861]

With regard to Chapter 11, this is unique in allowing private investors to enforce government obligations under Articles 1116 and 1117 of the NAFTA. Arbitral awards are final. Articles 1136(4),[862] 1136(5) and 1136(6) of the NAFTA require governments to establish rules for the enforcement of final awards. A disputing investor can enforce an award under the ICSID Convention and the United National Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the New York Convention). Moreover, The award can ultimately be enforced by the domestic courts of the NAFTA parties through government-to-government arbitration under Article 2008. The NAFTA party whose investor was involved in the proceeding may establish a panel under the Chapter 20 mechanism if the disputing party fails to comply with an arbitral award.

Chapter 19's panel decisions either uphold or return (in whole or in part) a final administrative agency determination in AD or CVD investigations. Although there is no appeal process, Chapter 19 allows for the establishment of an extraordinary challenge committee if a party does not believe that the panel process has been operated properly.

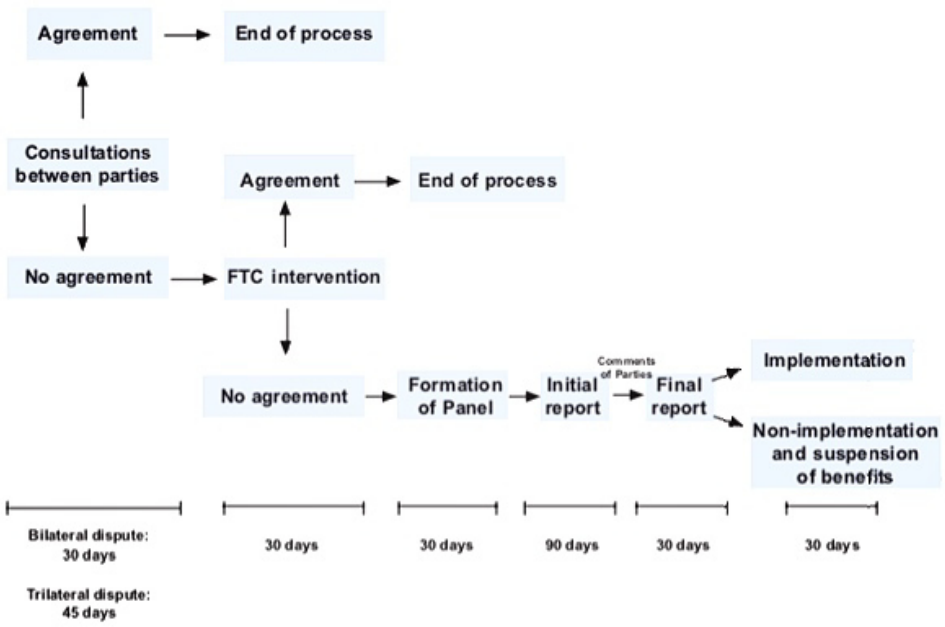
Non-compliance with a Chapter 20 ruling under the NAFTA can ultimately lead to penalties.[863] There are two types of sanctions for the non-implementation of final reports. Firstly, the offending measure may be removed together with the compensation provided to the affected member country, and secondly, retaliation is possible. It is stated in Article 2019 of Chapter 20 that 'in the event of non-compliance the winning complaining party can retaliate by suspending tariff concessions or other obligations covered by a trade agreement'. Under the NAFTA arrangement, the

[861] Article 2001 of NAFTA and Article 2001 (1) of NAFTA
[862] Article 1136(4) of NAFTA states that each disputing party should 'provide for the enforcement of an award in its territory.'
[863] Gary Clyde Hufbauer and Jeffrey J. Schott, *NAFTA revisited: achievements and challenges* (Peterson Institute for international economics 2005), page 29

suspension of benefits is the only remedy available to a party complaining of non-compliance based on a panel ruling. If the disputing parties fail to resolve the dispute under the suspension of benefits, the complainant party can retaliate by suspending the benefits afforded to the offending party.[864] Failing such a resolution, the non-conforming party may pay appropriate compensation in lieu of compliance.[865]

Flowchart 4.1 contains a Flow Chart of the General Mechanism of NAFTA Chapter 20.[866]

Flow Chart of the General Mechanism of Chapter 20.



[864] Article 2019 of NAFTA
[865] Article 2018(2) of NAFTA
[866] UNCTAD, 'Dispute Settlement regional approaches: NAFTA' (2003) United Nations conference on trade and development, page 16 http://unctad.org/en/docs/edmmisc232add24_en.pdf accessed 20 March 2017

f) Effectiveness of the NAFTA

This section contains a preliminary assessment of the NAFTA dispute settlement procedure based on certain criteria. The first is its effectiveness in resolving both state-to-state disputes and those that involve private parties, the second relates to the issue of transparency, the third is the independence of panellists, as well as their qualifications, while the fourth is an examination of some criticisms of NAFTA. Moreover, this section will mainly focus on the advantages and disadvantages of the processes in Chapters 19 and 20 of the NAFTA, but the dispute settlement mechanism in Chapter 11 will also be considered.

One way its effectiveness in resolving disputes can be measured is the number of cases in which it has been successful in resolving both state-to-state disputes and disputes between private parties.[867] To date (i.e., up to March 2017), the mechanism in Chapter 19 of the NAFTA has been used for more than nineteen years, during which time 109 cases have been initiated, including those that have been completed, terminated or are still in progress, as well as panel decisions and remand reports.[868] The disputes that have been dealt with under Chapter 19 of the NAFTA include twenty-seven cases against Canada, sixty-eight cases against the US and fourteen cases against Mexico.

In contrast, the dispute settlement mechanism in Chapter 20 of the AFTA has been used less frequently. According to information from the NAFTA dispute settlement website, the Chapter 20 dispute settlement mechanism has been used once between Canada and the US and twice between Mexico and the US.[869] Only three cases have

[867] Gustavo Vega Cánovas, 'The experience of NAFTA dispute settlement mechanisms: lessons for the FTAA' (2003) Presentation at the Atelier Aléna, University of Québec at Montreal, Canada

[868] For the decisions and reports under Chapter 19 visit https://www.nafta-sec-alena.org/Home/Dispute-Settlement/Decisions-and-Reports

[869] Three cases concern about two Mexican complaints: one about US trucking services restrictions and another about a broomcorn broom safeguard: and an unsuccessful US complaint about Canadian agricultural tariffs. Read more in, Lorand Bartels and Federico Ortino, *Regional trade agreements and the WTO legal system*, 2006 Oxford University press, page 23, Donald Mcrae and John Siwiec, 'NAFTA dispute settlement: success or failure?' (2010), page 371 http://biblio.juridicas.unam.mx/libros/6/2904/21.pdf accessed 1 May 2016

been settled since the NAFTA entered into force in 1994. In the nine years of applying the NAFTA dispute settlement mechanism in Chapter 20, only three cases have had to be decided by a formal panel [870] and the decisions were considered to be of exceptionally good quality.[871]

In terms of use, the dispute settlement mechanism in Chapter 11 of the NAFTA has been a successful, popular and well-used process, as can be seen from the cases to which it has been applied. Of the eighty-six cases initiated between 1994 and 2003, twenty-six were brought against Canada with seven pending cases, twenty against Mexico and twenty-one against the US.[872] It should be noted that there is no official source of information related to the NAFTA Chapter 11 disputes and none of the awards have been made public by any of the parties. From this perspective, it encourages more foreign direct investment due to the fact that all investors want transparency and stable rules and this element of the DSM provides them with greater certainty. In this respect it is unlike the cases in Chapters 19 and 20, where the NAFTA's secretariat also keeps records and makes them available through its official website so that they available to the public.[873]

In terms of the issue of transparency, this can be defined as providing fair access to information or in response to the demand for information. [874] The issue of transparency has often arisen in the context of the NAFTA and the main mechanism for enhancing transparency has been the panel proceedings. The NAFTA process does not

[870] Two cases brought by Mexico's complaints against the United States over brooms and trucking, and US complaints against Canada's poultry and dairy practices. Read more in Gustavo Vega Cánovas, 'The experience of NAFTA dispute settlement mechanisms: lessons for the FTAA' (2003) Presentation at the Atelier Aléna, University of Québec at Montreal, Canada

[871] Ibid,

[872] For investor-state statistics of disputes see, http://www.citizen.org/documents/investor-state-chart.pdf

[873] Regarding Chapter 19 cases, information is available but is not always up to date: regarding Chapter 20 there is scant information on issues that are under examination in the pre-panel stages. Visit https://www.nafta-sec-alena.org/Home/Dispute-Settlement/Decisions-and-Reports

[874] Whereas public participation is about actual engagement in decision-making, or the exercise of influence (or supply of information, or active participation, read Yves Bonzon, 'Comparative analysis of transparency and public participation mechanisms in regional trade agreements and other international regimes' (2008) EGDE workshop 14th March 2008, page 2

allow anyone but the member states to participate in the settlement of state-to-state disputes; moreover, only the investors and the NAFTA states may participate in investor-state arbitration.[875] One of the biggest challenges related to investor-state disputes in Chapter 11 of the NAFTA is the demand for greater transparency in an ad hoc mechanism.[876] The capacity to arbitrate in confidential proceedings is a significant advantage of private arbitration. The ability to maintain the confidentiality of evidence and settle claims on a confidential basis is perceived as being an effective system of arbitration. The key criticism of the dispute resolution system of the NAFTA is that settlement proceedings are closed to the public.[877] Both panel sessions and initial reports are kept confidential and third parties are only allowed limited participation, thereby fostering the confidential nature of the dispute settlement process.[878] However, under the NAFTA, only the decisions and the reasoning become public information in the form of a final report that is published fifteen days after it has been submitted to the Commission.[879]

The independence and qualifications of the panellists are also factors that can be used in a preliminary assessment of the NAFTA dispute settlement system. The use of binational panels increases the consistent application of trade law remedies, increases the procedural neutrality, efficiency and efficacy, and enhances the legitimacy and legality of the NAFTA's dispute resolution mechanisms. These benefits are derived based on the fact that the panels are composed of trade experts, who are deemed to be specialists in international trade law covered by the NAFTA's dispute resolution

[875] Some scholars agree that Chapter 11 in private arbitration procedures should remain confidential in order to encourage conciliation leading to the settlement of disputes. Read more in Gustova

[876] In the context of the NAFTA Chapter 11, the main ad hoc mechanism enhancing transparency have been 1) tribunal decisions; 2) formal notes of interpretation or declarations by the State Parties to the treaties; and 3) the practice of the relevant arbitral institutions. In addition, in October 2003 Canada and the United States publicly stated their intention to consent to open hearings in every case. Read more in, Meg Kinnear, 'Transparency and third party participation in investor-state dispute settlement' (2005) Symposium co-organised by ICSID, OECD and UNCTAD

[877] Gary Hufbauer, Reginald Jones, Jeffrey Schott and Yee Wong, 'NAFTA dispute settlement systems' (2003) Peterson Institute for International Economics, https://www.ciaonet.org/attachments/4605 /uploads accessed 1 May 2016

[878] NAFTA: revisited, page 220

[879] Article 2017(4) of NAFTA

mechanisms,[880] as well as operating on strict timelines, use domestic standards of review, and can make binding and enforceable decisions.[881]

The NAFTA panellists are independent and they conduct their enquiries with integrity and impartiality due to the fact that the NAFTA parties have established a Code of Conduct,[882] which applies to the panellists in both Chapters 19 and 20. However, it is necessary to note that it does not apply to a panel or committee roster, but to individuals who are being considered for appointment to a panel or committee. So far, the panellists have been nationals of the parties and this Code of Conduct makes the NAFTA effective due to their independence. This has evidently worked well, since there have been no instances of any parties claiming bias or conflict of interests. This Code of Conduct requires every candidate for membership of a panel to disclose 'any interest, relationship or any matter'[883] in order to maintain the panel's independence and impartiality. Moreover, panel members are required to act in a fair manner without incurring any obligation to accept any benefit, whether direct or indirectly, that could affect the performance of their duties.[884] Furthermore, none of the panellists are nationals of any of the parties or third parties to the dispute,[885] which they means that they cannot have any control over the composition of the panel selection process, thereby ensuring that the panellists have even greater independence.

Although the Chapter 19 panels function well, the secretariat has been concerned about problems in the dispute settlement process, such as delays in panel appointments, delays in the panel selection process, and the length of time required for

[880] Article 2009 (2) (a) of NAFTA
[881] California Western international law journal (1991) 22(2), page 11
[882] The NAFTA Code of Conduct for proceedings under Chapter 19 and Chapter 20, entry into force in 1 January 1994 available in https://www.nafta-sec-alena.org/Home/Legal-Texts/Code-of-Conduct?mvid=2
[883] The NAFTA Code of Conduct Part II C states that 'Candidates have to complete an Initial Disclosure Statement provided by Secretariat before they approved as panellists. This Part II C efforts for the panel to become aware of any interests, relationships or matters that could arise during any stage of the proceedings.
[884] The NAFTA Code of Conduct Part IV A,B,C explains further that the actions that could affect their performance of their duties, due to factors such as motivations of self-interest, or outside pressure
[885] Noted that the panellists can come from nationals of the parties or third parties in disputes if both parties agree, as is mentioned in Article 8.3 of NAFTA.

panels to reach their decision. Furthermore, Chapter 20 panels may find it difficult to agree to establish a roster of panellists. In fact, the NAFTA Secretariat website still does not provide a roster of Chapter 20 panellists based on it being difficult to contribute a list that has been agreed upon.[886] There is no official record of the establishment of a roster of Chapter 20; it has only been mentioned on the roster for NAFTA Chapter 19 of binational panels.[887]

Moreover, the effectiveness of the NAFTA dispute settlement mechanisms is not the only aspect explored in this section, but the NAFTA dispute settlement system itself has been criticised, particularly the Chapter 11 procedures, which some say give private corporations too much power to challenge governments' legitimate efforts to regulate them for the public good.[888] Furthermore, the decisions of Chapter 11 tribunals cannot be appealed based on the limitation of reviews in the terms of the ICSID or the Additional Facility Rules or the UNCITRAL rules, which can be judicially reviewed in the place of arbitration. These can provide only non-binding recommendations according to Chapter 20 of the NAFTA, but it is hard to get an impartial measure of equivalent benefits without binding arbitration.[889] There is no appellate reviews of Chapter 20 panels. These panels are only reviewed to determine whether they are consistent with the obligations of the NAFTA. The absence of any appellate reviews is also a significant barrier to settling disputes under the NAFTA.[890] This absence will make the applicable standard of judicial review for arbitral awards uncertain, which means that the courts in each of the NAFTA countries may come to different conclusions and different standards

[886] Donald Mcrae and John Siwiec, 'NAFTA dispute settlement: success or failure?' (2010), page 372 http://biblio.juridicas.unam.mx/libros/6/2904/21.pdf accessed 1 May 2016

[887] Roster for NAFTA dispute settlement Chapter 19 see, https://www.nafta-sec-alena.org/Home/Dispute-Settlement/Roster-Members

[888] Gary Clyde Hufbauer and Jeffrey J. Schott, 'NAFTA dispute settlement systems' Institute for international economics 2005, page 144 http://citeseerx.ist.psu.edu/viewdoc/ download ?doi=10.1.1.7.2257&rep=rep1&type=pdf

[889] Gary Clyde Hufbauer and Jeffrey J. Schott, *NAFTA revisited: achievements and challenges* (Institute for International economics 2005), Page 252

[890] Gabriel Cavazos Villanueva and Luis F. Martinez Serna, 'Private parties in the NAFTA dispute settlement mechanism: the Mexican experience' (2003) 77(1017) Tulane law review, page 1023

of NAFTA issues. These different interpretations of the standard of review make the decisions of the panels inconsistent.[891]

The settlement of disputes under the NAFTA model is less institutionalised and more fragmented. It relies more on ad hoc arbitration than other kinds of regional economic integration, for example the European arrangements.[892] Some critics have said that the NAFTA dispute settlement mechanisms are not centrally enforceable because of the limitations that make the NAFTA system ineffective. As mentioned above, the Secretariat has been concerned with problems related to the settlement of disputes, either because some mechanisms are not readily available or because there are some types of conflicts of interest.[893] The most common problem relates to delays, such as delays in appointing panels, delays in the panel selection process, and the length of time it takes for panels to reach their decision. Furthermore, some scholars such as Sergio López and Hector Fierro, explain that the panel process is affected by differences in legal cultures and other obstacles to communication between participants which also cause some delays. One example of the delay in appointing panels can be seen from the perspective of the different legal issues that arise from differences in culture, the diversity of language skills, and different legal traditions.[894] The Secretariat problem is a specific function that makes the NAFTA institutional elements very difficult to handle. The other problems relates to the lack of any structure for ensuring the binding nature of decisions. This means that there is no guarantee that a panel decision that has been rendered will be implemented quickly.

[891] Gabriel Cavazos Villanueva and Luis F. Martinez Serna, 'Private parties in the NAFTA dispute settlement mechanism: the Mexican experience' (2003) 77(1017) Tulane law review, page 1023

[892] http://www.wcoomd.org/en/topics/origin/instrument-and-tools/comparative-study-on-preferential-rules-of-origin/specific-topics/study-topics/dis.aspx

[893] Gabriel Cavazos Villanueva and Luis F. Martinez Serna, 'Private parties in the NAFTA dispute settlement mechanisms: the Mexican experience' (2002) Tulane Latin American law institute, page 7

[894] This opinion is in the Journal by Gabriel Cavazos Villanueva and Luis F. Martinez Serna, ' Private parties in the NAFTA dispute settlement mechanisms: the Mexican experience' (2002) Tulane Latin American law institute, page 6

4.2.3 The Common Market of the South (MERCOSUR)

4.2.3.1 Overview of the dispute settlement regime in the MERCOSUR

MERCOSUR's objective is to form a common market, as well as to eliminate trade barriers[895] among its signatories, which are Argentina, Brazil, Paraguay, and Uruguay.[896] MERCOSUR stands at an integration stage known as a customs union,[897] without any plan for future economic and monetary union, or even a common currency. MERCOSUR has become more legalised by reforming the institutional framework to its dispute settlement mechanism. According to Arnold and Rittberger, the reform was engendered based on the fact that "stronger states tend to be less in favour of legalisation, whereas weaker states need international commitment institutions for the advance in legalisation".[898]

As explained in both the Protocol Brasilia and the Protocol Olivos,[899] the MERCOSUR's dispute settlement mechanism is designed to solve controversies between the member states regarding the interpretation, application or non-compliance with the provisions contained in the treaty of Treaty of Asunción, or any of its agreements (within its protocols framework).[900] In addition, any decisions of the Common Market Council

[895] An important reason for its success in eliminate tariff due to the vast reserves of natural resources and energy provided by its members. Currently, economic crisis, currency volatility and economic conflicts among member countries have made investments less attractive and the foreign direct investment flow has become unpredictable.

[896] All South American countries are linked to MERCOSUR, either as member state or Associate member. MERCOSUR members are Brazil, Argentina, Paraguay, and Uruguay. Chile, Peru, Colombia, Guiana, Suriname and Ecuador are Associate members of MERCOSUR.

[897] A customs union is characterized by a common external tariff among members of the union as well as elimination of barriers of trade between member states that allowed for the free circulation of goods, services and production factors. Furthermore, this customs union would include the adoption of a common trade policy and the harmonisation of economic policies. Read more, Rafael A. Porrata-Doria, 'MERCOSUR: the common market of the twenty-first century?' (2004) 32 (1) Georgia journal of international and comparative law, 1

[898] 'Review: the legalization of dispute resolution in MERCOSUR' Wednesday 8 January 2014 save file http://www.panoramas.pitt.edu/content/review-legalization-dispute-resolution-mercosur

[899] The Protocol Brasilia and the Protocol Olivos are explained in section II and III below.

[900] The Protocol of Brasilia, art 1 and the Protocol Olivos, art 1

and the Resolutions of the Common Market Group' are subject to the dispute resolution procedure[901] (hereinafter 'controversy').

The evolution of the MERCOSUR dispute settlement mechanism can be seen in the following documents;

I) Founding Asunción Treaty[902]

Argentina, Brazil, Uruguay and Paraguay[903] signed the Treaty of Asunción to establish the MERCOSUR in 1991. This treaty, which took effect on the 31st December 1994, contained four mechanisms that were designed to move toward a common market, namely, trade liberalisation, common external tariffs, coordinated macro-economic policy and sector agreements. These were the first rules to settle disputes among member states but they were only able to achieve weak institutionalisation, with a temporary dispute settlement system provided in Annex III of the Treaty of Asunción.[904] The rules referred to the settlement of conflicts such as litigation through non-judicial methods by means of direct negotiation. If the negotiation failed, the parties could be referred to the Common Market Group (CMG) for a first attempt at mediation.[905] If the dispute was still not resolved by the Common Market Group, it was

[901] Rafael A. Porrata-Doria, 'MERCOSUR: the common market of the twenty-first century?' (2004) 32 (1) Georgia journal of international and comparative law, page 19

[902] The full text of Asunción Treaty (sources of English translation), is available at: http://www.sice.oas.org/trade/mrcsr/mrcsrtoc.asp

[903] MERCOSUR members consist of four developing countries - Brazil, Argentina, Uruguay, Paraguay and Venezuela. Currently, Associate members are Chile, Bolivia, Columbia, Ecuador and Peru. Treaty of Asunción took on Chile and Bolivia as associate members in 1996 and 1997, respectively. Peru became an associate member in 2003. Also, the Brazilian Senate approved last December the entry of Venezuela into the Common Market of the South.

[904] Annex No. III to the Treaty of Asuncion established a temporary three-step system for the resolution of disputes that might arise among the state parties concerning the application of obligations arising under that Treaty.

[905] The Common Market Group (CMG) is the MERCOSUR exclusive branch. It is the MERCOSURE's second highest institutional body. The CMG duty is to provide an advise of a panel of experts or specialists.

sent to the Common Market Council (CMC)[906] for a solution.[907] However, both the GMC and the CMC could only make non-binding recommendations.[908]

II) The Protocol of Brasilia[909]

The Protocol of Brasilia came into force on the 22nd April 1993 to provide a new mechanism for the resolution of controversies.[910] It enabled private individuals and companies of member states to access a dispute settlement mechanism and it contained procedures for resolving two kinds of disputes: 1) disputes between member states; and 2) dispute between a private party and state party. Moreover, it established a judicial method of dispute resolution and an *ad hoc* arbitration tribunal. Then, the Protocol of Ouro Preto came into effect on the 1st January 1995, which brought MERCOSUR legal personnel under international law and defined its institutional framework.[911]

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[906] The Common Market Council (CMC) is the most importance decision-making body within the MERCOSUR structure.

[907] The solution of dispute of MERCOSUR was in charge of political arm, which was subject to the will of the states. Read; Marcilio Toscana Franca Filho, Lucas Lixinski and Mariaa Belen Olmos Giupponi, *The law of MERCOSUR* (Hart Publishing, 2010), page 73

[908] Celina Pena and Ricardo Rozemberg, ' MERCOSUR: a different approach to institutional development' (2005) 05(6) focal policy paper, http://www.focal.ca/pdf/mercosur_Pena-Rozemberg_different%20approach%20institutional%20development_March%202005_FPP-05-06_e.pdf accessed 1 January 2015 page 8

[909] The Protocol of Brasilia, see http://www.mercosul.gov.br/.

[910] Thomas Andrew O' Keefe, 'Dispute resolution in MERCOSUR' (2002) 3(3) Journal of World investment, 507

[911] Regarding the dispute settlement procedures under the Protocol of Ouro Preto was an amendment of the Protocol Brasilia. One important amendment is the submission the controversies to the MERCOSUR Trade Commission (MTC), which act as a mediator both in conflict among member states or conflict among member states and private parties. Read more; Gabriella Giovanna and Jeanine Gama, 'Considerations on the MERCOSUR dispute settlement mechanism and the impact of its decisions in the WTO dispute resolution system' (2006) 1(4) CEBRI papers, page 6. Added that the MERCOSUR institution under the Treaty of Ouro Preto and Olivos include with seven institutions deal with implementing MERCOSUR's principles and purposes. They include the Council of the Common market (Council), the Common Market Group (Group), the MERCOSUR Commerce Commission (MCC), the Joint Parliamentary Commission, the Economic and Social Consultative Forum (Forum), the Administrative Secretariat (Secretariat), and the Permanent Appellate Tribunal (Tribunal). Read more, Rafael A. Porrata-Doria, 'MERCOSUR: the common market of the twenty-first century?' (2004) 32 (1) Georgia journal of international and comparative law, page 14-19

III) The Olivos Protocol[912]

The Olivos Protocol, which came in force on the 1st January 2004,[913] achieved the establishment of a permanent review court[914] with the aim of interpreting MERCOSUR regulations and settling trade disputes.[915] This Protocol was designed to replace the 1991 Protocol of Brasilia.[916] The establishment of Protocol Olivos gave the MERCOSUR dispute settlement mechanism its legal features and improved its institutional structure. Firstly, the development of this Protocol introduced a rule of choice of forum, whereby member states are allowed to choose between DSMs with 'multilateral or preferential free-trade agreements'. This option also allowed member states to refer their disputes to the World Trade Organisation (WTO) dispute settlement mechanism and other trade organisations.[917] The parties to the dispute cannot apply the case again in the court of another international organisation when they have agreed to apply it to the MERCOSUR dispute settlement system in order to avoid forum shopping.[918] Therefore, the selection of one forum excludes the option of choosing another; once they have made their selection, they cannot change it[919] and the parties will no longer be able to resort to

[912] The full text of the Olivos Protocol (sources of English translation), is available at: http://www.jstor.org/stable/20694326

[913] Before the Olivos Protocol is coming into force, the original text of the Protocol of Ushuaia remained valid. The Protocol of Ushuaia in 1998 concerns the commitment to democracy relates to the creation of the Permanent Tribunal of Review to reform the dispute settlement of MERCOSUR.

[914] A Permanent Tribunal of Review is designed to guarantee the correct interpretation, application and fulfillment of the fundamental instruments of the integration process and MERCOSUR norm. The power of the Permanent Tribunal of Review states in Article 22 of the Protocol Olivos as 'to confirm, modify or revoke the legal basis and decisions' of an *ad hoc* arbitral panel and the Tribunal's decision take precedence over those of the *ad hoc* body.

[915] In addition to the Protocol of Olivios, it also covers the 1994 Protocol of Colonia[915] concerning investment disputes for the Promotion and Reciprocal Protection of Investment and the 1994 Protocol of Buenos Aires for the Promotion and Protection of Investments Coming from non-MERCOSUR State Parties. For an information of The protocol Buenos Aires visits http://www.sice.oas.org/ trade/mrcsrs/decisions/AN0194_e.asp

[916] The development of The Olivos Protocol brought the progress in the process of integration within MERCOSUR and to improve the system for the settlement of disputes as stated in the preamble of the Olivos Protocol for the settlement of disputes in MERCOSUR. See also, Marcílo Toscano Franca Filho, Lucas Lixinski and María Belén Olmos Giupponi (ed.) *The law of MERCOSUR* (Hart Publishing 2010), page 75

[917] ASEAN studies centre, 'MERCOSUR economic integration: lessons for ASEAN' 2009 LSEAS report no.5, page 5 and Protocol of Olivos, art 1.2

[918] Christian Arnold and Berthold Rittberger, 'The legalisation of dispute resolution in MERCOSUR' (2013) 5(3) Journal of Politics in Latin America, page 103 save file Arnold_rittberger_2013_jpla

[919] ASEAN studies centre, 'MERCOSUR economic integration: lessons for ASEAN' 2009 LSEAS report no.5, page 6

another forum to settle the same dispute.[920] The Protocol of Olivos retained the basic elements of the Protocol of Brasilia, allowing the parties to resort to judicial means after the failure of negotiations. Moreover, it also enabled the arbitral panel to ensure compliance with its past decisions. Secondly, the Olivos Protocol established a permanent review tribunal composed of five arbitrators to hear appeals of arbitration awards.[921] The arbitrators were selected based on mutual accord for a three-year term agreed by majority vote. The judicial review of the decisions is made by *ad hoc* panels. A Permanent Review Court has the duty to interpret the MERCOSUR regulations and settle trade disputes. Furthermore, the Permanent Review Court has the duty to consult opinions at the request of the states, the MERCOSUR body and the Supreme Courts of the member states. All the development proposals require opting for a stronger legalised order by the creation of an international judicial body in order to ensure the effective and uniform application of the MERCOSUR legislation.[922]

4.2.3.2 Process of the Common Market of the South's dispute settlement regime

a) Consultation

As a first step, the state parties should attempt to resolve their conflicts through direct negotiations within fifteen working days[923] (unless they extend the time limit).

[920] United Nations, 'Dispute settlement regional approach MERCOSURE' 2003 United Nations conference on trade and development http://unctad.org/en/docs/edmmisc232add28_en.pdf accessed 1 January 2016, page 22

[921] The fifth arbitrators is chosen by consensus – one arbitrator designated by each member states and the fifth one chosen by consensus from the arbitrators included in a list of eight arbitrators- two from each member state as stated in articles 18 to 20 of the Protocol of Olivos.

[922] According to Christian Tomuschat explains an international judicial body can be defined as five criteria: (1) it must be permanent; (2) it must have been established by an international legal or instrument; (3) it must resort to international law in order to decide the cased summited to it; (4) it must decide the cases on the basis of preexisting rules of procedure and (5) its decision must be legally binding. Cesare Romano adds two other classification: (1) the judicial body must be composed of judges who have not been appointed *ad hoc* by the parties, but rather who have been chosen before a case is submitted through an impartial mechanism; (2) among the parties to the dispute, at least one must be a sovereign state or an international organisation. Read more, Romano Cesare, 'The proliferation of international judicial bodies: the pieces of the puzzle' (1999) 21(709 International Law and Politics, page 713-715

[923] Article 4 and 5 of the Protocol Olivos

The parties to a controversy should simultaneously inform the Secretariat of their progress and the results.[924] If the negotiation fails[925] or the dispute is only partially resolved,[926] the matter is referred to the Common Market Group,[927] which then has thirteen days (after the matter was submitted to it) to issue its recommendations for resolving the dispute.[928] Experts are allowed to provide advice and formulate these recommendations.[929] Then the Common Market Group will present the parties with a recommended resolution of their controversy.[930]

b) Ad Hoc arbitration panel

The parties to a dispute must first attempt to settle it through direct negotiation.[931] If the Common Market Group is also unable to resolve the dispute, any one of the state parties[932] can request it to be submitted to arbitration[933] by an *ad hoc* panel of three arbitrators.[934] The Protocol Olivos allows the parties to a controversy that has not been resolved by negotiation to agree to submit it to the arbitral Tribunal rather than the Group of an *ad hoc* arbitration panel for resolution. Under the Protocol of Olivos, the parties to a dispute that has not been resolved by negotiation may also have direct access to the Permanent Review Court.[935] According to Article 23, the dispute can be

[924] Article 2 and 3 of the Protocol of Brasilia; Article 4 and 5 of Protocol Olivos
[925] Article 2 of the Protocol of Brasilia
[926] Rafael A. Porrata-Doria, 'MERCOSUR: the common market of the twenty-first century?' (2004) 32 (1) Georgia journal of international and comparative law, page 19
[927] Article 4(1) of the Protocol Brasilia
[928] Article 8 of the Protocol of Olivos
[929] Article 4(2) of the Protocol of Brasilia
[930] Article 5 of the Protocol of Brasilia and Article 6 of Protocol Olivos
[931] Article 4 of the Protocol of Olivos
[932] The request is done by notifying and intending to the Administrative Secretariat of MERCOSUR. Then, the Secretariat will inform the other member states involved in the dispute.
[933] *Ad hoc* arbitration is conducted without an administering authority and generally without the aid of institutional procedural rules. Read, Christian Leathley, 'The MERCOSUR dispute resolution system' 2002 MERCOSUR study group, page5
[934] List of three arbitrators are selected from a list managed by the Secretariat as stated in Article 9 of the Protocol of Brasilia and Article 10 of Protocol Olivos
[935] The Permanent Review Court is the principal judicial organ of MERCOSUR and sits in the city of Asunción, Paraguay. Although the the Permanent Review can sit in other MERCOSUR member states for

referred directly to the Court without going to the Group or the *ad hoc* arbitration panel. Article 23 of the Protocol Olivos addresses the possibility that may arise 'when the parties to a controversy submit the controversy to the Tribunal,[936]namely, that in this situation the Tribunal will act as an arbitration panel and its decision will be final. Article 20 of the Protocol Brasilia and Article 16 of the Protocol Olivos state that the arbitrators are limited to making an award a maximum of ninety days[937] from the date of the appointment of the third arbitrator. In this case, the decision of the court will be final and binding. The Tribunal and the arbitral panel will decide the controversy based on the disposition of the 'community law', as well as those principles and norms of international law that apply to matter.

The panellists in a MERCOSUR arbitral tribunal, both in the *ad hoc* arbitration Court and the Permanent Review Court, are jurists with a recognised competence in trade and economic matters.[938] To maintain the independence of the tribunal, the presiding arbitrator and his or her alternative cannot be citizens of the disputing parties, even in a case where the appointment is made by the Administrative Secretariat.[939]

c) Appealing the Award

As stated in Article 17(1),[940] the Protocol Olivos changed MERCOSUR's dispute resolution mechanism by enabling arbitration awards to be appealed to the Permanent

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well-founded, See generally Christian Leathley, *International dispute resolution in Latin America: an institutional overview* (Kluwer Law International 2007), page 155

[936] The arbitral tribunal will establish its own rules of procedure, subject to allowing the parties a full opportunity to be heard, to present their case, and the proceeding being expeditious (article 15 of the Protocol of Brasilia. Read, Christian Leathley,'The MERCOSUR dispute resolution system' 2002 MERCOSUR study group, page5

[937] Within the period only ninety days means that an award must be made within sixty days extendible by a maximum of thirty days.

[938] Article 13.2 of The Protocol of Brasilia

[939] Article 10.3 (i) of The Protocol of Olivos

[940] The appeal process from an award of an ad hoc arbitral tribunal may be commenced by either party within 15 days refers to article 17(1) of the Protocol of Olivos

Appellate Tribunal (Permanent Review Court), which consists of five arbitrators.[941] The period of time for the Tribunal to render an award should be within thirty days after the filing of a response to the appeal and in making the award, it may confirm, modify or revoke the legal reasoning and decision of the award of the original arbitration panel.[942] It is important to note that the appeal would only relate to those issues that are dealt with within the award or the legal interpretation of community law set out in the award.[943] The decision of the Permanent Review Court is final, which means that it cannot be appealed and it prevails over the award of the arbitration panel.[944]

d) Decisions and their adoption

Any decisions[945] made by the *ad hoc* arbitration panel and tribunal are to be adopted by majority vote[946] and signed by all its members.[947] The Permanent Review Tribunal will only consider questions of law and it specifically has the authority to confirm and modify an award. Also, its decision is binding on the parties and cannot be appealed.[948] If any of the losing parties feel confused about an award, they may request

[941] The Tribunal is to be composed of five arbitrators, with each MERCOSUR country choosing one arbitrator. Four of whom are appointed by each member state for two-year term (Article 18(1) and 18(2) of the Protocol Olivos. One of whom shall be unanimously appointed by member states for three-year with nonrenewal period unless agreed consensus by the State Parties (Article 18(3) of Protocol Olivos. If a consensus is not possible, then the Director of the Administrative Secretariat in Montevideo selects the fifth arbitrators by lottery from a pre-submitted list of eight candidates. When a dispute only involves two countries, the Permanent Tribunal of Review is limited to three arbitrators, with one arbitrator from each country to the dispute and the third, a non-national, is chosen to be the President of the Tribunal by the Director of the Administrative Secretariat through a lottery.

[942] Article 22(1) of the Protocol of Olivos, which is the Permanent Review Tribunal, will consider only question of law, followed by its role is to ensure the consistent interpretation of the MERCOSUR legal norms, obligations and previouse ad hoc arbitral award. Read; Christian Leathley, 'The MERCOSUR dispute resolution system' 2002 MERCOSUR study group, page 10

[943] Article 17(2) of the Protocol of Olivos

[944] Article 22(2) of the Protocol of Olivos

[945] All decisions must be carried out and implemented within the timeframe included in the decision or, if none is mentioned, within thirty days from the date of its issue. A State Party ordered to comply with a decision must normally inform the winning State(s) of how it intends to do so within fifteen days after receipt of the decision.

[946] Article 25 of the Protocol of Olivos added that 'the actual vote tally is kept confidential and no dissenting opinions are allowed and should remain confidential at all times'.

[947] Article 25 of the Protocol of Olivos

[948] Article 26(2) of the Protocol of Olivos

clarification from the tribunal or the arbitration panel.[949] Failure to comply with such a decision or an arbitral award will allow the winning party to adopt temporary compensatory measures.[950] An example of these measure is the suspension of preferential tariff treatment or any other concessions. This suspension is to ensure compliance[951] if a state party feels that the measures taken by another (losing state) do not comply with the decision made by the tribunal or the arbitration panel. A State Party (wining state) has thirty days from the date when the measures were implemented to refer the matter back to the body (the tribunal or arbitration panel) that issued it, which will determine the issue within thirty days thereafter.[952] However, there are no provisions in either the Protocol of Brasilia or the Protocol of Oilvos by which arbitral rulings can be taken to domestic courts or made part of the law of a state party.[953]

e) Private parties' rights

The Protocol of Brasilia do not allow private parties, natural persons, or legal persons, who have no direct access to the dispute settlement mechanism, to submit claims against member states to arbitration. However, the Protocols of Brasilia and the Protocol of Olivos do make it possible for private parties, whether individuals or corporations, to request consultations and make complaints to the Common Market Group or Trade Commission through the National Section[954] of the country of origin[955]

[949] Article 28 of the Protocol of Olivos

[950] These compensatory measures may include the suspension of concessions or obligations granted in the same or even in other sectors and are independent of any obligation to refer the matter back to the body that issued the original decision.

[951] http://mercosurconsulting.net/mmix/index.php/2002/06/01/dispute-resolution-in-mercosur?blog=11

[952] Article 30 of the Protocol of Olivos stated that If a State Party feels that another State has not fulfilled its obligations under a decision in full or in part, it is also authorized to impose within a one-year period after the date for compliance has passed and ask for temporary compensatory measures.

[953] After all members have concluded in the adoption of decision, the Administrative Secretariat informs each member of the actions taken by the other members, and the legislation become effective estimate period around 30 days later for all the members. Read more; United Nations, 'Dispute settlement regional approach MERCOSURE' 2003 United Nations conference on trade and development http://unctad.org/en/docs/edmmisc232add28_en.pdf accessed 1 January 2016, page21

[954] The duties of the National Section of the Group after receives the claim will 1) negotiate with the National Section of the Group to which the member state against whom the claim has been brought to

of the complaining party. The complaints may relate to the adoption or application by a state party of legal or administrative measures of a restrictive or discriminatory nature or those leading to unfair competition in violation[956] of any MERCOSUR rule.[957] The Common Market Group will evaluate the complaint and may dismiss the claim or convene a panel of experts[958] on the subject matter of the controversy for an opinion regarding the settlement of conflicts between members.[959] If a defendant member state refuses to provide such relief, then the accusing member state may request the commencement of an arbitration proceeding against the defendant member state under the process described above for relief.[960]

f) Enforceability of decisions under the MERCOSUR

The state party responsible for enforcing the award has to inform the other party to the dispute of the measures that it will be taking,[961] as well as informing the Group through the Administrative Secretariat. Awards of both the *ad hoc* arbitration panels and the Permanent Review Court have to be enforced in accordance with the terms and the time period specified therein.[962] If the benefiting state party feels that the measures do not comply with the award, then Article 23 of Brasilia and Articles 31 and 32 of Olivos provide for 'temporary compensatory measures'. The state party may request a decision on the matter from either the *ad hoc* arbitration panel or the Permanent Review Court.

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resolve it, or 2) send the claim to the Group without any further proceeding or recommendation as explained in Article 27-28 of the Protocol of Brasilia and Article 41 of Protocol Olivos

[955] In this situation 'country of origin' means a place of usual residence or seat of business.

[956] In violation of the Treaty, its Protocols, Council Decisions or Group Resolution, of legal or administrative measures which have a restrictive, discriminatory, or disloyally competitive effect on that individual (individual controversy) referred to Article 25 of the Protocol of Brasilia and Article 39 of Protocol Olivos

[957] Raul Emilio Vinuesa, 'Enforcement of MERCOSUR arbitration awards' 2005 40(425) Texas international law journal accessed 26 January 2016 at http://www.tilj.org/content/journal/40/num3/Vinuesa425.pdf, 429

[958] The panel of experts consists of at least three members appointed by the Group referred to Article 30 of the Protocol of Brasilia and Article 43 of Protocol Olivos

[959] Article 29 of the Protocol of Brasilia and Article 42 of Protocol Olivos

[960] Article 32 of the Protocol of Brasilia and Article 44 of Protocol Olivos

[961] Article 29.1 and 29.3 of the Protocol of Brasilia

[962] Article 29.1 and 29.3 of the Protocol of Brasilia

This compensatory decision will be applied by the complainant party if the losing party fails to comply with the arbitral decision.

More importantly, the mechanism to enforce these arbitral awards is extremely weak due to the fact that this compensatory measure award is the sole remedy available to the successful party in a dispute.[963] There is no opportunity to oblige states to enforce awards other than through compensatory measures.[964]

g) Effectiveness of the MERCORSUR

As mentioned earlier, the MERCOSUR dispute settlement system is designed to be used when two or more member states submit a dispute that has arisen out of the MERCOSUR norms to an *ad hoc* panel of arbitrators appointed for that particular case. These arbitrators, who are selected from a list compiled and kept by MERCOSUR, may not necessarily be objective. They serve to decide the individual case and there is no guarantee that they will be reappointed to consider another case.[965] However, there is some progress toward an *ad hoc* arbitration dispute resolution mechanism, since this is strengthened by the Protocol of Olivos. Furthermore, the Protocol of Olivos was achieved by establishing a permanent review court[966] and was designed to interpret MERCOSUR regulations and settle trade disputes. Unfortunately, MERCOSUR simply does not have an effective dispute resolution mechanism; in fact, it has only been used

[963] Christian Leathley, 'The MERCOSUR dispute resolution system' 2002 MERCOSUR study group, page 15
[964] Raul Emilio Vinuesa, 'Enforcement of MERCOSUR arbitration awards' 2005 40(425) Texas international law journal accessed 26 January 2016 at http://www.tilj.org/content/journal/40/num3/Vinuesa425.pdf, 428
[965] Rafael A. Porrata-Doria, 'MERCOSUR: the Common market of the twenty-first century? (2004) 32(1) Georgia Journal of International and comparative law, page 23 http://digitalcommons.law.uga.edu/cgi/viewcontent.cgi?article=1237&context=gjicl accessed 1 June 2016
[966] A Permanent Tribunal of Review is designed to guarantee the correct interpretation, application and fulfillment of the fundamental instruments of the integration process and MERCOSUR norm. The power of the Permanent Tribunal of Review states in Article 22 of the Protocol Olivos as 'to confirm, modify or revoke the legal basis and decisions' of an *ad hoc* arbitral panel and the Tribunal's decision take precedence over those of the *ad hoc* body.

a limited number of times since its creation.[967] The absence of an effective enforcement mechanism is a major obstacle to the implementation and the expansion of the MERCOSUR agenda.[968] Currently, the rules of law and dispute settlement are creating many difficulties, since the MERCOSUR system seems to be a relatively effective dispute settlement mechanism. Moreover, it is important to point out that it is very difficult for many English-speaking researchers to undertake research on MERCOSUR because a large amount of sources and information on MERCOSUR are only available in Spanish and Portuguese.[969]

One problematic issue is the lack of a clear binding mechanism mandate,[970] which means that the MERCOSUR dispute settlement mechanism plays an ineffective role in solving controversies among parties. The mechanism for enforcing decisions is extremely weak. There is no effective mechanism the institution can utilise to enforce compliance with its norms; in other words, the MERCOSUR mechanism to settle disputes is complicated to use. The additional task of creating a Permanent Appellate Tribunal in the Protocol of Olivos is still problematic due to the fact that it lacks any effective mechanism to protect the rights of individual entities or persons under community law.[971] Besides, this system is inadequate to deal with the majority of disputes, since there is no court that can interpret these norms in a consistent attempt

[967] Christian Leathley, 'The MERCOSUR dispute resolution system' (2002) The Royal Institute of International Affairs Chatham House MERSOCUR study group, Page 11 http://www19.iadb.org/intal/intalcdi/PE/2007/00548.pdf accessed 21 March 2017

[968] Member states who generally abide by the rules and who are aggrieved by another member states's abuse or noncompliance with a MERCOSUR rule or norm will naturally conclude that they have no effective mechanism to protect their benefits within the organisation. Furthermore, there is no effective penalty for noncompliance with community norm. Without an effective enforce compliance, its operation and the method to resolve disputes will not be effective. See, Rafael A. Porrata-Doria, 'MERCOSUR: the Common market of the twenty-first century? (2004) 32(1) Georgia Journal of International and comparative law, page 64

[969] http://www.nyulawglobal.org/globalex/mercosur1.html#_edn15

[970] In order to be effective, the enactment of a number of trade liberalisation norms under MERCOSUR must be interpreted in a consistent manner and must be effectively enforce. Porrata-Doria, above 930, page 63

[971] Individuals may file their claim only to the National Group for the Common Market Group read more section 5 in the process of the Common Market of the South dispute settlement

to create a body of knowledge. This causes problems for the parties, since that they cannot rely on it when planning their actions.

One of the most interesting aspects of the Protocol of Olivos is the introduction of new rules regarding the choice of forum, which has also led to some criticism. Article 1 of the Protocol of Olivos addresses the fact that the State Parties have the option, when appropriate, of using either the MERCOSUR or the WTO system,[972] or any other preferential trade systems they may have entered into, as decided by the requesting party[973] to resolve any disputes that may arise among them. Some scholars argue that the choice of different dispute settlement mechanisms will hinder the economic integration progress, prevent the construction of a local case-law, and allow non-members to assess disputes that arise within the member states' agreement zone.[974] According to some scholars, 'the settlement of regional disputes by the WTO instead of the MERCOSUR DSM might bring the interference of national of non-member states with political interests contrary to the MERCOSUR'.[975] The application of this rule not only leads to a loss of respect for the MERCOSUR dispute settlement mechanism, but also to the rise of some discordant jurisprudence related to the obligations among MERCOSUR member states. This illustrates the flexibility in the choice of mechanism to settle disputes due to the different methods that are available. This leads to the absence of trust that is required for member states to choose MERCOSUR to resolve their disputes.

The mechanism to enforce these arbitral awards is extremely weak[976] based on the fact that this compensatory measure award is the sole remedy available to a

[972] Argentina recently decided to refer its dispute with Brazil concerning the Anti-dumping Measures on Resins directly to the WTO. (Case DS355 WTO, 26 December 2008).
[973] Olivos Protocol Regulation, art 4, para 4 and 5. This article obliges MERCOSUR member states to select only one mechanism. States are not allowed to send a dispute to both systems, as occurred when the Brasilia Protocol was still in force in the case concerning the Poultry Anti-Dumping Duties.
[974] Gabriella Giovanna and Jeanine Gama, 'Considerations on the MERCOSUR dispute settlement mechanism and the impact of its decisions in the WTO dispute resolution system' (2006) 1(4) CEBRI papers, pages 6-7
[975] Ibid, page 7
[976] Porrata-Doria, above 901, page 24

successful party in a dispute. Nonetheless, the problem is the process itself, which is enacted in private between the parties with no participation by *amici curiae.*[977] This limitation gives the impression that the process is not transparent.

In terms of the disputes involving member states and private parties, the Protocol of Olivos did not bring any innovation to the existing proceedings and it maintained the lack of direct access for private individuals and companies to the judicial procedures.[978]

Another weakness of the institutional characteristics of MERCOSUR is the lack of any automatic imposition of decisions, resolutions and directives originating from the main MERCOSUR organs into national law.[979] However, there are no provisions in either the Protocol of Brasilia or the Protocol of Oilvos by which arbitral rulings can be taken to the domestic courts or made part of the law of a state party.[980]

Section 4.3 Conclusion

The legislative provisions for the resolution of trade disputes in the NAFTA, the European Union and the MERCOSUR have been analysed in this chapter. As can be seen, the basic method for the resolution of trade disputes between member states is the use of consultation and negotiation. In terms of the dispute settlement mechanism of the European Union, the European Court of Justice acts through its supranational regime, its

[977] '*Amici curiae'* mean an impartial expert or a professional person or organisation acts to advise it in respect to some matter of law that directly affects the case in question.

[978] Gabriella Giovanna and Jeanine Gama, 'Considerations on the MERCOSUR dispute settlement mechanism and the impact of its decisions in the WTO dispute resolution system' (2006) 1(4) CEBRI papers, page 7

[979] ASEAN studies Centre Institute of Southeast Asian Studies, *'MERCOSURE Economic Integration Lessons for ASEAN'* (ISEAS 2009), page 4

[980] After all members have concluded in the adoption of decision, the Administrative Secretariat informs each member of the actions taken by the other members, and the legislation become effective estimate period around 30 days later for all the members. Read more; United Nations, 'Dispute settlement regional approach MERCOSURE' 2003 United Nations conference on trade and development http://unctad.org/en/docs/edmmisc232add28_en.pdf accessed 1 January 2016, page21

judgments and the direct effects of European law respectively. Unlike the European Union, the NAFTA rules have no direct effect on the national legal systems of its member states. The general dispute settlement provisions contained in Chapter 20 of the NAFTA are also covered by the particular dispute settlement arrangements for anti-dumping and countervailing (Chapter19) and the dispute provisions for investment disputes (Chapter 11). The NAFTA has created one of the most successful integrated legal systems, which defines it less than a structured dispute settlement system, based on *ad hoc* arbitration, to determine whether or not its members are complying with their international obligations. Procedurally, the NAFTA has also created an Appellate Body to ensure justice, which means that decisions made by the committee are binding as the final adjudication of the dispute.

