

How to Apply the ASEAN Protocol on Enhanced Dispute Settlement Mechanism 2004 to Settle Disputes on the Interpretation of ASEAN Comprehensive Investment Agreement 2009

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Abstract

This article is written to answer the question of how to apply the ASEAN Protocol of Enhanced Dispute Settlement Mechanism (EDSM) 2004 to settle disputes concerning on the interpretation of ASEAN Comprehensive Investment Agreement (ACIA) 2009. ACIA 2009 is a legal instrument which was designed to support the investment regime in ASEAN through four pillars of Investment such as Liberalization, Protection, Promotion, and Facilitation. This article examines EDSM 2004 and found that the ASEAN organization structure and the problem of ASEAN decision-making mode itself are also perceived as practical problems that arise from the application of EDSM 2004 in case of disputes concerning on the interpretation of ACIA 2009. Hence the author encourages ASEAN Member States may further strengthen the existing Dispute Settlement Mechanisms (DSMs) under EDSM 2004 by giving the free judgement and empower the Senior Economic Official Meetings (SEOMs) to make some structural changes such as a free judgement power to act as a full judicial function which is not related to the quasi-judicial function against the parties whom are members of ASEAN Summit.

Keywords: EDSM 2004, ACIA 2009, ASEAN, Interpretation

Introduction

Since ASEAN was established in 1967, many of ASEAN Legal Instruments are enacted to accomplish its purposes and objectives of ASEAN. The ASEAN Legal Instruments are separately classified into three main pillars such as (1) ASEAN Political-Security Community (APSC), (2) ASEAN Economic Community (AEC), and (3) ASEAN Socio-Cultural Community (ASCC). There are totally of 79 ASEAN Legal Instruments; 14 instruments for APSC, 59 instruments for AEC, 6 instruments for ASCC. (ASEAN, 2017a) The ACIA 2009 is one of legal instrument which was launched to support the investment regime in ASEAN and it has owned dispute settlement mechanisms. The ACIA DSMs is designed and developed from World Trade Organization Dispute Settlement Understanding (WTO DSU) with the expectations of more functional and effective DSM model in practice. (Naldi, 2014: 28) The ACIA 2009 applies both Investor-to-States and States-to-States DSMs. Both are applied the different DSMs. In Article 27 of ACIA 2009, it firstly refers to EDSM 2004 which provides a specific detailed to resolve any disputes between or among Member States. Secondly in case of disputes between Investors and Member States, it could apply section B of ACIA 2009. It is important to note that this article is focused only on the application of EDSM 2004 to settle disputes concerning on the interpretation of ACIA 2009 as well as the Investor-to-State Dispute Settlement (ISDS) under ACIA 2009 will

be planned to separately publish in another article, namely ASEAN Comprehensive Investment Agreement 2009: Investor-to-State Dispute Settlement later.

Law Interpretation and Disputes concerning on the Interpretation of ACIA 2009

Definition of Law Interpretation: Bryan A. Garner, the editor of Black Law dictionary defines “Law interpretation” as the process of discovering and expounding the intended signification of the language used in a statute, will, contract, or any other written document. Whenever the meaning of a legal document must be determined, Law interpretation shall take place. (Garner, 2009: 894)

ACIA 2009: ASEAN Comprehensive Investment Agreement (ACIA) 2009 was officially signed in Cha-am, Thailand on 26th February 2009 and entered into force on 29th March 2012 after Lao PDR, which is the last party of its Instrument gave the ratification on 24th February 2012. (ASEAN, 2017b) At the Cha-am Summit, the Heads of States and Government of ASEAN agreed to adopt and replaced the previous ASEAN instruments such as Agreement on Promotion and Protection of Investments (IGA) 1987, Protocol to Amend the IGA 1996, Framework Agreement on the ASEAN Investment Area (AIA) 1998, and Protocol to Amend the AIA 2001. (Invest in ASEAN, 2017a) In order to achieve the objectives of AEC by 2015, ACIA 2009 is a legal instrument which was designed to support a free, open, transparent and integrated investment regime in ASEAN through four pillars of Investment such as Liberalization, Protection, Promotion, and Facilitation. ACIA 2009 basically consisted of 49 Articles which are classified three sections such as Section A, B and C. (ASEAN, 2017b; Invest in ASEAN, 2017b)

Section A consists of 27 Articles such as Article 1 Objective, Article 2 Guiding Principles, Article 3 Scope of Application, Article 4 Definitions, Article 5 National Treatment, Article 6 Most-Favored-Nation Treatment, Article 7 Prohibition of Performance Requirements, Article 8 Senior Management and Board of Directors, Article 9 Reservations, Article 10 Modification of Commitments, Article 11 Treatment of Investment, Article 12 Compensation in Cases of Strife, Article 13 Transfers, Article 14 Expropriation and Compensation, Article 15 Subrogation, Article 16 Measures to Safeguard the Balance-of-Payments, Article 17 General Exceptions, Article 18 Security Exceptions, Article 19 Denial of Benefits, Article 20 Special Formalities and Disclosure of Information, Article 21 Transparency, Article 22 Entry, Temporary Stay and Work of Investors and Key Personnel, Article 23 Special and Differential Treatment for the Newer ASEAN Member States, Article 24 Promotion of Investment, Article 25 Facilitation of Investment, Article 26 Enhancing ASEAN Integration, Article 27 Disputes Between or Among Member States.

