

The Deadlock of ASEAN Dispute Settlement Mechanisms and Why ASEAN Cannot Unlock It?

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Abstract

The objective of this work is to answer the questions that “What is the deadlock of ASEAN Dispute Settlement Mechanisms (ASEAN DSMs)?” and “Why can’t ASEAN unlock it?” by comparative study between ASEAN DSMs and European Union Dispute Settlement Mechanisms (EU DSMs). A result of this work found that a positive consensus in decision making mode of ASEAN Summit under Article 20 of ASEAN Charter (Charter), which is seriously designed to protect the political security of ASEAN, also created a deadlock of ASEAN DSMs as a whole. Finally, in order to bypass this dead-end, the ASEAN needs to reverse the process by using the model of reverse consensus (negative consensus). However, even the Charter opens a gap to unlock its deadlock by re-interpreting of law, the ASEAN Summit still keep seriously staying on an ASEAN way to protect the political security. Hence the deadlock of ASEAN DSMs cannot be solved in practice until the political mindset of ASEAN is changed.

Keywords: ASEAN DSMs, ASEAN Charter, Consensus of ASEAN Summit

Introduction

The ASEAN was officially established in 1976 and turned to be the rule-based regional inter-governmental organization by launching the ASEAN Charter in 2008. The Charter consisted of 13 chapters, 55 articles. The ASEAN DSMs is cited under Chapter VIII (Settlement of Dispute) since Article 22 to Article 28, which were designed to link up between an existing ASEAN DSMs instruments before the Charter such as the Treaty of Amity and Cooperation in Southeast Asia (TAC 1976) and ASEAN Protocol on Enhanced Dispute Settlement Mechanism (EDSM 1996), and the new ASEAN DSMs instruments such as Protocol to the ASEAN Charter on Dispute Settlement Mechanisms (PDSM 2010), Instrument of Incorporation of Rules for Reference of Unresolved Disputes to ASEAN Summit (2010), Instrument of Incorporation of the Rules of Non-Compliance to the ASEAN Summit (2012), Rules for Reference of Non-Compliance to the ASEAN Summit (2012), Rules of Procedure for the Interpretation of the ASEAN Charter (2012). However, the fact obviously shows that in the history of ASEAN, any disputes among the ASEAN Member States has never been applied the ASEAN DSMs under Chapter VIII of the Charter even once. (KOH, 2008; NALDI, 2014)

The dispute of Preah Vihear Temple (Thailand Vs Cambodia, 2003) as well as Pedra Branca, Middle Rocks and South Ledge case (Malaysia Vs Singapore, 2003), Case Concerning Sovereignty over Pulau Ligitan and Pulau Sipadan (Indonesia Vs Malaysia 1997), Case Concerning land Reclamation by Singapore in and around the Straits of Johor (Malaysia Vs Singapore, 2003) were settled by the International Court of Justice (ICJ). The cases study on economic dispute such as Case on Prohibition of Imports of Polyethylene and Polypropylene (Singapore Vs Malaysia, 1995) and Case on Customs and Fiscal Measures on Cigarettes from the Philippines (Thailand Vs Philippines, 2008) were also settled by the WTO DSU instead.

According to the research question that “What is the deadlock of ASEAN DSMs?” and “Why can’t ASEAN unlock it?”, the objective of this work is (1) to comparative study the system of ASEAN DSMs and EU DSMs, (2) to address the deadlock of ASEAN DSMs, and (3) to propose a way to unlock it through the advantage of EU DSMs.