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Dispute Settlement in ASEAN: Legal Procedural Issue to Access

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Abstract. The Association of Southeast Asian Nations (ASEAN) establishes the ASEAN dispute settlement mechanism since 1996, but it has never been used by any ASEAN member states. In ASEAN, all ASEAN member states are required to settle all disputes amicably through diplomatic consultation and negotiation before referral to quasi-judicial under the ASEAN dispute settlement. This approach provides more flexibility and delay settling of dispute such as trade issue under the ASEAN Trade in Goods Agreement (ATIGA). In addition, certain trade issue under the ATIGA is not subject to be complained to the WTO dispute settlement. Therefore, some ASEN member states have to deal with their problems intra ASEAN under the ASEAN legal frameworks.

Keywords. ASEAN Charter, Dispute Settlement, ASEAN Trade in Goods Agreement, Trade Restriction Measure, Lao PDR

1. Introduction

Nearly 30 years that the Association of Southeast Asian Nations (ASEAN) has established its dispute settlement for economic agreements, but it has never been invoked by any ASEAN member countries (Sim, 2020a). However, it does not mean there is no economic dispute among ASEAN member states such as under the ASEAN Trade in Goods Agreement (ATIGA). Similar to other regional trade agreements, ASEAN have adopted the ASEAN dispute settlement mechanism as a tool for its members to resort to in order to solve economic disputes including trade disputes arising among ASEAN member countries (Claude Chase, 2016; Koesrianti, 2017). ASEAN has reviewed its dispute settlement mechanism two times in 2004 and in 2019 (Secretariat, 2004; Secretariat, 2019).

In principle, when any dispute arises among ASEAN member states on certain ASEAN agreements, the ASEAN Charter explicitly requires ASEAN member states to settle all disputes through consultations and negotiations (Secretariat, 2008. art 22). Technically, after ASEAN member states have exhausted negotiation and consultation, they are not averse to use third-party dispute settlement mechanisms (Beckman, 2016: 77-78). Similarly, under ASEAN economic agreements such as the ATIGA, ASEAN member states are required to resolve issue of the implementation of this agreement through directly bilateral consultation (Secretariat,

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2019). ASEAN member states cannot recourse to any dispute settlement mechanism before diplomatic dispute resolution (Beckman, 2016: 77-78). Dispute settlement in ASEAN provides too many opportunities for delay (Byrley, 1990-1991: 328). Certainly, even though under the ASEAN Charter and the ATIGA, the ASEAN dispute settlement mechanism is available to use, it is not compulsory mechanism and ASEAN member states are not mandated to used it either (Secretariat, 2008, art 24.3; Secretariat, 2009, art 90).

In general, the governments of ASEAN member states basically have two choices to resolve their disputes by informal consulations or resort to third-party adjudication under the ASEAN dispute settlement mechanism. In principle, based on international law principle, states have the right to decide whether or not and how to solve their disputes by informal or formal means. More precisely, states have the right to choose dispute settlement methods (Bilder, 1982; Kohen, 2013; Petersmann, 2006; Romano, 2007). Thus, why since 2010 the government of Lao PDR does not request consultations under the ASEAN disptue settlement until 2023?

In principle, ASEAN does not prevent its members to use non-ASEAN legal instrument such as the WTO dispute settlement to resolve trade disputes. In practice, there are some ASEAN member states brought cases against each other before the WTO DSB such as a dispute between Thailand and the Philippines in 2008 concerning customs valuation (WT/DS371/46, 2022), and Indinesia and Vietnam on Safegard on Certain Iron or Steel Product (Koesrianti, 2017: 26). On the one hand, certain trade issues could be reolved intra-ASEAN through diplomatic dispute resolution by consulations (Tan, 2004; Sim, 2014b). On the other hand, several trade issue under free trade agreement can not be resolved through diplomatic consultation and or even can be raised to the WTO dispute settlement either such as an issue of trade restriction measures under the ATIGA imposed by the government of Thailand. Trade iissue under the ATIGA are not under jurisdiction of the WTO dispute settlement. Even though many GATT/WTO rules are incorporated by reference to the ATIGA provisions, it does not mean all trade issues can be filed to the WTO dispute settlement since Trade in goods under the ATIGA is one type of free trade agreement. Regional tariff reduction measures under the ATIGA are silent under the WTO. They are exceptions in GATT Article XXIV:5 states that "the provisions of this Agreement shall not prevent, as between the territories of Members, the formation of a customs union or a free-trade area" (WTO, 1994, art.XXIV:5; Abbott, Autumn 1992: 1-17). Since 2010, the government of Laos has attempted to solve the problem with the government of Thailand, but the dispute has not been solved yet until today (Somsack, 2024).

This research applies qualitative methods to analyse dispute settlement in ASEAN particularly for ASEAN economic agreements. This study reviews dispute resolution in ASEAN. The paper uses the ASEAN Trade in Goods Agreement as an example to demonstrate a legal procedural issue of dispute settlement in ASEAN economic agreements. Even ASEAN has established and improved its dispute settlement, ASEAN member states still have difficulties to access. What is legal problem of dispute resolution in ASEAN which prevents ASEAN member states to access to the ASEAN dispute settlement? Additionally, the author also uses experience of Lao PDR to explore dispute resolution in ASEAN and to provide a possible solution for improvement. This Article argues that in order to improve disptue resolution in ASEAN more effectively and sufficiently if ASEAN provide more flexibility on dispute settlement methods.

