ASEAN AND ASEAN+ INTERGOVERNMENTAL DISPUTE SETTLEMENT MECHANISMS — A GENERAL PERSPECTIVE AND SOME SUGGESTIONS

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Abstract

The growing cooperation in ASEAN and ASEAN+ frameworks goes hand in hand with the proliferation of ASEAN and ASEAN+ dispute settlement mechanisms. However, due to this proliferation, ASEAN countries and their partners face a dilemma. On the one hand, in spite of their role, ASEAN and ASEAN+ dispute settlement mechanisms are underused. Therefore, it may be necessary to improve these mechanisms and encourage disputing parties to use them. On the other hand, proliferation of dispute settlement mechanisms may provoke risks. This paper presents a general perspective of ASEAN and ASEAN+ intergovernmental dispute settlement mechanisms. It compares them and their jurisdictions, while suggesting some ideas for a sustainable growth of these mechanisms.

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TABLE OF CONTENTS

The growing cooperation in ASEAN and ASEAN+ frameworks goes hand in hand with the proliferation of ASEAN and ASEAN+ dispute settlement mechanisms (DSMs). This proliferation can be explained by

DSMs' role in reducing uncertainties of cooperation legal frameworks (while offering legal interpretations and clarifications) and reinforcing their respectability (while singling out violations and recommending members to bring their measures into conformity with related rules). In fact, ASEAN members have never underestimated this role. For them, "DSM is a key component in the realization of a rules-based community, where the rule of law is strengthened and disputes are resolved through peaceful means with legal certainty and predictability."[2] However, the increasing number of DSMs may also entail challenges. Forum shopping, fragmentation of international law and harm to the credibility of regional or universal legal frameworks are potential risks related to the proliferation of DSMs and their eventual use.

This paper presents a general perspective of the panoply of ASEAN and ASEAN+ intergovernmental DSMs (I), before focusing on non-economic (II) and economic DSMs (III). It compares these mechanisms in general (IV) and their jurisdictions in particular (V), while suggesting some ideas for a sustainable growth of these mechanisms (VI).

I. ASEAN AND ASEAN+ INTERGOVERNMENTAL DSMS PANOPLY — A GENERAL PERSPECTIVE

1. ASEAN DISPUTE SETTLEMENT MECHANISMS

For almost 40 years, ASEAN members have deployed multiple efforts to construct different mechanisms of dispute settlement (DS),[3]

[2] ASEAN Secretariat, http://www.asean.org/news/asean-secretariat-news/item/asean-builds-strong-dispute-settlement-mechanisms, consulted on the 7th of October, 2015.

[3] The document establishing the ASEAN, which was signed in 1967, didn't mention a dispute settlement mechanism in ASEAN. Only four years later, for the first time, an ASEAN official document (the 1971 Declaration on the Zone of Peace, Freedom and Neutrality) mentioned dispute settlement, while recognizing the aims and objectives of the United Nations, including the peaceful settlement of international disputes. In 1976, this principle was reiterated in paragraph 6 of the Declaration of ASEAN Concord (which provides that ASEAN members shall rely exclusively on peaceful processes in the settlement of intra-regional differences). From 1976, different ASEAN legal documents contributed to develop the key mechanisms for dispute settlement in the region. The most notable documents are the 1976 Treaty of Amity and Cooperation (TAC), the 1996 Protocol on Dispute Settlement Mechanism, the

with the ambition of maintaining and establishing DSMs in all fields of ASEAN cooperation.[4] In this context, it would be useful to clarify which mechanism should be used in each field of cooperation. Besides imposing general principles of DS[5] and encouraging parties to resort to good offices, conciliation or mediation to solve their disputes,[6] the ASEAN Charter offers some guidelines in this matter. In general, the attribution of ASEAN DSMs is as follows:

— Disputes relating to specific ASEAN instruments shall be settled through the mechanisms and procedures provided for in such documents;

— Disputes concerning the interpretation or application of ASEAN economic agreements shall be settled in accordance with the ASEAN Protocol on Enhanced Dispute Settlement Mechanism (ASEAN Protocol on EDSM, or Vientiane Protocol), "where not otherwise specifically provided";

— Disputes not concerning the interpretation or application of any ASEAN instrument shall be resolved in accordance with the Treaty of Amity and Cooperation in Southeast Asia (TAC) and its rules of procedure;

— Disputes concerning the interpretation or application of the ASEAN Charter and other ASEAN instruments shall be settled through the appropriate DSM, established by the 2010 Protocol to the ASEAN Charter on Dispute settlement mechanisms (Protocol to the ASEAN Charter on DSMs).[7]

2004 Protocol for Enhanced Dispute Settlement Mechanism for disputes relating to ASEAN economic agreements, the 2007 ASEAN Charter (with its Chapter VIII related to Settlement of Disputes), and the 2010 Protocol the ASEAN Charter on Dispute Settlement Mechanisms.

[4] Article 22(2) of the ASEAN Charter.

[5] See Article 22(1) of the ASEAN Charter.

[6] Article 23 of the ASEAN Charter.

[7] See Article 24 ("Dispute settlement mechanisms in specific instruments"), Article 25 ("Establishment of dispute settlement mechanisms") of the ASEAN Charter and the Protocol to the ASEAN Charter on Dispute Settlement mechanisms. Note that in addition to these DSMs, according to Article 51(1) of the ASEAN Charter, any ASEAN member can refer to the ASEAN Secretariat for an interpretation of the Charter.

ASEAN DSMs can be roughly divided into two categories: economic DSMs (established by the Vientiane Protocol) and non-economic DSMs (prescribed in other related ASEAN documents). In this paper, for non-economic DSMs, we'll focus on those established by the TAC and its rules of procedure, as well as those prescribed in the 2010 ASEAN Charter and its Protocol on DSMs.

2. ASEAN+ DISPUTE SETTLEMENT MECHANISMS

DSMs have been established in ASEAN+ agreements for similar reasons to those motivating the establishment of ASEAN DSMs. ASEAN+ DSMs may be established by stand-alone legal documents on DS, such as those that ASEAN signed with the Republic of Korea (ROK),[8] the Republic of India (India)[9] or the Republic of China (China).[10] They are also prescribed in DS provisions of other agreements between ASEAN and its external partners.[11] Similar to ASEAN DSMs, ASEAN+ DSMs

[8] See the 2005 Agreement on Dispute Settlement Mechanism under the Framework Agreement on Comprehensive Economic Cooperation among the Governments of the Member Countries of the ASEAN and the Republic of Korea.

[9] See the 2009 Agreement on Dispute Settlement Mechanism under the Framework Agreement on Comprehensive Economic Cooperation between ASEAN and the Republic of India.

[10] See the 2004 Agreement on Dispute Settlement Mechanism under the Framework Agreement on Comprehensive Economic Co-operation between the ASEAN and the People's Republic of China.

[11] See, for example, Chapter IV of the 1976 Treaty of Amity and Cooperation in Southeast Asia (amended by the 1987, 1998 and 2010 Protocols, clarified by the 2001 Rules of Procedure of the High Council of the Treaty of Amity and Cooperation in Southeast Asia), Chapter 17 of the 2009 Agreement Establishing the ASEAN–Australia–New Zealand Free Trade Area, Article of the 2012 Protocol to Incorporate Technical Barriers to Trade and Sanitary and Phytosanitary Measures into the Agreement on Trade in Goods of the Framework Agreement on Comprehensive Economic Co-operation between the Association of Southeast Asian Nations and the People's Republic of China, Articles 13 and 14 of the Agreement on Investment of the Framework Agreement on Comprehensive Economic Co-operation between the Association of Southeast Asian Nations and the People's Republic of China, Article 30 of the 2007 Agreement on Trade in Services of the Framework Agreement on Comprehensive Economic Co-operation between the ASEAN and the People's Republic of China, Article 11 of the 2003 Framework Agreement on Comprehensive Economic Cooperation between the Republic of India and the ASEAN, Article 19 of

may be divided into two categories: non-economic and economic. Non-economic DSMs serve to solve disputes related to a wide range of issues (security, territory, transportation…). Economic DSMs help to settle disputes related to economic relations and are often linked to ASEAN+ economic agreements.

