JOPAG
JOURNAL OF POLITICS AND GOVERNANCE

Journal of Politics and Governance
15(1), January – April 2025

The Challenge of Senior Economic Officials' Meeting in ASEAN Dispute Settlement Mechanism

Somsack Hongvichit [1]

[1] School of Law, Zhejiang GongShang University, China
E-mail: somsackhongvichit@163.com , © Authors

Article history:

Received: May 10, 2024

Revised: October 4, 2024

Accepted: October 8, 2024

Keywords:

ASEAN Dispute Settlement Mechanism, SEOM, ATIGA, Concept of Legalisation

Abstract

This study examined the challenge of Senior Economic Officials' Meeting (SEOM) under the Protocol on Enhanced Dispute Settlement Mechanism 2019 (ASEAN DSM 2019) in the Association of Southeast Asian Nations (ASEAN) In ASEAN; SEOM assists the ASEAN Economic Ministers handling with all ASEAN economic matters. The SEOM also supervises dispute settlement mechanism for ASEAN economic agreements. Under the ASEAN DSM 2019, SEOM plays a significant role. The SEOM establishes panels. It adopts reports of a panel and the Appellate Body. The SEOM also enforces decisions of the panel and the Appellate Body. This research aims to study role of SEOM under the ASEAN DSM 2019. The findings revealed that judicial adjudication under the ASEAN DSM 2019 is not independent body. The SEOM controls whole dispute resolution procedures under the ASEAN DSM 2019. However, members of SEOM are representative of all ASEAN countries including the parties to the dispute. Arguable, adjudication proceedings under the ASEAN DSM 2019 is not impartiality. This paper suggested that ASEAN should establish a dispute resolution body for dispute settlement in ASEAN separately from SEOM.

Introduction

The Association of Southeast Asian Nations (ASEAN) has reviewed its dispute settlement mechanism two times first in 2004 and second in 2019. However, the whole system of dispute resolution is still controlled by Senior Economic Officials Meeting (SEOM). In principle, the Dispute Settlement in ASEAN (ASEAN DSM 2019) is a quasi-judicial body (Davidson, 2004). It deals with economic disputes which may arise among ASEAN member states (Davidson, 2004). Unfortunately, since 1996, the ASEAN dispute settlement has never been used by any ASEAN countries. (Sim, 2020). However, it does not mean there is no trade dispute among ASEAN member states. In fact, some trade disputes were resolved intra ASEAN through diplomatic dispute resolution by consultation and negotiation (Tan, 2004), while other trade disputes were resolved through the

WTO dispute settlement, for example trade dispute between Singapore and Malaysia in 1995 (WT/DS1, 1995) and a dispute between Thailand and the Philippines in 2008 (WT/DS371, 2022).

Technically, regarding the ASEAN DSM 2019, SEOM plays important role as a dispute settlement body. The SEOM is an administrative body for dispute settlement (Secretariat, 2019). The SEOM establishes panels. It adopts both reports of a panel and the Appellate Body. It also enforces decisions of the panel and the Appellate Body (Secretariat, 2019). In other words, under ASEAN economic cooperation, SEOM has tasks to implement all economic agreements (Beckman, 2016). The SEOM was assigned to work side by side with the ASEAN Economic Ministers (AEM) to coordinate and monitor the implementation of all economic agreements in ASEAN (Beckman, 2016). All of these tasks are not easy since the capacity of SEOM is limited in term of human resource and procedures. In practice, SEOM mainly depends on the Secretariat of ASEAN (Secretariat) for its assistance (Keosnaidi et al., June 2014). Nevertheless, in some point, the Secretariat lacks human recourses. The Secretariat has to assist and facilitate all ASEAN institutions (Keosnaidi et al., June 2014). Interestingly, under ASEAN, there is no detail working procedures for SEOM both to handle economic matters in ASEAN and to supervise the ASEAN DSM 2019 (Beckman, 2016). Most importantly, the ASEAN DSM 2019 allows members of SEOM whose governments are the parties to the dispute taking part in decision making process (Secretariat, 2019). Notably, SEOM is a diplomatic meeting which all members of SEOM are representatives of all ASEAN member states (Chow et al., 2018). Considering, under the ASEAN dispute settlement, adjudicative body is not independent body, so it might lead to impartial adjudication proceedings.

