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ASEAN vs. WTO DSM: Overcoming Jurisdiction Issues to Encourage Regional Trade Agreements' System Efficacy

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Abstract

Dispute settlement mechanism holds an important role in upholding the rights and obligations of member countries under any agreements signed by ASEAN members as well as to resolve any dispute between Members, therefore, AFTA has its own dispute settlement procedure. Unfortunately, it has not been fully efficient to solve the trade dispute within ASEAN countries because the parties tend to bring their disputes to WTO Dispute Settlement Body (DSB). This is because there are some issues and constraints in the AFTA DSM which vary from technical issues to cultural issues. Specifically, although there has not been any overlap issue with the WTO, the AFTA DSM might have the possibility to create such issue due to the lack of efficiency in the legal framework. It also has another major issues such as difficult access for private parties to defend their rights and the disputes in AFTA are rarely resolved because of the 'ASEAN Way' method. The ongoing reliance of ASEAN Member States to WTO DSB is an unfortunate situation knowing the fact that the WTO DSB has been struggling with overlap jurisdiction issues with other RTAs throughout the years. The aims of this writing is proposing possible solutions to encourage the efficacy of RTA's DSB usage particularly in ASEAN Region.

Keywords: Regional Trade Agreements; ASEAN; Dispute Settlement Mechanism; Trade Law.

Introduction

Since its establishment in 1995, WTO has a crucial role in global trade activities. For all the state members, WTO functions as a legislature and judiciary body. The first function scope is mentioned in the first paragraph of the Marrakech Agreement Preamble from which authorizes WTO to set and to rule some regulations in relation to helping each member obtaining the main goal of WTO establishment. Secondly, as a judiciary body, WTO is able to rule and to supervise the effectiveness of its law enforcement among its members.

The second function of WTO becomes a ground of Dispute Settlement Body establishment.

The Dispute Settlement Mechanism of WTO possibly becomes important for developing countries in order to defend their fair-trade rights and development needs.¹ Regarding to the main goals of the WTO Dispute Settlement Mechanism mentioned at the first paragraph of the Marrakesh Agreement preamble; raising standards of living, ensuring full employment, a large and steadily growing volume of income, and effective demand and expanding the production of and a trade in goods and services,² this system of dispute settlement also becomes essential component for ensuring those goals obtaining. Moreover, for the least developed countries members, this system also ensures them in gaining equal opportunity to create new employment and income.³ It can be seen that the dispute settlement mechanism of WTO can be an umbrella for developing countries to defend and to protect their rights in global trade.

Furthermore, the emerging trade practice in America and Europe with the establishment of Regional Trade Agreements (RTAs) in their areas has been the major influence for the Association of South East Asian Nations (ASEAN) to develop their own regional trade agreement through ASEAN Free Trade Area agreement (AFTA). AFTA aims to remove the tariff and non-tariff barriers within ASEAN countries. ASEAN economic co-operation has given many advantages in trade for ASEAN countries, therefore, AFTA has successfully achieved the objectives of ASEAN which the World Trade Organisation (WTO) has failed to achieve. As the long term plan for the AFTA relationship, the ASEAN members have agreed to establish the ASEAN Economic Community (AEC) by 2015. However, AFTA faces so many challenges in terms of its trade dispute resolution.

¹ ICTSD Information Note, April 2012.

² George Rockfall Lekgowe, 'The WTO Dispute Settlement System: Why It Doesn't Work for Developing Countries?' (*SSRN*, 2012),[3].

³ ICTSD Information Note, April 2012.

Dispute settlement mechanism holds an important role in upholding the rights and obligations of member countries under any agreements signed by ASEAN members as well as to resolve any dispute between Members, therefore, AFTA has its own dispute settlement procedure. Unfortunately, it has not been fully efficient to solve the trade dispute within ASEAN countries because the parties tend to bring their disputes to WTO Dispute Settlement Body (DSB). This is because there are some issues and constraints in the AFTA DSM which vary from technical issues to cultural issues. Specifically, although there has not been any overlap issue with the WTO, the AFTA DSM might have the possibility to create such an issue due to the lack of efficiency in the legal framework. It also has other major issues such as difficult access for private parties to defend their rights and the disputes in AFTA are rarely resolved because of the 'ASEAN Way' method. The ongoing reliance of ASEAN Member States to WTO DSB is an unfortunate situation knowing the fact that the WTO DSB has been struggling with overlap jurisdiction issues with other RTAs throughout the years.

This essay aims to propose solutions to the problems in AFTA DSM and the WTO DSM. It will also try to restore the trust of ASEAN Member States to start using AFTA DSM instead of the WTO DSM. The proposed attempt to have an effective dispute settlement mechanism for settling intra region disputes is through the establishment of an ASEAN arbitration centre followed by the amendment of several WTO provisions.