Section B proposes of 14 Articles about the Investment Dispute between an Investor and a member State such as Article 28 Definitions, Article 29 Scope of Coverage, Article 30 Conciliation, Article 31 Consultations, Article 32 Claim by an Investor of a Member State, Article 33 Submission of a Claim, Article 34 Conditions and Limitations on Submission of a Claim, Article 35 Selection of Arbitrators, Article 36 Conduct of the Arbitration, Article 37 Consolidation, Article 38 Expert Reports, Article 39 Transparency of Arbitral Proceedings, Article 40 Governing Law, Article 41 Awards.

Section C provides of 7 Articles such as Article 42 Institutional Arrangements, Article 43 Consultations by Member States, Article 44 Relation to Other Agreements, Article 45 Annexes, Schedule and Future Instruments, Article 46 Amendments, Article 47 Transitional Arrangements

Relating to the ASEAN IGA and the AIA Agreement, Article 48 Entry into Force, Article 49 Depositary.

Then in 2014, ACIA 2009 was amended by Protocol to Amend the ASEAN Comprehensive Investment Agreement (“the Protocol”). There are some slightly differences between the old investment instruments in the IGA, AIA, and ACIA. The Protocol replaced the IGA and AIA as well as strengthens the investment agreement in various ways such as Article 9 about the reservation of ACIA, Article 10 about the modification of ACIA, Article 42 about Institutional Arrangements of ACIA, and attached Annex 3 about Procedures for Amendment or Modification of Reservations to ACIA. Moreover it activated all modifications and reservations which made and endorsed by AIA Council at the AEM-15th AIA Council on 27th August 2012 in Cambodia. (Invest in ASEAN, 2017c) Then in September 2017, Second Protocol to Amend the ASEAN Comprehensive Investment Agreement (“the Second Protocol”) was released to amend Article 1 about Definition of Natural Person and Article 7 about Prohibition of Performance Requirements. (Invest in ASEAN, 2017d) Lastly in December 2017, Third Protocol to Amend the ASEAN Comprehensive Investment Agreement (“the Third Protocol”) was released to amend paragraph 8 of ACIA Headnote for the list of Reservations of Thailand about the Foreign Business Act B.E.2542 (1999). (Invest in ASEAN, 2017e) However the Second Protocol and Third Protocol are not yet entered into force.

Interpretation of ACIA 2009: The interpretation provision of ACIA 2009 is explained under Article 40(2) as “The tribunal shall, on its own account or at the request of a disputing party, request a joint interpretation of any provision of this Agreement that is in issue in a dispute. The Member States shall submit in writing any joint decision declaring their interpretation to the tribunal within 60 days of the delivery of the request. Without prejudice to paragraph 3, if the Member States fail to issue such a decision within 60 days, any interpretation submitted by a Member State shall be forwarded to the disputing parties and the tribunal, which shall decide the issue on its own account” as well as Article 40(3) described as “A joint decision of the Member States, declaring their interpretation of a provision of this Agreement shall be binding on a tribunal, and any decision or award issued by a tribunal must be consistent with that joint decision.”. (Invest in ASEAN, 2017b) Both Articles 40(2) and 40(3) as explained above, it can be seen that ACIA 2009 designs the process of discovering the intended signification of the language used in ACIA by the establishment of tribunal to make a joint interpretation of any provision of ACIA which is the dispute issue. The Member States have the limitation of 60 days to submit their joint interpretation to the tribunal. Importantly this joint decision shall be binding on the tribunal and any decision issued by the tribunal must be consistent with its joint decision.

Definition of Dispute: Bryan A. Garner, the editor of Black Law dictionary defines “Dispute” as a conflict or controversy, especially one that has given rise to a particular lawsuit. (Garner, 2009: 540)

Disputes concerning on the Interpretation of ACIA 2009: Due to the given definitions of the law interpretation and the dispute by Bryan A. Garner, it could interpret the dispute concerning on the interpretation of ACIA 2009 as a conflict or controversy related to the meaning of the language used in ACIA 2009.