Certainly, the institutional issues under the ASEAN DSM 2019 lead to impasse adjudication process. Arguably, ASEAN lacks an effect of dispute resolution, so investor should have no confidence in ASEAN (Sim, 2020). ASEAN will be more attractive if ASEAN improves the structure of institution (SEOM) under the ASEAN DSM 2019. An effective dispute settlement mechanism would enhance confidence of investors in the ASEAN Economic Community (Soeparna, 2021). In other words, a problem has been happening under the WTO makes ASEAN member states and other regional free trade agreement have to consider seriously strengthening and increasing credibility its dispute settlement mechanisms as a tool to solve trade disputes in the region (Foo, 2022).

This study aims to examine of a legal problem of dispute settlement in ASEAN. Under the ASEAN DSM 2019, SEOM plays a significant role as an administrative body to dispute resolution. However, SEOM is not independent organ in ASEAN. Members of SEOM are representatives of all ASEAN countries including the parties to the dispute. Arguably, judicial adjudicators under the ASEAN DSM 2019 would have problems in dispute resolution proceedings. Therefore, adjudication proceedings under the ASEAN DSM 2019 will become more impartiality if ASEAN establishes a dispute settlement body for the ASEAN DSM 2019 separated from SEOM.

Research Methods

This research paper analyses legal issue of SEOM in ASEAN. This paper reviews and examines the role and function of SEOM under ASEAN economic agreements including the ASEAN Charter and the ASEAN Protocol on Enhanced Dispute Settlement Mechanism 2019

(ASEAN DSM 2019). Notably, under other ASEAN economic agreements, SEOM has task to handles with all ASEAN economic matters. In other words, according to dispute settlement in ASEAN, SEOM supervises the ASEAN dispute settlement mechanism under the ASEAN DSM 2019. To explore legal issues, this research reviews certain literatures related to ASEAN dispute settlement and SEOM.

This paper applies concept of legalisation to analyze legal issue of the dispute resolution in ASEAN. According to this concept, it is not easy that adjudicative body in ASEAN would operate its function impartially because dispute resolution procedures are controlled by SEOM. However, members of SEOM are representation of all ASEAN countries including parties to the dispute. The issue of legalisation in dispute settlement is the main issue dealing with in this paper.

Literature review

General speaking, there are several literatures discussing about dispute settlement in ASEAN for example Kaplan (1996). The author examined the WTO and NAFTA Chapter 20 dispute settlement mechanism and proposed a comprehensive dispute resolution settlement for ASEAN Free Trade Area (AFTA) (Kaplan, 1996). Since ASEAN established the AFTA in 1992, there was not a dispute settlement mechanism for resolving trade disputes arisen under the AFTA. The author argued that to create the AFTA, ASEAN confronted the tension between need of AFTA for legal harmonization and persistent uneasiness of the Association over the institution-alization such requires of harmonization (Kaplan, 1996). However, ASEAN risked handicapping its efforts to realize primary objectives of AFTA: to draw foreign investment to the region and to increase intra-ASEAN trade by reducing tariff and non-tariff barriers, all these by failing to pay adequate attention to the legal infrastructure of trade (Kaplan, 1996). The author also suggested that unquestionably a dispute settlement mecha-nism under AFTA must fit comfortably into informal consultative style in ASEAN whereas it reflects some useful, effective elements of the WTO and NAFTA dispute settlement system. The AFTA had to incorporate its own unique mechanism on character with ASEAN's more consensus-based decision making (Kaplan, 1996). More importantly, to create an acceptable yet workable AFTA dispute settlement mechanism remained feasible. Any proposed dispute settlement mechanism had to be both political acceptable to ASEAN. It also had to be supportive of the private sector-led growth which AFTA was designed to bolster (Kaplan, 1996).

While, Kiriyama (1998) did a comparative study concerning institutional evolution in economic integration (Kiriyama, 1998). The author compared ASEAN dispute resolution mechanism with other dispute settlements such the WTO, the EU and NAFTA (Chapter 19 and Chapter 20). The author found that according to the ASEAN DSM 1996, ASEAN provided a panel system. Under this dispute settlement, a panel would be established by a party to a dispute upon request (Kiriyama, 1998). For the adjudication, the author argued that the adjudication over greater limited on discretion of member states in dispute resolution which were shown by consultation. For the Appellate review, the author found that under the ASEAN DSM 1996, the ASEAN's appellate review appeared to be a little different. It was an inter—governmental body. It had ASEAN Economic Minister, who conducted an appeal review. Panel procedures were not provided (Kiriyama, 1998). Furthermore, in term of political

