

REINFORCEMENT AND REVITALIZATION OF ASEAN DISPUTE SETTLEMENT BODY

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1 REINFORCEMENT AND REVITALIZATION OF ASEAN DISPUTE SETTLEMENT BODY

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1 ABSTRACT

The Association of Southeast Asian Nations (ASEAN) countries have a preference of their trade or economic dispute settlement through the World Trade Organization (WTO), panel instead of taking the advantage in the ASEAN regional scope. This research uses normative-law research methods and secondary type data from literature study sources such as literatures, articles, and sources of internets. Reinforcement and revitalization of ASEAN's dispute settlement body refers to the Protocol of Enhanced Dispute Settlement Mechanism (EDSM) and Panel body which was formed by Senior Economic Official Meeting (SEOM) during which the ASEAN countries are in disputes. Through this reinforcement and revitalization, ASEAN has a chance to establish the same permanent dispute settlement court as other regional organizations, such as European Union and Caribbean Community.

Keyword: Reinforcement, Revitalization, ASEAN Dispute Settlement.

INTRODUCTION

With the Plan of Action-PoA produced, ASEAN has transition from an association into a community in a short period of time (Andrea, 2006). ASEAN community is a foundation to strengthen ASEAN society's integration in responding to the global development (Kemenlu, 2011). This condition would lead to a significant impact in the ASEAN community's life changes, those changes can be united into 3 (three) pillars: first pillar, ASEAN Political-Security Community, second pillar, ASEAN Economic Community, and third pillar, ASEAN Socio-Cultural Community (Kemendag, 2012). In this discussion, the discussion will focus on the second pillar which is the ASEAN Economic Community (AEC). The main purpose of AEC is to create ASEAN as a single market and production base (Kemendag, 2015).

To reach its purpose, AEC has gone through a lot of challenges and even causes disputes between ASEAN member countries. Due to this, AEC has a role to settle disputes between its member countries. Regarding to dispute settlement, ASEAN is based by the ASEAN Charter (Schmitz, 2014). While for handling the mechanism of economic treaty disputes, AEC refers to the Protocol of Enhanced Dispute Settlement Mechanism (EDSM) (Kraichitti, 2015). As for dispute settlement mechanism in EDSM is set forth in Article 5 of EDSM which contains of dispute settlement procedure through Panel formulation of disputing countries (Termudomchai, 2016).

Same as ASEAN, panel formation mechanism in economic settlement disputes is also performed by the World Trade Organization (WTO) (Marceau, 2010). Even though they have

similarities, ASEAN countries would prefer to solve their economic disputes through the WTO instead of taking advantage of ASEAN's mechanism (Shedd, 2012). As for ASEAN countries that have brought their economic dispute cases to the WTO is Thailand; the case between Singapore and Malaysia and between the Philippines and Thailand. Thus, it can be seen that the dispute settlement mechanism in ASEAN is considered incomprehensive, in which ASEAN needs reinforcement and revitalization of its dispute settlement agency. In this case, ASEAN has a chance to perform reinforcement and revitalization towards the ASEAN panel or either to form a permanent judicial agency with final and binding decision that is ought to solve economic dispute occurring in ASEAN countries. This is as it has been applied by regional organization: European Union and African Union that each has the Court of Justice of the European Union and the African Court of Justice.

Based on the background, the issues to be discussed in this research are how the procedure of the settlement dispute in ASEAN is executed and how to perform reinforcement and revitalization of ASEAN's dispute settlement agency. The purposes of this research are to elaborate dispute settlements procedure in ASEAN Economic Community and to explain ways of reinforcement and revitalization of ASEAN's dispute settlement agency. The methods used in this research is normative-law method, the gained data is secondary type data which comes from literature study sources such as literature, article, and internet web sites.