EDSM 2004: The ASEAN Protocol on Enhanced Dispute Settlement Mechanism (EDSM) was on the DSMs of the World Trade Organization (WTO). (Naldi, 2014: 28) Without any doubts, the ASEAN’s economic integration is now the keystone of ASEAN. (ASEANstats, 2017a) The creation of AEC cannot be established without the implementation of as effective DSMs to solve

the disputes or disagreement among ASEAN Member States. (Das & Menon & Serino & Shreatha, 2013: 382-410) As a result, this was a reason why DSMs related to economic was concerned as an early priority of ASEAN.

The development of ASEAN DSM on Economic dispute was first time launched by the Framework Agreement on Enhancing ASEAN Economic Cooperation signed in Singapore on 28th January 1992, then it was officially amended three times. First time was amended by the Protocol to Amend the Framework Agreement on Enhancing ASEAN Economic Cooperation signed in Bangkok on 15th December 1995. Second amendment was superseded by the Protocol on Dispute Settlement Mechanism signed in Manila on 20th November 1996 which is called as EDSM 1996. Third amendment was superseded on 29th November 2004 by the ASEAN Protocol on Enhanced Dispute Settlement Mechanism, which is called EDSM 2004. (ASEAN, 2017c) The EDSM 2004 is an up-to-date ASEAN DSMs on economic dispute.

The EDSM 2004 essentially consists of 21 Articles and 2 Appendixes such as Article 1 Coverage and Application, Article 2 Administration, Article 3 Consultations, Article 4 Good Offices, Conciliation or Mediation, Article 5 Establishment of Panels, Article 6 Terms of Reference of Panels, Article 7 Function of Panel, Article 8 Panel Procedures, Deliberations and Findings, Article 9 Treatment of Panel Report, Article 10 Procedures for Multiple Complainants, Article 11 Third Parties, Article 12 Appellate Review, Article 13 Communications with the Panel or Appellate Body, Article 14 Panel and Appellate Body Recommendations, Article 15 Surveillance or Implementation or Findings and Recommendations, Article 16 Compensation and the Suspension of Concessions, Article 17 ASEAN DSM Fund, Article 18 Maximum Time-frame, Article 19 Responsibilities of the Secretariat, Article 20 Venue for Proceedings and Article 21 Final Provisions. Appendix I Covered Agreement and Appendix II Working Procedures of the Panel. (ASEAN, 2017c) In conclusion All ASEAN economic agreements are listed in appendix one of EDSM 2004. The key of EDSM 2004 includes a panel and appellate body. The establishment of a panel is the most important point of EDSM 2004. The complainant party can bring the case to the SEOM and asks for the establishment of a panel. The role of panel under EDSM 2004 is to investigate about the nature of disputes between the parties and assists the SEOM for a decision. Whenever the parties is not accept the panel report, the parties can appeal to an Appellate Body which established by the ASEAN Economic Minister (AEM). The procedure of a panel and Appellate Body requires to finish within 60 days of its establishment whenever a panel report has not been accepted by the parties.

How to apply EDSM 2004 to Disputes concerning on interpretation of ACIA 2009

An overview of applying EDSM 2004 to Disputes in general

As mentioned above the applicate of EDSM 2004 is basically influenced by a DSM model of WTO DSU. (Naldi, 2014: 28) ASEAN and WTO have many similar points such as consultation, the panel established by Dispute Settlement Body (DSB), Appellate body, and Implementation provision. The author considers the dispute settlement mechanisms under EDSM 2004 into three stages such as (A) the covered agreement, (B) dispute settlement procedure, and (C) the rights to recourse to ASEAN Summit in case of non-compliance.