intervention, the author found that the procedures under the ASEAN DSM 1996 were possible that political intervention existed. The author mentioned that the final ruling of the panels had to be approved by an inter-governmental body-SEOM. By nature, this approach was more political than judicial (Kiriyama, 1998). The author further explained that the procedures under the ASEAN DSM 1996 were different from the NAFTA dispute settlement. Reports of the panel were not directly addressed by parties to the dispute themselves. The SEAN DSM 1996 was also differed from the WTO dispute settlement. The ASEAN DSM 1996 took used majority approach. This still allowed disputants gathering to get support from other members (Kiriyama, 1998). The author expressed that before any further measures might be taken, a final decision under the ASEAN DSM 1996 procedure, automatically binding shall be provided. Or alternatively, the procedures must be accepted by the parties to the dispute (Kiriyama, 1998). The author also concluded that the ASEAN DSM 1996 marked ASEAN as a type of cooperation forum with adjudication. The author recommended that ASEAN should improve the roles of the institutions of ASEAN and its legislative role such as role of the ASEAN Economic Ministers, SEOM and the Secretariat of ASEAN as institutions involving trade dispute resolutions (Kiriyama, 1998).

In other words, Leviter (2010) examined the ASEAN Charter. The author found that the ASEAN Charter has failed due to the 'ASEN Way' deeply seated norms, encapsulated (Leviter, 2010). For over a decade which ASEAN countries do not want to formalize its dispute resolution mechanism since adopted a provision under the Common Effective Preferential Tariff scheme for ASEAN Free Trade Area in 1992 (Leviter, 2010). The ASEAN countries crafted its dispute settlement in 2004. This demonstrated that the ASEAN gradually accepted rules—based in economic integration. Nonetheless, dispute resolution in ASEAN remained as option rather than a mandate. (Leviter, 2010). The ASEAN DSM version 2004 allows ASEAN member states at any time to engage in conciliation or mediation. The author argued that the ASEAN DSM 2004 was expressly a non-obligatory instrument, since the ASEN DSM 2004 was adopted; there was no case (Leviter, 2010). The ASEAN member states continued relying on relation—based dispute resolution. As a result, when ASEAN countries were unable or unwilling to implement agreements, they simply renegotiated. Due to the loose instruments, the process of regional economic in the integration was suffered (Leviter, 2010).

Whereas, Chow (2008) found that even all ASEAN countries are members to the WTO, the international organisations do not provide comfort for the areas in the grey penumbra or in the areas outside the shadow itself While, it is true for the areas under the umbra of those international organisations (Chow, 2008). For example, the global institutional supply might provide insufficient for settling a dispute if there were insufficient overlap such as ASEAN entering into internal WTO plus trade agreement like AFTA. This provided for disciplines beyond those subject to the dispute settlement under the WTO (Chow, 2008). In this sense, a way to settle that dispute, ASEAN needs to develop such dispute settlement. While it had done so for disputes related the interpretation or application of ASEAN economic agreements. By agreeing in the ASEAN Charter, these problems would be settled through the ASEAN Protocol on Enhanced Dispute Settlement Mechanism (Chow, 2008). Moreover,

the author found that if looking only at hard legal institutions for the rule of law in ASEAN, it might be reductive. Whereas, the obligations might not be specifically enforceable by an adjudicative process, due to the political costs resulting from non-compliance and the international obligations were usually complied with (Chow, 2008). Where the international political cost of non-compliance was outweighed by the domestic political cost, so this allowed ASEAN member states in extremis making a calculation in order to suspend certain obligations instead of withdrawing completely from the regime and for these specific safety valves many international agreements in any case provided (Chow, 2008). In contrast, much economic cooperation within ASEAN which was based on a large extent on a personal and consensual approach and had in the past been largely achieved by the ASEAN way through the advent of the ASEAN Charter that could signal a paradigm shift (Chow, 2008).

Whereas, Koesnaidi and others (2014) discussed some of viewpoints under ASEAN dispute settlement mechanism 2004 (ASEAN DSM 2004). The author found that ASEAN DSM 2004 lacked compulsory jurisdiction over resolution of dispute which was one point that discouraged ASEAN member states to submit the case in order to solve their disputes. ASEAN member states were not mandated to use the ASEAN DSM 2004 (Keosnaidi et al., 2014). Under the ASEAN DSM 2004, ASEAN member states had an option to loge the case in ASEAN or the WTO dispute settlement. The ASEAN DSM 2004 provided a choice of forum (Keosnaidi et al., 2014). In addition, the authors also found that under the ASEAN DSM 2004, a manpower problem including legal staff and administrative also existed (Keosnaidi et al., 2014). In fact, there was a limited number of support staff who worked at the legal division to assist the Secretariat of ASEAN in order to carry out its functions (Keosnaidi et al., 2014).

