

# ASEAN Dispute Settlement: A decade hence



A number of scholars and practitioners in the field of international trade and economic integration consider the establishment of a vibrant and effective dispute settlement mechanism as a hallmark of any successful Free Trade Agreement (FTA). On a general note, it is statistically accepted that an expansion of international trade in goods (which is the primary objective of an FTA) and the volume of disputes or remedies filed among trading partners share a positive and proportionate relationship. Accordingly, an increase in the number of disputes raised by countries within an FTA

could, arguably, be indicative of a stronger significance that bilateral or regional trade would have in the overall political and economic interests of member countries. Such a trend may also show a rising awareness and appreciation within the regional business community regarding the benefits and pay-offs that may be had through a rigorous application and resort to invoking the provisions of international trade law.

Arising from this is the perception of fairness, equity (especially for smaller countries), predictability, and confidence in the strength of domestic and multilateral institutions that are critical to the flourishing of cross-border businesses. Regional integration would understandably entail wider, more rampant, and stiffer competition amongst businesses at a multinational scale. The presence of a strong dispute settlement mechanism and the sensible utilization thereof would provide an orderly framework that would better sustain and accommodate such a system of intensifying competition.

## Procedures: From the WTO...

Its dispute settlement system is one of the defining features of the World Trade Organization (WTO), giving it the mechanism with which to interpret the WTO Agreements (with a view to refining them eventually), the teeth to effectively enforce the same, and the authority to adjudicate among disputing parties. Since its inception in 1995, some 330 cases have already been filed at the WTO concerning a wide range of goods and domestic measures. This seeming success is further underscored by the observation that the resolution of disputes in the WTO, on the average, would take a year (with the exception of large and controversial cases such as the Airbus-Boeing Subsidy Dispute), which is comparatively quick vis-à-vis other similar institutions. Thus, it is usually the case that, in the context an FTA, the principles of the WTO Dispute Settlement process are adopted.

The WTO Dispute Settlement process (which is based on the Understanding on Rules and Procedures Governing the



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Settlement of Disputes, as signed in Marrakech last 15 April 1994) is divided into possible 4 steps: Consultations, Panel Establishment, Appeal, and the Decision. In between each stage, conciliation and mediation among disputing parties to resolve the issue may be resorted to.

During the first stage, a member country or a group of member countries would formally request for consultations with the member country or customs territory to which their complaint is directed. At least 60 days is provided to give all parties concerned the opportunity to discuss and to settle their issues.

Should this stage result in a stalemate, the complainants can have recourse to a formal request for the establishment of a Panel that will objectively weigh the merits of the case. The member being complained against is given one opportunity to block the setting up of the panel (as Japan just did recently). However, should the Dispute Settlement Body allow a second chance for the applicant, then the establishment of the panel can no longer be challenged. At this stage, a series of hearings, rebuttals, and consultations with experts (to resolve technical matters) are conducted. The Panel members, composed of representatives from 3 neutral countries, are only given 6 months to complete its investigation and submit its report to the DSB. The DSB can only reject a Panel's ruling by way of the "reverse consensus" rule. Furthermore, after 60 days, should no DSB consensus be reached to reject the said Panel report, the same shall take the status of a ruling.

A third step provides for an appeal process that may be invoked by either the losing or winning party. It is not uncommon at this point for both parties to issue an appeal before the DSB. Appeals, as commonly understood, should only tackle legal interpretations without anymore touching the facts and evidence discussed in the Panel process. At best, an appeal (whose process should not exceed 90 days) may overturn a Panel ruling. It may also uphold or modify a Panel ruling. It is important to note also that, in order for an appeal to take effect, it would first have to—like a Panel report—survive a reverse consensus vote from the DSB.

Once the outcome of the appeal is released, then the decision becomes final and executory. The DSB issues recommendations on how the losing party should adjust its trade regulations so as to render it compliant with its WTO commitments. The losing party will be required to state its intention to abide by these recommendations within 30 days. Usually members are given a flexibility of 15 months to comply (as "reasonable period of time"). However, if the losing party fails to act satisfactorily to comply with the recommendations of the adopted report, it should enter into another consultation with the complainants as to what form of compensation the former will have to extend. If 20 days pass and a deadlock persist as to the kind of compensation that should be exacted from the losing party, the complainants may then request the DSB for authority to retaliate. If the DSB does not oppose this through consensus, the said authority should be granted no later than 30 days after the expiration of the determined "reasonable period of time".

### ...to ASEAN



The said WTO model has been adopted by a number of FTAs, including the AFTA. ASEAN came up with its dispute settlement system pursuant to Section 9 of the Framework Agreement on Enhancing ASEAN Economic Cooperation, which is also the main basis for the conceptualization of the AFTA. Clearly, however, the Dispute Settlement Mechanism (DSM) of the AFTA has been patterned after that of the WTO as it follows identical principles and procedures with minute differences to be found only in the amount of time granted per phase prior to the issuance of reports and rulings. This, however, is rather expected in light of the fact that most of the ASEAN membership is comprised of WTO members. Like the WTO, coverage of the ASEAN DSM is fairly comprehensive,

taking within its scope all of the ASEAN economic agreements—the applicable and specific procedures of which should also be considered alongside the rules and procedures of the DSM. It may be recalled however that the ASEAN DSM was revised in 2004, ostensibly to make it better resemble the WTO DSB and enable a less political framework for the ASEAN Economic Ministers (AEM) to make a ruling. Under the new set-up, the AEM will form an Appellate Body to hear appeal cases and an ASEAN DSM fund will be established to defray the costs of proceedings.

