The Prospect of the Trade and Investment Disputes Settlement Mechanisms in ASEAN

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ABSTRACT

The ASEAN has been taking active step in reaching a stronger regional organization. The establishment of ASEAN Economic Community in 2015 is a concrete step toward a closer economic cooperation, including in trade and investment sectors. The closer economic cooperation and the more intensive communication in these sectors would lead to the possibility that conflicts or disputes would appear between the members of ASEAN.

This paper tried to provide a brief picture with regard to the recent development of the trade and investment disputes mechanisms in ASEAN. This paper would also try to see the challenges and weakness of the present mechanisms and how the effective and appropriate mechanisms should be achieved for the future of ASEAN dispute settlement mechanisms in these sectors.

A. Introduction

The ASEAN leaders have determined the direction of the ASEAN as a stronger regional organization. At least two indications support this direction. Firstly, ASEAN is to have three pillars communities: the Political and Security, Economic and Socio-Cultural Communities.\(^1\) Secondly, ASEAN would be rule-based society.\(^2\)

In the economic cooperation, the December 2015 would be the birth of the ASEAN Economic Community.\(^3\) The sectors that would play important role in the creation of the regional economic community are trade and investment.

The creation of the community would also enhance the intensive interaction between the trade and investment actors. Two possibilities would likely to occur. First,
the prosperity in the region would be realized. Secondly, there appear some situations where the dispute or conflict on trade and investment comes along.

The existence of the dispute settlement mechanisms in the region therefore would be crucial for ASEAN. The dispute on trade and investment would be solved effectively when there is an effective, strong and reliable dispute settlement mechanism.

The question that this paper would like to try to solve is whether the existing regimes on the dispute settlement mechanisms are effective enough to solve the trade and investment disputes.

B. The Regime on the Dispute Settlement Mechanism on Trade and Investment

1. Musyawarah as a Peaceful Settlement of Disputes

It is interesting to note that the founding fathers of ASEAN have seen the value of Musyawarah as one of the core trait of ASEAN in the resolution of their conflicts. Musyawarah or consensus or settlement through agreement by all the parties in dispute is a clear reflection of the settlement by peace, or amicable solution of dispute.

This means of settlement of dispute is taken especially when the dispute between governments arises. The history suggested that this means of dispute settlement mechanisms was unique. It stressed the importance of the philosophy of peaceful means in the resolution of disputes.

The history has witnessed that since its birth in 1957, ASEAN up to now slowly but surely has been evolving and even growing into a mature regional organization. This growth, I think, was and has been supported by this principle. Many commentators called it “ASEAN Way.”

Musyawarah or consensus however is not capable of solving complicated legal disputes. The complex disputes on trade and investment may arise out of complex trade or investment contracts or agreements. There needs therefore a specific and effective mechanisms to solve the complicated legal problems. It is therefore important to see that the existence of dispute settlement mechanism does not solely help the parties in solving their dispute. The existence of effective dispute settlement mechanism is a kind of legal protection especially to the traders and investors when they are in dispute with the Members.
The resolution of disputes through peaceful mechanisms is found in the United Nations Charter, in particular Article 33. Article 33 para. 1 lays down the very basic principle in the resolution of the dispute. Article 33 para. 1 of the UN Charter provides:

1. The parties to any dispute, the continuance of which is likely to endanger the maintenance of international peace and security, shall, first of all, seek a solution by negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means of their own choice.

The principal means of the dispute settlement mechanisms under article 33 above is also mentioned, as shown below, in the instruments of ASEAN, in particular in the resolution of trade and investment disputes which arises between Members and private sectors.

2. Mechanism for Trade and Investment Disputes

The specific provisions regulating the resolution of disputes on investment is found in the ASEAN Comprehensive Investment Agreement (ACIA). It is interesting to see that the provisions on the dispute settlement of investment disputes dominate most of the provisions of the ACIA. ACIA has 14 articles specifically dealing with the dispute settlement (Articles 27 -41). These provisions are embodied in the Section B.

ACIA regulates two kinds of disputes. Firstly, the dispute between Members (Article 27). Secondly is the dispute between Members and investors.

The former, the dispute between Members, article 27 provides a direction as to how the dispute to be settled. Article 27 refers to the ASEAN Protocol for Enhanced Dispute Settlement Mechanism or EDSM) signed in Vientiane, Lao PDR on 29 November 2004.

The provisions under the EDSM contain the legally structured mechanism. EDSM applies to all disputes concerning the commitments of ASEAN Members in economic fields. EDSM also applies to commitments of the members before the EDSM came into force. The EDSM will apply when an agreement is silent about the specific regulations on dispute settlement.  

4 Article 1 paras. 1 and 2 EDSM state:
The existence of EDSM is more relevant in the ASEAN Legal system since the Charter of the ASEAN is adopted. Article 24 para. 3 of the Charter restates the EDSM in the resolution of economic disputes between the ASEAN Members. Article 24 para. 3 of the Charter provides:

“3. 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.”

