Dispute Settlement Mechanisms for ASEAN Community: Experiences, Challenges and Way Forward

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I. Introduction

In Bali October 2003, ASEAN Leaders signed the Declaration of ASEAN CONCORD II (BALI CONCORD II) to establish ASEAN Community which comprises three main pillars: Political-Security, Economic and Socio-Cultural Community. Later, in the Philippines in January 2007, ASEAN countries announced the Cebu Declaration on the Acceleration of the Establishment of an ASEAN Community by 2015, from the previous goal of 2020.

Following such development, a historic agreement, the ASEAN Charter, which was signed, ratified and has entered into force in December 2008, served as a legal foundation for building ASEAN Community by providing legal status to ASEAN as an intergovernmental organization. It also codified ASEAN norms, rules and values and set clear ASEAN vision and target as well as accountability and compliance. On the same occasion, the ASEAN Economic Blueprint was adopted together with strategic schedules and timelines for ASEAN Member States (AMS) to implement their legal commitments to achieve ASEAN Economic Community by 2015.

The AEC Blueprint will transform ASEAN into a single market and production base with free flow of goods, services, capital and skilled labor and economic integration in all sectors which will make ASEAN a highly competitive economic region with equitable economic and social development and fully integrated into global economy. According to the strategic schedules, the AEC will be realized in 2015 by the timely implementation of the three ASEAN economic integration agreements, namely ASEAN Trade in Goods Agreement (ATIGA), ASEAN Framework Agreement on Service (AFAS) and ASEAN Comprehensive Investment Agreement (ACIA).

2 http://www.asean.org/
Under ATIGA, ASEAN Member States (AMS) agreed to liberalize trade in
goods by the reduction and elimination of tariffs and nontariff barriers for free flows of
goods within the ASEAN region.

According to AFAS, AMS agreed to accord national treatment to the services
provided by service providers of another AMS in all sectors from professional service,
financial, telecom, transport, construction, energy distribution, health, education,
tourism, entertainment and others through four modes of supply subject to limitations
and conditions under their respective laws and regulations specified in the schedules of
specific commitments, and to liberalize their trade in services by the reduction and
elimination of those laws and regulations.

According to ACIA, AMS agreed to liberalize their investment regime by
accord national treatment to investors and investments of other AMS in the
admission, acquisition, establishment and disposal of their investments in manufacturing,
agriculture, fishery mining, and service sector and allow free transfer of their
investments and interest subject to limitations and conditions under their laws specified
in the schedules of specific commitments, and to liberalize their investments by the
reduction and elimination of those laws and regulations. The AMS also agreed to
accord fair and equitable treatment and protect the investments of investors of other
AMS against expropriation, nationalization and other measures having equivalent effect
without prompt, adequate and effective compensation, and to guarantee transfer of
investment and its interest with balance of payment and financial stability safeguards and
exceptions.

These three economic integration agreements have also been used by AMS for
negotiation and conclusion of comprehensive economic partnership agreements with
ASEAN dialogue partners, namely Japan, Korea, China, Australia, New Zealand, and
India, all of which have now entered into force. To resolve the disputes arising from
interpretation and application, all these agreements provide dispute settlement
mechanisms between States as well as between State and investors through consultation
mediation and arbitration. In this regard, an adequate and efficient dispute settlement
mechanism (DSM) is essential for the effective implementation of all these Agreements,
which are the legal foundation of AEC.

The purpose of this Article is to explore the existing ASEAN DSMs provided for
in ASEAN Charter, agreements, protocols and related ASEAN instruments with the
view to promoting better understanding with observation and recommendations for the
effective use of DSMs for the implementation of the ASEAN Agreements.
II. Principles and Structures of Dispute Settlement Mechanisms in ASEAN Agreements

This part of the Article explores different types of DSM provided for in ASEAN instruments, from Treaty of Amity and Cooperation, ASEAN economic integration agreements to ASEAN Charter.

According to Section 8 (Settlement of Disputes) of the ASEAN Charter, which follows the UN Charter peaceful settlement of dispute mechanism, when disputes arise, AMS are first required to resolve them amicably through dialogue, consultation and negotiation. They may also at any time agree to utilize good offices, conciliation or mediation in the same manner within an agreed time limit. In this regard, the Chairman or the Secretary-General of ASEAN may be requested to act as a third person in these processes.