However, the boundaries between ASEAN and ASEAN+ DSMs, as well as economic and non-economic DSMs, may be blurred. Some examples may illustrate this point. *First*, at the beginning, the TAC was open for accession by Southeast Asian nations and aimed to establish a mechanism to settle disputes between them only.[12] Nowadays, it is open for accession by states and intergovernmental regional organizations outside Southeast Asia, subject to the consent of all the states in

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the Agreement on Investment under the Framework Agreement on Comprehensive Economic Cooperation between the ASEAN and the Republic of India, Article 30 of the 2014 Agreement on Trade in Services under the Framework Agreement on Comprehensive Economic Cooperation between the ASEAN and the Republic of India, Chapters 4, 5, 8, 9 of the 2008 Agreement on Comprehensive Economic Partnership among Member States of the ASEAN and Japan, Article 19 of the 2006 Agreement on Trade in Goods under the Framework Agreement on Comprehensive Economic Cooperation among the Governments of the Member Countries of the ASEAN and the Republic of Korea, Article 5.1 of the 2005 Framework Agreement on Comprehensive Economic Cooperation among the Governments of the Member Countries of the ASEAN and the Republic of Korea, Articles 18 and 19 of the 2009 Agreement on Investment under the Framework Agreement on Comprehensive Economic Cooperation among the Governments of the Member Countries of the ASEAN and the Republic of Korea, Article 29 of the 2007 Agreement on Trade in Services under the Framework Agreement on Comprehensive Economic Cooperation among the Governments of the Member Countries of the ASEAN and the Republic of Korea, Article 10 of the 2005 Agreement between the Governments of the Member Countries of the ASEAN and the Government of the Russian Federation on Economic and Development Cooperation, Article 8 of the 2004 Memorandum of Understanding between the Governments of the Member Countries of the ASEAN and the Government of the People's Republic of China on Cooperation in the Field of Non-traditional Security Issues, paragraphs 4 and 5 of the 2002 Declaration on the Conduct of Parties in the South China Sea, Article VII of the 2004 Memorandum of Understanding between the Governments of the Member Countries of the ASEAN and the Government of the People's Republic of China on Transport Cooperation…

[12] See ASEAN, *Text of the Treaty of Amity and Cooperation in Southeast Asia and related Information*, ASEAN Knowledge Kit, March 2005, p. 1. See also Article 18: "It (this agreement) shall be open for accession by other States in Southeast Asia".

Southeast Asia.[13] Therefore, the DSM established in the TAC and its rules of procedure can be used to settle both ASEAN and ASEAN+ disputes. *Second*, even if ASEAN economic disputes should be settled according to the ASEAN Protocol on EDSM, they can also be examined through the mechanism of the Protocol to the ASEAN Charter on DSMs, upon agreement of disputing parties.[14] In other words, the mechanism prescribed by the Protocol to the ASEAN Charter on DSMs may be used to settle both economic and non-economic disputes. *Third*, some agreements aim at establishing "multifaceted cooperation" between their parties, thus their DSMs can be used to settle economic as well as non-economic disputes.[15] Therefore, it is necessary to note that the distinction between ASEAN/ASEAN+ DSMs and economic/non-economic DSMs, which we'll use below, is only relative.

II. ASEAN AND ASEAN+ NON-ECONOMIC DISPUTE SETTLEMENT MECHANISMS

ASEAN and ASEAN+ legal instruments often propose modes of DS in order to settle disputes between their members. However, in many cases, the modes proposed are limited to consultations and negotiations.[16] The most elaborated DSMs are those established by the Protocol to the ASEAN Charter on DSMs (1), as well as by the TAC (2).

[13] See Article 1 of the 2010 Third Protocol amending the Treaty of Amity and Cooperation in Southeast Asia.

[14] Paragraph 1.b of Article 2 of the Protocol to the ASEAN Charter on DSMs (Scope and Application) states that "This Protocol shall apply to disputes which concern the interpretation or application of (...) other ASEAN instruments unless specific means of settling such disputes have already been provided for..." However, its paragraph (2) prescribes that "Paragraph 1(b) of this Article shall be without prejudice to the right of the Parties to such disputes to mutually agree that this Protocol shall apply."

[15] See, for example, the 2005 Agreement between the Governments of the Member Countries of the ASEAN and the Government of the Russian Federation on Economic and Development Cooperation.

[16] See, for example, Article 8 (Settlement of Disputes) of the Memorandum of Understanding between the Governments of the Member Countries of the ASEAN and the Government of the People's Republic of China on Cooperation on the Field of Non-traditional Security Issues; Article 20 (Settlement of Disputes between Centre Members) of the Memorandum of Understanding on Establishing the ASEAN-Korea Centre between the Member Countries of ASEAN and the Republic of Korea.

1. ASEAN NON-ECONOMIC DSMS ESTABLISHED BY THE PROTOCOL TO THE ASEAN CHARTER ON DSMS

The Protocol to the ASEAN Charter on DSMs covers disputes outside the ambit of the TAC or the Vientiane Protocol. It serves to settle disputes between ASEAN countries: *first*, its DSMs are established to settle disputes concerning the interpretation or application of the ASEAN Charter and other ASEAN instruments;[17] *second*, the Protocol itself aims to prevent festering conflicts and confrontation among the "Member States", who are ASEAN members.[18]

According to this Protocol, in order to solve a dispute, disputing parties may resort to consultation. They may also agree at any time to apply good offices, mediation or conciliation, in conformity with the rules prescribed in Annexes 1, 2 and 3. They may request the Chairman of ASEAN or the Secretary-General of ASEAN to provide good offices, mediation or conciliation.[19] Settlement agreements resulting from good offices, mediation and conciliation are binding on the disputing parties.[20]

After the receipt of the request for consultation, the complaining party may request the establishment of an arbitral tribunal in the following cases: the respondent does not reply within 30 days; the respondent does not enter into consultation within 60 days; the consultation fails to settle the dispute within 90 days or any other period mutually agreed by the parties to the dispute. The request must be made in the form of a written notice sent by the complaining party to the responding party.

The arbitral tribunal will be established only if the responding party expresses its consent within 15 days or, upon the disputing parties' agreement, within 30 days from the date of receipt of the notice

[17] Article 25 of the ASEAN Charter.

[18] See the Introduction of the Protocol to the ASEAN Charter on DSMs.

[19] Article 6.2 of the Protocol to the ASEAN Charter on DSMs. See also paragraphs 4 and 5 of the Declaration on the Conduct of Parties in the South China Sea, Article VII of the Memorandum of Understanding between the Governments of the Member Countries of the ASEAN and the Government of the People's Republic of China on Transport Cooperation.

[20] Article 16 of the Protocol to the ASEAN Charter on DSMs.

from the complaining party. Generally, an arbitral tribunal consists of 3 arbitrators: each party appoints one arbitrator and both parties concur on the 3rd arbitrator, during the period of time prescribed by the Annex 4 of the Protocol to the ASEAN Charter on DSMs.[21] In case any party fails to appoint an arbitrator within this period or if the parties to the dispute fail to agree on the appointment of the 3rd arbitrator, the Secretary-General of ASEAN or the Chairman of the ASEAN Coordinating Council (ACC) may be requested to do so.[22] The award of the arbitral tribunal shall be final and binding on the parties to the dispute.[23]

Without the agreement or the response of the responding party within the 15-day period, the complaining party may refer the dispute to the ACC.[24] This organ may direct the parties to resolve their dispute through good offices, mediation, conciliation or arbitration. Within 75 days from the date the dispute was referred to it, if the ACC cannot reach a decision on how the dispute is to be resolved, any disputing party may refer the dispute to the ASEAN Summit, the highest organ of ASEAN, as an unresolved dispute.[25] However, the DS procedure of the ASEAN Summit is not clarified by the ASEAN Charter or its Protocol on DSMs.