Overlapping Jurisdiction Issues in WTO DSM: WTO vs. RTAs

The agreement creating the WTO included the General Agreement on Tariffs and Trade 1994 (GATT 1994), which is based on the original text of the GATT 1947. As the WTO was formed, it established Dispute Settlement Body (DSB) in which the conducts are based on the provisions of the Understanding on Rules and Procedures Governing the Settlement of Disputes or the Dispute Settlement Understanding (DSU). The increasing need for trade between countries has encouraged countries in the same region to create Regional Trade Agreements

(RTAs). Each of the RTAs regulates its own dispute settlement mechanisms which result in overlap jurisdiction with the WTO.

Some cases, that involve the overlapping issue of RTAs and WTO, show the unwillingness of the WTO tribunal to suspend proceedings or decline to exercise jurisdiction due to a related dispute before another tribunal. The main issue that will be the highlight of the discussion is the unwillingness of the WTO tribunal to postpone proceedings or refuse to utilize their jurisdiction due to the fact that the dispute has been processed before the RTAs tribunal. In Mexico-Soft Drinks⁴ case, the case began with the United States accused Mexico's trade measures of violating the national treatment principle according to GATT. Mexico then sought for help from NAFTA and requested to establish a panel for the dispute due to the US's prohibitions on imports of Mexican sugar.⁵ In its defence, Mexico stated that the US's provisions had created a limitation to their market access for imports of Mexican sugar which was really different from what they had agreed on a specific agreement under NAFTA. Having heard the establishment of a panel under NAFTA, the US did not react promptly and avoided Mexico's proposal which resulted in Mexico's disappointment. Encouraged by the US non-responsiveness, Mexico raised the import tax on soft drinks sweetened with non-cane sugar to attract the US and finally, the US responded by lodging settlement request to the WTO.

Simply put, Mexico⁶ had invoked the WTO panel to refuse in utilizing its jurisdiction and asked for the WTO to shift the dispute so it can be handled based on the preference of the NAFTA arbitral panel. In particular, Mexico also argued that the WTO panels have "implied jurisdictional powers" which means that it has the power to restrain itself in exercising substantive jurisdiction where "the underlying

⁴ Panel report Mexico, 'Tax Measures on Soft Drinks and Other Beverages, WT/DS308/R, 7 Oct 2005' (2005).; Appellate Body Report, 'Tax Measures on Soft Drinks and Other Beverages, WT/DS308/AB/R, 6 Mar 2006' (2006).

⁵ Caroline Henckels, 'Overcoming Jurisdictional Isolationism at the WTO-FTA Nexus: A Potential Approach for the WTO' (2008) 19 *The European Journal of International Law*. [576 -579].

⁶ Chiara Giorgetti, *The Rules, Practice, and Jurisprudence of International Courts and Tribunals* (Martinus Nijhoff Publishers 2012). [142].

or predominant elements of a dispute derive from rules of international law” under RTAs claims or when the other parties show no interest to take the dispute to the appropriate forum.⁷ This resulted in a confusion of which forum has the power to rule the jurisdiction of the dispute, the WTO or NAFTA.

Chapter 20 of NAFTA regulates the dispute settlement forum exemption by stating that once a forum (either NAFTA or the WTO) has been chosen to settle the dispute, the other forum shall not be utilized. Instead of debating the inconsistency of the panel establishment under NAFTA provision, Mexico asked for the WTO panel to exercise jurisdiction in accordance with NAFTA provision. The result was the panel exercised its jurisdiction based on several provisions of the Dispute Settlement Understanding (DSU). In accordance with Article 11 DSU, the rejection of jurisdiction by the WTO would reflect major damage to the operation of the WTO DSB primary authority. It would also endanger the US’ rights, contradictory to Articles 3.2 and 19.2 DSU.⁸

Similarly, following the statement made by the Panel, the Appellate Body stated that refusing to utilize the jurisdiction would neglect and disrespect the DSU as a regulation for the dispute settlement mechanism. In support of the Panel’s decision, The Appellate Body opined that it has the right to determine its jurisdiction, including the scope of the jurisdiction and “a margin of discretion to deal, always in accordance with due process, with specific situations that may arise in a particular case and that are not explicitly regulated”.⁹ In conclusion, the goal of WTO DSB as the key platform for settling trade disputes would be questioned if it declined to exercise jurisdiction and would preclude the parties’ effort to justice.¹⁰

In *Brazil-Retreaded Tyres Dispute*,¹¹ where the case started with Brazil’s initiative of preserving the environment by imposing an import ban on retreaded tires due to its dangerous effect of the disposal (particularly by burning) and the

⁷ Appellate Body Report, *Mexico – Soft Drinks*, para.45.

⁸ Panel Report, *Mexico - Soft Drinks*, para.7.4 – 7.9.

⁹ Appellate Body Report, *Mexico – Soft Drinks*, para.45.