In case the disputes are still unresolved after the disputing parties has gone through the abovementioned processes, Section 8 lays down three main mechanisms to cope with such disputes, the non-binding and non-adjudicatory mechanisms comprise Advisory Mechanisms and Consultative Mechanisms, and the binding and adjudicatory mechanism based on specific instruments called Enforcement Mechanisms.

Advisory Mechanism is implemented by ASEAN Consultation to Solve Trade and Investment Issues (ACT), an informal non-legally binding advisory DSM for business sector of AMS, has encountered operational problems on cross-border issues related to the implementation of ASEAN trade and investment agreements which may be resolved through an online network of relevant government agencies of AMS and ASEAN Legal Unit.

Consultative mechanisms are implemented by ASEAN Compliance Monitoring Body (ACMB), which is a non-legally binding consultative DSM modeled after the WTO Textiles Monitoring Body and a simple and expeditious means to resolve the disputes by trade diplomacy. In this process, upon request, a third party or ACMB members may conduct the fact finding and review the case and make a recommendation with the view to resolving the disputes within an agreed timeframe.

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3 The report of the seminar “Legal issues involving ASEAN Economic Community and ASEAN Dispute Settlement Mechanisms” on 30 September 2013, Amari Watergate Hotel, Bangkok. (Thai language), and Paolo R. Vergano, “The ASEAN Dispute Settlement Mechanism and its Role in a Rule-Based Community: Overview and Critical Comparison”, ASEAN International Economic Law Network (AIELN) Inaugural Conference, 30 June 2009, p.2.

4 Article 22 (General Principles) and 23 (Good Offices, Conciliation and Mediation) of the ASEAN Charter.
In case the disputes cannot be resolved after going through all these mechanisms, Member States shall then resort to the binding enforcement mechanisms provided under ASEAN legal instruments, the details of which are as follows:

a. Treaty of Amity and Cooperation in Southeast Asia of 1976 (TAC)

Treaty of Amity and Cooperation in South East Asia is the first ASEAN legal instrument which provides DSM for resolving the disputes that arise from application of the treaty from political, security economic, social cultural and over all areas of relations among Member States. According to the Treaty, the process for peaceful settlement of disputes, modeled after the UN Charter, provides that AMS shall refrain from the threat or use of armed force against each other, and shall resort to settlement of disputes amicably through negotiations.

If the disputes cannot be resolved through negotiation, disputing parties may submit it to the High Council, which is a ministerial meeting of member states of TAC, to consider the issue and make recommendations on the appropriate means of settlement. The High Council may also offer to act as a mediator to resolve the disputes by good office, mediation, inquiry or conciliation.

The Parties to the Treaty, which has been in force since 1976, has now expanded to thirty-one countries, twenty-one of which are non-ASEAN countries, including China, India, Japan, Russia, South Korea, New Zealand, Australia, Canada, the United Kingdom, France, the United States of America and the European Union.

b. ASEAN Protocol on Enhanced Dispute Settlement Mechanism of 2004 (EDSM)

The EDSM or the so-called “Vientiane Protocol”, which has entered into force since 2004, established a set of non-adjudicatory mechanisms as well as formal adjudicatory mechanisms for disputes brought under ASEAN economic agreements in general, unless specific mechanism is stipulated.

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5 Article 24 (Dispute Settlement Mechanisms in Specific Instruments) of the ASEAN Charter.
7 Article 13 of the TAC.
8 Article 14 and 15 of the TAC.
11 Article 24.3 (Dispute Settlement Mechanisms in Specific Instruments) of the ASEAN Charter.
The Protocol is implemented by ASEAN Senior Economic Officials Meeting (SEOM) which establishes Panels, adopts reports and authorizes countermeasures. The EDSM also includes the Appellate Body of seven persons established by the ASEAN Economic Ministerial Meeting (AEM) similar to the dispute settlement mechanism under the World Trade Organization (WTO) which also comprises Panels and Appellate Body (Annex 2 of the WTO Agreement: Understanding on Rules and Procedures Governing the Settlement of Disputes) with some specific modifications.

Under the EDSM, DSM is initiated by a request for consultation by an AMS. Such consultation is a mandatory and prerequisite step to provide an opportunity for the parties to discuss the issue towards a mutually acceptable solution before entering litigation processes, and should be done within sixty days from the receipt of the request unless the parties agree otherwise. If the consultation fails to settle the dispute in such timeframe, the matter shall be raised to the SEOM by a request from the complaining party to establish a panel. The SEOM shall then establish a panel unless the SEOM decides otherwise by consensus (the so-called “reverse consensus”). The recourse under the EDSM, however, does not prevent AMS from resort to other voluntary DSM methods such as good offices, conciliation and mediation.