Compliance with arbitral awards or settlement agreements will be monitored by a reporting mechanism before the Secretary-General of the ASEAN. Any Member State affected by non-compliance may refer the matter to the ASEAN Summit for a decision. Again, it is not clear which procedure will be applied by the ASEAN Summit to solve this issue.

We can note the political and non-binding character of the non-economic DSMs established by the ASEAN Charter. A dispute will only go

[21] See Articles 2 and 4 of the Protocol to the ASEAN Charter on DSMs.

[22] The ASEAN Coordinating Council comprises the ASEAN Foreign Ministers, who meet at least twice a year. See Article 8 of the ASEAN Charter.

[23] Article 15 of the Protocol to the ASEAN Charter on DSMs.

[24] Article 8.4 of the Protocol to the ASEAN Charter on DSMs.

[25] Article 9 of the Protocol to the ASEAN Charter on DSMs. Article 1 of this Protocol defines "unresolved dispute" as "a dispute over the interpretation or application of the ASEAN Charter or other ASEAN instruments which has failed to be resolved by mutual agreement, and after the application and implementation of Article 9 of this Protocol." Article 9 is on "Reference to the ASEAN Coordinating Council".

to arbitration if all disputing parties agree, or if there is a positive decision of the ACC (meaning no ASEAN member opposes the proposition to direct the parties to resolve the dispute through arbitration).[26] Besides, the ASEAN Summit is a political organ. Therefore, the DS process bears the risk of being interfered with by political considerations.

While taking into consideration the low level of judicialization of these DSMs, the ASEAN Charter recognizes the right of the disputing members of recourse to the modes of peaceful DS contained in Article 33(1) of the Charter of the United Nations (UN) or any other international legal instruments to which the disputing members are parties.[27]

2. ASEAN, ASEAN+ NON-ECONOMIC DISPUTE SETTLEMENT MECHANISM ESTABLISHED BY THE TAC

The DSM of the TAC can be used to solve disputes "which do not concern the interpretation or application of any ASEAN instrument".[28] It can serve to settle disputes between states which acceded to the TAC, including ASEAN members and their external TAC partners.[29]

Besides imposing some principles of DS,[30] Chapter IV of the TAC introduces 3 possible means of DS:

— Friendly negotiations between disputing parties;[31]

— Regional processes: in case direct negotiations cannot be reached, disputes can be settled through regional processes, with the

[26] Article 20 of ASEAN Charter: "As a basic principle, decision-making in ASEAN shall be based on consultation and consensus."

[27] Article 28 of the ASEAN Charter.

[28] Article 24.2 of the ASEAN Charter.

[29] The Second Protocol amending the TAC includes an open accession clause, enabling the accession of states outside Southeast Asia (see Article 1). Nowadays, many other countries outside ASEAN, including Papua New Guinea, People's Republic of China, India, Japan, Pakistan, Republic of Korea, Russia, New Zealand, Mongolia, Australia, France, East Timor, Bangladesh, Sri Lanka, North Korea, United States, European Union, Brazil and Norway, entered into the TAC.

[30] See Article 13 of the TAC.

[31] Article 13 of the TAC.

intervention of the High Council.[32] However, the services offered by the High Council will not be used "unless all the parties to the dispute agree to their application to that dispute";[33]

— Universal mechanism: the disputing parties may have recourse to the modes of peaceful settlement contained in Article 33(1) of the Charter of the UN. This means that besides having recourse to negotiations, enquiry, mediation, conciliation and regional agencies or arrangements already mentioned in the TAC, disputing parties can use the mechanisms of arbitration and judicial settlement. Such mechanisms imply mainly the International Court of Justice (ICJ) as well as UN specialized tribunals, such as the International Tribunal for the Law of the Sea (ITLOS).[34]

In 2001, in order to clarify the regional processes, the TAC High Contracting Parties adopted the Rules of procedure of the High Council. Most importantly, related to the *composition*, the High Council shall include one ministerial-level Representative from each ASEAN member state as well as contracting parties which are not ASEAN members. However, only Representatives from ASEAN members enjoy a permanent status in the High Council. Representatives of states outside ASEAN can participate only if their states are directly involved in the dispute of which the High Council takes cognizance.[35] Concerning the *steps of DS*, only a party directly involved in a dispute can invoke the procedure of the High Council. In order to do

[32] The High Council shall take cognizance of the dispute and (i) recommend to the disputing parties appropriate means of settlement such as good offices, mediation, inquiry or conciliation (ii) it may offer its own good offices, or upon agreement of the disputing parties, constitute itself into a committee of mediation, inquiry or conciliation, (iii) when necessary, recommend appropriate measures for the prevention of a deterioration of the dispute or the situation. (See Articles 14 and 15 of the TAC).

[33] Article 16 of the TAC. This Article prescribes, however, that this limitation will not preclude the other TAC contracting parties not party to the dispute from offering all possible assistance to settle the dispute, and disputing parties should be well disposed towards such offers of assistance.

[34] Article 17 of the TAC.

[35] See Rule 3 of the Rules of Procedure of the High Council of the TAC. This "discrimination" can be explained by the fear of ASEAN states of external interference in regional problems. See Gao (Henry), "Dispute Settlement Provisions in ASEAN's External Agreements with China, Japan and Korea", www.nysba.org/Sections/

so, it shall submit to the Chairperson and the other contracting parties a written detailed statement relating to the dispute (nature, parties, basis upon which the High Council shall take cognizance of this dispute). The Chairperson shall convene a meeting of the High Council only on receipt of written confirmation of all disputing parties of their agreement to the application of the High Council's procedure.[36] The quorum for meetings of the High Council shall consist of all the Representatives of the High Council, and all decisions of the Council shall be taken by consensus.[37]

The High Council procedure can be praised by some for its flexibility and criticized by others for its weakness. The main criticisms are related to the procedure's low level of judicialization. *First*, the success of the process depends entirely on the disputing parties' willingness. An unwilling respondent has opportunities to block the process at every key step: initiation of the procedure (by refusing to provide written confirmation of its agreement to the application of the High Council's procedure), meetings of the High Council (by being absent from the meetings of the Council), and decision-making (by refusing to join the consensus at the meeting). *Second*, the TAC as well as its Rules of procedure provide little detail on procedural and substantial law for the High Council to work with.[38] *Third*, related to the High Council's composition, there is no requirement that its members must be legally qualified. On the contrary, we can suspect that Representatives at ministerial level, when making decisions, will give more weight to political rather than legal considerations.

International/Seasonal_Meetings/Vietnam/Program_1/Attachment_3.html, consulted on the 7h of October, 2015, pp. 13 — 18.

[36] See Rules 8 and 9 of the Rules of Procedure of the High Council of the TAC. In addition, "responding" parties may also provide detailed statements, which are similar to the ones provided by "complaining" party.

[37] See Rules 12 and 19 of the Rules of Procedure of the High Council of the TAC.

[38] For more analysis, see Gao (Henry), "Dispute Settlement Provisions in ASEAN's External Agreements with China, Japan and Korea", www.nysba.org/Sections/International/Seasonal_Meetings/Vietnam/Program_1/Attachment_3.html, consulted on the 7th of October, 2015, pp. 13–18.

In addition, discrimination against Representatives of non-ASEAN states (who cannot have a permanent status inside the High Council or be its Chairperson) may pour cold water on their enthusiasm to utilize the procedure. *Fourth*, the methods of DS used by the High Council (good offices, mediation, inquiry, conciliation) are essentially diplomatic. *Fifth*, there is no provision in the TAC or its Rules of procedure for a mechanism guaranteeing the compliance with the High Council's decisions. Therefore, the authority of these decisions is not guaranteed.