The EDSM lays down the legal principles concerning the settlement of dispute. When a dispute arises, the parties shall first of all settle their dispute by consultation or negotiation (Article 3). If it fails, the parties may settle the dispute by good offices, mediation or conciliation (Article 4). If these means of settlement fail, the parties may submit the dispute to a panel or the appellate body (Article 5).

The report or the finding of a panel or appellate body is binding. If one of the parties is found in breach of a particular obligation but it does not remedy its trade or economic policy, the other party may negotiate the compensation or even may suspend its concessions upon this party.5

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5 Article 16 paras. 1 and 2 EDSM provide:

“1. Compensation and the suspension of concessions or other obligations are temporary measures available in the event that the findings and recommendations of panel and Appellate Body reports adopted by the SEOM are not implemented within the period of sixty (60) days or the longer time period as agreed upon by the parties to the dispute as referred to in Article 15. However, neither compensation nor the suspension of concessions or other obligations is preferred to full implementation of a recommendation to bring a measure into conformity with the covered agreements. Compensation is voluntary and, if granted, shall be consistent with the covered agreements.

2. If the Member State concerned fails to bring the measure found to be inconsistent with a covered agreement into compliance therewith or otherwise comply with the findings and recommendations of panel and Appellate Body reports adopted by the SEOM within the period of sixty (60) days or the longer time period as agreed upon by the parties to the dispute as referred to in Article 15, such Member State shall, if so requested, and no later than the expiry of the period of sixty (60) days or the longer time period referred to in Article 15, enter into negotiations with any party having invoked the dispute settlement procedures, with a view to developing mutually acceptable compensation. If no satisfactory compensation has been
Part B of the ESDM contains a rather complicated provisions in the resolution of disputes between a Member and investors. The complexities of the regulations for the settlement of these Member-investor disputes are merely a reflection of the seriousness of the matter.

Based on this part B, the parties, Member and Investors, may use three mechanisms in the resolution of disputes. They include:

(1) Conciliation (Article 30);
(2) Consultation (Article 31); and
(3) Arbitration (Article 33 para. 2).

Conciliation based on article 30 above is similar with the settlement through negotiation. Conciliation under this article does not refer to the term conciliation under article 33 of the UN Charter or, for example, conciliation under the ICSID Convention.

Article 30 para. 1 provides that conciliation may be started any time and ended upon the request of the investor.

Consultation based on article 31 is the first procedure that the parties may take when the dispute arises. Article 31 requires consultation, which must be made in writing by the investor to the State (Article 31 para. 1).

Consultation must be completed within 180 days since the receipt of consultation by Member state. If the consultation fails, the parties may submit the dispute to arbitration (Article 32).

The remaining of the articles contain technical provisions about arbitration, such as the notice of arbitration (Article 33), the requirement of arbitration claim (Article 34), the choice of arbitrators (article 35), transparency in the process of arbitration (Article 39), and the decision of the arbitration (Article 41).

Also relevant is the provisions concerning the choice of law. Article 40 is reflecting or adopting the interests of the member states or the host state. This article in agreed within twenty (20) days after the date of expiry of the period of sixty (60) days or the longer time period as agreed upon by the parties to the dispute as referred to in Article 15, any party having invoked the dispute settlement procedures may request authorization from the SEOM to suspend the application to the Member State concerned of concessions or other obligations under the covered agreements.”
principles is different with those recognized in other International Investment Agreements. Article 40 provides:

“1. Subject to paragraphs 2 and 3, when a claim is submitted under Article 33 (Submission of a Claim), the tribunal shall decide the issues in dispute in accordance with this Agreement, any other applicable agreements between the Member States, and the applicable rules of international law and where applicable, any relevant domestic law of the disputing Member State.”

C. Prospect for the ASEAN Dispute Settlement Mechanism

1. Indicators

The issue of this paper is whether the dispute settlement mechanisms under ASEAN as mentioned above would be effective to solve the trade and investment disputes. There might be many indicators to determine the effectiveness of the mechanism. But, there are at least, two indicators that might directly affect the effectiveness of the mechanism:

1) Whether the traders and investors would use confidently the mechanism; and
2) Whether parties respect the decisions, recommendations or awards issued under the mechanism and whether the national courts enforce them.

Ad. 1. Whether the traders and investors would use confidently the mechanism

There are no reported cases as to whether the traders and investors in ASEAN have resorted to this mechanism to settle their dispute with the host state. This suggests that more time is necessary to witness the effectiveness of this mechanism. It may take at least several years after the coming into force of the ASEAN Economic Community (AEC).

The mechanism under the ACIA primarily emphasises the settlement by consultation, conciliation and arbitration. Consultation and conciliation are important. But when they fail to settle the dispute, the resort to arbitration in the settlement of trade and investment would be significant.
Arbitration has been long recognized as the most effective solution of commercial disputes thanks to the New York Convention of 1958. The New York convention is the international agreement that obliges its members to recognize the arbitration awards in their national territory. There are more that 150 states ratified this Convention.