ASEAN panel of three or five panelists is obliged to submit a written report with findings and recommendations within sixty days from its establishment, with ten additional days permitted in exceptional cases. The report will be adopted by the SEOM within thirty days of its submission unless an AMS decides to appeal or the SEOM decides not to adopt the report by consensus. Under the EDSM, disputing parties do not need to pay the costs of dispute settlement as it will be supported by ASEAN DSM Fund under the Protocol, whose contributions are made by all AMS.

EDSM also provides compliance system such as temporary measures in the form of compensation and suspension of concessions in case parties do not comply with the findings and recommendations within sixty days from the date of its adoption, unless a longer time period has been agreed.

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12 Article 2 (Administration) of the EDSM.
13 Article 12 (Appellate Review) of the EDSM.
14 Article 3 (Consultations) of the EDSM.
15 Article 5.1 (Establishment of Panels) of the EDSM.
16 Paolo, supra note 3, p. 4, pp. 1.
17 Article 4.2 (Good Offices, Conciliation or Mediation) of the EDSM.
18 Appendix II of the EDSM: Working Procedure of the Panel, para 1.5.
19 Article 8.2 (Panel Procedures, Deliberations and Findings) of the EDSM.
20 Article 9.1 (Treatment of Panel Report) of the EDSM.
21 Article 17 (ASEAN DSM Fund) of the EDSM.
22 Article 16 (Compensation and the Suspension of Concessions) of the EDSM.
23 Article 15.1 (Surveillance of Implementation of Findings and Recommendations) of the EDSM.
The procedure under the EDSM as described can be summarised as appeared in the flowchart below:

**Table 1: Dispute Settlement Mechanism under the 2004 Protocol on Enhanced Dispute Settlement Mechanism (similar to the WTO DSU)**

<table>
<thead>
<tr>
<th>Stage</th>
<th>Description</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td>Request for consultation by an AMS</td>
</tr>
<tr>
<td>2</td>
<td>Consultation (mandatory) within 60 days</td>
</tr>
<tr>
<td>3</td>
<td><strong>Adjudicatory mechanism</strong>&lt;br&gt;AMS request establishment of ASEAN panel&lt;br&gt;<strong>Non-adjudicatory mechanisms</strong>&lt;br&gt;- good offices&lt;br&gt;- consultation&lt;br&gt;- mediation&lt;br&gt;(no time frame) can begin/terminate at any time</td>
</tr>
<tr>
<td>4</td>
<td>ASEAN panel established by SEOM (unless SEOM agreed otherwise by consensus)&lt;br&gt;3 – 5 panelists&lt;br&gt;- Standard terms of reference&lt;br&gt;<strong>Mutually agreed solution</strong></td>
</tr>
<tr>
<td>5</td>
<td>Panel procedures</td>
</tr>
<tr>
<td>6</td>
<td>Panel submit <strong>written report</strong> to SEOM within 60 days from its establishment (10 additional days permitted)</td>
</tr>
<tr>
<td>7</td>
<td>SEOM adopts report within 30 days&lt;br&gt;SEOM decides by consensus to appeal</td>
</tr>
<tr>
<td>8</td>
<td>ASEAN Appellate body established (3 persons)</td>
</tr>
<tr>
<td>9</td>
<td><strong>Appellate review</strong>&lt;br&gt;must be issued within 60-90 days (uphold, modify, or reverse panel decisions)</td>
</tr>
</tbody>
</table>
c. Protocol to the ASEAN Charter on Dispute Settlement Mechanisms of 2010* (ACDSM)

The Protocol and its 6 annexes** were drafted under Article 25 of the ASEAN Charter (Establishment of Dispute Settlement Mechanisms) which states that appropriate dispute settlement mechanisms, including arbitration, shall be established to settle disputes concerning the interpretation or application of the Charter and other ASEAN instruments, unless otherwise specified***.