3. Comparison between non-economic DSMs of the ASEAN Charter and the TAC

ASEAN and ASEAN+ non-economic DSMs, as prescribed in the ASEAN Charter (and its Protocol on DSMs) and in the TAC (and its Rules of procedure), have some differences and share some similarities.

The most remarkable difference between the two DSMs is that while the TAC develops only diplomatic modes of DS, the ASEAN Charter and its Protocol on DSMs establish a mechanism of arbitration. We can criticize that this procedure of arbitration is highly voluntary. However, its existence is a sign of ASEAN members' efforts to judicialize their DSMs.

The most remarkable similarities of these DSMs are the following:

— They serve to settle disputes between contracting parties, meaning the states which participate to the related agreements. Private firms or individuals cannot participate in the procedure as disputing parties. This can be explained by the political characteristics of the examined disputes.

— They don't contain any precise tool to guarantee the compliance with DS solutions. This weakens the authority of ASEAN and ASEAN+ non-economic DSMs.

— They have never been used to resolve any ASEAN or ASEAN+ dispute. In order to settle their disputes, many ASEAN countries have

had recourse to the ICJ and the ITLOS,[39] even if in some cases the possibility of using an ASEAN or ASEAN+ DSM was proposed.[40]

III. ASEAN AND ASEAN+ ECONOMIC DISPUTE SETTLEMENT MECHANISMS

1. ASEAN ECONOMIC DISPUTE SETTLEMENT MECHANISMS

In the economic field, the mechanisms prescribed in the 2000 Protocol Regarding the Implementation of the CEPT Scheme Temporary Exclusion List and in the Article 8 (Consultations)[41] of the 1992 Agreement on the Common Effective Preferential Tariff (CEPT) Scheme

[39] For cases before the ICJ, see, for example: Request for interpretation of the Judgment of the 15 June, 1962 in the case concerning the Temple of Preah Vihear (Cambodia v. Thailand), 2011 and the case Temple of Preah Vihear (Cambodia v. Thailand), 1959; Sovereignty over Pulau Ligitan and Pulau Sipadan (Indonesia/ Malaysia), 1998; Sovereignty over Pedra Branca/Pulau Batu Puteh, Middle Rocks and South Ledge (Malaysia/Singapore), 2003. For cases before the ITLOS, see, for example: Case concerning Land reclamation by Singapore in and around the Straits of Johor (Malaysia v. Singapore), Provisional measures; Dispute concerning delimitation of the maritime boundary between Bangladesh and Myanmar in the Bay of Bengal (Bangladesh/Myanmar); Case concerning Land reclamation by Singapore by and around the Straits of Johor (Malaysia v. Singapore), Provisional measures. See also the case of the Philippines v. China before the Arbitral Tribunal of the ITLOS.

[40] The TAC DSM was proposed in order to solve the dispute between Malaysia and Indonesia over the islands of Sipadan and Ligitan as well as to settle the dispute between Thailand and Cambodia over the area surrounding the temple of Preah Vihear. However, finally, the ICJ was chosen to solve the disputes. See Woon (Walter), "Dispute Settlement the ASEAN way" (working paper), cil.nus.edu.sg/wp/wp-content/uploads/2010/01/Walter-Woon-Dispute-Settlement-the-ASEAN-Way-2012.pdf, pp. 11–14, consulted on the 7th of October, 2015.

[41] The procedure prescribed in this Protocol helps to deal with a situation when an ASEAN member delays temporarily the transfer of a product from its Temporary Exclusion List (TEL) into the Inclusion List (IL). Similar to Article XXVIII of the General Agreement on Tariffs and Trade (GATT), this Protocol establishes processes to allow a country to not meet its obligations in return for compensatory adjustments. The Protocol's mechanism contributed to settle some cases, such as those related to Malaysia and the Philippines' delays in phasing out their products from the TEL into the IL. For a more detailed presentation, see David (Chin Soon Siong), "Trade dispute settlement within ASEAN", in Yoong Yoong Lee, *ASEAN matters! Reflecting on the Association of Southeast Asian Nations*, Singapore Institute of Policy Studies and World Scientific Publishing Co., pp. 114–116.

for the ASEAN Free Trade Area (AFTA)[42] have been used and have contributed to prevent and solve differences between ASEAN members. However, in principle,[43] the main ASEAN mechanism to settle economic disputes is prescribed in the Vientiane Protocol.

The core of this DSM is a mandatory and highly judicialized procedure, strongly influenced by the WTO DS model. Therefore, the best way to understand the Vientiane Protocol's DSM is to compare it with the WTO DSM.

Many strong points of ASEAN DSM are inspired by the WTO DSM. To name just a few, *first*, strict time-lines are imposed for each step of DS. *Second*, the negative consensus method is applied in key phases of the DS procedure,[44] preventing disputing parties to unilaterally block the DSM. *Third*, the examination of cases is delegated to independent experts. *Fourth*, the prescription of an Appellate Body (AB) helps to reinforce the coherence of the ASEAN legal framework, while reducing influences of political considerations. *Fifth*, the possible application of measures of compensation and the suspension of concessions encourages the "losing" party to comply with the recommendations of ASEAN's DS body. *Sixth*, only state members have the right to accede to the DS procedure. These similarities can be explained by members'

[42] In applying the mechanism of this Article, any differences between ASEAN members relating to the interpretation or application of the Agreement shall, as far as possible, be settled amicably between the parties. If such differences cannot be settled amicably, they shall be submitted to the Coordinating Committee for the CEPT-AFTA (CCCA) and if necessary, to the ASEAN Economic Ministers (AEM). In particular, in reality, if the settlement of a "small" bilateral trade dispute doesn't imply major rule changes and can be made with a compromise at officials' level, the settlement is to be done bilaterally at the low level of officialdom. If they cannot do so, the issue will be discussed by the Senior Economic Officials of the two countries, in order to find an amicable resolution. For a more detailed presentation, see David (Chin Soon Siong), "Trade dispute settlement within ASEAN", in Yoong Yoong Lee, *ASEAN matters! Reflecting on the Association of Southeast Asian Nations*, Singapore Institute of Policy Studies and World Scientific Publishing Co., pp. 109–113.

[43] Article 24.3 of the ASEAN Charter.

[44] Like in WTO, the negative consensus method is applied while deciding to establish a panel, to adopt panel's/Appellate Body's report and to authorize the suspension of concessions or other obligations in the event of non-compliance with dispute settlement bodies' findings and recommendations.

willingness to reinforce the ASEAN legal framework and by the fact that the WTO DSM is highly appreciated worldwide for its effectiveness. In fact, the ASEAN case is not specific: for members of many regional trade agreements (RTAs), the WTO DSM is an inspirational source while they construct their DSMs.[45]

However, the ASEAN DSM is also different from the WTO DSM in some major aspects.

Firstly, unlike in the WTO, during the ASEAN DS procedure, the decisions related to the establishment of a panel or the adoption of a panel or AB report, the authorization of compensation and the suspension of concessions can be made not only *during*, but also *outside* the SEOM's meetings.[46] This mechanism guarantees that the decisions are made no later than the time-line prescribed for each DS step.

Secondly, unless the disputing parties agree on a longer time period, the maximum timeframe of dispute settlement in the ASEAN is only 445 days.[47] In the WTO, in theory, after 445 days, the case is only at the phase of determination of the reasonable period of time for implementation of recommendations and rulings.[48] This can be explained by shorter time periods given to different phases of DS in ASEAN, such as:

— In ASEAN, a panel has to complete its work and submit a report to the SEOM around 60–70 days after its establishment.[49] In the WTO, this period can be up to 6 months;[50]

— The period of time that the "losing" party benefits in order to implement findings and recommendations is shorter in ASEAN: within 60 days from the SEOM's adoption of the panel or AB reports, unless

[45] See Trinh (Duc Hai), *Le mécanisme de règlement des différends du GATT/OMC est-il un modèle pour l'Asie du Sud Est?*, doctoral thesis, Paris II, 1997, p. 16.