¹⁰ Caroline Henckels (n 5).[2].

¹¹ Panel Report Brazil, ‘Measures Affecting Imports of Retreaded Tyres, WT/DS332/R, 12 June 2007’ (2007).; Appellate Body Report Brazil, ‘Measures Affecting Imports of Retreaded Tyres, WT/DS332/AB/R, 31 December 2007’ (2007).

fact that it's proliferating area for mosquitoes.¹² Uruguay as one of the members of MERCOSUR showed its disagreement with the provision by challenging it in MERCOSUR arbitral proceedings followed by the statement that the provision constituted a new restriction of commerce between the parties.¹³ The result of the arbitral tribunal said that the provision was contradictory with MERCOSUR rules, therefore, Brazil created new provisions on the liberation of the import ban certain retreaded tires (referred to as remolded tires) originating in MERCOSUR countries. The EC reacted to the new provisions by questioning Brazil's consistency in compliance with the GATT prohibition on quantitative restrictions.¹⁴

In Brazil defense, Brazil realized that its import prohibition alongside its correlated fines did not comply with what Article XI GATT regulates, however, Brazil argued that its import prohibition was in line with the Article XX (b) GATT which specifically stipulates the law of human, animal, plant life, or health.¹⁵ Furthermore, Brazil also stated that the fines correlated with the import prohibition were in compliance and reasonable to Article XX (d). As opposed to Brazil's argument, the EC replied the defense by saying that Article XX GATT will only allow such measures only if they fulfill all the requirements of the chapeau of Article XX GATT, especially it is restricted to be applied to measure that sets up arbitrary or unjustifiable discrimination for countries that has the same terms. The EC said that the import exclusion for only MERCOSUR countries created arbitrary or unjustifiable discrimination between MERCOSUR countries and non-MERCOSUR members.

The *Brazil-Tyres* panel furtherly analyzed the terms "arbitrary" and "unjustifiable" and came with the result that Article XX GATT represents the ability to defend or convincingly explain the reason for any discrimination in the implementation of the measure.¹⁶ The panel also added that the import exclusion was

¹² Jennifer Hillman, 'Conflicts between Dispute Settlement Mechanisms in Regional Trade Agreements and the WTO - What Should WTO Do' (2009) 42 Cornell International Law Journal. [198-201].

¹³ Appellate Body Report, *Brazil – Tyres*, para. 122.

¹⁴ Appellate Body Report, *Brazil – Tyres*, para. 2.

¹⁵ Panel Report, *Brazil – Tyres*, para. 4 and 9.

¹⁶ *ibid.* para.7.260.

established after the MERCOSUR tribunal discovered Brazil's trade prohibitions in accordance with MERCOSUR provision.¹⁷ The panel opined that the MERCOSUR exclusion was implemented according to the framework of MERCOSUR and it was binding for Brazil. The panel also said that the discrimination in the context of import exclusion was not formed on purpose to give unfairness to non-MERCOSUR members, it was actually for the matter of preferential treatment for MERCOSUR members.¹⁸ In conclusion, the panel put its position on Brazil's side by deciding that the import exclusion was not a part of discrimination and the MERCOSUR dispute settlement ruling had given appropriate analysis and legal basis for establishing the MERCOSUR provision on import exclusion.¹⁹

Meanwhile, the Appellate Body had a different perspective of the Panel decision. The Appellate Body argued that discrimination could be caused by a reasonable provision or act which are arbitrary and unjustifiable due to the fact that it is clarified by the reason that has no connection to the goal of the provision's measure justified under the virtue of Article XX GATT, or has a different direction of the goal.²⁰ In the Brazil – Tyres dispute, the parties both coincided that the main goal of the measure was the preservation of life and health due to the effect of tire fires and mosquito-borne diseases, hence, the Appellate Body stated that the basic ground of the import exclusion in MERCOSUR failed to enforce the fair treatment and as a result, it constituted discrimination.²¹ The fact that the provision gave privilege to MERCOSUR countries to import more tires into Brazil, it supported the Appellate Body statement for its disagreement with Panel's decision. In conclusion, the Appellate Body said that the privilege for MERCOSUR countries only caused by the import exemption had created arbitrary or unjustifiable discrimination. As a consequence, the Appellate Body decision defeated the authority of the Panel's decision and replaced it with the finalisation of discrimination conduct by Brazil's

¹⁷ *ibid.*, para.7.271.

¹⁸ Panel Report, *Brazil – Tyres*, para 7.272-273.

¹⁹ Panel Report, *Brazil – Tyres*, para. 7.[281].

²⁰ Appellate Body Report, *Brazil – Tyres*, para. 232.

²¹ *ibid.*, para.228.

import exemption. This *Brazil-Tyres* dispute holds a role in one of the examples of overlaps or conflicts in jurisdiction between RTA and the WTO.