The MERCOSUR dispute settlement system had been characterised as an attempt to resolve disputes by diplomatic negotiation and ad hoc tribunals that have limited independence from the member-state governments. The problems with MERCOSUR's dispute settlement mechanism are based on an absence of exclusivity. Its current dispute resolution system is based on the Treaty of Asuncion and the 1991 Brasilia Protocol, which was replaced by the 2002 Olivos Protocol. However, despite the various Protocols that formed subsections of the Treaty of Asuncion, there is still no permanent system. The dispute resolution mechanism continues to be an ineffective means of enforcement, which lacks a trustworthy dispute resolution procedure. Nonetheless, although it would appear that the MERCOSUR system is unusual in its functioning and relatively effective dispute settlement procedures, it was included in this study as a result of the examples of cases of the ASEAN, in which the member states of the MERCOSUR are developing states.

Having analysed the issues discussed in this chapter regarding the framework for each of the regional dispute settlement mechanisms involved in the creation of the NAFTA, the EU and the MERCOSUR may be appropriate for application to the ASEAN. Moreover, the development of the dispute settlement regimes of the NAFTA, the EU

and the MERCOSUR will provide an example for the design of a trade dispute settlement mechanism and a reference for the ASEAN in relation to many political and economic ideas. The dispute settlement mechanism of the ASEAN will be explained in the next chapter.

CHAPTER V

DISPUTE SETTLEMENT MECHANISM IN TRADE AGREEMENTS ENDORSED BY THE ASEAN: AFTA Experience

'We, the Peoples of the member states of the Association of South East Asian Nations…. hereby decide to establish, through this Charter, the legal and institution framework of ASEAN.'

The Preamble to the ASEAN Charter

Section 5.1 Introduction

As explained in Chapter two, it is essential to examine the history of the evolution of the ASEAN's trade agreement, negotiations in order to understand its approach to the settlement of trade disputes.[981] An ASEAN Economic Community (AEC) cannot be established without the existence of some means of settling conflicts among the member states based on the interpretation and implementation of the various economic agreements, such as the ASEAN free trade agreement. Following the establishment of the ASEAN, the ASEAN Free Trade Area (AFTA) was signed as the first major economic integration agreement. The reason for forming the free trade area was to challenge to the traditional means of setting disputes in the ASEAN, which was based on a political agreement among member countries.[982] However, the AFTA framework agreement states that, 'any differences between member states regarding to the interpretation or application of this agreement or any arrangements, an appropriate

[981] For an explanation of the ASEAN Economic Community sees chapter two of the thesis.

[982] Ong Keng Yong, 'ASEAN's post agenda: strengthening and deepening community building' (2014) 28th Asia-Pacific roundtable 2-4June, Kuala Lumpur, Malaysia

body shall be designed to settle of their disputes.'[983] The creation of this dispute settlement mechanism was an early priority of the ASEAN based on the need to evaluate the progress of the ASEAN dispute settlement since the ASEAN focuses on economic cooperation rather than integration.[984] After reviewing the international organisation dispute settlement regimes of both multilateral trade in the World Trade Organisation (WTO) and regional orginisations like the European Union, the North American Free Trade Agreement (NAFTA) and the Mercado Comun del Sur (MERCOSUR), an attempt will be made in this chapter to assess the current dispute settlement regimes of the ASEAN in the context of today's ASEAN trade dispute settlement from the past to the present. The concept of conflict resolution in the framework of the ASEAN dispute settlement mechanism will be analysed by illustrating the development timeline of the ASEAN agenda.

The ASEAN dispute mechanism consists of both informal and formal procedures known as 'non-adjudicatory' and 'adjudicatory'. Non-adjudication or diplomatic procedures[985] include consultation, good offices, conciliation and mediation in an attempt to encourage member states to resolve their disputes in the most efficacious and mutually- acceptable manner. Non-adjudication procedures are informal ways to resolve disputes to reaching a mutually-agreed solution with the intention to avoid legal intervention. Rather than being mandatory, a party voluntarily participates in a non-adjudicatory procedure when asked to do so by the other party, and either party may terminate it at any time.[986] In contrast, adjudication procedures are a mechanism to

[983] The AFTA Framework Agreement http://www.asean.org/storage/images/2012/Economic/AFTA/Common_Effective_Preferential_Tariff/Framework%20Agreements%20on%20Enhancing%20ASEAN%20Economic%20Cooperation%20.pdf

[984] Jean-Claude Piris, Walter Woon, *Towards a rules-based community: an ASEAN legal service*, (Cambridge University press 2015), Page 24

[985] However, there are some problem in applying a diplomatic means of dispute settlement; 1) for being too 'power-oriented'; 2) not sufficient focusing on the legal merits of each party's case; 3) weakening the rule-based system. For more limitation of ASEAN trade dispute settlement read more in Chapter six of this thesis.

[986] Paolo R. Vergano, 'The ASEAN Dispute settlement mechanism and its role in rule-based community: overview and critical comparison' (2009) AIELN http://aieln1.web.fc2.com/Vergano_panel4.pdf accessed 1 May 2016

resolve disputes between member states by applying the relevant treaty rules that apply to them all. The mechanisms for resolving disputes between member states within the existing legal frameworks for economic co-operation in the ASEAN will be the focus of this chapter.

The limitation of the dispute settlement regime is one of the barriers to more effective in conflict resolution in the ASEAN. However, some academics perceive that ASEAN member countries have contributed more to conflict avoidance than conflict resolution with their use of the so-called as 'ASEAN Way'.[987] As a result, the ASEAN trade dispute settlement mechanism (DSM) has become more politicised according to the ASEAN's Secretary-General,[988] and not a single dispute has been resolved by it to date. Furthermore, the ASEAN has not fully developed its institutional capacity to prevent conflicting issues as well as the mechanism being unclear to internal institutions, as will be further explained in chapter 6 in the section devote to the problems and limitations of the ASEAN DSM and how the ASEAN can provide a more effective dispute settlement regime because the current dispute resolution mechanism is ineffective despite being flexible.[989]

The ASEAN trade dispute settlement mechanism is only designed to resolve State-to-State disputes. It was established in Article 25 of the ASEAN Charter (the 2010 Protocol) and allows one ASEAN member state to sue another in cases of a breach of the protection obligations under the ASEAN Charter and concerning the interpretation or application of the Charter and other ASEAN instruments. The ASEAN Charter was designed as a legal framework for the ASEAN as a rule-based organisation and Article

[987] David B. H. Denoon and Evelyn Colbert, 'Challenges for the Association of Southeast Asian Nations (ASEAN) Pacific Affairs' (1998-1999) 71(4), page 506 http://www.jstor.org/stable/2761082 accessed 1 May 2016

[988] Rodolfo C Severino, ASEAN secretary-general (1998-2002) gave the opinion that 'ASEAN is not a dispute settlement body for the member states to expect that ASEAN can be judge a conflict. The conflicts between ASEAN countries are political internal issues on both sides and ASEAN can do little about it' in Sujane Kanparit, 'A Mediator Named ASEAN' (2013) http://www.aseannews.net/a-mediator-named-asean-lessons-from-preah-vihear/ accessed 3 May 2016

[989] Agus Wandi, 'Building ASEAN capacity for conflict mediation' (2010) CMI, page 8

24(3) refers to the 2004 ASEAN Protocol on an Enhanced Dispute Settlement Mechanism ('EDSM') which provides a detailed mechanism to specifically address economic disputes among ASEAN Member States the so-called 'Vientiane Protocol.[990] Chapter VIII of the ASEAN Charter[991] is a general application rather than a replacement of the 2004 Protocol and the Charter's purpose is to fill the gaps where the Vientiane Protocol does not apply.[992] Moreover, the 2010 Protocol provides a framework for existing and future dispute settlement mechanisms, including future economic agreements. [993] Moreover, the Dispute Settlement Provision in non-economic agreements such as the Treaty of Amity and Cooperation in Southeast Asia (TAC) will be discussed in this chapter as an example of how dispute settlement works in the ASEAN.

The progress of the ASEAN trade dispute settlement mechanism is examined in this chapter from its original diplomatic procedure to its enhanced legal system. An attempt is made to answer the questions related to the adequacy of the dispute settlement institution and whether the processes are sufficiently clearly defined to be an effective regulation for ASEAN economic integration. The components of the ASEAN trade DSM, are analysed, together with an examination of their potential and the existing ASEAN DSMs provided for in the ASEAN Charter, ASEAN Protocols and related ASEAN instruments. The chapter is divided into four sections. Details of the mechanism for ASEAN conflict resolution and the ASEAN's style of conflict management are addressed in Section 2, while a formal ASEAN dispute resolution for both non-economic disputes and specific disputes concerning trade and economy is established in Section 3. The ASEAN Protocol on Enhanced Dispute Settlement Mechanism (EDSM or the

[990] The 2004 Protocol on Enhanced dispute settlement mechanism, signed in Vientiane by the Economic Ministers at the Eleventh ASEAN Summit, 29 November 2004. It should be noted that the 2004 Protocol on Enhanced Dispute settlement Mechanism, as reflected in the ASEAN Concord II in Bali, Indonesia.

[991] The 2010 Protocol to the ASEAN Charter on Dispute Settlement Mechanisms signed on 8th April 2010 in Hanoi, Vietnam. Accesses full text see, https://cil.nus.edu.sg/2010/2010-protocol-to-the-asean-charter-on-dispute-settlement-mechanisms/

[992] Piris and Woon, above 984, page 72

[993] At present, ASEAN is under the process of revising the Protocol in many aspects such as defining the term 'future economic agreement' see, Krit Kraichitti, 'ASEAN free trade agreements: policy and legal considerations for development' http://www.aseanlawassociation.org/9GAdocs/w3_Thailand.pdf accessed 1 January 2016, page 8

Vientiane Protocol) is presented as a mechanism specifically designed for intra-regional economic disputes between ASEAN Member states and a comparative analysis is made of the new 2004 Protocol and the ASEAN Charter on the dispute settlement mechanism. A conclusion is provided in Section 4.

Section 5.2. ASEAN dispute resolution

5.2.1 Mechanisms for conflict resolution within the ASEAN

Conflict resolution is defined as a process by which to resolve a conflict by ending a disagreement between two or more people and it can also apply to resolving a conflict between a system and the community.[994] Conflict resolution can also be described as a measure that attempts to resolve a conflict caused by incompatibility by producing a solution that is mutually acceptable to all the conflicting parties.[995] It is the process of conflict management that helps the conflict resolution to be more effective and there are various methods of conflict resolution such as the elimination and termination of conflict, which entails eliminating the root causes of the conflicts.[996] This has become an important issue for all member states and has led to questioning the capacity of the ASEAN to resolve both interstate and domestic conflicts.[997] In contrast, avoiding conflict is not the way to solve it but merely leads to postponing it. It is a way for the parties to buy time in the short term if they want to maintain their relationship or leave the group. It can be useful as a temporary measure. The term 'conflict management' contains three elements, namely, prevention, containment, and termination. Conflict containment

[994] Rahul Raj and Joeffrey M. Calimag, 'ASEAN dilemma and the missing link' (2011), pages 199-203
[995] Niklas L.P. Swanstrom and Mikael S. Weissmann, 'Conflict, Conflict prevention and Conflict Management and beyond: a conceptual exploration' (2005) A joint transatlantic research and policy center John Hopkins University http://www.mikaelweissmann.com/wp-content/uploads/2014/12/051107_concept-paper_final.pdf accessed 1 Mau 2016, page 6
[996] Christopher Mitchell, *The structure of International Conflict* (New York, St. Martin's Press,1981) part 1 and part 4
[997] Wandi, above 989

entails the use of force in order to prevent the conflict from spreading and the termination of the conflict involves a process of both settlement and resolution.[998]

The general idea of a dispute resolution mechanism is one that is highly agreed by the parties. It must have clear and generally applicable rules to be bound by the third party's decision in case the parties do not accept the decision made by them or the case concerns political opinions that make the decisions less legalised in the eyes of the law.[999] The ASEAN's way of managing conflict is explained below as well as the role of the ASEAN in terms of conflict management.

5.2.2 Conflict management in the ASEAN

'Conflict Management Mechanisms' are defined as processes, methods, devices and techniques used to resolve or manage a conflict, and while conflict management entails the elimination of violence it cannot eliminate the root causes of the conflict.[1000] Similarly, Fred Tanner suggests that conflict management is limited to mitigating and containing a conflict without solving it.[1001] Norm-settling, assurance, community-building, deterrence, non-intervention, isolation, intermediation, enforcement and internationalisation are all strategies of conflict management.[1002] The broad meaning of conflict prevention and conflict management is to avoid, minimise and try to manage conflicts between different parties,[1003] and it includes a wide range of techniques that can be grouped into three broad categories, namely, conflict avoidance, conflict

[998] Kripa Sridharan, 'Regional Organisations and Conflict Management: Comparing ASEAN and SAARC' (2008) Working paper 33-Regional and Global Axes of Conflict, page 3

[999] Kenneth W. Abbott, 'The concept of legalisation' (2000) 54(3) Int'L Org https://www.princeton.edu/~amoravcs/library/concept.pdf, page 401-403 accessed 1 June 2015

[1000] Mitchell, above 996, part 1 and part 4

[1001] Niklas Swanstrom, Sofia Ledberg and Alec Foss, *Conflict Prevention and Management in Northeast Asia: The Korean Peninsula and Taiwan Strait in Comparison* (Cambridge Scholars publishing 2010), page 4

[1002] Mely Caballero-Anthony, *Regional Security in Southeast Asia: beyond the ASEAN Way* (ISAS 2005), page 22

[1003] Swanstrom and Weissmann, above 995, page 5

prevention, and conflict resolution.[1004] Norm-setting can be defined by the state's identity or regulatory behaviour as the primary way to prevent conflicts; for instance, increasing transparency, reducing uncertainty and building confidence for reassurance. A community-building strategy is based on a secure community which seeks to reduce use of force by helping people to settle their disputes without fighting each other. Deterrence acts as a defence against the aggressive behavior of member states and non-member states, and finally, intermediation and internationalisation help to terminate conflict as a process of settling disputes.[1005]

The basic method to manage conflict entails the teaching that armed conflict will not help to settle any disputes and political parties must attempt to resolve their disputes peacefully as well as making the national policy more transparent.[1006] Professor Ramses Amer provides two approaches to conflict management in the ASEAN, the first of which involves the mechanisms formulated in different ASEAN declarations and treaties, while the second entails ASEAN members negotiating to adopt a decision-making process based on those mechanisms. However, the success of the ASEAN's dispute management cannot only be attributed to these two techniques, but the ASEAN should also distribute the techniques adopted by its members by engaging in the practices of musyawarah and muafakat (consultation and consensus). Besides, another technique for the management of ASEAN disputes is to use third-party mediation to settle disputes by stressing the virtue of self-restraint.[1007] Third-party mediation can be useful when the disputes are long- lasting, over costly, drawn-out and complex, and the disputants' own conflict management efforts have reached an impasse or in cases

[1004] Rajshree Jetly, 'Conflict management strategies in ASEAN: perspectives for SAAEC' (2003) 16(1) the Pacific review, page 55 http://www.tandfonline.com/loi/rpre20 accessed 1 June 2015
[1005] Anthony, above 1002, page 23
[1006] Anthony, above 1002, page 20
[1007] Hoang Anh Tuan, 'ASEAN Dispute Management: Implications for Vietnam and an Expanded ASEAN' (1996) 18(1) Contemporary Southeast Asia http://www.jstor.org/stable/25798320, page 63 accessed 15 June 2015

where they would like to accept and desire to seek a solution by co-operating and engaging in some contact and communication with the third party.[1008]

The Bali Treaty is an example of conflict management that relates to co-operation and the peaceful settlement of disputes in Chapters I, III and IV. The special point of this treaty is that it allows non-Southeast Asian states to be represented in the High Council if they are directly involved in the dispute, provided that Southeast Asian signatories give their consent for the non-Southeast states to settle their dispute through the regional processes. It should be noted that, regulation strictly prohibits non-Southeast Asian countries from being members of the High Council when the case only concerns Southeast Asian states in order to prevent interference from outside the ASEAN.[1009]

The purpose of conflict management is more specific than the definition of conflict resolution, arbitration, mediation, judicial settlement, and negotiation, all of which are exclusive to conflict management. [1010] The mechanisms of conflict management are the processes, methods, devices, techniques and strategies constructed to resolve or manage a conflict. They entail both the concepts of conflict resolution and conflict management, but there are some slight differences. Conflict resolution refers to the elimination and termination of conflicts, while conflict management is the elimination of violence without eliminating the cause of conflict.[1011] The ASEAN was originally a mixture of a political organisation and a permanent diplomatic conference.

There are many types of approached to security and the ASEAN is an example of a regional organisation designed to control conflict, which is the same as a co-operative

[1008] Tuan, above 1007, pages 68-69
[1009] Ramses Amer, Conflict management and constructive engagement in ASEAN's expansion, (1999) 20(5) third world Quaterly, page 1035 https://www.jstor.org/stable/3993610?seq=1#page_scan_tab_contents accessed 20 May 2015
[1010] Zartman William, 'Conflict management: The long and the Short of it' (2000) 20(1) SAIS reviews, pages 227-230
[1011] Anithony, above 1002, page 22

approach to settling local disputes and this is also reflected in the fact that the regional states have more control over latitude in the environmental sphere.[1012] It is considered to be helpful to now explain the origins and development of the ASEAN dispute resolution mechanism in order to examine the limitations of the ASEAN trade DSM in the next chapter.

The mechanism of conflict management is based on the institutionalisation of both formal and informal methods. Therefore, the ASEAN Dispute Settlement Mechanism can be best understood by focusing on understanding the non-adjudicatory mechanism of the ASEAN. This is an informal, non-legally-binding act, which is a popular mechanism for resolving business disputes especially those involving cross-border issues, since it covers the idea of the implementation of the ASEAN trade and investment agreements. The WTO model is an example of a non-legally-binding consultation based on diplomacy.[1013]

The nature and functions of the institutionalised methods of settling disputes the ASEAN way are very different in that they are not a typical conflict resolution mechanisms, but rather conflict-avoidance techniques.[1014] The first means to resolve conflict in the ASEAN is 'within the family', which could qualify as being political. The Treaty of Amity and Cooperation (TAC) is an example of a voluntary intergovernmental system whereby, if dispute arises, the parties can submit it to the High court and be represented by someone with a ministerial rank from member states. However, there is a gap in applying a conflict to the High court as a result of the procedural rules not being adopted until 2001, which is why parties have never used this forum to resole their disputes. Member states prefer to submit a case to the ICJ or the International Court of Justice based on the fact that the TAC cannot utilise this regional dispute resolution

[1012] ibid page 26
[1013] Vergano, above 986
[1014] Sridharan, above 998, page 11

mechanism.[1015] There is evidence that ASEAN states have used international institutions such as the International Court of Justice (ICJ), the International Monetary Fund (IMF) and the United Nations (UN) to settle their bilateral dispute since 2001 rather than the ASEAN mechanism.[1016]

Creating a mechanism for conflict management within the ASEAN entails examining the formation of different ASEAN declarations and treaties, as well as understanding the various issues related to the ASEAN mechanisms and the ASEAN negotiation and decision-making process.[1017] Third parties are people who help to negotiate in disputes between two countries when the ASEAN attempts to prevent regional disputes from worsening.[1018]

There are seven key documentations related to the conflict management mechanisms in the ASEAN namely, the ASEAN Declaration (Bangkok Declaration), the Declaration of ASEAN Concord, the Treaty of Amity and Cooperation in Southeast Asia, the Declaration of ASEAN Concord II (Bali Concord II), the ASEAN Security Community Plan of Action, and the Charter of the Association of Southeast Asian Nations (ASEAN Charter)[1019] all of which can be explained as new ideas for the mechanisms of the ASEAN from the past to the present. The ASEAN has been the most successful cooperation of countries for forty years at an inter-government level; however, there are some conflicts that still cannot be resolved in terms of security problems, especially territorial disputes among regional states,[1020] which lead to trade and financial problems among members.

[1015] Laurence Henry, 'The ASEAN Way and community integration: two different models of regionalism' (2007) 13(6) European law journal, page 864 http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1025097 accessed 12 May 2015

[1016] Avery D. H. Poole, 'Cooperation in contention: the evolution of ASEAN norms' (2007) YCISS working paper number 44, page 8

[1017] Amer, above 1009, page 1032

[1018] Yukawa Taku, 'Transformation of ASEAN's Image in the 1980s: The Cambodian Conflict and the Economic Development of ASEAN Member Countries' (2011) 49(2) Southeast Asian Studies, page 247 https://kyoto-seas.org/pdf/49/2/490204.pdf accessed 12 April 2015

[1019] Ramses Amer, 'The Association of Southeast Asia Nations (ASEAN) Conflict Management Approach Revisited: will the Charter Reinforce ASEAN's role', pages 8-11 http://www.seas.at/aseas/2_2/ASEAS_2_2_A2.pdf accessed 1 May 2016

[1020] Chin Kin Wah, 'Introduction: ASEAN – facing the fifth decade' (2007) 29(3) ISEAS, page 397

The development of regional norms as mechanisms to peacefully settle of disputes among members helps to understand why they were prioritised in the establishment of the 1967 ASEAN Declaration known as Bangkok Declaration, the 1972 Zone of peace, freedom and neutrality Declaration (ZOPFAN Declaration) and the 1976 Declaration of ASEAN Concord.[1021]

Section 5.3 Formal dispute resolution procedure

5.3.1 Dispute Settlement Provision in non-economic agreements

Non-economic agreements in dispute settlement provisions are weak and informal. They can be typically described as "disputes can be settled through consultation or negotiation between parties without any third party concerns'. The internal agreements in the dispute settlement mechanism within ASEAN can be compared with the external agreements in order to determine its success in building a rule-based regime. The external partners of the ASEAN are expected to be more powerful and able to apply more pressures whereas the internal agreements negotiated among members are expected to be relatively small; therefore, it is easier for members of the ASEAN to negotiate agreements among themselves than with external partners.[1022]

a) The Bangkok Declaration 1967

The Bangkok declaration 1967 first mentioned the general provisions for the settlement of disputes. It was established to promote regional cooperation in South-

[1021] Hao Duy Phan, 'Procedures for peace: building mechanism for dispute settlement and conflict management within ASEAN' (2013) 20(47) U.C. Davis Journal of international law and policy, page 3

[1022] Henry Gao, 'Dispute Settlement in ASEAN External Agreements with China, Japan and Korea', page 3 http://www.nysba.org/Sections/International/Seasonal_Meetings/Vietnam/Program_1/Attachment_3.html accessed 12 April 2015

East Asia with equality and partnership by expressing peace, progress, and prosperity in the region together with promoting economic and social stability in national development and the adherence to the principles of the United Nations Charter.[1023] This was the first legally-binding treaty; however, the ASEAN Declaration was signed by foreign ministers as national representative bodies of the member states, rather being ratified by heads of state, therefore the Bangkok Declaration was more of a political declaration than a constitutional treaty[1024] and it took more than nine years for the ASEAN to creates its own first summit meeting based on principles such as the establishment of annual meetings of Ministers of Foreign Affairs, a standing Committee, an ad-hoc Committee and a National Secretariat in each country. When conflicts arose among members in the initial period after launching the Bangkok Declaration, they tried to resolve their disputes by consultation rather than facing each other and above all they tries to avoid making a commitment to each other.[1025]

In 1967 the founders of the ASEAN expected it to be an association based on a voluntarily commitment to the common good with the intention to develop peaceful economic and cultural benefits for all in the primary stage.[1026] Also, the aims and purposes of the Association were to promote regional peace and stability by adapting the law of each country to the principles of the United Nations Charter.[1027] However, it cannot be said that the aim of the ASEAN Bangkok Declaration was achieved because no institutional framework was established for the ASEAN.[1028] This is because the organisation's legal personality, principles and functions of decision-making procedures were not specified as well as there being no dispute settlement mechanisms or any arrangement for financial contributions. With the TAC, was able to manage its affairs with the minimum formality with just a few binding agreements and weak regional

[1023] Walter Woon, 'The Framework for the Settlement of Disputes in ASEAN' (2012), page 1
[1024] Hao Duy Phan, 'Promoting compliance: an assessment of ASEAN Instruments since the ASEAN Charter' (2013-2014) 41(379) Syracuse J. Int'l L. &Com., page 380 save file 41syracusejintILcom379.pdf
[1025] R.P. Anand, *ASEAN: Identity, development and culture* (University of the Hawaii 1982), page 13
[1026] Rodolfo C. Severino, *ASEAN faces and future* (2001 the ASEAN Secretariat Jakarta), page 13
[1027] Ramses, above 1009 pages 1038-1039
[1028] Walter Woon, 'Dispute settlement in ASEAN' (2011) https://cil.nus.edu.sg/dispute-settlement-in-asean/

institutions.[1029] However, economic integration was not even anticipated in the Bangkok Declaration.

In fact, the Bangkok Declaration could not specify a mechanism for formal regional issues because the first stage of the development of the ASEAN was a basis of mutual trust among member states and there were no external powers.[1030] It did not have the usual legal formulation, no effective clauses and no require of ratification. Furthermore, it did not establish compliance bodies or any kind of supranational dispute settlement mechanism.[1031] In fact when examining recent unresolved disputes, it is doubtful that member states have the solidarity cooperation to terminate their conflicts and one reason for this is the representatives of ASEAN members have no formal diplomatic relationship with one another.

b) Bali summit 1976 (first ASEAN summit)

In 1976, a dispute settlement mechanism was established whereby member states could rely on peacefully settling intra-regional differences[1032] and this was to be concluded in the Bali summit of 1976 (the first ASEAN meeting attended by heads of state) by signing the Declaration of ASEAN Concord commonly known as the Bali Concord I on the 24th February 1976, which relates to all the member states of the ASEAN. After the ASEAN organised a meeting of its leaders, three treaties were put in place, namely, the Treaty of Amity and Cooperation in Southeast Asia (TAC), the Declaration of ASEAN Concord, and the agreement for the establishment of the ASEAN

[1029] Chun Hung Lin, 'EU-style Integration? Future of Southeast Asian countries after ASEAN Charter' (2011) Feng Chia University Taiwan, page 4 http://paperroom.ipsa.org/papers/paper_26431.pdf accessed 3 January 2015

[1030] Sueo Sudo, 'Foreign an ASEAN Community: Its significance, problems and prospects' (2006) graduate school of International Development September, page 3

[1031] Rodolfo Severino, *Southeast Asia in search of an ASEAN community insights from the former ASEAN secretary-general* (2006 Institute of Southeast Asian Studies), page 11

[1032] Woon, above 1028, page 1

Secretariat.[1033] This summit meeting was the first conference attended by the heads of government[1034] when the ASEAN concord framework for ASEAN economic functional and political cooperation was established.

The goal was established to settle intra-regional disputes by strengthening peaceful, free, neutral politics in order to promote the harmonisation of views, the coordination of positions and an analysis of the political views which were excluded from the Bangkok declaration by increasing economic, labour, education and social welfare, so called ZOPFAN.[1035] This principle included inter-state relations, which involves non-interference in the internal affairs of other countries; moreover, the setting of procedures for a decision-making process. Besides, this protocol provides the judiciary stage, which includes proceedings before a panel and a review of the panel's findings by the Appellate Body. The new legal framework of this protocol was signed in order to improve the ASEAN dispute settlement mechanism.[1036] Furthermore, the overall goal of the declaration of the ASEAN concord related to the general principles for managing disputes and expanding co-operation among member states in the ASEAN.

Chapter IV of this treaty mentions a pacific dispute settlement mechanism and the establishment of a High Council as a representative for members, but does not mention the concept of direct negotiation between conflicting parties. In cases where conflicts cannot be resolves, the High Council has a duty to resolve the dispute in good faith and prevent further dispute.[1037] What is more, Article 13 of this treaty provides for signatures in situations, where there is a risk of disputes arising through friendly negotiation.[1038] The mediation process of the Council is also discussed in Article 15,

[1033] D.S. Ranjit Singh, 'ASEAN's Odyssey of crises, achievements and visions,1967-2010' (2010the 18th Biennial Conference of the Asian Studies Association of Australia in Adelaide, page 4
[1034] Stuart Drummond, 'Fifteen Years of ASEAN' (1982) 20(4) Journal of Common Market Studies page 306 http://onlinelibrary.wiley.com/doi/10.1111/j.1468-5965.1982.tb00259.x/abstract accessed 23 May 2015
[1035] The ZOPFAN Declaration signed on 27th November 1971, Kuala Lumpur, Malaysia. Full text visits http://www.icnl.org/research/library/files/Transnational/zone.pdf
[1036] Vergano, above 986
[1037] Article 13 Chapter IV the 1976 ASEAN Treaty of Amity and Co-opration
[1038] Rames Amer and Keyuan Zou, *Conflict management and dispute settlement in East Asia* (Ashgate Publishing limited 2011, page 40-41

which imposes the duty on the Council to assume the role of mediator by recommending good offices, mediation, inquiry or conciliation to the parties in cases where there is no solution to their dispute.[1039]

The provision of this treaty relates to basic intergovernmental dispute settlement which can be divided into three levels of disputes that occur within the ASEAN, the first of which are intergovernmental disputes that may occur over national trade policy measures under the ASEAN agreement. The second are disputes at a private level between investors and business people over business relationships and the last is when the host state has a duty to amend the national law in order to modify and remove the contractual right of the investor.[1040] These are the principles of equality related to the internal affairs and non-interference between members of the ASEAN;[1041] however, Chapter IV of the TAC has three weaknesses, firstly, the TAC could not be applied without the agreement of the parties to the dispute, which meant that one of the disputants could block the use of the dispute settlement mechanism according to Articles 14 and 15. This procedure is non-mandatory in nature since it can be used for High Council contracting parties with a political mind-set in favour of objecting to the dispute settlement, which means that the solution will be political and disturb the peace and harmony of the parties. Secondly, the TAC allowed countries other than ASEAN member states to become involved in the dispute resolution process; for example, member states outside the ASEAN were able to watch and give an opinion at the meeting with the permission of the High Council. This led to a new amendment of the TAC in 2010, which prohibited non-ASEAN high contracting parties to become involved in cases to which the TAC is applied. Moreover, there is no arbitration or adjudication by

[1039] Ibid, page 42
[1040] Pearlie M.C. Koh, 'Enhancing economic co-operation: A regional arbitration centre for ASEAN?' (2000) 49 Int'l & Comp. L.Q, page 396 www.jstor.org/stable/761685 accessed 16 September 2015
[1041] Phan, above 1021

the court or tribunal. The TAC dispute settlement has to be consensual rather than confrontational.[1042]

The Bali summit and the WTO (World Trade Organisation) are quite similar with some specific differences in certain parts. The WTO is a multilateral model of a regional framework and has the specific needs identified by the ASEAN negotiators, which are lacking in the ASEAN.[1043]

c) The treaty of amity and co-operation in South East Asia (TAC)

After the adoption of the treaty of amity and co-operation, a total of twelve non-ASEAN countries signed the East Asia Summit.[1044] This protocol became popular in the period when the TAC was released the strengthened in 2001 when high contracting parties adopted the rule or procedure of the High Council of the Treaty of Amity and Cooperation in Southeast Asia.[1045] The TAC was the first legally-binding document in the ASEAN, which guided the relationship between regional states.[1046] Not only was the TAC signed by ASEAN members but also by several non-ASEAN countries, such as Russia, India and China in 1976 and 2003.[1047] The fundamental guiding principles of the Treaty of Amity and the Cooperation in Southeast Asia were based on the United Nations Charter that treaties are unexceptional. This treaty, which was related to a peaceful dispute settlement, provided a specific outline for the field of conflict management. Article 2 of this treaty contained a distinctive cultural style such as mutual respect for national sovereignty, the non-interference in other states' internal affairs, and a

[1042]Walter woon, 'Dispute settlement the ASEAN Way' (2010) National University of Singapore, page 14 http://cil.nus.edu.sg/wp/wp-content/uploads/2010/01/WalterWoon-Dispute-Settlement-the-ASEAN-Way-2012.pdf accessed 12 January 2015
[1043] Vergano, above 986
[1044] Chin Kin Wah, 'Introsuction : ASEAN—facing the fifth decade' (2007) 29(2) contemporary Southeast Asia, page 395
[1045] Phan, above 1021, page 4
[1046] Ibid, page 52
[1047] Asri Salleh, 'Dispute Resolution through Third Party Mediation: Malaysia and Indonesia' (2007) 15(2), page 157 http://journals.iium.edu.my/intdiscourse/index.php/islam/article/view/48 accessed 3 January 2015

peaceful dispute settlement all of which were peculiar to the ASEAN.[1048] The TAC was adopted in Bali on the 14th February 1976.

The dispute settlement mechanism was states in Chapter VI of the Treaty of Amity and cooperation in South East Asia (TAC) as the parties having to adopt determination and good faith to prevent disputes from arising, refraining from the use of force and retaining direct friendly negotiations between the disputing parties if the dispute still occur.[1049] Moreover, the meaning of dispute settlement within the context of the TAC should be regulated by effective and sufficiently flexible regional procedures.[1050] Chapter IV of the treaty contains five articles concerning the legal framework for regional dispute settlement, such as the Pacific settlement of disputes addressed in Article 13.[1051] The TAC ASEAN goal is to promote peaceful, everlasting amity and cooperation, including non-interference in the internal affairs of one state with another.[1052] Moreover, this also explains the constitution of an ad-hoc entity, the High Council, which is limited to only being cognisant of disputes and recommending the appropriate settlement consisting of good offices, mediation, inquiry, or conciliation, whereby the council may offer to become a mediator with the consent of the disputing parties using the prescribed dispute settlement and rule of procedure. The TAC consists of a High Council of representatives from each of the contracting parties that need to be agreed by both parties together.[1053] The other description of a High Council is one representative of each ASEAN state and a representative from a non-ASEAN member state that is party to the dispute.[1054] Furthermore, it also includes the process of arbitration as well as the potential involvement of third parties but not after seeking the

[1048] Micheal Leifer, 'The ASEAN peace process: a category mistake' (1999) 12 (1) <http://www.tandfonline.com/doi/pdf/10.1080/09512749908719276> accessed 27 July 2014
[1049] Article 13 the TAC
[1050] Phan, above 1021, page 453
[1051] Pearlie M. C Koh, 'Enhancing economic co-operation: a regional arbitration center from ASEAN' (2000) 49(2), page 390 <http://www.Jstor.org/stable/761685> accessed 15 February 2013
[1052] http://www.aseansec.org/64.htm.
[1053] Refer to article 24(2) of the TAC
[1054] Aletta Mondre, 'ASEAN widening integration a response to crisis?' (2013) the 8th Pan-European Conference on international relation, page 9 http://www.eisa-net.org/be-bruga/eisa/files /events/warsaw2013/Mondr%C3%A9_ASEAN%20Widening%20Integration.pdf accessed 16 June 2014

approval of the disputing parties. No explanation of the third party only refers to the High Council or any party that is related to the problem at hand. The role of the High Council in implementing measures to resolve a dispute when the parties are unable to settle their differences by negotiations.[1055] What is more, in this protocol's slip-up regarding the meaning of arbitration unintentionally reminds us of the arbitrariness of the process, particularly related to the dispute settlement mechanisms used within the ASEAN. The arbitrary process is a logical consequence of the practice of the ASEAN Way, which underlines the importance of the application of consultation and consensus in the decision-making processes in the ASEAN including those attempting to settle any kind of conflict. Article 25 in Chapter VIII of the charter related to the settlement of disputes illustrates the difference between general disputes and disputes concerning the interpretation or application of ASEAN instruments. In conclusion, the important point of this treaty is the concept of mutual relations based on a peaceful settlement of disputes and non-interference of one state in the internal affairs of another.[1056] Article 13 in Chapter IV mentions the "Pacific Settlement of Disputes" which refer to the risk that disputes may arise or have arisen and how the signatories should behave in these situations. "The signatories shall have the determination and good faith to prevent the arising disputes through friendly negotiations".[1057] The TAC does not apply unless the parties to the dispute agree that the disputants can block the use of a dispute settlement mechanism or, in cases where no solution to the dispute is reached between the parties, the duty is given in this chapter to the mediating role of the council to assume the role of mediator to solve the dispute by using good offices, mediation, inquiry, or conciliation as stated in Articles 14 or 15 applies if the parties to the dispute do not agree in which case of the disputants can block the use of the dispute settlement

[1055] Kriengsak Chareonwongsak, 'ASEAN's limits in conflict resolution in the region' (2014) National Singapore University, page 2 http://news.ntu.edu.sg/SAFNTU/Documents/Panel%201%20-%20Prof%20Kriengsak%20Chareonwongsak.pdf accessed 1 May 2014

[1056] L. Cuyvers and R. Tummers, 'The road to an ASEAN economic Community: how far still to go?' (2007) CAS discussion paper no: 57,6

[1057] Article 13, Chapter IV of the TAC

mechanism and this is weakness of this scheme.[1058] Besides, the TAC allows the parties to settle their dispute using good offices, mediation, inquiry and conciliation, but there are non-legal modes of dispute settlement and there is no explicit provision for arbitration or adjudication by a court or tribunal.[1059]

It is easy to see that the treaty on the Pacific Settlement of Disputes, fails to provide an outline of the procedure since it only provides for conciliation, mediation to be used by all the parties involved. This sometimes makes finding a solution problematic and affect the peace and harmony in the region in direct political negotiations.[1060] Furthermore, another weakness is the lack of an explicit provision for arbitration or adjudication by a court or tribunal. International courts and arbitrators cannot be controlled by governments if the rule of law is weak and governments cannot be expected to appreciate having to establish the power to decide an international political dispute for neutral external parties. A further weakness is that non-ASEAN states are able to attend and speak at the meetings under Rule 14.[1061] Article 15 of the TAC mentions about the power of the councils to offer ways to settle disputes using mediation, inquiry or conciliation; however, it does not mention the binding power of the recommendations or judgments in the necessary information of an enforcement mechanism.[1062]

The heart of the TAC body is the representative of the High Council from each of the High Contracting Parties. The High Council has the duty to recommend a suitable dispute settlement process to the parties when the dispute cannot be settled by negotiation. The High Council may offer good offices when referring to the agreement

[1058] Walter, above 1042, page 2
[1059] Ibid, page 2
[1060] Ibid, page 3
[1061] The rule 14 of the rules of procedure of non-ASEAN
[1062] Salleh, above 1047, page 158

between the parties, added to which, the suitable measures for the parties may also include a committee of mediation, inquiry, or conciliation.[1063]

The ASEAN Treaty of Amity and Cooperation (TAC) 1976 helps ASEAN members to use peaceful measures rather than using force to solve conflicts by managing inter-state relations, non- interference in the internal affairs of other countries, and using the peaceful dispute settlement referred to in Article 2 Chapter I of the TAC. Some academic professors are of the opinion that the Treaty of Amity and Co-operation is a new version of the 1967 Bangkok Declaration in the area of security and international relations.[1064] According to the TAC, all members are supported to settle their dispute using friendly negotiation. This pertains to using effective and sufficiently flexible regional procedures and eliminating negative thinking among members.[1065] The TAC is the only regional mechanism for resolving political and security disputes in Southeast Asia.[1066]

The Treaty of Amity and Cooperation is the first formal agreement signed by leaders in Southeast Asia. The benefit of this treaty is the peaceful settlement of disputes with no interference in internal affairs and without any force. The treaty provides for a "High Council" of ministers to bring regional peace and makes harmony in cases where the parties fail to settle their differences using negotiation. The High council needs to consider the appropriate means to help the parties reach a settlement. The TAC is only used to resolve disputes that are of a political and security nature.[1067]

In contrast, there are some weak points in Articles 14 and 15 of Chapter IV in that it does not apply if the parties do not agree to resolve the dispute. Moreover, any dispute settlement mechanism has to be consensual and there is no explicit provision for arbitration or adjudication by a court. Sometimes, the political situation affects the

[1063] Sanchita Basu Das, Jayant Menon, Rodolfo C Severino, Omkar Lal Shrestha, *the ASEAN economic community: A work in progress* (2013) Institute of Southeast Asian Studies, page 383
[1064] Drummond, above 1034, page 307
[1065] Phan, above 1021, page 4
[1066] Ibid, page 4
[1067] Ibid, page 53

peace and harmony in the region in cases where there are no legal modes such as of good offices, mediation, inquiry and conciliation. This is all related to political negotiation. In addition, external parties can give their opinions at meetings if the High Court gives permission for them to do so. Allowing external people to become part of any dispute settlement is unacceptable and makes the TAC process too public.[1068]

In conclusion, the ASEAN way is a diplomatic approach that embodies the principles of the TAC which provides for a peaceful dispute settlement with mutual respect of the independence, sovereignty, equality and national identity of all nations. Furthermore, the non-interference principle also applies in the internal affairs of one state and another as a right of every state. However, the High Council has not been constituted to resort to any of the given provisions because of the obstacle of its own treaty, which is its loose manner. The TAC procedure allows external countries other than ASEAN member states to become involved in the dispute settlement process, which is considered to be another of its weakness because these non-ASEAN states will be able to watch the proceedings or speak at meeting with the permission of the High Council. [1069] Furthermore, since there are no specific provisions to restrict the representatives in the High Court, non-ASEAN members may observe the meetings. There is also no specific provision for arbitration or adjudication by a court or a tribunal. The parties can hear the real legal judgment rather that tending to be political of representatives. Besides, the sanctions on the parties are weak and they are not compelled to utilise the High Council. Last but not lease, there is a gap in applying the TAC treaty based on Article 33(1) of the UN, which states that the parties may use other modes of peaceful settlement.[1070]

[1068] Joseph Wira Koesnaidi, Jerry Shalmont, Yunita Fransisca and Putri Anindita Sahari, 'For a more effective and competitive ASEAN dispute settlement mechanism' (2014) WTI and SECO project, page 7

[1069] Later, this point was amending of the TAC in 2010 (in force 12 June 2012) to provide that a non-ASEAN High Contracting Party will not form part of the High Council unless that party is directly involved in a dispute to which the TAC applies. Read more, Third Protocol Amending the Treaty of Amity and Cooperation in Southeast Asia, Article 2

[1070] Anthony, above 1002, page 61

5.3.2 Specific dispute settlement provision in economic agreements

This section highlights the specific mechanism for the settlement of trade disputes as seen through the 1996 Protocol, the 2004 Protocol and the ASEAN Charter. The expansion of trade dispute the Protocol 1996 was enacted in order to settle trade dispute, then the 2004 Protocol was enacted to replace the 1996 Protocol. The protocol can be brought to settle the dispute by using a set of non-adjudicatory mechanisms for example, consultations, good offices, conciliation and meditation. What is more, in the protocol provided a set of procedures at the adjudicatory stage, the panel proceeding, the Appellate Body which all the affected from the WTO dispute settlement. However, there are not copy all the idea, but they use as a reference model to the regional framework by the ASEAN negotiators.[1071] The economic agreement offers the parties to consult or negotiate under a variety of dispute settlement processes copies the WTO arbitration panel as a model of mechanism. All of economic agreements dispute shall be resolved through the procedures in the DSM agreement. ASEAN trade dispute settlement, the ASEAN Protocol on Enhanced Dispute Settlement Mechanism 2004 is specific on economic disputes. WTO model on dispute settlement is a pattern of ASEAN mechanism, for instance a panel procedure, findings and recommendations made by panels, the appellate review. SEOM as we known as the ASEAN Senior Economic Officials Meeting is also concerning in ASEAN trade mechanism.

In fact, the nature of ASEAN trade dispute settlement in structural both strengths and weaknesses. By now, the development of trade dispute settlement from the past until the present provided the infrastructure for the systematic settlement of disputes in different contexts and different agreements.[1072] The recent Protocol to the ASEAN Charter on dispute settlement mechanisms or the 2010 Protocol is an ASEAN's commitment to creating a rules-base organisation. Therefore, in this section will explain

[1071] Vergano, above 986, page 3

[1072] Locknie Hsu, 'The ASEAN Dispute Settlement System' in Sanchita Basu Das, Jayant Menon, Rodolfo C Severino, Omkar Lal Shrestha, *The ASEAN economic community: A work in progress* (2013) Institute of Southeast Asian Studies, page 389

the history of ASEAN trade dispute settlement from political to legal regime by researching the ASEAN Free Trade Area (AFTA), the 1996 Protocol on trade dispute settlement, the 2004 Protocol on an Enhanced Dispute Settlement Mechanism and the ASEAN Charter.

5.3.2.1 Dispute Settlement Mechanism under the ASEAN Free Trade Area (AFTA)

The ASEAN Free Trade Area, signed in 1992 by all ASEAN members in order to enlarge and bring a more active role, in particularly in the implementation of ASEAN economic agreements and in the management of ASEAN cooperation in the social, culture as well as to promote the economic area. However, there are no detailed provisions about the DSM in the AFTA framework agreement except for the general provision in Article 9,[1073] which plan to create a dispute settlement in the future. Regarding Article 9 of the AFTA framework agreement, those ASEAN members adopted the 1996 Protocol to strengthen the mechanism for the settlement of disputes in the area of ASEAN economic. [1074] It is not successful because its problematic implementation, the major reason for the limited success of AFTA lack of proper institutional and legal framework. The effect from the ASEAN Way, which makes the ASEAN, cannot be a rule-based system. The ASEAN countries chose to go in ASEAN Way cooperation without supranational institutions for decision-making or enforce

[1073] Article 9 of the AFTA Framework Agreement states that 'Any differences between the member states concerning the interpretation or application of this Agreement or any arrangements arising therefrom shall, as far as possible, be settled amicably between the parties. Whenever necessary, an appropriate body shall be designated for the settlement of disputes'.

[1074] Weidong Zhu, 'Dispute settlement mechanism of ASEAN free trade area (AFTA) and its implications for SADC' (2008) the first international conference on regional integration and SADC law held in Maputo, Mozambique, 23-25 April. http://www.tipmoz.com/library/resources/Oldsite1/Dispute_Settlement _Mechanism_ASEAN.pdf accessed 23 January 2015

community rules. ASEAN has a dispute settlement mechanism with application to AFTA commitment, but it has never been used.[1075]

5.3.2.2 1996 Protocol on a Dispute Settlement Mechanism

At the Bangkok Summit in December 1995, the Heads of State and Government of the ASEAN agreed to adopt a general dispute settlement mechanism (DSM) based on economic co-operation to apply to all disputes that arose from ASEAN economic agreements. This Protocol contained additional rules and procedures regarding the settlement of disputes in these agreements.[1076] The Protocol on Dispute settlement mechanism was signed in Manila on the 20th November 1996, to strengthen the mechanism for the settlement of disputes in the area of ASEAN economic co-operation. The way disputes in the relevant ASEAN agreements were resolved in the ASEAN Way was explored in this Protocol by focusing on the concept of a simple consensual majority for its decision-making procedures using consultation and negotiation. The 1996 Protocol was a short document, consisting of only 12 articles and two appendices, which emphasised the possibility of majority voting.[1077] Contrary to the commitment to the WTO agreement this was a unique agreement to be adopted by all members of the ASEAN. In this respect the ASEAN DSM was separate from and independent of the WTO system.[1078] The scope of the 1996 protocol was as follows;

[1075] Walter Lohman and Anthony B. Kim, 'Enabling ASEAN's Economic Vision' (2008) the heritage foundation page4 http://www.heritage.org/research/reports/2008/01/enabling-aseans-economic-vision accessed 23 January 2015

[1076] Paul J. Davidson, *The legal framework for International Economic Relation ASEAN and Canada* (Institute of Southeast Asian Studies, Singapore 1997) page 162

[1077] Simon Chesterman, 'Does ASEAN exist? The Association of Southeast Asian Nations as an international legal person' (2008) New York University working papers http://lsr.nellco.org/cgi/view content.cgi ?article=1084&context=nyu_plltwp accessed 23 January 2015

[1078] Das, Menon, Severino and Shrestha, above 1063, page 390

‘ The dispute settlement covers all disputes arising under the economic agreements or covered agreements.[1079] In case of the application of the DSM, the party also concern in the rules and procedures as well as covers with the special and additional rules and procedures application under the applicable covered agreement explains in the Article 1 of the 1996 Protocol.’

The major elements of the 1996 Protocol for a dispute settlement were similar to those of the WTO as can be seen in the Article 1, which is same as the WTO in terms of explaining the coverage and application of the agreement. This protocol addresses the failure of a bilateral negotiation caused by the inability to find a resolution, where the intergovernmental body has no institutional power to enforce its own ruling. The fora method can be applied at any stage before the Senior Economic Officials Meeting (SEOM) has made a ruling on a Panel report according to Article 1(3) of the Protocol on DSM 1996, which allows member states to use other fora for the settlement of disputes.[1080]

The 1996 Protocol on Dispute Settlement Mechanism was signed because ASEAN member states needed to strengthen the mechanism for settlement disputes in the area of the ASEAN economic agreement. Appendix 1 of the Protocol explains that it is the main mechanism for the settlement of all disputes that arise from economic cooperation and future economic agreements in the ASEAN. Protocol 1996 was a copy of the WTO dispute settlement mechanism[1081] and it will be compared with the WTO dispute settlement mechanism in detail in Chapter VI.