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2. Dispute Settlement in ASEAN

2.1 Overview

Historically, it took ASEAN nearly ten years to agree on settlement of disputes in ASEAN (Davidson, 2003a). ASEAN system has two institutionalized methods of dispute resolution. They are different in their nature and their function. First is dispute resolution under the Declaration of ASEAN Concord and the Treaty of Amity and Cooperation (Secretariat, 1976). Second is dispute resolution under the framework of AFTA and related agreements (Henry, November 2007; Severino, 2008; Woon, 2013). In economic cooperation area, the Preferential Trading Arrangements (PTA) was adopted in order to extend trade preferences among ASEAN member states in accordance with the provisions of the PTA and the rules, regulations and decisions agreed within the framework (Davidson, 2003: 55-57). The PTA provides settlement of dispute in the Article 14. In pursuant to Chapter VII, Article 14 of the PTA, Contracting State (the parties to a dispute) shall consult any matter affecting the implementation of the PTA (Secretariat, 1977, art 14.1).

In 1992, when ASEAN started its free trade area project-the ASEAN Free Trade Area (AFTA), similar to the PTA, ASEAN did not establish the ASEAN dispute settlement for ASEAN economic agreement (Secretariat, 1992). For example in pursuant to Article 9 of the AFTA, the Parties of the AFTA shall settle any differences between them concerning the interpretation or application of the AFTA or any arrangements arising therefrom amicably and whenever necessary an appropriate body shall be designed for the settling of disputes (Secretariat, 1992, art 9). Certainly, the Common Effective Preferential Tariff Scheme (CEPT) for the AFTA also provides similar mechanism to the AFTA. Under the provisions of Article 8 of the CEPT, "[a]ny differences between the Member States concerning the interpretation or application of this Agreement shall, as far as possible, be settled amicably between the parties. If such differences cannot be settled amicably, it shall be submitted to the Council referred to in Article 7 of this Agreement, and if necessary, the AEM" (Secretariat, 1992, art 8.3). The provision of Article 8(3) of the CEPT is similar to the provision of Article 9 of the AFTA which provides only consultation and emphasizes amicably dispute resolution.

In practice, ASEAN member states resolved their disputes arose under the AFTA-CEPT through diplomatic consultations and negotiations. The parties to the disputes did not request or refer to any ASEAN institutions which were responsible as supervisor of settlement of disputes (Tan, 2004; Sim, 2014b; Severino, 2008). Technically, the settlement of disputes mechanism under the PTA, and the AFTA-CEPT may provide possibilities of political intervention on dispute resolution procedures (Kwok, 2023: 96-97). Additionally, settlement of disputes under the CEPT by a political body such as the Council is not the best way resolving a legal matter. Ideally, judicial or arbitral settlement should be objective. It should be free from political influences (Panganiban, 1993:8).

Similar to other regional free trade agreements, later on ASEAN established dispute settlement mechanism for economic agreements. ASEAN first established the ASEAN dispute settlement mechanism in 1996 (ADSM 1996). The ADSM 1996 is patterned after the WTO Dispute Settlement Understanding (WTO DSU). It applies to all past and future ASEAN economic agreements, including the CEPT Agreement. The development of the dispute settlement mechanism in ASEAN indicates the evolving legal framework in ASEAN. Although the ASEAN mechanism is less legalistic in nature comparing to the WTO system, the establishment of the ASEAN DSM 1996 is a testament to the growing legalism in the field of international economic cooperation and is a promising development towards a more transparent approach to dispute settlement in the region (Davidson, 2004b).

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Nevertheless, in 2003, when ASEAN member states vowed to build an ASEAN Economic Community (Beckman, 2016: 67), ASEAN member states committed themselves to improve an existing ASEAN Dispute Settlement Mechanisms ensuring expeditious and legally binding resolution of any economic disputes (ASEAN Concord II, 2003, sec B1). ASEAN member states agreed to improve the ASEAN DSM 1996 by adopted the ASEAN Protocol on Enhanced Dispute Settlement Mechanism 2004 (ADSM 2004) (Secretariat, 2004). The ADSM 2004 is patterned in most respects after the WTO DSU. ASEAN member states expected that the ASEAN DSM 2004 would address the criticisms of the ADSM 1996 for lacking specific complaint procedures and concrete mechanisms for compensation (Deinla, 2017: 142). The ADSM 2004 demonstrates that ASEAN gradual acceptant rules-based economic integration by crafting a dispute settlement mechanism in 2004 (Leviter, 2010). The ADSM 2004 sought to provide a rules-based system to resolve disputes under ASEAN economic agreements (Beckman, 2016: 67).

Interestingly, in 2019, ASEAN has reviewed the ADSM 2004 by adopting the ASEAN Protocol on Enhanced Dispute Settlement Mechanism 2019 (ADSM 2019) (Secretariat, 2019). ASEAN establishes its dispute settlement as a tool for its members to resort in order to solve economic disputes arising among ASEAN member countries (Sim, 2020a: 280).

ASEAN is similar to other regional trade agreement which has formal legal mechanism for dispute settlement between the parties (Son, 2008: 113). Technically, the ASEAN dispute settlement system is a centralized system. The purpose of adopting of the ADSM 2019 is to correct the inconsistencies and deficience in the ASEAN dispute settlement mechanism under the ADSM 2004 (Secretariat, 2004). The ADSM 2019 enhances the ADSM 2004 by eliminating structural problems such as impractical timelines and by bolstering previsouly underdeveloped systems such as appellate procedures. The ADSM 2019 also creates panels and rules of conduct for panelists which will help give the ADSM 2019 more credibility than its predecessor (Sim, 2020a: 283). The ADSM 2019 is a government-to-government dispute settlement mechanism. The ADSM 2019 provides a means for resolving disputes among ASEAN member states over the interpretation and application of ASEAN economic agreements (Secretariat, 2019).

2.2 Principle of Dispute Settlement in ASEAN

ASEAN improved its legal and institutional framework by adopting the ASEAN Charter (Woon, 2015: 66). According to the provisions of Chapter VIII of the ASEAN Charter concerning settlement of disputes, ASEAN members are provided dispute resolution methods (Secretariat, 2008, Chapter VIII). The ASEAN Charter provides general principles of dispute settlement in Article 22 of the ASEAN Charter as defined as follows:

General Principles:

1. Member States shall endeavor to resolve peacefully all disputes in a timely manner through dialogue, consultation and negotiation.
2. ASEAN shall maintain and establish dispute settlement mechanisms in all fields of ASEAN cooperation (Secretariat, 2008: art 22).