RESEARCH AND DISCUSSION

The regulation for dispute settlements in ASEAN is based on the ASEAN Charter and further regulated in the ASEAN Protocol or the Enhanced Dispute Settlement Mechanism (EDSM) regarding to economic dispute settlement procedure. But, the procedure regulated in the EDSM Protocol is currently considered ineffective to be applied in economic dispute settlement between ASEAN member countries, which can be seen through numbers of ASEAN member countries' economic disputes that are solved out of ASEAN and instead brought upon the WTO. This circumstance has evolved a new issue upon ASEAN to commit reinforcement and revitalization towards the ASEAN panel or form a specific permanent economic dispute settlement agency.

ASEAN Economic Dispute Settlement Procedure

The ASEAN Economic Community establishment is based on the Declaration of ASEAN Concord II on the 9th (ninth) ASEAN Summit in Balitahun (Ishikawa, 2012). Not only ASEAN visions to build a single market of ASEAN region, another purpose of ASEAN is to create a production-based region through free flow of goods, service, invest, skilled human resources, and more free capital (Asean, 2015). To strengthen ASEAN's purpose, ASEAN has formed a mechanism by formulating numerous of agreements such as ASEAN Free Trade Area (AFTA) (Kobe, 2013), ASEAN Framework Agreement on Services (AFAS) (Asean, 2013); ASEAN Investment Agreement (AIA) (Asean, 2018). Besides those agreements, there is a guideline for the ASEAN Economic Community (AEC) which is the Declaration on ASEAN Economic Community Blueprint (Secretariat Asean, 2015). The AEC Declaration was signed on November 20th, 2007 (Battarchayay, 2009). Afterwards, by 2008, ASEAN Economic Community Blueprint was implemented (Yufani, 2014). While in cases of dispute settlement, AEC refers to the ASEAN Charter specifically in Article 22 of ASEAN Chapter which stated "Member States shall

endeavour to resolve peacefully all disputes in a timely manner through dialogue, consultation, and negotiation”.

In advance on economic dispute, the ASEAN Charter stated in Article 24 that “Where not otherwise specifically provided, disputes which concern the interpretation or application of ASEAN economic agreements shall be settled in accordance with the ASEAN Protocol on Enhanced Dispute Settlement Mechanism” (Koesrianti, 2015). Basically, this protocol has similarities in solving disputes as recommended in the ASEAN Charter, before the formation of a disputing state’s panel, firstly is recommended to solve the disputes between them through mediation, conciliation, and other forms of peaceful settlement disputes (Kristine, 2009). Enhanced Dispute Settlement Mechanism (EDSM) Protocol established a Senior Economic Official Meeting (SEOM) agency. Based on Article 1 and Article 2 of the protocol, SEOM would form a report and given broad authority to solve disputes. Furthermore, SEOM would form a panel to solve disputes occurring between member states.

Based on Article 5, the Panel’s formation is held in a SEOM meeting which occurs in 45 days maximum period after SEOM receives a written plea for a Panel’s formation. Article 6-9 regulates on Panel’s formation, work plan, and response towards the produced report by the Panel. Panel’s formation occurs after a discussion between the disputed parties which failed to meet a turning point. The Panel is to investigate the ongoing issue thus finding the problem-solving. The Panel’s discovery would eventually be in a form of a report that will be adopted by the SEOM. The Panel’s duties also consist of making a review or an objective valuation from the disputes, and form a discovery and recommendations regarding to the case (Kristine, 2009). Hence in Article 12, if the disputed parties failed to reach satisfaction of the Panel’s recommendation, then the parties can file an objection to the Appellate Body.

