

# **ANALYSIS OF ASEAN CHARTER RELATED TO ASEAN DISPUTE SETTLEMENT MECHNISM\***

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## **Abstract**

The Association of Southeast Asia (ASEAN) are recognized as the well-known regional organization in South East Asia regional. As normal as other inter organizations, ASEAN also has its own Dispute Settlement Mechanism (DSM) to handle with the disputes among ASEAN Member States. Since the establishment of ASEAN in the cold war era till the heading to ASEAN Community by the end of 2015, there are many treaties related to DSM such as ASEAN Charter (2007), Treaty of Amity and Cooperation in Southeast Asia (1976, 1987, 1998, 2010), ASEAN Protocol on Enhanced Dispute Settlement Mechanism (1996, 2004), Protocol to the ASEAN Charter on Dispute Settlement Mechanisms (2010), and etc. This article will show the reader an overview of ASEAN DSM and how to apply these DSMs through the ASEAN Charter.

**Keywords:** ASEAN DSM, ASEAN Charter, ASEAN

## **Introduction**

Since the establishment of ASEAN in the cold war era till the heading to ASEAN Community by the end of 2015, there are many treaties related to DSM such as ASEAN Charter (2007), Treaty of Amity and Cooperation in Southeast Asia (1976, 1987, 1998, 2010), ASEAN Protocol on Enhanced Dispute Settlement Mechanism (1996, 2004), Protocol to the ASEAN Charter on Dispute Settlement Mechanisms (2010), and etc. In order to understand an overview of ASEAN DSM, it will begin by looking at the ASEAN Charter because the Charter serves as the constitutional of ASEAN and also mandates dispute settlement mechanisms for all fields of ASEAN cooperation. It also created a link between all existing ASEAN DSM instruments and future ASEAN DSM instruments.

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## ASEAN Charter related to DSM

### Background

The ASEAN Charter essentially serves as a constitution as same as a real evolution for the ASEAN in achieving the ASEAN Community by providing legal and institutional framework for ASEAN. It also codifies ASEAN norms, rules and values, sets clear targets for ASEAN, and presents accountability and compliance. An idea of drafting the ASEAN Charter was popped up at 11<sup>th</sup> ASEAN Summit in 2005 (Kuala Lumpur Declaration on the Establishment of the ASEAN Charter, 2015) because the ASEAN realized that the present institutional base of ASEAN, which was mainly designed in the Cold war period concerning on anti-communist and external threat, was out of date and no more suitable to the ASEAN community building in future. In order to reform the ASEAN, the foreign ministers then agreed to a draft of a “*Declaration on the Establishment of an ASEAN Charter*” which looked forward to a rule-based organization framework of democracy, transparency, and good governance as well as protected the ASEAN way of consensus decision-making, respect for sovereignty, and non-interference. (Weatherbee, 2009)

Finally, with the collaboration between the ASEAN Eminent Persons Group (EPG) (The ASEAN Eminent Persons Group, 2015) and the High Level Task Force (HLTF), the ASEAN Charter was adopted at the 13<sup>th</sup> ASEAN Summit in November 2007 then entered into force on 15 December 2008. A gathering of the ASEAN Foreign Ministers was held at the ASEAN Secretariat in Jakarta, and registered with the Secretariat of the United Nations, pursuant to Article 102, Paragraph 1 of the UN Charter (1945). As commitment, the ASEAN Charter has become a legally binding agreement among ten ASEAN Member States. With the entry into force of the ASEAN Charter in 2008, ASEAN is now running under a new legal framework and established a number of new organs to boost its community-building process for AEC, APSC, and ASCC. Importantly, the new ideas, such as setting up ASEAN legal personality, articulating ASEAN's objectives and principles, strengthening ASEAN's structure, mandating the ASEAN Secretary-General to monitor the implementation of ASEAN decisions and instruments, establishing a human rights body, and placing the foundation for the development of dispute settlement mechanisms in all fields of cooperation, are placed into this ASEAN Charter. However, some of the proposals include the removal of non-interference policy in case of sanction mechanisms against violators and decision-making through voting are cut off.

