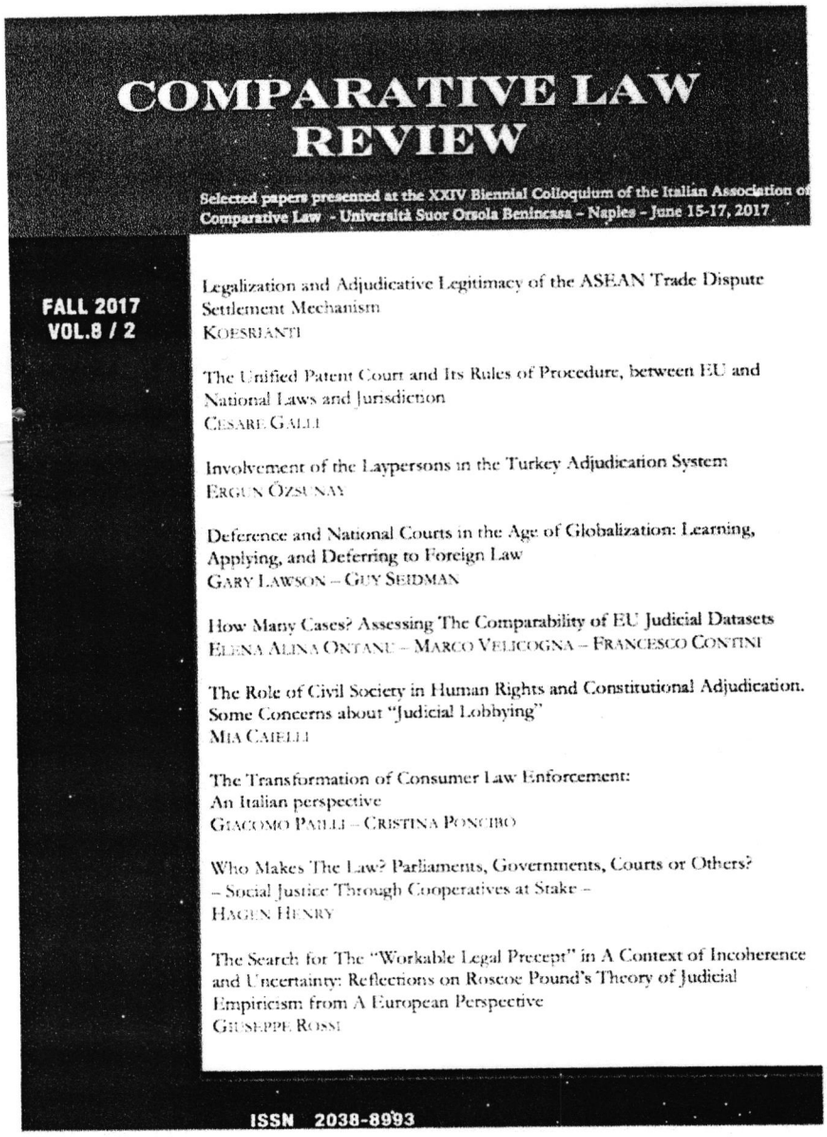

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COMPARATIVE LAW REVIEW

LEGALIZATION AND ADJUDICATIVE LEGITIMACY OF THE ASEAN TRADE DISPUTE SETTLEMENT MECHANISM

Koesrianti Koesrianti

ABSTRACT

ASEAN has adopted the ASEAN Charter in 2008, which designed ASEAN as a 'rule-based' organization. The Charter legalized all of ASEAN's principles, agreements, and co-operations and they became legally binding commitments. After nearly a decade since the adoption of the Charter, ASEAN Member Countries (AMCs) still put state sovereignty as a higher priority than organization interests in some areas of co-operation as agreed in the ASEAN Blueprints. As consequence, the fulfillment of measures of AEC Blueprint 2015 had not completed yet in December 2015 as agreed deadline. This article argues that legalization of ASEAN has failed. It discusses the ASEAN Economic Community Blueprints (2009 and 2015) as a strategic tool to achieve the ASEAN vision as well as a legalized model in achieving the ASEAN Community in 2025. It examines whether ASEAN will continue to avoid legalization, especially in implementing a trade dispute settlement mechanism even though the Charter stated that "disputes which concern the interpretation or application of ASEAN economic agreement shall be settled in accordance with the ASEAN Protocol on Enhanced Dispute Settlement Mechanism 2004". It examines other regional organizations, such as the European Union and North American Free Trade Area, as closer examination of other regional variation allows a better understanding of the benefits and cost of legalized institutions in sustaining co-operative and predictable outcomes for both governments and private agents. This article also observes the WTO dispute resolution mechanism since ASEAN had utilized the WTO Dispute Settlement Understandings (DSU) as a role model for its dispute settlement mechanism as specified.

REFBACKS

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Legalization and Adjudicative Legitimacy of the ASEAN Trade Dispute Settlement Mechanism

SUMMARY: 1. Introduction – 2. The emergence of international regulatory regimes - 2.1. The internationalization of economic and social activity in globalized era - 2.2. ASEAN trade dispute mechanism and its legalization (1977-2003) - 2.3. ASEAN Charter: legalization of ASEAN agreements and institutions - 2.4. A Rules-based ASEAN Community - 2.5. ASEAN Legal Instruments - 3. Pillars of the AEC Blueprints - 3.1. A single market and production base - 3.2. A highly competitive economic region - 3.3. A region of equitable economic development - 3.4. A region fully integrated into the global economy - 4.The legalization of ASEAN dispute settlement mechanism - 4.1. A community law: the European Union law as a comparison - 4.2. Dispute settlement mechanism in ASEAN - 4.3. The Dispute Settlement Mechanisms of other international organizations - 4.3.1. Dispute Settlement Mechanism under NAFTA and WTO: as comparative study - 4.3.2. Trade dispute settlement mechanism: ASEAN practical context - 5. Conclusion.

1. *Introduction*

ASEAN has moved to integrated economic area when in 2015 ASEAN Member Countries (AMCs) leaders declared the official establishment of ASEAN Community (AC) comprises of the ASEAN Economic Community (AEC) complemented by the ASEAN Political Security Community (APSC) and the ASEAN Socio-Cultural Community (ASCC). The AEC would create a single market and production base in the region by 2020 (later it advanced to 2015) by agreeing an open economic policy consist of a free flow of goods, services, investment, skilled labor and a free flow of capital. It is an ambitious program for ASEAN that has desired the AMCsto comply with the various obligations that are the foundation of the new communities. Historically ASEAN was a simple association of

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a group of Southeast Asian nations that its legal document, the Bangkok Declaration, essentially stated a few shared goals and announced an annual meeting of foreign ministers.[1]

For almost three decades the region has witnessed changing dynamics within the Southeast Asian region of integration and development as consequences of the ASEAN intra-regional development. ASEAN has expanded covering almost all countries in the Southeast Asian region, as new members of ASEAN, include Cambodia, Laos, Myanmar and Vietnam. ASEAN has expended its cooperation by concluded free trade agreements (FTAs) with major trading countries, such as Japan, India, China, South Korea, and Australia-New Zealand. Beside that, ASEAN also has deepenedits cooperation, covering and incorporating all of economic agendas, such as, goods, services, investment, and capital, as well as political security and socio-cultural sectors.