Under the Protocol, apart from non-adjudicatory processes such as consultation, good offices, mediation and conciliation which parties may agree to settle their disputes; the complaining party can also resort to arbitration. The disputing parties are obliged to fully comply with the arbitral awards and settlement agreements resulting from these non-adjudicatory processes. For the arbitration procedure, a third party who has substantial interest in the dispute is also allowed to participate in the process and the costs of such procedure shall be borne by the parties according to the Rules of Arbitration. (Annex 4 of the Protocol)

If an agreement to arbitrate cannot be reached within 15-30 days from the date of receipt of the notice from the complaining party, the dispute may be referred to the ASEAN Coordinating Council (ACC) who will consider and make suggestions as to dispute resolutions, and if no resolution can be reached, the ACC may refer the dispute to the ASEAN Summit as the final decision making body. The details and procedures of these DSM are stipulated in the annexes to the Protocol.

It is important to note that the Protocol will not be in force until all the ten AMS have ratified the Protocol and at present, only Indonesia and Vietnam have done so. At present, ASEAN is under the process of revising the Protocol in many aspects such as defining the term “Future Economic Agreement”, time frames in each procedure and the possibility of applying other types of dispute resolutions.

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** The 6 Annexes are, Rules of Good Offices, Rules of Mediation, Rules of Conciliation, Rules of Arbitration, Rules for Reference of Unresolved Disputes to the ASEAN Summit and Rules for Reference of Non-Compliance to the ASEAN Summit.
*** See also, Article 2 (Scope and Application) of the ACDSM.
**** Article 5-8 of the ACDSM.
***** Article 16 (Compensation and the Suspension of Concessions) of the ACDSM.
****** Article 13 (Third Party) of the ACDSM.
******* Article 9 (Reference to the ASEAN Coordinating Council) of the ACDSM.
******** Article 19.4 (Final Provisions) of the ACDSM.
********* http://agreement.asean.org/agreement/detail/42.html
********** Supra note 3, the report of the seminar on 30 September 2013.
Not only can the unresolved disputes under the ACDSM be submitted to the ASEAN Summit, but issues of non-compliance with the findings, recommendations or decisions resulting from ASEAN DSM can also be referred to the ASEAN Summit\textsuperscript{34} and can be withdrawn at any time in writing\textsuperscript{35}.

d. **Investor-State Dispute Settlement (ISDS) under the ASEAN Comprehensive Investment Agreement\textsuperscript{36} (ACIA)**

Another unique ASEAN DSM is the investor-state dispute settlement mechanism under Article 28 of the ACIA, which allows investors of an AMS, either natural or juridical persons, to bring a claim against the government of another AMS for the loss or damage to their investment resulting from the breach of obligation under the Agreement\textsuperscript{37}.

According to ACIA, AMS agreed to promote and protect investment of investor of other AMS in manufacturing, agriculture, fishery, mining and services sector against expropriation and nationalization or other measures having equivalent effect without prompt, adequate and effective compensation. The Agreement also guarantees free transfer of investment and its interest with balance of payment and financial instability safeguards. AMS also agreed under ACIA to liberalize their investment regime by according national treatment and most favored nation treatment in the admission, establishment, acquisition and disposal of investments of investors of other AMS.

In addition to State to State level, ACIA also provides a dispute settlement mechanism between states and investors. ACIA DSM process begins with consultation and negotiation\textsuperscript{38}, and if the dispute has not been resolved within 180 days of the receipt of a request for consultations, the disputing investor can submit an arbitration claim to the courts or administrative tribunals which have jurisdiction over such claim or other international arbitration rules and institutions\textsuperscript{39}. ACIA provides very detailed process of arbitration proceedings which gives a clear roadmap to disputing parties. It is important to note that disputing parties still can, at any time during the process, agree to conciliation\textsuperscript{40}.

\textsuperscript{34}Article 27 (Compliance) of the ASEAN Charter.
\textsuperscript{35}Rule 4 of the Rules for Reference of Non-Compliance to the ASEAN Summit of 2012. (Annex 6 of the ACDSM), see also, Report of the Seminar on “DSM of ASEAN and Rules on Submitting Non-Compliances Disputes to the ASEAN Summit”, 24 January 2012, Miracle Grand Convention Hotel, hosted by ASEAN Department, Ministry of Foreign Affairs, Thailand.
\textsuperscript{36}http://www.asean.org/images/2012/Economic/AIA/Agreement/ASEAN%20Comprehensive%20Investment%20Agreement%20%28ACIA%29%202012.pdf
\textsuperscript{37}Article 29.4 (Scope of Coverage) of the ACIA.
\textsuperscript{38}Article 31 (Consultations) of the ACIA.
\textsuperscript{39}Article 32 (Claim by an Investor of a Member State) and 33 (Submission of a Claim) of the ACIA.
\textsuperscript{40}Article 30 (Conciliation) of the ACIA.
Furthermore, the ISDS under ACIA also applies to foreign investors constituted or organized under the applicable laws of AMS, i.e. foreign-owned ASEAN-based companies^{41}. Such mechanism is anticipated to be easy to use and popular among non-ASEAN countries in the near future, although there are some criticism that the procedures under ACIA are detailed and can be complicated in practice.