The process of the ASEAN DSM under the Protocol on DSM 1996 begins with consultation, which is the first step of the process. This provides member states with the opportunity for their representatives to engage in consultation to settle a dispute regarding the implementation, interpretation, or application of an agreement or any of

[1079] It explains in Annex 1 the list of covered agreements
[1080] Article 1(3) o the 1996 Protocol
[1081] Koestianti, ‘ Rule-based dispute settlement mechanism for ASEAN Economic Community: Does ASEAN have it?’ (2016) 2(2) HALREV, page 187 http://pasca.unhas.ac.id/ojs/index.php/halrev, accessed 1 December 2016

the covered agreements. [1082] However, this consultation process is likely to confuse the parties because there is no official record of the number of days allowed for the consultation. If a member state requests a consultation, it will receiver a reply within 10 days of the date the request was received and enter into the consultation within a period of no more than 30 days after the date the request was received with a view to reaching a mutually satisfactory solution. If the consultation fails to settle the dispute within 60 days from the date the request for a consultation was received, the matter can be raised at the SEOM in order to establish a panel. However, according to Article 4 of the 1996 Protocol, the SEOM may seek an amicable settlement as an alternative to appointing a panel. This would be unlikely to happen in the WTO DSU because it does not contain the authority to pursue an amicable settlement. Article 4 of the Protocol on DSM 1996 states that the parties of the dispute can use the methods of good offices, conciliation and mediation at any time during the procedure of the dispute.[1083]

A panel[1084] should be established not more than 30 days after the date the dispute is brought before it. The panel has a duty to make an objective assessment of the dispute by examining the facts and ensuring that the dispute conforms the relevant the covered agreement.[1085] The SEOM provides for a final and legally-binding ruling by majority voting. However, the weakness of this stage is that there is no clear date related to when the case needs to be notified to the SEOM and this makes it difficult to determine when the following stage is to take place. Furthermore, the 1996 Protocol had no specific or standard rules for the panel procedure; rather, it authorised the panel to regulate its own procedures in relation to the right of the parties to be heard and its deliberations as stated in Article 6(1). The function of the panel is to make an objective assessment of the dispute, including examining the facts of the case, the applicability of

[1082] Article 2 of the 1996 Protocol
[1083] Article 3 of the 1996 Protocol
[1084] The working procedures of panels provides in Appendix 2 of the Protocol 1996. The nomination of panels is given as the nationals of ASEAN member states should be served as in the first preference of appendix 2 part I.
[1085] Article 5 of the 1996 Protocol

and conformity with the sections of the agreement or any covered agreement as well as other related findings. Moreover, the purpose of the panel is also to assist the SEOM to provide a ruling under the related agreement or any covered agreement. The panel is obliged to submit its report to the SEOM within sixty days of its formation plus a possible extension of 10 more days in exceptional cases. Subsequently, the SEOM has the duty to consider the panel's report and make a ruling on the dispute within thirty days from the submission of that report with a possible extension of 10 days in exceptional case, as stated in article 7. Moreover the panel must give the parties an opportunity to review the report before it is submitted to the SEOM.

The Protocol further provides that an appeal may be made to the ASEAN Economic Minister (AEM) within 30 days of the SEOM ruling and the AEM needs to make a decision within 30 days of the appeal[1086] and this decision is final and binding on all the parties to the dispute. There is no specific group of professionals who can serve as an appellate body. The ASEAN Economic Ministers (AEM) serve as an appellate body by being allowed to make a decision within thirty days of the appeal according to Article 8(2) and the maximum timeframe is 290 days.

In terms of compliance, the Protocol provides that member states who are parties to the dispute shall comply with the ruling or decision within a reasonable period of time.[1087] If no satisfactory compensation has been agreed within 20 days of the end of date of the reasonable period of time, the party who invoked the dispute settlement procedure may request authorisation from the AEM to suspend the application of concessions or other obligations under the agreement or any covered agreements to the related member state.

[1086] In exceptional cases, the AEM may take an additional 10 days to make a decision on the dispute.
[1087] The reasonable period of time shall be period of time mutually agreed to by the parties to the dispute but under no circumstances should it exceed 30 days from the AEM's decision.

Effectiveness

Apart from its obvious limitations, this dispute settlement mechanism is ineffective for several reasons due to the economic and political tension among member states. Furthermore, the competition in trade and investment between members is extremely complex based on a long history of envy and antagonism.[1088] It cannot be guaranteed that disputes among the parties would be settled without political sanctions. With adoption of the 1996 Protocol, the ASEAN has started to move from an informal to a more formal DSM; on the other hand, it has moved from a political regime to a legal one.[1089] At the panels stage, there is no clear timeline during which a consultation is to take place and there is no official time limits for every step of the dispute settlement process. Besides, the 1996 Protocol does not provide details of a procedural guideline or the effects of the consultation; thus it is hard for the parties to know the expected date. Moreover, the AFTA and the 1996 Protocol failed to resolve trade disputes because of the lack of effective penalties and no specific way to apply for an appellate body.

In addition, the ASEAN uses diplomacy and negotiation to settle disputes among member states rather than a legalistic dispute settlement mechanism.[1090] There were no formal applications of the ASEAN DSM under the 1996 Protocol. Therefore, the members of the ASEAN agreed to replace the Protocol with a new ASEAN dispute settlement mechanism and the development of the 2004 ASEAN DSM will be explained in the next section. In conclusion, with the establishment of the 1996 Protocol the ASEAN began to move to a more formal dispute settlement mechanism. Furthermore, it

[1088] Hank Giokhay Lim and Kester Tay Yi-Xun, 'Regional integration and inclusive development: lessons from ASEAN experience' (2008) Asia-Pacific Research and Training Network on Trade Working paper no. 59

[1089] Yong, above 982, page 169

[1090] Ibid, page 170

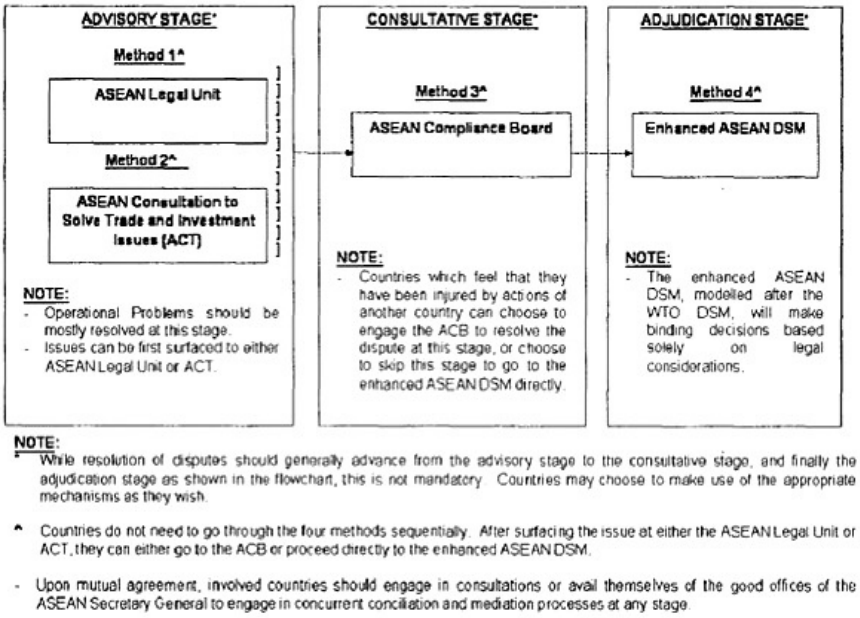
moved from the political realm which involved ministers or senior officials into a realm based on the law.

5.3.2.3 2004 Protocol on an Enhanced Dispute Settlement Mechanism

a) Non-adjudicatory mechanisms of the ASEAN

The formation of AEC enabled the member of the ASEAN to strengthen the mechanism to ensure the appropriate implementation of all economic agreements and the expeditious resolution of disputes. At the thirty-sixth AEM meeting in September 2004, ministers agreed to establish three new institutions. The Bali Concord II[1091] addressed the new dispute resolution method with these three new institutions, the first of which was a legal unit within the ASEAN Secretariat with the aim of providing governments with legal advice related to trade disputes. The second was the ASEAN Consultation to solve trade and investment issues (ACT) and the third was the ASEAN Compliance Body (ACB), which would perform a quasi-judicial function by reviewing trade disputes and issuing a judgment that would not be legally binding, but could be used to take steps to settle the dispute. These three institutions were intended to facilitate the swift resolution of disputes through a non-binding non-adjudicatory mechanism.

[1091] The ASEAN concord II as we known as Bali concord II have adopted on 7 October 2003. In Bali concord II there are something new about the development of collaboration within ASEAN seeking to bring the ASEAN vision 2020 by consisting on three pillars; an ASEAN Security Community, an ASEAN Economic Community and an ASEAN Socio-Cultural Community.



Flowchart 5.1: The ASEAN Dispute resolution mechanism flowchart[1092]

The ASEAN Legal Unit and the ASEAN Consultation to Solve Trade and Investment Issues (ACT) play an advisory role, which include highly qualified lawyers in trade laws employed by the ASEAN Secretariat. The ACT provides a legal interpretation and gives advice on trade disputes, especially for businesses that are encountering operational problems based on cross-border issues related to the implementation of the ASEAN agreement in trade and investment, as requested by member states.[1093] The

[1092] http://asean.org/?static_post=flowchart-of-mechanisms-and-processes-of-the-asean-dispute-settlement-system

[1093] When the problem occurs, the Host ACT will forward the problem to the other countries' ACT (Lead ACT). The Lead ACT will be responsible for directing the problem to the appropriate countries. The matter will be solved by the two ASEAN member states involved. The Host ACT has to proposed a solution an send to the individual or business within 30 days read more in; Paolo R. Vergano, 'The ASEAN dispute settlement mechanism and its role in a rules-based community: overview and critical comparison AIELN (2009), page 2 and the recommendations of the high-level task force on ASEAN economic integration.

advice given by the ASEAN Legal Unit is purely advisory and non-binding in nature. It is based on a bilateral consultation rather than being settled by the ASEAN Compliance Monitoring Body or the Enhanced ASEAN Dispute Settlement Mechanism.

The ASEAN Compliance Monitoring Body (ACMB) is a non-legally binding consultative dispute settlement mechanism, providing for a less procedural and more expedited system of dispute resolution based on diplomacy.[1094] Part of the model imitates the WTO Textile Monitoring Body[1095] and makes use of peer pressure in the stage of the ACMB. The ACME members from countries not involved in the dispute will review and issue a finding within an agreed timeframe when a dispute is referred to the ACMB if they are requested to do so. However, these findings are not legally binding.[1096] It should be noted that the findings of the ACMB would be tabled as inputs to the ASEAN Enhanced DSM, and the parties can bring the case to the ASEAN Enhanced DSM if the dispute is still unresolved after undergoing the aforementioned processes.

b) 2004 Protocol of the ASEAN Trade Dispute Settlement Mechanism

The Protocol on Enhanced Dispute Settlement Mechanism (EDSM), the so-called '2004 Protocol' or the 'Vientiane Protocol'[1097] was signed by all the ASEAN member countries in November 2004, and this significantly strengthened the ASEAN dispute settlement mechanisms.[1098] The 2004 Protocol was an upgraded and more sophisticated version of the ASEAN dispute settlement mechanism (DSM), designed to replace the 1996 Protocol. It was a roadmap to assist the establishment of the ASEAN Economic

[1094] Vergano, above 986, page 2
[1095] Hidetake Yoshimatsu, 'Collective action problems and regional integration in ASEAN' (2006) CSGR working paper no 198/06, Page 12 http://wrap.warwick.ac.uk/1907/ accessed 3 March 2015
[1096] Vergano, above 986, page 2
[1097] The 2004 Protocol on Enhanced dispute settlement mechanism, signed in Vientiane by the Economic Ministers at the Eleventh ASEAN Summit, 29 November 2004. It should be noted that the 2004 Protocol on Enhanced Dispute settlement Mechanism, as reflected in the ASEAN Concord II in Bali, Indonesia.
[1098] It is important to note that the EDSM also govern formal dispute resolution in ATIGA (ASEAN Trade in Goods agreement and most economic aspects of ASEAN. See, Woon, above 48 and Stefano Inama and Edmund W. Sim, *The foundation of the ASEAN economic community an institutional and legal profile* (Cambridge University press 2015), page 34

Community (AEC)[1099] and enhance the settlement of disputes raised under the 1996 Protocol. Despite being an adaptation of the 1996 Protocol, the 2004 Protocol on the Dispute Settlement Mechanism of ASEAN economic agreements contained some new institutional and mechanisms and measures to strengthen the implementation of economic agreements (i.e., the covered agreements),[1100] as well as a formal judicial procedure to resolve trade-related disputes.[1101] Moreover, as well as improving the existing ASEAN Dispute Settlement Mechanism, the 2004 Protocol makes the resolution of economic disputes legally binding.[1102] ASEAN member states were require to apply the Protocol on DSM 2004 as the main dispute settlement mechanism to resolve any trade disputes arising from the covered agreements (referred to as economic agreements)[1103] and any disputes related to the implementation, interpretation and application of current and future trade agreements.[1104] It is stipulated in Article 1 of the EDSM that is automatically applies to disputes based on the interpretation and application of the forty six ASEAN economic agreements adopted after 2004 and listed in Appendix I without the need to amend or update those agreements.[1105] In 2008, the ASEAN Charter expanded the applicability of the EDSM to include disputes arising from all ASEAN economic agreements, including those in the area of free trade and the liberalisation of goods and services.

The 2004 Protocol consists of 21 articles and 2 appendices and contains special rules and procedures. It specifically provides member states to resort to other *fora* to settle disputes that involve other member states, but a request can be made to

[1099] The leaders of ASEAN signed the Declaration of ASEAN Concord II (Bali Concord II) in Bali, Indonesia. This document seeks to attain regional integration through an ASEAN Economic Community (AEC) by 2020.
[1100] Article 1.2 of the 2004 Protocol
[1101] The ASEAN Protocol on Enhanced Dispute Settlement mechanism http://www.asean.org/news/item/asean-protocol-on-enhanced-dispute-settlement-mechanism
[1102] http://www.aseansec.org/15159.htm
[1103] Woon, above 1042
[1104] Refers to Articles 24(3) and 54(2) of the ASEAN Charter.
[1105] Robert Beckman, Leonardo Bernard, Hao Duy Phan, Tan Hsien-Li, and Ranyta Yusran, *Promoting compliance: The role of dispute settlement and monitoring mechanisms in ASEAN*, (Cambridge University Press 2016), page 67

establish a panel[1106]at any stage by a party to the dispute approaching the Senior Economic Officials Meeting (SEOM). It should be noted that, under the EDSM, the disputing parties do not need to pay to settle their dispute since the costs will be borne by ASEAN DSM Fund under the Protocol, which is maintained by contributions from all the ASEAN member states.[1107] Each main stage involved in the complete process of settling a dispute, beginning with the consultation between the parties, the adjudication by the panel and Appellate Body, until the implementation process should not exceed a time of 445 days.

Since the DSM only envisages participation by ASEAN member states, it does not permit private entities or investors to take part in the adjudication process. Private parties, such as companies, have no right to directly initiate the settlement procedure themselves; rather, they must raise their concern with the respective ASEAN state government, which will then initiate the dispute settlement mechanism on their behalf.

The new ASEAN DSM 2004 was modeled on the dispute settlement mechanism of the World Trade Organisation (WTO)[1108] which includes a panel and an appellate body. This new mechanism to settle a dispute consists of three main steps, the first of which entails consolations between the disputing parties. The second step involves adjudication by a panels and an appellate Body, while the third step is the implementation of the findings and recommendations.

There are two main ways to settle a dispute if a request for consultation fails: i) the parties find a mutually-agreed solution, particularly during the consultations stage; or ii) the dispute is resolved by adjudication, including the subsequent implementation of reports by the panel and the Appellate Body, to which the parties are bound, having been adopted by the SEOM. The adjudication procedures is completed in three stages; i) consultation between the parties; ii) adjudication by a panel and, if necessary, by an

[1106] Article 1.3 of the 2004 Protocol
[1107] Article 17 ASEAN DSM Fund of the EDSM
[1108] Vergano, above 986, page 3

appellate body; iii) implementation of the ruling, which includes the chance to ask for compensation and apply countermeasures in the event of the 'losing' party failing to implement the ruling.[1109]

Process of the ASEAN dispute settlement

a) Consultations

If a member states feels that another member state has directly or indirectly breached the Framework Agreement, or any of the agreements listed in Appendix I of the 2004 Protocol, including any future ASEAN economic agreement, the complainant member state may submit a written request for consultation to the respondent member state[1110] Based on the EDSM, consultation is a process initiated by an ASEAN member state.[1111] It is a mandatory step to give the parties[1112] an opportunity to discuss the issue under dispute and potentially move toward the implementation of a mutually-acceptable solution,[1113] the interpretation, or application of the Agreement or any of the covered agreements mentions in Article 3(1) of the 2004 Protocol. In other words, the consultation stage gives the parties to the dispute a chance to discuss the matter with the aim of facilitating the identification of a mutually-agreed solution without having to resort to litigation.[1114] The most important process for the parties at this stage is to

[1109] Ibid, page 3
[1110] Article 3.2 of the EDSM
[1111] Article 3 of the EDSM is the mandatory procedure. If there is any dispute under the covered agreements, the aggrieved party will request consultation.
[1112] The party that requests for consultation is called the complaining party (hereafter complaint), while the party to which the consultation request is addressed is the party complained against (hereafter respondent)
[1113] Krit Kraichitti, 'Dispute settlement mechanisms for ASEAN community: experiences, challenges, challenges and way forward' (2015) workshop on trade and investment ASEAN law Association page 6 http://www.aseanlawassociation.org/12GAdocs/workshop5-thailand.pdf accessed 16 December 2015
[1114] Vergano, above 986, page 3

notify the SEOM of the dispute. Prior consultation is not only a non-judicial or diplomatic measure, but the parties can also agreed to resolve their dispute through good offices, conciliation or mediation.[1115] Unlike consultation, which is a mandatory procedural step, good offices, conciliation and mediation are voluntary mechanisms for the settlement of disputes, which may begin and be terminated at any time. These mechanisms are not intended to result in a legal conclusion, but merely assist the parties to identify a mutually-agreed solution.[1116]Moreover, if consultation, good offices, conciliation and mediation are unsuccessful, the other parties can ask the senior Economic Official Meeting (SEOM) to resolve their dispute while the panel process proceeds.[1117] When the parties make a request to begin the process of consultation, the SEOM must be notified of it in writing with the reason for the request as well as an explanation of the issue, including the legal basis for the complaint based on Article 3(3).

In terms of the deadline of the request for consultation according to Article 3(4), the other party must reply within 10 days of the receipt of the request for the member to reply and within 30 days after the date of receipt for the parties to enter into a consultation with the requesting party. In cases where the request cannot resolve the dispute or one party does not respond to the request within 60 days after the date of receipt, there can be no consultation. Similarly, the matter may be referred to the SEOM if the consultation does not result in a satisfactory solution to the problem within 60 days. However, the party has another chance to submit a report on the unresolved case again in 30 days in order to continue the dispute settlement process. If it fails to do so, the complainant may raise the matter with the SEOM.

[1115] If the parties to the dispute agree, procedures for good offices, conciliation or mediation may continue while the panel process proceeds refers to Article 4.2 of the EDSM and Specifically, article 4 provided for good office, the Secretary-General of ASEAN could offer conciliation or mediation to assists in the settlement of a dispute with a significant role in resolution of such disputes.
[1116] Vergano, above 986,page 3
[1117] Article 4(2) of the EDSM

b) Senior Economic Official Meeting (SEOM)

The senior Economic Official Meeting (SEOM) is responsible for administering the Protocol on DSM 2004. The SEOM is comprised of the heads of trade, industry, finance and commerce of the ASEAN member states, who are tasked with handling all aspects of ASEAN economic cooperation. The main duties of the SEOM entail establishing the findings and recommendations of both the panels and the appellate bodies. In other word, the SEOM adjudicates disputes by establishing panel to make the adjudication reports binding, monitors the implementation of the findings and recommendations of reports of panels and appellate bodies, and authorises other obligations under the covered agreements in Articles 2(1) and 2(2) of the 2004 Protocol.[1118] When a member states fails to comply with the ruling, the SEOM helps to advise the implementation of the ruling and for authorizes member states to retaliate. The SEOM has the power to establish consultation panels and appellate bodies as well as the authority to adopt their reports. Moreover, the SEOM can use its power to terminate the dispute settlement process at any time and at any stage and this is sometimes based on political influence.

Besides, under Articles 17 and 19 of the EDSM, the ASEAN Secretariat is tasked with assisting the SEOM and has the duty to ensure compliance with the purposes of the EDSM. The ASEAN Secretariat is responsible for 1) administering the ASEAN DSM Fund for the purpose of the EDSM; 2) assisting panels and appellate body, especially on legal and procedural aspects and providing Secretariat and technical support; 3) assisting the SEOM to monitor and maintain surveillance of the findings and recommendations of panels and appellate bodies; and 4) receiving all documentations pertaining to disputes. It is also has a duty to propose nominations of the panel to the parties to the dispute and inform all member states of the composition of the panel formed.[1119]

[1118] Woon, above 1042, page 4
[1119] Appendix II.A of the EDSM

c) Panel process

The parties need to request the establishment of a panel in writing and both special terms of reference and standard terms of reference need to be indicated, as well as, any consultation, the identification of the specific measures at issue, including a brief of the legal basis of the clearly compliant problem.[1120] If the member state to which the request for consultation is made does not reply or enter into a consultation or the dispute is not settled by the consultations within 60 days after the receipt of the request, the complainant party can bring the matter to the SEOM and ask for the establishment of a panel. The duty of the panel under this Protocol is to think about the nature of the dispute between the parties and decide how the conflict can be best resolved.[1121] The process of the SEOM allows 45 days after the establishment of the panel for a decision to be made, either by meeting or by circulation. The panel has a duty to prepare and submit a report, which include all relevant fact of the agreement to the SEOM within 60 days. At the appeal stage, the panel reports are limited to the issues of law covered in the report and the legal interpretations of the panel.[1122] The role of the panel is to produce a report so that the SEOM can consider the facts and provisions of the relevant issues.

The most important point of the Vientiane Protocol is the establishment of a panel to examine and objective assess the dispute. The rules governing the panel proceeding can be found in Appendix II (I), where it is explained that a panel has the duty to regulate its own procedures based on the right of the parties to the dispute to be heard and its deliberations as stated in Article 6(3). The panel should suggest the best solution to resolve the conflict by referring to formal and comprehensive methods and within the scope of the economic agreement.[1123]Since the parties to the dispute may

[1120] Article 5(3) ot the EDSM
[1121] Article 7 of EDSM
[1122] Koesnaidi, Shalmont, Fransisca and Sahari, above 1068, page 9
[1123] Tommy Koh, Rosario G Manalo and Walter Woon, *The making of the ASEAN Charter* (World Scientific Publishing 2009), page 73

have different ideas about establishing a panel,[1124] the panel will be established by the SEOM no later than 30 days after the date on which the dispute was brought before it in order to search for the facts and provide recommendations to the parties.

Since the ASEAN does not provide a specific code of conduct for selecting panelists, the selection can sometimes be biased. Panellists are nominated by the Secretariat[1125] and are chosen from a list of well-qualified governmental or non-governmental individual[1126] who have served on or presented a case to the panel, who serve as a senior trade policy official of a member state or is a professional in international trade law policy. It should be noted that Article I (9) of Appendix II in the 2004 Protocol, panellists should not be representatives of the government or representatives of any organisation in order to avoid any undue influence. Moreover, according to article II (2) and article II (3) of Appendix II, the panel must meet in a close session and the documents submitted to the panel must be kept confidential. Panels should be composed of nationals of ASEAN member states.[1127] There is an exception whereby the people in the panel who are nationals of member states and whose governments are parties to the dispute can serve on a panel concerned with the dispute if the parties to the dispute agree.[1128] In cases where there is no agreement about the panellist within twenty days, the secretary-General of the ASEAN must determine the composition of the panel in conjunction with the SEOM and appoint the most appropriate panellists. Thus, in terms of the compositions of a panel, ASEAN panels are

[1124] Article 6 of the EDSM. Moreover, the panel can seek information and technical advice from any individual or body it deems appropriate see 'Dispute settlement regional approaches: ASEAN' United Nations conference on trade and development, (2003), page 11.
[1125] If there is no agreement between the parties concerning the panelists within 20 days of the decision of the SEOM to establish a panel, the Secretary-General of ASEAN can determine the composition of panel refer to Appendix II.I.7. The Secretary should be conducted the procedure under certain conditions as, i) at the request of either disputing party; ii) after the Secretary-General has consultations with the SEOM; iii) to be completed within ten days; iv) after the Secretary-General consults with the disputing parties refer to Appendix II.I.7. It should be noted that the last condition only applies in the case where the relevant procedures of the covered agreements that are at issue in the dispute require special or additional rules.
[1126] Appendix II EDSM
[1127] Art I (1) of Appendix II
[1128] Art I (3) of Appendix II

non-permanent bodies composed of three to five panellists based on the agreement of the parties to the dispute.[1129]

The function of the panel is to objectively assess the dispute, by examining the facts of the case and the applicability of and conformity[1130] with sections of the agreement in order to make the best recommendations related to the agreement in the case and any covered agreement.[1131] Moreover, the panel also has the duty to produce any findings that can assist the SEOM to make a ruling that is provided for under the agreement in the case or any covered agreement.[1132] Its deliberations are confidential.[1133] The panel must give the parties an adequate opportunity to review the report of its findings and recommendations before it is submitted to the SEOM in writing within 60 days of its establishment. However, it can take an additional 10 days to submit the findings and recommendations to the SEOM in exceptional cases.[1134] The panel report can be reviewed by the parties to the dispute.[1135]

The SEOM should normally adopt the panel report within 30 days of its submission unless a party to the dispute formally informs the SEOM of its decision to appeal. In this case the SEOM may decide by consensus not to adopt the report until the completion of the appeal. According to Article 9(2) of the 2004 Protocol in the event that no meeting is scheduled by the SEOM to enable the adoption or non-adoption of the panel report within 30 days, the adoption should be done by circulation.

[1129] Article I (5) of Appendix II of the EDSM: Working Procedure of the Panel, *para* I.5.
[1130] Christoph Herrmann, Markus Krajewski and Jorg Phillipp Terhechte, *European Year Book of International Economic Law 2013* (Springer 2013), Page 353
[1131] Article 7 of the EDSM
[1132] Article 5.1 of the EDSM
[1133] 'Dispute settlement regional approaches: ASEAN' United Nations conference on trade and development, (2003), page10
[1134] Art 8(2) of the 2004 Protocol
[1135] Art 8(3) of the 2004 Protocol

d) Appeal Proceedings

The establishment of an Appellate Body is the most significant element of the 2004 Protocol. The ASEAN Economic Ministers (AEM) should establish an Appellate Body composed of seven persons, three of whom shall serve on any one case. Third parties can join the case by making a written submission of their substantial interest in the matter and be given an opportunity to be heard by the Appellate Body.[1136] The term of the Appellate Body is four years team and the term may be renewed once.[1137] The members of the Appellate Body serve for a fixed term and need to have demonstrated their expertise in the law and international trade. Thus, a body comprised of experts is expected to make its findings based on legal reasoning.

An Appellate Body should be limited to the legal issues covered in the panel report and the legal interpretations developed by the panel.[1138] The Appellate proceedings should not exceed 60 days from the date a party to the dispute makes a formal notification of its decision to appeal to the date of the circulation of the Appellate Body's report. If the Appellate Body cannot provide its report within 60 days, it should inform the SEOM in writing including the reason for the delay and the time it estimates that it will be able to submit the report. This should not be more than 90 days.[1139] The Appellate Body must make every attempt to accelerate the proceedings in urgent cases related to the perishable goods. Lastly, according to Article 12(13), the adoption process should be completed within a 30-day period irrespective of it being settled by the SEOM or by circulation. In the event of there being no meeting of the SEOM scheduled to enable the adoption or non-adoption of the report within 30 days, the adoption should be done by circulation. If a reply is not received within the said 30

[1136] Art 12(1) and Art (4) of the EDSM
[1137] Art 12(2) of the EDSM
[1138] Art 12(6) of the EDSM
[1139] Article 12(5) of the EDSM. It should be noted that the timeframe accorded for appellate review is longer than the one allocated to conduct the panel proceeding. The AB may uphold, modify or reverse the legal finding and conclusions of the panel, as states in Article 12(12)

days, it means that the Appellate Body report has been accepted by the parties to the dispute and the decision of the Appellate Body is final and binding on them.[1140]

e) Compliance

The implementation procedure of the EDSM also includes compliance, compensation or the suspension of concessions. The disputant is given sixty days to implement the findings and recommendations of the panel or Appellate Body after they have been adopted by the SEOM. However, there are 14 extra days as an extended timeline for the parties to decide to comply after the SEOM has adopted of the reports.[1141] However, if the SEOM refuses to provide a reports of its progress in implementing the findings and recommendations of the panel and Appellate Body within 60 days or within the longer time period agreed by the parties, then the concerned party of the dispute may trigger the process of compensation and the suspension of concessions.[1142]

Moreover, if a member state fails to comply with the SEOM' s ruling or the ASEAN Economic Minister's decision, or fails to implement the measure that is consistent with the Agreement or any covered agreement, the member state may enter into a negotiation with the state involved in the dispute settlement procedure with a view to agreeing mutually-acceptable compensation as addressed in Article 16.[1143] This Protocol also provides a compliance system (i.e., a temporary measure in the form of compensation and the suspension of the concession) within 60 days from the date of its adoption, in cases where the parties fail to comply with the findings and recommendations.[1144] If no satisfactory compensation has been agreed within 20 days after the date of expiry of the reasonable period of time, the party that invoked the

[1140] Article 8 of the EDSM
[1141] Article 15 of EDSM
[1142] Article 16(1) of the EDSM
[1143] Article 16 of the EDSM
[1144] Article 15.1 of the EDSM

dispute settlement procedure may request the AEM for authorisation to suspend the application of concessions or other obligations to the member concerned under the related agreement or any of the covered agreements.[1145] It should be noted that since the payment of compensation is voluntary[1146] if the offending party avoids paying compensation, the matter may be referred to the ASEAN Summit for a decision under Article 27(2) of the ASEAN Charter.[1147]

Table 5.1 shows the Process of the ASEAN dispute settlement

Duration	Process and Action
60 days	Pre-adjudication consultation and mediations
45 days	SEOM establishes DSM panels and appoints panelists
60-70 days	Panel reports, containing legally binding findings and recommendations, to be submitted to SEOM
30 days	SEOM to decide on the adoption of panel's report if no appeal
60-90 days	Appeal proceedings to be reviewed by DSM Appellate Body whose report is to be submitted to SEOM
30 days	SEOM to decide on adoption of Appellate Body's report
60 days	Compliance by AMS concerned to report findings and recommendations (unless parties in dispute agree in a longer timeframe for compliance)

[1145] Articles 9.1 and 16(2) of the EDSM
[1146] Article 16 of the EDSM
[1147] Piris and Woon, above 984, page 81

What is new in the 2004 Protocol?

There are some slightly differences between the old dispute settlement mechanism in the 1996 Protocol and the new 2004 Protocol. The enactment of the 2004 Protocol to replace the 1996 Protocol includes the contribution of efforts by the ASEAN leadership to create a more reliable and legalistic DSM in the interest of trade. The evolution of the new 2004 Protocol is meant to ensure the implementation of all economic agreements and the acceleration of the dispute settlement process. This improvement of the ASEAN protocol not only benefits member states in terms of providing a more effective dispute settlement mechanism, but also raises the opportunities for economic integration by being applied to all future ASEAN economic agreements, thereby enabling member states to better understand their rights and obligations to others. The 2004 Protocol whereby trade disputes will be adjudicated by the AEM or the SEOM and will be binding and linked to the ASEAN Secretariat, is implemented in response to the ASEAN's 1997 financial crisis. These new concepts are established to accommodate the differences among member states, as well as among firms in the private sectors.[1148]

The new 2004 Protocol strengthens the dispute settlement mechanism in various ways. For example, it revises the Protocol on DSM 1996 by the addition of a new set of provisions and more detailed and guidelines to settle the economic disputes among ASEAN member states. Firstly, the new Protocol reduces the ambiguity[1149] in the old Protocol. It consists of twenty one articles with substantial passages, while the old Protocol only contained twelve articles with short passages. Secondly, the duties of the SEOM have increased in the 2004 Protocol compared with the 1996 Protocol and this has brought transparency to the new ASEAN DSM. The continued strong involvement of the SEOM facilitates the establishment of a tighter dispute settlement system based on

[1148] Yong, above 982, page 172

[1149] Hidetake Yoshimatsu, 'Collective action problems and regional integration in ASEAN' (2006) CSGR working paper no198/06. http://wrap.warwick.ac.uk/1907/ accessed 1 May 2015, page 9

the WTO's dispute settlement understanding.[1150] The newly reformed protocol is designed to bring ASEAN closer to the aim of formulating an ASEAN Economic Community. Thirdly, it transfers the resolution of disputes from a diplomatic to an adjudicatory process with the establishment of an Appellate Body, which is the most significant element of the 2004 Protocol. The three stages of the new DSM are consultation, panel and an appellate body review. Furthermore, the new 2004 Protocol has a more specific and exact timeframe of when the consultation begins and ends and there is an obligation to notify the SEOM of the results. There is more clarity at the panel stage, which is explained in Appendix II of the new ASEAN DSM. The procedures for consultation as well as the deliberation, findings and recommendations of the panel and the Appellate Body, are very clear. Furthermore, there is some improvement in terms of the new ASEAN DSM creating an Appellate Body, which is totally separate from a political body (the AEM was the Appellate Body in the previous DSM).

The transfer from diplomatic to adjudicatory dispute resolution with the establishment of the Appellate Body is the most significant development of the 2004 Protocol. One of the reasons for improving the 1996 Protocol was to clarify the fact that the informal style of decision-making in the ASEAN had to be become a more rule based mechanism in order to increase transparency and enable regional economic integration. Moreover, the three stages of the new DSM, namely, consultation, panel and an appellate review, help the ASEAN to further legalise the resolution of trade disputes before having to resort to adjudication. The parties can choose consultation before directly processing to the next stage in which case, the SEOM must immediately be notified of the dispute. The SEOM then has the duty to ensure that the process of consultation begins within 60 days after the date of receipt of the request, this means that the consultation has failed and the unresolved case will be reported again to the SEOM in order to continue the process based on DSM. After reporting the request, the SEOM will establish a panel consisting of a suitable team to search for facts and provide

[1150] Ibid, page 12

recommendations and their report will be submitted to the SEOM within 30 days. The appellate body will be managed by the ASEAN Economic Ministries to hear appeals from panel cases if the dispute remains unsettled after the submission of recommendations by the panel. The ministers will select seven people to serve as the appellate body for a period of four years, and while those selected must not be associated with any government, they must be experts in law and international trade.

The 2004 Protocol is designed to move forward to be a rule-orientated system and it has dramatically developed the 1996 Protocol is several areas, including the utilisation of the negative consensus[1151] for establishing panels, the adoption of panel and appellate reports, the authorisation to suspend concessions, the replacement of the ASEAN Official Body by an appellate review body and the establishment of a strict timeline for each step in the procedure. One of the characteristics of the 2004 Protocol is a negative consensus, which means that, if the SEOM decides by consensus not to establish a panel or adopt the report of the panel or the Appellate Body, it can establish and adopt the reports within the timeframe prescribed in the EDSM.[1152] In other words, the nature of the context of both the 1996 Protocol and the 2004 Protocol is no different from the 1996 DSM. The only difference is that the 2004 DSM expresses a clearer process of conflict management and empowers the SEOM with political influence in the DSM process. The trade dispute resolution mechanism has been developed from a diplomatic process in the 1996 Protocol to legalistic adjudication in the new 2004 Protocol. Whereas the diplomatic process included consultation, good offices, conciliation and mediation by encouraging member states to resolve their dispute in a mutually-acceptable manner, adjudication is a means for member states to resolve their disputes by applying the relevant treaty rules.

[1151] 'Negative consensus' model under the SEOM would have to decide consensus not to set up a panel, adopt a panel report, adopt an appeal report or authorise retaliation, see Chesterman, above 1077, page 206.

[1152] The definition of 'negative consensus' provides in Michael Ewing-Chow and Ranyta Yusran, 'If you build it they still will not to come: ASEAN trade dispute settlement mechanism, (2014), page 5.

5.3.2.4 ASEAN Charter on settling trade disputes

The ASEAN Charter plays an important role in promoting the compliance and commitment of ASEAN nations in the area of economics, security, the environment and communicable diseases. It was signed by ASEAN leaders in November 2007 and came into force on 15th December 2008. This Charter is a legal framework for the ASEAN to achieve its stated goals and objectives, the first of which is to pave the way of ASEAN states to become a single market and production base, as well as promoting an inter-state relationship among their people.[1153] Moreover, the Charter improves the legal framework of the ASEAN and provides a rule-based organisation for more effective regional grouping,[1154] as well as a designated dispute settlement mechanism with legally-binding obligations. The Charter has given root to a new ASEAN[1155] by standing as a fundamental tool that underpins the rights and obligations agreed between members in order to resolve the disputes;[1156] in other words, it is a practical, efficient and more credible mechanism to resolve disputes in an effective and timely manner.[1157] The ASEAN charter is one of the new organs to operate within the ASEAN to foster the process of community building.[1158] Productive inter-governmental negotiation could make the ASEAN more effective in terms of providing democratic norms, rule of law, social justice, good governance and compliance to the ASEAN dispute settlement through the Treaty of Amity and Cooperation in Southeast Asia (TAC) and the EDSM.[1159] The fundamental principle of the ASEAN Charter is based on respecting sovereignty, equality, territorial integrity, and consensus and being united under the Charter in

[1153] Rodolfo C. Severino, 'ASEAN: New Charter, New Optimism' Southeast asia's security outlook in *Regional outlook Southeast Asia 2009-2010* Institute of Southeast Asian studies
[1154] Munir Majid, 'ASEAN in Perspective" LSE IDEAS Southeast Asia International affairs program' (2009), page 9 http://www.lse.ac.uk/IDEAS/publications/reports/pdf/SR002/SR002_majid.pdf accessed 23 January 2015
[1155] Ioan Noicu "ASEAN between aspirations and realities" (2009) 29(3) ABAC Journal (September-December 2009) pages 1-2
[1156] http://www.asean.org/asean/asean-charter
[1157] The preamble to the 2010 Protocol
[1158] Koesnaidi, above 1068, page 10
[1159] Noicu, above 1155, pages 1-2

diverse factors. The Charter will help the ASEAN to achieve its purpose by providing a decision-making process for ASEAN institutions. Not only it is the creation of an institution within the ASEAN but it also strengthens to ASEAN institutions especially the Secretariat and facilitates the agreement and settlement of disputes among members.[1160]

The 16th ASEAN summit based on the theme "Toward the ASEAN Community: from vision to Action" was held in Hanoi, the capital city of Vietnam, in April 2010, when the ASEAN dispute settlement mechanism was changed in order to help all member states with different perceptions of the interpretation and application of the ASEAN Charter to resolve their disputes.[1161] The implementation of the ASEAN charter was directed toward enabling ASEAN foreign ministers to identify key methods and actions to connect the region in three dimensions, namely, physical, institutional and people to people, and this was further discussed at the 17th ASEAN summit in Myanmar in October 2010.

The ASEAN Charter on dispute settlement mechanisms (the 2010 Protocol) can be applied by means of the peaceful resolution of disputes based on making a rule-based organisation a reality. The disputes that can be resolved under this Protocol concern the interpretation or application of the ASEAN Charter and non-economic instruments.[1162] The process to settle a dispute is explained in Article 5(1) in which it is stipulated that, after a dispute arises, the responding party has 30 days to reply to the request of the complainant and 60 days to enter into consultation by means of a mutual agreement. Articles 6 and 7 allow the parties to resolve their dispute using good offices, mediation or conciliation at any time to solve the conflict. The settlement of disputes is

[1160] EuGene K.B. Tan, 'The ASEAN Charter as "legs to go places": Ideational norms and pragmatic legalism in community building in Southeast Asia' (2010) page 172

[1161] (From the newspaper report in the section of world news political "Yearender: ASEAN moves towards one community vision on firm base by Han Qiao http://www.lexisnexis.com/uk/nexis/results/docview/docview.do?docLinkInd=true&risb=21_T17437676178&format=GNBFI&sort=BOOLEAN&startDocNo=1&resultsUrlKey=29_T17437676182&cisb=22_T17437676181&treeMax=true&treeWidth=0&csi=8078&docNo=1)

[1162] article 2(1) of the 2010 ASEAN Charter

scoped as a specific instrument in the ASEAN Charter, together with the establishment of a dispute settlement mechanism related to unresolved disputes as discussed in the Articles 24, 25 and 26 of the Charter and the 2010 Protocol. It is stated that all disputes related to specific ASEAN instruments issue need to be settled using those instruments, apart from disputes that are not concerned with the interpretation or application of the ASEAN instrument which can be settled under the Treaty of Amity and Cooperation. If no specific instrument is applied for disputes related to interpretation or application under the Charter, they can be settled according to the DSM. The 2010 Protocol can be applied in cases where the interpretation or application of the ASEAN Charter itself has no specific means of DS and the parties agree to settle under this Protocol.

The ASEAN Charter consists of eight chapters[1163] comprised of 55 articles and 4 annexes related to the purposes and basic principles of the ASEAN, its institutional structures, membership criteria, and the rights and duties of member states. The principles and procedures for decision-making are also discussed in this Charter together with the process of implementation and dispute settlement, as well as the budget of the organisation,[1164] under the aims and purposes, which are adapted from the Bangkok Declaration as an Association for regional cooperation.[1165] In the context of the ASEAN, the Charter on dispute settlement was adapted from the example of the European Union, which was described by a Singaporean member of the Task Force as a peaceful resolution of disputes. The first method of the Charter to make the ASEAN a more effective rules-based organisation focused on formalising the ASEAN as an institution that governs its own legal and institutional framework based on a strategic

[1163] The ASEAN Charter see, http://asean.org/wp-content/uploads/images/archive/publications/ASEAN-Charter.pdf

[1164] Helen E. S. Nesadurai, 'The Association of Southeast Asian Nation (ASEAN)' (2008) 13(2), Routledge taylor& francis group

[1165] *The ASEAN Declaration, done in Bangkok,* 8 August 1967 <http://www.aseansec.org/ 1212.htm> accessed 6 August 2013

decision-making process. The ASEAN Charter will be legally binding where appropriate and serve as a legal and institutional framework within the ASEAN.[1166]

The establishment of a formal mechanism to settle disputes is explained in Chapter VIII of the Charter. All disputes must be resolved peacefully using consultation[1167] and negotiation within the specified period of time of filing stated in Article 22 of the Charter,[1168] as well as the need for the disputing parties to resort to good offices, conciliation or mediation to resolve their disputes within an agreed time.[1169]

The dispute settlement mechanism must cover all the fields of ASEAN co-operation referred to in article 22(2) of the Charter. Disputes related to the interpretation or application of the ASEAN Charter itself, or of other instruments with no specific means of settling disputes or of other ASEAN instruments which expressly provide that the 2010 Protocol or part thereof shall apply, or disputes in which the parties mutually agree that the 2010 Protocol shall apply, should all be settled by the mechanism established in the 2010 Protocol.

Article 24 (1) of the ASEAN Charter is the key provision, in which it is stated that disputes should be settled using the mechanism provided in that instrument. According to Article 24(2), disputes that do not related to the interpretation or application of any ASEAN instrument should be settled under the TAC, whereas those that relate to the interpretation or application of ASEAN economic agreements should be settled in accordance with the ASEAN Protocol on Enhanced Dispute Settlement Mechanism (EDSM).[1170]

[1166] Paul J. Davidson, 'The role of international law in the governance of international economic relations in ASEAN' (2008) 12 SYBIL, pages 216-217

[1167] Article 20 gives the definition of the meaning of consultation and consensus is a basic principle decision—making in ASEAN based on "consensus and procedure" see, Kazushi Shimizu, 'The ASEAN Charter and the ASEAN Economic Community' (2011) 40 Econ. J. of Hokkaido University

[1168] Article 22(1) of the ASEAN Charter

[1169] Article 23(1) of the ASEAN Charter

[1170] Article 24(3) of the ASEAN Charter

Arbitration can be applied in cases where there is no effective dispute settlement mechanism. It should be applied to disputes that relate to the interpretation or application of this Charter and other ASEAN instruments in cases where no specific mechanism is provided, based on Article 25 of the Charter.[1171]

The relationship between the ASEAN DSM Protocol and the ASEAN Charter is shown in Articles 26 and 27 of the ASEAN Charter and the Protocol. Article 26 provides that 'unresolved disputes pertaining to political leaders have to be referred to the ASEAN Summit for a decision'.[1172] However, the ASEAN Summit is not a court or an arbitral tribunal; it is a policy-making body that operates in the ASEAN Way and the decision-making is based on a consensus.[1173] In terms of enforcement and compliance, the ASEAN Charter provides ways to ensure compliance with the findings, recommendations or decisions of an ASEAN dispute settlement mechanism. [1174] According to Article 27 of the Charter[1175] the Secretariat should comply with the finding, recommendations and results of an ASEAN DSM and submit a report to the ASEAN Summit. It is stated in Article 27 (2) that 'any member state affected by non-compliance with the findings, recommendations or decisions resulting from an ASEAN dispute settlement mechanism, may refer the matter to the ASEAN Summit for a decision'. Therefore, the ASEAN Summit acts as the final arbitrator and enforcer of a decision that has been reached using any ASEAN dispute settlement mechanism. Additionally, the ASEAN Summit decides cases of a serious breach of the Charter and non-compliance.[1176] However, it is important to note that this provision does not prescribe a mechanism for the ASEAN Summit to act in this capacity.[1177]

[1171] Davidson, above 1166, page 220
[1172] Das, above 1063, page 385
[1173] Article 7(2)(b) of the ASEAN Charter
[1174] Article 27 of the ASEAN Charter
[1175] Article 27 of the ASEAN Charter
[1176] Chow and Yusran, above 1152, page 16
[1177] Phan, above 1021, page 5 For more detail regarding the problem of the ASEAN Summit read more in Chapter 6 in section 6.2.3

Section 5.4 Conclusion

According to the above description of the ASEAN's fundamental principles, the ASEAN dispute settlement mechanism was established around 1971 and was based on the notions of peace, freedom and neutrality of the United Nations. The key factors of the dispute settlement mechanism can be seen from the Treaty of Amity and Cooperation 1967, the 1996 Protocol on dispute settlement, and the 2004 Protocol on dispute settlement until the establishment of the ASEAN Charter on Dispute Settlement, which focuses on the different methods used to settle disputes between member states of the ASEAN. The different processes under the ASEAN dispute settlement mechanism covers all the disputes that arise from a number of trade agreements adopted by the ASEAN. The Protocol on Enhance Dispute Settlement Mechanism in 2004 (EDSM) replaced the Protocol of DSM in 1996 in terms of the resolution of economic disputes. The ASEAN mechanism for the settlement of trade disputes is increasingly legalistic, adjudicatory or quasi-judicial, which is evident from the 1996 Protocol.[1178] This was followed by the first formal mechanism for the resolution of trade disputes in the ASEAN in 2004 by adopting all major contexts, similar to the WTO Dispute settlement mechanism[1179] in the so-called Vientiane Protocol, which strengthened the institutional mechanism of the ASEAN by improving the existing ASEAN dispute settlement mechanism to ensure the expeditious and legally binding solution of all economic disputes toward a legalistic and rule-based institution.[1180] In the period of the Bangkok Declaration, the ASEAN relied on political relationship rather than the law and this diplomatic process meant that the ASEAN was managed by consultation, consensus, and declaratory statements: on the other hand, these successful political relationships were not underpinned by legally-binding obligations and there were very few effective

[1178] The Protocol on Dispute Settlement Mechanism, done at manila, 20 November 1996, text at <http://www.aseansec.org/7813.htm>

[1179] http://www.aseansec.org/17593 (Accessed 29/12/2013)

[1180] Michael Ewing-Chow, 'ASEAN Integration, the rule of law and investment agreements' (2013) American society of International law Proceeding of the Annual Meeting, page 284 http://www.jstor.org/stable/10.5305/procannmeetasil.107.0284 accessed 12 January 2015

dispute settlement mechanisms.[1181]However, major improvements were made to the ASEAN dispute settlement mechanism with the advent of the new 2004 Protocol. The new reform has upgraded the ASEAN DSM and produced a more sophisticated mechanism, in which the details of working procedures were clarified, specifically at the panel stage, the procedures for consultations and the deliberations, findings and recommendations of the panel and Appellate Body. The overall idea of the EDSM procedure is highly judicial and this facilitates a more speedy resolution. Although there are some weak points, such as the limitation of state parties to apply this dispute settlement mechanism, the nature of the EDSM ensures very good impartial treatment with a reasonable choice for states to settle trade disputes. However, the ASEAN member states are not currently utilising this procedure.[1182] No dispute has been settled using the ASEAN mechanism at the time of writing and this has led to the ASEAN DSM being increasingly criticised from both a procedural and substantial perspective. In addition, its efficiency is still questioned. Therefore, the problems that have arisen in its application and how many of these problems remain unresolved will be considered in the next chapter.

[1181] Ibid, page 284
[1182] Mondre, above 1054, page 13

CHAPTER VI

PROBLEMS AND THE LIMITS OF THE ASEAN's DISPUTE SETTLEMENT MECHANISM

Section 6.1 Introduction

The study of the ASEAN's dispute resolution systems in the previous chapter led to the capacity of the member countries of the ASEAN to prevent and resolve their conflicts. Appropriate models of conflict management and regional cooperation have been evolved by each regional group to different sets of challenges[1183] and this has led to conflict among the ASEAN members in pursuit of their own national interests. There are several mechanisms to manage conflict of interests on an international level, such as diplomacy, mediation, arbitration, adjudication and a coercive threat or the use of force,[1184] and some critics have highlighted the failure of the ASEAN in this respect rather than its effectiveness. This chapter will contain an illustration of how the ASEAN deals with the problematic issue of the relationship between the ASEAN DSM and the ASEAN charter; for instance, the lack of institutions, the absence of non-compliance, etc. The diverse political and legal systems, the problem of the 'ASEAN Way', and the procedure of the ASEAN free trade agreement dispute settlement itself are also perceived as barriers to the regional integration of the ASEAN Community. The lack of an effective dispute settlement mechanism across the ASEAN is a barrier to economic

[1183] Rajshree Jetly, 'Conflict management strategies in ASEAN: perspectives for SAARC' (2003) 16(1) The Pacific Review, page 53

[1184] Donald E. Weatherbee, *International relations in Southeast Asia: the struggle for autonomy* (3ed edn, Rowman and Littlefield 2014)

integration, which is why some academic writers perceive that the formation of the ASEAN has succeeded in preventing political conflict, but failed to prevent trade disputes.[1185]

ASEAN member countries need to be more integrated as a group and more engaged within the global economy in order to maintain centrality in the region and become an increasingly important player on the global stage. New challenges confronting the ASEAN are driving it to push for successful integration and the strengthening and development of ASEAN institutions and mechanisms. These challenges have the effect of accelerating the process to implement a dispute settlement mechanism under the ASEAN Economic Community (AEC), especially for agreements that cover economic disputes. They are often associated with member states' ratification of the ASEAN instruments regarding the settlement of disputes and an ongoing lack of trust in this dispute settlement mechanism by member states. While a comparison of the ASEAN members helped to set the stage for the challenges they face, the AEC will undoubtedly be confronted by many more challenges as well as opportunities.