[46] See, for example, Article 5.2 of the Vientiane Protocol. Similarly, see Article 9.2, 12.13, 16.6 of the Vientiane Protocol.

[47] See Article 18 of the Vientiane Protocol.

[48] See Article 21.4 of the Understanding on Rules and Procedures Governing the Settlement of Disputes.

[49] Article 8.2 of the Vientiane Protocol.

[50] Article 12.8 of the DSU.

the parties to the dispute agree otherwise.[51] The "losing" party will not have 30 days after the adoption of the panel or AB report to decide when and how it will implement the recommendations and rulings, like in the WTO;[52]

— In the WTO, disputing parties have 45 days after the adoption of the recommendations and rulings to find an agreement on a reasonable period of time for implementation.[53] In ASEAN, disputing parties have to make this decision within 14 days from the adoption of the panel or AB report;[54]

— In the WTO, if the reasonable period of time is to be determined through arbitration, this determination may take up to 90 days after the date of adoption of the recommendations and rulings.[55] This step doesn't exist in the ASEAN DS procedure, giving more space to diplomatic approaches and shortening the DS timeframe;

— In principle, the period of time given to an ASEAN panel in order to decide on the existence or consistency with a covered agreement of measures taken to comply with the recommendations and rulings is shorter than the period given to a WTO panel.[56]

ASEAN members' efforts to differentiate their DSM from the WTO DSM undoubtedly aim to encourage ASEAN members to use the regional DSM. One may wonder if this timeframe is realistic:[57] it may impose heavy burdens on the ASEAN DS body as well as disputing parties. Because of this timeframe, ASEAN members may hesitate to bring their cases before the regional DSM. However, some elements may support, or at least explain, the ASEAN approach. *First*, cases brought before

[51] Article 15 (1, 2, 3) of the Vientiane Protocol.

[52] See Article 21.3 of the DSU.

[53] Article 21.3.b) of the DSU.

[54] Article 15.3 of the Vientiane Protocol.

[55] Article 21.3.c) of the DSU.

[56] See Article 15.5 of the Vientiane Protocol and Article 21.5 of the DSU.

[57] For more detailed critics, see Peter Van den Bossche and Paolo R. Vergano, "The Enhanced Dispute Settlement Mechanism of ASEAN: A Report on Possible Improvement", Report funded by Asian Development Bank, 2008. See also Koesnaidi (Joseph Wira), Shalmont (Jerry), Fransisca (Yunita), Sahari (Putri Anindita), *For a more effective and competitive ASEAN dispute settlement mechanism*, Paper for WTI/SECO Program, Jakarta, June 2014, pp. 16–18.

ASEAN may be less complicated than those brought before the WTO: often, ASEAN members have a lot of opportunities to consult each other about the issue at different official levels. This helps to eliminate many divergent points of view and simplifies the issue. *Second*, ASEAN has only 10 members. Therefore, the workload of the ASEAN DS body should be less than that of the WTO DSB.

2. ASEAN+ ECONOMIC DISPUTE SETTLEMENT MECHANISMS

ASEAN+ DSMs are often highly institutionalized. In some cases, they are prescribed in chapters related to DS of ASEAN+ free trade agreements, such as Chapter 17 (Consultations and Dispute Settlement) of the 2009 Agreement establishing the ASEAN-Australia-New Zealand Free Trade Area (AANZFTA); Chapter 9 (Settlement of Disputes) of the 2008 Agreement on Comprehensive Economic Partnership among Member States of the ASEAN and Japan (AJCEP Agreement). Some other DSMs are prescribed in separate agreements, such as the 2004 Agreement on Dispute Settlement Mechanism of the Framework Agreement on Comprehensive Economic Co-operation between the ASEAN and the People's Republic of China (ASEAN-China Economic DSM Agreement), the 2009 Agreement on Dispute Settlement Mechanism under the Framework Agreement on Comprehensive Economic Cooperation between ASEAN and the Republic of India (ASEAN-India Economic DSM Agreement), and the 2005 Agreement on Dispute Settlement Mechanism under the Framework Agreement on Comprehensive Economic Cooperation among the Governments of the Member Countries of the ASEAN and the Republic of Korea (ASEAN-ROK Economic DSM Agreement). Many ASEAN+ economic agreements make reference to these types of agreements in their DS provisions.[58]

[58] These agreements often prescribe that disputes related to them shall be resolved through the mechanisms established in the DSM agreements. See, for example, Article 30 of the 2007 Agreement on Trade in Services of the Framework Agreement on Comprehensive Economic Co-operation between the ASEAN and the People's Republic of China; Article 19 of the 2014 Agreement on Investment under the Framework Agreement on Comprehensive Economic Cooperation between the ASEAN and the Republic of China; Article 30 of the 2014 Agreement on Trade in Services under the Framework Agreement on Comprehensive Economic Cooperation between ASEAN and the Republic of India.

DS procedures under ASEAN+ DSMs begin with consultations. Written requests for consultation shall be submitted by complaining parties to responding parties. The requests shall include specific measures at issue, the factual and legal basis of the complaint, and provisions of the covered agreement allegedly breached.[59] The responding parties shall reply to the requests and enter into consultations within 30 days of receipt of the request, in order to reach a mutually satisfactory solution.[60] This period of time shall be shortened to 10–20 days in case of urgency, including perishable goods. If the disputing parties so agree, they may use conciliation, mediation and, in some cases, good offices methods. The application of these methods may begin and terminate at any time by any disputing party. The provisions on conciliation, mediation and good offices are similar to those prescribed in the WTO DSU.[61]

If consultations fail, the complaining party may make a written request to the responding party and other parties of the ASEAN+ agreement to establish an arbitral panel. Upon receipt of the request, an arbitral panel shall be established. Normally, the panel is composed of 3 members — each party appoints one member and both parties agree on the 3rd one, who is the panel's Chair. If any party fails to appoint its arbitrator within the time period prescribed by the agreement, the arbitrator appointed by the other party shall be the sole arbitrator (except under the AANZFTA and the AJCEP agreement).[62] Unless disputing

[59] See Article 4.2 of the ASEAN-China Economic DSM Agreement; Article 3.2 of the ASEAN-ROK Economic DSM Agreement, Article 62.2 of the AJCEP Agreement; Article 4.2 of the ASEAN-India Economic DSM Agreement; Article 6 of Chapter 17 of the AANZFTA.

[60] Article 4.3 of the ASEAN-India Economic DSM Agreement, Article 6.4 of Chapter 17 of the AANZFTA, Article 4.3 of the ASEAN-China Economic DSM Agreement, Article 3.3 of the ASEAN-ROK Economic DSM Agreement, Article 62.3 of the AJCEP Agreement.

[61] Article 5 of the ASEAN-India Economic DSM Agreement, Article 7 of Chapter 17 of the AANZFTA, Article 63 of the AJCEP Agreement, Article 4 of the ASEAN-ROK Economic DSM Agreement provide for the good offices, mediation and conciliation proceedings. Article 5 of the ASEAN-China Economic DSM Agreement provide for mediation and conciliation proceedings only.

[62] Article 11.7 of Chapter 17 of the AANZFTA: "If all three arbitrators have not been appointed within 45 days of the date of the receipt of the notification (...),

parties agree otherwise, an arbitral panel has a term of reference similar to that of the WTO DS panel.[63]

The panel proceedings of ASEAN+ DSMs are quite similar to those prescribed in the WTO DSU.[64] In general, the arbitral report shall be released to disputing parties within 120 days from the date of establishment of the panel. This time period may be shorter in case of urgency, or can be extended if the panel has difficulty in issuing the report in time. In any case, this time period shall not exceed 180 days or 120 days in the case of urgency, unless the disputing parties agree otherwise.[65] The arbitral panel's report is binding on disputing parties.