III. Implementation Challenges of ASEAN DSM

Although ASEAN DSM has been well established by many ASEAN Treaty Agreements from TAC to Enhanced DSM with clear and detailed procedures and timelines as described above, for some reasons, AMS have never resorted to such mechanisms as yet. Instead, the AMS prefer to settle their disputes by rule-based DSM which is more reliable, predictable and practical such as those of WTO^{42} and International Court of Justice (ICJ). Until now, all disputes between AMS have been resolved through the consultations and subject matters are merely misunderstandings that did not require adjudication processes^{43}.

In this regard, some issues that may undermine the use and legal certainty of such mechanism have been raised, which can be grouped into five categories as follows:

a. Possibility for Forum Shopping^{44}

ASEAN DSM does not have exclusive jurisdiction as EDSM has a choice of forum clause which gives opportunities for AMS to resort to any other fora for settlement of disputes at any stage of the non-adjudicatory mechanisms^{45}. Such action is, however, not allowed under WTO DSU^{46}. This unique characteristic of ASEAN DSM has a benefit in terms of flexibility but is viewed that it undermines the jurisdiction of ASEAN DSM and places countries with limited resources at the disadvantage.

\[\text{\footnotesize^{41} Article 4 (Definitions) (e) of the ACIA.}\]


\[\text{\footnotesize^{43} Ibid., p. 25.}\]

\[\text{\footnotesize^{44} Paolo, supra note 3, p. 7, III.}\]

\[\text{\footnotesize^{45} Article 1.3 (Coverage and Application) of the EDSM, see also, Koesnaidi, Shalmont, Fransisca, Sahari, supra note 42, p. 34.}\]

\[\text{\footnotesize^{46} Article 23 (Strengthening of the Multilateral System) of the DSU.}\]
b. ASEAN Ways

The structure of ASEAN DSM follows the peace seeking norms and traditions of ASEAN which use political, diplomatic and relation-based means to prevent and settle their differences rather than a rule-based and legal means. For example, it is based on the principle of non-interference in the internal affairs of AMS. Hence, all decision-making process of ASEAN is finally based on consensus, which is more likely to be a negotiable and political/diplomatic nature rather than a legal nature.

Furthermore, AMS cultural norms have a unique characteristic of non-confrontation and compromise to avoid formal disputes and try to resolve conflicts through consultation and mediation wherever possible. Therefore, AMS prefer to resolve disputes in a non-adjudicatory way rather than utilizing adjudicatory mechanisms. This characteristic can also be implied from the language used in most of the ASEAN economic agreements which are in cooperative manner rather than imposing compulsory rights and obligations. For example, the use of the neutral phrase such as “may” instead of “shall,” and the addition of “where applicable”, “as appropriate” or “as may be applicable” can be seen in many economic agreements.

Moreover, a number of agreements with legally binding language often impose complicated layers of obligations which is difficult to implement in practice. For example, the ACIA which was originally intended to liberalize all investment sectors but ended up with a long list of reservations that can be liberally modified by each member country at any time, upon the condition that such modification is not a back-track for investment liberalization.

c. Impractical Nature of ASEAN DSM

Some impractical natures of ASEAN DSM can be summarized as follows:

- Short timeframes in each process of ASEAN DSM are difficult to be met in practice. For example, sixty-day timeframe for the panel to submit reports is unrealistic, especially when compared with those of WTO practice which normally takes up to fourteen months from panel establishment to the circulation of the report.

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47 Paolo, supra note 3, p. 10-11, the report of the seminar on 30 September 2013, and Koesnaidi, Shalmon, Fransisca, Sahari, supra note 42, p. 20.
49 Ibid.
50 Koesnaidi, Shalmon, Fransisca, Sahari, supra note 42, p. 33.
Since the panel will have to go through many procedural steps from its establishment, exchange of written submissions, meetings with the parties, and drafting an interim report before submitting it to the SEOM. Also, there may be the case where the panel wishes to seek expert advice\(^{51}\) which may take more time.