Those disputes above might have been the effect of obligatory and specific jurisdiction that the WTO has from Article 23 (1) WTO DSU in which it sets out the members obligations to obey the rules and procedures of DSU in terms of seeking remedies for violation of obligations, nullification, impairment of benefits and an impediment to the attainment, under the covered agreements. The establishment of the panel by the WTO will begin the dispute settlement process without having concerned about the other formation of the panel outside their jurisdiction and the Panel and Appellate Body rulings have the legal binding effects for the parties.²² Consequently, the earlier decision by the RTA's dispute settlement process will be ignored and have no legal effect.

On the contrary, the existence of RTAs are justified by the GATT/WTO system according to Article XXIV GATT which states that "accordingly, the provisions of this Agreement shall not prevent, as between the territories of contracting parties, the formation of a customs union or of a free-trade area or the adoption of an interim agreement necessary for the formation of a customs union or of a free-trade area." This means that the GATT/WTO system recognizes the use of the dispute settlement mechanisms in RTAs and the authority to resolve the disputes. This provision might be the reason behind the increasing overlaps and conflicts between the WTO and RTA as well as creating confusion about whether the WTO (through article 23 DSU) is able to refuse in utilizing its jurisdiction or not.²³

The Issues and Obstacles in AFTA Dispute Settlement Mechanism

AFTA DSM generally adopts the operation of the dispute settlement in the WTO,²⁴ but it also has major differences in order to facilitate what the parties need.

²² Debra P. Steger, 'The Jurisdiction of the World Trade Organization' (2004) 98 AM. SOC'Y INT'L PROC.[142] and [143].

²³ Jennifer Hillman (n 12).[198].

²⁴ Gabrielle Marceau and Julian Wyatt, 'Dispute Settlement Regimes Intermingled: Regional Trade Agreements and the WTO' (2010) 1 Journal of International Dispute Settlement.[80].

The implementation of AFTA DSM is based on the ASEAN Protocol on Enhanced Dispute Mechanism (2004 Protocol). The 2004 protocol offers the parties two methods of dispute resolution which are panel proceedings and non-adjudicatory mechanisms (choices vary from good offices, conciliation or mediation).²⁵ However, despite its exclusive dispute settlement mechanism, ASEAN member states still rely on the dispute settlement in the WTO although major disputes have arisen under AFTA. This situation is caused by several problems that AFTA has, in particular, the weaknesses and obstacles of the AFTA DSM.

The first problem will be the chance of overlapping jurisdictions between AFTA DSM and the WTO DSM. The AFTA DSM proceeds under the virtue of the 2004 protocol, which unfortunately it does not regulate the 'choice of forum' clause that determines the complainant party in a dispute to select either the WTO DSM or the AFTA DSM. This results in the exclusivity of a dispute settlement mechanism and 'forum shopping'.²⁶ In particular, the parties will spend their time in the dispute settlement process than concluding the disputes with agreements on the issues. As a consequence, the parties will be caught in a dead end if one party brings the disputes to a forum while the other party asks for the formation of a panel to the SEOM. In that case, an issue of which jurisdiction shall apply will arise, which adds more confusion to the parties, slow down the disputes to be settled, and requires more costs for both parties. The freedom to choose a suitable forum that comes from Article 1 (3) of the 2004 protocol may be misinterpreted and leads to contradictory basis in the presentment of their cases, rather than providing flexibility to the parties.²⁷ Therefore, it should be changed to meet certain criterias so it will not harm the value of the effective implementation of the AFTA DSM.

Furthermore, most ASEAN members have trust issues AFTA DSM due to the fact that it is still untested and not as experienced as the WTO in settling trade

²⁵ *2004 Protocol on Enhanced Dispute Settlement Mechanism*, art. 4.

²⁶ Caroline Henckels (n 5).[571].

²⁷ Gonzalo Villalta Puig & Lee Tsun Tat, 'Problems with the ASEAN Free Trade Area Dispute Settlement Mechanism and Solution for the ASEAN Economic Community' (2015) 49 *Journal of World Trade*. [286].

disputes. The need to establish an ASEAN dispute settlement mechanism was caused by the case where in 1995, Singapore charged Malaysia with the prohibition of imports of petrochemical products, which is one of Singapore's major exports.²⁸ Simply put, Singapore lodged a request for consultation to the WTO concerning that allegation in which Malaysia has breached Singapore's rights under the GATT provisions. Not long after the request of consultations, Singapore revoked its Panel request after the consultation did not give significant solutions for both parties. However, Malaysia successfully managed to reach Singapore personally and it resulted in the "mutually agreed solution". This case later influenced ASEAN to form its own dispute settlement mechanisms to resolve intra-regional trade disputes.²⁹ Kahler states that "bringing an intra-ASEAN trade dispute to the WTO embarrassment to the organization and its members; it also sparked a realization that disputes of this kind were likely to increase as economic intergration deepened among the ASEAN economies". Due to the non-existence of the dispute settlement mechanism in the 1996 protocol, ASEAN ammended the 1996 protocol with 2004 protocol that regulates the mechanism specifically and exhaustively.