The process of the community establishment has begun when ASEAN rose to the challenge for deep integration by launched the 2003 Bali Concord II to establish the ASEAN Community consist of three pillars, namely, APSC, AEC, and ASCC by 2020. ASEAN also adopted the ASEAN Charter in 2007 and it entered into force in 2008 as a legal foundation for the ASEAN Community. The Charter has been regarded as the 'constitution' of ASEAN. The preamble of the Charter clearly stated that "We, the peoples of the Member States of the ASEAN ...HEREBY DECIDE to establish, through this Charter, the legal and institutional framework for ASEAN".

In ensuring that the AMCs commitment toward the ASEAN's goal timely firm, the ASEAN leaders adopted blueprint of AEC for achieving the AEC by 2015. In achieving this goal ASEAN utilizes AEC scorecard measures and the AMCs should implement these measures in their national level in certain time frame, which ended its' term in December 2015. However, the AMCs could not accomplish all the measures completely. In general the AMCs had only implemented 92,7 percent or 469 of the total 506 measures until the target date. Regarding with these unfinished obligations, AMCs agreed to place themas priority of the AMCs with certain new deadlines. Meanwhile, law at any level can perform various functions includes communication, facilitation, and coercion.[2]As communication law

[1] The ASEAN Declaration (Bangkok Declaration), Indonesia – Malaysia, Philippine-Singapore- Thailand, done at Bangkok, 8 August 1967, see asean.org/the-asean-declaration-bangkok-declaration-bangkok-8-august-1967/ (viewed on 02/04/2017)

[2] DAVID, M. TRUBEK, R. HUDEC, M.P. COTTREL, *The Theory of International Economic Law: the Law of Global Space,* in C. THOMAS, J.P. TRACHTMAN (eds), *Developing Countries*

set forth standards for behavior of individuals, organizations or states. While law as facilitation, create arenas in which individuals or groups may seek to set rules for their interaction or solutions to common problems, law as coercion provides sanctions for noncompliance with authoritative standards or mutually agreed-upon rules.[3]

This article argues that legalization of ASEAN has failed. It discusses the ASEAN Economic Community Blueprint as a strategic tool to achieve the ASEAN vision as well as a legalized model in achieving the ASEAN Community in 2025.AMCs compliance of their AEC commitments is based on how many measures that accomplished by individual AMC and these are monitored by Scorecard system, called the AEC Scorecard, which has been used by ASEAN as a monitoring mechanism. As a compliance tool, the AEC Scorecard reports the progress of implementing the various AEC measures, identifies implementation gaps and challenges, and tracks the realization of the AEC by 2025.This article also examines whether ASEAN will continue to avoid legalization, especially in implementing a trade dispute settlement mechanisms.ASEAN has adopted dispute settlement resolution clauses in the ASEAN Charter.

2. *The emergence of international regulatory regimes*

2. 1. *The internationalization of economic and social activity in globalized era*

The notion of a single unified system of decision-making authority has become increasingly problematic in a global political economy due to interdependence of states' relations. Proliferation of regional organizations has been flourished since early 1990s, so there are no longer 'regions without regionalism'.[4] Since then, regional organizations have been becoming actors in their own right in an increasingly vertically and horizontally differentiated emerging system of global governance.[5]Majority of these

in the WTO Legal System, Oxford Univ Press, 2009, p. 132.

[3] Ibid.

[4] N.D. PALMER,1991, *The new Regionalism in Asia and the Pacific*, Lexington, M.S: Lexington Books, quoted in P. NGUITRAGOOL, J. RULAND, *ASEAN as An Actor in International For a: Reality, Potential and Constraints*, Cambridge, 2015, p. 2.

[5] J. RULAND, 2010, *Balancers, Multilateral Utilities or Identity Builders? International Relations and the Study of Inter-regionalism*, Journal of European Public Policy 17 (8): 1268-1280, quoted in P. NGUITRAGOOL, J. RULAND, ibid.

new regional organizations are inter-governmental in nature. International organizations have in the past been defined in international treaties simply as 'inter-governmental organizations' in order to demonstrate that the key characteristic of such groupings is that their membership comprises states.[6] Amerashing he refers to organizations 'normally created by a treaty or convention to which states are parties and the members of the organization so created are generally states' and points to 'basic characteristics such as establishment by international agreement among states, possession of a constitution, possession of organs separate from its members, establishment under international law, and either exclusive or predominant membership of states or governments.'[7]An international organization is created by means of a treaty. The treaty may give it legal personality under international law where it then becomes a subject of international law and can have rights under international law by which is bound.[8]ASEAN as an international organization also declares its international legal personality.[9]If an entity has international legal personality, it is recognized by international law as a person where it can have rights and obligations.[10] It can enter into agreements, incur liability and perform other acts that result in a change in its legal position.

In this era of globalization, many see that the traditional concept of sovereignty has vanished as globalization has curtailed national sovereignty with respect fiscal, monetary, and economic policy.[11]It is transforming traditional conceptions and constructions of sovereignty when the conventional image of sovereignty associated with exclusive territorial jurisdiction is no longer theoretically or empirically serviceable in the face of internationalization of economic and social activity. In facing globalization, majority states in the world now became the member of international groupings in order to strengthen their position on bargaining their

[6] See e.g. the Vienna Convention on the Representation of States in their Relations with International Organizations, 1975; the Vienna Convention on Succession of States in Respect of Treaties, 1978 and the Vienna Convention on the Law of Treaties between States and International Organizations, 1986.

[7] AMERASINGHE, *Principles of Institutional of International Organization*, Cambridge University Press, 2005, p 201.

[8] T.C. HARTLEY, *European Union Law in A Global Context, Text, Cases and Materials,* Cambridge Univ. Press, 2004, p. 132.

[9] See, article 3 of ASEAN Charter.

[10] HARTLEY, n. 8, p. 217.

[11] L. BOULLE, *The Law of Globalization: An Introduction*, Kluwer Law International,2009, p 102

national interests toward international trade major players.[12]As a result of globalization, international regimes of one type or another are playing a growing role in the regulation of affairs which related to the governance beyond the level of nation state by bringing more aspects of international life into the ambit of law-like processes.[13] This specific law that apply refers to the use of various authoritative processes that affect national cross-borders transactions.

It is perceived that states in the Asia Pacific region, including Southeast Asian region prefer more informal methods of consultation to formal organizations.[14] They relations tend to have mechanisms with emphasis on diplomacy such as second tier diplomacy and informal meetings. In the ASEAN context, the Bangkok Declaration 1967, actually did not create an organization, the founding fathers of ASEAN intended to set up a mechanism to foster mutual trust among them. Therefore, in the first two decades of ASEAN establishment there was very few interest-driven agreements had been produced by ASEAN since ASEAN at that time merely as a forum for AMCs to know each other as neighboring countries that had been separated by their own colonial histories whose have similar destiny to face communism threat.