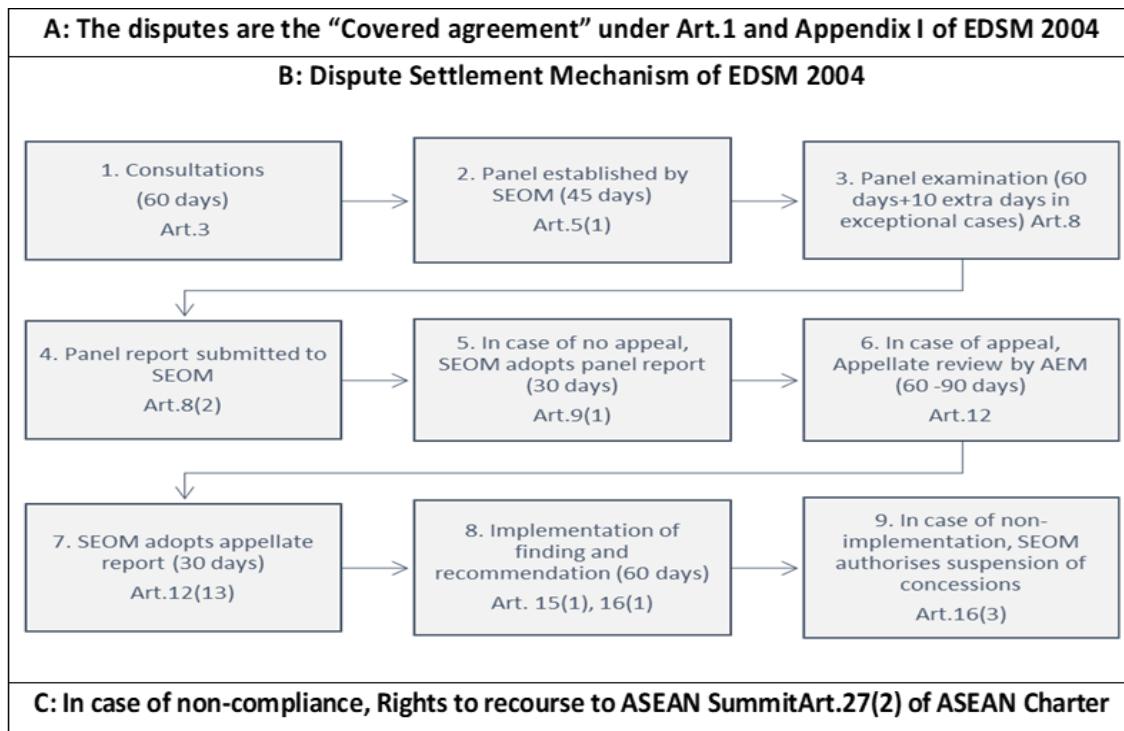


Figure 1 The dispute settlement mechanism under EDSM 2004

As shown on Figure 1 at stage A, according to Appendix I and Article 1 of EDSM 2004, the dispute which can apply EDSM 2004 must firstly be considered as a dispute under the “Covered agreement”. (ASEAN, 2017c) The 46 protocols of covered agreements are listed in Appendix I below;

1. Agreement on ASEAN Preferential Trading Arrangements 1977.
2. Agreement on the ASEAN Food Security Reserve 1979.
3. Basic Agreement on ASEAN Industrial Projects 1980.
4. Supplementary Agreement of the Basic Agreement on ASEAN Industrial Projects ASEAN Urea Project (Indonesia) 1980.
5. Basic Agreement on ASEAN Industrial Joint Ventures 1983.
6. Agreement on ASEAN Energy Cooperation 1986.
7. ASEAN Petroleum Security Agreement 1986.
8. Agreement on the Preferential Shortlisting of ASEAN Contractors 1986.
9. Supplementary Agreement to the Basic Agreement on ASEAN Industrial Joint Ventures 1987.
10. Protocol on Improvements on Extensions of Tariff Preferences under the ASEAN Preferential Trading Arrangement 1987.
11. Revised Basic Agreement on ASEAN Industrial Joint Ventures 1987.
12. Agreement Among the Government of Brunei Darussalam, the Republic of Indonesia, Malaysia, the Republic of the Philippines, the Republic of Singapore, and the Kingdom of Thailand for the Promotion and Protection of Investments 1987.
13. Protocol to Amend the Revised Basic Agreement on ASEAN Industrial Joint Ventures 1991.
14. Framework Agreement on Enhancing ASEAN Economic Cooperation 1992.
15. Agreement on the Common Effective Preferential Tariff Scheme for the ASEAN Free Trade Area 1992.

16. Second Protocol to Amend the Revised Basic Agreement on ASEAN Industrial Joint Ventures 1992.
17. Third Protocol to Amend the Revised Basic Agreement on ASEAN Industrial Joint Ventures 1995.
18. Protocol to Amend the Agreement on the Common Effective Preferential Tariff (CEPT) Scheme for the ASEAN Free Trade Area (AFTA) 1995.
19. Protocol to Amend the Agreement on ASEAN Preferential Trading Arrangements 1995.
20. ASEAN Framework Agreement on Services 1995.
21. ASEAN Framework Agreement on Intellectual Property Cooperation 1995.
22. Protocol Amending the Agreement on ASEAN Energy Cooperation 1995.
23. Basic Agreement on ASEAN Industrial Cooperation 1996.
24. Protocol to Amend the Agreement Among the Government of Brunei Darussalam, the Republic of Indonesia, Malaysia, the Republic of the Philippines, the Republic of Singapore, and the Kingdom of Thailand for the Promotion and Protection of Investments 1996.
25. ASEAN Agreement on Customs 1997.
26. Protocol Amending the Agreement on the ASEAN Energy Cooperation 1997.
27. 2nd Protocol to Amend the Agreement on the ASEAN Food Security Reserve 1997.
28. Protocol to Implement the Initial Package of Commitments under the ASEAN Framework Agreement on Services 1997.
29. Agreement on the Establishment of the ASEAN Center for Energy 1998.
30. Protocol on Notification Procedures 1998.
31. Framework Agreement on the ASEAN Investment Area 1998.
32. ASEAN Framework Agreement on Mutual Recognition Arrangement (MRAs) 1998.
33. Protocol to Implement the Second Package of Commitments under the ASEAN Framework Agreement on Services 1998.
34. ASEAN Framework Agreement on the Facilitation of Goods in Transit 1998.
35. Protocol on the Special Arrangement for Sensitive and Highly Sensitive Products 1999.
36. Protocol regarding the Implementation of the CEPT Scheme Temporary Exclusion List 2000.
37. E-ASEAN Framework Agreement 2000.
38. Protocol 5: ASEAN Scheme of Compulsory Motor Vehicle Insurance 2001.
39. Protocol to Amend the Framework Agreement on the ASEAN Investment Area 2001.
40. Protocol to Implement the Third Package of Commitments under the ASEAN Framework Agreement Services 2001.
41. ASEAN Sectoral Mutual Recognition Arrangement for Electrical and Electronic Equipment 2002.
42. Protocol to Implement the Second Package of Commitments on Financial Services under the ASEAN Framework Agreements on Services 2002.
43. Protocol to Amend the Agreement the Common Effective Preferential Tariff (CEPT) Scheme for the ASEAN Free Trade Area (AFTA) for the Elimination of Import Duties 2003.
44. Protocol Governing the Implementation of the ASEAN Harmonized Tariff Nomenclature 2003.
45. Agreement on the ASEAN Harmonized Cosmetic Regulatory Scheme 2003.
46. Protocol to Amend the Protocol Governing the Implementation of the ASEAN Harmonised Tariff Nomenclature 2004.