In theory, independence of adjudication is a key issue to legalisation. Legalisation of dispute resolution should comprise three dimensions: independently, accessible and enforceable (Robert et al., 2000). Independence refers to the extent to—formal legal arrangement ensuring that impartiality with respect to concrete state interests can render adjudication (Robert et al., 2000). While, accessing specifies parties not states can easily influence the agenda of the tribunal. (Robert et al., 2000). In other words, enforceability denotes the extent that decisions of dispute resolution can be implemented without taking any actions by the governments (Robert et al., 2000). Notably, in detail, independence refers to an international authority who charges with dispute resoltuion can deliver and get legal judments independently (Robert et al., 2000). At the end states continue purely controlling the traditional international dispute resolution in law and political places. The interested parties' agents resolve disputes by themselves. Each side offers its own interpretation rules and their applicability to the case at issue. Disagreements are settled through bargaining in institutionalized interstate. There are not procedure permanent rules or legal precedent. In legalized dispute settlement, decisions have to be consistent with international law (Robert et al., 2000). However, the outcome is also possible being influenced institutional rules by determining the conditions-interpretation standards, requirements of voting, selection under which authoritative decisions are made (Robert et al., 2000).

Notably, in principle, there are three dimensions which defines characteristics of legalisation: obligations, procession and delegation (Kenneth et al., 2000). The third dimension of legalisation-delegation refers to the extent which states and other actors delegate authority to designate third parties including courts, arbitrators, and administrative organizations—to implement agreements (Kenneth et al., 2000). The characterstic forms of legal delegation are third—party adjudication which has authority to interpret rules and applied such rules to individual facts. Thus, it is not in ineffect to make new rules, at least interestingly under established international law doctrines (Kenneth et al., 2000). When the parties are consent to bind decisions of third—party adjudication on the basic of clear and general applicable rules, dispute settlement mechanisms are most highly legalized. In contrast, when the process involves political bargaining between the parties who are able to accept or deny proposals without legal justification, those dispute settlement mechanisms are least legalized (Kenneth et al., 2000).

On other words, regarding a managerial theory, the best way of promoting compliance is that to design more effective regimes and to provide mechanism to assist and to resolve problems (Thompson, 2013). Institutions have functions to facilitate state parties. Institutions provide advice and assistance to promote compliance (Thompson, 2013). When it comes to non-compliance, institutions are potentially valuable information source and coordination and enforcement even if they lack independent enforcement capacity (Thompson, 2013). When rules are ambiguous, institutions provide clarification. They resolve conflicts of interpretation (Thompson, 2013). Additionally, institutions help identify behavior as non-compliant by providing transparency and monitoring. In addition, institutions also help to supply information in order to motivate states interacting within and through them, thereby to clarify whether or not the enforcing state is acting in defense of international rules more aggressively (Thompson, 2013). Probably, all of these increase a chance which non-compliance will be reached with enforcement actions (Thompson, 2013). Nevertheless, it doesn't mean every institution has equal effect in this point. In general, when it comes to clarify rules, find facts, and endorse sanctions against a violator, highly legalisation and independent institutions are viewed more credibly (Thompson, 2013).

Similarly, Koremenos (2012) discussed the design of international institutions-international adjudication and issues of compliance (Koremenos, 2012). The author found that for international delegation and adjudication, an important branch in the literature on international agreements is relevant to the interpretation of law and the extent to that adjudication and delegation in international agreements arise (Koremenos, 2012). Arguably, states may violate commitments due to they simply misinterpreted ambiguous provisions in an agreement not only due to they lack the capacities to comply with the rules (Koremenos, 2012). The institutions may break down: an action by one side is potentially mistakenly viewed as a breach of commitment by the other and, in turn, triggerd retaliation if this is the case, absent some mechanisms of adjudication among the disagreeing parties (Koremenos, 2012). The author suggested that adjudication may help to resolve this problem by channeling disputes over the interpretation of agreement language into institutionalized

procedures. An unwarrented breakdown of cooperation may be prevented, so it creats more robust forms of cooperation in the presence of niose (Koremenos, 2012). Moreover, it looks like uncertainties about the other behavior of actors. The presence of adjudication can also be connected to the enforcement phase. Being identified as a violator of terms of an agreement by an authorized, independent body is assumed to inflict an increased reputational cost on it (Koremenos, 2012).