In the beginning of 1990s ASEAN started to revitalize and institutionalize of their economic and political activities by forming the ASEAN Free Trade Area (AFTA) and ASEAN Regional Forum (ARF) to meet the emerging challenges posed by globalization of the world economy and the uncertain regional strategic environmental. Eventually, ASEAN's approach to economic cooperation and integration focused on the need to eliminate trade barriers to intra-regional trade and investment that this leads to competitiveness of the region that can compete more effectively in international markets in facing an increasingly competitive global world. ASEAN eventually also has legalized all of its dynamic regional governance. ASEAN very recently also declared as a rule-based organization as its' future goal, as stated, "cognizant of our commitment made under ...that set out the future direction for ... and a truly rules-based, ...ASEAN"[15] Furthermore, ASEAN also committed

[12] KOESRIANTI, *International Cooperation Among States In Globalized Era: The Decline Of State Sovereignty, Indonesia Law Review* 3 (3), 267 – 28, 2013, p. 275.
[13] D.M. TRUBEK, M.P. COTTREL, R. HUDEC, *The Theory of International Economic Law: the Law of Global Space,* in C. THOMAS AND J.P. TRACHTMAN (eds), *Developing Countries in the WTO Legal System*, Oxford Univ Press, 2009, p. 130.
[14] G. TRIGGS, *Confucius and Consensus: International Law in the Asian Pacific*, 21 *Melbourne University Law Review* 650, 1997, p 675.
[15] ASEAN, Kuala Lumpur Declaration on ASEAN 2025: Forging Ahead Together,

to realize a vision as a rules-based ASEAN Community in 2025.[16]

International legalization is a form of institutionalization characterized by three dimensions: obligation, precision, and delegation.[17] Obligation means that states are legally bound by rules or commitments and therefore subject to the general rules and procedures of international law.[18] Precision means that the rules are definite, unambiguously defining the conduct they require, authorize, or proscribe.[19] Delegation grants authority to third parties for the implementation of rules, including their interpretation and application, dispute settlement, and (possibly) further rule making.[20] These dimensions are conceptually independent, and each is a matter of degree and gradation. Their various combinations produce a remarkable variety of international legalization. Legalization isranging from "hard" legalization (characteristically associated with domestic legal systems) through various forms of "soft" legalization to situations where law is largely absent. Most international legalization lies between the extremes, where actors combine and invoke varying degrees of obligation, precision, and delegation to create subtle blends of politics and law.[21]

In a slightly different view, legalization in ASEAN can be understood comprehensively by analyzing the 'ASEAN way'. One stated that 'ASEAN way' has never given primacy, so far, to logic and rigorous conceptual models, but usually amounts to pragmatic responses- mainly to external pressures- and under political constraints such as far-reaching respect for national sovereignty and a search for consensus. [22]Nonetheless, after the commencement of the ASEAN Charter in 2008, ASEAN has moved toward mechanism rule of law. Both national law and regional has similar concept of law, especially the function of law. In relation with sovereignty, it can be said that law is the most important aspect. Law is the main foundation for the formation of political order, interestingly; law is 'the sole guarantor of

para.6. Retrieved from ASEAN website www.asean.org/storage/2015/11/ASEAN_2025_Forging_Ahead_Together.pdf.

[16] ASEAN, Community Vision 2025, number 4, ibid.

[17] MILES KAHLER, *Legalization as Strategy: The Asia-Pacific Case. International Organization*, 54, 2000, p 549-571.

[18] Ibid.

[19] Ibid.

[20] Ibid.

[21] MILES KAHLER, *Legalization as Strategy: The Asia-Pacific Case*, in *International Organization*, 54, 2000, p 549-571.

[22] J. PELKMANS, *The ASEAN Economic Community: A Conceptual Approach*, Cambridge University Press, 2016, p. 191.

the continuity of civilization'.[23]The central features of any regime based on the rule of law are as follow:[24]

1. The outcomes of actions are given by clear, transparent and accessible rules;
2. Such outcomes are enforceable, whether through penalties, sanctions or moral suasion;
3. Arbitrariness in the exercise of power and uncertainty of outcomes are minimized.

Fundamental to rule of law and a rules-based organization are mechanisms for accountability and agreed rules that are applicable to all.

2.2. *ASEAN trade dispute mechanism and its legalization (1977-2003)*

ASEAN legalization of its trade dispute mechanism had started when ASEAN started its efforts at economic integration among the Association in 1992. Initial obstacles of ASEAN integration included among others is the wide differences in economic size, development level and industrial competence among AMCs that giving rise to widely divergent perceptions of benefits and costs of economic integration. The international pressures such as the formation of the single market of the European Union and the North Free Trade Area that were likely would attracted foreign investments to Europe and America has led ASEAN to switch to outward-looking development strategies to boost economic development in the region by establishing ASEAN Free Trade Area (AFTA) in 1992. The AFTA Agreement has set up its own dispute settlement mechanism as its Annex, which legalized the trade disputes mechanism in ASEAN. Previously, the ASEAN agreements such as ASEAN Industrial Complementation (AIC) Scheme of 1981, ASEAN Industrial Joint Venture (AIJV) of 1983 and the Preferential Trading Arrangements (PTA) of 1977 and others, each has only one article on dispute resolution mechanism. In the period of 1977 – 1990 the scope for disputes among member states was great as ASEAN and its members have certainly not been immune to trade and trade related

[23] J SHEEHAN, *The problem of Sovereignty: the American History Review*, Oxford University Press, Vol.3, 2006, p 7.
[24] A. DUXBURY, *Moving toward or turning away from institutions? The future of International Organizations in Asia and Pacific*, in *Singapore Yearbook of International law*, 2007, 11 SYBIL, 177-193, p 177.

disputes but have no effective mechanisms for dispute resolution.[25]

In 2003, in ASEAN Summit IX in Bali, ASEAN intended to move toward economic integration and declared that ASEAN would have formed an ASEAN community in 2020. The Declaration of Bali Concord II stated that AMCs pledged to achieve an ASEAN Community 'for the purpose of ensuring durable peace, stability, and shared prosperity in the region' by the year 2020 as outlined in the ASEAN Vision 2020.[26] The Declaration was an ASEAN' response to the financial crisis 1997/1998, endemic disease SARS, some terrorist attacks in the region, and 'is seen as an attempt to regain credibility from its economic partners.'[27]ASEAN has been moved even closer together by integrating AMCs' economic as likely one country is the presence of two emerging giant India and China, where China has more than double the size of ASEAN in terms of people and economic per capita.[28]Later on, the deadline of the formation of ASEAN Community was decided into 2015 or five year earlier. The Community comprise of three pillars, ASEAN Political and Security Community, ASEAN Economic Community, and ASEAN Socio-Cultural Community. Eventually, the Community has been established officially in December 2015.

2.3. *ASEAN Charter: legalization of ASEAN agreements and institutions*

Roadmap for an ASEAN Community 2009-2015 set up measures and schedules for the establishment of ASEAN Community in 2015 where all 10 member nations aim to achieve uniformity of rules and procedures and seamless physical, infrastructural and people-people connectivity. Accordingly, for an organization to be rules-based, it must be clothed with legal personality. Without legal personality, it will not be able to apply or enforce its rules and rule of law toward its member states where these rules should also have a legally binding to the organization itself. The organization must also be subject to a strong Dispute Settlement Mechanism (DSM) in order to provide predictability and legal certainty to the organization and its members as well as their counterpart parties.[29]

[25] KOESRIANTI, *The Development of the ASEAN Trade Dispute Settlement Mechanism: From Diplomacy to Legalism*, Unpublished Dissertation, Faculty of Law, UNSW, 2005, p 65

[26] Declaration of Bali Concord II 2003, see asean.org/?static_post=declaration-of-asean-concord-ii-bali-concord-ii