The remainder of this chapter is briefly organised as follows. Some of the limitations of the ASEAN in resolving conflict among member countries are addressed in Section two by examining the issues it has faced in the pursuit of economic integration. The focus of these limitations is the instruments of trade integration and dispute resolution based on the problematic relationship between ASEAN member states and the ASEAN Free Trade Area dispute settlement mechanism (AFTA), *i.e.* the 2004 ASEAN Protocol on Enhanced Dispute Settlement Mechanism (EDSM). However, as discussed in Chapter V, the 2004 Protocol EDSM has transformed the ASEAN into a rule-based system, as well as being an effective practical and credible mechanism to resolve conflicts between member states. However, they hesitate to make use of it

[1185] Nimnual Piewthongngam,'Strengthening and Deepening ASEAN Economic Integration through the ASEAN Free Trade Area: Legal Aspects of the Implementation of AFTA' Theses and Dissertations under the Digital Commons: The Legal Scholarship Repository Golden Gate University School of Law page 159

because it has a number of weaknesses that may eventually undermine its efficiency.[1186] The current ASEAN dispute settlement mechanism appears to fail to fulfill its primary function of resolving inter-state conflicts, nor does it contribute to the settlement of trade disputes in domestic and intra-state conflicts, as will be analysed in this section. It is important to note that ASEAN member states have not yet utilised the organisation's dispute settlement mechanism. Interestingly, not a single dispute has been handled by this mechanism to date and it is uncertain whether or when it will be used in the future.[1187] Based on sample cases, ASEAN member states prefer to use the World Trade Orgaisation (WTO) mechanism to settle their trade disputes. This discussion will support the debate of the issue of the ASEAN's legal future and how it has been framed in the context of its progress toward a rules-based system, which will be further explained in the next chapter in order to make more some practical recommendations for the proper working of the ASEAN dispute settlement mechanism. Furthermore, the political and informal legal system called the 'ASEAN Way'[1188] is considered to be a huge barrier to the development of the ASEAN's legal infrastructure[1189], as will be explained in Section three. The ASEAN Charter is also included in the analysis in this chapter, since this has failed to enhance the ASEAN' s ability to achieve further economic integration and this failure appears to have blocked the ASEAN from moving toward deeper integration.[1190] The chapter ends with a conclusion in Section four.

[1186] Willem Van der Mur, 'the legal nature of the ASEAN Economic community 2015' Master thesis in international and European Law University of Amsterdam, page 12

[1187] Hsien-Li Tan, Hao Duy Phan, Ranyta Yusran, Leonardo Bernard and Robert Beckman, *Promoting compliance the role of dispute settlement and monitoring mechanisms in ASEAN instruments* (Oxford University press 2016), page 164

[1188] For a description of the ASEAN Way; see more in Chapter one of this thesis, section 1.4.2

[1189] Jeffrey A. Kaplan, 'ASEAN's Rubicon: A Dispute Settlement Mechanism for AFTA' 1996 14(2) Pacific Basin Law Journal, page 149 and Lee Leviter, 'The ASEAN Charter: ASEAN failure or member failure?' (2010) 43(159) International law and politics page, 160

[1190] Rizal Sukma, 'ASEAN beyond 2015: the imperatives for further institutional changes' (2014) ERIA discussion paper series, page 12 <http://www.eria.org/ERIA-DP-2014-01.pdf > accessed 1 May 2015

Section 6.2 Problems and the limitations of the ASEAN dispute settlement mechanism

6.2.1 ASEAN and World Trade Organisation (WTO)

ASEAN countries are members of the WTO[1191], while the Lao PDR is, for now, has been a member of WTO since 2013. This means that all of ASEAN members are already committed to the multilateral liberalisation of the WTO.[1192] The ASEAN trade Dispute Settlement Mechanism (DSM) is examined in this section with an emphasis on economic disputes in the context of international trade law by comparing the DSM with the WTO context, which is very similar to the WTO dispute settlement mechanism. This similarly affects the ASEAN mechanism in other fora organisations, which ASEAN member states prefer to choose to settle disputes apart from its own mechanisms. It is important to note that the ASEAN dispute settlement process is very similar to the WTO dispute settlement mechanism (DSM); therefore, ASEAN countires' use of the WTO DSM is also described and explained in this section. When Comparison the ASEAN DSM with the WTO Dispute Settlement Procedure, the similarities between the 2004 Protocol and the WTO DSM are almost substitutes for each other. One sequence is the overlapping jurisdiction between the ASEAN and the WTO DSM, or even the jurisdiction that

[1191] ASEAN countries and the WTO, as of January 2017, there were ten ASEAN member countries, ten of which were also WTO members. In terms of the participation of ASEAN members in the GATT system example, three of the six were not even contracting parties to the GATT before the early 1980s. Both the attitude and posture of ASEAN countries toward the GATT have evolved considerably during the past fifteen years. Brunei Darussalam became a WTO member on 1st January 1995 and a member of the GATT on 9th December 1993; Cambodia joined the WTO on the 13th October 2004, but is not a member of the GATT; Indonesia joined the WTO on the 1st January 1995 and the GATT on the 24th February 1950; Malaysia joined the WTO on the 1st January 1995 and the GATT on the 24th October 1957; Myanmar joined the WTO on the 1st January 1995 and the GATT on the 29th July 1948; Lao PDR is a WTO membership but is not a member of the GATT; The Philippines joined the WTO on the 1st January 1995 and the GATT on the 27th December 1979; Singapore joined the WTO on the 1st January 1995 and the GATT on the 20th August 1973; Thailand joined the WTO on the 1st January 1995 and the GATT on the 20th November 1982; Vietnam joined the WTO on the 11th January 2007 but not the GATT. Source https://www.wto.org/english/thewto_e/whatis_e/tif_e/org6_e.htm

[1192] Locknie HSU, 'WTO and regional trade liberalisationl implications for the ASEAN', page 2

conflicts with the dispute settlement organs of the WTO or other regional agreements.[1193]

There are three reasons for comparing between the ASEAN EDSM and WTO DSM in this analysis, the first of which is the problem of the ASEAN's exclusive jurisdiction. The second concerns forum shopping, while the third is the timing of the panel process and the funding of the costs of the DSM. The problems faced by the ASEAN and its member states are also discussed below.

6.2.1.1 Adjudication Problems

a) Exclusive Jurisdiction

The issues of exclusive jurisdiction and forum shopping are adjudication problems in the ASEAN because members apply various effective regional organisations for a variety of reason. There is currently a lack of harmonisation of the laws because the ASEAN has no juridical personality or legal standing under international law.[1194] For example, Malaysia, Singapore and the Philippines support the ASEAN as a way to constrain Indonesia by providing Indonesia with a channel for its aspirations to become a regional power.[1195] The ASEAN has no legal underpinning because of its failed regional initiatives and lack of commitment and its agenda is overloaded with too many regional initiatives.[1196] According to Markus Hund, the ASEAN is less meaningful because it lacks a common pool of sovereignty and this means that it cannot have influence beyond its

[1193] Pieter Jan Kuijper, James H. Mathis and Natalie Y. Morris- Sharma, *From treaty-making to treaty-breaking: model for ASEAN external trade agreements* (Cambridge University press 2015), page 18
[1194] Rodolfo C. Severino, *Framing the ASEAN Charter: An ISEAS perspective* (ISEAS 2005), page 6
[1195] Seong Min Lee, 'ASEAN: brief history and its problems' (2006) Korean Minjok Leadership Academy International program <http://www.zum.de/whkmla/sp/0607/seongmin/seongmin.html> accessed 1 January 2016
[1196] Sueo Sudo, 'Forcing an ASEAN Community: Its Significant, Problems and Prospects' (2006) 146 GSID, page 21 <http://www.gsid.nagoya-u.ac.jp/bpub/research/public/paper/article/146.pdf> accessed 24 July 2015

members.[1197] Not only has it a problem of jurisdiction, but the ASEAN also faces a lack of a regional identity among its people, which leads member governments prefer to adopt informal processes. Moreover, the ASEAN lacks a binding court to settle disputes, which is also a significant problem in terms of adjudication.[1198]

Currently, ASEAN member states are not considering an ASEAN Court of Justice in their institutional reform, or more ideally, court-to-court communication. The ASEAN should have its own court to adjudicate internal issues and a uniform law to apply within that court. This problem will have a negative effect on regional investors in cases where there is no predictable remedy for disputes that could promote investors' trust in the region's stability and motivate them to undertake business transactions.[1199] The undefined role of the domestic courts in the enforcement of future arbitral awards arising from disputes is also a problem. Moreover, there is insufficient and diffuse judicial oversight within the ASEAN. Although the Charter tries to set a standard of legal norms in specific areas of trade and security through national governments and national courts,[1200] the ASEAN court of justice should serve as an independent body based on agreed principles of international law in order to ensure the timely resolution of economic agreements and ASEAN agreements.[1201] This will be further explained in chapter seven.

[1197] Timo Kivimaki, 'Southeast Asia and Conflict prevention. Is ASEAN running out of steam?' (2012) 25(4) The Pacific Review, page 407 <http://www.tandfonline.com/doi/abs/10.1080/09512748.2012.685094> accessed 1 November 2016

[1198] Megan R Williams, 'ASEAN: Do progress and effectiveness require a judiciary?' (2007) 30(2) Suffolk transnational law review, page 433 <http://heinonline.org/HOL/Page?handle=hein.journals/sujtnlr30&div=19&g_sent=1&collection=journals> accessed 1 January 2015

[1199] Ibid, page 456

[1200] Diane A. Desierto, 'ASEAN's Constitutionalisation of International law: Challenges to evolution under the new ASEAN Charter' (2010-2011) 49 Colum. J. Transnat'l L., pages 280-281 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1712831> accessed 13 May 2016

[1201] Kurniawan Hari, 'ASEAN should extablish court of justice: Think tank' the Jakarta Post, Jakarta 19 April 2006 <http://www.thejakartapost.com/news/2006/04/19/asean-should-establish-court-justice-think-tank.html> accessed 15 May 2016

b) Forum Shopping and Overlap between the ASEAN Free Trade Agreement and the WTO

Overlaps of jurisdiction in dispute settlement can be defined as 'situations where the same dispute or related aspects of the same dispute could be brought to two distinct institutions or two different dispute settlement systems'[1202] This situations can lead to difficulties concerning 'forum shopping' whereby the parties to a dispute can choose between two adjudicating bodies or two different jurisdictions for the same facts[1203] and there may be a conflict in any of these overlapping situations. There are many types of overlaps; for example, 1) when two fora assert that they have exclusive jurisdiction over the disputed matter; 2) when one forum maintains that it has exclusive jurisdiction and the other one offers jurisdiction on a permissive basis to deal with the same matter or a related one; and 3) when the dispute settlement mechanism of two different fora are obtainable (on a non-mandatory basis) to consider the same or similar matters.[1204] This kind of problems may arise in situations where the dispute settlement processes of two agreements are activated in parallel; for example, the two dispute settlement mechanisms may claim that they have the final jurisdiction and may reach different or even contrary conclusions about the merit of the dispute.[1205]

To begin with, the DSM system was created under the 2004 Protocol on Enhanced dispute settlement mechanism (EDSM). It is similarly to the WTO's system,[1206]

[1202] Kyung Kwak and Gabrielle Marceau, 'Overlaps and conflict of jurisdictions between the WTO and RTAs' (2006) Conference on regional trade agreements World Trade Organisation, pages 2 and 3 https://www.wto.org/english/tratop_e/region_e/sem_april02_e/marceau.pdf accessed 30 October 2016
[1203] Ibid, pages 2 and 3
[1204] Ibid, pages 2 and 3
[1205] Kwak and Marceau, above 1202, pages 2 and 3
[1206] It is important to note that the comparison of the 1996 Protocol and the WTO DSU can be explained by the fact that the Protocol 1996 is a short document that consists of only 12 articles and two appendices, while the WTO dispute settlement mechanism consists of 27 very lengthy articles and four appendices. Other difference can be seen in terms of confidentiality at the consultation stage. The consultations in the DSM were not copied in the confidentiality provision of the protocol. The Protocol follows the WTO DSU by providing for conciliation and good offices but excludes the important confidentiality provision in the DSU from the counterpart provision. Furthermore, the Protocol 1996 focuses on the concept of a simple consensual majority for its decision-making, whereas the WTO DSU applies the principle of negative

which was based on its Dispute Settlement Understanding (DSU), and these two systems are subjected to a critical comparison in this paragraph. While it is evident that the dispute settlement procedures in the EDSM 2004 have been profoundly influenced by the WTO Dispute Settlement Understanding, there are some important difference between these two systems based on the Protocol and the DSU. For example, there are some contextual differences such as the ASEAN substitutes the SEOM for the DSU, while the WTO has deliberation and legal differences. In practice, the differences from the Protocol are flexible and lead to potential legal uncertainty and the unsatisfactory operation of the DSM.[1207]Another important limitation of the ASEAN Dispute Settlement Mechanism (DSM) is the overlap of the DSM and others outside the ASEAN DSM. In other words, whether disputes that arise from such agreements can be brought to international forums such as the WTO, which has jurisdiction over the dispute, has to be determined and this causes further delay in finding a resolution and increases the parties' costs. According to Article 1(3) of the 2004 Protocol:

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consensus and covers it with the panel, third parties, panel and appellate body reports, which are not mentioned in the Protocol 1996. However, there is no clear timeline during which a consultation is to take place at the panel stage, and there is no official time limit to be passed to match every step in the dispute settlement process. Besides, the Protocol 1996 does not provide the details of procedural guidelines on the procedure for and effects of consultation. However, the WTO DSU requires the member state that requests the consultation to notify the dispute settlement body related to both the Councils and Committees of the request. The composition of panels as non-governmental individuals who should be well-qualified in government is similar in the Protocol 1996 and the WTO. Unlike the Protocol 1996, the WTO does not clearly state that national of ASEAN member states should be offered as first preference when nominated the panels. There are only a few differences between the WTO DSU and Appendix 2 part 1 of the Protocol 1996 in terms of the amount of time granted in the period of the issuance of the report and the ruling. Moreover, the Protocol 1996 also recognises, good offices, conciliation and mediation, the same as the WTO. They also have an appeal procedure with a strict timeline and include provisions related to compensation and the suspension of concessions. However, the 1996 Protocol has the same procedures as well as some differences. The two mechanisms differ in that the Protocol 1996 does not create an administrator to be responsible for following the rules and procedures like the WTO DSU. Furthermore, the WTO mentions the terms of reference of panels, third party complainants and the adoption of the panel and appellate body report, which are not include in the Protocol 1996 and it also does not provide any details of the consultation provisions. For general detailed of the dispute settlement of the 1996 Protocol and the AFTA trade dispute settlement, see Koesrianti 'The development of the ASEAN trade dispute settlement mechanism: from diplomacy to legalism' Thesis submit to the University of New South Wales, pages 222-249

[1207] Sanchita Basu Das, Jayant Menon, Rodolfo C Severino, Omkar Lal Shrestha *The ASEAN economic community: A work in progress (*Institute of Southeast Asian studies 2003), page 392

> 'The provisions of this Protocol are without prejudice to the rights of Member States can bring disputes arising from trade agreement to either the ASEAN DSM at a stage before a request is made to the Senior Economic Officials Meetings (SEOM) to establish a panel.'[1208]

Since all ten ASEAN member states are also members of the WTO, they can bring disputes that arise from AFTA to either the AFTA DSM or the WTO DSM before a request is made to the Senior Economic Officials Meeting (SEOM) to establish a panel.[1209] Article 1 of the ASEAN Protocol[1210] explains that alternative forums are an open provision. The content is worded broadly and refers to 'disputes involving other member states and can resort to other fora at any stage'. For example, if the dispute also falls within its 'covered agreements' up to the time the SEOM establishes a panel, the provision will not be clear during the time of establishing the panel, but also before a request for the establishment of a DSM panel is made. This is a more serious difference between the WTO DSU and ASEAN DSM because the DSU does not allow the use of alternative fora to resolve disputes related to its 'covered agreements'. In other words, the WTO's DSU does not provide for a choice of dispute settlement forum.[1211] It only permits disputes to the covered agreements of the WTO to be brought under it and WTO members are willing to submit their WTO disputes to that system. As mentioned, the WTO's DSU does not provide for such a choice of dispute settlement forum.[1212]

[1208] Article 1(3) of the 2004 Protocol

[1209] Gonzalo Villalta Puig and Lee Tsun Tat, 'Problems with the ASEAN free trade area dispute settlement mechanism and solutions for the ASEAN economic community' (2015) 49(2) Journal of World Trade, page 285

[1210] The provisions of this protocol do not prejudice the right 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 Senior Economic Officials Meeting (SEOM) to establish a panel pursuant to paragraph 1 Article 5 of the Protocol.

[1211] Paolo R. Vergano, "The ASEAN Dispute Settlement Mechanism and Its Role in a Rules-based Community: Overview and Critical Comparison", (2009) paper presented at the inaugural conference of the Society of International Economic Law, page 7 http://aieln1.web.fc2.com/Vergano_panel4. pdf accessed 1 May 2016

[1212] Das, Menon, Severino, and Shrestha, above 1207, page 393

According to the above provision, the overlap between these two systems can cause a great deal of complexity. Firstly, the conflict of legal principles makes it difficult for different jurisdiction to interpret the same provision;[1213] moreover, it can lead to 'forum shopping' by member states. In other words, parties can be flexible and free to choose where to settle their disputes.[1214] From this point of view, it is true that Article 1(3) of the 2004 Protocol gives the disputing parties the flexibility to rely on conflicting precedents in the presentation of their respective cases. On the other hand, a claim under Article 1(3) is not even tenable. This kind of flexibility conferred on the parties can constrain the resolution of the dispute by failing to preserve the integrity and exclusivity of the process. This is not similar to the NAFTA and the WTO DSM because the 2004 Protocol does not contain a 'choice of forum' for the parties to select a dispute settlement mechanism. According to the context of Article 1(3) both parties are free to engage in forum shopping since the 2004 Protocol includes a range of times before a party asks the SEOM to establish a panel.[1215] In cases where a party seeks recourse to other fora at the same time as the other party sends a request to the SEOM to establish a panel, the parties will be caught a deadlock with a further delay in resolving the dispute and greater costs.[1216] Therefore, the flexibility granted by Article 1(3) must be subject to certain qualifications if it is not to interfere with the effective operation of the AFTA DSM.[1217]

Moreover, the ASEAN and the WTO have many similar points, which make them close substitutes for each other.[1218] This similarity shows that the ASEAN member states recognise the 2004 DSM as being interior to the WTO DSM. The relevant organs are firstly, a lack of standing of private parties. The WTO's DSU system only allows WTO

[1213] Puig and Tat, above 1209, page 285
[1214] Mur, above 1186, page 12 and Vergano, above 29, page 9
[1215] Puig and Tat, above 1209, pages 285-286
[1216] Ibid, page 286
[1217] Ibid, page 286
[1218] Weidon Zhu, 'The dispute settlement mechanism of ASEAB free trade area (AFTA) and its integration and SADC' (2008) Paper presented for the International Conference on regional integration and SADC Law in Maputo, http://www.speed-program.com/wpcontent/uploads/2012/11/Dispute_Settlement_Mechanism_ASEAN.pdf, page 3

members to participate as complainants, respondents and third parties. Similarly, the ASEAN DSM gives privileged participation to ASEAN states. It is obvious that, unlike the WTO, business actors in the private sector of the ASEAN do not all private entities or entities or investors to participate in the adjudicatory process.[1219] If they prefer to invoke the mechanism, private parties need to bring their case by engaging with ASEAN officials and member governments to pursue the case on their behalf.

The lack of standing of private parties creates a number of obstacles in the system and leads to the unequal treatment of identical cases. Firstly, private parties lose control of the dispute under the current arrangement and this causes a delay in the dispute settlement process, as well as unnecessary expenditure. It would be more advantageous, if the private party was be able to represent itself bargaining according to its own business model, and make appropriate concessions throughout the process. According to the AFTA DSM, they must be represented by their governments; however, if the AFTA DSM granted direct access to the concerned private party, the dispute would take less time to resolve. It would end earlier and incur less cost and unnecessary attention. Secondly, the private parties may have a difficult time in pressurising their government to represent them when it is a non-democratic government. For example, in cases where the government does not have an interest in a private dispute, it may be reluctant to go through all the trouble and cost necessary to resolve it. Whenever a government displays the AFTA DSM and confronts the opposite government, it risks of losing face not to mention domestic political support and money.[1220]

In addition, the lack of an incentive to represent private parties and the problems of corruption and bureaucracy also hinder the effective deployment of the dispute settlement mechanism for private parties.[1221] Government corruption is a major

[1219] Locknie Hsu, 'The ASEAN Dispute Settlement System' in *The ASEAN economic community: A work in progress (*Institute of Southeast Asian studies 2003), page 415
[1220] Puig and Tat, above 1209, page 291
[1221] Puig and Tat, above 1209, page 292 and Panpanut Voraveerapong, 'Corruption impacts on bilateral trade between ASEAN countries during 2006-2011: gravity model approach' (2013) 3(6) World trade journal of social sciences, pages 39-40

impediment to dispute settlement, in this instance, because private parties do not have direct access to the AFTA DSM. Many private disputes may never reach the AFTA DSM due to domestic corruption and if the private parties need to bribe government officials to have their dispute heard, the AFTA DSM can hardly be considered to be an appropriate conflict resolution system.[1222] Singapore is highly ranked in terms of the absence of corruption, whereas Thailand, Malaysia, Brunei Darussalam and Indonesia rank a little lower. However, the thirty most corrupt countries in the world are Cambodia, Laos PDR and Myanmar. In addition, even if corruption is not an issue, the cost of lobbying is also equally problematic for the concerned private party. Requesting the government process to represent a private party's claim in the AFTA DSM is more of a barrier than a procedural step.[1223]

Secondly, the consultation process of the 2004 Protocol on EDSM and the WTO is similar. A party can make a request for consultation against the complaining party or another party caused by the nullification or impairment of the benefit of the other party under the covered agreements. The request must be written to the responding party with the specific measure at issue, the facts and the legal basis. Moreover, like the WTO the 2004 Protocol also encourages its member states to resolve their disputes through consultation and settle them by amicably.

Thirdly, the provisions to adopt a panel in the 2004 Protocol and the WTO DSM are very similar. The establishment of a panels in the EDSM is similar to the WTO in that it requires a brief summary of the legal basis of the compliant. Like the WTO, ASEAN panels are composed of three panellists, except in special cases when the parties to the dispute agree to five panellists within 10 days from the establishment of the panel. The function of the panel and the panel procedures in the EDSM are very close to a WTO panel, which exactly mirrors that in Article 11 of the WTO DSU. The function of the

[1222] Puig and Tat, above 1209, page 292
[1223] Puig and Tat, above 1209 page 292

panel[1224] is to make an objective assessment of the dispute, including examining of the facts of the case and conforming with the provisions of the covered agreements, as well as exchanging written submissions and rebuttals.[1225] However, the panels are slightly different. Those in the ASEAN are instructed to follow the working procedures in Appendix II.[1226] They are not allowed to derogate from the provisions mandated by Article 8.1.[1227] The panels in the WTO DSM, are also instructed to follow the working procedures in Appendix 3; however, they are allowed to develop their own ad hoc working procedures.[1228] The provision between the two systems pursuant to the working procedures of the panel is exactly the same, but the main difference is that Article 8 of the WTO DSU allows nationals to serve as panellists, whereas, only nationals of third parties are allowed to serve on a panel in the ASEAN DSM without the express permission of the parties to the dispute.[1229]

Fourthly, the members of an Appellate Body (AB) should be chosen by the ASEAN Economic Ministers. They serve for a four-year period and each person may only be reappointed once.[1230] Parties to the dispute may wish to appeal the case by submitting an appeal to the AB. Unlike the WTO, ASEAN members are not given a period of grace to consider whether they want the case to be appealed or not.[1231] However, the strict timelines in the 2004 Protocol are slightly similar to those in the WTO and provisions of the panel and appellate reports are also adopted in the Protocol whereas

[1224] For more detailed discussion see, Chapter five
[1225] Article 8.1 of the EDSM
[1226] Working Procedures of the Panel that is explained in Appendix II of the Protocol, those who are qualified to become members of the panel must have well-qualified governmental and non-governmental individual.
[1227] Joseoh Wira Koesnaidi, Jerry Shalmont, Yunita Fransisica and Putri Anindita Sahari, For a more effective and competitive ASEAN disputes settlement mechanism' (2014) 06 SECO/WTI Academic Cooperation Project working paper <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2613871>, page 16 accessed 13 May 2014
[1228] Ibid, page 16
[1229] Ibid, page 17
[1230] Article 12 of the 2004 Protocol
[1231] Article 9.1 of the 2004 Protocol

there is a consensus against adopting the reports in the dispute settlement procedure of the WTO.[1232]

Fifthly, institutions such as the SEOM and the ASEAN Secretariat closely resemble the dispute settlement mechanism of the WTO. The SEOM has a duty to administer the 2004 Protocol. The ASEAN also has a Secretariat that provides multifunction assistance for the implementation of ASEAN agreements and decisions, as stated in Articles 17, 19 and 19.2 of the 2004 Protocol.[1233]

Sixthly, one of the similarities between the 2004 Protocol and the WTO is the use of a 'negative consensus'.[1234] This means that the SEOM will establish a panel and adopt the reports of the panel or Appellate Body within the timeframe set out in the EDSM, unless it decides by consensus not to do so.[1235] The aim of this consensus tool is to expedite the dispute settlement and avoiding a deadlock. For example, a panel must be formed within forty five days of the SEOM receiving a request to form one, unless the SEOM decides by consensus not to do so.[1236] Another example is that the compliance clause also applies the negative consensus principle.[1237]

The comparison of the timelines of the procedure in the EDSM and the WTO DSU is summarised in the flowchart below.

[1232] Koesnaidi, Shalmont, Fransisica and Sahari, above 1227, page 9

[1233] Article 19 of the Protocol also entrusts the Secretariat with tasks involving the settlement of disputes among member states. It is responsible for assisting the panels and AB members with matters concerning legal, historical and procedural aspects. Additionally, Article 19.2 of the Protocol stipulates that the Secretariat must also assist the SEOM to oversee the implementation of the panel and AB reports and receive all the documentation related to the dispute. In addition, the Secretariat is responsible for administering the ASEAN DSM Fund for the EDSM.

[1234] See Chapter 5 for a more comprehensive definition of 'negative consensus'

[1235] Michael Ewing-Chow and Ranyta Yusran, 'If you build it they still will not come: ASAN trade dispute settlement mechanism, (2014) National of Singapore University Journal, page 5 <http://cil.nus.edu.sg/wp/wp-content/uploads/2014/11/If-You-Build-it-They-Still-Will-not-Come-MEC-RY-03102014.pdf> accessed 13 November 2016

[1236] Article 5(2) of the 2004 Protocol

[1237] Article 16 of the 2004 Protocol

Table 6.1 shows comparison of timelines between the EDSM and the WTO DSU[1238]

EDSM		WTO	
Action	Day	Action	Day
- Request for Consultations	0	- Request for Consultations	0
- Reply to request for Consultations	10		
- Consultations begin	30	- Consultations completed	60
- Referral to SEOM	60 (max)	- Referral to DSB	80
- Formation of panel	105	- Composition of panel	100
- Panel report	165	- Panel report	370 (max)
- Adoption of panel report by SEOM	195	- Adoption of panel report by DSB	430
- Appellate Body report	225-255	- Appellate Body report	520
- Adoption of Appellate Body report by SEOM	255-285	- Adoption of Appellate body report by DSB	550

It can be seen from the above comparison table that the EDSM provides almost the half time that the WTO DSU provides for a panel and appellate body review. Each stage of the EDSM and the WTO DSU follows the same pattern with provisions for

[1238] Stefano Inama and Edmund W. Sim, *The foundation of the ASEAN economic community An Institutional and Legal profile* (Cambridge University Press 2015), page 132

consultations, good offices, conciliation and mediation, as well as arbitration by a panel. However, the ASEAN mechanism is less legalistic in nature than the WTO dispute settlement mechanism. The WTO DSM provides additional time for the parties to review the panel proceedings related to the appeal stage, whereas the ASEAN mechanism is beneficial in that the parties may not have to wait so long to find the panel. Also, the panel is allowed a 60-day periods to make an intelligent decision from the issuance of the final report and submission of a notice of appeal. In terms of the DSM process, the time the parties have to wait for a result from the beginning until the final judgment is as long as 445 days.[1239]

6.2.2 Non-utilisation of ASEAN procedures

The non-utilisation of ASEAN procedures will be addressed in this section in order to explain why ASEAN member states preceive the ASEAN free trade area DSM (the 2004 ASEAN Protocol on an Enhanced Dispute settlement mechanism – known as the EDSM) as a less preferable option than the WTO DSM. Despite its twelve-year history, ASEAN member states have never brought a single dispute to be resolved through the EDSM channels and one of the major reasons for the limited success of AFTA DSM is, arguably, the lack of a legal framework in the ASEAN DSM Protocol. It has been criticised and invoked less among members because of the dispute resolution process not because there are no economic disputes among ASEAN states or they are particularly averse to bringing a third-party dispute adjudication, as is explained below.

Furthermore, the EDSM has never been tested, which is why it is so ineffective[1240] and why ASEAN countries have not trust in their own dispute settlement

[1239] Sarinna Areethamsirikul, 'The impact of ASEAN enlargement on economic integration: successes and impediment under ASEAN political institution' (2008) Doctoral thesis University of Wisconsin-Medison
[1240] David Soon Siong Chin, 'Trade dispute settlement within ASEAN' in Yoong Yoon Lee, *ASEAN Matters Reflecting on the Association of Southeast Asian Nations* (National University of Singapore 2011), page 114

mechanism.[1241] Therefore, this part of the paper will be divided into two sections, the first of which will focus on the weakness of the ASEAN 2004 Protocol on Enhanced dispute settlement mechanism and the second part will contain a discussion of why ASEAN countries prefer to use the WTO dispute settlement mechanism to settle their disputes

6.2.2.1 Weaknesses of the ASEAN 2004 Protocol on Enhanced dispute settlement mechanism (The EDSM)

a) Problem with the 2004 Protocol

One of the major reasons of the limited success of the AFTA DSM is, arguably, the lack of a legal framework in the ASEAN DSM Protocol. This causes a lack of confidence in invoking and applying ASEAN agreements as the underlying legal authorisation, as well as the lack of maturity in many ASEAN institutions, particularly the EDSM. In addition, the obligations in the EDSM are not binding because of the voluntary nature of the whole process. There is no provision that requires disputing parties to respect and implement a decision or face sanctions for the failure to implement it.[1242] Thus, it is evident that the EDSM is inadequate compared to the WTO DSM and this is liable to cause problems.

Firstly, a number of agreements contained in the 1996 Protocol are not covered by the 2004 Protocol.[1243] Some of the agreements adopted after 1996 expressly refer to

[1241] Aletta Mondre, 'ASEAN Wider integration a response to crisis?' (2013) The 8th Pan-European Conference on international relations, page 14

[1242] Tanja A. Borzel, Lukas Goltermann, Mathis Lohaus and Kai Striebinger, *Roads to regionalism: genesis, design and effects of regional organisaion* (2nd edn, Routledge Taylor and Francis 2012)

[1243] The 1996 Protocol, Appendix I; and the 2004 Protocol, Appendix I. The 1996 Protocol covered forty seven economic agreements in its Appendix, while the 2004 Protocol covered forty six. For instance, the 1988 Memorandum of Understanding Brand-to-Brand Complementation on the Automotive Industry

the 1996 Protocol, but they are not included in the Covered Agreements in Appendix I of the 2004 Protocol.[1244] This means that there were economic agreements signed prior to 2004 that did not provide parties with access to a dispute settlement mechanism. As explained in Chapter five, it was stated in Article 24(3) of the ASEAN Charter and Article 1.2 of the 2004 Protocol that ASEAN member states were required to apply the Protocol in DSM 2004 to resolve any trade disputes that arose from the covered agreements (referred to as economic agreements) and any disputes related to the implementation, interpretation and application of current and future trade agreements. This means that the 2004 Protocol would automatically apply to any economic agreement signed after 2004 without the need to amend or update the Covered Agreement as stated in Article 1(1) of the 2004 Protocol. As can be seen, the gap of not including all the covered agreements was remedied with the entry into force of the ASEAN Charter.[1245] However, the applicability to future agreements to be concluded under the framework agreement is unclear and this may create uncertainty as to which ASEAN member states are covered by the dispute settlement agreement.[1246]

Secondly, some inadequacies still exist when compared to the WTO. For example, non-violation claims are not addressed in the 2004 Protocol. The jurisdiction of the AFTA dispute settlement mechanism should be applied of both violation claims and non-violation claims to ensure the long-term integrity of the AFTA, as mentioned in Article 26 of the WTO DSU. Accepting such non-violation claims will prevent AFTA member governments from performing actions that are not obviously covered by the AFTA, but which can seriously damage the trade benefits the AFTA was intended to deliver.[1247]

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under the Basic Agreement on ASEAN Industrial Complementation was a Covered Agreement in the 2004 Protocol.

[1244] See Appendix I of the 2004 Protocol

[1245] Tan, Phan, Yusran, Bernard and Beckman, above 1187, pages 67-69

[1246] James H. Mathis, Natalie Y. Morris-Sharma and Pieter Jan Kuijper*, From treaty-making to treaty breaking: models for ASEAN external trade agreements with non-ASEAN states* (Cambridge University Press 2015), pages 163-164

[1247] Jeffrey A Kaplan 'ASEAN's Rubicon: A dispute settlement mechanism for AFTA' (1996) 14(2) Pacific Basin Law Journal <http://escholarship.org/uc/item/8635n2c5> accessed 1 May 2014

Thirdly, there are no special procedures for less-developed member states.[1248] These procedures would protect the least developed countries in the ASEAN, such as Laos, Myanmar and Cambodia, in terms of a special procedure with special treatment.[1249] Therefore, under the AFTA DSM, the member states of developed countries with greater economic and political power can threaten the member states of less powerful and less-developed countries.

Fourthly, the impractical nature of the short timeframe for each process of the ASEAN DSM may have a serious negative effect on the efficiency of the Enhanced DSM,[1250] and is difficult to meet in practice. For example, the sixty-day timeframe for the panel to submit its reports[1251] is unrealistic and illogical[1252] because the panel will have to undertake many procedural steps from its establishment to the exchange of written submissions, meetings with the parties, and drafting an interim report before submitting it to the SEOM. Also, more time may be needed in cases where the panel has to seek expert advice.[1253] The time allowed for the panel to analyse and produce its findings is very short compare to the WTO practice, which normally takes almost sixteen months from the panel establishment of the panel to the circulation of its report.[1254] Also, there is no grace period for the parties to consider the panel's report. In addition, the EDSM provides from 60 up to 90 days for the Appellate Body, which is a longer timeframe than that provided for the Panel procedure. Since, the Appellate Body is responsible for fewer legal issues than the panel. ASEAN panels are likely to fail to follow

[1248] Puig and Tat, above 1209, page 288
[1249] Kaplan, above 1188
[1250] Mur, above 1186, page 9
[1251] According to Article 8.2 of the Protocol, ASEAN panels must submit a written report with their findings and recommendations within sixty days to submit their report to the SEOM.
[1252] Peter Van Den Bossche and Paolo R. Vergano, 'the Enhanced dispute settlement of ASEAN: A report on possible improvements' (2009), page 44
[1253] Krit Kraichitti, 'ASEAN free trade agreements: Policy and legal considerations for development' http://www.aseanlawassociation.org/9GAdocs/w3_Thailand.pdf accessed 12 June 2015, pages 11-12
[1254] See Articles 17.5 and 21.5 of the WTO DSU. A sample case, is the *Boeing V.* Airbus disputes, when it was more than five years before the report of the WTO appellate was circulated. For more see If you build, page 11

the compulsory timeframe in a number of cases and this could well prejudice to the credibility and attractiveness of the ASEAN DSM system.[1255]

Fifthly, appeals are limited under the EDSM, since the Appellate Body can only consider matters related to the interpretation of legal issues covered in the panel report and legal interpretations that are developed by the panel but are not matters of fact.[1256] Article 9(1) of the EDSM only provides a 30-day timeframe for the SEOM to consider of the report. However, the EDSM does not provide a period of grace after the submission of the panel report for the parties to decide whether any of them wants to appeal the report, whereas the WTO DSU procedures provide a twenty-day period for the parties to consider the panel report before the report is considered for adoption by the DSM, as states in Article 16(2) of the DSU. If the parties decide not to appeal the report, the DSU provides another sixty days for the DSB to consider the adoption of the panel's report according to Article 16(4) of the DSU.

Sixthly, the EDSM does not provide detailed rules on the working of good offices, conciliation or mediation. Since these provisions are copied from Article 5 of the DSU, the parties may wish to refer to the explanations provided by the WTO.

Seventhly, the ASEAN DSM fund, which is an innovative approach to the financing of a dispute settlement mechanism, is explained in Article 17. However, this provision is accompanied by a number of problems, the first of which is that it fails to stipulate the amount each member sate has to pay into the Fund or how the method of contribution should be decided.[1257] In terms of the funding costs of the DSM, the 2004 Protocol provides for the establishment of an ASEAN DSM fund, to which all the ASEAN member states equally contribute initially. This fund covers the expenditure of the panels, the Appellate Body, and any related administrative costs of the ASEAN

[1255] Vergano, above 1211, page 9
[1256] Kraichitti, above 1253, page 12 article 12.6
[1257] Chow and Yusran, above 1235, page 11

Secretariat.[1258] Moreover, the EDSM does not provide any guidelines on how panels and the Appellate Body should apportion the expenses of the dispute. It is silent about the proportion of the sum that each party should bear.[1259] It is important to note that all other expenses incurred by any party, including legal representation, are not covered by the DSM Fund and must be borne by that party. This will be discourage less-developed members, such as Laos, Cambodia, Myanmar and Vietnam, from utilising the mechanism of the protocol because the expenditure will burden their economy. Not only will they have to cover the expenses associated with the dispute, but they must also reimburse any legal fees.[1260]

In terms of the WTO DSU, it is less costly than bringing a dispute to the EDSM because it provides that the costs of the panel and Secretariat will be covered by the budget of the WTO Secretariat.[1261] However, the formula for apportioning the costs that must be borne by the members remains unclear in the ASEAN DSM. The protocol does not specifically provide any clear guidance on the apportioning of the costs to the parties involved in the dispute.[1262] This is difficult to reconcile with the ASEAN's ambition of establishing a rule-based community,[1263] since the cost of the DSM process is very high and the parties need to wait for a result for as long as 445 days.[1264]

b) The problem arises from the Senior Economic Officials' Meetings (SEOM)

One of the reasons the EDSM has never been fully invoked is the role of the SEOM in the dispute resolution process. As mentioned in chapter five, the SEOM

[1258] Article 17 of the 2004 Protocol
[1259] Chow and Yusran, above 1235, page 12
[1260] Joseoh Wira Koesnaidi, Jerry Shalmont, Yunita Fransisica and Putri Anindita Sahari, For a more effective and competitive ASEAN disputes settlement mechanism' (2014) 06 SECO/WTI Academic Cooperation Project working paper, page 24 https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2613871 accessed 13 May 2014
[1261] Chow and Yusran, above 1235, page 25
[1262] Koesnaidi, Morris-Sharma and Kuijper, above 1246, page 24
[1263] Vergano, above 1211, page 10
[1264] Article 15 of the 2004 Protocol

functions as an administrative organ for the protocol and to authorise the suspension of a concession in the covered agreement.[1265] For example, all steps lead to the SEOM in that complaints are initiated by a submission to the SEOM, the panels are composed by the SEOM, appeals to the Appellate Body are made to the SEOM, requests for arbitration for non-compliance are made to the SEOM, and reports for the arbitration are also authorised by the SEOM.

When closely examining the details of the protocol, it can be seen that the problem with the SEOM is that the process of settling disputes via the SEOM is an informal one. This informal approach allows the SEOM to appoint *ad hoc* panels rather than any kind of permanent tribunal.[1266] The SEOM has a duty to make rulings that are provided for in the Agreement or any of the covered Agreements.[1267] When the consultation fails to settle a dispute between states, the SEOM can decide not to establish a panel be consensus, as stated in Article 5.[1268] The 2004 Protocol specifically does not require a consensus by experts not to adopt a panel decision, and ASEAN member states still feel that some consensus is required in any procedure that involves the SEOM. This is also one of the barriers of the EDSM protocol.

Furthermore, the SEOM has a discretionary power to end a procedure. In addition, it should be noted that Article 4.3 of the 2004 Protocol confers a discretionary power on the SEOM to achieve an amicable settlement of a dispute without appointing a panel.[1269] This discretionary power of the SEOM is perceived to be a major drawback for the efficiency of the ASEAN dispute settlement mechanism.[1270] Another problem

[1265] Article 2 of the 2004 Protocol
[1266] Geoffrey B. Cockerham, 'Regional integration in ASEAN: institutional design and the ASEAN Way' (2010) 27(2) East Asia: An International Quarterly, http://tic.car.chula.ac.th/tsunami/104-ascc6/30516-regional-integration-in-asean-institutional-design-and-the-asean-way, accessed 10 May 2016 page 175-176
[1267] Article 5.1 of the 2004 Protocol
[1268] Article 5 of the 2004 Protocol
[1269] Chien Huei Wu, 'The ASEAN Economic Community under the ASEAN Charter; its external economic relations and dispute settlement mechanisms in Christoph Herrmann and Jorg Philipp Terhechte, *European year book of International Economic Law* (1st edn, Springer 2010), page 18
[1270] Mur, above 1186, page 12

with the SEOM is that the 2004 Protocol fails to provide any guidelines on the direction of the SEOM or any provision for such a right is subject to authorisation from the SEOM, and this could reduce the neutrality and reliability of the system as a whole.[1271] For example, if the SEOM is obliged to continue to make decisions in the ASEAN Way[1272] and reports may be adopted by a negative consensus, the enforcement of those reports will be more problematic. It is important to note that this dispute resolution mechanism is bogged down by the need for an ASEAN Way consensus among members.[1273] Another problem is that the SEOM is not a legal entity and it does not exclusively deal with free trade issues, which leads to the ASEAN framework being uncertain about ASEAN organs.

6.2.2.2 ASEAN countries' use of the WTO DSM

ASEAN countries' participation in the WTO will be discussed in this section. As mentioned above, the ASEAN DSM has never been used in the process of adjudication.[1274] This is not because there have been no economic dispute among ASEAN states, although only two-intra-ASEAN economic disputes occurred between 1996 and 2004[1275] which is a very low number. The lack of use of the ASEAN DSM may partly explained by the questionable effectiveness of the system.[1276] The two cases below show that the ASEAN members chose the WTO fora to solve their dispute instead of using the ASEAN forum.

[1271] Cockerham, above 1266, page 179
[1272] The problems of the ASEAN Way will be explained in section 6.2.2.2.
[1273] Chun, above , page 15
[1274] Unlike the WTO DSM, which was established in 1995, the ASEAN DSM, which was established in between 2004 and 2010, has never been used by ASEAN member states to resolve their trade disputes
[1275] It is important to note that the two economic cases occurred when the 1996 Protocol was replaced by the 2004 Protocol.
[1276] Lornard Bartels and Federico Ortino, *regional trade agreements and the WTO legal system* (Oxford University Press 2006), page 352

a) Examples of intra-ASEAN trade disputes[1277]

ASEAN members use WTO DSU systems to settle their economic dispute rather than applying their own dispute settlement mechanism. To date, WTO members from ASEAN countries such as Indonesia, Malaysia, the Philippines and Thailand have submitted a complaint or been a respondent in a dispute under the WTO. It is clear that ASEAN member states have demonstrated that they are prepared to have their trade disputes dealt with by the WTO.[1278]Two examples of intra-ASEAN trade disputes are the case between Malaysia and Singapore based on the prohibition of imports of polyethylene and polypropylene in 1995 and the case between the Philippines and Thailand over cigarettes in 2008-2011. Furthermore, intra-ASEAN trade disputes are likely to be resolved by negotiation. The details of both cases are provided below.

The first case that was brought to the WTO was Singapore's complaint against Malaysia's prohibition of the importation of polyethylene and polypropylene[1279] which were one of Singapore's major exports in 1995. Singapore exported a significant volume of plastic resins to Malaysia and argued that Malaysia's import ban violated its obligations under the General Agreement on Tariffs and Trade (GATT) 1994 and the Agreement establishing the WTO. This case arose from the Malaysian government's imposition of a system that required importers of polyethylene and polypropylene to obtain an import license from the Ministry of International Trade and Industry under the Customs Prohibition of Imports Amendments No.5 Order 1994 on the 15th March 1994.

[1277] It is important to note that intra-ASEAN disputes are separate from trade disputes. There was a dispute between Cambodia and Thailand over the Temple of Preah Vihear during 2010-2013, which was brought to the International Court of Justice (ICJ). A dispute between Malaysia and Singapore in 2003 regarding land reclamation was settled using an Ad Hoc tribunal under the UNCLOS. A dispute between Malaysia and Singapore over Pedra Branca from 2003 to 2008, was settled by the ICJ. A dispute between Indonesia and Malaysia over Sipandan-Litigan during 1998-2002 was settled via the ICJ, and a dispute over the Temple of Preah Vihear between Cambodia and Thailand during 1959-1962 was also settled via the ICJ. For more information see, Hadi Soesastro, 'Regional economic cooperation and its institutionalisation' (2003) CSIS working paper, pager 15 <http://www.csis.or.id/papers/wpe071> accessed 1 May 2015 save file wpe071

[1278] Das, Menon, Severino and Shrestha, above 1207, pages 392-394

[1279] Current status see; WT/DS1/1, WT/DS1/2 – official document available from WTO website at www.wto.org

A letter of no objection from the Malaysian producer, Titan Chemicals was approved. Singapore asked for a consultation with Malaysia and quickly established a panel. However, Singapore and Malaysia managed to settle the dispute bilaterally later, and Singapore withdrew its complaint on the 19th July 1995. This case appears to have taken place a year before the ASEAN agreed its own DSM (The 1996 Protocol on Dispute Settlement resolution); however, the fact is that the ASEAN mechanism existed at the time of the dispute but the two disputants ignored it. One of the reasons is that it did not contain a formal dispute settlement procedure and it did not contain all the highlights of the prevailing practice in the ASEAN for settling intra-ASEAN disputes.[1280]

The second more recent case in 2011 between the Philippines and Thailand concerned a WTO dispute over Thai fiscal and custom measures to import cigarettes from the Philippines.[1281] The dispute was based on an allegation by the Philippines of the partial and unreasonable application of valuation practices, excise tax, health tax, TV tax, VAT, retail licensing requirements and import guarantees imposed upon cigarette importers.[1282] The Philippine government claimed that Thailand administered these measures in a partial and unreasonable manner thereby violating Article X:3(a) of the GATT 1994.[1283] This case was in contrast to the trade dispute between Malaysia and Singapore described above. The Philippines requested consultations and invoked the WTO dispute resolution procedure and the countries settled the matter amicably after singing the ASEAN Charter in Singapore without haveing to resort to formal dispute settlement mechanisms.

[1280] Tanm Phan, Yusran, Bernard and Beckman, above 1187, pages 64-66

[1281] WTO, Thailand- Customs and Fiscal Measures on Cigarettes form the Philippines, Request for consultations by the Philippines, WT/DS371/1, 12 February 2008 and The panel and Appellate Body reports, WTO/DS371/R and WTO/ DS371/AB/R, respectively, are available at <http://www.wto.org/english/ tratop_e/dispu_e/cases_e/ds371_e.htm>

[1282] (World Trade Organization, current status Thailand customs and fiscal measures on Cigarettes from the Philippines 2010.

[1283] WTO, Thailand; Customs and Fiscal Measures on Cigarettes from the Philippines, Request for consultations by the Philippines, WT/DS371/1, 12 February 2008

However, the Philippines failed to reach a satisfactory resolution with Thailand[1284] and requested the establishment of an arbitration panel on the 29th September 2008 at a time when the Protocol for Enhanced Dispute Settlement Mechanism (EDSM) was already in force and before the Charter was totally ratified by the member states later that year. This means that the dispute between the Philippines and Thailand could have been resolved in accordance with the Vientiane Protocol - EDSM but it was not. The Philippines requested a WTO panel instead of applying the ASEAN EDSM. Subsequently, Thailand appealed the panel's decision to the appellate body and the appellate body upheld the entirety of the panel's decision in its report.[1285]

One thing is clear from these two disputes, namely, that ASEAN states use the WTO dispute settlement mechanism after they have exhausted negotiation and consultation. The fact that they have brought their disputes to the WTO and not the 2004 Protocol suggests that ASEAN member states trust the WTO mechanism more because it is potentially subject to compulsory jurisdiction and its awards are easily enforceable, whereas the 2004 Protocol is untried and untested. This illustrates that member states still have no confidence in the effectiveness of the ASEAN dispute settlement mechanism.[1286] There are several possible reasons why the 2004 Protocol is untested, as explained above in the Weaknesses of ASEAN 2004 Protocol on Enhanced dispute settlement mechanism.

b) Participation of ASEAN members in the WTO dispute settlement system

From 1995 to date, the WTO members from the ASEAN which have either initiated a complaint or acted as a respondent in a dispute under the system are Indonesia, Malaysia, the Philippines and Thailand. Singapore and Vietnam have so far

[1284] Thailand-Customs and Fiscal measures on Cigarettes from the Philippines, WT/DS371/R
[1285] Thailand-Customs and Fiscal Measures on Cigarettes from the Philippines, AB-2011-1, Read more page Indonesia Journal bookmark plus The UN or ASEAN, pages 322-326
[1286] Lean-Claude Piris and Walter Woon *Toward a rules-based community: An ASEAN legal service* (Cambridge University Press 2015), page 84

only participated as complinants, but not respondents. However, ASEAN countries have participated as third parties in numerouse other WTO disputes. An examination of the participated of ASEAN member states in the WTO dispute settlement mechanism (table below) can also explain why they may preferred to apply the alternative institutional mechanism available through the WTO. One of the reasons that no dispute has been brought for resolution under the 2004 EDSM is because of the trade liberalisation to which member states have been committed under the WTO in recent years. As a result, the WTO DSM is a more attractive option than an ASEAN instrument in terms of obligation, adjudication processes, as well as, institutions and jurisprudence.