Disputing parties are supposed to agree on the means as well as on the reasonable period of time needed to implement the panels' recommendations. If they fail to do so, the matter may be referred to the original tribunal panel.[66] If the responding party fails to comply with tribunal panel's recommendations within a reasonable period of time,

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any Party to the dispute may request the Director-General of the WTO to make the remaining appointments within a further period of 15 days." A similar provision can be found in Article 65 of the AJCEP agreement.

[63] Articles 6 and 7 of the ASEAN-India Economic DSM Agreement; Articles 6, 7, 8 of the ASEAN-China Economic DSM Agreement; Articles 8 and 11 of Chapter 17 of the AANZFTA; Articles 64, 65, 67, 68 of the AJCEP.

[64] For more analysis, see Gao (Henry), "Dispute Settlement Provisions in ASEAN's external Agreements with China, Japan and Korea", www.nysba.org/Sections/International/Seasonal_Meetings/Vietnam/Program_1/Attachment_3.html, pp. 24–28, consulted on the 7th of October, 2015. See also Article 13 of the AANZFTA, Articles 11–13 of the ASEAN-India Economic DSM agreement.

[65] Article 13 of the ASEAN-India Economic DSM Agreement; Article 69.2 and 69.6 of the AJCEP Agreement; Article 12 of the ASEAN-ROK Economic DSM Agreement; Article 9.8 of the ASEAN-China Economic DSM Agreement. Note that Article 13.3 of Chapter 17 of the AANZFTA Agreement requires that the arbitral tribunal process from the date of establishment until the date of the final report shall not exceed a period of 9 months, unless the disputing parties agree otherwise.

[66] Article 12 of the ASEAN-China Economic DSM Agreement; Article 15 of the ASEAN-India Economic DSM Agreement; Articles 15–16 of Chapter 17 the AANZFTA Agreement; Article 14 of the ASEAN-ROK Economic DSM Agreement; Article 71 of the AJCEP Agreement. Note that in the AANZFTA, Article 16 of the AANZFTA Agreement prescribes recourse to an arbitral tribunal re-convened for this purpose (Compliance Review Tribunal).

the complaining party may request the application of compensation and the suspension of concessions or benefits.[67]

3. COMPARISON BETWEEN ASEAN AND ASEAN+ ECONOMIC DSMS

In general, all ASEAN and ASEAN+ DSM provisions require parties to consult each other and provide for the establishment of DS panels, as well as possible recourse to mediation, conciliation and good offices. In all agreements, members show a strong willingness to settle economic disputes, with the prescription of mandatory arbitration or panel/AB examination. "Losing" parties, in all cases, are bound by DS body's rulings and recommendations. If those recommendations are not respected, complaining parties have opportunities to request compensation or apply suspension of concessions.

These similarities can be explained by the strong influence of the WTO DSM model on a great number of RTAs, including ASEAN+ agreements. This can also be explained by the influence of ASEAN members, who play an active role during the negotiations of ASEAN+ agreements.

However, the influence of the WTO DSM is stronger on ASEAN Economic DSM than on ASEAN+ mechanisms. *Firstly*, the Vientiane Protocol prescribes a permanent AB, while this organ is absent from ASEAN+ economic DSMs. According to some experts, this absence is due to the fact that the small number of disputes under the ASEAN+ agreements in comparison with WTO disputes can hardly justify the establishment of a standing appellate tribunal.[68] However, this cannot explain why the Vientiane Protocol provides for a standing AB. *Secondly*, while the WTO DSU and the Vientiane Protocol prescribe

[67] Article 13 of the ASEAN-China Economic DSM Agreement, Article 15 of the ASEAN-ROK Economic DSM Agreement, Article 71 of the AJCEP Agreement, Article 15 of the ASEAN-India Economic DSM Agreement, Article 17 of Chapter 17 of the AANZFTA Agreement.

[68] See Gao (Henry), "Dispute Settlement Provisions in ASEAN's External Agreements with China, Japan and Korea", www.nysba.org/Sections/International/Seasonal_Meetings/Vietnam/Program_1/Attachment_3.html, consulted on the 7th of October, 2015, p. 32.

panels of 3–5 members, under the ASEAN+ agreements in many cases panels can include only one member. This issue can be explained by the different selection procedures of panelists. Under the WTO and the Vientiane Protocol, panelists are proposed by the Secretariat and agreed by disputing parties. Under ASEAN+ agreements, each disputing party names one panelist and the third one is to be agreed by them. A respondent may attempt to stalk the process by refusing to name its own panelist. The possibility of having one-member panels can prevent this risk.

IV. COMPARISON BETWEEN ASEAN AND ASEAN+ ECONOMIC AND NON-ECONOMIC DSMS

From the above-mentioned presentation, we can note that the economic DSMs are more legalistic than the non-economic ones. This difference can be explained by several reasons. *First*, economic and non-economic agreements imply obligations of different natures. In economic agreements, the obligations are easier to quantify and their violations are easier to detect. Thus, a legalistic DS mechanism adapts well to these agreements. *Second*, economic agreements often bring about market opportunities and tangible economic gains. These benefits constitute sufficient motivation to overcome states' resistance to the adoption of a legalistic DSM. *Third*, economic issues are often considered to be less sensitive and more technical than political ones. Therefore, states are less reluctant to establish and use legalistic DSMs to resolve economic disputes. In fact, this trend in ASEAN and ASEAN+ DSMs is not specific. Around the world, economic DSMs are often more legalistic than non-economic ones.[69]

However, notwithstanding their different levels of juridicialization, all ASEAN and ASEAN+ economic as well as non-economic DSMs are underused by their members. Like many other countries in the world, members of ASEAN and ASEAN+ agreements prefer universal DSMs

[69] For more information, see Gao (Henry), "Dispute Settlement Provisions in ASEAN's External Agreements with China, Japan and Korea", www.nysba.org/Sections/International/Seasonal_Meetings/Vietnam/Program_1/Attachment_3.html, consulted on the 7th of October, 2015, p. 34.

such as those of the WTO,[70] the ICJ and the ITLOS. Many experts have tried to explain this issue by pointing out different reasons. According to us, one of the most convincing reasons is the "comparative advantages" of universal DSMs: they have been "tested" many times and have already developed a set of jurisprudence, thus are often considered as more credible and predictable than regional DSMs. In addition, as the membership of universal agreements is often bigger, the rulings obtained through universal DSMs set precedents in larger communities. Besides, the disputing parties' choice of neutral panelists is also larger and easier in a universal than in a regional context. At the same time, some consider that ASEAN and ASEAN+ DSMs (in particular those related to non-economic DSMs) may fail to address the needs of disputing parties, or gain their trust, due to their procedural or institutional shortcomings.[71]

[70] Even after the establishment of the regional DSMs that could examine their disputes, the Philippines brought a case against Thailand's measures (WT/DS371, *Thailand – Customs and fiscal measures on cigarettes from Philippines*); New Zealand brought a case against Australian measures (WT/DS367, *Australia – Measures affecting the importation of apples from New Zealand*); Indonesia brought a case against ROK measures (WT/DS312, *Korea – Anti-dumping duties on imports of certain paper from Indonesia*) before the WTO Dispute Settlement Body.