Moreover Article 1(1) of EDSM 2004 extends to cover up the disputes related to Future Economic Agreements. In order to consider Economic Agreement as the Future Economic

Agreement under this article, the unclear and still-in-doubt on what grounds of law could refer to and what Future Economic Agreement are covered by EDSM 2004. Hence in this case the law interpretation is needed. (Limsiritong, 2016c: 140-142)

At stage 2 when there are any disputes related to the covered agreements under Article 1(1) and Appendix I, the party can make a request for consultations to SEOM in writing. Then the other party needs to reply to the request within 10 days after the date of receipt and shall enter consultations within 30 days after the date of receipt of the request. When the consultation fails for whatever reasons, for example, the other party does not reply within 10 days after the date of receipt of the request, or does not enter into consultations within a period of 30 days after the date of receipt of the request, or the consultations fail to settle a dispute within 60 days after the date of receipt of the request, the dispute will be raised to SEOM to establish a panel unless SEOM decides by consensus not to establish its panel.

SEOM should decide to establish a panel within 45 days after the date of receipt of the request. Interestingly, a non-reply shall be automatically considered as agreement to the request for the establishment of a panel because it is to avoid the tactic of keeping silent.

After the establishment of a panel, a panel will examine the facts of case, the applicability of and conformity with the selections of the covered agreements, findings, and recommendations in relation to the case, then submits a report and recommendations to SEOM within 60 days after the date of establishment. Panel discussions shall be confidential, and the panel's report shall be drafted without the presence of the parties with the provided information and the statements.

After received the panel report, SEOM must adopt its report within 30 days after the date of submission unless SEOM decides by consensus not to adopt the report. If the party does not agree with the panel report, the party can appeal a panel report to an Appellate Body which is established by ASEAN Economic Ministers (AEM). However an appeal is limited to issues of law which are covered only in the panel report and legal interpretations.

The Appellate Body should uphold, modify or reverse the legal findings and conclusions of the panel within 60 days from the date of appeal, then submit its report to SEOM to adopt within 30 days. But as an optional at any time, the good offices, conciliation or mediation by Secretary-General of ASEAN with the view to assisting Member States to settle a dispute will be purposed to the party.

When the panel report or Appellate Body report is released, the parties to the dispute are obliged to accept the report unconditionally and adopt these reports within 60 days from the date of SEOM's adoption.

When the findings or recommendations are not implemented within 60 days from the date of SEOM's adoption, the measures of compensation and the suspension of concession will be applied as a sanction. If there is no satisfactory compensation within 20 days after the date of expiry of the period of 60 days, the party may request authorization from SEOM to suspend the application to the Member State concerned of concessions or other obligations under the covered agreements. However the compensation and suspension of concessions are temporary measure. Moreover EDSM 2004 also creates a State-to-State compulsory arbitration and enforcement. As can be seen, when SEOM decided by the consensus not to do so on the function provides under Appendix II of EDSM2004. This means unless ASEAN Member States all agree by consensus, compulsory and binding arbitration will take place as automatically apply.

At stage 3 when the offending party remains ignoring its compliance, this issue will be considered as a non-compliance with the findings, recommendations or decisions resulting from the ASEAN DSMs and referred to ASEAN Summit for a decision due to Article 27(2) of ASEAN charter.