As can be seen from the statistics of the participation of ASEAN member states in WTO dispute settlement systems in the table below, Singapore, Thailand and the Philippines have initiated complaints and Malaysia, Thailand and the Philippines have participated as third parties. In addition, Malaysia, the Philippines and Thailand have acted as either Appellants or Appellees. For example,[1287] Malaysia and Thailand were complainant parties as well as appellees in *Us-shrimp.*[1288] In *Indonesia-Automobiles*,[1289] the first case that was ever brought against Indonesia, the investment rules of that country were scrutinised and challenged by Japan, the US and the EC.[1290] Singapore in the *EC- lan cases*[1291] and the Philippines in the *EC- Banana cases*[1292] on the 25th September 1997 and Indonesia in the Brazil- *desiccated coconut case*.[1293]

[1287] For details of the sample cases, see Locknie Hsu, 'Application of WTO in ASEAN', page 376 <http://www.aseanlawassociation.org/docs/w7_sing.pdf > accessed 13 November 2016
[1288] WT/DS58/AB/R, Appellate Body report adopted 6 November 1998, Lockie Hsu, 'WTO and regional trade liberalization: implications for ASEAN, page 11
[1289] WT/DS54//R, WT/DS55/R, WT/DS59/R, WT/DS64/R, Panel report adopted 23 July 1998
[1290] Lockie Hsu, above 10, page 11
[1291] WT/DS 62/R, WT/DS67/R, WT/DS68/R 22 June 1998
[1292] WT/DS27/R/USA
[1293] Panel report WT/DS22/R 20 March 1997

Country	Total WTO disputes	Dispute Involving ASEAN Member	Dispute involving ASEAN+3
Indonesia	5 as complainant 4 as respondent 4 as a 3rd party	None	1 complaint against Republic of Korea 2 disputes brought by Japan
Philippines	5 as complainant 5 as respondent 5 as a 3rd party	1 complaint against Thailand	1 complaint against Korea 2 cases brought against Australia
Thailand	13 as complainant 3 as respondent 5 as a 3rd party	1 complaint brought by the Philippines	None
Malaysia	1 as complainant 1 as respondent 2 as a 3rd party	1 complaint brought by the Singapore	None
Singapore	1 as complainant 4 as a 3 rd party	1 case against Malaysia	None
Vietnam	1 as complainant 3 as a 3rd party	None	None
Cambodia Myanmar Brunei	None None None	None None None	None None None

Table 6.2: Participation of ASEAN member states in WTO dispute settlement[1294]

[1294] There were even more cases involving ASEAN countries as complainants, respondents or third parties in WTO dispute settlement. Thailand, Indonesia and the Philippines have been the most active participants in the region, having brought 13, 5 and 5 bilateral trade disputes to the WTO DSM respectively, while Vietnam has never brought a case to the WTO. Both Malaysia and Singapore were early users of the WTO DSM, when it was first operated in 1995. Malaysia and Singapore used it to bring a case against each other in 1995, which referred to the issue of Malaysia's prohibition of the import of polythylene and polypropylene. Lastly, the remaining ASEAN countries, namely Cambodia, Laos, Myanmar and Brunei, have never brought a trade dispute to the WTO. For example, Indonesia has been a complainant in 8 cases, a respondent in 2 cases and a third party in 8 cases. Thailand has been a complainant in 13 cases, a respondent in 3 cases and a third party in 56 cases. While the Philippines has been a complainant in 5 cases, a respondent in 6 cases and a third party in 14 cases. Indonesia has

The above table presents the statistics of the ASEAN member states that have had their disputes resolved by the WTO and the level of dispute in which they have engaged with partners in the ASEAN's external trade area (China, Japan, the Republic of Korea, Australia and New Zealand)[1295] and it can be seen that many ASEAN member states have brought their trade disputes to the WTO. Thailand used this highly legalised dispute resolution system the most and Singapore the least.[1296] As mentioned earlier, the use of the WTO mechanism shows that ASEAN member states trust the WTO system more than the ASEAN dispute settlement mechanism.

6.2.3 Criticisms of the ASEAN Charter

As mentioned in Chapter 5, the Charter extended the coverage of the Vientiane Protocol or (the EDSM) to all ASEAN economic agreements, as stated in Article 24(3). The ASEAN Charter expanded the applicability of the EDSM to include disputes that arose from all ASEAN economic agreements. It provided that all the disputes that arose from all ASEAN economic agreements should be resolved through the EDSM. The ASEAN wanted to introduce a rule-based system with the creation of the Charter, but states were not obliged to use the ASEAN institutions to resolve disputes and other issues related to these rules, which made the ASEAN Charter ineffective.[1297]

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initiated 3 consultation requests, 2 of which went to panels (WT/DS123,DS217, DS312); Malaysia pursued 1 panel case against the US (WT/DS58); the Philippines launched 4 cases, one of which was pursued in panel proceedings (WT/DS22, DS61, DS270, DS271); and Thailand initiated 11 cases against 6 different WTO member states (WT/DS17, DS35, DS47, DS58, DS181, DS205, DS217, DS242, DS283, DS286 and DS324). In contrast, ASEAN members have not often been the target of WTO dispute settlement proceedings. There has been 1 dispute involving the Indonesian auto regime (WT/DS54, DS55, DS59 and DS64); a challenge to Thai anti-dumping duty on H-beams (WT/DS 122) and several cases against the Philippines (WT/DS74, DS102, DS195 and DS 215. Read more in, Bartels and Ortino, above 94, page 353 and https://www.wto.org/english/tratop_e/dispu_e/dispu_by_country_e.htm

[1295] Lisa Toohey, 'When Failure indicates success: understanding trade disputes between ASEAN members' in Charles Harvie, Dioniosius Narjoko and Sothea Oum, *Economic integration in East Asia* (Routledge 2015)

[1296] Bartels and Ortino, above 1276, page 353

[1297] Lee, above 1188, page 193

Although the ASEAN Charter improved the ASEAN's dispute resolution system by transforming the ASEAN from a loose intergovernmental cooperative to a formal international organisation, it remained a complex process.[1298] For instance, the Charter still repeated that most parts of existing dispute resolution mechanisms should continue to be followed ASEAN practices reflected the ongoing problems facing the association, which the ASEAN Charter refused to address, as well as failed to clarify.[1299] The limitations of the Charter are explained below.

a) Scope of the Charter

The first limitation of the Charter[1300] is that there is no mandate for the ASEAN member states to use these fora to resolve their disputes, neither is there any authorised agreement to impose a mandatory requirement for the use of these fora and this means that the ASEAN Charter is not a compulsory mechanism. This problem is reflected in Article 24(3), which provides that all trade disputes concerning the covered agreements should be resolved through the EDSM; however, the Charter does not force states to use the EDSM to settle their trade disputes because the EDSM itself allows member states to use other fora. This rule creates a conflict between the EDSM and the ASEAN Charter. Moreover, it is stated in Article 22 of the Charter, which relates to the general principle of dispute settlement that the 'ASEAN maintains and establishes dispute settlement mechanisms in all fields of ASEAN cooperation.' This means that the ASEAN Charter can be used indirectly as an alternative to the trade mechanism, which does not claim exclusive jurisdiction over disputes, apart from those concerning economic agreements, for which the ASEAN 2004 Protocol shall govern under Article 24.[1301] For example, there are no sanctions are applied by the economic commitment in

[1298] Lee, above 1188, page 193

[1299] ASEAN Studies Centre, *The ASEAN Community: Unblocking the Roadblocks* (2008 Institute of Southeast Asian studies), page 9

[1300] It was signed by ASEAN leaders in November 2007 and came into force on 15th December 2008.

[1301] Article 24 of the Charter relates to the dispute settlement mechanisms in specific instruments and states that where none are specifically provided, disputes that entail the interpretation or application of

the event of a breach of the Charter. In this case, Article 22 provides for the establishment of a dispute settlement mechanism, but it does not determine the kind of mechanism that should be used and it does bring the issue to bear; also, no process or timeframe is prescribed.

b) Problem with the ASEAN Summit (problem of insufficient judicial)

As mentioned in Chapter 5, the relationship between the ASEAN DSM Protocol and the ASEAN Charter is shown in Articles 26 and 27 of the ASEAN Charter and the Protocol. Article 26 provides that 'unresolved disputes pertaining to political leaders have to be referred to the ASEAN Summit for a decision'.[1302] Additionally, the ASEAN Summit is also to decide cases of serious breaches of the Charter or non-compliance.[1303]

However, although the ASEAN Summit is not a court or an arbitral tribunal, its role as a final arbitrator and enforcer may provide political judgment for ASEAN member states. The ASEAN Summit is a policy-making body that operates in the ASEAN Way and the decision-making is based on a consensus.[1304] In terms of enforcement and compliance, the ASEAN Charter provides ways to ensure compliance with the findings, recommendations or decisions of an ASEAN dispute settlement mechanism.[1305] According to Article 27 of the Charter,[1306] the Secretariat should comply with the findings, recommendations and results of an ASEAN DSM and submit a report to the ASEAN Summit. It is stated in Article 27 (2) that 'any member state affected by non-compliance with the findings, recommendations or decisions resulting from an ASEAN dispute settlement mechanism, may refer the matter to the ASEAN Summit for a decision', while Article 20(4) of the ASEAN charter indicates that 'in the case of a serious

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ASEAN economic agreements shall be settled in accordance with the ASEAN Protocol on Enhanced Dispute Settlement Mechanisms.

[1302] Das, Menon, Severino and Shrestha, above 1207, page 385

[1303] Chow and Yusran, above 1235, page 16

[1304] Article 7(2)(b) of the ASEAN Charter

[1305] Article 27 of the ASEAN Charter

[1306] Article 27 of the ASEAN Charter

breach of the Charter or non-compliance, the matter shall be referred to the ASEAN Summit for a decision.' However, it is important to note that this provision does not denote what ASEAN Summit's decisions could entail when acting in the capacity of decision-maker on the matters explained above.[1307] One ASEAN scholar questions that 'what procedure must be followed, or how should such a dispute be resolved and by what mechanism, or could these decisions impose sanctions, declare duties to make reparations (analogous to consequences of breaching international obligations in Articles on States' responsibility) or affect the membership status of non-complying ASEAN member states?' Furthermore, the ASEAN still does not mention any provision of how the Summit should make its decision when a consensus cannot be reached. These vague guidelines that appear in ASEAN Summit decisions will require a political solution rather than a legal one.[1308] Furthermore, it is unclear whether the term 'non-compliance' applies to any of the ASEAN instruments or only the ASEAN Charter. There are no criteria to determine when a breach is sufficiently serious to merit being referred to the ASEAN Summit.[1309]

The ASEAN Summit acts as the highest governing body of the organisation.[1310] The nature of the ASEAN Summit is that of a political body that is only convened twice a year, when a final decision is made by consensus thus giving an opportunity to review the dispute. This consideration is based on the presence of the political content in some aspects of ASEAN dispute settlement mechanisms. Critics are also wary of vesting the ASEAN Summit with the power to make a final decision, fearing that the decision will

[1307] Tan, Phan, Yusran, Bernard and Beckman, above 1187, page 5
[1308] Desierto, above, 1200, pages 40-41 and Tan, Phan, Yusran, Bernard and Beckman, above 1187, page 88
[1309] Paolo R. Vergano, The ASEAN dispute settlement mechanism and its role in a ruled base community: overview and Critical comparison', (2009) AIELN, page 8
[1310] The ASEAN Economic Ministerial Meetings has been the decision-making organ for economic matters since 1976. The supreme decision-making authority is the ASEAN Heads of Government Meeting, also known as the ASEAN Summit.

inevitably be politically driven. These conditions are also perceived to slow down the process.[1311]

As mentioned above, the ASEAN Summit's decision-making process is guided by the principle of consensus, which is the weakest point of the ASEAN structure. It shows that the ASEAN lacks an integrated decision-making structure for the ASEAN Summit to resolve an unresolved dispute and suffers from institutional and procedural deficiencies. If consensus is to be used, the Charter is silent on how the ASEAN Summit should make a decision where a consensus cannot be reached, which exacerbates the institutional and procedural deficiencies.[1312]Article 27 that relates to non-compliance causes the same uncertainty as Article 26.[1313] The power of the ASEAN Summit to make decisions is one of the reasons why no disputes have been brought to the ASEAN DSM because members are afraid that their diplomatic and political relationships will be controlled by the DSM.

c) The issue of compliance

The criticisms of the Charter have focused on its lack of mechanisms and lack of legitimacy to ensure compliance with ASEAN obligations including norms related to democracy, human rights and fundamental freedom, social justice, the rule of law and good governance.[1314] The legal status of the association consists of principles, structures, and practices.[1315] The incorporation of ASEAN law and international law among ASEAN member states is problematic, which leads to the lack of a direct effect and a problem of normative transplantation as long as there is insufficient institutional and legal judicial consistency in the ASEAN.[1316] The incorporation covers the binding nature and question

[1311] Kraichitti, above 1253, page 12
[1312] Chow and Yusran, above 1235
[1313] Kraichitti, above 1253, page 12
[1314] ASEAN Studies Centre, above 1129, page 10
[1315] Ibid, page 10
[1316] Desierto, above 1200, page 298

of obligation involved in the layers of the ASEAN and international scope within each member state.

The absence of a sanctions regime for non-compliance for the violation of its provisions and of other ASEAN instruments is also a problem for the ASEAN, reflected in its continued informality.[1317]

d) Relatively inefficient institutional structures

In the context of ASEAN, its institutions have always been at the centre of criticism of the association. The analysis of formulating the ASEAN Charter demonstrates the limits within which ASEAN institutionalisation has been used to settle disputes in the ASEAN. The ASEAN Secretariat is only standing centralised institution.[1318] The ASEAN is a weak international organisation with a relatively inefficient institutional structure of economic interdependence.[1319] The new institutions organs are presented in the new Charter, but their functions and roles and how they relate to each other still lack clarity. Attention also needs to be drawn to the opinion of Helen E.S. Nesadurai that regional institutions are weak because member countries prefer them and insist on non-intrusive, intergovernmental mechanisms for decision-making, enforcement and flexible adjudication and consensus. [1320] The change in these features of the institutionalisation and decision-making of the ASEAN give a mixed picture of the Association.[1321] The slow institutional evolution of the ASEAN's structures caused by the political nature of the Association as a loose form of inter-governmental cooperation reflects a strong desire to highly prioritise the retention of national sovereignty.[1322] The instrument is very loose which makes gaping problems. On the one hand, there is some criticism of the slow pace of the ASEAN's institutional inability to match its political-

[1317] Sukma, above1190, page 12
[1318] Nghee, above 1126, page 152
[1319] Kivimaki, above 1197, page 405
[1320] Severino, Menon and Bas, above 1207, page 28
[1321] Soedastro, above 1277, pages 4-5
[1322] Ibid, page 6

diplomatic achievement with cooperation in the economic and social fields followed by the ASEAN's objective. After the ASEAN was established in 1967, it did not set regional organisations any task in the context of institutional structures, which makes it dysfunctional and very slow. The ASEAN lacked fixed institutions in the formative year[1323] and the ASEAN Secretariat is still the only standing centralised institution[1324] which contributes to the slow growth of the ASEAN's organisational structures. Although several attempts have been made to restructure the institutional framework, there has only been limited change. The ASEAN Economic Community (AEC) itself was designed to maximise the flexibility of ASEAN member states and there are various organisational structures and mechanisms to aid the integration process. The limitation of the Secretariat's functions has a negative effect on the ASEAN's institutional structure because it is overloaded with a great many coordinated activities, while the secretariat has limited resources at its disposal.[1325]

This Charter is regarded to be somewhat deficient and this has led to a number of attempts to strengthen the ASEAN Secretariat recently, since it is perceived to be the major weakness of the Charter. As for the EDSM, it is stipulated in Article 19, which refers to the function of the ASEAN Secretariat that the Secretariat is responsible for assisting the panels and the Appellate Body, especially with legal, historical and procedural aspects. The Vientiane Protocol[1326] also strengthens the function of the ASEAN Secretariat. However, the EDSM only includes a small part of the Secretariat's responsibility compared to the WTO. Firstly, the Secretariat will facilitate consultation among ASEAN bodies and seek the most efficient way to establish appropriate institutional arrangements at programme or project level. Secondly, the Secretary-General is obliged to provide an annual report to the ASEAN Summit and the ASEAN

[1323] R. P. Anand, ASEAN identity, development and culture (Sison's printing press 1981)
[1324] Nghee, above 1226, page 152
[1325] Das, Menon, Severino and Shrestha, above 1207, page 431
[1326] The 2004 Protocol on Enhanced dispute settlement mechanism, signed in Vientiane by the Economic Ministers at the Eleventh ASEAN Summit, 29 November 2004. It should be noted that the 2004 Protocol on Enhanced Dispute settlement Mechanism, as reflected in the ASEAN Concord II in Bali, Indonesia.

Secretariat has to undertake a formal review every two years.[1327] Furthermore, as already mentioned, the role of the ASEAN Secretariat is to assist the panels and the Appellate Body, especially in legal, historical and procedural areas by providing secretariat and technical support and assisting the SEOM to monitor the implementation of the findings and recommendations of the panel;[1328] however, it has no legal power.[1329] Although the role of the ASEAN secretariat and its performance, the ASEAN Secretariat and the Secretary General of the ASEAN was enhanced by the Charter, they still play a very limited role in policy-making and are not capable of acting against obstinate members.[1330]

One ASEAN scholar gave an example that 'the ASEAN secretariat remains at the margins of ASEAN policy-making since it does not possess delegated powers to command individual member states to comply or devise common policies on its own initiative.[1331] Similarly, according to the opinion of other ASEAN scholars, 'the ASEAN Secretariat is exactly like someone who works in an office, but only handles the paperwork and arranges meetings for the organisation and is never given the power to make important decisions or initiate policy.[1332] Moreover, another ASEAN scholar added 'The ASEAN Secretariat is for administrative purposed only. It works on documents and letters, bit it is not a decision-making body.[1333] It appears that the problem with the Secretariat is that member states realise the limitations of this ASEAN organ, especially the limited function of the Secretariat through the functions of ASAN dispute settlement mechanisms. Besides, there is a serious lack of legal professionals and the officers of the

[1327] Hidetake Yoshimatsy, 'Collective action problems and regional integration in ASEAN' 2006 198(06) CSGR working paper, page 12 < http://wrap.warwick.ac.uk/1907/> accessed 1 March 2015
[1328] Article 19 of the 2004 Protocol
[1329] Hank Giokhay and Lester Tay Yi-xun, 'Regional integration and inclusive development: lesson from ASEAN experience' (2008) 59 Asia-Pacific research and training network paper series, page 15 <http://artnet.unescap.org/pub/wp5908.pdf> accessed 12 August 2015
[1330] Pattharapong Rattanasevee, 'Towards institutionalised regionalism: the role of institutions and prospect for institutionalization in ASEAN' (2014) 3(556), Springerplus, page 5 <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4182320/> accessed 12 August 2015
[1331] Giokhay and Tay Yi-xun, above 1329, page 15
[1332] Rattanasevee, above 1200, page 6
[1333] Asian Development Bank: *Institutions for Regional Integration: Toward an Asian Economic Community* (Asian Development Bank Manila 2010)

ASEAN Secretariat lack the capacity under the EDSM to constitute some of the ASEAN's infamous organs, such as support for panels and Appellate Body. According to Dr. Surin Pitsuwan, formerly a member of the ASEAN Secretariat, the Secretariat consists of 260 personnel, including seventy nine staff openly enrolled from member stares. They are responsible for the execution of the general administrative functions of the ASEAN Secretariat under the ASEAN Charter, as well as under the 2004 Protocol, while the WTO recruits more than 600 staffs only to handle trade cooperation and the settlement of disputes.[1334] All of the above evidence clearly illustrates that the lack of power of the ASEAN Secretariat is a problem for the ASEAN that need to be resolved. Therefore, some possible means of further empower the ASEAN Secretariat will be discussed in Chapter seven.

6.2.4 The ASEAN Way

The structure of the ASEAN dispute settlement mechanism (DSM) follows the peace- seeking cultural norms and traditions of the ASEAN by using political, diplomatic and relation-based means to prevent and settle conflicts. The ASEAN cultural norms have the unique characteristic of compromise with the aim of avoiding formal disputes and trying to resolve conflicts through consultation and mediation wherever possible. The ASEAN followed the ASEAN Way in both decision-making and dispute settlement, which means that it was founded as a loose structure organisation.[1335] The ASEAN Way is based on three principles, namely, respect for state sovereignty, non-intervention and the peaceful resolution of conflict. In other words, the ASEAN Way entails avoiding or preventing conflict rather than resolving it.[1336] Diplomatic negotiation is preferred

[1334] Tan, Phan, Yusran, Bernard and Beckman, above 1187, page 79

[1335] Seong Min Lee, 'ASEAN: brief history and its problems' (2006) Korean Minjok Leadership Academy International program http://www.zum.de/whkmla/sp/0607/seongmin/seongmin.html

[1336] The explanation of the ASEAN Way read, section 1.4.2 of Chapter one. Added that, the main constitutive documents of the pre-Chapter ASEAN are the 1976 Treaty of Amity and Cooperation (TAC) and the 1967 ASEAN Bangkok Declaration. Both instruments clearly defined the terms of Southeast Asian regional economic, political and social-cultural cooperation under an intergovernmental framework

regardless of the designation of an enhanced dispute settlement mechanism.[1337] The means of settling a dispute by diplomatic negotiation and consultation has significant advantages over legal or judicial approach, such as greater flexibility, privacy, control of the outcome by the parties, reduced cost, and the balance of political and legal considerations, which can result in being too power-orientated.

In terms of the decision-making process, this is all finally based on consensus, which is more likely to be of a negotiable and political or diplomatic nature rather than rule-based and legal means. The definition of consensus does not assume that everyone must agree; rather, it assumes that at least no-one objects to the proposal. Consensus does not require unanimity, but rather leads to finding a common interest that could appeal to all. It is important to note that it is sometimes much harder to reach consensus using the decision-making and ASEAN dispute resolution process. For example, case that require the consensus of ten members will be more complex and entail more disputes than those that require the consensus of six members.

The limitations of the principle of consensus can be observed from the EDSM Protocol of the ASEAN dispute settlement in the ASEAN Charter. As Gonzalo Villalta puts it, the problem with the ASEAN Way is its inability to recognise that political disputes and trade disputes are very different in nature. The ASEAN Way has different functions with respect to economic integration and security cooperation.[1338] In terms of security cooperation, territory disputes may affect the region's peace and security and although the ASEAN Way is an effective method commonly used to address the political disputes, it is not practically to apply it to economic disputes. The effectiveness of the ASEAN Way to resolve political disputes is evidenced by the willingness of each ASEAN state government to commit to the ASEAN Way, for example, they agreed the Treaty of Amity and Cooperation (TAC) which is now codified in the ASEAN charter.

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operating through member states consensus vote (otherwise known as the 'ASEAN Way') Read more in, Desierto, above 1200, page 12

[1337] WU, above 1269, page 3

[1338] Leviter, above 1188, page 171

Therefore, each country needs to resolve problems in a way that does not harm the good relationship between states in the ASEAN. In addiction, the power of the courts is a powerful incentive for the disputants in domestic disputes between neighbouring countries to reach an amicable settlement rather than imposing penalties or it is easier to try to settle than incur the risk of litigation, the outcome of which is sometimes uncertaint. Therefore, in the opinion of Professor Paolo, the ASEAN Way reflects 'the less confrontational nature of Asian culture which leads governments to prefer negotiation and a diplomatic solution'.[1339]

However, one of the differences between political and economic disputes is that economic disputes tend to have a very real impact on people[1340] and economic disputes need to be resolved urgently, which means that the ASEAN Way is not a suitable way to handle them.[1341] The critical commentary of the use of the ASEAN Way to settle disputes raised a number of fundamental questions that relates to how the incorporation of the ASEAN Way contributes to the unpopularity of the AFTA DSM among ASEAN member states, the impacts of the ASEAN Way on the dispute resolution in ASEAN, and the way in which the ASEAN Way serves as a barrier to effort to integrate the ASEAN, particularly in the economic fields. These questions are answered below.

As mentioned above, if the ASEAN Way continues to be applied to economic disputes, it will lead to pressure for modification. The ASEAN Way is also identified as the source of the slowdown in regional cooperation, [1342] which makes the implementation of ASEAN Economic Community commitment and domestic reform a slow process.[1343] Moreover, if ASEAN countries choose to adopt the ASEAN Way of

[1339] Vergano, above 1211

[1340] Such as they directly affect income levels, job security, and living standards, to name only a few factors. Read more in, Puig and Tay, above 1209, page 294

[1341] Ibid, page 294

[1342] Kim Hyung Jong, 'ASEAN Way and its implications and challenges for regional integration in Southeast Asia' (2007 12 JATI), page 25

[1343] Siow Yue Chia, 'The ASEAN Economic Community: progress, challenges and prospects' (2013 440 Asian development bank institute), page 4 https://www.adb.org/sites/default/files/publication/156295/adbi-wp440.pdf accessed 13 January 2014

cooperation without a supranational institution for decision-making or enforcing community rules, they risk having no legal control of economic cooperation, which endangers further integration.[1344] This is because the nature of the ASEAN Way is based on formal and informal meetings through consensus-based decision-making and some academics are of the opinion that the application of the ASEAN Way to settle dispute remains a problem the ASEAN, as well as the lack of a provision of suspension for the violation of dispute settlements. The dynamics of the ASEAN Way in the realm of economic cooperation and how it could affect the proposed ASEAN Economic Community can be explained by several factors. a Firstly, the ASEAN Way is a process that avoids strict reciprocity. This reflects the unwillingness of members to be too legalistic, which means that the ASEAN was not founded on a formal dispute resolution mechanism and prefers a political and diplomatic resolution rather than a judicial one.[1345]Thus, the ASEAN is still unable to overcome discrepancies in the interpretation and application of the principles of its charter.

Secondly, the ASEAN's decision-making process remains guided by the principle of consensus.[1346] However, consensus entails an informal kind of negotiation and it is not explained how the consensus rule can apply when faced with a conflict of interests. In reality, all member states without exception are unwilling to make a consensual decision despite having the duty to do so because they misinterpret or even reject such a principle. The absence of consensus on important issues means that member states are encouraged to disagree and go their separate ways without the ASEAN taking a specific position on the given issue. Furthermore, the weakness point of this absence also leads to a lack of progress on many issues based on a lack of speed and results.

Thirdly, the ASEAN Way makes the ASEAN DSM an informality system, which acts on an ad-hoc basis. According to Robert Gallo, it rejects the need for an organised

[1344] Yan Luo, 'Dispute settlement in the proposed East Asia FTA' in book Lornard Bartels and Federico Ortino , *Regional trade agreements and the WTO legal system* (Oxford University Press 2006) page 425
[1345] Bartels and Ortino, above, 1276, page 50
[1346]Sukma, above 1190, page 12

structure, which facilitate functionality or problem-solving. For instance, the perspective of many national ASEAN leaders of the need to apply an informal doctrine to flexibly deal with disputes, rejects the need for established mechanisms such as courts to provide a solution to legal problems because it would undermine the alternative, e.g. group consensus.[1347] However, although the EDSM defines itself as a rule-based system, it has a political element; therefore, the end product is a system that is ruled by politics rather than the law.[1348] This demonstrates a visible tension between the desire for informality and the need of a rules-based system.

6.2.5 Diversity and ASEAN values

In order to prepare for an assessment of the future capacity of the ASEAN DSM, the core differences will be explained in this section, since they constitute one of the barriers to the development of the settlement of disputes within the ASEAN. The member countries of the ASEAN have diverse backgrounds, cultures, religions, ethnicity and political systems, both in the individual countries themselves and between the countries in the region. There are developmental gaps between well-developed and less-developed members, such as Cambodia, Laos, Myanmar and Vietnam, which makes it more difficult to develop the ASEAN among member states.[1349] Moreover, the ASEAN is confronted by a serious dilemma based on a diverse population, geographical conditions and different internal cultural norms.[1350] An evaluation of the system of trade dispute settlement in the ASEAN should include some cultural and the concept of

[1347] Robert Gallo, 'The future of informalism in the economic integration of ASEAN' (20120(2) JEAIL, page 497
https://litigation-essentials.lexisnexis.com/webcd/app?action=DocumentDisplay&crawlid=1&doctype=cite&docid=5+JEAIL+495&srctype=smi&srcid=3B15&key=532b688ac4457eb27080203987906026 accessed 1 May 2015
[1348] Puig and Tat, above 1209, page 296
[1349] Hung, above 1224, page 821
[1350] Biswa Nath Bhattacharyay, 'Prospects and challenges of integrating south and southeast Asia' (2014) (4) International Journal of Development and conflict, page 53 <http://www.ijdc.org.in/uploads/1/7/5/7/17570463/article_3.pdf> accessed 1 January 2016

'ASEAN values'. All the above reasons will give rise to a number of implications for the development of a dispute settlement mechanism through the integration of trade.

a) Different political and legal systems

One of the most significant differences is that it is difficult to find uniform political entities in the legislative system of the ASEAN. The legal systems in the ASEAN are a combination of Common law and Civil law systems, as well as religious laws such as Muslim or customary law. As a former British colony Malaysia uses a legislative system that originated from Anglo-Saxon law combined with the Common law. Since the South East states have been under controlled by various countries, the international relations in each colony country are pursued according to its motherland. For example, Indonesia has adopted the Continental law system of the Netherlands its formal colonial master as well as the Roman Dutch Law. Brunei Darussalam is governed under an absolute monarchy and its legal system is based on the English Common Law, while Singapore, the Philippines and Indonesia are democracies. Cambodia gained its independence from France, which influenced the Cambodian legal system. This is a Civil law mixture of French-influenced code customary law and communist theory as well as an increasing influence of Common Law. Malaysia is a constitutional monarchy and its legal system is based on the English Common Law. Thailand is democratic constitutional monarchy and the only ASEAN member state that has never experienced foreign rules.

Most of the ASEAN member states have been colonized and some have been forced to become communist.[1351] Thailand is the exception because it has not been colonised. The founding members of the ASEAN that are non-communist states are Indonesia, Malaysia, the Philippines, Singapore and Thailand, but they are used to suffering from economic problems and domestic problems in terms of political force and the legitimization of political leadership. The political stance of Laos and Vietnam is

[1351] Nghee, above 1226, page 157

communist, while Laos's legal system is based on traditional customs influenced by French legal norms and socialist procedures. On the one hand, Vietnam is one of the newest members, which has gained its independence from France. Is is a communist state, in which the political power rests with the communist party. The military rule and British force is slowly softening in Myanmar, which was communist and anti-communist before its independence.[1352] These different political systems among member states are a problem in ASEAN.

Different types of government are derived from the negotiation of several different political theories and governments' negotiation strategy. The impact of the explosion of democracy around the world at the same time questions the treaties among states adopted by different types of government. The role of domestic politics, the power of domestic lobbies, and the independence of the judiciary will continue to affect their involvement in the international economy. Therefore, when creating international dispute resolution mechanisms, member states and the organisation itself should think about the type of structure they are creating and the education their own citizenry will need in order to truly understand and support the new organisation. The other problem that concerns the settlement of disputes in the ASEAN depends on the diversity of the political systems in member states. Problems sometime arise from the coordination of the domestic implementation of ASEAN measures by member states rather than between them. Member governments sometimes fail to set targets and directions the commitments and implementation of their ambitious plans for economic liberalisation.

[1352] Ravichandran Moorthy and Guido Benny, 'Is an ASEAN Community achievable? A public perception analysis in Indonesia, Malaysia and Singapore on the perceived obstacles to regional community' (2012) 52(6) University of California Press, page 1058 <http://www.jstor.org/stable/pdf/10.1525/as.2012.52.6.1043.pdf> accessed 13 May 2015

b) Difference in the level of economic development

Development gaps between members, such as an income gap, institutions and infrastructure, are also weaknesses of the ASEAN. The CLMV countries[1353] may have implicitly accepted that membership would entail some level of economic integration;[1354] however, the weak domestic infrastructure of low-income members make it more difficult for other countries in Asia. The difference between member states' economy is also a problem; for example, Singapore is ranked as one of the freest economies in the world, whereas Cambodia is a small country, which generally affects the ASEAN's credibility in trade issues.[1355] As well as the differences in economic development, such as Singapore being the world leader in social and economic development, whereas Laos and Myanmar are still problem-ridden countries[1356] the diversity of their historical background has a direct impact on regional integration.

The other problem with the ASEAN is gab between the richest and poorest members, which mean that ASEAN countries are not ready to open up yet. There are many poor ASEAN economies, such as those of Cambodia, Laos, Myanmar and Vietnam and the challenge to their economic competitiveness, includes labor skills, lack of a developed product quality standard, and institutional infrastructure.[1357] The absence of a list of special or additional rules and procedures may create the potential issues of which rules apply. In conclusion, while the ASEAN has its weakness, it does not mean that it cannot achieve what is good for member states, especially in terms of economic integration.

[1353] CLMV refer to Cambodia, Laos, Myanmar and Vietnam
[1354] Leviter, above 1188, page 200
[1355] Joshua Kurlantzick, 'ASEAN's future and Asian Integration' (2012) Council on Foreign relations press <http://www.cfr.org/asia-and-pacific/aseans-future-asian-integration/p29247> page 12 accessed 13 May 2015
[1356] Vyacheslav Urlyapov, 'ASEAN Enlargement: Motives, Significance and consequences' (2010) International affairs special issue, page109
[1357] Moorthy and Benny, above 1227, page 1054

c) Diversity of religion and linguistic unity

A significantly sensitive diversity of religion and the historical influence of India and China are the unique characteristics of the region's culture, especially in terms of religion, art and politics; however, each country has its own individual style. For example, Islam predominates in Brunei, Indonesia, Malaysia, and the southern Philippines. Singaporeans and Filipinos believe in Confucianism and Catholicism, together with a large number of mixed-Chinese, European, Papuans, Laos Tai and Mon-Kmer speaking people.[1358] Buddhism is the main religion of Myanmar, Thailand and Laos, Cambodia and Vietnam. Vietnam's Buddhism is more like the northern Buddhism (Mahayana), whereas the rest of the region practices Theravada Buddhism.

Another important characteristic is the linguistic unity cutting across the boundaries established by colonial powers. For example, the Indonesian/Malay language is spoken throughout Indonesia, Malaysia and the southern Philippines, as well as in some settlements along the southern coastal regions of Thailand, Cambodia and Vietnam, although the dialects are different from region to region. Another example is the Tai language, which is spoken in Thailand, Shan State in Myanmar and Laos, again with some variation.[1359]

In conclusion, the reflection of the meaning of ASEAN culture not only includes the language of a number of ASEAN economic agreements, but also the meaning of different members of society.

d) Other problems

There are some problems that cause a barrier to the development of the ASEAN dispute settlement, the first of which is the lack of leadership in the ASEAN. Indonesia

[1358] Lee, above 1195

[1359] Mya Than, *Myanmar in ASEAN: Regional Cooperation Experience* (ISEAN publishing 2005), page 2

was the natural leader prior to the financial crisis because of its position as the most powerful country in the region with a great many natural resources, a large population, anti-communist society and a strong political system.[1360] However, the ASEAN cannot move forward without a clear leader and the ASEAN cannot be more stabilised without someone to control the implementation of policy measures.

The second obstacle is the language of the community, which is limited to sharing norms and values and a social identity that relies on long-term interests, but the ASEAN DSM states that the English language should be used in the proceedings. In this case, it would be better if three or four official languages were available as different languages are used in ASEAN countries. However, since there is no common language between ASEAN members, the use of English is a common second language of all countries, which makes it easier to conduct the proceedings.

The third obstacle is a lacks of public opinion surveys that would help provide a stable level of legitimacy. Without public support, the risk will become redundant in the future and there is currently insufficient to conceptualise the future of the ASEAN.

Section 6.3 Conclusion

The limitations of the ASEAN trade dispute settlement mechanism were explored in this chapter, as well as the problematic relationship between the ASEAN Charter and the ASEAN trade DSM. Not only do the problems with the ASEAN Charter contradict the legal framework, but also the use of the ASEAN Way, since the principle of resolution by consensus and the ASEAN dispute resolution mechanism do not go well together. The reasons why the ASEAN member states have not yet put the trade dispute resolution mechanism into effective use and why the dispute resolution mechanism has never has

[1360] Niklas Swanstrom, 'Regional cooperation and conflict management: lessons from Pacific Rim' Doctoral thesis Uppsala University, page 141

been used within the ASEAN have been examined in this chapter and found to be based on the fact that there have been no major conflicts or disputes among ASEAN countries. Thirty years after its establishment, the ASEAN has not yet applied its own formal dispute settlement or conflict resolution mechanism.

The study of the ASEAN's apparent reluctance to utilise its own DSM found that ASEAN member states prefer to continue the settlement of dispute using mechanism outside the ASEAN framework, such as the WTO, and this leads to problems of jurisdiction and the overlap of the trade DSM with the WTO DSM. Member states sometimes settle their disputes based on regional dispute settlement mechanism. The WTO has served as a good model for the ASEAN's dispute settlement process; for example, the arbitral panels are copied from the WTO, as well as the provisions on compensation and the suspension of concessions. The FTA dispute settlement mechanism appears to be used much less frequently than the WTO, and thus its record on dispute settlement is limited.[1361] However, the DSM remains an option rather a mandate due to the flexibility of the EDSM to resort to the outside systems of the ASEAN. This flecibility led to DSM not being obligatory in 2004.

In addition, it could be inferred that the authority of the ASEAN DSM is not an exclusive mechanism for resolving disputes that arise from ASEAN covered agreements because ASEAN member states do not trust their own mechanism or feel confident in using it since it cannot function well to settle conflicts. In other words, member states are afraid to settle a dispute using the DSM because confrontational behaviour creates bad feeling and has a negative effect on their diplomatic and political relationships. Moreover, ASEAN member states try to avoid using the DSM in any case because of its political influences, which is an importance factor in their lack of willingness to apply it.

The problematic relationship between the ASEAN Charter and the ASEAN trade DSM can be seen in a lack of enforcement, lack of compliance, and the political result of

[1361] Razeen Sappideen and Ling Ling He, 'Dispute settlement under free trade agreements: the Proposed Australia-China free trade agreement', (2001) 12(4) the journal of world investment and trade, page 581

a trade DSM in the ASEAN Way. Some designations of this ASEAN EDSM have even gone beyond the ASEAN Way and the passage of the ASEAN Charter has led to the ASEAN being criticised for ineffectiveness due to its requirement of consensus for decision-making and its continued reliance on the ASEAN Way. The reason ASEAN member states have not utilsed the judicial DSM is the result of the less confrontationist nature of the Asian culture based on the ASEAN Way.

It is essential to study the ASEAN problem related to dispute settlement to help ASEAN member states to solve any differences among themselves and also maintains the implementation of their agreements. The problems associated with the development of the ASEAN's dispute settlement mechanism are related to trade liberalisation and economic integration. The questions that need answering relate to how the ASEAN can enhance its economic integration through the innovations of its legal system, what aspects of a formal legal system can be maintained within the ASEAN, and how willing is the ASEAN to litigate the ASEAN measures of law to make full use of an enhanced dispute settlement mechanism. Therefore, the implementation of the ASEAN trade DSM and a model for the effective establishment of a credible dispute settlement mechanism for the maintenance of the ASEAN agreement on liberalisation and suggestions of how the ASEAN's legal framework could develop will continue to be explained in the next chapter.

CHAPTER VII

IMPLEMENTATION AND FUTURE DEVELOPMENT OF AN ASEAN TRADE DISPUTE SETTLEMENT MECHANISM

"Moving towards the ASEAN Economic Community, ASEAN should have a strengthen of the institutional mechanisms of ASEAN, including the improvement of the existing ASEAN Dispute Settlement Mechanism to ensure expeditious and legally binding resolution of any economic disputes"[1362]

Declaration of ASEAN Concord II

Section 7.1 Introduction

As seen in the previous chapter, the further liberalisation of trade has inevitably led to trade disputes, which can be resolved in various ways.[1363] The ASEAN Economic Community (AEC) was established in 2015 with the ultimate goal of achieving closer economic integration among ASEAN countries.[1364] However, the success of the ASEAN Free Trade Area (AFTA) depends on the implementation of an effective mechanism to settle trade disputes among member countries and an opportunity to test its performance. The increase in the number of free trade agreements also leads to an increasing number of dispute settlement mechanisms that cover compliance and

[1362] Declaration of ASEAN Concord II (Bali Concord II), Bali, Indonesia, 7 October 2003. (*TAPR* Document I.B.3.k). <http:// www.aseansec.org/15159.htm>, accessed July 1, 2012

[1363] Giovanni Maggi and Robert W. Staiger, 'Trade disputes and settlement', (2016) http://www.dartmouth.edu/~rstaiger/TradeDisputes_091516.pdf accessed 13 January 2015

[1364] Benny Teh Cheng Guan, 'ASEAN's regional integration challenge: the ASEAN process' (2004) (20) the Copenhagen Journal of Asian studies, page 70 http://rauli.cbs.dk/index.php/cjas/article/download/34/32 accessed 1 May 2015

enforcement associated with institutional involvement, particularly trade disputes.[1365] This raises the question of how the disputes that arise from these agreements can be resolved based on the effectiveness of the settlement mechanisms.

As mentioned in the previous chapter, both the ASEAN Charter and the enhanced dispute settlement mechanism, the so-called 2004 Protocol, and contain problems and limitations, and the dispute settlement mechanisms (DSM) in the ASEAN are criticised for their ineffectiveness and inherent lack of straightforwardness. The AFTA DSM has never even been tested, which illustrates that it fails to play a meaningful role; thus, it is evident that the ASEAN's capacity to prevent and resolve conflicts needs to be developed in order for the ASEAN to possess an efficient institutional structure. The preparation for the AEC requires the AFTA to seriously consider the adoption of an effective dispute settlement system and establish a useful new direction for an ASEAN dispute settlement mechanism to provide a coherent foundation for the construction of the AEC.

Before explaining the reform of the ASEAN dispute settlement mechanism within the field of trade conflict in the ASEAN, it is appropriate to take a close look at the concepts applied[1366] in order to identify the key issues involved in building such a community. The unification of the ASEAN member states entails institutional, dispute settlement, and structural challenges; however, the reform and strengthening of its institutions is perhaps the most serious of all challenges. Thus, the aim of this chapter is to answer questions related to the effectiveness of the dispute resolution mechanism utilised by the ASEAN. Some of the important questions regarding the ASEAN Protocol itself, as well as its institutions,[1367] will be addressed in this chapter; for example, was the 2004 Protocol reform a lost opportunity to further improve the ASEAN's regional

[1365] Songying Fang, 'The strategic use of international institutions in dispute settlement' (2010) Quarterly journal of political science, page 109 https://www.princeton.edu/~pcglobal/conferences/beijing08/papers/Fang.pdf accessed 12 June 2014
[1366] Michael Ewing-Chow,' Culture Club or Chameleon: should the ASEAN adopt legalization for economic integration?' (2010) 12 SYBIL, page 232
[1367] Ibid, page 232

system of dispute settlement based on learning a lesson from the WTO experience? Can it be further improved? Is the adoption of the WTO DSU model as a dispute settlement mechanism appropriate for the conditions and political situation in the ASEAN? Should all ASEAN decisions continue to be made by consensus? Should the principle of non-interference be watered down? Is the celebrated ASEAN Way still appropriate, useful, or fit for purpose? What institutional pattern would be useful for promoting an ASEAN legal system by mapping details concerning the making, monitoring, and enforcing of rules for the ASEAN? The importance of DSMs will be briefly explained prior to this analysis.

A comparative examination of the dispute settlement mechanisms of international organisations is the key to evaluating the efficiency of the ASEAN's dispute settlement system and resolving any problematic issues. Some recommendations on how to improve the current process for settling trade disputes are also provided in this chapter by studying the 2004 Protocol on Enhanced Dispute Settlement Mechanism (EDSM) and the ASEAN Charter. It is important to note that the dispute settlement mechanism in any trading system is based on various factors, such as the nature of the trading arrangement and political and social factors, each of which provides different types of evidence of the role played by dispute settlement in economic integration. The World Trade Organisation (WTO), the North America Free Trade Agreement (NAFTA), the European Union (the EU) are examples of reliable mechanisms for the settlement of trade disputes, which have been proved to be effective in other parts of the world and they can act as a useful guide for the ASEAN. The most important lesson to be learned from the NAFTA is the difference between developed and developing countries.[1368] Not only are the WTO, the NAFTA and the EU appropriate examples for this study, but also Mercado Comun del Sur, also known as MERCOSUR, is also included in this research because it is similar to the ASEAN in the sense that its member states are developing

[1368] Nguten Tan Son, 'Towards a compatible interaction between dispute settlement under the WTO and regional trade agreements' (2008) (5) MqJBL, page 118 http://heinonline.org/HOL/LandingPage?handle=hein.journals/macqjbul5&div=7&id=&page= accessed 12 June 2015

countries. An analysis of some of the different background elements of regional disputes of the EU, the NAFTA and MECOSUR may illustrate the comparative benefits of these three dispute settlement mechanisms. Moreover, it is necessary to evaluate whether ASEAN member states take the prompt action required to bind themselves with their ASEAN obligations, which have been defined or clarified in dispute settlement reports.

In order to achieve the aforementioned objective, the aim of this article is to find an appropriate framework for an efficient and effective mechanism for ASEAN member states to settle disputes that arise from free trade agreements. The changes made to the ASEAN concept of a dispute settlement mechanism and the contribution of ASEAN member states to resolving the conflicts between them will be illustrated in this chapter, and the relevance of the ASEAN's approach to settling disputes will be explained. The strengthening of institutions to deepen economic cooperation in the ASEAN will also be mentioned with a focus on the ASEAN Secretariat. In addition, the prospects and challenges involved will be examined in this chapter, particularly with regard to the ASEAN trade dispute settlement pillar, and a clear direction for the efforts to reform the ASEAN dispute settlement mechanism will be provided in the context of the establishment of the ASEAN Economic Community (AEC) for this region until 2020. The study will be concluded in the final section with a summary of the important findings that could help the ASEAN to not only achieve its objectives, but also present itself as a viable and effective regional organisation. The testing of the ASEAN resolution provision will make it more active among its member states.[1369]

Section 7.2 Requirements for a successful dispute resolution mechanism in the ASEAN

The settlement of disputes plays an important role in monitoring treaty violations and helps to offset the problem of lack of information. An effective dispute

[1369] ISDS or Institute for Strategic and Development Studies report 2002

settlement mechanism can create a standard of administration that is speedy with minimal expense, and conveys the trust and confidence necessary for the promotion of a greater intensity of regional economic activity[1370] with a lack of complexity.[1371] A strong DSM is defined as a response to members' demand for deeper agreements with a wider membership, and it entails significant obligations.[1372] The depth of agreements and size of membership play a role in pushing all states toward stronger dispute settlement rules.[1373] The establishment of an ASEAN dispute settlement mechanism would require a significant amount of work to design a system that is capable of the early identification, analysis, and cost effective resolution of disputes and has the full support of all the ASEAN Member States. The reasons why an effective coordinated dispute resolution system is so important will be explained in this section. The demand for a suitable dispute settlement mechanism for the ASEAN Economic Community is expected to be based on a rule-based community that is governed by strong institutions and is able to secure compliance with, and enforcement of, contracted obligations and commitments,[1374] as well as having the authority to impose sanctions on offenders.[1375] An ASEAN Compliance Body is also important to provide the DSM with more credibility.[1376] The issue of uncertainty based on a lack of knowledge of the intentions of prospective partners is also a factor that leads to an ineffective dispute settlement

[1370] Lim Yew Nghee, 'Restoring foreign investor confidence in ASEAN: legal framework for dispute settlement processes' (1998) 19 Singapore Law review, page 148

[1371] Read more in Christian Leathley, 'The MERCOSUR dispute resolution system' (2002) The Royal Institute of international affairs MERCOSUR study group, page 2 save file 00548.pdf

[1372] Todd Allee and Manfred Elsig 'Why do some international institutions contain strong dispute settlement provisions? New evidence from preferential trade agreements' (2016) 11 Springer Rev Int Organ, page 91

[1373] Ibid, page 91

[1374] Paolo R. Vergano, 'The Enhanced dispute settlement mechanism of ASEAN' (2012) Centre for international law Seminar

[1375] James Mccall Smite, 'The politics of dispute settlement design: explaining legalism in regional trade pacts', (2000) 54(1), Cambridge University Press, pages 146-147

[1376] Denis Hew, 'Economic Integration in East Asia: An ASEAN perspective', Institute of Southeast Asian Studies (ISEAS) 11 May 2006, page 51

mechanism[1377] and legal framework via the interpretation and clarification of the preservation of the rights and obligations of ASEAN member states.[1378]

A strong DSM consists of legal procedures that provide for speedy litigation free of delay that enables complainants to drive the legal process, make important choices, and facilitate the implementation of a legal award.[1379] Therefore, a strong fixed conflict resolution mechanism needs to include an effective decision-making process. The ASEAN needs to be transformed from an association to a community and the Charter needs to contain more elements of institutionalism.[1380] ASEAN economic integration cannot be achieved without a strong institutional structure and a better enforcement mechanism.[1381] Moreover, an ASEAN Secretariat should be considered in order to provide legal advice on trade disputes and an ASEAN Consultation should be established to solve trade and investment issues peacefully based on the United Nations' concept to provide a quick resolution to problems.[1382]

Moreover, an ASEAN Centre for peace and reconciliation needs to be established, since the building of institutions and infrastructure within the ASEAN must be based on recommendations for conflict mediation and internal mechanisms for preventing conflict. The development of a conflict mediation programme is also important, as well as the adoption of humanitarian actions to support member countries with the aim of promoting people-orientated peace.[1383] What is more, as mentioned above, the ASEAN

[1377] Aletta Mondre, 'ASEAN widening integration A respond to crisis' (2013) The paper for the 8th Pan-European Conference on international relations, page 5 http://www.eisa-net.org/be-bruga/eisa/files/events/warsaw2013/Mondr%C3%A9_ASEAN%20Widening%20Integration.pdf accessed 13 June 2016

[1378] Paolo R. Vergano, 'The Enhanced dispute settlement mechanism of ASEAN' (2012) Centre for international law Seminar

[1379] Todd, above 1372, page 101

[1380] Edy Prasetyono, 'Traditional Challenges to States: Intra-ASEAN Conflicts and ASEAN's Relations with External Power' (2007), page 6 http://library.fes.de/pdf-files/bueros/singapur/04601/2007-3/edy.pdf accessed 12 January 2015

[1381] Hew, above, 1376

[1382] Denis Hew and Hadi Soesasto, 'Realising the ASEAN Economic Community by 2020' (2003) 20(3) ISEAS and ASEAN-ISIS Approaches ASEAN Economic Bulletin, page 293

[1383] Agus Wandi, Building ASEAN capacity for conflict mediation' (2010) CMI by the European Union, page 9

needs to establish and strengthen an ASEAN Secretariat and ASEAN Consultation to provide legal advice on trade disputes. Trust in policy recommendations is a very important factor for ASEAN member states to choose the ASEAN dispute settlement mechanism. It is important for an ASEAN law to develop the structure of the DSM procedures as well as make member states familiar with the ASEAN DSM. The challenges, conditions and factors involved in improving the implementation of the ASEAN dispute settlement mechanism are explained below.