[71] Other popular reasons are the following: *First*, ASEAN members have a non-confrontational spirit. Even members of economic agreements are not only concerned with economic matters, but also with maintaining peace and stability in the region. They prefer negotiations and diplomatic means to formal, legalistic means to resolve their disputes. Therefore, when possible, members of ASEAN and ASEAN+ agreements may prefer to resolve their disputes via diplomatic modes. *Second*, ASEAN member governments may not always be fully conscious of their DSMs when considering possible reactions to measures imposed by other member states. *Third*, the lack of exclusive jurisdiction of ASEAN and ASEAN+ DSMs paves the way for its members to "forum shop" and therefore, discourages them to submit the case before the ASEAN and ASEAN+ DSMs. For more detailed analysis, see Koesnaidi (Joseph Wira), Shalmont (Jerry), Fransisca (Yunita), Sahari (Putri Anindita), *For a more effective and competitive ASEAN dispute settlement mechanism*, Paper for WTI/SECO Program, Jakarta, June 2014, pp. 20–23, 35; David (Chin Soon Siong), "Trade dispute settlement within ASEAN", in Yoong Yoong Lee, *ASEAN matters: Reflecting on the Association of Southeast Asian Nation*; Chin (Lionel Yee Woon), "Implementation of international agreements in the realization of the ASEAN Charter", www.aseanlawassociation.org/11GAdocs/workshop4-sg.pdf, consulted on the 7th of October, 2015, p. 6; Hammond (Felicity), "A Balancing Act" Using WTO Dispute Settlement to Resolve Regional Trade Agreement Disputes", in *Trade, Law*

The underuse of regional DSMs may cause damage to their credibility. However, frequent recourse to regional DSMs, combined with conflicts of jurisdictions of different DSMs, may also imply some risks, as analyzed below.

V. JURISDICTIONS OF ASEAN AND ASEAN+ DSMS

It is logical for an agreement to include provisions related to DSMs in order to facilitate its respect and interpretation. However, the co-existence of different DSMs, if not well managed, may entail some risks, such as: forum shopping, different interpretations of substantially similar or identical rules of international law by different forums, parallel disputes and double remedies, and non-respect of rulings of universal or regional dispute settlement bodies.

The key item which decides the interactions between DSMs is the clause related to their Coverage (or Scope and application, Choice of forum). While studying the coverage of ASEAN and ASEAN+ DSMs, we can note that:

— In the non-economic field, some rare agreements exclude explicitly the reference to any third party or international tribunal.[72] However, the two most developed DSMs (prescribed in the ASEAN Charter and in the TAC) are open to disputing parties' recourse to other DS forums.[73]

and Development, Winter 2012, Vol IV, No2, pp. 421–450, pp. 429–430; See Woon (Walter), "Dispute Settlement the ASEAN Way" (working paper), cil.nus.edu.sg/wp/wp-content/uploads/2010/01/Walter-Woon-Dispute-Settlement-the-ASEAN-Way-2012.pdf, consulted on the 7th of October, 2015.

[72] See, for example, Article 8 of the Memorandum of Understanding between the Governments of the Member Countries of the ASEAN and the Government of the People's Republic of China on Cooperation on the Field of Non-traditional Security Issues, Article 20 of the Memorandum of Understanding on Establishing the ASEAN-Korea Centre between the Member Countries of the ASEAN and the Republic of Korea, and Article 8 of the 2Memorandum of Understanding between the Governments of the Member States of the ASEAN and the Government of the People's Republic of China on Cooperation in the Field of Intellectual Property.

[73] Article 28 of the ASEAN Charter: "Unless otherwise provided for in this Charter, Member States have the right of recourse to the modes of peaceful settlement

— In the economic field, in most cases, ASEAN and ASEAN+ agreements recognize the disputing parties' right to have recourse to other DSMs. However, the Vientiane Protocol imposes a condition: the resort to other forums shall be made before a party has made a request to the SEOM to establish a panel.[74] The AANZFTA, the ASEAN-India Economic DSM agreement, the AJCEP agreement and the ASEAN-ROK Economic DSM agreement prescribe that the selection of one forum excludes other possible forums, and the selection is made when the Complaining Party requests the establishment of a DS panel.[75] However, in addition to this choice, the AANZFTA offers to disputing parties a possibility to agree in writing that this provision shall not apply to a particular dispute.[76] The ASEAN-China Economic DSM agreement has a similar provision, while specifying that disputing parties may agree to the use of more than one DS forum in respect of a particular dispute.[77]

The co-existence of the above-mentioned rules and those related to the jurisdiction of the WTO Dispute Settlement Body can be compared

contained in Article 33(1) of the Charter of the United Nations or any other international legal instruments to which the disputing Member States are parties."

According to Article 17 of the TAC: "Nothing in this Treaty shall preclude recourse to the modes of peaceful settlement contained in Article 33(1) of the Charter of the United Nations…" However, this Article insists: "…The High Contracting Parties which are parties to a dispute should be encouraged to take initiatives to solve it by friendly negotiations before resorting to the other procedures provided for in the Charter of the United Nations."

[74] Article I.3 of the ASEAN Protocol on EDSM.

[75] See Article 5 of the ASEAN-India Economic DSM agreement, Article 60 of the AJCEP agreement, and Article 2 of the ASEAN-ROK Economic agreement.

[76] See Articles 3 and 5 of Chapter 17 of the AANZFTA.

[77] Article 2 of the ASEAN-China Economic DSM agreement:

"5. Subject to paragraph 6, nothing in this Agreement shall prejudice any right of the Parties to have recourse to dispute settlement procedures available under any other treaty to which they are parties.

"6. Once dispute settlement proceedings have been initiated under this Agreement or under any other treaty to which the parties to a dispute are parties concerning a particular right or obligation of such parties arising under the Framework Agreement or that other treaty, the forum selected by the complaining party shall be used to the exclusion of any other for such dispute.

"7. Paragraphs 5 and 6 above shall not apply where the parties to a dispute expressly agree to the use of more than one dispute settlement forum in respect of that particular dispute."

with a tangled bowl of spaghetti. Take for example jurisdictions over economic disputes. The situation can be summarized as follows:

Dispute settlement mechanism	Does it prohibit itself from re-examining a dispute already examined by another forum?	Does it prohibit disputing parties to resort to other forums when it already examined the dispute?
1	2	3
ASEAN EDSM	No	Yes (after a request for the establishment of an ASEAN DS panel)
AJCEP	Yes (after a request for the establishment of another DS panel)	Yes (after a request for the establishment of an AJCEP DS panel)
ASEAN-India	Yes (after a request for the establishment of another DS panel)	Yes (after a request for the establishment of an ASEAN-India DS panel)
ASEAN-ROK	Yes (after a request for the establishment of another DS panel)	Yes (after a request for the establishment of an ASEAN-ROK DS panel)
AANZFTA	Yes, but disputing parties may agree otherwise	Yes, but disputing parties may agree otherwise
ASEAN-China	Yes, but disputing parties may agree to use more than one forum	Yes, but disputing parties may agree to use more than one forum
WTO	No	No

Consequently, when 2 ASEAN countries have an economic dispute, the following scenarios may happen:

— According to the Vientiane Protocol, *if they have chosen the ASEAN DSM*, recourse to another DSM is prohibited by the ASEAN Protocol and some ASEAN+ agreements. However, the DS bodies of the AANZFTA, the ASEAN-China Economic DSM agreements (if disputing parties so agree) and the WTO DSB are not bound by this obligation. They may always re-examine the issue. *If another DSM has been chosen*, recourse to the ASEAN DSM is prohibited by some ASEAN+ agreements. However, it is not prohibited by the Vientiane Protocol, the AANZFTA, the ASEAN-China Economic DSM agreements (if there is an agreement between parties), and the WTO DSU.

— *If the complaining party has chosen a DSM prescribed in the ASEAN-ROK, the AJCEP or the ASEAN-India Economic DSM agreement*, the case always bears the risk of re-examination by the WTO or the ASEAN economic DS body. On the contrary, *if another DS forum has been chosen by the complaining party*, the case will not be re-examined under the ASEAN-ROK, the AJCEP and the ASEAN-India Economic DSM agreements.

— Under the AANZFTA and the ASEAN-China Economic DSM agreement, *if the parties agree* in writing (according to the first agreement) or expressly agree (according to the second agreement) *to the use of more than one DS forum* in respect to the dispute, they can simultaneously resort to any above-mentioned DSM. However, this choice is valid only under the WTO DSU and the Vientiane Protocol (if the request for the establishment of the panel under the Vientiane Protocol is made *after* the request for the establishment of other panels). Other ASEAN+ DSMs do not recognize this possibility.