[27] KOESRIANTI, The Development, 2005, n. 25 supra. p. 88

[28] PELKMANS, n. 22 supra,p. 191

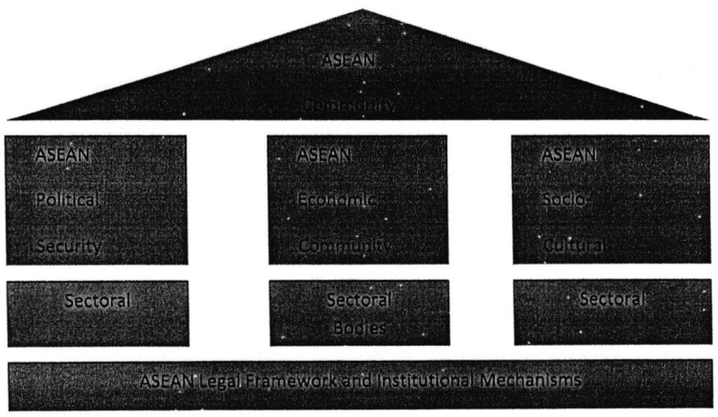
[29] KOESRIANTI, *WTO Dispute Settlement Mechanism: Indonesia's Prospective in International Trading System*, Vol.27 No. 2, June 2015, Mimbar Hukum, Univ. Gadjah Mada, p.127

When the ASEAN leaders adopted the AEC Blueprint 2007 they committed that:

> "*...each ASEAN Member Country shall abide by and implement the AEC by 2015. The AEC Blueprint will transform ASEAN into a single market and production base, a highly competitive economic region, a region of equitable economic development, and a region fully integrated into the global economy...*"

It can be said that the AEC Blueprint binds AMCs when they agreed to adopt it by signing and ratifying the AEC Blueprint. In other words, the AEC Blueprint is a legal instrument by which AMCs commit themselves to realize AEC's goal.Following the entry into force of the ASEAN Charter on 15 December 2008, ASEAN has been formalizing its institutional by setting up and putting in place rules and procedures to support the objective of a rules-based ASEAN Community for the benefit of the peoples of ASEAN. Thus, the role of ASEAN Charter are: (i) to provide ASEAN with its own legal personality distinct from its Member States; (ii) to enshrine ASEAN key principles and purposes, including strengthening the rule of law and the ASEAN Community; (iii) to set up necessary institutional mechanisms and bodies to implement ASEAN cooperation programs and activities; (iv) to provide the legal framework for community building an integration processes.[30]

Figure 1: ASEAN Legal Framework and Institutional Mechanisms



[30] ASEAN Secretariat, *ASEAN Community: Institutional Structure and Legal Framework,* Presentation to international students of AMERTA Program- Universitas Airlangga, *Field Trip*, Jakarta, 2 May 2017

ASEAN has officially declared as a rules-based organization in December 2015, as an ASEAN Community, which consist of three pillars. ASEAN Community Pillars are developing and/or adopting rules and regulations to implement policies and agendas under their respective Blueprints. In achieving its goals, ASEAN set up the institutional mechanisms and legal framework that each sector has its own Sectoral bodies in each three communities as shown in figure 1. Each Sectoral Body has the competence to work on legal issues, including enters into various legal instruments.

ASEAN Institutional Structure/Organs comprise of: (i) ASEAN Summit (head of governments/Prime Minister); (ii) ASEAN Coordinating Council (ACC) (Foreign Ministers); (iii) ASEAN Community Councils (Minister of relevant bodies); (iv) ASEAN Sectoral Bodies (new organ that listed in the ASEAN Charter); (v) Secretary – General of ASEAN and the ASEAN Secretariat; (vi) Committee of Permanent Representatives to ASEAN (CPR); (vii) ASEAN National Secretariats; (viii) Entities Associated with ASEAN; (ix) ASEAN Inter-Governmental Commission on Human Rights (AICHR).

2.4. *A Rules-based ASEAN Community*

ASEAN after the ASEAN Charter 2008 has entered into forced - as the legal foundation of ASEAN Community 2015 (AC15) has moved to legalistic mechanisms. Each ASEAN Community Pillar has developed various instruments under its respective areas of competence to pursue ASEAN integration agendas under their respective Blueprints. Currently there are approximately 219 legal instruments in ASEAN are in place, setting out rules and measures for regional cooperation and integration. In the context of ratification all ASEAN legal instruments, the ASEAN Secretariat (ASEC) has duty to monitoring their ratifications as well as their implementationthat assisted by LSAD and relevant Sectoral Bodies. Secretary –General of ASEAN is the depositary of each agreement concluded within the ASEAN framework. LSAD assists the Secretary-General in discharging this role by notifying AMCs and/or Contracting Parties of a Party's ratification, acceptance, approval or accession of an agreement and its date of entry into force. LSAD also distributes Certified True Copies (CTCs) of new agreements concluded within the ASEAN framework to the Missions/Embassies of AMCs and/or Contracting Parties. The role of LSAD includes to do review of Agreements including drafting of final provisions, review contracts, review of applications for use of the ASEAN

Name, and to register ASEAN Legal Instruments to the UN Treaty Section.

2. 5. *ASEAN Legal Instruments*

In the ASEAN context, legal instruments are instruments that creating rights and obligations under international law. In states practice and literature of international law there are many terminologies for treaty, such as convention, agreement, concord, declaration, protocol, pact, charter, covenant, and concordat. All of these names refer to the same basic activity and the use of one term rather than another often signifies little more than a desire of variety of expression.[31]The term treaty is the one most used in the context of international agreement. It is stated that, an international agreement concluded between states in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation (Art.2 the 1969 Vienna Convention). The fundamental principle of treaty law is undoubtedly the proposition that treaties are binding upon the parties to them and must be performed in good faith.

3. *Pillars of the AEC Blueprints*

In the ASEAN institutional history, In the Declaration of AEC Blueprint 2015, the ASEAN leaders stated ASEAN as a rules-base organization. The AEC Blueprint 2015 would have been used to transform the Southeast Asian region become a single market and production base that mean the region will become an integrated market and an integrated production base, where goods and food, services are sourced regionally. The AEC Blueprint outlines the measures to be taken by the AMC and the schedule for implementation that is a strategic framework timeframe that divided into four time frames: 2008-2009, 2010-2011, 2012-2013, 2014-2015.

ASEAN economic region in which there is a free flow of goods, services, investment and freer flow of capital, equitable economic development and reduce poverty and socio-economic disparities in year 2020. Eventually the ASEAN region will be a region that a stable, prosperous and highly competitive. Indeed, the vision of the AEC is to create a highly competitive

[31] Malcolm N. Shaw, *International Law*, Cambridge, Sixth Ed, 2008, p. 904.

single market that promote equitable economic development for AMC as well as facilitate their integration with the global community.

ASEAN leaders have agreed a detailed mechanism that embodied in the Roadmap for ASEAN Community (2009-2015) upon the Cha-am Hua Hin Declaration on the Roadmap for ASEAN Community 2009-2015, which consist of three pillars. The leaders also agreed on the Initiative for ASEAN Integration (IAI) Strategic Framework and IAI work plan 2 (2009-2015). The three pillar blueprintsand IAI work plan 2 shall constitute the Roadmap for an ASEAN Community and each AMC shall ensure its timely implementation. Every pillar consists of details legal instruments as guidance for AMC to achieve ASEAN Community in 2015.