Section 7.3 Values and Criteria related to improving the implementation of the ASEAN dispute settlement mechanism

Disputes among ASEAN member states were always resolved by diplomatic negotiation and *ad hoc* tribunals with member-state governments having limited independence. However, in order to prepare for the shift toward more legalisation in the ASEAN, the values and criteria related to the design of an ASEAN dispute settlement mechanism and institutional reform are presented in this section. The biggest challenge for the ASEAN is to establish a rule-based organisation that can develop a legal and institutional framework. Furthermore, an effective dispute settlement mechanism is one of the essential elements of this rule-based organisation. Ideally, the ASEAN dispute settlement mechanism should be short, clear and inspiring, and represent the fundamental law of the association, including its values, ideas and objectives. Rajah suggests that, when developing an ASEAN community model, it should be borne in mind that ASEAN countries are unconditionally concerned with nation building and the construction of their respective national identities.[1384] Furthermore, it is necessary to evaluate the capability of ASEAN member states to take prompt action to comply with their ASEAN obligations, as defined by ASEAN panels and the Appellate Body in the

[1384] Choon-Yin Sam, 'Thinking regionally or nationally? The case of ASEAN' (2014) PSB Academu ISSN 2349-4379, page 88

dispute settlement reports, since this is also one of the criteria for the ASEAN to develop an effective dispute settlement mechanism.

With regard to improving the ASEAN dispute settlement system, there are currently many means to settle disputes; therefore, there needs to be clear guidelines as to which mechanism should be used to resolve which disputes.[1385] Some opportunities for reform will be proposed in this section based on the limitations of the design and practice of the ASEAN Enhanced DSM. Developed countries should be mindful of developing and under-developed countries when emphasising regional and common interests. In addition, the ASEAN has to develop various kinds of dispute settlement mechanisms through the multilateral enactment of national legislation.

A well-developed dispute settlement mechanism should prioritise the governance of the activities of the AEC, which are reflected by the depth of economic integration, as well as the role of international institutions,[1386] particularly dispute settlement mechanisms that have been influenced by a range of historical and cultural factors that are unique to the region. An appropriate dispute settlement model is essential to enable the ASEAN to move forward without delay. This model must fit comfortably into an informal and consultative style, as well as possess some useful, effective elements that match the unique ASEAN characteristic of consensus-based decision-making. The current DSM, which is an effective and workable dispute settlement mechanism, can also be improved to better balance diplomacy and institutionalisation.[1387]

[1385] Nguyen Hung Son, 'The ASEAN Political Security Community: Challenges and Prospect' (2011) Institute for Foreign Policy and Strategic studies Diplomatic Academy of Vietnam, pages 1-7

[1386] Cherie O'Neal Taylor, 'Dispute resolution as a catalyst for economic integration and an agent for deepening integration: NAFTA and MERCOSUR?' (1997) 17(1) Northwestern journal of international law and business, pages 851-853

[1387] Hank Giokhay Lim and Kester Tay Yi-Xun, 'regional integration and inclusive development reasons from ASEAN experience' (2009) Asia-Pacific research and training network in trade working paper series, 59(2009), http://www.unescap.org/sites/default/files/AWP%20No.%2059.pdf accessed 13 January 2016 page 15

It is essential to combine the duties of the public and private sectors when building an effective dispute settlement mechanism that can be accepted in the whole of the ASEAN and avoid violation. It is argued that a coherent policy is needed and ASEAN democratic nations must push for a democratic dispute settlement regime.[1388] It is very hard to define the people who will be permitted to access the dispute settlement mechanism, but the private sector needs a speedy and transparent mechanism in order to develop an efficient business plan. Some commentators suggest that the ASEAN needs a depoliticised dispute resolution system that is more binding and has clear outline procedures. A third party dispute resolution mechanism will stimulate a significant growth in ASEAN intra-regional trade. Another proposal is to institute decision-making by majority voting rather than consensus, since the current ASEAN process is based on the practice of consultation and consensus. According to Amitav Acharya, the ASEAN does not lack regulation or consultation, but it has no concept of centralised permanent decision-making.[1389] In practice, the ASEAN process has no clear format for decision-making and meetings lack a formal agenda; therefore, an activity plan is needed. Organisations need to prepare for a broader framework and timeline for the ASEAN both in the short team and long term. Regulations and legislation can be prepared in the short term, while implementation will take longer.[1390] The ASEAN should provide enforcement measures in all fields of cooperation. Moreover, the idea of an ASEAN court should be modelled on the European Court of Justice, which would have a legal effect in the domestic courts of the member states,[1391] as further explained in the section below.

The harmonisation of the ASEAN trade law should also be carefully considered because the ASEAN is involved in several trade and investment issues, such as investor-

[1388] C.L. Lim, 'East Asia's engagement with cosmopolitan ideals under its trade treaty dispute provisions' (2011) 56(4) McGill Law Journal, page 828

[1389] Amitav Acharya", 'Culture, security multilateralism The ASEAN way and Regional Order' (1998) 19(1) Contemporary security policy, page 62

[1390] ASEAN 2015 'seeing around the corner in a new Asian landscape' (2014) http://www.nielsen.com/content/dam/nielsenglobal/apac/docs/reports/2014/Nielsen-ASEAN2015.pdf, page 14

[1391] Lim and Xun, Ibid above, 1387, page 15

state disputes. Moreover, harmonisation will support the transparency of domestic laws, regulations and judicial decisions in all member states. The future plan for ASEAN arbitration entails the harmonisation of the arbitral procedure, which can be seen in the uniformity of arbitral legislation together with improving the design of the DSM to better balance diplomacy and institutionalisation. It is important for the ASEAN DSM to establish an autonomous body to arbitrate and resolve disputes by making legally-binding decisions.[1392]

The implementation of the ASEAN economic dispute settlement initiatives has been difficult to date, as well as the identification of the challenges to its future community-building efforts. Therefore, how disputes are handled and whether they are resolved to the satisfaction of the parties tends to depend on the contents of the provisions of the dispute settlement agreement.[1393]

However, the ASEAN is still encountering some challenges in ensuring its relevance to all the peoples of the region in order to promote greater participation and be a truly people-centred organisation, and one of those challenges entails finding a way to test the ASEAN system of resolving trade disputes, as discussed below.

Section 7.4 Challenging Factors that influence the development of an ASEAN trade dispute settlement mechanism

The importance of an ASEAN trade dispute settlement mechanism was highlighted by the enhancement of the dispute settlement system in the 2004 Protocol. It is important to develop a truly integrated and well-functioning ASEAN market and regional economy by developing the EDSM into a rule-based system with an effective

[1392] Ibid, page 15

[1393] Todd Allee and Manfred Elsig, 'Why do some international institutions contain strong dispute settlement provisions? New evidence from preferential trade agreements' (2015) Springer Science and Basined media New York, page 91

dispute settlement procedure,[1394] as well as establishing an ASEAN Secretariat to facilitate the effective functioning of the DSM. Moreover, it should be developed from the existing ASEAN dispute settlement mechanism to ensure that it can be implemented quickly and give the ASEAN a legally binding resolution for economic disputes.

7.4.1 Rule-Based dispute settlement mechanism

Making the ASEAN DSM a rule-based regime rather than a relationship-based regime is one of the challenges facing the ASEAN today. A rule-based dispute settlement mechanism will help the ASEAN to function properly and give participating states some measure of sovereignty as the authority for the system to deliver binding decisions, as well as eliminating consensus in the decision-making process.[1395] It is important to note that, even though the AFTA DSM defines itself as a rule-based system, elements of the ASEAN Way,[1396] which is a political framework, are still an obstacle for the ASEAN.[1397] As explained in the previous chapter, the principle of the ASEAN Way also applies in the ASEAN trade DSM, for example, in the panel proceedings, the initial phase of the procedure as mandatory consultation and the final phase of the procedure, which refers to the ASEAN Summit. The ASEAN Way relies on diplomatic measures to resolve disputes.[1398] It influences the ASEAN dispute settlement mechanism, because it focuses on the principle of non-interference and consensus. This means that, when a dispute arises among ASEAN member states, they negotiate and resolve it in the ASEAN Way in the early stage. Some academics indicate that using the ASEAN Way as a dispute

[1394] Koesrianti, Rule-based dispute settlement mechanism for ASEAN Economic Community: Does ASEAN have it?' (2015-2016) 2(2) HALREV, page 186
[1395] Krit Kraichitti, 'ASEAN free trade agreements: Policy and legal considerations for development' http://www.aseanlawassociation.org/9GAdocs/w3_Thailand.pdf accessed 12 June 2015, page 17
[1396] For more information about ASAEN Way read chapter one section 1.4.2
[1397] Gonzalo Villalta Puig and Lee Tsun Tat, 'Problems with the ASEAN free trade area dispute settlement mechanism and solutions for the ASEAN Economic Community' (2015) Journal of World Trade 49(2), pages 295-296
[1398] Puig and Tat, above 1397, page 293

settlement mechanism will continue to be a problem as a result of its nature, which is based on the behavioural norm.

Therefore, some suggestions for the ASEAN to transform itself into a more rule-based organisation will be made in the next section. The concept of a supranational model, the harmonisation of the ASEAN law, as well as the ASEAN regional court, will also be included in this section in order to discuss the opportunities and conditions to strengthen the ASEAN rule-based process without it becoming a supranational institution like the European Union.

7.4.2 ASEAN's institutional Challenge

Institutions are defined as relatively stable structures of identities and interests that consist of regulative norms and rules for international interaction.[1399] They can further be defined as government associations with organisational procedures and structures.[1400] If an institution that is designed to motivate economic integration has a weak framework, it will fail, and the failure of the ASEAN institutional mechanisms is seen in the weakness of the commitment to the ASEAN Way, which continues to be clearly insufficient and ineffective, thereby limiting the role of the ASEAN. An institution with a high potential will increase cooperation, whereas one with low potential will not. This finding implies that the ASEAN needs to be reformed to become a highly potential institution.[1401]

The suggestions to develop the ASEAN's institutional potential will be a litmus test for ASEAN member states to make a binding commitment and thus increase the

[1399] Shaun Narine, 'Institutional theory and Southeast Asia: The case of ASEAN' (1998) World affair 161(1) summer, page 40
[1400] Sanchita Basu Das, Jayant Menon, Rodolfo C Severino, Omkar Lal Shrestha *The ASEAN economic community: A work in progress (*Institute of Southeast Asian studies 2003), page 415
[1401] Fang, above 1365, page 107

ASEAN's credibility and relevance.[1402] Some suggestions for the ASEAN to address its institutional challenges are provided in this section to determine if its institutions are sufficiently developed to enable the transformation of its dispute settlement mechanism.[1403] To reiterate, the strengthening of the institutional design to enhance the implementation of the ASEAN's dispute settlement mechanism should be focused on; a) a decision-making; b) imposing sanctions, and c) compliance. It is important to note that the need to institutionalise is not only focused on decision-making, but also covers the compliance of all member states and the imposition of sanctions for non-compliance. The institutional design should be renovated to transform an inter-governmental cooperation structure into a regional institution. Moreover, a stronger ASEAN Secretariat will also help the ASEAN to achieve its objective of integration.

7.4.2.1 Re-interpreting the ASEAN Way

It is questionable whether the ASEAN's institutions and legal texts are capable of supporting the development of a single production base and single market in the AEC or of enhancing the dispute settlement mechanism.[1404] Although the ASEAN Charter contains a number of provisions to generally increase the capacity of the ASEAN institutions and is a good first step toward developing more formalised rules and roles, it has a limited ability to completely transform the ASEAN's institutional integrity. According to Helen E.S. Nesadurai, ASEAN institutions are weak because member states insist on a "non-intrusive, inter-governmental mechanism for decision-making and

[1402] John Ravenhill, 'Fighting irrelevance: An economic community with ASEAN characteristics' (2007) RSPAS, page 24
[1403] Chow and Yusran, above 1235, page 227
[1404] Stefano Inama, Edmund W. Sim *The Foundation of the ASEAN Economic Community* An institutional and legal profile (Cambridge University Press 2015), page 7

enforcement", which emphasises flexibility and consensus.[1405] Furthermore, member states question the legitimacy of the ASEAN Secretariat based on its actions.[1406]

Moreover, the ASEAN system as a whole suffers from institutional and procedural deficiencies. The ASEAN also lacks the required number of staff to develop policies for various decision-making bodies and monitor and implement functions related to those policies. These procedural and institutional shortcomings also have a negative impact on the ASEAN DSM system.

Therefore, the ASEAN needs to introduce further institutional changes in order to be taken seriously rather than using informal mechanisms to solve its problems,[1407] as further discussed below.

a) Decision-making and the principle of consensus

The establishment of a dispute settlement mechanism plays an integral role in the transformation of the ASEAN institutions, which will contribute to a meaningful ASEAN Economic Community.[1408] Decision-making rules are a fundamental factor of any effective institution or organisation. The constitution of a voting system will strengthen ASEAN institutions in a way that helps to exercise a DSM and a reward and sanction system.[1409] As mentioned in Chapters 1 and 5, the ASEAN's decision-making process is still based on the principle of consensus, which is perceived to be its weakness and needs to be changed. Consensual decision-making causes a delay due to the different attitudes and views of member countries, and the diverse levels of development and

[1405] Sanchita Basu Das, Jayant Menon, Rodolfo C Severino, Omkar Lal Shrestha *The ASEAN economic community: A work in progress (*Institute of Southeast Asian studies 2003), page 392

[1406] Amitav Acharya, 'ASEAN institutional reform and strengthening', page 3 http://www.amitavacharya.com/sites/default/files/ADBI%20ASEAN%20Institutional%20Reform%20Paper.pdf accessed 13 May 2016

[1407] Shuan Narine, explaining ASEAN: Regionalism in Southeast Asia

[1408] Noel M. Morada, 'ASEAN at 40: Prospects for community building in Southeast Asia' (2008) 15(1) Asia-Pacific Review, page 42

[1409] Kazushi Shimizu, 'The ASEAN Charter and the ASEAN Economic Community' (2011) 40 Economic Journal, page 84

economic structures in the ASEAN.[1410] Since the concept of consensus is not accepted by all member states, the issues discussed in this community are based on widely different historical experience and foreign policy orientations.[1411] As a result, ASEAN countries choose to use the ASEAN Way to make decisions or enforce community law. The nature of the ASEAN Way is based on a culture of voluntary commitment and flexible compliance related to the implementation and interpretation of obligations.[1412] This flexibility enables member states to frequently abuse their commitment to trade liberalisation.[1413] According to Dr Surin Pitsuwan, a former ASEAN Secretary, this flexible engagement based on the principle of the ASEAN Way could damage the ASEAN's credibility if it is left unaddressed.

Therefore, the question of whether all ASEAN decisions should continue to be made by consensus or decision-making will be addressed in this section, as well as what needs to be done to implement a more effective decision-making process, which includes voting, either on the basis of a simple majority, or a two-thirds or three-quarters majority, and is acceptable to all ASEAN member states.[1414]

To answer the above question, it is very important to revisit the EPG report,[1415]in which it was recommended that the ASEAN's decision-making method of consensus should be revised.[1416] Decision-making based on consultation and consensus should only apply to sensitive issues,[1417] such as security and foreign policy.[1418] Moreover, it was

[1410] The variety of ASEAN economic structure and differences in their ASEAN level of economic read more in Chapter 6 section 6.2.5

[1411] Leszek Buszynski, 'ASEAN's New Challenges' (1997-1998) 70 (4) <http://www.jstor.org/stable/2761323> accessed 01/08/2014, page 557 save file 2761323

[1412] John Ravenhill, 'Fighting irrelevance: an ASEAN economic community with ASEAN characteristics' (2007) RSPAS working paper 2007/3, page 17

[1413] Lorand Bartels and Federico Ortino, *Regional trade agreement and the WTO legal system*, (Oxford University Press 2006), Page 52

[1414] Muur, above 1186, page 16

[1415] The report of the Eminent person group on the ASEAN Charter http://www.asean.org/storage/images/archive/19247.pdf accessed 12 January 2014

[1416] Kazushi Shimizu, 'The ASEAN Charter and the ASEAN Economic Community' (2011) 40 Econ. J. of Hokkaido University Save file EJHU_40-_73, page 75

[1417] It is importance to note that the definition of sensitive issues is not specified, which allows for different interpretations that may cause future problem.

further recommended that a flexible participation formula such as 'ASEAN minus X' could be applied and decided upon by Councils of the ASEAN Community based on the limitation of the ASEAN Charter[1419] Article 20[1420] and 21[1421] that limit alternative decision-making to the ASEAN Summit.[1422] In addition, these recommendations also included the right of ASEAN leaders to vote on issues that could not be resolved by consensus[1423] because consensus is not synonymous with unanimity. In the ASEAN, it rarely means that all ASEAN member states have to agree on joint action.[1424]

As indicated above, it is essential for the ASEAN Way to be modified to develop an approach that solves problems instead of merely setting them aside and moving on.[1425] If there is a will for the ASEAN Way to continue to play a proactive role, consensus should not be discarded as the fundamental principle of decision-making, but it should not be equated with unanimity.[1426] Majority approval rather than consensus would improve the dispute resolution system, especially for non-sensitive issues.[1427]

[1418] Amitav Acharya, 'ASEAN institutional reform and strengthening', page 11. Moreover, the other exception to consensual decision-making is in crucial matters where the member state under consideration is excluded from the consensus. These crucial matters are such as, firstly, when a government comes to power through unconstitutional means such as a military coup; secondly, when a democratically elected party is unlawfully prevented from constituting government. Thirdly, when a government is engaged in gross and sustained violations of human rights, fourthly, When a member state fails to make financial contribution and pay its dues to ASEAN, and lastly, Any other matter deemed as consistent and deliberate non-compliance with ASEAN principles, read more in Carolina G. Hernandez, 'Institution building through an ASEAN Charter', page 18

[1419] See more information in Chapter 6 in decision-making rules

[1420] Article 20 of the ASEAN Charter

[1421] Article 21 of the ASEAN Charter

[1422] Noel M. Morada, 'The ASEAN Charter and the promotion of R2P in Southeast Asia: challenges and constraints' (2009) Martinus and Nijhoff publishers

[1423] Das, Menon, Severino, Shresth, above 1405, page 417

[1424] Ibid, page 417

[1425] Megan R. Williams, 'ASEAN: do progress and effectiveness require a judiciary?' (2007) 30 Suffolk Transnat'l L. Rev, page 457

[1426] Rizal Sukma, 'ASEAN Beyond 2015: the imperatives for further institutional changes' (2014) ERIA, page 14

[1427] Chun Hung Lin, 'EU-style Integration? Future of Southeast Asian Countries after ASEAN Charter' (2011) Graduate Institute of Financial and Economic law Feng Chai University Taiwan, page 15 and Seong Min Lee, 'ASEAN brief history and its problems' (2006) Koran Minjok leadership academy international program https://www.zum.de/whkmla/sp/0607/seongmin/seongmin.html accessed 1 June 2016

In terms of voting, this is a new decision-making process for the ASEAN. The EPG Report recommended that decisions in non-sensitive areas and areas other than security and foreign policy might be taken through voting. The concept of a simple majority is based on a majority of two thirds (2/3rd) or three quarters (¾)[1428]in cases where a consensus cannot be reached. According to Prime Minister, Lee Kuan Yew, the decision-making process could be improved by the following process: 'when four agree and one does not, this can still be considered as consensus and the five-minus-one scheme can benefit the participating four without damaging the remaining one'.[1429] In any case, the ASEAN preference of consensus as opposed to voting is based on a desire to avoid exposing the minority as having lost and the majority as having won. With only ten member states, a voting result of 7-3 or 6-4 would be inherently divisive.[1430] If the ASEAN Charter were to be based on this majority-voting concept, the ASEAN's consensus method would be revised and the principle of non-intervention in internal affairs would change.[1431]

7.4.2.2 Compliance through imposing sanctions

The imposition of sanctions would help to improve the ASEAN's credibility and could be used to effectively implement awards.[1432] This idea, particularly the suspension of the rights and privileges of the ASEAN Council in response to any serious breach by any ASEAN member state, Declarations, agreements, concords and treaties as well as the norms and values of the ASEAN,[1433] are needed to maintain a strong dispute

[1428] Amitav Acharya, 'ASEAN institutional reform and strengthening', page 11 http://www.amitavacharya.com/sites/default/files/ADBI%20ASEAN%20Institutional%20Reform%20Paper.pdf accessed 13 May 2016

[1429] Far Eastern Economic Review, February 1, 1980

[1430] Yoong Yoong Lee, *ASEAN's matters Reflecting on the Association of Southeast Asian Nations* (ISEAS 2011)

[1431] Kazushi Shimizu, 'The ASEAN Charter and the ASEAN Economic Community' (2011) 40 Economic Journal, page 75

[1432] Allee and Elsig, above 1372, page 104

[1433] Amitav Acharya, ASEAN's ambition and Denis Hew, Towards an ASEAN Charter: regional economic

settlement mechanism and achieve compliance with agreements.[1434] As can be seen in Chapter 6, most regional instruments in the ASEAN fail to impose sanctions and this is a critical obstacle to monitoring compliance. Therefore, the ASEAN Charter should improve the DSM by imposing sanctions in order to bolster economic integration. In the context of a trade dispute, a government will achieve compensation by developing a protocol by which to sanction states that violate trade agreements.[1435] The Charter should impose sanctions to ensure compliance rather than legally-binding economic commitments. In this way, the Charter would ensure that the ASEAN DSM is given some much needed bite to make it more effective.[1436]

Moreover, since the adoption of sanctions is still a sensitive issue, it should begin by focusing on the form of punitive mechanism that should be put in place, the types of sanctions and the areas to which sanctions should and could be applied.[1437] According to Singapore's Foreign Minister, George Yeo, the lack of sanctions for non-compliance in the ASEAN Charter means that it is an inefficient mechanism, not only to implement agreed decisions, but also to enforce them. Since non-compliance seems to have been unforeseen,[1438] the Charter is completely lacking in this basic legal function.[1439]

7.4.3 Dispute settlement procedure challenges

Since the dispute settlement procedure is at the heart of the ASEAN DSM, there needed to be clear guidelines to enhance the framework's relevance to overcome the

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integration, in framing the ASEAN Charter, supra note 10, pages 33,34-36

[1434] Allee and Elsig, above 1372, page 95

[1435] Maggi and Staiger, above 1363 page 2

[1436] Denis Hew, 'Economic integration in East Asia: an ASEAN perspective' UNISCI discussion papers (2006) 11, page 55

[1437] Rizal, page 15

[1438] Clara Portela, 'The Association of Southeast Asian Nations (ASEAN): Integration, internal dynamics and external relations' (2013) EXPO/B/AFET/FWC/2009-01/Lot2/13 <http://www.europarl.europa.eu/RegData/etudes/note/join/2013/433713/EXPO-AFET_NT(2013)433713_EN.pdf> accessed 28 July 2013, page 6

[1439] Eugene K.B. Tan, 'The ASEAN Charter as 'Legs to go places': Ideational norms and pragmatic legalism in community building in Southeast Asia' (2008) 12 SYBIL, page 178

challenges faced in settling disputes. Thus, the functions of the DSM were enhanced and it was renamed the ASEAN Protocol on Enhanced DSM (EDSM). As explained in Chapter 5, an Appellate Body was established with a specific function and some organs were created to monitor the implementation of the AEC. Clearly, the ASEAN member states' preference for other fora to settle their disputes remains a weakness of the ASEAN which still needs to be dealt with[1440] and this is largely why the task of implementation is still unfinished. As mentioned in previous Chapters, there has currently been no single dispute invoked in the ASEAN DSM under the AFTA[1441] and it has never been tested, but this does not mean that it will not be used in future. The current status is that the ASEAN is continuing without reforming the EDSM, which means that the option of enforcement through the EDSM is practically a non-starter, which leads to the creation of a legal vacuum. The effect of the ASEAN Way leads to a demand for the AFTA DSM to embrace the rule of law and stay away from the ASEAN Way in order to reposition itself as a real rule-based system to resolve conflict.

The WTO mechanism is the best model for the ASEAN to follow because ASEAN member states are also members of the WTO; hence, any bilateral, plurilateral or multilateral negotiations made among member states, including any regional trade agreements (RTAs) for the establishment of each form of economic integration within the ASEAN should comply with the commitment to the principle of WTO law. Moreover, the WTO is based on the idea of a rule-based multilateral trading system by means of applicable trade agreements and the resolution of trade disputes on a legal basis.[1442] A dispute settlement mechanism based on the rule of law should serve as an efficient mechanism to deliver binding decisions.[1443]

Therefore, the question of whether the transplantation of the WTO dispute settlement understanding (DSU) is suitable for the ASEAN will be discussed in this

[1440] Ibid.
[1441] Lorand Barlets and Federico Ortino, *regional trade agreements and the WTO legal system* (Oxford University press 2006), page 442
[1442] Puig and Tat, ibid above 1209, page 296
[1443] Ibid, page 296

section by considering the adoption process and the conditions and political situation in the ASEAN. The second attempt to improve the structure of the process must be based on legal certainly in order to identify and fill the gaps in an ASEAN agreement. Some of the Articles in the DSU specifically refer to the use of customary international law in the interpretation of treaties and some gaps can be seen in the context of the Protocol. For example, there are no time constraints or confidentiality provisions in the scope of DSM consultations and sometimes, when a trade disputes arises between ASEAN member states, they can be confused about which forum can be chosen and which choice of law will fit an ASEAN agreement as well as another like the WTO. Another gap is that there is no equivalent guiding principle related to the use of the customary international legal principles of interpretation of treaties. Moreover, there are big gaps in the context of the protocol; for instance, there is no time limit or confidentiality provision regarding DSM consultations and the appellate body in the DSM does not appear to stipulate working procedures or a code of conduct. In this discussion, the WTO dispute settlement mechanism will be explained as a model that is mainly suitable for ASEAN, while the dispute settlement regimes of the other trade organisations will be mentioned where applicable.

In terms of the move toward transparent processes and dispute reports, all member states need to become more familiar with decision-making and train advisers with legal experience in order to promote transparency and create more confidence in the system. The best way to make the ASEAN DSM more transparent and give ASEAN members more confidence in it is to establish an ASEAN website as a useful tool for them to easily access information in all areas of the DSM, including free e-learning modules, various official languages, all documents and all background papers. The requirement of consensus can also be frustrating for companies affected by an AFTA dispute in which they have the right to access a dispute resolution mechanism, but their home ASEAN government is unwilling to invoke the EDSM Protocol. AFTA's mechanism should be adopted by ASEAN member states, particularly their private sectors, to

encourage individual and future members to strengthen their own domestic dispute settlement systems.

The elimination of these gaps in procedures to prepare for the AEC would thus entail the reformation of the current provisions under the EDSM to make it more effective. With regard to Panels and the Appellate Body, the ASEAN should consider establishing a list of panellists composed of one panellist from each country. The lack of information on Panels and the Appellate Body suggests a need for more publicity. All members should be able to access the ASEAN's list of panellists and the Appellate Body to determine their names and qualifications.[1444] The DSM's appellate body should have a set of working procedures, which should be updated periodically the same as the WTO Appellate Body. This will help the ASEAN DSM to promote a better understanding of the code of conduct and the appeals process. Moreover, since the lack of publicly-available information about Panels and the Appellate Body has a negative effect on member states, it needs to be preserved; for example, publishing the names and qualifications of Panellists and the publications of the Appellate Body on the Secretariat and the ASEAN website can be the most powerful tool for providing information about the dispute settlement process. The WTO system is a useful procedure for the DSM and its adoption can be further improved by studying WTO cases.

ASEAN member countries may further strengthen the existing dispute settlement mechanism by empowering Senior Economic Official Meetings (SEOMs) to make some structural changes. There is a need for specific provisions to regulate and control the exercise of power of the SEOMs in appointing the panel, adopting the report made by the AB, and surveying the implementation of the findings in Article 5(1), 9(1) and 15(6). In terms of the role of the SEOMs in the dispute settlement process, their decisions should require the consensus of all the ASEAN members. Foreign investors will be more likely to invest in South East Asia countries if the ASEAN dispute settlement mechanism

[1444] Das, Menon, Severino, Shrestha, above 1400, pages 394-397

is more effective, but transparency and legal certainty in the settling of disputes and enforcing of judgments will give investors even more confidence.[1445]

Another issue relates to the funding in the ASEAN DSM, since the formula for apportioning the costs that must be borne by member states remains unclear.[1446] Also, under the current dispute settlement mechanism, the cost of the panel proceedings is paid by the disputing parties and this may prevent smaller and poorer ASEAN countries from participating in such proceedings.[1447] The cost involved in resolving a dispute should be similar to the WTO where all member states share the costs. In other words, all costs are shared equally by all ASEAN member states rather than just the disputing parties. Their share of the cost is based on a formula that depends on the volume of their international trade in goods and services. This will make ASEAN member states more willing to participate in dispute settlement proceedings.[1448]

An analysis of the different background elements and a comparative study of the three examples of regional dispute settlements of the EU,[1449] NAFTA and MERCOSUR may be beneficial for ASEAN. The design of regional trade dispute settlement regimes can provide a point of reference for many comparative examples of attempts to encourage trade liberalisation and bilateral trading concepts that could be functionally implemented in the context of ASEAN. Therefore, the general analysis of the dispute resolution regime in NAFTA, in this paragraph, will discuss which functions are useful for the development of the ASEAN trade dispute settlement mechanism.

[1445] Lim Yew Nghee, 'Restoring Foreign investor confidence in ASEAN: Legal framework for dispute settlement processes' (1998) 19 Sing. L. Rev. 145, page 145

[1446] Joseph Wira Koesnaidi, Jerry Shalmont, Yunita Fransisca and Putri Anindita Sahari, 'For a more effective and competitive ASEAN dispute settlement mechanism' (2014) SECO/WTI Academic Cooperation project working paper series, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2613871 page 24 accessed 13 May 2015

[1447] Henry Gao, 'Dispute settlement provisions in ASEAN's external agreements with China, Japan and Korea', pages 38-39 http://www.nysba.org/Sections/International/Seasonal_Meetings/Vietnam/Program_1/Attachment_3.html accessed 13 January 2015

[1448] Ibid, pages 38-39

[1449] For a detailed discussion of the European Union and ASEAN see, section 7.4.5 Legal effect commitment

The main common feature of NAFTA and ASEAN is that both are regional organisations, which consist of countries with huge differences in their economies, cultures and consensus. The dispute settlement system in NAFTA is a diversified system, which combines different mechanisms to solve different disputes using various legal documents.[1450]

The lessons to be drawn from NAFTA to ASEAN are; firstly, as has been mentioned above in Chapter 5, that NAFTA provides for the settlement of disputes through its arbitration panels. Disputing parties are required to engage in negotiations and consultations privatel, and they can agree to consult at the request of any country or else on an annual basis. The parties can agree on the interpretation and application of the NAFTA agreement[1451] and make every attempt to reach an agreement by means of co-operation and consultation at all times by the NAFTA Commission in an attempt to arrive at a mutually satisfactory resolution.[1452] As the highest institution, the Commission may refer to advisers or independent experts.[1453]

The issue of the independence of panellists is another challenges to the trade dispute settlement mechanism.[1454] In addition, the independence and qualifications of the panellists are also factors that can be used in a preliminary assessment of the NAFTA dispute settlement system. The NAFTA panellists are independent and they conduct

[1450] Zhou Yilei, 'The parallel dispute resolution mechanism in ASEAN- from the perspective of trade dispute and investment disputes', (2013) Thesis submitted to the School of Law at City University of Hong Kong, page 249

[1451] UNCTAD, dispute settlement regional approaches: NAFTA (2003) United Nations Conference on trade, page 7

[1452] Article 2006 of NAFTA

[1453] Gary Clyde Hufbauer and Jeffrey J. Schott, 'NAFTA dispute settlement systems' Institute for international economics, page 17

[1454] The transparency in panel proceedings can be seen in the NAFTA article 22012.1(b); the principle function of WTO panels is to assist the dispute settlement body (DSB), as with their predecessor, i.e. GATT. The working procedures of the DSB dictate that the panels must meet in closed session; the deliberations are confidential and the public can have no access to the panel process. Panellists are required to possess expertise appropriate to a case, but they may not be citizens of the parties or third parties to a dispute. Moreover, the nominated panellists are required to disclose any information that they may have through the whole procedure which may affect their independence in rendering decisions; on panellists in general, see DSU, art.8.

their enquiries with integrity and impartiality due to the fact that the NAFTA parties have established a Code of Conduct,[1455] which applies to panellists in both Chapters 19 and 20. So far, the panellists have been nationals of the parties and this Code of Conduct makes the NAFTA system effective due to their independence. ASEAN would get the same benefits if ASEAN had a safeguard provision in the ASEAN system, such as a code of conduct for the panellists. Under the NAFTA and the WTO system, panellists serving in panels are subject to codes of conduct to ensure their impartiality. The design of the provision of these codes of conduct can be used to guide ASEAN in forming its own code of conduct.

Also, according to the time duration of the dispute settlement in ASEAN, a long time limitation is not appropriate, since the longer the time it takes to solve a dispute, the tenser will be the atmosphere and the relationship which will develop among the disputing member states.[1456] When considered with the NAFTA experience, NAFTA's regulations on time duration are more appropriate, since it has considered the needs of all the member states to solve their disputes within a shorter period than the WTO. ASEAN can learn from NAFTA to speed up the process whenever this is feasible and justified. The time duration in NAFTA may be appropriate for ASEAN.[1457]

According to the ASEAN dispute settlement mechanism, it gives privileged participation to ASEAN states. It is obvious that, unlike the WTO, business actors in the private sector of the ASEAN do not allow private entities or investors to participate in the adjudicatory process. If they prefer to invoke the mechanism, private parties need to bring their case by engaging with ASEAN officials and getting member governments

[1455] The NAFTA Code of Conduct for proceedings under Chapter 19 and Chapter 20, which entered into force on 1 January 1994 are available in https://www.nafta-sec-alena.org/Home/Texts-of-the-Agreement/Code-of-Conduct?mvid=2. Not only does NAFTA provide a Code of Conduct but in the WTO, as has also been mentioned, the panellists, are well qualified, independent and non-attributable, as stated in the Rules of Conduct section II par 1.

[1456] Zhou Yilei, 'The parallel dispute resolution mechanism in ASEAN - from the perspective of trade disputes and investment disputes', (2013) Thesis submitted to the School of Law at City University of Hong Kong, page 249

[1457] Ibid, page 249

to pursue the case on their behalf.[1458] The lack of standing of private parties creates a number of obstacles in the system and leads to the unequal treatment of identical cases. Private parties lose control of the dispute under the current arrangement and this causes a delay in the dispute settlement process, as well as unnecessary expenditure.

Adopting the model of the EU[1459] and the NAFTA systems[1460] would grant the benefits of access to legal remedies to private parties, if the private party was able to represent itself by bargaining according to its own business model, and to make appropriate concessions throughout the process, as well as promoting regional integration in the long run.

As for MERCOSUR, they are still at the primary stages of cooperation. The MERCOSUR dispute settlement system had been characterised as an attempt to resolve disputes by diplomatic negotiations and ad hoc tribunals that have limited independence from the member-states governments. The problems with the MERCOSUR's dispute settlement mechanism are based on an absence of exclusivity. Its current dispute resolution system is based on the Treaty of Asuncion and the 1991 Brasilia Protocol, which was replaced by the 2002 Olivos Protocol,[1461] However, despite these various protocols; unfortunately, MERCOSUR simply does not have any effective dispute resolution mechanism; in fact, it has only been used a limited number of times since its creation.[1462] The absence of any effective enforcement mechanism[1463] is a major obstacle to the implementation and the expansion of the MERCOSUR agenda.[1464] Nonetheless, although it would appear that the MERCOSUR system is unusual in its

[1458] Locknie Hsu, 'The ASEAN dispute settlement system' in the *ASEAN economic community: A work in progress* (ISEAS 2003, page 415)
[1459] See, Chapter 4 section 4.2.1.2 European Community dispute settlement regime (c) Private parties' rights
[1460] See, chapter 4 section 4.2.2.2 (c) The process of the NAFTA dispute settlement mechanism – Private parties' rights
[1461] See, Chapter 4 section 2.3.1 for an overview of the dispute settlement regime in the MERCOSUR
[1462] Christian Leathley, 'The MERCOSUR dispute resolution system' (2002) The Royal Institute of International Affairs Chatham House MERCOSUR study group, page 11
[1463] For a detailed discussion of the absence of an effective dispute settlement regime under the MERCOSUR, see Chapter 4 section 2.3.1 (g)
[1464] Rafael A. Porrata-Doria, 'MERCOSUR: the Common market of the twenty-first century?' (2004) 32(1) Georgia Journal of International and comparative law, page 64

functioning and its relatively effective dispute settlement procedures, it was included in this study as a result of the fact that the member states of MERCOSUR are developing states, which should means they can be an example in the case of ASEAN. However, the MERCOSUR is a failed model in the aspect of the competition for markets and investments, which ASEAN needs to learn from in order to avoid these mistakes.

7.4.4 ASEAN's organisational structure challenges

a) Strengthening the ASEAN Secretariat

As indicated in the previous chapter, the limited power of the Secretariat is another problem for the ASEAN. Despite their power being enhanced by the Charter, as mentioned earlier, the ASEAN Secretariat and the Secretariat-General of the ASEAN still play a limited role in policy-making. The lack of the Secretariat's ability to make a successful ASEAN policy makes the membership unwilling to comply with multilateral agreements and it is incapable of acting against obstinate members.[1465] According to Hund, although the ASEAN Secretariat retains its position as policy-maker, it does not possess the power to force individual member states to comply or devise common policies on its own initiative.[1466] Not only is this an internal problem, but the ASEAN Secretariat has no authority to call for compliance with ASEAN agreements, which makes ASEAN member states mistrust regional institutions.[1467] The ASEAN Secretariat has no legal authority to resolve the disputes that arise from ASEAN national customs

[1465] Rattanasevee, above 1330, page 2
[1466] Rattanasevee, above 1330, page 2
[1467] Rodolfo C. Severino, 'The ASEAN Charter: An Opportunity not to be missed' (2006) UNISIC Discussion papers No: 12 ISSN 1696-2260, page 165

and those that trade authorities coordinate among themselves.[1468] The lack of case-law also causes uncertainty and inconsistency in interpretation.[1469]

The ASEAN Secretariat must be strengthened to contribute more to regional economic surveillance, monitoring of compliance, settlement of economic disputes and the implementation of major economic integration programmes,[1470] as well as providing privileges and acting as a governing body of law that brings more immunity when working for a supranational organisation. In other words, the ASEAN should empower the ASEAN Secretariat to become a real central mechanism.

The ASEAN Secretariat and the ASEAN Secretary General should be strengthened by permanent representatives from each member state representing their government and acting on its behalf when making decisions.[1471] The key challenges to the ASEAN Secretariat's effective functioning include the need for its role and function to be clearly specified and the need for it to be sufficiently resourced to sustain its institutions, budget, human resources, and relationship with national governments,[1472] since its current structure does not enable the ASEAN Secretariat to respond to changing developments and all members' needs.[1473]

A further step may be necessary to develop the structure of the Secretariat, starting with measures to enhance the potential of the Secretariat staff by training more experts in the office of the Secretariat. This should include the appointment of senior members of staff with oversight responsibilities.[1474] There should be links between the Office of the Secretariat and the departments in order to increase the sufficiency to

[1468] Edmund W. Sim, 'Improving governance in the ASEAN Economic Community' (2009) AIELN, page 7
[1469] Pearlie M. C. Koh, 'Enhancing economic co-operation: a regional arbitration centre for ASEAN' (2000) Int'l and Comp. L.Q. 49, pages 398-399
[1470] S. Pushpanathan, 'ASEAN's readiness in achieving the AEC 2015: Prospects and challenges' in Sanchita Basu Bas *Achieving the ASEAN economic community 2015: challenges for member countries* (ISEAS 2012), page 18
[1471] Jusuf Wanandi, 'The ASEAN Charter: Its importance and content' The Jakarta Post 18 April 2006 save file http://www.thejakartapost.com/news/2006/04/18/asean-charter-its-importance-and-content.html
[1472] Das, Menon, Severino, Shrestha, above 1400, page 400
[1473] Acharya, above 1354, page 4
[1474] Ibid, page 5

funding, facilitate a comprehensive policy-planning role, and coordinate projects across different sectors.[1475] Moreover, the ASEAN Secretariat remains underfunded and understaffed,[1476] which means that it has insufficient finances to attract talented and capable people.[1477] The ASEAN should be strengthened with an intake of expert staff to fulfil its role as a rule-based organisation with the potential to provide legal opinions. Some scholars add that this makes it difficult for the ASEAN Secretariat to act as the backbone of the association by being a powerful central administration that can grow into a more institutionalised organ.[1478] The Secretariat is currently overloaded with region-wide administrative and coordinated activities as well as research, analysis, technical support and monitoring.[1479] The salaries offered by the Secretariat are too low to attract professionals and there is no structure to activate the Secretariat's role as a dispute settlement mechanism. These functions of the ASEAN Secretariat should be strengthened by comparing them to the functions of the EU Commissioners.[1480] Furthermore, at membership level, the model of the EU shows that the ASEAN should consist of separate ministers to serve as national secretariats under the control of their national leaders. It is noted that long-term institutional reform cannot be achieved without reconsidering relationships, particularly with the Coordinating Council, the Ministerial Bodies, the Committee of Permanent Representatives and the national government.[1481] This needs to be addressed in future since the Secretariat will serve as an information centre and coordination hub for ASEAN integration in each member

[1475] Ibid, pages 4-5

[1476] Avery Poole, The state versus the Secretariat: capacity and the norm of equality in ASEAN. The lack of professional staff can be explained by the figures; in 2012 ASEAN employed 300 people, including 65 managers and experts, 180 local staff and 55 persons from donor organisaitons. Although these figures do not include coordinating staff who work in member countries, compared to the EU, which has about 55,000 staff working under the EU institutions.

[1477] Rattanasevee, above 1330, page 7

[1478] Ibid, page 7

[1479] Ibid, page 6

[1480] Lin, above 1427, page 15

[1481] Moving forward: the prospects for insitutionalisation in ASEAN in Pattharapong Rattanasevee, ' Towards institutionalized regionalism: the role of institutions and prospects for institutionalisation in ASEAN' (2014) Springer, page 2-3

country.[1482]

The call for Permanent Representatives with additional capacity to deal with economic matters is also a good suggestion for the ASEAN. According to former ASEAN-Secretariat, Surin Pitsuwan, these Permanent Representatives could play an administrative and budgetary role in the ASEAN Secretariat in order to fill the gap caused by the absence of responsibility .[1483]

7.4.5 Legal Effect Commitment

Before discussing the development of the ASEAN legal framework, it is necessary to mention the way in which the ASEAN has been operating based on the ASEAN Way, as explained in Chapters one[1484] and five.[1485] As mentioned earlier, the ASEAN legal framework is currently based on the cultural style of the ASEAN Way, which greatly constrains the viability and implementation of its legal institutions. It obstructs economic integration by being based on the principles of non-interference and consensus [1486] and it also prevents the ASEAN from drafting its own effective constitutions.[1487] Since the ASEAN Way relies on consensus, it is important to note that individual states lack the authority to act on their own; in other words, each state holds the key to moving toward the legal integration of the ASEAN. Moreover, diverse development also hinders the process of integration, as can be seen by the significant differences in the legal systems of member states. The legal systems in the ASEAN are

[1482]Chun Hung Lin, 'EU-style Integration? Future of Southeast Asian Countries after ASEAN Charter' (2011) Graduate Institute of Financial and Economic law Feng Chai University Taiwan, page 15

[1483] 'ASEAN's Challenge: some reflections and recommendations on strengthening the ASEAN Secretariat' http://aseanec.blogspot.com.es/2012/11/dr-surin-sums-up-aseans-challenge-in.html accessed 17 November 2016

[1484] Read more in Chapter one, Section 1.4.2 the ASEAN Way and the decision-making structure

[1485] Read more in Chapter six, action problem and the limitation of the ASEAN's dispute settlement mechanism, Section 6.2.4

[1486] Richter page 15

[1487] Benny, above 1364, page 79

hybrids of both Common law and Civil law.[1488] According to the ASEAN's former Secretary-General, Ong Keng Yong, 'the ASEAN has to become increasingly more legalistic' in order to engage in more economic cooperation.[1489]

It is recognised that the legal framework influences the process of regional integration and an effective legal framework is required to bring more legal certainty for the rapid economic development of the region.[1490] In addition, the dispute resolution mechanism is highly legalised with parties generally agreeing with the application of rules that are bound by the decision of a third party. However, the dispute resolution mechanism becomes less legalised with the appearance of political bargaining and the parties refuse to accept the determination of the third party adjudication.[1491] The ASEAN currently lacks a binding court to settle disputes or harmonise laws.[1492] The need and the possibility for the ASEAN to have a committed institution to harmonise and further integrate the economies of ASEAN countries, such as harmonising community law, a supranational regime, and whether the ASEAN needs to establish an ASEAN court of justice to correlate their economic activities will be discussed in this section. The 'committed institution' would serve the ASEAN by constraining the member states from breaking the rules of cooperation,[1493] as well as the creation of an appropriate committed institution must necessarily be accompanied by a regional economic system within the ASEAN at the regional level.[1494]

[1488] Read more in Chapter six, Section 6.2.5 (a) different political and legal systems and Deborah A. Haas, 'Out of others' shadows: the ASEAN moves toward greater regional cooperation in the face of the EC and NAFTA' (1994) 9(3) American university international law review, page 863

[1489] Secretary-General Ong Keng Yong, 'ASEAN and the 3L's: leaders, laymen and lawyers' http://www.aseansec.org/17356.htm

[1490] Erman Rajagukguk, 'Harmonisation of the law in ASEAN countries toward economic integration' (2012) 9(4) Hukum International Journal, page 530 http://heinonline.org/HOL/LandingPage?handle=hein.journals/indjil9&div=45&id=&page= accessed 1 June 2015

[1491] Chow,' Culture Club or Chameleon: should the ASEAN adopt legalisation for economic integration?' (2010) 12 SYBIL, page 231

[1492] Megan R. Williams, 'ASEAN: do progress and effectiveness require a judiciary' (2007) 30(2), Suffolk transnational law review, page 433

[1493] Benny, above 1364, pages 84-85

[1494] Pearlie M.C. Koh, 'Enhancing economic co-operation: A regional arbitration centre for the ASEAN' (2000) (49) International and comparative law quarterly, page 393

Before discussing the conditions and possibilities for the ASEAN to move beyond legalisation, the term 'legalisation' needs to be defined. Legalisation can be said to be a literary concept of international relationships or the use of issue of a journalistic international politics organisation. Furthermore, legalisation includes the obligations of international actors, who abide by the legal rules and procedures in both international and domestic areas. These legal rules and procedures impose obligations that are distinctive from those that arise from coercion, comity and morality.[1495] The last element of legalisation is delegation.[1496] This is related to third parties and includes the use of courts, arbitrators and administrative bodies to settle disputes. Michael Ewing-Chow adds that legalisation refers to the characteristics that institutions may possess. Furthermore, a 'legal delegation' can be claimed to allow disputes to be resolved by third parties according to legal principles based on political or diplomatic interactions between the parties themselves.[1497]

The European Union (EU) model of regional integration is based on being legally binding under a supranational regime with well-established enforcement mechanisms. The question arises whether the ASEAN can be modelled on the EU because the ASEAN has been classified as having weak legalisation, while the EU's legalisation is seen to be strong.[1498] This strong legalisation makes it difficult for the ASEAN to formulate a regional legal framework based on the EU.[1499]

A legal framework should be established for economic and trade co-operation in the ASEAN and moved closer to economic co-operation among member states. There

[1495] Chow,' Culture Club or Chameleon: should the ASEAN adopt legalization for economic integration?' (2010) 12 SYBIL, pages 230-231
[1496] Taylor, above 1386, page 287
[1497] Todd Allee and Manfred Elsig; 'Why do some international institutions contain strong dispute settlement provisions? New evidence from preferential trade agreements' (2016) Rev Int Organ, page 93
[1498] Michael Ewing-Chow,' Culture club or chameleon: should ASEAN adopt legalization for economic integration' (2010) 12 SYBIL, page 231
[1499] Michael Ewing-Chow,' Culture club or chameleon: should ASEAN adopt legalization for economic integration' (2010) 12 SYBIL, page 231 and Deborah A. Haas, 'Out of others' shadows: ASEAN moves toward greater regional cooperation in the face of the EC and NAFTA' (1994) 9(3) American university international law review, page 861

are many reasons to adopt the model of the European Union because the attributes of the European Union were the inspiration for modernising the ASEAN. Thus, the possibility for the ASEAN to establish a committed institution will be analysed in this section by examining the opportunities for a supranational organ in the ASEAN in the form of a regional court under community law like the European Union. It is important to note that some scholars suggest that the ASEAN needs to learn from the EU model, but it does not need to necessarily adopt the exact practices of the EU.[1500] Specifically, the ASEAN appears to have a great chance to learn from the practice of the EU dispute settlement mechanism as a learning process toward regional cooperation. One of the reasons for the ASEAN to follow the EU is the similarity between them in the area of economic integration, which is mainly based on closer trade cooperation. The EU institutional structure will be considered in the last section in order to answer the question of whether the ASEAN should follow the EU model in order to improve in terms of institutional development. However, there are some differences between the ASEAN and the EU, which make it difficult to apply the EU legal model as a basis for the development of an ASEAN legal structure in medium-long term recommendations, as explained below.