This parallel existence of different DSMs, as well as the lack of articulation between their jurisdictions, carries many risks. *First*, the "forum shopping" phenomenon may proliferate. States may choose one among many DSMs to solve their problem, depending on the potential advantages that may arise. The competition between the DSMs may damage their credibility and at least one DSM will be the "victim" of the "forum shopping" phenomenon. *Second*, if many forums are used, they may come up with different conclusions while examining the same question. Consequently, a state risks implementing different solutions for the same issue, and the implementation of one solution implies non-respect of another one. Therefore, the coherence of the international economic system may be threatened.[78]

One can always argue that the above-mentioned risks are very small. Thanks to the "ASEAN way" of cooperation, the possibility of ASEAN members and their partners using dispute settlement mechanisms seem to be limited, at least in the short term. However, from the legal perspective, ASEAN and ASEAN+ DSMs were adopted.

[78] See, for example the WTO's *Argentina – Definitive anti-dumping duties on poultry from Brazil* case (Complainant: Brazil), WT/DS241.

Their jurisdiction is therefore binding on ASEAN members and their partners. In addition, it is not sure that the new generation of leaders of ASEAN countries and their partners will follow the same "ASEAN way" in the future. Besides, it is logical to assume that the DSMs are established not only to demonstrate the good willing of contracting parties, but also to be used when necessary. Thus, the risks related to the co-existence of many DSMs are potential.

VI. TOWARDS A SUSTAINABLE GROWTH OF ASEAN AND ASEAN+ DISPUTE SETTLEMENT MECHANISMS

1. CONCENTRATION ON THE DEVELOPMENT OF DIPLOMATIC MEANS OF DISPUTE SETTLEMENT

At the moment, members of ASEAN and ASEAN+ agreements still prefer universal DSMs such as those of the ICJ, the ITLOS and the WTO. Should the ASEAN try to reverse this situation? From our point of view, in the short term, it would be more useful (and realistic) for the ASEAN and ASEAN+ DSMs to complement, rather than to compete with universal DSMs. More precisely, as consultations (and to some degree, mediation, conciliation and good offices) represent a strong point of ASEAN culture, members of ASEAN and ASEAN+ agreements should focus on the application and development of this mode of DS. These members should be encouraged to participate actively in consultations between them, before resorting to any other DS forum.[79]

2. IMPROVEMENT OF ASEAN AND ASEAN+ DISPUTE SETTLEMENT MECHANISMS

The role of regional DSMs, including ASEAN and ASEAN+ ones, should not be underestimated. On the one hand, the ASEAN and ASEAN+ DSMs should be improved in order to resolve potential questions

[79] Hammond (Felicity) also proposed that in general, RTA parties could continue to use their own consultation provisions as set out in the RTA. In case consultations fail, they may opt-in to the WTO dispute settlement system at the point of establishing a panel. See Hammond (Felicity), "A Balancing Act" Using WTO Dispute Settlement to Resolve Regional Trade Agreement Disputes", in *Trade, Law and Development*, Winter 2012, Vol IV, No. 2, pp. 421–450, p. 438.

which are not ruled by universal agreements, such as disputes related to "WTO+" issues. On the other hand, in comparison with universal DSMs, ASEAN and ASEAN+ DSMs have some strong points. An ASEAN or ASEAN+ DS body would understand best the legal issues of ASEAN or ASEAN+ agreements. The solution proposed by such a body may be most suitable for the disputing parties. In addition, ASEAN and ASEAN+ countries have similar cultures and have many opportunities to consult each other about their disputes and eliminate their disagreements. This will help to settle disputes "the ASEAN way".

Therefore, it is necessary to highlight the role of regional DSMs and strengthen the human resources of related DS bodies. Besides, as the WTO DSM has many comparative advantages, in the short term, a simple "importation" of the WTO DSM model to regional agreements would be insufficient to attract the interest of their members. In the long term, this "importation" may fail to address their needs. In fact, even the WTO DSM is not perfect. Many WTO Members, including ASEAN states (in particular Myanmar, Indonesia, Thailand and the Philippines) propose a variety of ways to improve this mechanism. Their propositions concern, among other things, the special and differential treatment in favor of developing countries during a DS procedure,[80] the composition of panels and Appellate Body,[81] and the consolidation of the mechanism of implementation of recommendations and decisions.[82] In particular, when it came to the implementation issue, propositions concerning the application of financial compensation and collective responsibility were supported by some ASEAN members.[83] Members of ASEAN and ASEAN+ agreements should find inspiration from their own propositions related to WTO DSM improvement in order to ameliorate their regional DSMs, rather than simply following the existing WTO DS model.

[80] See documents TN/CTD/W/2, TN/DS/W/17.

[81] TN/DS/W/61, TN/DS/W/31, TN/DS/W/17.

[82] TN/DS/W/17, TN/DS/W/3.

[83] TN/DS/W/17.

3. AVOIDING CONFLICTS OF JURISDICTIONS

Last but not least, efforts should be made to avoid conflicts of jurisdictions between universal and regional DSMs. Merging ASEAN agreements with other countries under the Regional Comprehensive Economic Partnership Agreement[84] may contribute to reducing conflicts of jurisdictions. Besides, in our opinion, provisions prescribing the possible use of more than one DS forum to resolve a dispute (as included in the AANZFTA and the ASEAN-China Economic DSM agreement) should be eliminated, or at least clarified in order to avoid potential conflicts of jurisdictions. ASEAN states and their external partners should be encouraged to find inspiration from the "choice of forum" clauses of the ASEAN-ROK, the AJCEP, the ASEAN-India Economic DSM agreements while establishing new DSMs and proposing amendments to the existing ones, including the WTO DSM.

REFERENCES

Chin, D. S. S. (2011). Trade dispute settlement within ASEAN, in Yoong Yoong Lee. *ASEAN matters*! *Reflecting on the Association of Southeast Asian Nations*. Singapore Institute of Policy Studies and World Scientific Publishing Co.

Chin, L. Y. W. (2012). *Implementation of international agreements in the realization of the ASEAN Charter*. Available at: www.aseanlawassociation.org/11GAdocs/workshop4-sg.pdf (accessed 7 October, 2015).

Gao, H. (2015). *Dispute Settlement Provisions in ASEAN's External Agreements with China, Japan and Korea*. Available at: www.nysba.org/Sections/International/Seasonal_Meetings/Vietnam/Program_1/Attachment_3.html (accessed 7 October, 2015).

[84] See the ASEAN Framework for Regional Comprehensive Economic Partnership. See also Gao (Henry), "Dispute Settlement Provisions in ASEAN's External Agreements with China, Japan and Korea", www.nysba.org/Sections/International/Seasonal_Meetings/Vietnam/Program_1/Attachment_3.html, pp. 36–37, consulted on the 7th of October, 2015.

Hammond, F. (2012). "A Balancing Act" Using WTO Dispute Settlement to Resolve Regional Trade Agreement Disputes. *Trade, Law and Development*. Winter. Vol. IV. No. 2.

Koesnaidi, J. W., Shalmont, J., Fransisca, Y., Sahari, P. A. (2014). *For a more effective and competitive ASEAN dispute settlement mechanism* (paper for WTI/SECO Program, Jakarta).

Trinh, D. H. (1997). *Le mécanisme de règlement des différends du GATT/OMC est-il un modèle pour l'Asie du Sud Est?* Doctoral thesis. Paris II.

Van den Bossche, P. and Vergano, P. R. (2008). *The Enhanced Dispute Settlement Mechanism of ASEAN: A Report on Possible Improvement* (report funded by Asian Development Bank).

Woon, W. (2010). *Dispute Settlement the ASEAN way* (working paper). Available at: cil.nus.edu.sg/wp/wp-content/uploads/2010/01/Walter-Woon-Dispute-Settlement-the-ASEAN-Way-2012.pdf (accessed 7 October, 2015).