As the 2004 protocol came into effect, it has not been fully implemented by ASEAN member states. This is shown by the case of Thailand – Customs and Fiscal Measures on Cigarettes from the Philippines.³⁰ In summary, The Philippines (claimant) alleged Thailand (respondent) for violating the Article X: 3 (a) of the GATT 1994 which then resulted in an unfair procedural treatment and Article X:1 for the failure to create provisions concerning the VAT of cigarettes and the exemption of a guarantee enforced in the customs valuation procedure. The Philippines preferred to bring its dispute with Thailand to the WTO instead of AFTA DSM, although both the Philipines and Thailand are members of ASEAN. The

²⁸ World Trade Organization, 'DS 1: Malaysia — Prohibition of Imports of Polyethylene and Polypropylene' (*World Trade Organization*, 2010).

²⁹ Annika Korte, 'Why Did NAFTA and ASEAN Set Up Dispute Settlement Procedures?', *Roads to Regionalism: Genesis, Design, and Effects of Regional Organizations* (Ashgate Publishing Limited 2012).[110].

³⁰ See Panel Report, *Thailand – Cigarettes (Philippines)*, WT/DS371/R, 15 July 2011.

Philippines then requested consultations with Thailand on 7 February 2008, four years after the 2004 Protocol has prevailed. This case reflects the idea of how ASEAN member states still opt to the WTO DSM because of its experience, legal certainty, and the preferable outcome by the parties in a dispute.³¹ In addition, the lack of trade law experts in ASEAN compared to the human resources in the WTO and the deficiency of ASEAN Laws by the member states (they are more familiar with the WTO laws) have discouraged ASEAN member states from choosing AFTA DSM as their first priority of dispute settlement platform. As a result, if there is no major change in the member states' preferences of dispute settlement, the AFTA DSM will never be used in operation and does not have the chance to support AFTA in the perspective of law enforcement.³² Recently (1 June 2015), Vietnam lodged a complaint to Indonesia under the WTO regarding a safeguard measure imposed by Indonesia on imports of certain flat-rolled iron or steel products which does not comply with provisions under GATT 1994 and the Agreement on Safeguards.³³ This ongoing case is another example of ASEAN member countries' reluctance to use AFTA DSM that still occurs until now.

Another weakness of AFTA DSM can be shown by the non-existence of special provisions for 'least developed countries' member states. In contrast, the WTO provides specific dispute settlement procedure for countries other than developed countries through Article 12 (10) of the WTO agreement – Dispute Settlement Understanding (DSU), which points out that in the position of a respondent, the country is allowed to prolong the specified time of consultations (prior to the panel meeting) and in the panel stage, the country is able to add more time in the due dates for the purpose of preparing its submissions. This provision aims to give fairness and put less-developed countries in the same power of developed countries in dispute resolution. However, the non-existence of such provision in AFTA DSM

³¹ Joseph Wira Koesnaldi [*et. al.*], 'For a More Effective and Competitive ASEAN Dispute Settlement Mechanism' (2014).[26].

³² *ibid.*[27].

³³ World Trade Organization, 'DS 496: Indonesia — Safeguard on Certain Iron or Steel Products' (*World Trade Organization*, 2015).

therefore constitutes greater political and economic powers for developed countries in defeating the less-developed countries' efforts in seeking justice.³⁴

Specifically, over the years, the WTO has shown more efforts to facilitate the less-developed countries to access WTO DSM. This can be seen from the meeting of WTO ministers in 1996 which concluded with an agreement to add more support for least developed countries to improve their participation in WTO and developed countries commitment of creating easy access for least developed countries' products to enter their market, then in 1997, six international organizations joined forces to establish the "Integrated Framework", a form of corporation in the technical assistance programme for least-developed countries.³⁵ In 2002, the WTO set up the work programme for least-developed countries and many more to come.³⁶

Moreover, the AFTA DSM does not give proper facilitation for private parties in accessing the dispute settlement process. Therefore, in order to have their disputes resolved, private parties need to co-operate with their government in which the case will be brought on behalf of the government. The issues of private parties' access are usually caused by the corruption hindrance and the politicization of the process by turning the private disputes to national disputes. Apart from Singapore, most countries in ASEAN still struggle with the issue of government corruption which creates major obstacles for the process of creating a clean government. In order to accelerate the private parties' interests, it usually requires them to bribe government officials to have the disputes handled. Hence, the procedure of having the government to represent private parties in AFTA DSM reflects more impediments than as a procedural step.³⁷

Last but not least, The existence of the 'ASEAN Way' method in solving intra-regional disputes may also harm the effectiveness of AFTA DSM. The 'ASEAN Way' are built on the basis of three characteristics, which are the eagerness of not to lose face in public or to make other members lose face, a priority of

³⁴ Gonzalo Villalta Puig & Lee Tsun Tat (n 27).[288].