ASEAN Dispute Settlement Issue

² In the dispute settlement mechanism, it can be stated that ASEAN refers to WTO as their best example. More over, the WTO’s can be trusted² in the dispute settlement regarding to trading and effectiveness (Kaplan, 1996). This is due to the WTO’s dispute settlement mechanism that has evolved from the previous form, using diplomatic based structure which is relatively simple (GATT) into a law, legalistic, and adjudicated based mechanism (Koesrianti, 2015). One of the similarities of dispute settlement between ASEAN and WTO is a panel formation² in solving economic disputes. Dispute settlement mechanism through WTO is regulated in Understanding on Rules and Procedures Governing the settlement of dispute or DSU in short, and the body that operates it is the Dispute Settlement Body or DSB (Suherman, 2012). To solve a DSB dispute, eleven Panels will be formed, adopting 18 Panels’ reports, and 11 appellate body reports (WTO, 2012). Even though there are similarities of mechanism in dispute settlement between ASEAN and WTO, but there are few ASEAN countries that solves their disputes in WTO’s DSB, the records shows that until 2015, there are 9 (nine) ASEAN countries that solves their disputes in the WTO (Donovan, 2015). One of the ASEAN countries disputes that were brought into the⁴ WTO is between Thailand and European Union back in 2008 (Donovan, 2015). Besides that, there are several other economic disputes such as the polietilen import prohibition case and polipropilena that includes between Singapore and Malaysia in 1995 and the case regarding to cigarette customs and fiscal between the Philippines and Thailand in 2008, which was also solved in the WTO (Limsiritong, 2016).

There are factors that lead ASEAN member states to choose WTO instead of ASEAN in solving their economic disputes. These factors consist of ASEAN dispute settlement mechanism

that is still considered new in which the member states are not familiar with the ASEAN dispute settlement law. The difference can be pointed out in which the ASEAN Protocol on Enhanced Dispute Settlement Mechanism was applied in 2004, while the WTO's Understanding on Rules and Procedures Governing the settlement of dispute has been formed since 1995 (Shedd, 2012). Due to that, Member states of ASEAN are more familiar with WTO's regulation, not to mention a large number of law cases that has been developed under the WTO. Another factor is that there are lacks awareness on the ASEAN regulation regarding to the dispute settlement which cause member states to prefer the WTO in solving their disputes since member states are comfortable with regulations under multilateral agreement such as the WTO (Koesnaldi, 2014). From few cases it shows that member states of ASEAN considered the dispute settlement in ASEAN incomprehensive. With that stated, ASEAN needs reinforcement and revitalization upon their dispute settlement agency, or by forming a permanent court to solve dispute and based on a statute.

The existence of a permanent adjudication in a regional organization has been first applied by the European Union and African Union. European Union has the Court of Justice of the European Union, while the African Union has the African Court of Justice (Phan, 2013). European Union has the Court of Justice of the European Union (Danwitz, 2014), while the African Union has the African Court of Justice (Magliveras, 2006). The Court of Justice of the European (CJEU) consists of three courts: Court of Justice, General Court, Civil Service Tribunal. Even though divided into three, all of them have main duties which are reviewing all legality of actions by the European Union and ensuring interpretation uniformity and European Union's law implementation (European Union, 2010). Instead in economic disputes, European Union's member states solve their disputes through the Court of the European Free Trade Area (EFTA Court). Even though EFTA's working milestone is based on EFTA Agreement (Mc Iver, 2017), the EFTA Court is able to follow and adopt laws of CJEU (Baudenbacher, 2004).

Same as the CJEU, African Union (AU) has the African Court as the permanent court. The formation is based on the African Charter Protocol regarding to the human rights which was established on June 9th, 1998 in Ougadougou, Burkina Faso, legalized by the Organization of African Unity's (OAU) Assembly of Heads of State and Government (Udombana, 2014). African Court has jurisdiction for all cases and disputes that is recommended to them regarding to interpretation and implementation of African Charter on the Human Rights and the people, and other human rights instruments which has been ratified by member state of African Union. Instead of which, the economic dispute settlement in the African Union is solved by a permanent court which is The Court of Justice of the Regional Economic Communities (RECs). Basically, this court was established based on the Abuja Agreement 1991 and formed by the Regional Economic Communities (RECs). Basically, this court is formed to handle disputes that relates with agreement violation and RECs actions (especially that relates to economic and monetary policy) to member states (FIDH, 2010).