In general, according to dispute settlement mechanisms in regional free trade agreements, there are two types of dispute settlement body-political body and adjudicating bodies (adjudicative body or panels and a standing appellate body). The purpose to establish the dispute resolution institutions is to elaborate institutional structures for administration (Chase et al., 2016). In fact, the dispute resolution institutions in types of the political bodies are charged with the overall administration of the agreement. They may be composed at the ministerial level, a lower level, or both. To varying degrees, those bodies have role in dispute resolution both directly and indirectly. Precisely, some agreements designed such political bodies acting as dispute resolution institutions. They have authority to intervene directly into the dispute settlement rulings without consent of the disputing parties (Chase et al., 2016). In contrast, some agreements, those political bodies are assigned to participate in the dispute settlement process. They supervise functions being formally notified of consultations and or panel requests, appeal review. They adopt final reports made by panels and the Appellate Body. They also enforce decisions of panels, and authorize retaliatory measures for non—compliance (Chase et al., 2016).

Results and Discussion

1. Overview of ASEAN Dispute Settlement

1.1 Introduction of Dispute Settlement Mechanism under ASEAN

Technically, the ASEAN DSM 2019 is a government—to—government dispute settlement (Chase et al., 2016). The ASEAN DSM 2019 provides third party adjudication for resolving dispute intra ASEAN concerning the interpretation and application of ASEAN economic agreements (Secretariat, 2019). In pursuant to the provisions of the ASEAN DSM 2019, any matter affecting to implement, interpret or apply the Agreement or any covered agreement, ASEAN member states shall accord adequate opportunity for consultation regarding any representations made by other ASEAN member states. Any differences must be resolved amicably between the Member States as far as possible (Secretariat, 2019).

According to the provisions of the ASEAN DSM 2019, there are several processes. First is consultation process. Once an ASEAN member state takes an action against other ASEAN member state before dispute settlement under ASEAN, the process started from consultations between the disputing parties (Secretariat, 2019). Second is panel stage. If the consultations fail to settle the issue, a party to the dispute may request SEOM to establish a panel (Secretariat, 2019). The panel has tasks "[t]o make an objective assessment of the dispute before it, including an examination of the facts of the case...and to make its findings and recommendations in relation to the case" (Secretariat, 2019, art.9). The findings and recommendations of the panel shall be submitted to SEOM. Then SEOM must adopt that report unless there is consensus not to do so or a party notifies its decision to appeal (Secretariat, 2019). Third is an appeal

review stage. A party to the dispute can appeal the report of a panel to the ASEAN Appellate Body (Secretariat, 2019). The Appellate Body reviews a particular case regarding issues of the law written in the panel report including legal interpretations that the panel developed. The report of the Appellate Body must be adopted by SEOM unless there is consensus not to adopt it (Secretariat, 2019). Final stage is implementation stage. The disputing parties unconditionally must accept. The respondent party has to comply with the decisions written in the reports of the panel or the Appellate Body (Secretariat, 2019). Considering, the ASEAN dispute settlement is modeled to the WTO dispute settlement (Sim, 2020), but with certain different aspects. For example under WTO dispute settlement, Dispute Settlement Body is a permanence body. In contrast, in ASEAN, SEOM is diplomatic representatives of all ASEAN member countries meetings. Members of SEOM are not permanent (Koesrianti, 2005; Sim, 2020).

1.2 The development of dispute settlement mechanism in ASEAN

In theory, the dispute settlement mechanism in ASEAN plays quasi-judicial role to resolve trade disputes intra ASEAN. ASEAN developed its dispute settlement from a pure diplomatic approach to legalistic approach (Kaplan, 1996). ASEAN member states started their economic cooperation by establishing the AFTA in 1992 (Tan, 2004). According to the AFTA, trade disputes that might occur among member states shall possibly be settled amicably between ASEAN member states (Kaplan, 1996). On the other hand, the Common Effective Preferential Tariff (CEPT) scheme for the AFTA further defined that the ASEAN Free Trade Area Council (AFTA Council) was created to resolve AFTA disputes (Secretariat, 1992). This means that in case the parties to the dispute could not achieve any amicable solution, they could refer to the AFTA Council and the ASEAN Economic Ministers either as a last resort (Kaplan, 1996).