The process of the ASEAN DSM, again like the WTO, begins with consultations between the complaining member country and the respondent member country. A timeframe similar to the WTO is provided, particularly 60 days, after which an establishment of a Panel may be requested from the Senior Economic Officials' Meeting (SEOM), which is the counterpart of the DSB. The SEOM will have to appoint the said Panel within 30 days after the concerns are raised before it. Unlike the WTO, there is no specific national neutrality requirement in the appointment of the members of the Panel. The Panel will hear both sides and make a close and objective examination of the facts of the case consistent with the DSM rules, the specific/pertinent provisions of the Agreement invoked, and other Agreements that touches upon the issue. The Panel will then have to submit its report to the SEOM, at most, 60 days after its establishment. The SEOM would, in turn, study the report and would put the approval of the report to a vote in 30 days (with an allowable extension of 10 days for exceptional cases). The disputing parties may attend the voting, but would not be allowed to play a part. If the said report is approved by the SEOM, then it becomes a ruling. To serve as guidance in the formulation of such ruling, the Panel may also furnish the SEOM with its findings in relation to the Agreement concerned or any other Agreement that may be directly or indirectly involved.

The SEOM's ruling may still be appealed, through the AEM within a timeframe of 30 days. Through a vote, the AEM will decide upon the Appeal in another 30 days—although an extension of 10 days may be granted for exceptional cases. During the voting the parties involved may be present

but would not be allowed to participate in the decision making. The AEM's decision will be final and binding to both parties in the dispute.

The final decision, as with the WTO, will have to be complied with by the affected party within "a reasonable period of time"—which in practice means not more than 30 days after the issuance of the SEOM's or AEM's ruling. This compliance could either take the form of an award, a compensation, or an authorization for the suspension of concessions or obligations under the covered agreement—all within a tight timeframe of 290 days since the dispute was initiated. Again, the party obliged by the ruling to amend its legislation and make it consistent with its ASEAN commitments should do so within a "reasonable amount of time". Otherwise, after the lapse of the said time frame, the party will have to negotiate with the member country who initiated the dispute settlement procedures to agree on a mode of compensation. If 20 days pass without any positive development, the complaining party may ask for authorization from the AEM for it to suspend the concessions it extends (under any agreement covered) to the member country complained against.

### Some issues (timeframe, compensation, disuse)

Regarding the timeframe, the SEOM was inclined to adopt a longer timeframe than the WTO due to supposedly closer affinity amongst the ASEAN member states. Investors, on the other hand, would want shorter timeframes precisely because issues would be confined to ASEAN alone. It is unlikely that the 30 day period timeframe could even be met since the AEM meets only twice a year and the gap between formal and informal meetings is between 90 to 180 days. Thus, according to experts, settling disputes via the WTO rather than the ASEAN DSM would be the way to go. Interestingly, the first WTO DSM case is actually between two ASEAN countries—Singapore and Malaysia in 1996.

Compensation is another issue for the ASEAN DSM, as real and commensurate compensation is yet to be seen. The precedence set forth under the Temporary Exclusion List (TEL) protocol, between the Philippines and Singapore, is the only one

which has some form of compensatory adjustment measures but even then it was more a political settlement than a monetary settlement. Singapore asked for US\$13 million based on projected losses, and got back less than US\$5 million in adjustments. Thailand got nothing from the Philippines and Malaysia although they were supposed to be affected even more by the TEL protocol. Compensation in kind is even more difficult to measure and reconcile.

Notably, however, for all its structure and organization, and despite over a decade of existence and one amendment added to its name, the ASEAN DSM has yet to receive its first case. To our understanding, to date no cases have yet been heard or ruled upon by either the DSB or AEM. Further, no country has yet nominated technical experts to serve on the DSM panel.

Going back to the earlier discussion on how a vibrant DS mechanism indicates the institutional maturity of the FTA where it is effective, this may be telling of an AFTA whereby its signatories are completely on good trade terms with each other (possible but not likely) or an AFTA that is still underutilized and below optimization point. This brings out a need for the business and public sector to gain more knowledge and derive a better understanding of the ASEAN DSM, allowing them to recognize and better appreciate the benefits of availing of the DSM.

Under certain assumptions, the type of cases that would probably have greater chances of being raised at the ASEAN DSM would be on tariffs. A number of observers have commented that some ASEAN countries have been lax about meeting their tariff time-tables in reducing and eliminating tariffs. It would be a good example for a case to be brought up on the delays of ASEAN countries in phasing out their TEL or Sensitive List (SL). The eventual elimination of tariffs in 2010 would be a watershed point for ASEAN countries to comply with their commitments. In the long run, the ASEAN DSM could mature to deal with non-tariff measures such as market access issues. Possible issues would be the movement of used cars, technical standards and national treatment.