³⁵ World Trade Organization, 'Understanding the WTO: Developing Countries' (*World Trade Organization*, 2015).

³⁶ *ibid.*

³⁷ Gonzalo Villalta Puig & Lee Tsun Tat (n 27).[292].

consensus-based dispute resolution than confrontation, and a non-acceptance for the idea of state intervention without the approval of other states' internal affairs.³⁸ Unfortunately, this approach seems to be inadequate with the proper requirements in resolving trade disputes because when the consultation stage fails to create the agreed outcome, the parties are expected to override the underlying issues in order to maintain the continuous relationship between both parties, so the main issues will remain unresolved.³⁹ Therefore, the use of this approach forces the member states 'to agree to disagree'.⁴⁰

From the perspective of trade disputes, the 'agree to disagree' approach will affect the economic situation of member states and threaten the national resources, income levels, job security, living standards, etc.⁴¹ The reality is that the AFTA DSM is already contaminated by the 'ASEAN way' of resolving disputes. For instance, in the panel proceedings, the first stage (consultations) and the final stage (referral to the ASEAN Summit) depend on diplomatic measures to settle the dispute. Nevertheless, a different situation happens to the AFTA DSM which tends to collaborate the legalistic factors of the WTO DSM with the 'ASEAN Way' approach in the first and final stage of the dispute settlement process in an attempt to get the consensus-based outcome. Hence, in the litigation process, disputing parties are usually caught in a zero-sum relationship in which one party has the bad intention to bring down the other party's interest and vice versa.⁴² Integrating the idea of consensus-building in the dispute settlement approach causes the parties to litigate the issue with being less proactive to the matter. As a consequence, the outcome will usually be incoherent, lack of clarity in the framework, and the Member States are also reluctant to use AFTA DSM.

³⁸ Walter Woon SC and David Marshall, 'Dispute Settlement The ASEAN Way' (*Centre of International Law National University of Singapore*, 2012).[1].

³⁹ Yuen Foong Khong, *Crafting Cooperation: Regional International Institutions in Comparative Perspective* (Cambridge University Press 2007).[32–82].

⁴⁰ Gonzalo Villalta Puig & Lee Tsun Tat (n 27).[293].

⁴¹ *ibid.*[294].

⁴² Lars Kirchhoff and Nadja Alexander(eds), *Constructive Interventions: Paradigms, Process and Practice of International Mediation: Global Trends in Dispute Resolution* (3rd edn, Kluwer Law International 2008).[137].

Furthermore, in order to preserve the relationship when member states are in dispute, they are entitled to apply Article 26 and 27 (2) of the ASEAN Charter⁴³ which generally set out that in the event of non-compliance with the dispute settlement decision, the next step to settle the dispute can be held in the ASEAN Summit, ASEAN's annual meeting of Member States. This means that the ASEAN Summit indirectly holds the top role of the decision-making body.⁴⁴ It results in greater confusion and more questions regarding the power of AFTA DSM decisions. It also opens several opportunities for the losing party to manipulate the situation and threaten the winning party's resources.

The ASEAN Member States Challenges in the WTO DSM

Although the WTO DSM is the ASEAN member states' primary preference in resolving trade disputes, they have to be concerned about their resources and powers as most of the ASEAN members state are developing countries and least developed countries. Guzman and Simmons⁴⁵ state that there are two barriers of developing countries usually encounter when resolving their disputes in the WTO, the first is the "capacity barriers", which means that there will be financial issues because of the necessity to ask for the help of legal assistance. This is caused by the limited numbers of competent human resources in international trade law expertise. The second is the "power barriers", which means that countries with major powers and resources will be able to utilize their power as a form of punishing conduct when their provisions were challenged by developing countries. In addition to that, there will be language limitations because most developing countries do not speak English as their national languages, therefore, they will find difficulties in interpreting the panels and appellate hearings.⁴⁶

⁴³ 2007 ASEAN Charter, art. 26, 27(2).

⁴⁴ Gonzalo Villalta Puig & Lee Tsun Tat (n 27).[295].

⁴⁵ Andrew T. Guzman and Beth A. Simmons, 'Power Plays and Capacity Constraints: The Selection of Defendants in World Trade Organization Disputes' (2005) 34 Journal of Legal Studies. [564–573].

⁴⁶ Roderick Abbott, 'Are Developing Countries Deterred from Using the WTO Dispute Settlement System?' (2007).[11].