- Under Article 26 of the ASEAN Charter, a dispute which remains unresolved after the application of ASEAN DSM shall be referred to the ASEAN Summit, a political body held merely twice a year, where the final decision will be made by consensus hence give an opportunity for a review of the dispute. These conditions are also said to slow down the process. Moreover, it would give the ASEAN Summit a difficult task to consider complicated, detailed and sensitive matters within a short time frame of their meetings.

- Under Article 27 of the ASEAN Charter, any AMS affected by non-compliance of the findings, recommendations or decisions resulting from ASEAN DSM is also allowed to refer the dispute to the ASEAN Summit for a political solution, which will in the same way give the same uncertainty as Article 26 thereof\(^{52}\).

- Appeals under EDSM are limited since Appellate Body can only consider matters on interpretation of legal issues but not factual matters.

These structures make ASEAN DSM a political mechanism for dispute resolution because consensus is unlikely to be reached in practice. Although such flexibility may be appropriate for AMS who possess different government systems, development levels, religions and cultures, finally a rule-based mechanism is needed to enhance the reliability, efficiency and transparency to the DSM such as those of the WTO and ICJ.

\section*{d. Coverage of ASEAN DSM Fund\(^{53}\)}

Article 17 of the EDSM provides that costs covered by ASEAN DSM Fund are those of panels, Appellate Body and related administrative costs of the ASEAN Secretariat, but not including other expenses incurred by each party such as legal representation and shall be borne by each party. Therefore, it is unlikely that a country with limited resources will be able resort to the mechanism under the Protocol. In contrast, the costs of WTO DSM are overall covered by the budget of WTO Secretariat which is contributed by all WTO members according to the formula based on their share of international trade in goods and services, which guarantees fairness of such proportion.

\(^{51}\) Article 8.4 (Panel Procedures, Deliberations and Findings) of the EDSM.

\(^{52}\) Paolo, \textit{supra} note 3, p. 8, III.B and the report of the seminar on 30 September 2013.

\(^{53}\) \textit{Ibid.}
e. Lack of Legal Certainty and Legal Expert 54

While many AMS such as Singapore, Malaysia, Thailand, and the Philippines brought their trade disputes to WTO for settlement, the ASEAN DSM has never been used by AMS to resolve their trade disputes. Unlike the WTO DSM which was established in 1995, ASEAN DSM was created recently during 2004 and 2010.

f. Different Approaches of ASEAN Countries towards the Recognition and Enforcement of Foreign Arbitral Awards55

The arbitral awards from dispute settlement mechanism under ASEAN economic agreements are, in practice, difficult to be enforced in AMS due to the differences of their legal systems and approaches in the recognition and the enforcement of foreign arbitral awards.

Although all the ten AMS are parties to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958, arbitration and related implementing legislations in some AMS are still identified as not fully compatible with the Convention, so are their implementation.

While Investor-State DSM (ISDSM) under ACIA and Bilateral Investment Agreements (BITs) has never been used to settle investment disputes among AMS, Thailand, Malaysia, Indonesia and some other AMS have resorted to ISDSM under their BITs with European countries, the experiences of which can be shared with AMS for effective the implementation of ASEAN economic agreements as well as comprehensive economic partnership agreements between ASEAN and its dialogue partners.

According to United Nations Conference on Trade and Development (UNCTAD) analytical work 56, ISDSM was designed to depoliticize investment disputes and create a forum that offers investors a fair hearing before an independent, neutral and qualified tribunal. It was seen as a mechanism for rendering final and enforceable decision through swift cheap and flexible process over which disputing parties would have considerable control. However, the actual functioning of ISDSM has led to concerns about systematic deficiencies relating to legitimacy and transparency, contradiction between arbitral awards, difficulties in correcting erroneous arbitral

54 Report of the seminar on 30 September 2013, and Koesnaidi, Shalmont, Fransisca, Sahar, supra note 42, p. 27.
55 The report of the Public Hearing Meeting on Research Project “Procedure towards International Arbitration in the System of ASEAN countries”, Public hearing, 15 December 2014, Centara Grand at Central Ladprao, Bangkok. (Thai language)
decision, in dependence and impartiality of arbitrator, as well as the cost and time of arbitral procedures. The main concerns and critiques about current ISDM as well as recommendations for the reform of ISDSM that should be given a serious consideration according to UNCTAD are as follows:

i. Legitimacy and Transparency

In many cases, foreign investors have used ISDSM claims to challenge measures adopted by state in the public interest to promote economic, social development, environment protection and public health. Questions have been raised whether the three individuals appointed on an ad hoc basis can be seen by the public as having sufficient legitimacy to assess the validity of State acts and give substantial amount of compensation to the claimer which exerts significance pressure on public finance while ISDSM can be kept fully confidential.