Reinforcement and Revitalization of ASEAN's Dispute Settlement Agency

Regarding to the issue above, then a form of reinforcement and revitalization of ASEAN's dispute settlement agency is needed. There are numerous member states of ASEAN that solves their dispute in WTO, while the fact is that the mechanism in WTO used is similar with the mechanism used in ASEAN which is forming the Panel (Locknie, 2015), showing the necessity of reinforcement and revitalization in ASEAN's Panel. As mentioned before, that the ASEAN Panel is formed by the SEOM agency. Instead, in Article 12 of ASEAN Protocol on

Enhanced Dispute Settlement stated that the last stage on ASEAN economic dispute settlement is a report from the Appellate Body which is in the form of a recommendation. The recommendation cannot be adopted by SEOM based on the parties' consensus. This shows that ASEAN dispute settlement system is contained in Protocol on Enhanced Dispute Settlement is not binding and firm because it is just a recommendation.

Besides that, the mechanism in the Protocol on Enhanced Dispute Settlement is ineffective to be applied in economic dispute settlement between member states of ASEAN. The reason is, that in terms of funding the dispute settlement based on Article 17 of Enhanced Dispute Settlement Protocol, it regulates that in order to contribute funding terms of ASEAN dispute settlement should come from state members of ASEAN with fair parts. Afterwards, the cost for dispute settlement must be split between the disputing parties. This would be a threat for disputing parties in continuing disputes in ASEAN. Different with the WTO who has its own provisions in settling confidential cases, a distinct budget are to be provided (Vasmatkar, 2015). Based on these facts, it can be concluded that the current ASEAN dispute settlement mechanism is no longer comprehensive, even the source of law of ASEAN dispute settlement which is the EDSM is also no longer effective. With that being said, a reinforcement and revitalization towards ASEAN dispute settlement's agency and source of law is very much needed.

The revitalization is focused towards the EDSM Protocol and the Panel made by the SEOM. As an agency that settles disputes between countries, the Panel does not have any firm position regarding to the structure and secretary thus the system is not trusted by ASEAN member states in settling their disputes. Just as the invalid Panel Structure, the Panel also does not determine of who could be the Panel member or who would be an arbiter in the Panel during the dispute settlement. Because the SEOM would eventually create the Panel during or after there is a dispute, then the Panel's position itself is not permanent. This would refer to the location of the Panel's secretary which cannot be determined, as the Article 20 of EDSM states that the place of consultation could be occur anywhere which the Panel and parties think as the best. This could stimulate doubtfulness from all ASEAN member states to resolve their dispute in the ASEAN Panel because both the source of law which is the EDSM is considered ineffective, following non permanent structure and secretary of the Panel.

In revitalizing the source of law, Panel's structure, and Panel's secretary, ASEAN has a chance to form a permanent court with a firm structure following a judge determined to resolve a dispute, with a permanent location in a country, and a firm source of law that regulates on dispute settlement formulated in a statute. This formation of a permanent court is as same as other regional organizations such as the European Union and African Union have done. If the European Union can form a permanent court with the EU Law and African Union with the African Charter Protocol, then ASEAN supposedly can form a court through EDSM Protocol amendment or forming a new statute. This is as stated in Article 52 of the UN Charter that the UN gives authority to regional organizations by giving authority to deal with disputes that are threats to the world peace and safety as long as the regulations and organs made by the organization are intact with UN's principles and goals (Kabau, 2012).

However, in order to form a permanent court and in process of EDSM amendment or form a new statute, the AEC would face certain challenges (Afandi, 2011). In AEC's negotiation for an instant, in the process of negotiation, the countries would argue and have an argument to reach for consensus (Leviter, 2010). In this term, the AEC would prioritize diplomatic process compared to legal regulations, thus it is not uncommon if the decision made during a negotiation would prioritize political interests (Limsiritong, 2016). Most cases in negotiation process would

raise an argument to defend political interest, even when the argument would likely ignore the nature of law (Kraichitti, 2015).