The problem with the provisions on arbitration under the ACIA is that there is no the so-called ASEAN commercial arbitration institution. The provisions of arbitration under the ACIA would presumably suggest that the arbitration would be an ad hoc arbitration chosen or set up by the parties. The freedom and the agreement of the parties to choose their means of settlement must be protected and honoured.

The question that needs considering is whether ASEAN needs its own arbitration institution?

The position of this paper is that it is not easy to set up an institutional arbitration, for example ASEAN arbitration body to settle the trade and investment disputes. Firstly, is the level of regional economic integration of ASEAN. With the ratification of the ASEAN Charter, ASEAN has moved further into a stronger economic community. This community has shifted from the so-called ASEAN Free Trade Area set up in 1992 to the “common-market”. This level of integration still give national sovereignty and national law to regulate the Members’ internal affairs. This kind of integration is not supportive for the establishment of a permanent commercial arbitration.

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6 See for example: Simon Greenberg, Christopher Kee and J. Romesh Weeramantry, *International Commercial Arbitration: An Asia-Pacific Perspective*, Cambridge: Cambridge U.P., 2011, p. 9. (The authors argued that the New York Convention was ‘*Perhaps the most important milestone in the entire history of international commercial arbitration*’).

7 Article III of the New York Convention of 1958 provides:

“Each Contracting State shall recognize arbitral awards as binding and enforce them in accordance with the rules of procedure of the territory where the award is relied upon, under the conditions laid down in the following articles. There shall not be imposed substantially more onerous conditions or higher fees or charges on the recognition or enforcement of arbitral awards to which this Convention applies than are imposed on the recognition or enforcement of domestic arbitral awards.”


9 The level of economic integration in the regional economic organization includes: free trade area, customs union, common market, economic union and political union. (See http://people-hofstra.edu/geotrans/eng/ch5en/economic integration.htm/).
This paper suggested that the existing arbitration institutions in the Members territories might be relevant and be encouraged to settle the trade and investment disputes under ASEAN regimes.\(^{10}\)

Secondly, to set up an ASEAN institutionalized commercial arbitration needs a huge work. The home or the place of arbitration would be crucial. The selection of arbitrators would not be easy given their qualifications and the knowledge of arbitration law, including the procedural law and the better understanding of the arbitration law of ASEAN Members.

Thirdly, the establishment of an institutional arbitration under the umbrella of ASEAN would raise the issue of independency or neutrality of such institution.

2) Whether parties respect the decisions, recommendations or awards issued under the mechanism and whether the national courts enforce them.

The indicator that the awards or decisions issued by the dispute settlement mechanisms are respected is the most important indicator. Whether the mechanism is perfect or not, is similarly essential. However, the issue of the enforcement of the awards, namely whether the national courts would enforce the awards is the most importance.

The main problem with the enforcement of the foreign awards is that many legal systems in the world including within ASEAN, foreign court awards or decisions are not binding and therefore could not be enforced. They are not binding upon the national courts to enforce them. Indonesia for example has this specific regulation.\(^{11}\)

The only awards that would be honoured is the arbitration awards. All ASEAN Members have ratified the New York Convention of 1958.\(^{12}\) ASEAN may rely on this Convention to ensure that the arbitration awards made within its member territories would be honoured in other Member territories.

2. The Challenge Ahead

\(^{10}\) The role of arbitration institutions in the Members territories would play important part in the settlement of trade or investment disputes between private sectors (traders and investors).

\(^{11}\) Article 436 of the Dutch-procedural Code (or Reglement op de Burgerlijke rechtsverordering or Rv).

\(^{12}\) Brunei Darussalam (1996); Cambodia (1960); Indonesia (1981); Lao PDR (1998); Malaysia (1985); Myanmar (2013); Philippines (1967); Singapore (1986); Thailand (1959); Viet Nam (1995). (See: Http://www.newyorkconvention.org/new-york-convention-countries/contracting-state.)
As indicated above, the dispute settlement mechanism still needs to be tested in the near future. Whether the traders and investors will resort to this dispute settlement mechanism of ASEAN would raise another issue to take into account.

The most important issue in the near future is the dire needs of 'socialization' of the ASEAN dispute settlement mechanism. The ASEAN dispute settlement mechanism should be made known to the business communities in the members’ territories. Members should consider to try to encourage the business communities to resort to this mechanism when a dispute arises.

Similarly, this mechanism will depend upon the national legal system in the region. This includes among others whether the national arbitration law of the Members have been adopting the modern standard of arbitration law (in this respect the UNCITRAL Model Arbitration Law of 1985/2006). The procedural arbitration law is also important.

Also relevance, the submission of trade and investment disputes to this mechanism will as well be determined by the political position on the part of the Members. Since the mechanism is a kind of legal protection provided to the traders and investors, the efficacy of the mechanism would be affected by the political will of the Member states. ***