In conclusion EDSM 2004 is designed to establish a panel and supports SEOM to have a decision. The good points of EDSM 2004 are (1) the legal binding of the reports, (2) the implementation of report is like the process of WTO DSU, and (3) it places the issue of implementation of findings and recommendations on every SEOM agendas till it has been solved.

How to apply EDSM 2004 to ACIA 2009 in case of law interpretation under Article 27

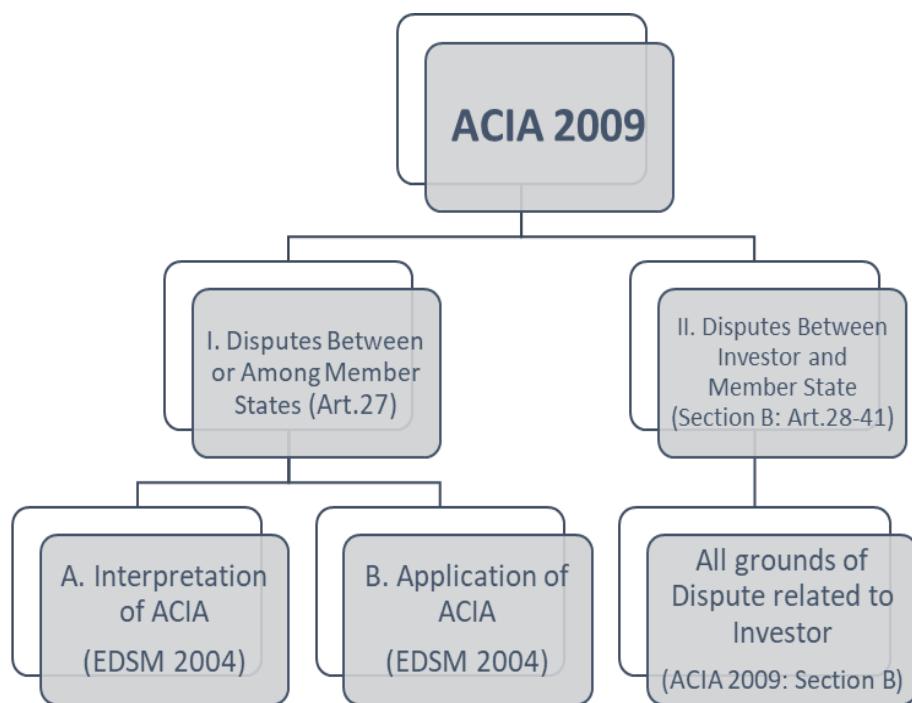


Figure 2 Dispute Settlement Mechanisms (DSMs) under ACIA 2009

As shown on Figure 1, ACIA 2009 is not on the list of covered agreement under Appendix I of EDSM 2004 and is also in doubt to define itself as the future economic agreement under Article 1(1) of EDSM 2004. (Limsiritong, 2016c: 140-142) However as shown on Figure 2, ACIA 2009 clearly determined to apply EDSM 2004 to settle the disputes of ACIA 2009 under Article 27 which stipulated “The ASEAN Protocol on Enhanced Dispute Settlement Mechanism signed in Vientiane, Lao PDR on 29 November 2004, as amended, shall apply to the settlement of disputes concerning the interpretation or application of this Agreement.”. This would mean that EDSM 2004 will be applied only in case of the disputes between or among Member States and there is limitation to the only two types of ACIA disputes such as (1) the disputes related to interpretation of ACIA 2009, and (2) the dispute related to the application of ACIA 2009. For the Investor-to-State Dispute Settlement (ISDS), it will be applied by section B (Article 28-41) of ACIA 2009 which is not under the scope of this article.

Problem of Applying EDSM 2004 in case of Interpretation of ACIA 2009

ILLUSTRATIVE ASEAN ORGANIZATIONAL STRUCTURE



Figure 3 ASEAN Organization Structure

Source: ASEAN Today (2017)

As shown on Figure 3, the key in-charge authority to play role under EDSM 2004 is SEOM. SEOM is the meeting of senior officials from economic ministries as well as AEM is the decision-making body for economic matters. According to Article 10(2) of ASEAN Charter stated that “Each ASEAN Sectoral Ministerial Body may have under its purview the relevant senior officials and subsidiary bodies to undertake its functions as contained in Annex 1...” (ASEAN, 2016) This would mean that SEOM as a subsidiary body is supervised under AEM. AEM is also the other subsidiary body of ASEAN Sectoral Ministerial Bodies in AEC. With the fact that ASEAN is the top-down organization, in this sense ASEAN Summit is the supreme authority of its organization and all of ASEAN Sectoral Ministerial Bodies including AEM and SEOM are the non-independent bodies with the limitation of decision-making power under ASEAN Summit. (Limsiritong, 2016b: 20-22, 2017: 76-77) The ASEAN organization structure is not designed with the separation of power to do check and balance concept. So this is also hard for SEOM, whose is a subsidiary body of ASEAN, to make any decision against the party, whose is one of ASEAN Summit. This situation is similar to the case of ASEAN Charter interpretation by ASEAN Secretariat under Article 51 of ASEAN Charter which is also impossible for ASEAN Secretariat to interpret ASEAN Charter against ASEAN Summit. (Limsiritong, 2016a: 10-11)