3. 1. *A single market and production base*

The first AEC pillar seeks to create a single market and production base through free flow of goods, services, investment, skilled labor and freer flow of capital. Cumulatively, these aim for a more liberalized market that provides its population with greater opportunities to trade and do business within the region, with reduced trade costs and improved investment regimes that make ASEAN a more attractive investment destination for both international and domestic investors in facing globalization era.Free flow of goods is one of principal means by which the aims of a single market and production base can be achieved. A single market for goods and services will facilitate the development of production networks in the region and enhance ASEAN capacity to serve as a global production center or as a part of the global supply chain.ASEAN like other international organizations realized that eliminating trade barriers, tariffs and non-tariffs, is surely a part of the answer to the challenges posed by globalization. Pascal Lamy stated that ...the real cause of the downsides of globalization is not more open trade, but instead failure to accompany trade expansion with other domestic economic policies that address the adjustment costs of opening up to foreign competition.[32]ASEAN has agreed and decided some sectors as a priority of trade integration. There are 12 priority integration sectorsthat ASEAN has identified to serve as a catalyst for economic integration in the region: agro-based, healthcare, air transport, logistics, automotive, rubber-based, electronics, textile and apparel, e-ASEAN/ICT, tourism, fisheries,

[32] PASCAL LAMY, *The WTO Development Agenda: Working for A Fairer Global Trading System,* in MERIT E JANOW, V. DONALDSON, A. YANOVICH, in *The WTO: Governance, Dispute Settlement and Developing Countries, Juris Publishing Inc*, 2008, p. 13.

wood-based. Therefore the sectors that actually have privilege or special treatment among AMCs are only 12 sectors, that AMCs should apply in their national level.

3. 2. *A highly competitive economic region*

In order to establish a region of highly competitive economic region, ASEAN has to have a harmonization law of AMCs.The main objective of the competition policy is to foster a culture of fair competition. Institutions and laws related to competition policy have recently been established in some but not all AMCs. There is currently no official ASEAN body for cooperative work on Competition Policy Law (CPL) to serve as a network for competition agencies or relevant bodies to exchange policy experiences and institutional norms on competition law.

Competition policy is quite new to some ASEAN Member States with only some of them having national competition law and competition regulatory bodies. ASEAN has conducted a study on best practices in the introduction and implementation of competition policy and law in the East Asia Summit countries (ASEAN, Australia, China, India, Japan, New Zealand and the Republic of Korea). An ASEAN Experts Group on Competition has also been set up to coordinate competition policies and related issues at the regional level. Currently, ASEAN-wide Guidelines on Competition Policy and the Handbook on Competition Policy and Law for Business in ASEAN have been developed by the Experts Group.

3. 3. *A region of equitable economic development*

ASEAN historically divided into two groups of members, the old member countries, ASEAN-6 and the new member countries, CLMV where there is a economic development gap between these two groups. Efforts to narrow the development gap under the AEC 2009 Blueprint based on mainly on the Initiative for ASEAN Integration (IAI) Work Plan 2 (2009-2015) that formulated based on key programme areas of the three Community Blueprints. The actions that had been taken are critical and necessary to boost the process of integration in the region. The Work Plan developed articulate actions in building CLMV capacity for participation in ASEAN programmes, for example, consider carefully the importance of a project's role in national development plans, long-term continuity

and sustainability, and absorptive capacity of CLMV countries. Thus, IAI projects have coherence, focus, adequate coverage, reflect substantive gaps in priority sectors and activities essential for integration, and more importantly, are responsive to the needs of the CLMV.When there is no gap among AMCs, soon ASEAN will combine all the AMCs strengths and to speak with one voice, include trade policy of opening up ASEAN's market like its counterpart, the EU that has opened its market where the average tariff for industrial goods is about 4% and agriculture goods about 10%.

3.4. *A region fully integrated into the global economy*

The official establishment of the AEC in December 2015 has provided greater opportunities for socio-economic growth. The benefits of AEC are firstly people will have a greater choice of goods and services through increases in intra-regional trade. Secondly, it will be a larger economy of scale for businesses and industries, thereby increasing productivity while reducing production costs, leading to more competitive pricing of goods. Thirdly, it will reduce production costs that can be passed onto consumers who can benefit from lower prices of goods and services. Eventually, a greater demand for goods and services will create jobs in various industries such as manufacturing, transport, logistics and communications.Increased trade and investment will promote greater entrepreneurship and innovation in products and services, thereby producing better variety, quality and efficiency, which will benefit consumers. Apparently, an increased economic integration will strengthen business networks across ASEAN, building growth and prosperity. The important thing is a higher level of employment in ASEAN would contribute towards building a larger middle class, thereby reducing the gap between the rich and the poor, which will promote social stability, apart from a consumer market with purchasing power for goods and services.

The actual implementing agencies of the AEC, the governments of the AMCs that have differences in ability to implement the Blueprint and there is no penalty for any defaulting defined in the Blueprint or in other agreements and the ASEAN Charter. The biggest and most indispensable challenge for accomplishment of the Blueprint is to ensure implementation in each member country as well as the evaluation and the progress reports of implementation by AMCs. The ASEAN Scorecard, whichis to monitor the implementation of the Blueprint have not been disclosed publicly.[33]

[33] Ibid

4. *The legalization of ASEAN dispute settlement mechanism*

Regional solutions for regional problems, is still relevant for ASEAN. The notion that Southeast Asia are best placed to manage their own challenges has long captivated the regional imagination by which ASEAN has solved their issues in their own way that as known as ASEAN way. Before ASEAN Charter, ASEAN is a loose organization. Problems or the different view among AMCs was solved informally. AMCs prefer to solve most of their problems voluntary by peaceful means in timely manner through dialogues, consultations and negotiations. After the establishment of ASEAN Charter in 2008, ASEAN has moved to a legal organization. ASEAN has declared and undertook rule of law to realize a part of ASEAN Community Vision 2025, 'a rules-based community that fully adheres to ASEAN fundamental principles, shared values and norms as well as principles of international law governing the peaceful conduct of relations among states'.[34]For very board economic cooperation, from good to investment, ASEAN should have reliable dispute settlement mechanism to ensure legal certainty and predictability for business people and foreign investors. For the purpose of this article, it discusses on dispute settlement mechanism in other organizations such as the EU, WTO and NAFTA as in the following section.

4.1. *A community law: the European Union law as a comparison*

The previous research on ASEAN integration stated that 'ASEAN law is not easy to find'.[35]ASEAN has utilized many nomenclatures for ASEAN agreements, from Charter to Plan of Action, which some are politically significant such as concords and declarations, and some others indicate as legal instruments, such as arrangements, conventions, protocols.[36] Some of these agreements did not track the standard clauses generally recognized in treaty law concerning final clauses or entry into force clauses. They can classified as follow: signature, with a specified waiting period before entry into force; signature, with a 'domestic ratification' or notification

[34] Asean, 2016, Kuala Lumpur Declaration on ASEAN 2025: Forging Ahead Together, para.8.8.1

[35] Davinia Abdul Aziz, R. Dehausse, *The Instruments of Governance of ASEAN: An Inventory and Critical Analysis,* project ASEAN Integration Through Law, Plenary 2, ASEAN Governance, Management and External Legal Relations, Hanoi, Vietnam.