Meanwhile, the least developed countries will be confronted with obligations in the WTO and the non-existence of guarantee in terms of their trade privileges (e.g. tariff preferences). Moreover, with their lack of powers and resources, they become easy objectives for complaints. In summary, there will be a lot of challenges for least developed countries because they have no skillful human resources, a few varieties of exports as well as a limited distance of exports, and their preferences of settling disputes at the bilateral stage instead of having to go through consultations or panel proceedings at the WTO to solve their disputes.⁴⁷ These tables present the numbers of the developing countries and least developed countries participation in WTO DSM (including ASEAN member states) in general:⁴⁸

Table 1. Complaining parties in WTO disputes

	1995-1999	2000-2004	2005-2009	2010-2013	Total
Brazil	6	16	2	2	26
Canada	15	11	7	0	33
Chile	2	7	1	0	10
China	0	1	5	6	21
European Union	47	21	13	9	90
India	9	7	2	3	12
Japan	8	4	1	6	19
Korea	3	9	2	2	16
Mexico	8	5	8	2	23
USA	60	20	13	13	106
Other-developed	12	6	4	3	25
Other-developing	34	40	20	26	120
Other-least developed	0	1	0	0	1
Total	204	148	78	72	502

*Note that because some complaints were brought by multiple Members, the total number of complaining parties exceeds the total number of responding parties for some periods.

⁴⁷ *ibid.*[13].

⁴⁸ Kara Leitner and Simon Lester, 'WTO Dispute Settlement 1995-2013 – A Statistical Analysis' (2014) 17 *Journal of International Economic Law*. [193].

Table 2. Responding parties in WTO disputes

	1995-1999	2000-2004	2005-2009	2010-2013	Total
Brazil	9	3	2	1	15
Canada	10	3	2	2	17
Chile	3	7	3	0	13
China	0	1	16	14	31
European Union	28	23	16	10	77
India	13	4	3	2	22
Japan	12	2	1	0	15
Korea	11	2	1	0	14
Mexico	3	9	2	0	14
USA	39	49	20	14	122
Other-developed	20	4	1	6	31
Other-developing	37	32	11	23	103
Other-least developed	0	0	0	0	0
Total	185	139	78	72	474

Solutions to the Issue in the WTO DSM and AFTA DSM

Having discussed the participation of ASEAN member states in the WTO DSM, it describes the constraints of AFTA DSM and lack of least developed members' participation in the WTO DSM due to their limited resources and powers. On the other hand, the WTO still manage its way out of the overlap jurisdiction issue. Therefore, having intra-region trade disputes to be resolved by the WTO is not the best solution. In order to overcome their issues, AFTA and the WTO need to create a breakthrough in their mechanisms.

From the perspective of AFTA, there has been an idea to establish an exclusive ASEAN arbitration centre to settle the intra-region disputes. This would be an effective solution to the lack of efficiency in the AFTA DSM legalistic framework. Unlike the EU, ASEAN member states still emphasize on their supreme power or authority, therefore they are reluctant to the fit in the court-like superstructure. Having arbitration as the main approach to settle trade disputes would be considered by ASEAN member states as a friendly alternative to settle the trade disputes

because of its informal yet adjudicative procedure⁴⁹ If the ASEAN member states would apply arbitration approach to their trade disputes, it could gradually eliminate all aspects of AFTA DSM weaknesses. In summary, the advantages of having an arbitration centre are:⁵⁰

1. Provide direct access to private parties so they can lodge their requests independently without having the government to represent them.
2. Set out the limit of political intervention in the dispute settlement procedure. The existence of Article 26 ASEAN Charter would leave the disputes unresolved because it allows the disputes to be referred back to the ASEAN Summit for a final decision. Thus, when parties fail to reach consensus, arbitration would lead them to the New York Convention in regards to the enforcement of the arbitral award and the arbitration decision is final and binding.
3. The use of the arbitration approach would differ from the dispute settlement in the AFTA and the WTO. This would be very helpful for the ASEAN member states and their larger companies in their region because they are used to the procedure of arbitration and understand how the outcome would be. The use of arbitration would also come with the benefit of having local expertise over and above the WTO DSM because it would be adjusted to local market practices and legal traditions.⁵¹

The establishment of an arbitration center would represent legal certainty within AFTA DSM in which the least developed members would be encouraged to settle their disputes in the intra-regional stage and not a bilateral stage. Moreover, the establishment of an arbitration centre would be in line with Article 1 (3) 2004 protocol which allows parties to look for the alternative in dispute settlement to another forum in terms of disputes arising from AFTA. Nonetheless, this article would cause a dead end and arise an issue of contradictory jurisdiction

⁴⁹ Pearlie M C Koh, 'Enhancing Economic Co-Operation: A Regional Arbitration Centre for ASEAN?' (2000) 49 *International and Comparative Law Quarterly*. [399].

⁵⁰ Gonzalo Villalta Puig & Lee Tsun Tat (n 27). [301-302].