The provisions above reflect the ASEAN principle of cooperation the „ASEAN Way.“ One of primary components of the ASEAN Way is that a diplomatic strategy based on consultation and consensus. Diplomatic officials initially engage in informal discussions to later facilitate a consensus-based decision at official meetings. This process enables ASEAN member countries determining areas of agreement. It also compartmentalizes contentious issues. Thus, that disputes do not delay entire agreements (Leviter, 2010: 167).

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Notably, for special agreements such as economic agreements, in pursuant to Article 24 of the ASEAN Charter, ASEAN member states are provided a particular dispute settlement mechanism. The provisions of the Article 24 of the ASEAN Charter provide that:

1. Dispute relating to specific ASEAN instruments shall be settled through the mechanisms and procedures provided for in such instruments.
2. 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.
3. Where not otherwise specifically provided, disputes which concern the interpretation or application of ASEAN economic agreements shall be settled in accordance with the ASEAN Protocol on Enhanced Dispute Settlement Mechanism (Secretariat, 2008, art 24).

In general, the ASEAN Charter plays a significant role as the primary framework document foundational of the ASEAN Community (Woon, 2015: 86). In principle, the ASEAN Charter neither does not specifies specific dispute resolution modes using to resolve trade disputes intra-ASEAN nor allow ASEAN member states to choose other modes or skip modes that the ASEAN Charter defined. Certainly, ASEAN member states must employ dispute resolution modes under the ASEAN Charter (Naldi, 2014: 120-121). Regarding the Article 24(3) of the ASEAN Charter, the ASEAN dispute settlement mechanism under the ADSM 2019 would be apply to settle any matter concerning interpretation and application arising under the ATIGA as the provision of the Article 89 of the ATIGA also stated (Secretariat, 2009, art 89).

2.3 Some issues under the ASEAN Economic Agreements: Trade Restriction Measure under the ATIGA

In 2014, the Ministry of Commerce, Thailand had issued a notification on the import of corn used as raw material for animal feed into the Kingdom of Thailand (Thailand) in accordance with the agreement under the ASEAN Free Trade Area (AFTA) for the year 2015-2017. This notification is for the purpose to render the importation of corn used as raw material for animal feed into Thailand which is in accordance with the agreement under the AFTA for the year 2015 to 2017. According to this notification, corn used as raw material from animal feed imported from ASEAN member countries under the ASEAN Free Trade Area-the ASEAN Trade in Goods Agreement shall comply with the rules, procedures and conditions stated the Article 4 of the Notification. For example importers who would like to import corn used as raw material from animal feed to Thailand, they are allowed to import only at the allowed time period. The provision of Article 4(2) of the Notification states that "[i]n case of general importer(s), it shall import the goods during 1st February to 31st August of each year…"

In general, since, 2001 under the ASEAN Free Trade area, the government of Thailand has reduced the tariff of corn to 5 percent for all ASEAN member states (Wisarn Pupphavesa, 2016). Nonetheless, in 2005, the government of Thailand has reduced the tariff on corn to 0 percent for all ASEAN member states under the ATIGA (Wisarn Pupphavesa, 2016). This means that imports from ASEAN member states enjoy both duty free and import quota free preferences under the ATIGA only certain period time of the year. In on the words, the government of Thailand does not impose season import restriction measure under the WTO and other free trade agreements which the government of Thailand has joined. For example, under the WTO, the government of Thailand committed to the MFN tariff of 20 percent for the in-quota import of 54.7 thousand tons. Notably, the out-of-quota import is subject to a 73 percent

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tariff (Wisarn Pupphavesa, 2016). Therefore, in case any importers of ASEAN member states would like to import corn to Thailand which is out of the allowed time period, they will not enjoy both duty free and quota free preferences. They have to be imposed 73 percent tariff under the WTO commitments (Wisarn Pupphavesa, 2016).

In contrast, according to the Notification, the Ministry of Commerce, Thailand allows the Public warehouse Organization which is a state enterprise under the Minister of Commerce importing corn from ASEAN member states including from Lao PDR all year. The provision of Article 4.1 of the Notification states that "(1) In case that Public warehouse is an Importer, it shall import the goods during 1st January to 31st December of each year…" It implies that other importers excepted the Public warehouse Organization is eligible to import corn from ASEAN member states enjoying both duty free and quota free preferences under the ATIGA to 0 percent all year around.

In fact, since 2010, the Department of Foreign Trade of Thailand imposed nontariff barriers such as season import restriction on imports from Cambodia, Lao PDR and Myanmar (CLM) on maize or corn used as raw material for animal feed into the Kingdom of Thailand (Thailand). The government of Thailand argues that it has to impose such measure in order to protect domestic producers of maize by prohibiting import of maize from CLM following the harvest season in 2010 after the domestic price of maize fell from the peak price of over 9 bath par kg in 2008 to below 6 bath per kg in 2009. When the domestic stock of maize was depleted, the government of Thailand allowed for only 4 months from March-June in 2011. Later the season import restriction was relaxed, allowing for the importation of maize from CLM for 5 months during March-July in 2012 and 6 months during March-August in 2013. However, in 2014 the seasonal import restriction was tightened. The importation of maize from CLM was allowed from only 1 month in August. Most, recently, the seasonal import restriction has been relaxed to allow imports of maize from CLM for 7 months (February- August) annually from 2015-2017 (Wisarn Pupphavesa, 2016).