[36] ibid

requirement; ratification within a specified period; and entry into force on a date specified in the text of the legal instrument.[37]

Similar with the European Union' treaties, all ASEAN agreements are international treaties in nature. They are the product of AMCs as a group, not similar to Directives as the product of the EU Council (comprised of ministers from the governments of the member states) and the Commission.[38]The European Commission negotiates on behalf of the all EU member states (27 states) on the basis of a mandate that is determined by the Council.[39]Article 288 of the TFEU clarifies the powers of the Council and the Commission to adopt regulations and issue directives that constitute as community law. While EU regulations are similar in form to administrative regulations, a directive establishes regional policy. It is then left to the member states to implement the directive in whatever way is appropriate to their national legal system. Article 249 [189] EC saysthat regulations have direct effect and a directive is 'binding as to the result to be achieved' and contain time limits for national implementation. The member states must adopt all measures necessary to implement legally binding Unions acts.[40]

Unlike the EU, ASEAN in the early 1990s was a model of institutional development without legalization. ASEAN institutions were far more elaborate than they had been at the founding of the group years earlier, an intergovernmental model one. The scope of cooperation had widened to encompass broad government policies. Binding and precise legal obligationsamong the member states remained relatively few, however, and delegation of interpretation or enforcement to judicial or quasi-judicial institutions did not exist. ASEAN then has been developed and expanded from only six become ten member countries. The scope of cooperation was also developed as in 1992 AMCs agreed to form a free trade area in the region, which would be accomplished in 2005. In 2003 ASEAN leaders declared to integrate their economies by forming ASEAN Community that would be accomplished in 2020.

The ASEAN leaders recognized the compliance of the AMCs to the ASEAN legalinstruments are significance despite the realization of the target measures of the AEC Blueprint 2009was not fully completed yet.

[37] ibid
[38] R. H. FOLSOM, *European Union Law in a nutshell*, West Publishing Co, 2011, p.55
[39] C. LAGARDE, *Managing the Future Challenges Facing the WTO: A European Perspective*, in MERIT E JANOW, V. DONALDSON, A. YANOVICH, *The WTO: Governance, Dispute Settlement and Developing Countries*, Juris Publishing Inc, 2008, p. 30
[40] Ibid

The leaders however acknowledge that regional economic integration is a dynamic, ongoing process as economies as well as domestic and external environments are constantly evolving.[41]Therefore ASEAN continued to implement the unfinished measures of the AEC Blueprint 2009. The full implementation of AEC Scorecard has monitored closely as that have been previously committed by AMCs, totaling 506 measures. However, the AMCs could not accomplish all the measures completely. In general the AMCs had only implemented 92,7 percent or 469 of the total 506 measures until the target date i.e. November 2015. These unfinished obligations were becoming priority of the AMCs with further deadlines.When they fully implemented the region would have creating a networked, competitive, innovative, and highly integrated and contestable ASEAN. In other words, the AMCs has not accomplished the AEC measures that agreed before as ASEAN does not have any legal forceful authority toward AMCs so that the all measures of AEC Blueprint can be fully implemented and not overdue. Indeed, there is no regional authorized body, which can force the unwilling party that does not implement the ASEAN agreement in its national level that can hinder the development programs of ASEAN.

This is different with the EU, in the late 1970s and early 1980s, it was relatively little progress was made at the legislative level because of the inability of the Council to reach consensus on many Commission proposals. During this period, it was largely through expansive European Court of Justice (ECJ) decisions that continued progress was made toward realizing the internal market goal.[42]For example, the ECJ ruled that normally a good lawfully marketed in one member state could be marketed in the others, notwithstanding local restrictions that purported to limit such marketing possibilities (the *Cassis de Dijon* case.[43] Such court however does not exist in ASEAN. ASEAN does have a Protocol on Enhanced Dispute Settlement Mechanism that suppose to solve trade disputes among AMCs, this Protocol however has yet in operation as the AMCs never bring a case before the panel under this Protocol which is discussed in the following section in this paper.

It can be said that judgments of the European Court have always been binding, but until the Treaty of European Union of 1992 came into force,

[41] ASEAN Economic Blueprint 2025, para.2
[42] W.J. DAVEY, *European Integration: Reflections on its Limits and Effects*, 1 *Ind.J. Global Leg. Studies* 185, 190-193 as quoted in J.H. JACKSON, W.J. DAVEY, A.O. SYKES, *Legal Problems of International Economic Relations: Cases, Materials and Text*, 4th Edition, 2000, p. 143
[43] Ibid

there was no provision for sanctions.[44] Member states just expected to obey, even though in some cases there were problems. In *Commission v. France*[45] for example, the Court ruled that France had violated the Treaty but France refused to comply. The Commission stated that France's refusal to obey the judgment was itself a violation of Community law as this provided by article 228 [171] EC, which says that Member States must comply with the court's judgments. The Commission asked the Court to grant interim measures to order France to comply with the earlier judgment until final judgment was given. Eventually a support system for lamb and mutton was established and France withdrawn its restrictive measure to the importation of mutton and lamb included from the UK. Later the Treaty on EU (Maastricht Agreement) of 1992 introduced the possibility of imposing fines on Member States for failure to comply with judgments of the ECJ. This was done through an amendment to article 228 [171] EC (Panel 6.5).

In 2016 the ASEAN leaders declared the formal establishment of the ASEAN Community 2015 (AC 15) comprising APSC, AEC and ASCC (Kuala Lumpur Declaration on ASEAN 2025: Forging Ahead Together) with ASEAN Community's Post 2015 Vision that set out the future direction for a politically cohesive, economically integrated, socially responsible and a truly rules-base, people-oriented, people-centred ASEAN. This vision will continue the work of the Roadmap for an ASEAN Community (2009-2015). ASEAN well-poised to embark on a new phase of not just community building, but also community strengthening and consolidating which is the new milestone of ASEAN of 2025 with new agenda. The ASEAN 2025 documents are an affirmative of ASEAN's resolve to continue along the path of regional integration and provide an insight as to regional organization priorities, focus and goals. The process of establishing AC 2025 will not easy, and surely there may create some internal difficulties in some AMCs that would constitute as obstacles to intra-Community trade for certain products, ASEAN therefore has to learn from the EU experiences.

4.2. *Dispute settlement mechanism in ASEAN*

ASEAN Charter entry into force in 2008 functioned as legalized the

[44] T.C. HARTLEY, *European Union in a Global Context: Text, Cases, and Materials*, Cambridge Univ Press, 2004, p. 100

[45] *Commission* v. *France* (Second Lamb and Mutton case, Court of Justice of the European Communities, Cases 24, 97/80 R, [1980] ECR 1319; [1981] 3 CMLR 15

previous ASEAN agreements (Protocols, agreements, declarations, treaties and principles) and changes ASEAN from a 'loose organization' to a 'rules-based organization' and thus ASEAN Charter becomes the 'constitution of ASEAN'. The Charter also means its interpretation and application are settled through processes that ensure that such agreements are given full effect. After the Charter ASEAN will commit that all the conduct and affairs of ASEAN are compliant with rule of law. The Charter ensures the compliance of the AMCs toward ASEAN Community agreements.

Theoretically the central feature regime based on rule of law that the outcomes of actions are govern by clear, transparent, and accessible rules; the outcomes are enforceable, whether through penalties, sanctions or moral suasion, in this sense, arbitrary power and uncertainty of outcomes are minimized. It can be said that the Charter has functions as follow.

1. To provide ASEAN with its own legal personality distinct from its Member States (Art.3)
2. To enshrine ASEAN key principles and purposes, including strengthening the rule of law and the ASEAN Community
3. To set up necessary institutional mechanisms and bodies to implement ASEAN cooperation programmes and activities
4. To provide the legal framework for community building and integration processes.