However, in 1996, ASEAN established the first dispute settlement mechanism by signing the Protocol on Dispute Settlement Mechanism (ASEAN DSM 1996) (Secretariat, 1996). This dispute settlement would resolve disputes by third party adjudication such as panel (Secretariat, 1996). Regrettably, there were certain weaknesses such as under the ASEAN DSM 1996, SEOM could reject to establish a panel, or even decided to deal with cases on their own (Hsu, 2010). As a result, in 2004, ASEAN replaced the ASEAN DSM 1996 by signing the ASEAN Protocol on Enhanced Dispute Settlement Mechanism (the ASEAN DSM 2004) (Secretariat, 2004). The ASEAN DSM 2004 improved certain problems related to SEOM (Kooi, 2007). For example, in pursuant to the provisions of the ASEAN DSM 2004, SEOM could not deny establishing a panel or even taking part in dispute resolution as adjudicators. The SEOM shall establish a penal and adopt a report of panel (Secretariat, 2004). However, in 2019; ASEAN replaced the ASEAN DSM 2004 by the 2019 ASEAN Protocol on Enhanced Dispute Settlement Mechanism (ASEAN DSM 2019). Certainly, comparing the ASEAN DSM 2004 and the ASEAN DSM 2019, there are some improvements for example the provision of Article 23 which is related to special procedures involving least-development member states. Futhermore, the ASEAN DSM 2019 provides several procedures of dispute resolution which the disputing parties are supposed to follow with (Secretariat, 2019).

Nonetheless, since ASEAN adopted the ASEAN DSM 2019 until today, there is not any case invoked by ASEAN member states. On the other hand, it does not mean there are not economic disputes in ASEAN (Foo, 2022; Tan, 2004). In practice, for example ASEAN member states resolved trade disputes through diplomatic dispute resolution approach and/or brought the cases to the WTO dispute settlement (Kwok, 2023; Sim, 2014). Considering, even though ASEAN reviewed its dispute settlement two times, it still maintains more political aspects more than legalisation. Under the ASEAN DSM 2019, a political body such as SEOM controls the dispute resolution procedures.

2. Role and Function of SEOM in ASEAN

2.1 Supervising Economic Matters

In ASEAN, SEOM has multiple roles in economic cooperation. Under ASEAN economic cooperation, SEOM is an assistant institution supporting the ASEAN Economic Minister (AEM) (Woon et al., 2015). The SEOM was assigned to work side by side with the AEM. The SEOM coordinates and monitors the implementation of all ASEAN economic agreements and being the arbiters of ASEAN economic agreements (Severino, 2015). In the past, the AEM operated its functions through five economic committees not SEOM. After 1992, ASEAN assigned SEOM with a task to deal with all aspects of ASEAN economic cooperation which is in line with the streamlining of the ASEAN organizational structure (Davidson, 2002).

The SEOM holds its meetings at least two times per years in order to review and supervise all economic aspects (Secretariat, 2008). In fact, there are more than 200 meetings which SEOM had with officials covering subjects which range from science and technology to environment and culture. Basically, ASEAN holds its meetings over 600 meetings per year (Toohey, 2011). Certainly, from the beginning, ASEAN assigned the AEM with power to review the coordination including the implementation of agreed ASEAN programmers and also project on economic cooperation (Beckman, 2016). As discussed above SEOM was tasked to deal with all aspects of ASEAN economic cooperation, but oversight would be provided by the AEM. The SEOM meeting resolves technical issues, while the AEM meeting resolves issues of policy (Woon et al., 2015). Unfortunately, there are about 20-25 people who work with SEOM (Keosnaidi et al., 2014). The SEOM is similar to other ASEAN institutions generally relies on the support and facilitation of the Secretariat of the ASEAN in order to operate functions of SEOM (Keosnaidi et al., 2014; Phan, 2014).

2.2 Supervising the dispute settlement in ASEAN

Under the ASEAN DSM 2019, as mentioned before SEOM plays a role in dispute resolution. The SEOM establishes panels, adopts reports of panels and the Appellate Body and enforces the recommendations of the panels and the Appellate Body (Secretariat, 2019). In pursuant to Article 2 of the ASEAN DSM 2019, SEOM is an administrative body for dispute settlement mechanism in ASEAN (Secretariat, 2019).

As discussed before according to the ASEAN DSM 2019, there are several dispute resolution procedures which SEOM taking part to supervise. For example, when a member state requests to use the ASEAN DSM 2019 Mechanism, the party who requests consultations has to notify to SEOM (Secretariat, 2019). Additionally, any ASEAN member state who considers that it has a substantial interest in consultations, if such member state desires

to join in the consultation; it is able to notify the consulting member states and SEOM (Secretariat, 2019).