Notably, regarding the ATIGA provision, all ASEAN member states including Thailand have obligation to implement both tariff and non-tariff commitments. The purpose of the ATIGA is to reduce or elimimate trade barriers such as tariffs, so the Chapter 2 concering tariff liberalisation embodied such issues. In pursuant to Aricle 19, 20 and of the ATIGA, all ASEAN member are imposed the principle of reduction or elimination of import duties. The provisions of Article 19 of the ATIGA state that "1. Except as otherwise provided in this Agreement, Member States shall eliminate import duties on all products traded between the Member States by 2010 for ASEAN-6 and by 2015, with flexibility to 2018, for CLMV; 2. Each Member States shall reduce and/or eliminate import duties on originating goods of the other Member States in accordance with the following modalities…" (Secretariat, 2009, art 19). The AFTA‟s features that highlight the country-specific, product-specific tariff elimination schedule is inherited by the ATIGA. A lengthier transition period represents special and deffirential treatment for CLMV countires. Under the ATIGA products are divided in different categories and subject to different schedule of tariff reductions (Hsieh, 2021: 39). In addition, in pursuant to Artilce 19 paragrph 2 of the ATIGA, "each member state shall reduce and/or elimiate import duties on originating goods of the other Member States" (A. (Secretariat, 2009, art 19.2). According to the provisions of Article 19, paragraph 2 of the ATIGA, there are two different timelines of reduction and elimination of tariffs between ASEAN-6 and CLMV member countries, for example "import duties on the products listed in Schedule A of each Member State‟s tariff liberalisation schedule shall be eliminated by 2010 for ASEAN 6 and 2015 for CLMV…" (Secretariat, 2009, art 19.2).

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In other words, according to the ATIGA, all ASEAN member states also have obligations to reduce and eliminate non-tariff barriers. As stated above, ASEAN member states have done impressive progress in tariff reduction and elimination under the ATIGA. Notably, under the ATIGA, ASEAN member states do not have not only obligations to reduce tariff barriers, but also obligations to eliminate quantitative restrictions and non-tariff barriers. The provision of Article 40 of the ATIGA sets out serveral obligations to all ASEAN member states related to non-tariff barriers as followed:

1. Each Member State shall not adopt or maintian any non-tariff measure on the importation of any good of any other Member State or on the exportation of any good destined for the terrritory of any other Member State, except in accordance with its WTO rights and obligations or in accordance with this Agreement.
2. Each Member State shall ensure the transperency of its non-tariff measures permittee in paragraph 1 of this Article in accorance with Article 12 and shall ensure that any such measures are not prepared, adopted or applied with the view to, or with the effect of, creating unnecessary obstacles in trae among the Member States.
3. Any new measure or modification to the existing measure shall be duly notified in accordance with Article 11.
4. The database on non-tariff measures applied in Member States shall be further developed and included in the ASEAN Trade Repository as referred in Article 13 (Secretariat, 2009, art 40).

Notably, the provision of Article 40 of the ATIGA does not include what an unnecessary obstacle to trade and left it undefinced (Hirang, July 2019: 297). Considering, as important as tariff barriers are to trade, another problem for firms are a set of issues lumped together under the heading of NTMs which are policy measures relevant to policy objectives of governments such as food safety or environmental protection (Minh Hue Nguyen, 2019: 38). Arguably, as experiencing, under trade liberalization, governments of state parties to a free trade agreement might increase non-tariff barriers to protect domestic industries exposed by tariff elimination (Brien, 1995: 705-706). Countries may adopt protectionist trade policies in order to protect a domestic industry, and employment in the industry from competition arising from imported products, foreign services or service suppliers (Bossche, 2012: 20). In practice, especially when governments have committed to eliminate or reduce the tariffs for these products, some of them make use of NTMs to protect domestic businesses from an influx of imports (Minh Hue Nguyen, 2019: 38). As the Department of Foreign Trade of Thailand that imposes seasonal restriction measures on the import of corn from CLM countries in order to protect domestic farmers in Thailand (Wisarn Pupphavesa, 2016: 20).

Certianly, even though ASEAN member states are obligated to comply with their commitments to eliminate tariff, but the ATIGA provides certain flexibilities as emergency measures through a safeguard clause for ASEAN member states under the provision of Article 23 of the ATIGA. The provisions of Article 23, paragraph 1 of the ATIGA related to temporary modification or suspension of concessions state that “in exceptional circumstances other than those covered under Article 10, Article 24 and Article 86 where a Member State faces unforeseen difficulties in implementing its tariff commitments, that Member State may temporarily modify or suspend a concession contained in its Schedules under Article 19” (Secretariat, 2009, art 23.1). Notably, a scope of the provision of Article 23 of the ATIGA would cover any event which may occur on implementation of the ATIGA‟s obligations on trade barriers such tariff and non-tariff barriers which are outside of Article 10, 24 and 86 of the ATIGA. The provision of Article 23 of the ATIGA is similar to the provision of Article 6(1) of

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the CEPT concerning the emergency measures (Secretariat, 1992, art 6). However, the provision of Article 6(3) of the CETP further states that "suspension of preferences shall be consistent with the GATT" (Secretariat, 1992, art 6.3). The provision of Article 6 of the CEPT describes the purpose of suspension of preferences as a safeguard measure (Secretariat, 1992, art 6.2). In contrast, the provisions of the Article 23 of the ATIGA do not refer any commitments under the GATT. Under the ATIGA, there is specific provision which specifies safeguard measures under the provision of Article 86 of the ATIGA incorporated Article XIX of GATT 1994 (Secretariat, 2009, art 86). Based on the provision of Article 23 of the ATIGA, the government of Thailand is able to impose trade restriction measure by temporarily modifying or suspending concessions under the provision of Article 19 of the ATIGA. Predictably, the provision of Article 23 of the ATIGA, similar to the Article 6 of the CEPT, "can be used in a constructive fashion or it can become a protectionist tool" (Tiwari, 1994: 231).