7.4.5.1 Challenges to the Court System

Regional courts can be the solution to many problems, since they enable countries to develop a legal alternative.[1501] The establishment of ASEAN regional court modelled on the European Court of Justice (ECJ) has been proposed to increase the effectiveness of the ASEAN legal system.[1502] The construction of a regional court would

[1500] Michael Ewing-Chow,' Culture club or chameleon: should ASEAN adopt legalization for economic integration' (2010) 12 SYBIL, page 230

[1501] Karen J. Alter and Liesbet Hooghe, 'Regional dispute settlement' in Tanja A. Borxel and Thomas Risse (eds.), Oxford Handbook of Comparative Regionalism (Oxford University Press 2016), page 542

[1502] Akrasanee Arunanondchai, 'Institutional reform to achieve ASEAN economic integration in Denis Hew (ed) Roadmap to an ASEAN Economic Community, (ISEAS 2005), page 67

significantly advance the legalisation of regional organisations and this would help the ASEAN to work on a more transparent dispute settlement mechanism, thereby reducing the need for quiet diplomacy, as well as achieving deeper integration. Moreover, the formation of an ASEAN Court would provide stability and predictability by encouraging investment and growth in the ASEAN. Thus, the necessary conditions for the formation of such a court will be explained in this section, together with a discussion of the factors the ASEAN should focus on in order to be ready for this challenge.

a) Opportunities and possibilities to establish an ASEAN Court of Justice[1503]

There are some major differences between the ASEAN and the European Union (EU), which make it difficult to apply the EU legal model to develop an ASEAN legal structure. Firstly, the EU and the ASEAN have different objectives. The intention and general objectives of the ASEAN were established in 1967 and it was created as a loose organisation to encourage cooperation, whereas the EU was established as the result of treaty, which defined its powers and functions, and limited its jurisdiction to forming an integrated regional community.[1504] The main difference between the ASEAN and the EU relates to sovereignty. The EU is based on the concept of shared sovereignty, while the ASEAN is more concerned with reinforcing national sovereignty and remains an intergovernmental organisation.

The difference between the structure of the ASEAN Economic Community and the European Union is that they adopt a different route toward regional integration. [1505] Also, the success of the EU is partly attributable to the fewer impediments to regionalism as well as the fact that the original members had a stronger

[1503] Carolina G. Hernandez, 'Institution building through an ASEAN Charter', pages 37-38 http://www.kas.de/upload/auslandshomepages/singapore/Hernandez_AseanCharta.pdf accessed 12 May 2015

[1504] Chesterman, 'Does ASEAN exist?' (2010) 12 Sybil, page 199-211 and Deborah A. Haas, 'Out of others' shadows: ASEAN moves toward greater regional cooperation in the face of the EC and NAFTA' (1994) 9(3) American university international law review, pages 861-862

[1505] Laurence Vandewalle, 'EU-ASEAN: challenges ahead" directorate-general for external policies/ policy department' DG EXPO/B/POLDEP/NOTE/2014_14, page 14 save file EXPO_IDA

economy than their ASEAN counterparts. Unlike the EU, the ASEAN is not a customs union with a common external trade policy and common external tariffs. It is also not a single market like the European Union.

The third fundamental difference between the two organisations is their dispute resolution mechanism. The ASEAN settles its disputes based on conciliation, mediation and dependable offices and it currently has no court of justice system.[1506] In contrast, the EU has formal adjudicatory mechanisms as its regional legal regime, headed by the European Court of Justice (ECJ).[1507]

The other major difference is that the ASEAN has no capacity to impose legal acts with a direct effect; rather, its efforts to transform itself into an organisation that respects its international obligations, binding obligations or binding decisions on member states remains dependent on some South Asian countries.[1508] Meanwhile, the EU is highly institutionalised, distributing the power granted to it by the member states between the European Council as the main source of legislature, state representatives' Commission, a Parliamentary body to share the legislative power and a Court of Justice for interpreting and upholding EU law.[1509] In contrast, the ASEAN has no regional parliament nor a council of ministers with law-making power.[1510]

Lastly, the cultural concept of the ASEAN Way has also caused the people of ASEAN to tend to ignore the court as a place for the resolution of disputes that arise among them,[1511] whereas the European Court of Justice (ECJ) is a supranational

[1506] Rodolfo C. Severino, 'ASEAN faces the future' The ASEAN Secretariat collection of speed book, Jakarta
[1507] Deborah A. Haas, 'Out of others' shadows: ASEAN moves toward greater regional cooperation in the face of the EC and NAFTA' (1994) 9(3) American university international law review, page 862
[1508] Diane A. Desierto, 'ASEAN's constitutionalisation of international law: challenges to evolution under the new ASEAN Charter' (2010) presentation paper at the 'non-state actors: panel of the international law association British conference, Oxford Brookes University, page 11
[1509] Megan R. Williams, 'ASEAN: do progress and effectiveness require a judiciary' (2007) 30(2) Suffolk transnational law review, page 453
[1510] Simon Chesternam, 'Does ASEAN exist? The Association of Southeast Asian Nation as an international legal person' (2008) New York University publish law and legal theory
[1511] Erman Rajagukguk, 'Harmonisation of law in ASEAN countries towards economic integration' (2012) 9(4) Journal Hukum international, page 531

institution,[1512] which is completely independent of the member states. In addition, it has mandatory jurisdiction, which means that whether or not a dispute comes under its competence, it has a monopoly over dispute resolution in the Community, which is not subject to acceptance by the member states.[1513] However, the ASEAN is still far behind the European community in terms of both political and economic integration.[1514] The EU regional integration is more formalised or so-called hard integration whereas the model of the ASEAN is based on soft integration and is less formalised than the EU.

Therefore, the ASEAN should consider learning a lesson from the authority of the supra-national court of the EU to ensure that Community law is effectively applied. Ideally, the Court of Justice of the EU solves disputes that arise among member states, EU institutions, businesses, and individuals. It also considers disputes between member states of the European Union, between the European Union and member states, between the institutions within the European Union and between individuals or corporate bodies and the European Union.[1515] There are several categories of proceedings under the ECJ that the ASEAN should consider; for example, (i) the preliminary ruling procedure; (ii) the proceedings for the failure to fulfil an obligation; (iii) the proceedings for annulment; and (iv) the proceedings for the failure to act. The preliminary ruling entails cooperation between the National Courts and the Court of Justice and consists of one judge from each member state, which makes a total of 27 judges from all the national legal systems of the Community.[1516] Such preliminary rulings are significant to ensure the uniform application of Community law by all member states.[1517] If a dispute arises or if a member states fails to fulfil an obligation, there are proceedings for the failure to act. Proceedings for annulment will be applied when there

[1512] For further discussion on supranational explains below
[1513] Laurence Henry, 'The ASEAN Way and community integration: two different models of regionalism' (2007) 13(6) European Law Journal. page 863
[1514] Rodolfo C. Severino, 'ASEAN faces the future' The ASEAN Secretariat collection of speed book, Jakarta
[1515] http://europa.eu/institutions/inst/justice/index_en.html
[1516] Thailand Law Journal 2010 Spring issue 1(13) http://www.thailawforum.com/articles/Role-of-ALA-2.html
[1517] Thailand Law Journal 2010 Spring issue 1(13) http://www.thailawforum.com/articles/Role-of-ALA-2.html

is any request for the annulment of Community Provision and Legal Acts. Such an annulment process would ensure that the actions of the ASEAN Economic Ministers were consistent and reduce the political influence on economic matters.[1518]

In addition, the ASEAN Court of Justice should be empowered to take jurisdiction of the following;

a) The ASEAN Free Trade Area (AFTA) and other economic agreements that include binding rules;

b) Inter-state disputes between two and more ASEAN member states that involve the norms and principle of international law, where such disputes are referred by member states;

c) Such other ASEAN agreements as may be agreed and include legally binding rules.[1519]

As mentioned earlier, it is interesting that some major differences between the ASEAN and the EU prevent ASEAN states from copying the highly regarded institution of the ECJ to acquire legitimacy. It is important to note that the ASEAN has no judicial body that could be described as being equivalent to the European Court of Justice; however, ASEAN leaders have agreed to establish an ASEAN Economic Community (AEC) by 2020 and several ASEAN documents are being prepared to establish a judicial organ. There are currently great opportunities to implement legal cooperation among ASEAN members and the role of the court in dispute resolution as well as the improvement of arbitration will become increasingly important in the future.[1520] Professor Woon adds that it is difficult to establish a supranational court because the rule of law is not firmly

[1518] Naronchai Akrasanee and Jutamas Arunanondchai, 'Institution reforms to achieve ASEAN market integration' in Sharon Siddique and Sree Kumr*, The ASEAN 2nd reader* (ISEAS 2003), Page 510

[1519] Naronchai Akrasanee and Jutamas Arunanondchai, 'Institution reforms to achieve ASEAN market integration' in Sharon Siddique and Sree Kumr*, The ASEAN 2nd reader* (ISEAS 2003), Page 510

[1520] Erman Rajagukguk, 'Harmonisation of law in ASEAN countries towards economic integration' (2012) 9(4) Journal Hukum international, page 531

established in every ASEAN member state. Interestingly, it is difficult in practice, but there also some advantages to the ASEAN. The ECJ appears to allow itself to become involved in the national caseload for the development of Community law. This makes the legal integration of Community law consistent because national judges serve as an independent body. The establishment of an ASEAN Court of Justice would provide reliability for member states, as well as giving investors confidence in the businesses sector. The Court of Justice would further integrate the region and ensure the timely resolution of disputes based on the agreed rules and obligations and the norms and principles of international law. Moreover, an ASEAN Court would support regional investors with a predictable remedy for disputes and encourage investment in the region to promote economic advancement.[1521] All of these factors are reasons why a regional court is necessary for the ASEAN to succeed; however, it first requires the application of a uniform law.[1522] To illustrate, the ASEAN needs to further consider if it is determined to promulgate a so-called ASEAN Community law as opposed to European Union law, as discussed in the next section.

7.4.5.2 Community Law Challenges

The previous section stated that the Court of Justice of the European Community (ECJ) could be modelled by the ASEAN for making a decision on the establishment of the ASEAN Court of Justice. The ECJ has been active in expanding community competences and enhancing the effectiveness of Community law. The promoting of Community law also actively engages in community law integration into national legal systems, and that

[1521] Megan R. Williams, 'ASEAN: do progress and effectivess require a judicary' (2007) 30 Suffolk Transnat'l L. Rev., page 456

[1522] Termsak Chalermpalanupap, 'the need for a legal framework for ASEAN integration' (2005) International law conference on ASEAN legal systems and regional integration http://www.asia-europe-institute.org/Events/International-Law-Conference/Papers/The%20Need%20of%20A%20Legal%20Framework %20for%20ASEAN%20Integration.pdf accessed 12 June 2015

Community law has supremacy over any incompatible national law.[1523] To run parallel with this, applying it to the ASEAN Court of Justice, Community law should be discussed as a step forward for the ASEAN to develop ASEAN law. In the long term, there is a possibility that ASEAN community law could grow through the unification of law.[1524] To define the opportunities for the ASEAN's effort to establish community law therefore, firstly the concept of a supranational union should be a continuing discussion within the concept of community law. As explained above, the ASEAN should consider learning a lesson from the authority of the supranational court of the European Union to ensure that Community law is effectively applied.

The supranational court's rulings are clearly defined as a supreme organ in all ways to domestic law. In other words, the supranational court's rulings must be followed by domestic courts, and also promote the decisions themselves, and are integrated into the domestic legal commitment as can be seen under the ECJ. The relationship between the ECJ and the domestic court shows that the ECJ makes the ruling based on the law alone, and the domestic court have a duty to render the final decision applying the EU law.[1525]

Based on the ECJ's experiences, if the ASEAN accepts ASEAN Community law as a principle to govern the association that can be applied at national level, it will also help deepen the ASEAN members' further integration. Furthermore, the importance for the ASEAN law's need to develop the structure of dispute settlement procedures as well as the ASEAN law, should make the ASEAN members familiar with the ASEAN disputes settlement mechanism. However, the development of ASEAN law is recognised to be a complex and difficult task in the present circumstances, to be an active force upon the region. It is important to note that writings on ASEAN law have been limited when

[1523] Ellen Vos, 'Regional integration through dispute settlement: the European Union experience' (2005) Maastricht Faculty of Law working paper no. 2005-7, page 2 https://papers.ssrn.com/sol3/papers.cfm?abstract_id=977450 accessed 8 January 2017

[1524] Erman Rajagukguk, 'Harmonisation of law in ASEAN countries towards economic integration' (2012) Journal Hukum international 9(4), page 532

[1525] *ASEAN 2030 Toward a borderless economic community* (2014) Asian Development Bank Institute, page 275

dealing with specific legal problems regarding the national context among ASEAN member countries. For example, there is no ASEAN law that deals with restrictive trade areas.[1526] While suggestions to changes in member state law can be made, the ASEAN lacks the power to enact or enforce laws to ensure uniformity,[1527] which is one of the main barriers for the ASEAN to become integrated with Community law. Therefore, this section will discuss the opportunities and guidelines for harmonising ASEAN laws.

Harmonising the laws of the member states is one of the future stages for the ASEAN to realise in formulating regional legal rules. The harmonisation of ASEAN law, such as the harmonisation of trade issues, is a topic that the ASEAN needs to focus on. Harmonising law is not only supportive of ASEAN law, but also brings more transparency to domestic laws, the regulations and the judicial decisions.[1528] As mentioned above, the ASEAN has no judicial institutional framework to facilitate it, as compared with the EU, which has a competence of attribution of the community dispute resolution as indicated above. The characteristics of the EU, such as preliminary rulings and state sanctions for failure have helped strengthen its autonomy and brought about the unity of the community legal order. The binding influence of the EU legal system is enforced throughout every member state under national law.[1529]

a) Opportunities to develop ASEAN Community Law

Since the ASEAN members have been unwilling to encourage the formation of a binding uniform legal system as mentioned above, as a result of the nature of the ASEAN's economic principles, there is support and general consensus for the principle of non-interference in domestic affairs of member states, which makes the ASEAN

[1526] Read more in George T.L Shenoy, 'The emergence of a legal framework of a legal framework for economic policy in ASEAN' (1987) 29 Malaysia Law review
[1527] Ibid.
[1528] ASEAN 2015, 'Seeing around the corner in a new Asian landscape' Nielson save file Nielsen-ASEAN 2015, page 14
[1529] Deborah A. Haas, 'Out of others' shadows: ASEAN moves toward greater regional cooperation in the face of the EC and NAFTA' (1994) 9(3) American university international law review, pages 865-866

government reluctant to lose their country's national rights and controls.[1530] These two principles seem to be bringing a lot of pressure for the ASEAN to develop a uniform legal system under the supranational community like that of the European Union. The ASEAN is not a supranational power, because it does not have a commission which acts as an independent organ which has been adopted as a legal body for the member states and which acts directly in ways that are binding for the member states. These political sensitivities in non-interference among the ASEAN members have effectively obstructed the development of community law in the ASEAN.[1531] Moreover, the ASEAN does not have any power of enforcement and has no judicial system under international law. This lack of any supranational element definitely makes it impossible for the ASEAN to form a centralised community.[1532] Furthermore, the ASEAN dispute settlement system is still based on consultation through diplomatic channels rather than the use of legal mechanism processes like the European Union.

According to the opinion of an Indonesian scholar from the CSIS, this shows the difficulty for the ASEAN to make a decision, which is still based on the consensus approach. She added that the idea of a strong supranational concept for the ASEAN is not necessarily the best way forward. She suggested that at least the ASEAN needs a body for decision-making. [1533] If the ASEAN is still based on the current intergovernmental cooperative framework with no significant reform to its principle norms, it does not mean that the ASEAN should be developed directly towards a supranational concept as has appeared in Europe. If the ASEAN wants to succeed like the European Union in the foreseeable future, the ASEAN should rethink regarding the consensus, and should be heading towards a supranational model in order to transfer autonomous decision-making authority to the ASEAN. Many scholars have pointed out

[1530] Rattanasevee, page 8 and Yang Hanmo, 'The achievability of an ASEAN Community through regional integration – in comparison with the European Union', (2013) Hong Kong Baptist University Journal, page 9

[1531] Lin, above 1427, page 13

[1532] Thomas Schmitz, 'the ASEAN economic community and the rule of law' (2014) page 2

[1533] Pattharapong Rattanasevee, 'Towards insitutionalised regionalism: the role of insitutions and prospects for institutionalization in ASEAN' (2014) Springer plus, page 7

that the ASEAN should establish supranational institutions with rule-making organs such as an ASEAN legislative mechanism, an organisational executive mechanism for the implementation of rules and decisions, as well as a judicial institution for interpreting and enforcing ASEAN rules and decisions. Professor Hund gave another suggestion, that the ASEAN requires centrally managed policies and also more independent and preferably supranational institutions in order to support it, to a certain degree, on a supranational basis.[1534]

As explained in Chapter one[1535], in order to adopt the dispute settlement mechanism of the ASEAN in an effective way, the ASEAN should think about how to develop ASEAN law through supranational law. The next section will address the possibility of the ASEAN transforming ASEAN Law into supranational law. The first opportunity to harmonise ASEAN community law is that ASEAN states must first take certain preliminary steps to create an ASEAN legal regime in ASEAN fields. These fields include trade, business, industry, communications and transportation. The second stage is that member states should harmonise national laws governing certain areas that affect the common interest. The harmonisation of national laws in each country will have similar rules governing particular activities. The opinion of the former Secretary General, Dr. Surin Phitsuwan, also supports this view that:

> *'In Europe, having a European Court and a European Parliament…it seems very easy to do because it has been part of the national culture. While the ASEAN has a vast diversity as the mix law regime'*[1536]

Regarding the ASEAN challenge to establish community law, as explained in chapter 6, the legal systems in the ASEAN are a mix of Common law and Civil law. This

[1534] Yang Hanmo, 'The achievability of an ASEAN Community through regional integration – in comparison with the European Union', (2013) Hong Kong Baptist University Journal, page 9 http://library.hkbu.edu.hk/award/images/2014_Awardhonourable_YangHanmo.pdf accessed 12 January 2016

[1535] Read more chapter one section 4 structural-formal characteristics of ASEAN

[1536] Pattharapong Rattanasevee, 'Towards insitutionalised regionalism: the role of insitutions and prospects for institutionalization in ASEAN' (2014) Springer plus, page 7

combination of Common and Civil law may make it difficult for the ASEAN to develop ASEAN law at the community level. This is because a former British colony affects the three ASEAN countries, Malaysia, Singapore and Brunei, who were colonised by the British and embrace the Common law system. The legal system in Brunei Darussalam is based on English Common law. Indonesia, Vietnam, Lao and Cambodia, who were colonised by the Dutch and the French, embrace the Civil Law system. Thailand is the only ASEAN member state that has never experienced foreign rule, and also embraces the Civil law system.[1537] Secondly, the experience is of ASEAN disputes or arguments being resolved through diplomatic channels rather than legal process. This experience shows that ASEAN members have been reluctant to bind to the formation of a uniform legal system. In this sense, the political channels are a sensitive issue among the ASEAN members and have effectively prevented the development of community law.[1538] Not only does the diversity of the legal system within the ASEAN differ greatly, mixing common law and civil law systems and hybrids of both, when compared with the EU's experience, it shows that the EU legal institution has more formalised rules than the ASEAN, which also creates difficulties building community law.

Thirdly, as mentioned in Chapter one, the ASEAN is still a traditional international organisation, in the sense that it has a purely intergovernmental structure without any formal intergovernmental decision-making organisations.[1539] To explain this, the ASEAN has no institutions with supranational competences as can be seen in the ASEAN Charter, it remains intergovernmental. Therefore, on the one hand, the nature of the ASEAN means it does not have supranational governmental authority over its member states,[1540] unlike the EU which has the European Commission as a regional executive, the European Parliament as the regional legislature and the European Court of Justice as

[1537] Tan ssrn-id 325484 and Erman Rajagukguk, 'Harmonisation of law in ASEAN countries towards economic integration' (2012) Journal Hukum international 9(4), page 532
[1538] Lin, above 1427, page 16
[1539] Leviter, above 50 page 200
[1540] ASEAN's institutional structure includes the ASEAN Summit, the ASEAN Foreign Ministers as the ASEAN Coordinating Council and the ASEAN Secretariat. Read more in Philomena Murray, 'Comparative regional integration in the EU and East Asia: moving beyond integration snobbery' (2010) Macmillan Publishers 47, pages 311-312

regional judiciary.[1541] This intergovernmental structure shows that the state should be the most important political actor, where it has the authority to join a community together with its absolute sovereign power, while the sovereignty of each state should be equally balanced within the community.[1542]

Fourthly, after reviewing the current ASEAN agreements and declarations plan, they are usually vague and very general regarding the setting of practical rules of cooperation. In the ASEAN, there is nothing that can be presented that shows ASEAN members are ready to move towards community law for deeper integration.[1543] For example, when the ASEAN reached a consensus to take action to implement uniform law, the next process was to implement this decision at the domestic level. To implement at the domestic level was more difficult than forming a consensus at the regional level. To date, the lack of practical rules to have an implemented process and the diversity in legal development has led ASEAN agreements to be difficult to put into effect.[1544]

In the long term, the ASEAN needs to construct a supranational concept to further facilitate economic integration. The ASEAN should concentrate attention on the formation of a supranational regime, attempting to harmonise ASEAN law[1545] as well as the unification of an ASEAN supranational political institution, such as the ASEAN parliament, Council and ASEAN Commission like that of the EU, in order to complement with these mechanisms to ensure the uniformity of the ASEAN legal regime.[1546] Interestingly enough, the ASEAN has never been an attractive equivalent for any ASEAN

[1541] ASEAN's matter, page 4

[1542] Yang Hanmo, 'The achievability of an ASEAN Community through regional integration – in comparison with the European Union', (2013) Hong Kong Baptist University Journal, page 7 http://library.hkbu.edu.hk/award/images/2014_Awardhonourable_YangHanmo.pdf accessed 12 January 2016

[1543] Lin, above, 1427 page 12

[1544] Lin, above, 1427 page 13

[1545] Erman Rajagukguk, 'Harmonisation of law in ASEAN countries towards economic integration' (2012) Journal Hukum international 9(4), page 531

[1546] Lim Yew Nghee, 'Restoring foreign investor confidence in ASEAN: legal framework for dispute settlement processes' (1998) 19 Sing. L. Rev.,page 164

member states, currently, the opportunities to implement legal cooperation are wide open.[1547] After the ASEAN Charter came into force, the ASEAN had no intention of following supranational powers, and even today this policy remains unchanged.[1548]

7.4.6 Government and Leadership Challenges

Successful regional integration requires a capable member state, or a small union of several member states, to serve as trusted leadership in directing and organising regional issues. The ASEAN would benefit from stronger government and stronger leadership if all the member states could work together to build a community; which highlights the importance of the successful development of ASEAN integration.[1549] Until now, no country seems to have both the potential to take on this responsibility[1550] and the willingness to take the first step.[1551] ASEAN leadership can be defined as an invisible leadership.[1552] The lack of leadership and governmental challenges in the ASEAN is one of the factors why the ASEAN is not a successful regional institution. This is because the ASEAN does not have an undisputed leader or a coalition of leaders to guide the organisation.[1553] Furthermore, the lack of leadership within the ASEAN also affects the ASEAN's lack of a central authority to contact, and lack of action

[1547] Lorand Bartels and Federico Ortino, *regional trade agreements and the WTO legal* system (Oxford University Press 2007), page 444

[1548] Pattharapong Rattanasevee, 'Towards institutionalised regionalism: the role of institutions and prospects for institutionalization in ASEAN' (2014) Springer , page 5

[1549] Pattharapong Rattanasevee, 'Leadership in ASEAN: the role of Indonesia reconsidered' (2014) Asian journal of political science 2(22), page 113

[1550] Yang Honmo, 'The achievability of an ASEAN community through regional integration – in comparison with the European Union, (2014) HKBU institutional repository, page 11 http://repository.hkbu.edu.hk/cgi/viewcontent.cgi?article=1005&context=lib_ugaward accessed 12 January 2017

[1551] ibid, page 11

[1552] Pattharapong Rattanasevee, 'Leadership in ASEAN: the role of Indonesia reconsidered' (2014) Asian journal of political science 2(22), page 113 http://www.tandfonline.com/ doi/pdf/10.1080/02185377.2014.895912 accessed 12 May 2016

[1553] Paul J. Dividson, *The legal framework for international economic relations: ASEAN and Canada* (ISAS 1997), page 2

to speak with other organisations and other States.[1554] It is important to note that this section will only show examples of the general ideas that have inspired the ASEAN to develop government and leadership capacities.

One of the roles of government in the ASEAN can be seen in the comprising of international obligations, such as member governments can also provide those governments with strong arguments against pressures from particular interest groups within their country.[1555] On the one hand, the national government is concerned with the level of regulation. The national government affects trade and investment transactions.[1556] The government influences customs administration, taxation and immigration, and rights of establishment cover restrictions on foreign investment or trade. Furthermore, this obligation reflects rules of domestic policy, which concerns their implementation under domestic laws.[1557] The role of the ASEAN government in the area of trade can be seen when negotiating a trade pact. For example, governments must decide the legalistic threat its trade dispute settlement mechanism poses to the discretion of political leaders in a threefold way.[1558] Firstly, it may constrain their ability to manage unforeseen costs by making it more costly in an adjustment to provide protection to specific groups injured by trade liberalisation. Secondly, it may limit their general policy autonomy across a range of domestic regulations, which it judges against treaty commitments to eliminate non-tariff barriers to trade. Thirdly, it may provide their ability of authority to third parties, who may pursue trade policy bilaterally, a strategy with distinct political advantages.[1559] Furthermore, these government

[1554] Lin Chun Hung, 'ASEAN Charter: deeper regional integration under international law?' (2010) Chinese JIL http://chinesejil.oxfordjournals.org/content/9/4/821.abstract accessed 1 May 2015, page 9
[1555] Paul J. Dividson, *The legal framework for international economic relations: ASEAN and Canada* (ISAS 1997), page 2
[1556] Guan, above 1556, page 3
[1557] Jose L. Tongzon, *The economies of Southeast Asia before and after the crisis* (2nd edn, Edward Elgar Publishing Limited 2002)
[1558] Defending the spectrum from diplomacy to legalism, page 145
[1559] Definding the spectrum from diplomacy to legalism, page 145

challenges are also included within the government's capacity to prepare for economic integration as well as the building up of a dispute settlement mechanism.[1560]

a) Leadership Challenges

The ASEAN lacks a strong leader who is capable of coordinating and promoting the integrational efforts of the region. The ASEAN requires a clear and supportive leader who can serve as an institutional regional player to facilitate and drive regional projects.[1561] This situation proves that the ASEAN must not be lacking as a core economic power within the regional combination.[1562] The ASEAN leader should support all advisory and legal services, especially for less developed ASEAN members in the area of trade and investment disputes. At the same time, ASEAN members should try to be aware of all the existing legal assistance relating to the dispute settlement mechanism process, particularly in regional community-building. A lack of decisive leadership could lead to a problem within the organisation, and could also lead to its collapse, which puts more pressure on it from external powers interfering, regarding ways of thinking about the development of the ASEAN.[1563] Therefore, this section will explain the problems that would arise in the ASEAN when faced with a lack of leadership. The ASEAN is a failing security institution because the institution is without a leader.[1564] However, there are some questions which arise regarding who could be the ASEAN's leader and who is good enough to be the ASEAN's leader. This question of leadership can be broken down in several ways, such as, has the ASEAN ever had a leadership? Who was it? Is the ASEAN leaderless? In order to answer these questions it is very important to note that many

[1560] Andrea Schneider, 'Getting Along: the evolution of dispute resolution regimes in international trade organisations' (1999) 20(4) Michigan journal of international law, page 729 http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1295562 accessed 1 January 2016

[1561] Pattharapong Rattanasevee, 'Why Indonesia should take a leading role in ASEAN' East Asia Forum (2015) http://www.eastasiaforum.org/2015/03/28/why-indonesia-should-take-a-leading-role-in-asean/

[1562] Clark D. Neher, Southeast Asian the new international era (Westive press 1999), page 145

[1563] Pattharapong Rattanasevee, 'Leadership in ASEAN: the role of Indonesia reconsidered' (2014) Asian journal of political science 2(22), page 113-114 http://www.tandfonline.com/ doi/pdf/10.1080/02185377.2014.895912 accessed 12 May 2016

[1564] Nicholas Khoo, 'Rhetoric vs. Reality: ASEAN's clouded future' (2004) 5 (49) Georgetown Journal of International Affairs, page 54

ASEAN scholars consider Indonesia to be the ASEAN's leader. On the other hand, some scholars say the ASEAN is leaderless. Thus, the critical role of Indonesia's prospects in leading the ASEAN is also discussed in this section to further understand the nature of how Indonesia acts as the ASEAN's leader, and what the future directions of the ASEAN are for appointing it as the ASEAN's leader.

Some ASEAN scholars, such as Ong Keng Yong, the former Secretary-General of the ASEAN shares the values of the ideas of the leadership. He believes that leadership is 'about lifting a person's vision to a higher level and raising a person's performance to bring a higher standard'. According to another ASEAN scholar, leadership is not just about a dynamic personality forging a good relationship amongst members, acting as a 'winning friends or influencing people' individual, but the person who can support and bring all the members into the centre ground with good cooperation and acts of leadership within a group or organisation.[1565] There are three possible explanations of leadership in the ASEAN. Firstly, 'Sectorial Leadership' refers to leadership directing the country through areas or sectors of competence, or depending on who is in the best position to take the lead at the time. Secondly, 'Cooperative Leadership' is formed among a group of countries that share a strategic role and share their visions in the region. It is important to note that this form of leadership is similar to the case of the European Union, where Germany and France appear as a coalition leader.[1566] The EU's experiences, under the Franco-German leadership demonstrate that leadership is seen as a powerful driver that accelerates and facilitates the negotiation and decision-making

[1565] The Opening address at the ASEAN leadership forum in the topic of leadership challenges in the 21st century Southeast Asia: regional integration, competitiveness and community building at Kuala Lumpur, Malaysia on 22March 2004 http://asean.org/?static_post=leadership-challenges-in-the-21st-century-southeast-asia-regional-integration-competitiveness-and-community-building accessed 6 May 2016

[1566] France and Germany have made great efforts in the European Union. It is important to note that in ASEAN many small countries can play more important roles than the big countries. Such as Singapore is the smallest country in ASEAN, but it has an important role in economic areas of ASEAN see; Christopher B. Roberts, ASEAN regionalism: cooperation, values and institutionalisation (New York: Routledge 2011), page 166

process, which help to achieve mutual outcomes.[1567] If adopted by the ASEAN no single ASEAN country could fulfil the leading role. If applied, as with the case of the European Union, the ASEAN should be built on the basis of two or three countries in order to forge cooperation among their leaders, with the ability to consolidate their domestic politics. Lastly, 'Periodical Leadership' assumes that individual countries can act as the leadership of the ASEAN; for example, Indonesia's President Suharto and Singapore's Prime Minister Lee Kuan Yew.[1568]

As mentioned in Chapter one, Thanat Khoman, the Ex-Minister of Foreign Affairs for Thailand who drafted the formation of the ASEAN's declarative document was one of the ASEAN's founding fathers in 1967. In this sense, Thailand was the leader in the founding of the ASEAN, by way of the ASEAN's founding document, the so-called Bangkok Declaration of 8 August 1967.[1569]

However, Indonesia could be said to be ASEAN's leader too; Indonesia, which has the largest population and one of the strongest armed forces is assumed to be the ASEAN's leader. It is not only the largest and most highly populated country in the region but has also been the most active in international affairs. But the ASEAN would not have been formed with Indonesia being able to take this role if President Soeharto had not decided to end the Sukarno regime's confrontational stance in foreign affairs and instead seek good relations with the rest of the World. Later, the ASEAN's efforts at economic cooperation and integration would not have gotten off the ground if Indonesia had not made its economy more open.[1570] Malaysia too has had moments of leadership. The declaration on the Zone of Peace, Freedom and Neutrality was adopted upon Malaysia's initiative and under its chairmanship of the ASEAN Foreign Minister's meeting in 1971.

[1567] Pattharapong Rattanasevee, 'Leadership in ASEAN: the role of Indonesia reconsidered' (2014) Asian journal of political science 2(22), page 114 http://www.tandfonline.com/doi/pdf/10.1080/02185377.2014.895912 accessed 12 May 2016

[1568] Pattharapong Rattanasevee, 'Why Indonesia should take a leading role in ASEAN' East Asia Forum (2015) http://www.eastasiaforum.org/2015/03/28/why-indonesia-should-take-a-leading-role-in-asean/

[1569] Read more Chapter one overview of structure and understanding of ASEAN section 1 introduction

[1570] Kazushi Shimizu, 'The ASEAN Charter and the ASEAN Economic Community' (2011) 40 Economic Journal, page 76

The term 'ASEAN Vision 2020' was adopted at the ASEAN Summit in Kuala Lumpur in 1997.

The academic professor Pattharapong Rattanasevee demonstrated that Indonesia should take a leading role in the ASEAN; the reason being that the ASEAN requires the presence of an undisputed leadership, and Indonesia seemed to be the only candidate.[1571] The founder of the Foreign Policy Community of Indonesia, Dino Patti Djalal, also supports the idea that Indonesia should further assert itself as the ASEAN's leader to maintain and play a central role in the region.[1572] This is because Indonesia is the world's fourth largest state in terms of population, and the largest countries compose of 40 per cent of the ASEAN's total population. Furthermore, due to the Indonesians experience of a painful colonisation, Indonesia is trying to end regional conflict and expects to remove the external powers from the region.[1573] Currently, Indonesia is seen as having a silent leadership in the region.[1574] The Indonesians contemporary leadership role in the ASEAN plays a part in conflict management. This role reflects the intention of Indonesia to stabilise by acting as a state that tries to solve both the political and security tensions of its members.[1575] However, since the financial crisis in 1997[1576] which made Indonesia lose its standing and international credibility

[1571] Pattharapong Rattanasevee, 'Why Indonesia should take a leading role in ASEAN' East Asia Forum (2015) http://www.eastasiaforum.org/2015/03/28/why-indonesia-should-take-a-leading-role-in-asean/

[1572] Marguerite Afra Sapiie, 'As ASEAN's natural leader, Indonesia should assert leadership' The Jakarta Post 18th September 2016

[1573] Pattharapong Rattanasevee, 'Why Indonesia should take a leading role in ASEAN' East Asia Forum (2015) http://www.eastasiaforum.org/2015/03/28/why-indonesia-should-take-a-leading-role-in-asean/

[1574] Pattharapong Rattanasevee, 'Leadership in ASEAN: the role of Indonesia reconsidered' (2014) 2(22) Asian journal of political science, page 120 http://www.tandfonline.com/doi/pdf/10.1080/02185377.2014.895912 accessed 12 May 2016

[1575] Two of the example cases, such as, temple of Preah Vihear case between Thailand and Cambodia and the issue of South China Sea between People's Republic of China and several ASEAN member states read more in, Bama Andika Putra, 'Indonesia's leadership role in ASEAN: history and future perspect' (2015) SOCIOINT International conference on education, social sciences and humanities, page 213 http://www.ocerint.org/socioint15_epublication/papers/234.pdf accessed 12 May 2016

[1576] The explanation of ASEAN financial crisis read more in chapter 2

after it experienced severe economic difficulties which affected the position of the ASEAN's leadership, it has collapsed with no obvious successor.[1577]

To sum up the role for the ASEAN's leadership; the ASEAN cannot escape from this challenge and the competition for leadership never stops.[1578] Such leadership will provide the ASEAN with the management of interdependence and it must recognise the complementary nature of regional integration and balance community-building. However, this situation over leadership of the ASEAN creates a vacuum, and the picture of leadership has become more complex within the association. Leadership in the ASEAN alters, depending on the sector, which makes it unclear which country will become the ASEAN's leader. The ASEAN has no membership criteria related to the character of the political regime, ideological system and orientation, economic policy, or level of development. In the future, if the ASEAN is to decide on the leader of the community, these challenges will need to be overcome and the opportunities be fully utilised for the present and future, as well as enhancing the pursuit of leadership for the ASEAN. Currently, the core of the ASEAN leadership has been pushed down a difficult road which has become even harder.[1579]

Section 7.5 Conclusion

The ASEAN is still facing challenges that need to be taken into consideration. Based on the analysis above, this chapter answers the questions on how dispute settlement can be made more useful to fully evaluate an effective system of trade

[1577] Pattharapong Rattanasevee, 'Leadership in ASEAN: the role of Indonesia reconsidered' (2014) Asian journal of political science 2(22), page 116 http://www.tandfonline.com/doi/pdf/10.1080/02185377.2014.895912 accessed 12 May 2016

[1578] Christopher B. Roberts, ASEAN regionalism: cooperation, values and institutionalisation (New York: Routledge 2011), page 20

[1579] Christopher B. Roberts, ASEAN regionalism: cooperation, values and institutionalisation (New York: Routledge 2011), page 21

dispute settlement in the ASEAN. The structure of a dispute settlement system cannot be examined without analysing the overall design, jurisdiction, scope, the enforcement mechanism and the legal status of decisions. The current system is not suitable in all aspects of the ASEAN. This chapter provides the recommendations and some basic suggestions for the future direction of the ASEAN dispute settlement model, particularly with regard to the ASEAN trade dispute settlement pillar, and a clear direction for the efforts to reform the ASEAN dispute settlement mechanism are provided in the context of the establishment of the ASEAN Economic Community (AEC) for this region until 2020.

These improvements include the development of the ASEAN institutional dispute settlement and its structure, by empowering the ASEAN Secretariat and the qualified staff to the Secretariat. Suggestions are also made for improving rules and procedures of the dispute settlement mechanism by making the ASEAN DSM a rule-based regime rather than a relationship-based regime. The re-interpreting of the ASEAN Way must be modified to develop an approach. With the ASEAN still remaining involved in the flexible engagement of the ASEAN Way, it could damage the ASEAN's credibility if it is left unaddressed. Moreover, this chapter also provides more understanding about the ASEAN Protocols on the economic dispute settlement mechanism as well as the ASEAN Charter, which are all related to ASEAN dispute settlement instruments for their government and among all member countries. The challenges to make the ASEAN successful would require the development of effective workability of the dispute settlement mechanism which is governed by stronger institutions. Without this strong institutional structure, the ASEAN cannot have a better enforcement mechanism to achieve economic integration. The comparative analysis of the dispute settlement mechanisms under the WTO and the ASEAN are due to the similarities between the dispute settlement's mechanisms of the ASEAN free trade agreement. The ASEAN can learn from the WTO in developing an effective dispute settlement between them respectively. The ASEAN trade dispute settlement mechanism (DSM), the dispute settlement systems of the World Trade Organisation (WTO) and the existence of the ASEAN trade DSM discussed above, provide useful criteria for the ASEAN. As compared

to the WTO, it provides the best model for the ASEAN, such as the Panels and Appellate Body, which appears to be the most appropriate to the ASEAN. Also, ASEAN member countries may further strengthen the existing dispute settlement mechanism by empowering the Senior Economic Official Meeting (SEOM) to make some structural changes. Another issue related to funding in the ASEAN DSM, is that the cost involved in resolving a dispute should be similar to the WTO, where all member states share the costs.

With this context in mind, the ASEAN would be prepared to move forward to a more rule-based mechanism. The establishment of the ASEAN Court of Justice, the concept of the supranational model and the harmonisation of law, are also provided in this chapter. The establishment of the ASEAN Court of justice provides jurisdiction over economic agreements as well as the designated judges nominated by each member state.[1580] The necessity of a court system in the region is important to deal with complex issues resulting from increased integration. Harmonising the laws of the member states is one of the future stages for the ASEAN to realise in formulating regional legal rules. Interestingly enough, the ASEAN has never been an attractive equivalent for any ASEAN member states. In the long term the harmonisation of ASEAN law, and the supranational model comparable to the European Union, which has a strong enforcement mechanism, should be addressed in order to support economic integration.

Currently, the ASEAN lacks a strong leader who is capable of coordinating and promoting the integrational efforts of the region. In the future, if the ASEAN decides on the leader of the community, these challenges will need to be overcome and the opportunities will need to be fully utilised for the present and the future, as well as enhancing the pursuit of leadership in the ASEAN.

[1580] Biswa Nath Bhattacharyay, 'Peospects and challenges for integrating south and Southeast Asia' International journal of development and conflict (2014), page 87

According to the ASEAN, the mechanism has never been tested, so in order to promote and encourage ASEAN member states to test that the ASEAN DSM is valuable for ASEAN members, they must try to use the ASEAN DSM provided in the 2004 Protocol. When the member states try this mechanism, they will know if something goes wrong, or which points they have to fix. This test will help to clarify some corrections and reviews for better understanding for the future.[1581]

[1581] Lim Yew Nghee, 'Restoring foreign investor confidence in ASEAN: legal framework for dispute settlement processes' (1998) 19 Sing. L. Rev.,page 164

CHAPTER VIII

CONCLUSION

Section 8.1 Structure of thesis

The purpose of this thesis is to provide a better understanding of the ASEAN Protocol on the settlement of economic disputes, the so-called 2004 Protocol on Enhanced Dispute Settlement Mechanism (EDSM), and the ASEAN Charter, which are all dispute settlement instruments for the governments of all ASEAN member countries. The central research questions were designed to determine how these dispute settlement instruments can be made more useful to form a fully effective system of settling trade disputes in the ASEAN and how the ASEAN can strengthen its trade dispute settlement mechanism. These were accompanied by three sub-questions: i) what are the problems and limitations of the ASEAN that challenge the improvement of its dispute settlement mechanism?; ii) What are the impacts of the so-called ASEAN Way; iii) Why are ASEAN member states unwilling to make full use of the EDSM, preferring to bring their trade disputes to the World Trade Organisation (WTO) for settlement?

Along the road to answer the research questions, the thesis is structured in the following way; Chapter 1 contains an overview of the evolution and characteristics of the ASEAN including its structure, its decision-making, its legal personality, the concept of ASEAN sovereignty, and the way it works in terms of settling internal disputes. This examination of the ASEAN's main characteristics provides a better understanding of the

way it functions. The process of economic integration in preparation for the ASEAN Economic Community is described in Chapter 2, which contains a detailed account of the latest development of economic cooperation among ASEAN member countries to move toward an increase in regional cooperation in terms of economic growth in order to strengthen the ASEAN Community. Moreover, the attempt to achieve economic integration with the creation of a single market is also discussed in this chapter. The trade dispute settlement mechanisms of the GATT and the WTO under a multilateral trading system are outlined in Chapter 3, since these are useful examples to compare with the mechanisms used in the ASEAN. Regional trade organisations are examined in Chapter 4 using the dispute settlement mechanism models in force in the European Union (The EU), the North American Free Trade Areas (NAFTA), and the Common Market of the South (MERCOSUR) as examples. These regional trade dispute settlement regimes provide a reference for many comparative examples that encourage trade liberalisation and bilateral trading concepts, which could function well in the context of the ASEAN. The mechanisms to settle disputes related to trade agreements endorsed by the ASEAN Free Trade Area are examined in Chapter 5, together with the development of the ASEAN dispute settlement method, as stated in the 1996 Protocol on a dispute settlement mechanism, the 2004 Protocol on an Enhanced Dispute Settlement Mechanism (EDSM), and the ASEAN Charter, particularly related to the settlement of trade disputes. The concept of conflict resolution in the framework of the ASEAN dispute settlement mechanism is analysed by illustrating the timeline of the development of the ASEAN agenda. Most of Chapter 6 is devoted to the problems and limitations of the ASEAN's dispute settlement mechanism, with the reminder containing a brief examination of the problematic issues encountered by the ASEAN in the pursuit of economic integration. Finally, the implementation and future development of an ASEAN trade dispute settlement mechanism are discussed in Chapter 7, together with a further consideration of the problems and some recommended solutions.

Section 8.2 Thesis Summary

The ASEAN had been established for 50 years before the ASEAN Charter came into force and the lack of a formal Charter had affected its legal personality and defined it as a loose organisation, which had never been established internationally. The adoption of the ASEAN Charter in 2005 enabled the ASEAN institutions to function more effectively and gave them a legal status. The development of the ASEAN engendered by the adoption of the ASEAN Charter included; 1) A new status under international law; 2) A legal personality characterised by the enactment of the ASEAN Charter; 3) Strengthening of the ASEAN's institution since the Charter served as an important step in the ASEAN's commitment to bring all member countries' economies together for the deeper and wider integration of the ASEAN. This adoption of the ASEAN Charter helped the ASEAN to strengthen its international economic linkages, ensure the implementation of agreements to promote regional cooperation, and to comply with all the membership obligations.

In order to better understand the emergence of the ASEAN's trade dispute settlement mechanism, it is important to have some background knowledge of the structure of the ASEAN and the way it functions. The ASEAN is an inter-governmental association with no supranational body based on its characteristics and evolution. In other words, the ASEAN has no institutions with supranational competences as can be seen in the ASEAN Charter; it remains intergovernmental. The ASEAN has no supranational government authority over its member states, unlike the European Union, which has the European Commission as a regional executive, the European Parliament as the regional legislature and the European Court of Justice as regional judiciary. Based on the intergovernmental structure of the ASEAN, the state is still the most important political actor, and although it has the authority to join communities together with its absolute sovereign power, the sovereignty of each member state should be equally balanced within the community.

Nevertheless, the ASEAN needs to move toward being a more regional organisation to initiate "regional community building", and with this in mind, it made efforts to improve the region's competitiveness to sustain economic growth. Then, in 2003, at the 9th ASEAN Summit in Bali, Indonesia, the ASEAN leaders agreed to establish an ASEAN Community consisting of three pillars, namely, the ASEAN Political and Security Community (APSC), the ASEAN Economic Community (AEC) and the ASEAN Social Cultural Community (ASCC). The AEC Blueprint contained four key goals for the ASEAN to become; i) a single market and production base; ii) a highly competitive economic region; iii) a region of equitable economic development; and iv) a region fully integrated into the global economy. Furthermore, the ASEAN has cultivated close cooperation in the area of trade with countries outside the region such as Australia, Canada, China, India, Japan, Republic of Korea, New Zealand, Russia, the United States and the European Union.

The ASEAN achieved the establishment of an ASEAN Economic Community (AEC) on the 31st December 2015 for deeper economic integration. The main concept of the AEC was to create a stable, prosperous and highly competitive ASEAN economic region, characterised by the free flow of goods, services, investment, and expanded opportunities for skilled labour migration. However, the creation of the AEC would not produce a complete Common Market in which all member countries would remove all barriers to the free flow of goods, services, labour and capital; rather, it would be a single market in which all member countries would remove barriers to the flow of goods, services and capital. It was created to realise the real competition among its members with the aim of freely circulating goods, capital, investment and services. The current status of the ASEAN is somewhere between a free trade area and a Customs Union. However, the 2015 timeline for the AEC was just the beginning. Now, in 2017, an ASEAN Economic Community (AEC) exists and the intra-ASEAN trade in goods is no longer blocked by high tariffs and import duties. The ASEAN 2015 deadline should be seen as a milestone year and the measure of a work in progress. Some processes need to continue in order to maintain its relevance in an evolving global economy and this

requires the commitment of every member country. Therefore, ASEAN leaders need to follow the ASEAN Vision 2025: Forging Ahead Together as a guide for ASEAN economic integration from 2016 to 2025, when the ASEAN will be seen to be even more proactive, working with efficient planning and further engagement in competitive innovation in order to meet challenges and create a fully functional AEC. This is the long-term goal the ASEAN should strive to achieve.

Since the AEC entails higher levels of trade between ASEAN member countries, the number of trade disputes is expected to increase significantly as it moves toward a higher level of economic integration; therefore, a creative and effective trade dispute settlement mechanism will also be required to achieve the Association's goal. The ASEAN needs to develop a mechanism that can settle disputes between member states in the move toward a fully secure economic community and play a useful role in developing a holistic rule-based Community.