Under the panel process, SEOM also plays several roles in dispute resolution procedures (Secretariat, 2019). For example according to Article 6 of the ASEAN DSM 2019, if the consultations fail to resolve the problems, the complainant party can request SEOM to establish a panel. The SEOM must establish a panel except SEOM decided not to establish the panel by consensus (Secretariat, 2019). Notably, before SEOM adopts reports of the panel, the findings and recommendations of the panel must be submitted to SEOM. After the disputing parties review the interim report, comment and agree on it, then the panel can submit the interim report to SEOM as being considered the final panel report (Secretariat, 2019). Certainly, under the ASEAN DSM 2019, SEOM has to adopt a panel report, except a party to the dispute notifies SEOM for an appeal or SEOM decides not to adopt that report by consensus (Secretariat, 2019). Interestingly, during the deliberations of SEOM, members of SEOM whose governments are members of disputing parties are able to be presented (Secretariat, 2019). On the appeal review process, similar to the process to adopt the panel report, SEOM has to adopt a report of the Appellate Body, except SEOM decide not to adopt that report by consensus (Secretariat, 2019).

On implementation stage, SEOM acts as an enforcement institution. The SEOM oversees the non-compliance matter (Secretariat, 2019). Non-compliance problems are placed on every agenda of SEOM meetings, until it is resolved (Secretariat, 2019). The SEOM conduct surveillance on the implementation of the findings and recommendations of panel and Appellate Body. Any non-compliance is possible to be raised at the SEOM meeting by any ASEAN countries at any time (Secretariat, 2019). The respondent party has to submit a status report of implementation within 10 days prior the each such SEOM meetings (Secretariat, 2019). In addition, SEOM has power to grant authorization on compensation and suspension of concessions measures. The wining party may impose trade retaliation measures on the losing party by request authorization from SEOM (Secretariat, 2019). Considering, SEOM plays significant role on dispute resolution under the ASEAN DSM 2019. Regrettably, SEOM is an inter-governmental organ. By nature, it is more political than judicial. All members of SEOM are representative of all ASEAN member states, so how SEOM would operate its function impartiality (Kiriyama, 1998).

3. Discussion

General speaking, SEOM has a significant role to supervise both ASEAN economic agreements and dispute settlement under the ASEAN DSM 2019. However, there are certain challenges for SEOM to operate those roles efficiently. The SEOM is a dependent body. All members of the SEOM are representatives of all ASEAN countries (Limsiritong, 2018; Phan, Spring 2014; Secretariat, 2009). In theory, the dispute resolution will be less legalization if its process belongs to member countries directly (Sim, 2020). Moreover, the composition of SEOM is less available (Toohey, 2011). In practice; members of SEOM compose of senior capita-based government officials. Members of SEOM are at least deputy-directors of international relation within trade and investment ministers level (Toohey, 2011). Representatives to SEOM are not exclusively assigned to SEOM. The members of SEOM also hold formal positions in

other ASEAN organs and in their home countries (Chow et al., 2018). Certainly, the adjudication under the ASEAN DSM 2019, one question may be raised that how SEOM gives advice on certain problems on finding written in reports when members of SEOM are not experts in ASEAN law. Significantly, the dispute resolution system under the ASEAN DSM 2019 is closed the door to political institution such as SEOM. In this sense, private individuals are hardly to predict what would happen next. Arguably, disputes such as barriers of tariff and non-tariff to trade seem to be disputes between individual to government rather than government to government, as a scholar mentioned that "the private sector needs..., transparent mechanism to ensure its ability to implement business plans efficiently" (Kaplan, 1996, p. 176).

In other words, the ASEAN DSM 2019 allows all members of SEOM including the disputing parties to participate in decision making process. For example, as an administrative body for the ASEAN DSM 2019, SEOM may participate in dispute resolution proceedings such as in the drawing up the reference terms of the panel process in consult with the disputing parties (Secretariat, 2019). However, there is not clear how SEOM conducts its meetings. There are no written guidelines detailing the general functions of SEOM. In practice, SEOM relies heavily on institutional memory and practice, which in itself can vary and is not sustainable in the long term (Beckman, 2016). Furthermore, it is also not clear how SEOM takes decisions. According to the ASEAN Charter, ASEAN takes decision by consensus. SEOM is one of ASEAN institutions which mean that SEOM would take a decision by consensus (Deinla, 2017). Arguably, in principle, it is possible that SEOM will struggle with decision-making process. How SEOM can reach an agreement by consensus if members of SEOM whose governments are the parties to the dispute are allowed to participate in decision making process?