Certainly, regarding the provisions of Article 19, the government of Thailand has to reduce import tariff to 0 percent and it shall not adopt any non-tariff measure on the importation of corn from CLM countries. Although under the provisions of Article 23 of the ATIGA, the government of Thailand can suspend trade preferences under the ATIGA by imposing trade restriction measures on corn import from CLM countries, they are temporarily measures. The objective of the ATIGA is similar to the purpose of the CETP to increase the competitiveness of ASEAN"s economies. If recourse is made to the emergency measures provided at every perceived threat to an industry, this objective will not achieve. The provision should be widely interpreted. Where there is a clear demonstration of injure or threat of injury to a particular product, the provision of emergency measure should only be used. Significantly, the period of suspension should also under the extent which is absolutely necessary (Tiwari, 1994: 231).

3. The Provision of Dispute Resolution under the ATIGA

3.1 Legal Requirement and Dispute Resolution Means

According to the ATIGA, ASEAN member states have to matter related implementation of this Agreement through bilateral diplomatic consultation. For example under the provisions of Article 23 of the, ASEAN member states particularly the parties to a dispute have to consult and negotiate in order to reach an acceptable mutual agreement (Secretariat, 2009, art 23).

In general, under the ATIGA, ASEAN member states are imposed with obligations and commitments. If there is any dispute occurs under certain provisions of the ATIGA, ASEAN member states have to follow with settlement of dispute approach specified in particular provision such as the provisions of Article 23 of the ATIGA related market access principle- tariff concessions. According to the provision of Article 23 of the ATIGA, there are certain procedures of dispute settlement concerning tariff commitments under the ATIGA (Secretariat, 2009, art 23). For example the Article 23, paragraph 2 of the ATIGA states that an ASEAN member state seeking to invoke to temporarily modifies or suspends concessions, when the temporary modification or suspension of concessions is to take effect, the applicant member state must notify in writing of such temporary modification or suspension of concessions to the ASEAN Free Trade Area (AFTA) Council at least one hundred and eighty

(180) days prior to the date (Secretariat, 2009, art 23). Any disputes which may occur from temporaty modification or suspension of concessions would be a subject to resolve through consultations or negotiations under certainly time frame defined under Article 23, paragraph 3 of the ATIGA (Secretariat, 2009, art 23). The provision of the Article 23 of the

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ATIGA is similar to the provision of Article 6(3) of the CEPT in the sense that emergency measures may be subject of consultation (Secretariat, 1992, art 6.3).

Notably, under the ATIGA, the ASEAN Economic Ministers Meeting (AEM) has mainly task to enforce the commitments by supervising the implementation of this agreement (Secretariat, 2009, art 90). Additionally, Senior Economic Officials Meeting (SEOM) is an assistant institution supporting the AEM (Woon, 2015: 24). Under ASEAN economic cooperation, the SEOM is not only in charge of implementation of all economic agreements, but also adjudication under the ASEAN Dispute settlement mechanism (Beckman, 2016: 64-68). The SEOM is responsible in administering the ASEAN dispute settlement mechanism (Secretariat, 2019, art 2). Furthermore, in pursuant to Article 90(1) of the ATIGA, The AEM must establish an AFTA Council. It comprises one (1) ministerial-level nominee from each Member State and the Secretary-General of ASEAN. In the performance of its functions, the SEOM must support the AFTA Council. In the fulfillment of its functions, the SEOM may establish bodies, as appropriate, assisting them such as the Coordinating Committee on the implementation of the ATIGA. The effective implementation of this Agreement must be ensured by the SEOM with assisting by the Coordinating Committee on the implementation of the ATIGA. The SEOM must coordinate and technical bodies and committees under this Agreement support them (Secretariat, 2009, art 90). It implies that ASEAN member states have to discuss all matters related the implementation of the ATIGA through the diplomat meetings such as the AEM and the SEOM, the AFTA Council and other relevant ASEAN bodies. In practice, ASEAN consult each other to ensure implementation (Beckman, 2016: 58-100; Kaplan, 1996: 148). In pursuant to Article 23(6) and (7) of the ATIGA, in the event that there is no agreement is reached after the consultations or negotiations between the interested member state and the applicant member state, in pursuant to Article 23, paragraph 6 and 7 of the ATIGA, the AFTA Council is authorized to approve or provide recommendation within thirty

(30) days upon receipt of the notification (Secretariat, 2009, art 23.6-7). Under the ATIGA, the AFTA Council plays significant role to enforce the ATIGA which is in practice it does. In the past, trade disputes among ASEAN member states were resolved through the AFTA Council level (Beckman, 2016: 106-107; Kaplan, 1996: 148).

Nevertheless, the ATIGA provides a mechanism for settling disputes which may arise among ASEAN member states from the implementation of rules under the ATIGA (Secretariat, 2009). In pursuant to the provisions of the ATIGA, basically ASEAN member states are provided non-adjudicatory and adjudicatory mechanisms. For example according to the provision of Article 88, to settle disputes that may arise from this Agreement, the ASEAN Consultations to Solve Trade and Investment Issues and the ASEAN Compliance Monitoring Body as contained in the *Declaration on ASEAN Concord II (Bali Concord II)* may invoke (Secretariat, 2009, art 88). Notably, any ASEAN member state may resort to the mechanism provided in the ASEAN Protocol on Enhanced Dispute Settlement Mechanism is it does not wish to avail of the ASEAN Consultations to Solve Trade and Investment Issues and the ASEAN Compliance Monitoring Body (Secretariat, 2009, art 88). This provision provides non-adjudicatory mechanisms or an informal, non-legal binding dispute resolution mechanism. These mechanisms under the protocol Article 88 of the ATIGA mainly facilitate the swift resolution of disputes through non-binding and non-adjudicatory systems (Vergano, 2009: 3).