Besides that, regarding to the separation of legislative, executive, and judicial power, the ASEAN does not have any kind of separation of it. ASEAN only consist of ASEAN summit as the highest leading organ. This situation makes ASEAN not having any authority in balancing the organs (Limsiritong, 2016). This situation makes ASEAN not having any authority in balancing the organs. In this case, ASEAN would come into troublesome with law enforcement and dispute settlement, because the judicial organ does not have its own authority to decide a case. Instead, the judicial organs operate side by side with the legislative and executive organs. This authority separation has been applied by the European Union where the executive, judicial, and legislative have separate authorities. This made European Union owning a balanced power to form a permanent court (Limsiritong, 2016). Hence, in ASEAN economic deal, the legal language used is cooperative and does not force between comparative rights and obligation. For example, the usage of neutral phrases such as “can” and not “must”, and addition of “if applicable”, “according to the needs”, or “that may apply”, those several phrases could be seen in numerous economic agreements (Kraichitti, 2015).

As for lack of dispute settlement mechanism usage in ASEAN, it has ingrained between member states of ASEAN. This is caused by ASEAN who does not have exclusive jurisdiction and no firm provisions on giving mandate in using ASEAN dispute settlement mechanism for disputing parties of ASEAN's member states. They have a choice to file their cases either to ASEAN or WTO, and most of the member states would hand their disputes to the WTO as mentioned before. And then, it will add with lack of ASEAN's member states awareness regarding to dispute settlement mechanism regulation in ASEAN. Even though the provisions in ASEAN dispute settlement mechanism reflect the WTO dispute settlement mechanism, the countries, however, are not aware of this (Koesnaldi, 2014).

Other challenges which ASEAN would face are different politic system and law system between ASEAN member states. These differences would make it complicated for all member states of ASEAN to bind and accept the same law system. As a result, law coordination between ASEAN's member states would be hampered (Termudomchai, 2016). Another difference is in the law system and approach between ASEAN's member states in foreign arbitration decision's acknowledgement and enforcement. The result of this difference is an obstacle to operate arbitration system reinforcement in dispute settlement mechanism under ASEAN between its member states (Kraichitti, 2015).

CONCLUSION

Reinforcement of the permanent court to solve countries' disputes of ASEAN is an answer of numerous ASEAN state members' issue which settles their disputes in the WTO. This issue shows that there is a need for a reinforcement and revitalization of ASEAN's dispute settlement. Previously, the ASEAN economic dispute settlement is based on the Enhanced Dispute Settlement Mechanism ASEAN Protocol with the Panel made by the SEOM agency that is currently considered incomprehensive. Thus, it raises a need to reinforce and revitalize the Panel and EDSM Protocol. The mentioned reinforcement and revitalization refers to ASEAN's chance to form a new mechanism that is more effective in solving economic dispute which is forming a permanent court as owned by the European Union and African Union. However, in the process of formation, ASEAN is to face several challenges which most of them come from ASEAN member states' own issues. Afterwards, in developing economic dispute settlement

mechanism in the ASEAN region would be hard to develop if their own state member would prefer to solve their disputes outside ASEAN or in this case the WTO. As known for, the WTO mechanism is the main guideline for ASEAN in forming the dispute settlement mechanism. Nevertheless, the WTO is also an ultimate rival in ASEAN dispute settlement mechanism in solving their member states.

RECOMMENDATION

Member states of ASEAN are expected to trust the mechanism in trusting the ASEAN resolution and maintenance so the regional issues can be solved through regional aspect without including other organization that is wider than the region aspect. Then, if the current mechanism in ASEAN is considered unfulfilling the state member's need, the ASEAN could form a new and more effective permanent court. However, in order to form a court would need cooperation from ASEAN state member to be included in building dispute settlement in the ASEAN region. To face challenges in the process of building permanent court, ASEAN can make a comparison by reviewing permanent court formation for dispute settlement which was previously done by the EU and AU.

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