### Contents

Generally, ASEAN Charter consists of a total of 13 chapters, 55 articles. Chapter I (Art.1-2) stated about purposes and principles of ASEAN, Chapter II (Art.3) is conferred a legal personality to the ASEAN as an inter-governmental organization. Chapter III (Art.4-6) stated about membership such as member states, rights and obligations as well as admission of new members. Chapter IV (Art.7-15) stated about ASEAN organs and their duties such as ASEAN summit, ASEAN Coordinating Council, ASEAN Community Councils, ASEAN Sectoral Ministerial Bodies, Secretary-General of ASEAN and ASEAN Secretariat, Committee of Permanent Representatives, ASEAN National Secretariats, ASEAN Human Right Body, and ASEAN Foundation. Chapter V (Art.16) acknowledged about entities associated with ASEAN. Chapter VI (Art.17-19) stated about immunities and privileges of ASEAN and ASEAN related parties. Chapter VII (Art.20-21) stated about ASEAN decision-making through consultation and consensus, and implementation and procedure. Chapter VIII (Art.22-28) stated about ASEAN dispute settlements. Chapter IX (Art.29-30) stated about budget and finance of ASEAN. Chapter X (Art.31-40) stated about administration and

procedure. Chapter XII (Art.41-46) stated about external relations. Finally, Chapter XIII (Art.47-55) stated about general and final provisions.

For the provision of ASEAN DSM, it is particularly stipulated in Chapter VIII (Art.22-28) on mode of Dispute Settlement. Art.22 essentially refers to general principles, Art.23 (good offices, conciliation and mediation), Art.24 (Dispute settlement mechanisms in specific instruments), Art.25 (establishment of dispute settlement mechanisms), Art.26 (Unresolved disputes), Art.27 (Compliance), Art.28 (United Nations Charter Provisions and Other Relevant International Procedures). As consideration, it is clearly that Chapter VIII on Dispute Settlement provides a comprehensive framework for existing and future dispute settlement mechanisms in ASEAN. Hence, it essentially means that Art.22-28 are a main gate linked to other ASEAN DSM instruments.

## **ASEAN DSM working system**

### **Introduction**

As usually in domestic law, when a dispute occurs, it might be solved in quite a few ways. Firstly, the parties will try to talk by themselves. Secondly, when they cannot find a way out, they will ask a third person to help them solving its problem. Last of all, when all disputes could not be solved by themselves, they might agree to submit their dispute to the court for a legal binding judgment. All of these are a commonsense approach to solve dispute and was normally stated in many laws in level of domestic law and international law as well as the ASEAN also applied these commonsense dispute settlement in its constitutional law of ASEAN which is the ASEAN Charter.

### **The ASEAN DSM System**

According to ASEAN Charter, all disputes shall firstly start with the general principle in Article 22(1) stated that “*Member States shall endeavor to resolve peacefully all disputes in a timely manner through dialogue, consultation and negotiation*”.[15] In this process, the parties need to talk first. When the dispute cannot be solved, the parties may agree to resort to good offices, conciliation or mediation within an agreed time limit[16] and may request the Chairman of ASEAN or the Secretary-General of ASEAN, acting in an ex-officio capacity, to provide these good offices, conciliation or mediation. Secondly, the disputes will be classified and apply the DSM based on their commitments under Article 24(1), 24(2), 24(3), 25, and 28 as provided in figure below.

Article 24 (1)	Article 24 (2)	Article 24 (3)	Article 25	Article 28
Disputes relating to specific ASEAN instruments shall be settled through the mechanisms and procedures provided for in such instrument	Disputes which do not concern the interpretation or application of any ASEAN instrument shall be resolved peacefully in accordance with the Treaty of Amity and Cooperation in Southeast Asia (TAC) and its rules of procedure	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 (EDSM)	Where not otherwise specifically provided, appropriate dispute settlement mechanisms, including arbitration, shall be established for disputes which concern the interpretation or application of this Charter and other ASEAN instruments	Unless otherwise provided for in this Charter, Member States have the right of recourse to the modes of peaceful settlement contained in Article 33(1) of the Charter of the United Nations or any other international legal instruments to which the disputing Members States are parties