On other words, the ATIGA provides a formal, legal binding, dispute resolution mechanism by referring to the ASEAN dispute settlement mechanism for economic agreements under the ADSM 2019. The ATIGA specifies such adjudicatory mechanism in Article 89 of the ATIGA. The provision of Article 89 of the ATIGA states that any difference between Member

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States concerning the interpretation or application of this Agreement, the ASEAN dispute settlement mechanism (Secretariat, 2009, art 89). Notably, the ATIGA does not provide a formal adjudicatory mechanism instead of including a dispute resolution process which makes reference to the ASEAN Dispute settlement Mechanism. Generally, the provisions of dispute settlement under the ATIGA encourages the dispute prevention (Adolf, 2018: 14).

In principle, reading the provisions of Article 89, the ADSM 2019 is not compulsory mechanism. It depends on whether or not ASEAN member states particularly the disputing parties will use it even though the Article 24(3) of the ASEAN Charter states that "…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" (Secretariat, 2008, art 24). The ASEAN dispute settlement is specifically stipulated by the ASEAN Blueprint 2015 as a tool to enhance the implementation and realization of the ASEAN Economic Community which a specific function to "promote a rules-based community is recommended" (ASEAN Economic Blueprint, 2015, para 72.iv). Nevethelss, according to the ASEAN Economic Cmmunity Blueprint 2025, section III.A.82.iv concerning implementation mechanism, ASEAN member states are entitled to choose a dispute settlement process solving disputes for economic agreements including the ATIGA. This paragraph states that "ASEAN Member States may also access other mechanisms such as the ASEAN Solutions for Investments, Services, and Trade…ASEAN Member States retain the option to utilise [ASEAN dispute settlement mechanism]…to promote a rules-based community" (ASEAN Economic Blueprint, 2015, section III.A.82.iv). As one scholar found that "[d]ispute resolution is key to any trade agreement; without an effective means of settling specific disputes and enforcing provisions generally, parties will have a little incentive to honor their trade commitments" (Rosa, 1993: 257).

3.2 Dispute Resolution in Practice: Experience of Lao PDR

As discussed before, in 2014 the Ministry of Commerce of Thailand imposes trade restriction measures against corn used as raw material for animal feed imports from Cambodia, Lao PDR and Myanmar (CLM). In fact, since 2010, the Department of Foreign Trade of Thailand imposed nontariff barriers such as season import restriction on imports from CLM on maize or corn used as raw material for animal feed into the Kingdom of Thailand (Thailand). As noted before, in principle, the government of Thailand has reduced the tariff on maize to 0 percent for CLM. Under the ATIGA, the government of Thailand also has reduced the tariff on maize to 0 percent for all ASEAN member states since 2010 (Wisarn Pupphavesa, 2016: 16-20).

Inevitably, trade restriction measures imposed by the government of Thailand have directly impacts to the exportation of maize of Laos. For example, in 2011; Thailand applied a tariff 73 percent on corn from Laos (Vientiane Time, 2011). A year, Thailand again had a similar measure in place (Vientiane Time, 2012). Arguably, from time to time, Thai government has imposes additional tariff for corn from Laos (Somsack, 2024). Apparently, the imposition has directly negative effects to local farmers in Laos. The local farmers cannot access into the market appropriately. The exportation amount has decreased nearly 40 percent in 2016 compared the year before (Foreign policy department, 2018). It means they lose income from selling crops. Moreover, the lifestyle of local farmers has changed. Most of the farmers of 4 provinces in the northern country changes the way to plant and trade. Local farmers begin to grow new crops instead of corn. They have to start a growing process. On the other hand, some

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of the farmers export their crops to China and Vietnam, but the cost of transportation is quite high (Vientiane Time, 2011).

Currently the government of Lao PDR is struggling with unresolved trade dispute with Thailand concerning trade restriction measure imposed on importation of maize or corn from Lao PDR since 2010. Since 2010, the government of Laos has attempted to solve the problem with Thai government through ASEAN stages, but the dispute has not been resolved yet. For example in 2011 representatives of Lao had met and discussed with the representatives from Thailand related concerns of trade restriction measures through the Committee under the ATIGA (ATIGA 2011). In 2018, both representatives had met and discussed certain trade cooperation including a problem of trade restriction measures on imported corn from Lao PDR through Senior Economic Officials Meeting (Foreign policy department, 2018). Notably, during the meetings bilateral consultations, the government of Lao PDR raised concerns about the import restriction measure on the importation of corn by the government of Thailand. The government of Lao PDR wished to find a solution on this problem soon. Notably, in the meeting, the government of Thailand expressed that it would consult in order to find a solution as soon as possible (Foreign policy department, 2018).

Since 2010, until today (2024) the government of Laos has attempted to resolve the problem with Thai government through bilateral consultation and negotiation in deferent level of ASEAN institutions such as the Coordinating Committee for Implementation of ASEAN Trade in Goods Agreement, The Senior Economic Officials Meetings and the ASEAN Economic Ministers through ASEAN stages many times, but the dispute has not been resolved yet (Somsack, 2024). Each time the government of Thailand replies that it would find a way out for this issue. The government of Thailand has agreed on a proposal proposed by the government of Lao PDR on the restriction measures of corn or maize imported from Lao PDR. The government of Thailand would find a mutual acceptable solution bilaterally. Thailand have to reduce eliminate tariff rate quotas on ASEAN productions such as import tariff on corn production by 2008. However, Thailand has claimed that they have to apply a restriction measure to protect and promote domestic producers (Wisarn Pupphavesa, 2016: 16-20).

Recently (2024), the government of Thailand still applies import restriction measure on corn imported from Lao PDR. As conducted an interview with government officials at Ministry of Industry and Commerce, Lao PDR in March 2024, recent, the dispute concerning restriction measure on importation corn from Lao PDR is still imposed by the government of Thailand. The official suggests that “undeniably, the problem of import restriction measure of Thailand on importation of corn from Lao PDR has become a problem very long time. It becomes an unresolved issue for 13 years since 2010” (Wisarn Pupphavesa, 2016: 19). Presently, the government of Thailand continutes to imposes a import restrict meaure in form of a seasonal import restriction on imports from Cambodia, Lao PDR and Myanmar on maize or corn used as raw material for animal feed into the Kingdom of Thailand (Thailand) regarding notice of Ministry of Commerce of Thailand. Within 12 years of imposing restriction, local farmers and exporter have lost benefits more than 200 million US dollar approximately (Wisarn Pupphavesa, 2016: 19).