Moreover applying the decision making mode of ASEAN in this case under Article 27(2) of ASEAN Charter could make the deadlock situation. (Limsiritong, 2016b: 22-23) Whenever the offending party which is also one of ASEAN Member State rejects to comply the reports and recommendations of AEM, any ASEAN Member State which affected by this non-compliance

can use the right to recourse the matter to ASEAN Summit for a decision under Article 27(2) of ASEAN Charter. Hence in case of non-compliance of findings and recommendations resulted from EDSM 2004, it finally refers to ASEAN Summit for decision making under Article 20 of ASEAN Charter.

Due to Article 20(1) of ASEAN Charter, ASEAN Summit shall make all decisions for relating ASEAN key issues on a basic principle of consultation with the method of positive consensus which requires all ASEAN Member States in ASEAN Summit to agree with decision. The consensus decision making mode of ASEAN Summit is a deadlock of ASEAN DSMs because it is conservatively based on positive consensus which required the voting of all ASEAN Member States, included the ASEAN Member States who are in conflict. (Limsiritong, 2016b: 22-23)

According to Article 22, ASEAN Summit is a political body whose decision-making system is based on ASEAN way which is consultation and positive consensus. (Limsiritong, 2018: 10-15) In practice ASEAN Summit seeks consensus with all ASEAN Member States. This policy of seeking consensus gives equal voting rights to ASEAN Member States without regards to the size of a country's economy, land, population or any other factors. Later in a political sense it creates a well-balanced system concerned primarily with the balance of powers between all ASEAN Member States. (Limsiritong, 2017: 75-77, Lin, 2010; Tan, 2008; Severino, 2006)

Hence applying the consensus model for non-compliance under Article 27, it could create a big conflict of interest in case the dispute is submitted to ASEAN Summit as it is hardly conceivable that ASEAN Members States who are also a party to the dispute will give consensus and vote against themselves. (Phan, 2013; Sim, 2008)

Conclusion and Recommendation

To summarize, EDSM 2004 is developed from WTO DSU to improve ASEAN DSMs in case of ACIA 2009. Even EDSM 2004 is designed to be a legal binding procedure, the applying EDSM 2004 in case of law interpretation of ACIA 2009 creates difficulty. Moreover the criticisms on ASEAN organization structure and ASEAN decision making perspective are still in question of effectiveness in practical way. Because these factors are influenced and designed by giving the supreme power to ASEAN Summit based on ASEAN way concept. (Limsiritong, 2018: 10-15) Hence the empowerment to SEOM under EDSM 2004 in case of ACIA 2009 is useless in practice because SEOM cannot make any decision against the party whose takes place in ASEAN Summit.

For recommendations in order to support and expand the investment regime in ASEAN, the amendment of EDSM 2004 is urgently needed. Even the Second and Third Protocols are just signed by ASEAN Member States in 2017, but these protocols did not mention an issues of ASEAN organization structure and ASEAN decision making affected to application of EDSM 2004 in case of ACIA 2009 at all. Hence the new amendment should be more focused on giving the free judgment and empower the SEOMs to make some structural changes such as a free judgement power to act as a full judicial function which is not related to the quasi-judicial function against the parties whom are members of ASEAN Summit.

New Challenge in future

In the present, there are now a very high value of investment between and among ASEAN Member States. (ASEANstats, 2017b; ASEAN Secretariat, 2017: 3) Without any doubts in order to claim someone as a rule-based international organization as ASEAN did, the applying ASEAN DSMs in reality is mostly needed. Because no one knows how long ASEAN can avoid talk and sweep its problem under the carpet. If even EDSM 2004, which supposed to be the

best DSMs of ASEAN is in doubt of law interpretation and could not be enforced, then this would lead a good question to us how ASEAN Member States need to rely on EDSM 2004. And this finally effects to the trustworthiness of ASEAN itself as the successful intergovernmental organization in Southeast Asia.

References

ASEAN. 2016. **ASEAN Charter**. Retrieved from www.asean.org/wp-content/uploads/2012/05/11.-October-2015-The-ASEAN-Charter-18th-Reprint-Amended-updated-on-05_-April-2016-IJP.pdf.

_____. 2017a. **ASEAN Legal Instruments**. Retrieved from agreement.asean.org/.

_____. 2017b. **ASEAN Comprehensive Investment Agreement (ACIA) Enters Into Force Creating a Stable and Predictable Business Investment Environment**. Retrieved from asean.org/asean-comprehensive-investment-agreement-acia-enters-into-force-creating-a-stable-and-predictable-business-investment-environment/.