⁵¹ Pearlie M C Koh (n 49). [402 – 406].

once another dispute settlement forum has distinct conclusions. Hence, exclusive jurisdiction is needed to affirm the authority of the arbitration forum in order to prevent this conflict.

As for the WTO, the overlap jurisdiction which happened in the *Mexico-Soft Drinks* and *Brazil-Tyres* shall be the primary lesson to improve their system by reviewing their basic rules. Looking at the legal basis of the WTO jurisdiction, there has been a contradiction between Article 23 DSU with Article XXIV GATT. In particular, under the virtue of Article 23 DSU, the WTO has the power to adjudicate all breach of WTO obligations and WTO members are able to request for the formation of panel proceedings, which results in the adversity of having another forum to settle the disputes although there has been an agreement under an RTA regarding the parallel dispute settlement mechanism for parallel obligations.⁵² On the contrary, article XXIV GATT acknowledges the right for disputing parties to enter RTAs dispute settlement mechanisms.

In response to the issue, it will be helpful if there is an amendment of Article 23 of the DSU to allow members to decide the most suitable forum to settle their disputes⁵³ as well as allow the panel to refuse in exercising the jurisdiction when there is already a decision from an RTA.⁵⁴ Furthermore, Article 13 DSU should regulate the panels' authority to ask for the materials (such as information and evidence) of their analysis from parties, any other source, or even rulings from an RTA tribunal.⁵⁵ All of those requests for amendment shall be followed by the WTO panels' acknowledgment of the existence of arguments and defenses under an RTA, therefore, the WTO or RTA panels can adopt the same law.⁵⁶

⁵² Jennifer Hillman (n 12).[205].

⁵³ Kyung Kwak & Gabrielle Marceau, 'Overlaps and Conflicts of Jurisdiction Between the WTO and RTAs' (2002).[8].

⁵⁴ Jennifer Hillman (n 12).[205].

⁵⁵ Kyung Kwak & Gabrielle Marceau (n 53).[9].

Joost Pauwelyn, 'Going Global, Regional, or Both? Dispute Settlement in the Southern Africa Development Community (SADC) and Overlaps with the WTO and Other Jurisdictions' (2004) 13 Minnesota Journal of Global Trade.[254-55].

⁵⁶ Joost Pauwelyn, 'Going Global, Regional, or Both? Dispute Settlement in the Southern Africa Development Community (SADC) and Overlaps with the WTO and Other Jurisdictions' (2004) 13 Minnesota Journal of Global Trade.[254-55].

Moreover, there are several things that WTO members should consider prior to requesting the WTO to establish a panel. Following the proposal for change in the Article of 13 and 23 DSU, WTO members could participate by deliberating the rules that allow the postponement proceedings in one forum while the other forum examines the case and matters.⁵⁷ Lastly, as a preventive approach, the disputing parties are expected and encouraged to maximize their WTO remedies in advance of bringing an RTA dispute and vice versa.⁵⁸

Conclusion

This essay focuses on examining the issues from two different scopes: first, the WTO and RTAs; second, the WTO and AFTA, as well as giving a preventive solution for the issues in AFTA DSM and a repressive solution for the WTO to consider having an amendment in its provision. The plan for ASEAN Economic Community to be effective by 2015 needs to be supported by having an effective dispute settlement mechanism to settle trade disputes in the intra-regional stage. The possibility of overlapping jurisdiction, the ‘ASEAN Way’ of solving disputes, the difficult access for private parties to enter the dispute settlement process have been the major barriers to the effectiveness of AFTA DSM. Therefore, an exclusive arbitration centre to settle intra-region disputes shall be a consideration for ASEAN to overcome the lack of efficiency in the AFTA DSM legalistic framework. An arbitration centre will give a lot of benefits for the member states as they are already familiar with the arbitration procedure as an alternative dispute resolution. This idea will only be successful if each of ASEAN member states is willing to restore their trust to AFTA DSM so it is no longer untested. As a result, ASEAN Member States do not have to rely on the WTO DSM to settle intra-region trade disputes as the WTO itself also faces overlapping jurisdiction issues (e.g. *Mexico – Soft Drinks* dispute and *Brazil – Retreaded Tyres* dispute) with the other RTAs in terms of its power to exercise

⁵⁷ Kyung Kwak & Gabrielle Marceau (n 53).[10-11].

⁵⁸ *ibid.*

jurisdiction for the given case. In order to resolve this problem, the WTO needs to amend Article 23 DSU so it will not be contradictory to Article XXIV GATT and also an amendment of Article 13 DSU to give more significant authority to the WTO Panel in terms of their analysis in settling disputes. By implementing these solutions, the WTO will have a balanced and consistent legal framework to govern its dispute settlement mechanism so it will not create overlapping issues with the other mechanisms in RTAs.

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