ii. Inconsistent and Erroneous Arbitral Decisions

According to UNCTAD, several arbitral awards which are in public domain have recently exposed a significant divergence in arbitral practice between tribunals. The lack of clarity and consistency of both the application of laws and the interpretation of related terms, such as the definition of “investment” and “investor”, could lead to not only the problem of legitimacy, but also the uncertainty about the meaning of key treaty obligations.

iii. Divergence of Interpretation of Treaty Standard Provisions by Arbitral Tribunals

ISDSM which allows private investors to bring a claim for compensation against their host Government for violation of treaty standard clauses which are still ambiguous to be interpreted, such as Fair and Equitable Treatment (FET) and Most Favored Nation treatment (MFN). According to UNCTAD, some decisions rendered in 2012 showed that while some tribunals allowed investors to use the MFN clause in an investment treaty to import a more favorable dispute resolution provision contained in another investment treaty to which the host state is a party. Some tribunals, on the other hand, denied the application of the MFN clause to “all matters” subject to BIT, by

58 Electrabel v. Hungary and Caratube International Oil Company (CIOC) v. Kazakhstan
59 Pac Rim Cayman v. El Salvador
60 UNCTAD, supra note 1.
61 UNCTAD, supra note 2.
62 UNCTAD, supra note 1.
63 Teinver v. Argentina
stating that the MFN clause shall be “territorially limited”. Furthermore, several cases have also confirmed the variety of approaches that the tribunals have taken in determining the FET standard.

iv. Calculation of Compensation

The current investment arbitration regime has been criticized as it allows the arbitral tribunal to render award to the investors who bring claims against States requesting a large amount of monetary compensation. In 2012, at least nine decisions have awarded investors million dollar compensation plus simple or compound interest. Moreover, there are still also discussions regarding future profits, the calculation of the compensation, and the valuation method.

v. Annulment and Judicial Review

Generally, international law does not allow a domestic court or a committee to directly annul or reverse a decision made by an international tribunal. However, it is different for ISDSM. Several awards have been annulled and reversed, both by an ad hoc committee and a domestic court, based on various reasons, as reflected in Victor Pey Casado v. Chile and BG v. Argentina cases.

Moreover, there are still arguments regarding the competency of arbitral tribunals to consider the counterclaim, whether the provisional measures could be ordered when the situation is urgent, and whether the tribunals can accept amicus curiae briefs.

The Government of Thailand has experienced the problems and shared the concerns about deficiency of ISDSM from Thailand vs Walter Bau Arbitration case. Walter Bau, liquidator of a German Construction firm, claimed compensation from the Royal Thai Government for violation of Thai Germany Bilateral Investment Protection Treaty of 2002 by breaching a concession contract to build a toll road from Bangkok to Don Muang Airport, by reducing the fee and the construction of the pararel road to the Airport which caused damage. In this case, the tribunal rendered award in favor of the claimant against Thailand argument that the Tribunal had no jurisdiction to consider the case because the shares owned by the German construction firm was not the approved investment to be protected by the Treaty. Although the tribunal rejected Walter Bau claim that the measures taken by Thai Government was creeping expropriation or measures having equivalent effect to expropriation but found that Thailand had breach

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64 ICS Inspection v. Argentina and Daimler v. Argentina
65 UNCTAD, supra note 1.
the fair and equitable treatment provision by violating the claimant’s legitimate expectation, and awarded the claimant 29 million Euro compensation.\textsuperscript{66}

In consideration of overcoming the challenges of the ISDSM, several approaches have been proposed and considered, including encouraging alternative dispute resolution (ADR) and restricting investor access to ISDS.\textsuperscript{67} ADR, such as conciliation and mediation, could be another channel for investors for dispute resolution, since they both allow neutral third party’s participation in finding a mutually solution and preserve relationship between the parties. Furthermore, apart from having detailed arbitration clauses, requiring investors to exhaust local remedies or resorting to ADR before bringing the claims to the ISDS, will also help save resources of both parties and strengthen judicial system of the ISDS.