_____. 2017c. **ASEAN Protocol on Enhanced Dispute Settlement Mechanism**. Retrieved from agreement.asean.org/media/download/20141217102933.pdf.

ASEANstats. 2017a. **ASEAN Economic Progress in 50 years**. Retrieved from www.aseanstats.org/publication/asean-economic-progress-in-50-years/?portfolioCats=64.

ASEANstats. 2017b. **ASEAN Inflow FDI in 50 years**. Retrieved from www.aseanstats.org/publication/asean-inflow-fdi-in-50-years/?portfolioCats=64.

ASEAN Today. 2017. **Illustrative ASEAN Organizational**. Retrieved from faizal-asean.blogspot.com/2007/09/illustrative-asean-organizational.html.

ASEAN Secretariat. 2017. **ASEAN Investment Report 2017**. Retrieved from asean.org/storage/2017/11/ASEAN-Investment-Report-2017.pdf.

Das, S., Menon, J., Serino, R., & Shreatha, O. 2013. **ASEAN Economic Community: Working in progress**. Singapore: ISEAS Publishing.

Garner, B. 2009. **Black's Law Dictionary**. 9th ed. Minnesota: Thomson Reuters.

Invest in ASEAN. 2017a. **ASEAN Comprehensive Investment Agreement**. Retrieved from investasean.asean.org/index.php/page/view/asean-free-trade-area-agreements/view/757/newsid/871/asean-comprehensive-investment-agreement.html.

Invest in ASEAN. 2017b. **ACIA Main Text**. Retrieved from investasean.asean.org/files/upload/Doc%2005%20-%20ACIA.pdf.

Invest in ASEAN. 2017c. **Protocol to Amend the ACIA (Aug 2014)**. Retrieved from investasean.asean.org/files/upload/Inv%20-%20Protocol%20to%20Amend%20ACIA_2014.pdf.

Invest in ASEAN. 2017d. **Second Protocol to Amend the ACIA (Sep 2014)**. Retrieved from [investasean.asean.org/files/upload/2ndACIA\(1\).pdf](http://investasean.asean.org/files/upload/2ndACIA(1).pdf).

Invest in ASEAN. 2017e. **Third Protocol to Amend the ACIA (Dec 2014)**. Retrieved from [investasean.asean.org/files/upload/3rd%20Protocol%20to%20Amend%20the%20ACIA%20\(Signed,%202020%20Dec%202017\)\(1\).pdf](http://investasean.asean.org/files/upload/3rd%20Protocol%20to%20Amend%20the%20ACIA%20(Signed,%202020%20Dec%202017)(1).pdf).

Limsiritong, N. 2016a. "How to Apply Protocol to the ASEAN Charter on Dispute Settlement Mechanism 2010 in Case of ASEAN Charter Interpretation." **ASEAN Political Science Review** 1 (1): 8-13.

Limsiritong, N. 2016b. "The Deadlock of ASEAN DSMs and Why ASEAN Cannot Unlock it." **RSU International Journal of College of Government** 3 (1): 18-25.

Limsiritong, N. 2016c. "The Problems of Law Interpretation under ASEAN Instruments and ASEAN Legal Instruments." **MFU Connexion Journal of Humanities and Social Sciences** 5 (2): 136-155.

Limsiritong, N. 2017. "Why ASEAN Fails to Play Role in the Rohingya Situation from the Perspective of ASEAN Charter." **ASEAN Political Science Review** 1 (2): 73-79.

Limsiritong, N. 2018. "How does the ASEAN Way exist under the ASEAN Charter?." in **Proceedings of the 2nd Asian Social Sciences and Business Research Conference**. Bangkok: Political Science Association of Kasetsart University, pp. 10-15.

Lin, C. 2010. "ASEAN Charter: Deeper Regional Integration under International Law?." **Chinese Journal of International Law** 9 (4): 821-837

Naldi, G. 2014. "The ASEAN Protocol on Dispute Settlement Mechanisms: An Appraisal" **Journal of International Dispute Settlement** 5 (1): 28.

Phan, H. 2013. **Towards a Rules-Based ASEAN: The Protocol to the ASEAN Charter on Dispute Settlement Mechanisms**. Pennsylvania: Pennsylvania State University.

Severino, R. 2006. **Southeast Asia in Search of an ASEAN Community: Insights from the Former ASEAN Secretary-General**. Singapore: Institute of Southeast Asian Studies.

Sim, E. 2008. "The ASEAN Charter: One of many steps towards an ASEAN Economic Community." **International Trade Law Regulation** 14 (6): 109-116.

Tan, E. 2008. "The ASEAN Charter as "Legs to Go Places": Ideational Norms and Pragmatic Legalism in Community Building in Southeast Asia." **Singapore Year Book of International Law** 12: 175.