The Official expresses that although a purpose of protectionist measure applied by the government of Thailand to promote and protect domestic local farmers who grow corn in Thailand, this policy in question go beyond an extent of promotion and protection. Precisely, the measure is inconsistent to Chapter 4 concerning non-tariff measures of ATIGA particularly Article 41 defined about general elimination of quantitative restrictions (Secretariat, 2009, art 41). Technically, the protected trade policy such as a seasonal import restiction measure which

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the government of Thailand imposes is violated the commitments under the ATIGA and restrict trade liberalizaiton as well as trade in goods flow problems in ASEAN (Somsack, 2024a).

It is not surprised why a dispute between Lao PDR and Thailand have not been able to solve through bilateral consultations and negotiations. The government of Lao PDR has requested the government of Thailand to find a solution on that problem, if not the government of Lao PDR would take an action against it before the ASEAN dispute settlement. The government of Thailand requests the government of Lao PDR not to take further step beyond diplomatic discussion. However, finally, in 2023, the government of Lao PDR has notified the ASEAN Secretariat that it requests to use the ASEAN dispute settlement to solve the matter with Thailand. Recently, the government of Lao PDR has prepared argument in order to initiate the dispute resolution proceedings against trade restriction measures of Thailand on importation of Lao corn or maize (Somsack, 2024b).

4. Analysis: Ineffective Settling of Disputes

Regarding ASEAN legal framework concerning dispute settlement, all ASEAN member states must attempt and exhaust to resolve their disputes through friendly methods before recourse to judicial mechanism. Notably, under ASEAN economic agreements such as the ATIGA, all ASEAN member states are obligated to resolve differences related the implementation issues through dispute resolution approach provided in such agreements.

In principle, in ASEAN, all ASEAN member states are explicitly required to resolve their disputes through diplomatic dispute settlement approach determined under the ASEAN legal framework. As noted before, for example according to the ASEAN Charter, all ASEAN member states have obligation to resolve all kind of differences both in security and economic cooperation amicably determined in the provision of Article 22(2) of the ASEAN Charter (Secretariat, 2008, art 22.2). The Provision of Article 22(1) of the ASEAN Charter states that "Member States shall endeavor to resolve peacefully all disputes in a timely manner through dialogue, consultation and negotiation" (Secretariat, 2008, art 22.1). This provision reflects uncontroversial in do far as ASEAN practices to date having been within this range of softer approaches to settling disputes (Tay, 2008: 158). Similarly under the ASEAN economic agreements such as the ATIGA, it also stipulates that ASEAN member states must try to resolve their disputes related to the implementation of this agreement through diplomatic discussed by consultation and negotiation. For example the provision of Article 23(4) of the ATIGA states that "…the applicant Member State shall engage in consultations or negotiations with the Member States who have made notification pursuant to paragraph 3 of this Article…" (Secretariat, art 23.4).

Understandably, the source of the ASEAN Charter is from all ASEAN legal frameworks since ASEAN established in 1967 such as the 1967 Bangkok Declaration and the 1976 Declaration of ASEAN Concord and the Agreement on ASEAN Preferential Trading Arrangements. It is not surprised that dispute settlement in ASEAN reflects "the rule of the bureaucrat and not the rule of law governs decision-making and also the implementation phase" (Tay, 2008: 154). All ASEAN legal framework is influenced the concept of the „ASEAN Way" (Tay, 2008: 155). Notably, the ASEAN Way emphasizes on consultation, consensus, and non-interference (Leviter, 2010: 161). Essentially, aspects of the ASEAN Way are: first, a desire not to lose face in public or to make other ASEAN member states lose face; second, a preference for consensus more than confrontation, third, it is a rejection of the notion that states have rights to interfere-the right to interfere without consent in the internal affairs of other states (Koesrianti, 2016: 186). As a result, the ASEAN Way is the method that ASEAN member states

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have applied to seek compromise on certain issues (Kurtz Simmer, 2018: 239). Certainly, critics object that the ASEAN Way‟s emphasis on consultation, consensus, and non- interference forces the organization to adopt only those policies satisfying that lowest common denominator. These critics are correct that decision making by consensus requires members to see eye to eye before ASEAN can move forward on an issue. Nonetheless, these principles emerged to ensure stability in a historically tumultuous region. Still, coordinate progress towards any goal extremely difficult is made by the diversity of the organization‟s membership (Leviter, 2010: 161-162). The ASEAN Way may indicate how member states avoid and manage conflicts although it may not necessarily provide a guide to resolve inter- state conflicts in ASEAN (Beckman, 2016: 20).