Figure 1: The ASEAN Charter related to ASEAN DSM

According to Article 24(1) of the Charter, it stated that “*Disputes relating to **specific ASEAN instruments** shall be settled through the mechanisms and procedures provided for in such instruments*”. It means whenever the dispute occurs and related to specific ASEAN instrument, the DSM of that specific ASEAN instrument will be applied to its dispute. For example, if the disputes are related to the good, the ASEAN Free Trade Agreement (AFTA)[19] or the ASEAN Trade in Goods Agreement (ATIGA) will be considered as the specific ASEAN instruments and then be applied to this dispute. In case of the dispute related to the Service, it has the ASEAN Framework Agreement on Services (AFAS)[21] to apply to its dispute. In case of the dispute related to Nuclear weapon, dispute has to rely on the Treaty on the Southeast Asia Nuclear-Weapon-Free Zone (SEANWFZ).

According to Article 24(2) of the Charter, it stated that “*Disputes which **do not concern the interpretation or application of any ASEAN instrument** shall be resolved peacefully in accordance with the Treaty of Amity and Cooperation in Southeast Asia and its rules of procedure*”. In case of disputes not involving any ASEAN instrument, the Treaty of Amity and Cooperation in Southeast Asia (TAC) and its rules of procedure will be applied to its disputes. So any bilateral treaties or multilateral treaties, which are not signed under the ASEAN framework such as the Japan-Thailand Economic Partnership Agreement (JTEPA), Thailand-Chile Free Trade Agreement, China-Singapore Free Trade Agreement, also are under this article.

According to Article 24(3) of the Charter, it stated that “*Where not otherwise specifically provided, disputes which concern the interpretation or application of **ASEAN***

*economic agreements shall be settled in accordance with the ASEAN Protocol on Enhanced Dispute Settlement Mechanism*". When the dispute is the ASEAN Economic Agreement, the ASEAN Protocol on Enhanced Dispute Settlement Mechanism (EDSM) shall be applied to its dispute. The ASEAN Economic Agreement is considered as "*the Covered Agreements*" as stipulated in Appendix I of the EDSM. The lists of the Covered Agreements in Appendix I now has 46 agreements.

According to Article 25 of the Charter, it stated that "***Where not otherwise specifically provided, appropriate dispute settlement mechanisms, including arbitration, shall be established for disputes which concern the interpretation or application of this Charter and other ASEAN instruments***". In case of no specific provision provided in this Charter, the disputes can apply by the mode of arbitration, or appropriate DSMs. The appropriate DSM under Article 25 was significantly expanded by a Protocol to the ASEAN Charter on Dispute Settlement Mechanisms (PDSM). For the purpose to fill a gap of ASEAN Charter, the PDSM was designed to give the clear explanation for ASEAN DSM provisions such as rule of consultation, good office, mediation, conciliation, and arbitration.

According to Article 28 of the Charter, it stated that "*Unless otherwise provided for in this Charter, Member States have the right of recourse to the modes of peaceful settlement 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*". In case of no specific provision provided under the ASEAN Charter, the ASEAN Member States can apply the UN DSM, the mode of peaceful settlement in Article 33(1) of the UN Charter to their dispute.

Finally, in case all of these DSMs could not settle the dispute, the dispute will be considered as "*an unresolved dispute*" and shall be referred to the ASEAN Summit for its decision.

## Conclusion

To summarize, the Charter further mandates dispute settlement mechanisms for all fields of ASEAN cooperation and also created a link between all existing ASEAN DSM instruments and future ASEAN DSM instruments. However, based on the ASEAN way, these DSMs could not be applied against their wills by the ASEAN Member States to solve their disputes.

According to history of ASEAN since the establishment of ASEAN in 1967, there are many disputes between the ASEAN Member States. For example, the territory dispute between Thailand and Cambodia (Preah Vihear Temple case) as well as between Malaysia and Singapore (Pedra Branca, Middle Rocks and South Ledge case), the trade disputes (Malaysia Vs Singapore on import licensing on Polyethylene), and (Philippines Vs Thailand on taxes on cigarettes).[35] However, all of these disputes were settled by a non-ASEAN DSM such as the International Court of Justice (ICJ) and the WTO DSU.[36] So this fact is obviously showing that ASEAN still has a lot of works to encourage the ASEAN Member States to settle their dispute by the ASEAN DSM.

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