In addition, transparency is also a core component in strengthening the ISDSM, since it will help promote both predictability and accountability of the system. This could also include having a specific limited scope for claims which investors could resort to ISDS and having accurate definitions for the fundamental text, such as investment, investor,\textsuperscript{68} the MFN and the FET clauses. Moreover, transparency in the ISDS, including the publication of information and third party submission, is similar to the concept of “checks and balances” in the general judiciary system, as it would help increase both legitimacy and confidentiality.

Despite problems and concerns from experiences with ISDSM, Thailand still stands firm to strengthen our arbitration and alternative dispute settlement systems. In this regard, Thailand Arbitration Center and all related Government agencies are prepared to work closely with Arbitration center in all ASEAN countries

IV. Role and Contribution of ALA in Strengthening and Promoting ASEAN DSM

a. Link ASEAN Law Association (ALA) website with ASEAN Secretariat website to share information about ASEAN Community, ASEAN treaties, agreements and their implementing laws and regulations as well as to coordinate and share with the Legal Unit of the Secretariat on the outcomes of workshops and seminars organized by ALA on all legal issues.

b. As an affiliated NGO to ASEAN under the Charter, ALA should work closely with ASEAN Secretary General and the Secretariat in organizing joint seminars or workshops to promote better understanding and build up capacity for its members

\textsuperscript{66} Walter Bau AG (In Liquidation) v The Kingdom of Thailand, UNCITRAL., Award, Jul 1, 2009.
\textsuperscript{67} UNCTAD, \textit{supra} note 2.
\textsuperscript{68} UNCTAD, \textit{supra} note 2.
to use of ISDSM in the implementation of ASEAN economic agreements with technical support from UNCTAD, WTO and ITC.

c. **Promote networking and cooperation among ALA members** from the judiciaries, parliaments, governments, law firms and law faculties in sharing views and experiences on the enactment of related laws and regulations, and on the problems from the use of ISDSM in ASEAN economic agreements.

d. **Strengthen cooperation and networking among Arbitration Centers in AMS**, some of which are internationally recognized such as Kuala Lumpur Regional Arbitration Center and Singapore International Arbitration Center, and jointly promote the use of arbitration centers in AMS for the settlement of investment disputes between an AMS government and a foreign investor under a bilateral investment promotion and protection agreement, ACIA and comprehensive economic partnership agreement or free trade agreement between ASEAN and its dialogue partners.

V. **Ways Forward**

In order to promote and encourage AMS and their investors to resort to ASEAN DSM including ISDSM, certain suggestions have been made. Those include improving rules and procedures of the DSM to be more balanced and practical, transparent and cost effective, more rule-based than relation-based system, and enhancing public awareness and knowledge about ASEAN Charter, ASEAN economic agreements, all related ASEAN legal instruments and their DSM for governments, business sectors, and the civil society of AMS. It is now most timely for promoting cooperation and networking among arbitration centers of AMS, the Legal Unit of ASEAN Secretariat and all those legal professions in AMS. In this regard, ALA can play an important role in promoting the use of ASEAN economic integration for the benefit of their respective governments, business sectors, their civil society, their members, and the ASEAN Community as a whole.

Other notable suggestions include making ASEAN DSM a rule-based regime rather than relation-based regime (such as the elimination of consensus in decision making process), revision of cost burden in resolving dispute to be similar to the system of WTO where all costs are shared equally by all AMS rather than by disputing parties, and the training of more experts in ASEAN laws and each field of disputes to be used as experts, legal advisors, and arbitrators.

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69 The report of the seminar 30 September 2013, and Koesnaidi, Shalmont, Fransisca, Sahari, supra note 42, p. 38.
Meanwhile, in the near future, it is foreseen that other alternative dispute resolutions (ADRs) such as negotiation, conciliation and mediation, the mechanisms available under the free trade area agreements, BITs between AMS and private sectors’ contracts will also play an important role in ASEAN DSM. The benefits of ADRs are mainly its tailor-made nature and flexibility, allowing both parties to seek mutual solution without legally binding effect, unlike the arbitral awards. Beyond that, it also helps the parties to maintain their relationship which fits well with for not a pro-lawsuit society like ASEAN\(^{70}\). ACDSM stipulated that the parties to the dispute shall comply with the arbitral awards as well as settlement agreements resulting from ADRs; therefore, ADRs can also have a legally-binding effect if such terms have been agreed by the AMS\(^{71}\) under the ASEAN framework.

\(^{70}\) Ibid.
\(^{71}\) Article 16 (Compliance with Arbitral Award and Settlement Agreement) of the ACDSM.