Apprarently, based on the provisions of the ASEAN Charter and the ATIGA, all ASEAN member states are required to attempt and exhaust to resolve their disputes through friendly negotiation first before they can request to use a judicial or quasi-judicial mechanism. However, in pursuan to the ASEAN Charter and the ASEAN economic agreements as discussed before, all ASEAN member states have only diplomatic dispute settlement procedures. For exmple as the provision of Article 22(1) of the ASEAN Chater states that “Member States shall endeavour to resolve peacefully all disputes in a timely maner through dialogue, consultation and negotiation” (Secretariat, 2008, art 22.1). Even though in pursuant to the provision of Article 23 of the ASEAN Charter, ASEAN are provided other diplomatic dispute settlement procedures. The provision of Article 23(1) of the ASEAN Charter states that “Member States which are parties to a dispute may at an time agree to resort to good offices, consiliation or mediation in order to resolve the dispute within an agreed time limit” (Secretariat, 2008, art 23.1). The provision of Article 23(1) of the ASEAN Charter emphasizes the Good Offices, Conciliation and mediation are dispute settlement methods as option not compulsory. ASEAN member states particularly the disputing parties are not mandated to use such procedures. Notably, the ATIGA does not provide any other dispute settlement methods more than consultations and negotiation (Secretariat, 2009). The provision of Article 22(1) of the ASEAN Charter and the provision of Article 23(4) of the ATIGA use the term of „*shall*‟ rather than „*may,*‟ this emphasizes that settling disputes in ASEAN, consultation and negotiation are compulsory and all ASEAN member states must mandate, but other dispute settlement methods are not compulsory. As the experience of TAC has demonstrated that even though ASEAN member states are not prevented from bringing their disputes to be resolved at the international area, again friendly negotiations should have been attempted and exhausted before doing so (W. Woon, 2011). As one scholar expresses that the ASEAN Charter failed to “develop mechanisms better equipped to resolve interstate conflict than those mechanisms which existed before the ASEAN Charter” (Leviter, 2010: 199).

Certainly, although there are several dispute settlement methods constituted in the ASEAN Charter, consultation has traditionally been viewed as the ASEAN way of settling disputes. It emphasizes on maintaining good relationships and avoiding the dispute developing into a full blown court battle. In general, this process alerts a party to an issue or a potential issue in the hope that they will have an opportunity for discussing their problems. This is the idea to resolve any conflict through dialogue and negotiation. As one scholar mentioned about the dispute settlement in ASEAN is based on the ASEAN way why consultation or mediatory style of dispute resolution are invariably mentioned first in ASEAN instruments or documents before other methods such as arbitration involving the imposition of a decision of a third part (Kwok, 2023: 106-107). The requriement of settling disputes under the ASEAN Charter and the ATIGA have binding effect (E. K. Tan, 2018: 141).

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As some experience of settling disputes in practice in ASEAN in the past, ASEAN is strict on the ASEAN way which the the ASEAN Charter and the legal framework of ASEAN economic have reflected such norms. Under the TAC agreement, ASEAN member, specificed mentioned, must resolve their dispute by consultation and negotiations. Similarly to economic agreement such as the PTA, the AFTA and the CEPT for the AFTA also stipulate that ASEAN member states must resolve concerning dispute in those agreements through consultations and negotiations (Secretariat, 1977; Secretariat, 1992a; Secretariat, 1992b).

In principle, dispute settlement refers to a legal system and laws which provide a mechanism for the settlement of disputes that arise among members of a society, concerning the rules established by that society. There is a number of forms of these mechanims which can rang from more formal to less formal methods of litigation, arbitration, mediation, conciliation, negotiation (Davidson, 2003: 5). In pursuant to Article 33(1) of the UN Charter concerning settlement of dispute, ASEAN member states as UN members have several options to use in order to solve disputes arising among them (UN Charter, art33.1). Notably, thess methods can be broadly divided into volutary and compulsory. It depends on whether or not the parties to a dispute are under a legal obligation to enter into a particular means of settlement. Nonetheless, this does not mean that under a voluntary process the parties will never be bound by the result; nor that under a compulsory process the result will always be binding. It depends entirely on the terms that have been agreed (Aust, 2010: 431). As mentioned before in principle, states are obligated to resolve their dispute by peaceful means. States are encouraged to use many kind of peaceful means suggested under the principle of international law to resolve their disputes. Additionally, states also have free choice of dispute settlement methods either. States are able to choose dispute settlement methods which are appropriated and reasonable to particular issue and circumstance.

As experience of Lao PDR has shown that the government of Lao PDR has to consult and negotiate with the government of Thailand for solution concerned. Arguably, dispute settlement in ASEAN, ASEAN member states do not have free choice right of dispute settlement means. ASEAN member states have to use the consulation and negotiation to resolve their disputes first as a compulsory requirement of settling disputes. Moreover, although ASEAN provides other diplomatic dispute settlement such as good offices, conciliation and mediation, all of these methods are not compulsory (Secretariat 2008, art 23). They require states consent to use. It implies that the complainant party can not use other means more than consultation and negotiation without consent of the respondent party due to consultation and negotiation are compulsory requirement for settlement of disputes. Therefore, dispute settlement in ASEAN, ASEAN member states do not have free choice and more option of dispute settlement.

5. Conclusion

ASEAN has developed its dispute settlement for economic agreement for long time since it started its free trade agreements. ASEAN first established its dispute settlement mechanism for ASEAN economic agreements in 1996. Even though ASEAN has reviewed its dispute settlement for economic agreements two time in 2004 and 2019, until now it has never been invoked by any ASEAN member states. In practice, ASEAN member states resolved trade issues for example through diplomatic dispute resolution by consultation and negotiation. Some ASEAN member states took actions against each other before the WTO dispute settlement mechanism. Unfortunately, some trade issues under free trade agreement such as under the ASEAN Trade in Good Agreement are not under jurisdiction of the WTO.

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In principle, ASEAN provides certain dispute resolution approach for all matter including economic issues for its members to use. In ASEAN, the ASEAN Charter explicitly states that ASEAN member states must resolve their disputes through diplomatic dispute resolution by consultation and negotiation. Similarly, the ATIGA also requires ASEAN member states to settle issues of the implementation of the ATIGA by consultation before referral to the ASEAN dispute settlement. Certainly, in ASEAN, ASEAN member states do not have free choice of dispute resolution means. ASEAN also does not provide more choice of means as the principle of international law suggested instead of consultation and negotiation. Arguably, in ASEAN, ASEAN member states are not able access to the ASEAN dispute settlement directly. Therefore, in order to improve dispute resolution for ASEAN economic agreements, ASEAN should provide flexibility for ASEAN member states on dispute resolution means. Under ASEAN economic agreements, ASEAN member states should have free choice of dispute resolution means.

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