Each ASEAN Community Pillar has developed various instruments under its respective areas of competence to pursue ASEAN integration agendas under their respective Blueprints. There are approx. 219 legal instrumentsin ASEAN are in place, setting out rules and measures for regional cooperation and integration. Monitoring ratification and implementation of ASEAN legal instruments is a challenge for ASEC (incl. LSAD) and relevant Sectoral Bodies. ASEAN still relies on the ASEAN way by which means consultation and consensus that usually diminishing enforceable obligations and national sovereignty facing organization's interest and historically AMCs have been resistant to binding obligations.

Chapter VIII ASEAN Charter regarding dispute settlement mechanism in ASEAN that should conduct. General principleof DSMis to resolve peacefully all disputes in a timely manner (dialogue, consultation, and negotiation). For Economic disputes (Art.24.para.3) should be resolved by mechanism laid down in ASEAN Protocol on Enhanced Dispute Settlement Mechanism/EDSM. For Non-economic disputes are covered by TAC, ASEAN Protocol 2010, Art.33 (3) UN Charter or other international

legal instruments, including arbitration. If the AMCs encountered a dispute that cannot be resolved, the Charter stated that unresolved disputesshall referred to the ASEAN Summit.

ASEAN will face difficulties in establishing its goal to be a single market. If AFTA had already been established almost without problems, a single market will have some issues in particular the issue related to external tariffs among the AMCs as the Association has two groups, which have different economic development level. The CLMV group (Cambodia, Laos, Myanmar and Vietnam) has flexibility in implementing tariffs reduction compared to the ASEAN-6 (Indonesia, the Philippines, Thailand, Malaysia, Singapore, and Brunei Darussalam). It will be difficult for ASEAN to make the AMCs implement their agreed commitments under ASEAN Protocol, Declarations or other ASEAN legal instruments because ASEAN does not have a strong body as its counterpart, the EU that has the Commission with broad power to investigate internal market and identify non-tariff barriers. The EU Member States, the Commission and private actors could bring a case before the EU Court. On the other hand, there is no regional court in place in ASEAN

4.3. *The Dispute Settlement Mechanisms of other international organizations*

4.3.1. *Dispute Settlement Mechanism under NAFTA and WTO: as comparative study*

It is often the parties have different interpretation on the international trade agreements. In the scope of international trade relations, the regional organizations have applied various types of trade dispute mechanisms. In the WTO context, the states members shall resolve their disputes under the DSU of WTO. The WTO Member states as states parties to the various treaties under the WTO umbrella (covered agreements) including the successor treaty to the original 1947 GATT have access to dispute settlement as of right. In the WTO dispute settlement mechanism a ruling will be adopted as binding unless all the Members, including the winning party vote against its adoption (negative consensus).[46]It also has determinations of when and how the losing party must act to implement a ruling are subject to arbitration; and should the losing party not implement a ruling in accord with the finding of the arbitrators, retaliation (a withdrawal of

[46] KOESTIANTI, *WTO Dispute*, n. 29 supra, p.127

trade concession to the losing party by the wining party) is automatically authorized.[47] It can be said that WTO is a self-enforcing contract: assuming non compliance with the rulings by a WTO adjudicating body, the injured Member can request and impose countermeasures, that is raise the level of its bound duties *vis-à-vis* the author of the illegal act.[48]Hence, from a systemic perspective, countermeasures are a means aimed at inducing compliance.[49]

To ensure the *predictability and certainty of the DSM outcome* (measured), effective and benefits for all the members

The dispute settlement mechanism of NAFTA can be found in: Chapter 11, Chapter 19 and Chapter 20. Chapter 11 establishes a mechanism for the settlement of investment disputes that ensures both equal treatment among investors of the Parties to the Agreement in accordance with the principle of international reciprocity and due process before an impartial tribunal. It established a framework of rules and disciplines that provides NAFTA investors with a predictable, rules-based investment climate as well as dispute settlement procedures, which are designed to provide timely recourse to an impartial tribunal.

In a case if a NAFTA investor who alleges that a host government has breached its investment obligation under Chapter 11 NAFTA, then this investor can seek money damages for measures of one of the other NAFTA Parties and choose and have recourse to one of the arbitral mechanisms, namely,the arbitration rules of the United Commission for International Trade Law (UNCITRAL Rules),or the World Bank's International Centre for the Settlement of Investment Disputes (ICSID), ICSID's Additional Facility Rules.the Arbitration (Additional Facility) Rules of the International Centre for Settlement of Investment Disputes ("ICSID Additional Facility Rules").The investor may also choose the remedies available in the host country's domestic courts. An important feature of the mechanism under Chapter 11 NAFTA arbitral provisions is the enforceability in domestic courts of final awards by arbitration tribunals as an alternative of mechanism.

Important to note that the Chapter 11 mechanism is effectively limited to investors of a Party to NAFTA, and more specifically, a national or corporation of a NAFTA Party that seeks to make, is making or has made

[47] R. HOWSE, *Adjudicative Legitimacy and Treaty Interpretation in International Trade Law: The Early Years of WTO Jurisprudence*, in J.H.H. WEILER (Ed), *The EU, The WTO, and the NAFTA: Towards a Common Law of International Trade,* Oxford University Press, 2000, p 35

[48] M. MATSUSHITA, T.J. SCHOENBAUM, P.C. MAVRODIS, *The World Trade Organization: Law, Practice and Policy*, Oxford International Law Library, 2006, p. 143

[49] *ibid*

an investment, in another NAFTA country. Also important to note is that, generally speaking, investors may not bring NAFTA Claims against their own governments for harm to investments made in their own country.To date, corporate investors have used Chapter 11 to challenge a wide variety of governmental laws, policies, and position, including federal controlled substances regulations, the provision of public postal services, municipal contracts, tax policy, and most recently, an effort by the U.S. government to prevent the spread of mad cow disease. Cases filed against NAFTA governments in total are 45 cases notices to commence arbitration filed by corporations and investors under NAFTA Chapter 11 with a total of US$ 5 billion claimed. Of these 45 notices, only 13 have been against Canadian government, majority has been against Mexico, which has been the recipient of 18 notice of intent. Of the 45 notices of intent that have been filed, a total 21 have been withdrawn. Further, of the 12 cases that have been concluded, investors have won only 5 cases. Of these 5 cases, investors have claimed a total of US$791 millions but only received a total of US$35,5 millions. Canada, for example, has only paid out a total of US$18,4 millions, and in 3 cases which were won by investors, while over US$900 millions has been claimed. The number of cases filled against the USA is 17 cases, against the government of Canada 14 cases (exclude the notice of intent received and current arbitrations).

Meanwhile, chapter 19 of NAFTA establishes mechanism for review final antidumping and countervailing duty determination. Article 1904 establishes a mechanism to provide an alternative to judicial review by domestic courts of final determinations in antidumping and countervailing duty cases, with review by independent binational panels. A Panel is established when a Request for Panel Review is filed with the NAFTA Secretariat by an industry asking for a review of an investigating authority's decision involving imports from a NAFTA country. In Canada, the USA, and in Mexico, they have each own authority agencies that determine whether or not dumping or subsidy has caused injury or retardation (material retardation of the establishment of a domestic industry) or is threatening to cause injury to the domestic industry. For example, the Canada Border Services Agency (CBSA) deals with dumping and subsidy determinations and the Canadian International Trade Tribunal (CITT) conducts enquiries of injury to the domestic industry that caused by dumping and subsidy from the other NAFTA member states. In the United States of America, it is the Department of Commerce, International Trade Administration, which makes dumping and subsidy determinations,

while the United States International Trade Commission conducts injury inquiries. While in Mexico, it is the Secretaría de Economía, Unidad de Prácticas Comerciales Internacionales that makes both the dumping / subsidy and injury determinations. These agencies are referred to as investigating authorities. The dumping, subsidy and injury determinations of the investigating authorities can also be appealed, in Canada to the Federal Court of Canada, in the United States to the Court of International Trade and in Mexico to the Tribunal Fiscal de la Federación.