Conclusion

ASEAN established the dispute settlement mechanism for ASEAN economic agreements since 1996, but until today, it has never been used by any ASEAN member states. Although ASEAN reviewed its dispute settlement two times, SEOM still retains control over adjudication procedures. In ASEAN, SEOM has multiple tasks. The SEOM assists the ASEAN Economic Ministers to handle with all economic matters in ASEAN. SEOM also supervises the dispute settlement mechanism under the ASEAN DSM 2019. However, SEOM is a political body in ASEAN. Members of SEOM are representatives of all ASEAN countries. Additionally, there is no working procedure for SEOM to guide the dispute resolution. Arguably, SEOM would apply the ASEAN Way approach resolving dispute by consultation and consensus. In practice, SEOM takes decisions by consensus. Under the ASEAN DSM 2019, members of SEOM who are nationals to the disputing parties are allowed to participate in the process of decision making. Assuming, how SEOM reaches an agreement on certain issues related dispute resolution process.

Therefore, ASEAN should improve the role and functions of SEOM. This research suggests that ASEAN should establish a dispute settlement body for the ASEAN DSM 2019 separately from SEOM. As one scholar has expresses that the ASEAN dispute settlement mechanism will be more effective and attractive ASEAN countries to utilize dealing with inevitably trade disputes

arising among them under ASEAN economic agreements and increase investors' confidence in the ASEAN Economic Community if ASEAN improves role and functions of SEOM (Kooi, 2007).

References

Agreement on the Common Effective Preferential Tariff (CEPT) Scheme for the ASEAN Free Trade Area (AFTA). (1992). *ASEAN Agreement*. https://agreement.asean.org/media/download/20140119155006.pdf

ASEAN Charter. (2008). *ASEAN Agreement*. https://asean.org/wp-content/uploads/2021/09/2.-February-2015-The-ASEAN-Charter-18th-Reprint.pdf

ASEAN Economic Blueprint. (2015). https://asean.org/wp-content/uploads/2021/09/21083

ASEAN Dispute Settlement Mechanism. (1996). https://asean.org/?static_post=the-1996-protocol-on-dispute-settlement-mechanism

ASEAN Protocol on Enhanced Dispute Settlement Mechanism. (2004). https://agreement.asean.org/media/download/20141217102933.pdf

ASEAN Trade in Goods Agreement. (2009). https://asean.org/wp-content/uploads/2020/12/ASEAN-Trade-in-Goods-Agreement.pdf

ASEAN Protocol on Enhanced Dispute Settlement Mechanism. (2019). https://agreement.asean.org/media/download/20200128120825.pdf

Beckman, R., Bernard, L., Phan, H., Hsien-Li, T., & Yusran, R. (2016). *Promoting compliance: The role of dispute settlement and monitoring mechanism in ASEAN instruments*. Cambridge University Press.

Chase, A. C. (2016). Mapping of dispute settlement mechanisms in regional trade agreements: Innovative or variations on a theme? In R. Acharya (Ed.), *Regional trade agreements and the multilateral trading system* (pp. 608–702). Cambridge University Press.

Deinla, I. (2017). *The development of the rule of law in ASEAN: The state and regional integration*. Cambridge University Press.

Kaplan, J. A. (1996). ASEAN's rubicon: A dispute settlement mechanism for AFTA. *UCLA Pacific Basin Law Journal, 14*(2), 147–195.

Koremenos, B. (2012). Institutionalism and international law. In J. L. Pollack, J. Dunoff, & M. A. (Eds.), *Interdisciplinary perspectives on international law and international relations: The state of the art* (pp. 59–82). Cambridge University Press.

Piris, J.-C., & Woon, W. (2015). *Towards a rules-based community: An ASEAN legal service*. Cambridge University Press.

Severino, R. C. (2015). *Southeast Asia in search of an ASEAN community*. Yusof Ishak Institute.

Sim, E. W. (2020). ASEAN further enhances its dispute settlement mechanism. *Indonesian Journal of International & Comparative Law, 7*(2), 279–292.

Toohey, L. (2011). When 'failure' indicates success: Understanding trade disputes between ASEAN members. In R. W. Ross & P. Buckley (Eds.), *East Asian economic integration: Law, trade and finance* (pp. 150–182). Edward Elgar.

Woon, W. (2013). Dispute settlement in ASEAN. *Korean Journal of International and Comparative Law, 1*, 92–104.

World Trade Organization. (n.d.-a). *WT/DS1/3*. https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds1_e.htm

World Trade Organization. (n.d.-b). *WT/DS371/46*. https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds371_e.htm