As explained above, an ASEAN Economic Community (AEC) cannot be established without the existence of some means of settling conflicts among the member states based on the interpretation and implementation of a variety of economic agreements, such as the ASEAN free trade area (AFTA). Since the AEC is based on a single market, the performance of these economic frameworks will be discussed in this thesis apart from one element of the ASEAN Economic Community, which relates to the main previous AFTA, namely the flow of goods. An overview of the ASEAN mechanisms for the settlement of disputes created by the ASEAN Protocol on Enhanced DSM (EDSM), the so-called 2004 Protocol, and the ASEAN Charter related to ASEAN economic agreements is provided in this thesis. The ASEAN 2004 Protocol provided a means for governments to settle disputes between them and was limited to members of the ASEAN. The new 2004 Protocol also allows for the establishment of an Appellate Body consisting of independent experts with professional experience, which means that both government and non-government officials are involved in resolving the dispute and making a judgment on a legal basis. The ASEAN Charter was designed as a legal framework for the

ASEAN as a rule-based organisation and Article 24(3) refers to the 2004 ASEAN Protocol on an Enhanced Dispute Settlement Mechanism (EDSM) which is a detailed mechanism to specifically address economic disputes among ASEAN member states. The 2004 Protocol on Dispute Settlement Mechanism of ASEAN economic agreements contained some new institutional mechanisms and measures to strengthen the implementation of economic agreements (i.e., the covered agreement), as well as a formal judicial procedure to resolve trade-related disputes and any dispute related to the implementation, interpretation and application of current and future trade agreements. The ASEAN dispute settlement mechanism consists of both informal and formal procedures known as 'non-adjudicatory' and 'adjudicatory'. Non-adjudication or diplomatic procedures include consultation, good offices, conciliation and mediation in an attempt to encourage member states to resolve their disputes in the most efficient way by reaching a mutually-agreed solution. The adjudication stage consists of panels and an Appellate Body, while the third stage entails the implementation of the findings and recommendations. The ASEAN DSM 2004 was modelled on the dispute settlement mechanism of the World Trade Organisation. The overall idea of the EDSM procedure is highly judicial and this facilitates a more speedy resolution, despite having some weak points; for example, the apparent reluctance of ASEAN member states to utilise their own DSM, preferring instead to continue to settle their disputes using mechanisms outside the ASEAN framework, such as the WTO, which leads to problems of jurisdiction and the overlap of the trade DSM and the WTO. Therefore, the flexibility of the EDSM to resort to systems outside the ASEAN makes the ASEAN DSM optional rather than mandatory. Moreover, ASEAN member states try to avoid using the DSM because of its political influence, which is an important factor of their lack of willingness to apply it. They still prefer to take their trade disputes to the WTO rather than using ASEAN instruments, especially since the dispute settlement mechanism of the WTO has a number of features that are attractive to the ASEAN, such as more reliability, more predictability, and well-structured and substantive rules. The analysis of the transplantation of the WTO dispute settlement model in the ASEAN shows that this

model contains methods and processes that suit the conditions and political situation in the ASEAN.

There is a need to further enhance the ASEAN's achievement of these challenges; therefore, measures that would give more impetus to the ASEAN's current dispute settlement mechanism have been suggested in this thesis. These include developing the structure of the ASEAN's institutional dispute settlement mechanism by increasing the power of the ASEAN Secretariat and its qualified staff. It is also suggested that the rules-based regime should be improved rather than continuing with a relationship-based regime. The re-interpreting of the ASEAN Way must be modified to develop an approach because the ASEAN's continued adoption of this over-flexible method to resolve internal disputes could damage its credibility if it is left unaddressed. The WTO appears to be the most appropriate model for the ASEAN with its Panels and Appellate Body. In terms of funding, all member states should share the costs involved in resolving a dispute using the ASEAN DSM, similar to the WTO.

Moreover, the establishment of the ASEAN Court of Justice, the concept of a supranational model and the harmonisation of law, were also addressed in this thesis. From a long-term perspective, the ASEAN needs to construct a supranational concept to further facilitate economic integration. It should focus on the formation of a supranational regime in an attempt to harmonise ASEAN law, as well as the unification of ASEAN supranational political institutions, such as an ASEAN parliament, Council and ASEAN Commission like the European Union, in order to complement the dispute settlement mechanism of the ASEAN and adopt it in an effective way.

However, according to the opinion of an Indonesian scholar from the CSIS, the ASEAN needs a decision-making body if it wants to succeed like the European Union in the foreseeable future. Therefore, it should rethink the method of consensus and head toward a supranational model in order to transfer autonomous decision-making authority to the ASEAN. Interestingly, the ASEAN had no intention of following

supranational powers after the ASEAN Charter came into force and this policy remains unchanged.

One of the big challenges for the ASEAN entails the testing of the 2004 Protocol by member countries, since this would highlight practical problems if something goes wrong or identify any weak points that need to be fixed. This test would clarify what needs to be corrected for a better understanding in the future.

Sinopsis

El objetivo de esta tesis es comprender el Protocolo de la Asociación de Naciones del Sudeste Asiático (ASEAN) para la resolución de conflictos económicos, el llamado Protocolo de 2004 sobre un Mecanismo Mejorado de Resolución de Conflictos (EDSM, por sus siglas en inglés) y la Carta de la ASEAN, todos ellos relacionados con instrumentos de resolución de conflictos para los gobiernos de todos los países miembros de la ASEAN. La Carta de la ASEAN se incluye de forma prioritaria en el análisis de esta tesis, puesto que no ha conseguido mejorar la capacidad de la ASEAN para lograr una mayor integración económica, y este fracaso parece haber impedido a ASEAN avanzar hacia una integración más profunda.

Una cuestión importante que se plantea desde la adopción del Protocolo de 2004 (el EDSM) es por qué ningún Estado miembro de la ASEAN ha sido capaz de resolver ni un solo conflicto a través del EDSM, lo cual significa que el EDSM nunca ha sido puesto en práctica hasta el momento. Los Estados miembros de la ASEAN dudan en utilizarlo porque tiene una serie de debilidades que pueden disminuir su eficacia. Basándose en ejemplos ofrecidos por varios casos, los Estados miembros de la ASEAN prefieren utilizar el mecanismo de la Organización Mundial del Comercio (OMC) para resolver sus conflictos comerciales. Cabe señalar que el proceso de resolución de conflictos de la ASEAN es muy similar al mecanismo de resolución de conflictos de la OMC. Esto afecta de manera similar al mecanismo de la ASEAN en otros foros, ya que los estados miembros de la ASEAN prefieren resolver conflictos más allá de su propio mecanismo.

Por otra parte, esta situación también ha llevado a una crítica cada vez mayor del mecanismo de resolución de conflictos de la ASEAN (DSM) desde una perspectiva tanto procedimental como sustancial. Además, su eficacia sigue siendo cuestionada. La

diversidad de sistemas políticos y jurídicos, el problema de la "ASEAN Way" (la manera de proceder de ASEAN) y el procedimiento de resolución de conflictos del Acuerdo de Libre Comercio de la ASEAN también se perciben como obstáculos para la integración regional de la Comunidad de la ASEAN.

Asimismo, esta tesis ilustra el establecimiento y la evolución de una variedad de diferentes regímenes de resolución de conflictos aplicados a los conflictos comerciales, basada en un análisis de cómo las organizaciones comerciales multilaterales y regionales desarrollan sus mecanismos de resolución de conflictos. La tesis ofrece un resumen de los procedimientos y estructuras relevantes antes de realizar un examen más detallado de los conflictos que puedan surgir entre los Estados Partes. Además, el funcionamiento de estos mecanismos de resolución de conflictos se explicará en esta tesis, especialmente aquellos que involucran la inversión extranjera y algunos relacionados con conflictos entre los estados sobre la aplicación e interpretación de los tratados de libre comercio. El Acuerdo General de Aranceles Comerciales (GATT) y la Organización Mundial del Comercio (OMC) proporcionan un ejemplo de sistemas multilaterales de comercio institucionalizado.

La perspectiva regional se abordará también en esta tesis, que se centrará en tres grandes organizaciones regionales: la Unión Europea (UE), el Mercado Común del Sur (MERCOSUR) y el Área de Libre Comercio de América del Norte (TLCAN). Debe señalarse que el MERCOSUR ha sido incluido como ejemplo en esta tesis de una organización que ha resuelto conflictos comerciales de forma eficaz. Esto se debe a que el MERCOSUR es similar a la ASEAN en el sentido de que los Estados Miembros son países en vías de desarrollo. Un análisis de los diferentes elementos de fondo y una perspectiva comparativa de los cinco ejemplos de mecanismos de resolución de conflictos del GATT, la OMC, la UE, el TLCAN y MECOSUR pueden ser beneficiosos para la ASEAN. El diseño de regímenes de resolución de conflictos comerciales puede servir como referencia para muchos ejemplos comparativos para fomentar la liberalización del comercio y los conceptos comerciales bilaterales que podrían aplicarse funcionalmente

en el contexto de la ASEAN. El estudio de estos mecanismos sirve también para el desarrollo de un mecanismo de resolución de conflictos comerciales de la ASEAN.

El hecho de que los Estados miembros de la ASEAN no recurran a este mecanismo puede atribuirse a muchos factores. Las recomendaciones y sugerencias básicas para la orientación futura del modelo de resolución de conflictos comerciales de la ASEAN, en particular con respecto al pilar del mecanismo de resolución de conflictos de la ASEAN, y una orientación clara para los esfuerzos por reformar el DSM de la ASEAN se abordan en el contexto de la Comunidad Económica ASEAN (AEC). Es interesante observar que hasta la fecha no se ha tratado ni un solo conflicto con este mecanismo, y existe incertidumbre sobre cuándo se utilizará en el futuro, si es que se llega a usar. Será difícil para el AEC ser eficaz en el futuro si el problema del no-uso de DSM no puede resolverse.

CONCLUSIONES

1 Estructura de la tesis

El propósito de esta tesis es proporcionar una mejor comprensión del Protocolo de la Asociación de Naciones del Sudeste Asiático (ASEAN) sobre la resolución de conflictos económicos, el llamado Protocolo de 2004 sobre el Mecanismo Mejorado de Resolución de Conflictos (EDSM) y la Carta de la ASEAN, todos ellos instrumentos de resolución de conflictos para los Gobiernos de todos los países miembros de la ASEAN. Las preguntas centrales de esta tesis doctoral han sido diseñadas para determinar cómo

estos instrumentos de resolución de conflictos pueden ser más útiles para formar un sistema completamente efectivo de resolución de conflictos comerciales en la ASEAN y cómo la ASEAN puede fortalecer su mecanismo de resolución de conflictos comerciales. Estas preguntas esenciales vienen acompañadas de tres sub-preguntas: 1) ¿Cuáles son los problemas y limitaciones de la ASEAN que cuestionan la mejora de su mecanismo de resolución de conflictos? 2) ¿Cuáles son los impactos de la llamada "ASEAN Way" (la manera de proceder ASEAN)? 3) ¿Por qué los Estados miembros de la ASEAN no están dispuestos a hacer pleno uso de la EDSM, prefiriendo trasladar sus conflictos comerciales a la Organización Mundial del Comercio (OMC) para su resolución?

Para intentar responder a las preguntas perfiladas en esta tesis doctoral, esta se estructura de la siguiente manera: el capítulo 1 contiene una visión general de la evolución y las características de la ASEAN, incluida su estructura, su toma de decisiones, su personalidad jurídica, el concepto de soberanía de la ASEAN y su modo de resolver los conflictos internos. Este estudio de las principales características de la ASEAN ofrece una mejor comprensión de su funcionamiento. El proceso de integración económica en preparación de la Comunidad Económica de la ASEAN se describe en el capítulo 2, el cual contiene también un informe detallado de las últimas novedades en cuanto a la cooperación económica entre los países miembros de la ASEAN para avanzar hacia un aumento de la cooperación regional en términos de crecimiento económico para fortalecer la Comunidad ASEAN. Además, en este capítulo se analiza también el intento de conseguir la integración económica con la creación de un mercado único.

Los mecanismos de resolución de conflictos comerciales del GATT y la OMC bajo un sistema multilateral de comercio se describen en el capítulo 3, ya que estos son ejemplos útiles para comparar con los mecanismos utilizados en la ASEAN. En el capítulo 4 se examinan las organizaciones regionales de comercio, utilizando como ejemplos los modelos de mecanismos de resolución de conflictos vigentes en la Unión Europea (UE), en la zona del Tratado de Libre Comercio de América del Norte (TLCAN) y en el Mercado Común del Sur (MERCOSUR). Estos regímenes regionales de resolución de conflictos

comerciales proporcionan una referencia para muchos ejemplos comparativos que fomentan la liberalización del comercio y los conceptos comerciales bilaterales, y que podrían funcionar bien en el contexto de la ASEAN. En el capítulo 5 se analizan los mecanismos para resolver los conflictos relacionados con acuerdos comerciales aprobados por la Zona de Libre Comercio de la ASEAN, junto con el desarrollo del método de resolución de conflictos de la ASEAN, tal como se establece en el Protocolo de 1996 sobre un mecanismo de resolución de conflictos, el Mecanismo de Resolución de Conflictos (EDSM) y la Carta de la ASEAN, particularmente en relación con la resolución de conflictos comerciales.

El concepto de resolución de conflictos en el marco del mecanismo de resolución de conflictos de la ASEAN se analiza ilustrando el calendario del desarrollo de la agenda de la ASEAN. La mayor parte del capítulo 6 se dedica a los problemas y limitaciones del mecanismo de resolución de conflictos de la ASEAN, con un recordatorio que contiene un breve análisis de las problemáticas de la ASEAN en la búsqueda de la integración económica. Por último, en el capítulo 7 se examina la aplicación y el desarrollo futuro de un mecanismo de resolución de conflictos comerciales de la ASEAN, junto con un análisis adicional de los problemas y algunas soluciones propuestas.

Resumen de alguna de las conclusiones más relevantes presentadas por esta tesis

La ASEAN ya había sido establecida durante 50 años antes de que entrara en vigor la Carta de la ASEAN y la falta de una Carta formal hubiese afectado a su personalidad jurídica y la definiera como una organización informal, que nunca había sido establecida internacionalmente. La adopción de la Carta de la ASEAN en 2005 permitió a las instituciones de la ASEAN funcionar de manera más efectiva y les dio un estatus legal. El desarrollo de la ASEAN originado por la adopción de la Carta de la

ASEAN incluyó: 1) Un nuevo estatuto según el derecho internacional. 2) Una personalidad jurídica caracterizada por la promulgación de la Carta de la ASEAN. 3) El fortalecimiento de la institución de la ASEAN, ya que la Carta sirvió como un paso importante en el compromiso de la ASEAN de juntar todas las economías de los países miembros para una integración más profunda y más amplia de la ASEAN. Esta adopción de la Carta de la ASEAN ayudó a la ASEAN a fortalecer sus vínculos económicos internacionales, a asegurar la aplicación de acuerdos para promover la cooperación regional y a cumplir con todas las obligaciones de los miembros.

Con el fin de comprender mejor la aparición del mecanismo de resolución de conflictos comerciales de la ASEAN, es importante tener conocimientos básicos sobre la estructura de la ASEAN y su funcionamiento. La ASEAN es una asociación intergubernamental que no cuenta con un órgano supranacional y que está basada en sus características y evolución. En otras palabras, la ASEAN no tiene instituciones con competencias supranacionales, y como se puede apreciar en la Carta de la ASEAN, sigue siendo una organización intergubernamental. La ASEAN no tiene autoridad supranacional sobre sus Estados miembros, a diferencia de la Unión Europea, que tiene a la Comisión Europea como ejecutiva regional, al Parlamento Europeo como legislador regional y al Tribunal de Justicia como órgano judicial regional. Sobre la base de la estructura intergubernamental de la ASEAN, el Estado sigue siendo el actor político más importante y, aunque tiene la autoridad de unirse a las comunidades junto con su poder soberano absoluto, la soberanía de cada Estado miembro debe estar equilibrada dentro de la comunidad.

Sin embargo, la ASEAN debe avanzar hacia una organización más regional para iniciar "la construcción de una comunidad regional", y con ello en mente, se han hecho esfuerzos para mejorar la competitividad de la región para sostener el crecimiento económico. Luego, en 2003, en la IX Cumbre de la ASEAN celebrada en Bali (Indonesia), los líderes de la ASEAN acordaron establecer una Comunidad de la ASEAN que se basara en tres pilares: la Comunidad Política y de Seguridad de la ASEAN (APSC), la Comunidad

Económica de la ASEAN (AEC) y la Comunidad Cultural Social de la ASEAN (ASCC). El Plan de AEC contenía cuatro objetivos clave para que la ASEAN se convirtiera en: 1) un mercado único y una base de producción, 2) una región económica altamente competitiva, 3) una región de desarrollo económico equitativo, y 4) una región plenamente integrada en la economía mundial. Además, la ASEAN ha cultivado una estrecha cooperación en el ámbito del comercio con países de fuera de la región como Australia, Canadá, China, India, Japón, República de Corea, Nueva Zelanda, Rusia, Estados Unidos y la Unión Europea.

La ASEAN logró la creación de una Comunidad Económica de la ASEAN (AEC) el 31 de diciembre de 2015, para perseguir una integración económica más profunda. El principal objetivo de la AEC fue crear una región económica ASEAN estable, próspera y altamente competitiva, caracterizada por el libre flujo de bienes, servicios, inversiones y mayores oportunidades para la migración de mano de obra cualificada. Sin embargo, la creación de la AEC no produciría un Mercado Común completo en el que todos los países miembros eliminarían todas las barreras a la libre circulación de bienes, servicios, mano de obra y capital, sino que sería un mercado único en el que todos los países miembros eliminarían los obstáculos al flujo de bienes, servicios y capitales. Fue creada para alcanzar la competencia real entre sus miembros con el objetivo de dejar circular libremente bienes, capital, inversión y servicios. La situación actual de la ASEAN se halla entre una zona de libre comercio y una Unión Aduanera. Sin embargo, el referido calendario de 2015 para la AEC ha sido sólo el inicio. Ahora, en 2017, existe una Comunidad Económica de la ASEAN (AEC) y el comercio interno de la ASEAN de mercancías ya no está bloqueado por altos aranceles y derechos de importación. La fecha límite de la ASEAN 2015 debe considerarse un año transcendental y la medida para cuantificar el trabajo en curso. Algunos procesos deben continuar para mantener su relevancia en una economía global en evolución y esto requiere el compromiso de cada país miembro. Por lo tanto, los líderes de la ASEAN deben mantener la visión de la ASEAN 2025: el documento *Forging Ahead Together* (Avanzar Juntos) es una guía para la integración económica de la ASEAN de 2016 a 2025, cuando se considera que la ASEAN

será aún más proactiva, trabajando con planificación eficiente y mayor participación en la innovación competitiva para hacer frente a los desafíos y crear una AEC completamente funcional. Este es el objetivo a largo plazo que la ASEAN debe luchar por conseguir.

Dado que la AEC implica mayores niveles de comercio entre los países miembros de la ASEAN, se espera que el número de conflictos comerciales aumente significativamente a medida que se avance hacia un mayor nivel de integración económica. Por lo tanto, también hará falta un mecanismo creativo y efectivo de resolución de conflictos comerciales para lograr el objetivo de la Asociación. La ASEAN necesita desarrollar un mecanismo que pueda resolver las disputas entre los estados miembros para aspirar a una comunidad económica completamente segura y desempeñar un papel útil en el desarrollo de una Comunidad integral basada en reglas.

Como se ha expuesto anteriormente, no puede establecerse una Comunidad Económica de la ASEAN (AEC) sin la existencia de algunos medios de resolución de conflictos entre los Estados miembros basados en la interpretación y aplicación de diversos acuerdos económicos, como la Zona de Libre Comercio de la ASEAN (AFTA). Como la AEC se basa en un mercado único, la actuación de estos marcos económicos se discutirá en esta tesis doctoral, aparte de un elemento de la Comunidad Económica de la ASEAN que se refiere a la AFTA anterior, es decir, el flujo de bienes. En esta tesis se ofrece una visión general de los mecanismos ASEAN para la resolución de conflictos creados por el Protocolo de la ASEAN sobre el DSM Mejorado (EDSM), el llamado Protocolo de 2004 y la Carta de la ASEAN relacionada con los acuerdos económicos de la ASEAN. El Protocolo de la ASEAN de 2004 proporcionó a los gobiernos un medio para resolver los conflictos entre ellos y se limitó a los miembros de la ASEAN. El Protocolo de 2004 también permite el establecimiento de un Órgano de Apelación formado por expertos independientes con experiencia profesional, lo que significa que tanto funcionarios gubernamentales como no gubernamentales participan en la resolución del conflicto y en dictaminar una sentencia sobre una base jurídica. La Carta de la ASEAN se

diseñó como un marco jurídico para la ASEAN como organización basada en normas, y el Artículo 24(3) se refiere al Protocolo de 2004 de la ASEAN sobre un Mecanismo Mejorado de Resolución de Conflictos (EDSM), que es un mecanismo mejorado para abordar específicamente los conflictos económicos entre estados miembros de la ASEAN. El Protocolo de 2004 sobre el Mecanismo de Resolución de Conflictos de los acuerdos económicos de la ASEAN contenía algunos nuevos mecanismos institucionales y medidas para fortalecer la aplicación de los acuerdos económicos (es decir, el acuerdo cubierto), así como un procedimiento judicial formal para resolver conflictos relacionados con el comercio y cualquier conflicto relacionado con la aplicación, interpretación y práctica de los acuerdos comerciales actuales y futuros. El Mecanismo de Resolución de Conflictos de la ASEAN consiste de procedimientos formales e informales conocidos como "no decisorios" y "decisorios". Los procedimientos no decisorios o diplomáticos incluyen la consulta, los buenos oficios, la conciliación y la mediación, en un intento de alentar a los Estados miembros a resolver sus disputas de la manera más eficiente posible alcanzando una solución mutuamente acordada. La fase de adjudicación consiste en grupos especiales y un Órgano de Apelación, mientras que la tercera etapa implica la aplicación de las conclusiones y recomendaciones. El DSM de la ASEAN de 2004 se inspiró en el mecanismo de solución de conflictos de la Organización Mundial del Comercio (OMC). La idea general del procedimiento EDSM es altamente judicial y esto facilita una resolución más rápida, a pesar de tener algunos puntos débiles. Por ejemplo, la aparente reticencia de los estados miembros de la ASEAN a utilizar su propio DSM, prefiriendo en lugar de ello resolver sus diferencias utilizando mecanismos ajenos al marco de la ASEAN, como la OMC, lo que conduce a problemas de jurisdicción y a la superposición del DSM comercial y la OMC. Por lo tanto, la flexibilidad de la EDSM para recurrir a sistemas fuera de la ASEAN hace que el DSM de la ASEAN sea opcional y no obligatorio. Además, los estados miembros de la ASEAN tratan de evitar el uso del DSM debido a su influencia política, que es un factor importante de su falta de voluntad para aplicarlo. Prefieren llevar sus diferencias comerciales a la OMC en lugar de utilizar instrumentos de la ASEAN, sobre todo porque

el mecanismo de resolución de conflictos de la OMC tiene una serie de características atractivas para la ASEAN, tales como mayor fiabilidad, más previsibilidad y normas mejor estructuradas y más sustanciales. El análisis del trasplante del modelo de resolución de conflictos de la OMC hacia la región ASEAN muestra que este modelo contiene métodos y procesos que se adaptan a las condiciones y situaciones políticas de la ASEAN.

Es necesario mejorar aún más la consecución de estos desafíos por parte de la ASEAN. Por eso, en esta tesis doctoral se han sugerido diversas medidas que darían más impulso al actual mecanismo de resolución de conflictos de la ASEAN. Estas incluyen el desarrollo de la estructura de un mecanismo institucional de resolución de conflictos de la ASEAN, aumentando el poder de la Secretaría de la ASEAN y su personal cualificado. También se sugiere que se mejore el régimen basado en normas en lugar de continuar con un régimen basado en relaciones. Debe modificarse la reinterpretación del "ASEAN Way" (la manera de proceder de ASEAN) para desarrollar un enfoque, porque la continua adopción por parte de ASEAN de este método excesivamente flexible para resolver disputas internas puede dañar su credibilidad si no es atendido. La OMC parece ser el modelo más apropiado para la ASEAN con sus Grupos Especiales y el Órgano de Apelación. En cuanto a la financiación, todos los Estados miembros deben compartir los costos de resolución de un conflicto utilizando el DSM de la ASEAN, parecido a la OMC.

Además, en esta tesis doctoral se aborda la creación de un Tribunal de Justicia de la ASEAN, el concepto de modelo supranacional y la armonización del derecho. Con una perspectiva a largo plazo, la ASEAN necesita construir un concepto supranacional para facilitar la integración económica. Debería centrarse en la formación de un régimen supranacional en un intento de armonizar la legislación de la ASEAN, así como la unificación de las instituciones políticas supranacionales de la ASEAN, como un parlamento de la ASEAN, un Consejo y un Comisión de la ASEAN al igual que la Unión Europea, para así complementar el mecanismo de resolución de conflictos de la ASEAN y adoptarlo de manera efectiva.

Sin embargo, según la opinión de un académico indonesio del CSIS, la ASEAN necesita un órgano de toma de decisiones si quiere tener éxito como la Unión Europea en el futuro próximo. Por lo tanto, ASEAN debe repensar el método de consenso y dirigirse hacia un modelo supranacional para transferir autoridad autónoma de toma de decisiones a la ASEAN. Es significativo que la ASEAN no ha tenido intención de conseguir poderes supranacionales después de la entrada en vigor de la Carta de la ASEAN, y esta política no ha cambiado.

Uno de los grandes desafíos para la ASEAN es la prueba del Protocolo de 2004 por parte de los países miembros, ya que esto pondría de manifiesto los problemas prácticos si algo falla o se identifica cualquier punto débil que deba arreglarse. Esta prueba aclararía lo que debe ser corregido para una mejor comprensión de ASEAN en el futuro.

ABSTRACT

Le but de cette thèse est de comprendre les règles de résolution de conflits économiques au sein de l'ASEAN (Association des nations de l'Asie du Sud-Est). Les gouvernements des pays membres utilisent deux instruments : le Protocole de 2004 relatif au règlement des contentieux profonds (en anglais Enhanced Dispute Settlement Mechanism, EDSM en abrégé) et la charte de l'ASEAN. La charte de l'ASEAN est également analysée dans cette thèse, car elle n'a pas réussi à améliorer la capacité de l'ASEAN de parvenir à une intégration économique plus poussée et cet échec semble avoir empêché l'ASEAN de progresser vers une intégration plus profonde. Une question importante qui a été soulevée depuis l'adoption du Protocole de 2004 (EDSM) est pourquoi aucun État membre de l'ASEAN n'a jamais fait résoudre un seul différend par le biais de l'EDSM, ce qui signifie que l'EDSM n'a jamais été testé. Cependant, les Etats membres de l'ASEAN hésitent à s'en servir, car il présente un certain nombre de faiblesses qui pourraient éventuellement miner son efficacité. En se basant sur l'échantillon de cas, on remarque que les États membres de l'ASEAN préfèrent utiliser le mécanisme de l'Organisation mondiale du commerce (OMC) pour régler leurs contentieux commerciaux. Il est important de noter que le processus de règlement des différends de l'ASEAN est très similaire à celui de l'OMC. Cette ressemblance touche le mécanisme de l'ASEAN dans toutes ses autres organisations où les Etats membres préfèrent choisir de régler des différends en dehors de leur propre mécanisme. De plus, le fait de ne pas appliquer l'EDSM dans la gestion de conflits au sein de l'ASEAN a également provoqué une critique mettant en doute le mécanisme de règlement des différends de l'ASEAN (DSM) d'un point de vue tant procédural que substantiel; en outre, son efficacité est toujours mise en question. Les systèmes politique et juridique divers, le problème de la «ASEAN Way» et la procédure du règlement des différends de l'ASEAN sur le libre-échange sont également perçus comme des obstacles à l'intégration régionale de la Communauté de l'ASEAN.

Cette thèse illustre en outre la création et l'évolution d'une variété de différents régimes de règlement des litiges appliqués aux différends commerciaux basés sur une discussion sur la façon dont les organisations commerciales multilatérales et régionales mettent au point un mécanisme de règlement des différends. Il conviendra d'aborder brièvement des procédures et des structures pertinentes avant de procéder à un examen plus approfondi des litiges pouvant survenir entre les États membres. Le fonctionnement de ces mécanismes de règlement des différends sera également expliqué dans cette thèse, en particulier ceux qui concernent l'investissement étranger et ceux qui sont liés aux différends entre les États parties sur l'application et l'interprétation des accords de libre-échange. L'Accord général sur les tarifs douaniers et le commerce (AGETAC) et l'Organisation mondiale du commerce (OMC) donneront un exemple de systèmes multilatéraux du commerce institutionnalisé. La perspective régionale sera également abordée dans cette thèse qui se concentre sur trois grandes organisations régionales étant l'Union européenne (UE), le Marché commun du Sud (MERCOSUR) et l'Accord de libre-échange nord-américain (ALENA). Il convient de souligner que le MERCOSUR a été pris comme exemple dans cette thèse en tant qu'organisation efficace, parvenue à résoudre les différends commerciaux. Il est d'ailleurs semblable à l'ASEAN dans la mesure où ses Etats membres sont des pays en développement. Une analyse des différents éléments de base et une perspective comparative des cinq exemples de mécanismes de règlement des différends de l'AGETAC, de l'OMC, de l'UE, de l'ALENA et du MECOSUR pourraient être bénéfiques pour l'ASEAN. La conception de régimes de règlement des différends commerciaux peut servir de référence à de nombreux exemples comparatifs pour encourager la libéralisation du commerce et les concepts commerciaux bilatéraux qui pourraient être mis fonctionnellement en œuvre dans le contexte de l'ASEAN. Une étude de ces mécanismes sera utile pour le développement d'un mécanisme de règlement des différends commerciaux de l'ASEAN.

Le fait que des États membres de l'ASEAN n'ont pas réussi à recourir à l'EDSM peut être attribué à de nombreux facteurs. Des recommandations et propositions

fondamentales pour la future direction du modèle de règlement des différends commerciaux de l'ASEAN, notamment en ce qui concerne le pilier du mécanisme de règlement des différends de l'ASEAN et une orientation claire pour les efforts visant à réformer le DSM de l'ASEAN sont abordées dans le contexte de la création de la Communauté économique de l'ASEAN (CEA). Il est intéressant de noter qu'aucun litige n'a été traité jusqu'ici par ce mécanisme et qu'il n'est pas certain qu'il sera utilisé à l'avenir. Si oui, comment ? Si le problème de non-utilisation du DSM ne peut pas être résolu, il sera difficile de croire à l'efficacité de la CEA à l'avenir.

CONCLUSION

1 Structure de these

Le but de cette thèse est de comprendre les règles de résolution de conflits économiques au sein de l'ASEAN (Association des nations de l'Asie du Sud-Est). Les gouvernements des pays membres utilisent deux instruments : le Protocole de 2004 relatif au règlement des contentieux profonds (en anglais Enhanced Dispute Settlement Mechanism, EDSM en abrégé) et la charte de l'ASEAN. Les questions centrales de recherche ont été conçues pour déterminer comment l'EDSM et la charte de l'ASEAN peuvent être améliorées dans le but de former un système pleinement efficace de règlement des différends commerciaux dans l'ASEAN et comment l'ASEAN peut renforcer son mécanisme de règlement des différends commerciaux. Celles-ci sont accompagnées de trois sous-questions : i) Quels sont les problèmes et les limites de l'ASEAN qui mettent en question l'avancée de son mécanisme de règlement des

différends? ; ii) Quels sont les impacts de la soi-disant ASEAN Way ? ; iii) Pourquoi les États membres de l'ASEAN ne veulent-ils pas faire pleinement usage de l'EDSM, et préfèrent-ils porter leurs différends commerciaux à l'OMC (Organisation mondiale du commerce) pour régler les litiges?

Pour tenter de répondre aux questions de recherche, la thèse est structurée de la façon suivante : le 1er chapitre donne un aperçu de l'évolution et des caractéristiques de l'ASEAN, ainsi que de sa structure, sa prise de décision, sa personnalité juridique, du concept de souveraineté de l'ASEAN et de la manière dont elle fonctionne pour ce qui est du règlement des différends internes. Cet approfondissement des principales caractéristiques de l'ASEAN permet de mieux comprendre la manière dont elle fonctionne. Le processus d'intégration économique en vue de la préparation de la Communauté économique de l'ASEAN est abordé au chapitre 2. Celui-ci contient un compte rendu détaillé des derniers développements de la coopération économique entre les pays membres de l'ASEAN afin d'accroître la coopération régionale en termes de croissance économique dans le but de renforcer la communauté de l'ASEAN. La tentative de réaliser l'intégration économique avec la création d'un marché unique fait également partie des sujets de discussion dans ce chapitre. Les mécanismes de règlement des différends commerciaux de l'AGETAC et de l'OMC dans le cadre d'un système commercial multilatéral sont exposés dans le chapitre 3. Il s'agit d'exemples utiles pour comparer les mécanismes utilisés dans l'ASEAN. Les organisations commerciales régionales sont examinées au chapitre 4 en utilisant comme exemples les modèles de mécanisme de règlement des différends en vigueur dans l'Union européenne (UE), l'Accord de libre-échange nord-américain (ALENA) et le Marché commun du Sud (MERCOSUR). Ceux-ci constituent une référence avec de nombreux exemples comparatifs qui encouragent la libéralisation du commerce et les concepts commerciaux bilatéraux, qui pourraient bien fonctionner dans le contexte de l'ASEAN. Les mécanismes de règlement des différends liés aux accords commerciaux approuvés par la zone de libre-échange de l'ASEAN sont exposés au chapitre 5 ainsi que le développement de la méthode de règlement des différends de l'ASEAN, énoncée dans le

Protocole de 1996 sur un mécanisme de règlement des différends, le Protocole de 2004 concernant un mécanisme de règlement des contentieux profonds (en anglais Enhanced Dispute Settlement Mechanism, EDSM en abrégé) et la Charte de l'ASEAN, notamment en ce qui concerne le règlement des différends commerciaux. Le concept de résolution des litiges dans le cadre du mécanisme de règlement des différends de l'ASEAN est analysé par l'illustration de la chronologie de l'évolution de l'agenda de l'ASEAN. La majeure partie du chapitre 6 est consacrée aux problèmes et aux limites du mécanisme de règlement des différends de l'ASEAN, avec le rappel d'un bref examen des questions problématiques rencontrées par l'ASEAN dans la recherche d'intégration économique. Enfin, la mise en œuvre et le futur développement d'un mécanisme de règlement des différends commerciaux de l'ASEAN sont traités dans le chapitre 7 avec un examen plus approfondi de ses problèmes et la préconisation de certaines solutions.

Résumé de la these

L'ASEAN avait été créée depuis 50 ans avant l'entrée en vigueur de la Charte de l'ASEAN. L'absence d'une Charte formelle avait affecté sa personnalité juridique et l'avait définie comme une organisation informelle qui n'avait jamais été établie à l'échelle internationale. L'adoption de la Charte de l'ASEAN en 2005 a permis aux institutions de l'ASEAN de fonctionner plus efficacement et leur a donné un statut juridique. Le développement de l'ASEAN suscité par l'adoption de cette Charte comprenait: 1) Un nouveau statut issu du droit international ; 2) Une personnalité juridique caractérisée par la promulgation de la Charte de l'ASEAN ; 3) Le renforcement de l'institution de l'ASEAN depuis que la Charte a constitué une étape importante dans l'engagement de l'ASEAN à réunir les économies de tous les pays membres pour une intégration plus large et plus profonde. Cette adoption de la Charte de l'ASEAN a aidé l'ASEAN à renforcer ses liens économiques internationaux, en assurant la mise en œuvre

d’accords visant à promouvoir la coopération régionale et à respecter toutes les obligations qui découlent de cette adhésion.

Afin de mieux comprendre l'émergence du mécanisme de règlement des différends commerciaux de l'ASEAN, il est important d'avoir une certaine connaissance de la structure de l'ASEAN et de la manière dont elle fonctionne. L'ASEAN est une association intergouvernementale sans organisme supranational fondé sur ses caractéristiques et son évolution. En d'autres termes, l'ASEAN n'a pas d'institutions ayant des compétences supranationales comme on peut le voir dans la Charte de l'ASEAN ; il reste intergouvernemental. L'ASEAN n’a pas de pouvoir supranational sur ses Etats membres, contrairement à l'Union européenne qui a la Commission européenne en tant qu'administrateur régional, le Parlement européen en tant que législateur régional et la Cour de justice européenne en tant que magistrat régional. En se basant sur la structure intergouvernementale de l'ASEAN, l'État reste l'acteur politique le plus important, et bien qu'il puisse adhérer aux communautés avec son pouvoir souverain absolu, la souveraineté de chaque Etat membre doit être répartie de manière équitable au sein de la communauté.

Néanmoins, l'ASEAN a besoin de s'orienter vers une organisation plus régionale pour lancer un "renforcement des communautés régionales", et pour cela, il s'est efforcé d'améliorer la compétitivité de la région pour soutenir la croissance économique. Puis, en 2003, lors du 9ème sommet de l'ASEAN à Bali en Indonésie, les dirigeants de l'ASEAN ont convenu d'établir une Communauté de l'ASEAN constituée de trois piliers, à savoir la Communauté de politique et de sécurité de l'ASEAN (CPSA), la communauté économique de l’ASEAN (CEA) et la Communauté socio-culturelle de l’ASEAN (CSCA). Le schéma directeur de la CEA contenait quatre objectifs clés pour l'ASEAN visant à devenir ; i) un marché unique et une base de production ; ii) une région économique hautement compétitive ; iii) une région à développement économique équitable ; et iv) une région pleinement intégrée à l'économie mondiale. En outre, l'ASEAN a développé une coopération étroite dans le domaine du commerce avec autres pays extérieurs tels

que l'Australie, le Canada, la Chine, l'Inde, le Japon, la République de Corée, la Nouvelle-Zélande, la Russie, les États-Unis et l'Union européenne.

L'ASEAN a établi la Communauté économique de l'ASEAN (CEA) le 31 décembre 2015 pour une intégration économique plus profonde. L'objectif principal de la CEA était de créer une région économique stable, prospère et hautement compétitive, caractérisée par la libre circulation de marchandises, de services, d'investissements et de possibilités accrues de migration de main-d'œuvre qualifiée. Cependant, la création de la CEA ne produirait pas de marché commun complet dans lequel tous les pays membres élimineraient tous les obstacles à la libre circulation des marchandises, des services, du travail et du capital ; il s'agirait plutôt d'un marché unique où tous les pays membres élimineraient les obstacles au flux de marchandises, de services et de capitaux. La CEA a été créée pour réaliser une véritable concurrence entre ses membres dans le but de faire circuler librement des marchandises, des capitaux, des investissements et des services. Le statut actuel de l'ASEAN se situe entre une zone de libre-échange et une union douanière. Cependant, nous ne parlons jusqu'ici que du calendrier de 2015 de la CEA, au tout début. Aujourd'hui, en 2017, il existe une Communauté économique de l'ASEAN (CEA) et le commerce intra-ASEAN des marchandises n'est plus bloqué par des droits élevés et des droits d'importation. La « deadline » de l'année 2015 de l'ASEAN doit être considérée comme une étape pour le travail en cours. Certains processus doivent continuer afin de conserver leur pertinence dans une économie mondiale en pleine évolution, ce qui exige l'engagement de chaque pays membre. Par conséquent, les dirigeants de l'ASEAN doivent poursuivre la vision de 2025 de l'organisation, qui est d'aller de l'avant ensemble pour l'intégration économique de l'ASEAN de 2016 à 2025, période durant laquelle l'ASEAN sera considérée comme encore plus proactive, en travaillant avec une planification efficace et un engagement plus poussé dans l'innovation concurrentielle, ceci pour relever les défis et créer une CEA pleinement fonctionnelle. C'est l'objectif à long terme que l'ASEAN doit s'efforcer d'atteindre.

Etant donné que la CEA s'implique dans des niveaux commerciaux plus élevés entre les pays membres de l'ASEAN, le nombre de différends commerciaux devrait augmenter considérablement dans la mesure où il s'oriente vers un niveau d'intégration économique plus élevé. De ce fait, un mécanisme créatif et efficace de règlement des différends commerciaux sera également nécessaire pour atteindre l'objectif de l'Association. L'ASEAN doit mettre au point un mécanisme permettant de régler les différends entre les États membres en vue d'une communauté économique pleinement sécurisée et de jouer un rôle important dans le développement d'une communauté holistique fondée sur ses règles.

Comme on l'a expliqué ci-dessus, une Communauté économique de l'ASEAN (CEA) ne peut être établie sans l'existence de moyens permettant de régler les conflits entre les Etats membres sur la base de l'interprétation et de la mise en œuvre de divers accords économiques comme la zone de libre-échange de l'ASEAN (en anglais ASEAN Free Trade Agreement, AFTA en abrégé). Etant donné que la CEA est basée sur un marché unique, la performance de ces cadres économiques sera discutée dans cette thèse sans prendre en compte le flux de marchandises (étant lié à l'AFTA). Un aperçu des mécanismes de l'ASEAN pour le règlement des différends créés par le Protocole de l'ASEAN sur un mécanisme de règlement des contentieux profonds, soit le Protocole de 2004 et la Charte de l'ASEAN relative aux accords économiques de l'ASEAN est présenté dans cette thèse. Le Protocole de 2004 de l'ASEAN a permis aux gouvernements de régler les litiges entre eux et s'est limité aux membres de l'ASEAN. Le nouveau Protocole de 2004 prévoit également la constitution d'un organe d'appel composé d'experts indépendants dotés d'une expérience professionnelle, ce qui signifie que le gouvernement et les fonctionnaires non gouvernementaux sont tous impliqués dans le règlement du différend et dans la formulation d'un jugement sur une base juridique. La Charte de l'ASEAN a été conçue comme un cadre juridique pour l'ASEAN en tant qu'organisation fondée sur les règles et l'article 24 (3) se réfère au Protocole de 2004 de l'ASEAN sur un mécanisme de règlement des contentieux profonds (en anglais Enhanced Dispute Settlement Mechanism, EDSM en abrégé) qui est un mécanisme détaillé traitant

spécifiquement les différends économiques entre les États membres de l'ASEAN. Le Protocole de 2004 sur le Mécanisme de règlement des différends des accords économiques de l'ASEAN contenait de nouveaux mécanismes institutionnels et des mesures visant à renforcer la mise en œuvre des accords économiques (c'est-à-dire l'accord visé) ainsi qu'une procédure judiciaire formelle pour résoudre les litiges liés au commerce et tout contentieux relatif à la mise en œuvre, l'interprétation et l'application des accords commerciaux actuellement en vigueur et à venir. Le mécanisme de règlement des différends de l'ASEAN se compose de procédures informelles et formelles appelées «non juridictionnelles» et «juridictionnelles». Les procédures non juridictionnelles ou les procédures diplomatiques incluent la consultation, les bons offices, la conciliation et la médiation dans une tentative d'encourager les Etats membres à résoudre leurs différends de la manière la plus efficace en trouvant une solution mutuellement convenue. L'étape juridictionnelle (d'arbitrage) se compose de comités, d'un organe d'appel et de la mise en œuvre de conclusions et de recommandations. Le mécanisme de règlement des différends de l'ASEAN de 2004 (en anglais Dispute Settlement Mechanism, DSM en abrégé) a été inspiré de celui de l'Organisation mondiale du commerce (OMC). L'idée générale de la procédure EDSM est hautement judiciaire et cela facilite une résolution plus rapide, malgré quelques points faibles ; par exemple, l'apparente réticence des Etats membres de l'ASEAN à utiliser leur propre DSM, ceux-ci préférant plutôt continuer à régler leurs différends en utilisant des mécanismes en dehors du cadre de l'ASEAN, comme celui de l'OMC. L'utilisation d'autres mécanismes pour gérer les litiges au sein de l'ASEAN entraîne des problèmes de juridiction et le recoupement entre la DSM commerciale et l'OMC. Par conséquent, la flexibilité de l'EDSM de recourir à des systèmes en dehors de l'ASEAN rend le DSM de l'ASEAN facultatif plutôt que obligatoire. De plus, les Etats membres de l'ASEAN tentent d'éviter d'utiliser le DSM en raison de son influence politique, ce qui est un facteur important de leur manque de volonté de l'appliquer. Ceux-ci préfèrent toujours porter leurs différends commerciaux devant l'OMC plutôt que d'utiliser les instruments de l'ASEAN, notamment parce que le mécanisme de règlement des différends de l'OMC a

un certain nombre de caractéristiques attrayants au regard de l'ASEAN tels que plus de fiabilité, plus de prévisibilité, et des règles bien structurées et substantielles. L'analyse de la transplantation du modèle de règlement des différends de l'OMC dans l'ASEAN montre que ce modèle contient des méthodes et des processus concordant aux conditions et à la situation politique de l'ASEAN.

Il est nécessaire d'améliorer davantage la capacité de l'ASEAN à relever ces défis ; de ce fait, des mesures qui donneraient plus d'élan au mécanisme actuel de règlement des différends de l'ASEAN ont été suggérées dans cette thèse. Celles-ci comprennent le développement de la structure du mécanisme de règlement des différends institutionnels de l'ASEAN en augmentant le pouvoir du Secrétariat de l'ASEAN et de son personnel qualifié. L'amélioration du régime fondé sur des règles est également plus favorable que la poursuite d'un régime axé sur les relations. La réinterprétation du « ASEAN Way » doit être modifiée afin de développer une approche parce que l'adoption par l'ASEAN de cette méthode de gestion des différends internes considérée trop souple pourrait nuire à sa crédibilité si l'on n'y remédie pas. L'OMC semble être le modèle le plus approprié pour l'ASEAN avec ses comités et l'Organe d'appel. En ce qui concerne le financement, tous les États membres doivent partager les frais de l'utilisation du DSM de l'ASEAN dans le règlement d'un différend, comme l'OMC.

Par ailleurs, la création de la Cour de justice de l'ASEAN, le concept d'un modèle supranational et l'harmonisation du droit ont également été abordés dans cette thèse. Dans une perspective à long terme, l'ASEAN a besoin de concevoir un concept supranational pour faciliter davantage l'intégration économique. Celle-ci devrait se concentrer sur la formation d'un régime supranational dans le but d'harmoniser la loi ASEAN, et d'unifier des institutions politiques supranationales de l'ASEAN telles qu'un parlement de l'ASEAN, le Conseil et la Commission de l'ASEAN comme le cas de l'Union européenne afin de compléter le mécanisme de règlement des différends de l'ASEAN et de l'adopter de manière efficace.

Cependant, selon l'opinion d'un spécialiste indonésien du CSIS (Le Center for Strategic and International Studies), l'ASEAN a besoin d'un organe de décision pour réussir comme l'Union européenne dans un avenir proche. Ainsi, il est nécessaire de repenser la méthode de consensus et de se diriger vers un modèle supranational afin que l'ASEAN puisse prendre des décisions en toute autonomie. Ce qui est intéressant, c'est que l'ASEAN n'avait pas l'intention de respecter les pouvoirs supranationaux après l'entrée en vigueur de la Charte de l'ASEAN. De ce fait, cette politique reste inchangée.

L'un des grands défis de l'ASEAN consiste à convaincre les pays membres de tester le Protocole de 2004. Car, si des dysfonctionnements sont repérés au cours de son application, une correction pourra être proposée. Ce test est important puisqu'il précisera ce qui devra être corrigé pour une meilleure compréhension à l'avenir.

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RÉSUMÉ: Le but de cette thèse est de comprendre les règles de résolution de conflits économiques au sein de l'ASEAN (Association des nations de l'Asie du Sud-Est). Les gouvernements des pays membres utilisent deux instruments : le Protocole de 2004 relatif au règlement des contentieux profonds (en anglais Enhanced Dispute Settlement Mechanism, EDSM en abrégé) et la charte de l'ASEAN. Une des questions les plus importantes évoquées depuis l'adoption du Protocole de 2004 (EDSM) est de savoir pourquoi aucun des Etat membres de l'ASEAN n'a jamais fait résoudre un seul différend par le biais de l'EDSM, ce qui signifie que l'EDSM n'a jamais été mis en pratique. De plus, cette question a également conduit à une critique mettant en doute le mécanisme de règlement des différends de l'ASEAN (en anglais Dispute Settlement Mechanism, DSM en abrégé) dans une perspective procédurale et substantielle ; leur efficacité est en outre remise en question. Le fait que les Etats membres de l'ASEAN ont échoué à recourir à ce mécanisme peut être attribué à plusieurs facteurs. Des recommandations et propositions fondamentales pour la future direction du modèle de règlement des différends commerciaux de l'ASEAN sont abordées dans le contexte de la création de la Communauté économique de l'ASEAN (CEA). Il sera difficile à l'avenir pour la CEA d'être efficace si le problème d'application du DSM ne peut pas être résolu.

SUMMARY: The aim of this thesis is to understand the ASEAN Protocol for the settlement of economic disputes, the so-called 2004 Protocol on an Enhanced Dispute Settlement Mechanism (EDSM) and the ASEAN Charter, which are all related to dispute settlement instruments for the governments of all ASEAN member countries. One of the important questions that have been raised since the adoption of the 2004 Protocol (EDSM) is why no ASEAN member state has ever brought a single dispute to be resolved through the EDSM, which means that the EDSM has never been tested. Moreover, it has also led to increasing criticism of the ASEAN Dispute Settlement Mechanism (DSM) from both a procedural and substantial perspective; furthermore, its efficiency is still in question. The failure of ASEAN member states to resort to this mechanism can be attributed to many factors. Recommendations and basic suggestions for the future direction of the ASEAN trade dispute settlement model are addressed in the context of the establishment of the ASEAN Economic Community (AEC). It will be difficult for the AEC to be effective in future if the problem of utilising the DSM cannot be resolved.

DISCIPLINE: Droit privé et sciences criminelles

MOTS-CLES : ASEAN, INTÉGRATION ÉCONOMIQUE, MÉCANISME DU RÉGLEMENT DES LITIGES