Chapter 20 provides mechanism to resolve all disputes regarding the interpretation or application of the NAFTA. The steps set out in Chapter 20 are intended to resolve disputes by agreement, if at all possible. The process begins with government-to-government (the Parties) consultations. If the dispute is not resolved, a Party may request a meeting of the NAFTA Free-Trade Commission (comprised of the Trade Ministers of the Parties). If the Commission is unable to resolve the dispute, a consulting Party may call for the establishment of a five-member arbitral panel. Moreover, it provides for scientific review boards which may be selected by a panel, in consultation with the disputing Party, to provide a written report on any factual issue concerning environmental, health, safety or other scientific matters to assist panels in rendering their decisions. It mechanism also covers dispute that related to Chapter 7 (Agriculture and Sanitary and Phytosanitary measures), Chapter 10 (government procurement), Chapter 11 (Non-compliance of a Party with a final award); and Chapter 14 (Financial Services).

4.3.2. *Trade dispute settlement mechanism: ASEAN practical context*

ASEAN is continuing into rules-based organization. This commitment has been affirmed as one of ASEAN principles as stipulated in ASEAN Charter, that ASEAN Member Countries (AMCs) to act in accordance with the principle of "adherence to multilateral trade rules and ASEAN's rules-based regimes especially 'for effective implementation of economic commitments and progressive reduction towards elimination of all barrier to regional economic integration'. ASEAN trading framework has become more 'legalized' with the adoption of ASEAN Charter as legal commitment of AMCs to achieve ASEAN goal together.

Unlike national law, however, ASEAN has not equipped by proper and adequate enforcement power to induce its member states' compliance. With fast growing cooperation on the economic sectors, disputes would have arisen in the process of ASEAN economic integration, which specially relate to the interpretation and application of ASEAN economic agreements. A

dispute arises when a member government believes that another member government is violating an agreement or a commitment that it has made in ASEAN.

Under the ASEAN Charter, ASEAN Protocol Enhanced Dispute Settlement Mechanism (EDSM) 2004 or the Vientiane Protocol is the main ASEAN rules and procedures for trade disputes. Principally the EDSM has panels as a mandatory dispute settlement mechanism (DSM). The EDSM also provides an Appellate Body (AB) to assess disputes that cannot be solved by peaceful means settlement mechanisms such as good offices, mediation or conciliation. The findings of the panels or the AB can request a member state to take measures to bring its economic policy into conformity with either ASEAN economic agreements or covered agreements. The authorized institution for DSM in ASEAN is the Senior Economic Officials Meeting (SEOM). The Protocol applies to all ASEAN trade disputes, such as AFTA (the 1992 Framework Agreement on Enhancing ASEAN Economic Cooperation), AFAS, ACIA, AIA or other economic agreements set out in Appendix I to the Protocol, as well as future ASEAN economic agreements (referred to as "Covered Agreements"). The Covered Agreements, initially 46 economic agreements, later on it become 79 economic agreements.[50]

The EDSM procedure is resembled to the DSU WTO. The Vientiane Protocol is similar with the DSU WTO in the context that both mechanisms consist of stages including Consultations, Panel, Appellate Body, and Compensation. Principally the parties in disputes should resolve their dispute by peacefully means mechanisms. The parties first should have a diplomatic mechanism in resolving their dispute, such as good offices, negotiation, mediation, inquiry, and conciliation. The Secretary General of ASEAN ex-officio can take part as a mediator by providing good offices, conciliation or mediation (Art 4 Protocol ESDM) to the parties in disputes. The Secretary has "a potentially significant role" in resolution of such disputes.

The mechanism utilizes a panel and appellate body to solve trade disputes among AMCs. Based on recommendations from panel or appellate body, the party shall amend its economic policies so that they are conformed tothe certain ASEAN economic covered agreement. SEOM can authorize the winning party to suspend concessions or other obligations under the covered agreements. The party concerned should comply with

[50] KOESRIANTI, *Rule-based Dispute Settlement Mechanism for ASEAN Economic Community: Does ASEAN have it ?*, Vol. 2, Issue 2, August 2016, in *Hasanuddin Law Review* (HalRev), 2016, p. 98

its obligations under the covered agreements. Accordingly ASEAN has established a quasi-judicial mechanism of trade disputes in ASEAN.[51]Thus, ASEAN has legalized its trade dispute settlement mechanism by put legal mechanism to the Protocol and this in line with the statusASEAN as a rules-based organization.

Beside EDSM, however the AMCs could bring their disputes to arbitration, as it is a possibility that provided by the ASEAN Charter. Not only arbitration, the AMCs could also bring their disputes to another forum when they assume as an appropriate dispute settlement mechanism for their dispute. All these options are possible, as the Charter has provided it in Article 25. This article says, "Appropriate dispute settlement mechanisms, including arbitration, shall be established for disputes which concern the interpretation or application of this Charter and other ASEAN instruments". Therefore, it is why some AMCs have brought their disputes to the WTO forum, for example Philippine and Thailand on Customs and Fiscal Measures on Cigarettes from the Philippine (WTO case: DS 371). Also, Indonesia and Vietnam on Safeguard on Certain Iron or Steel Product (WTO case: DS 496).[52]

The Protocol 2010 provides a mechanism of dispute settlement through arbitration (Articles 10-17 and Annex 4).[53]The ASEAN Coordinating Council (ACC), which consist all of foreign ministers of AMCs will have arbitration as dispute settlement mechanism based on consensus.The AMCs Foreign Ministers adopted the Protocol to the ASEAN Charter on Dispute Settlement Mechanisms (Protocol 2010)[54] on 8 April 2010 in Hanoi. This Protocol aims to fill the gaps when Treaty of Amity (TAC) or the Vientiane Protocol cannot be implemented.

[51] G. VILLALTA PUIG, L. TSUN.TAT, *Problems with the ASEAN Free Trade Area Dispute Settlement Mechanism and Solutions for the ASEAN Economic Community,* 49 *Journal of World Trade,* Issue 2, pp. 277 – 308, 2015, p 285

[52] See for example, www.wto.org/english/tratop_e/dispu_e/dispu_status_e.htm

[53] The 2010 Protocol to the ASEAN Charter on Dispute Settlement Mechanisms adopted in Hanoi, Vietnam, on 8 April 2010, see at cil.nus.edu.sg/rp/pdf/2010%20Protocol%20to%20the%20ASEAN%20Charter%20on%20Dispute%20Settlement%20Mechanisms-pdf.pdf

[54] Ibid

5. *Conclusion*

Legalization became agenda of ASEAN after the commencement of the ASEAN Charter. ASEAN declared as rules-based organization on the basis of norms and rational choice. Legalization of regional governance is in the process of dynamic construction. The dynamic balance of law's obligation and state's flexibility can be achieved only when legalization is undergoing multiple interactions on both regional and state level. Many regional grouping have their own type of cooperation, formal and informal modes that states can choose the one is cooperation rather than regulation as the primary method of interaction. In a sense, the degree of legalization of various international or regional arrangements that move away from institutionalization. It is perceived that states in the Asia Pacific region prefer more informal methods of consultation to formal organizations.[55] They relations tend to have mechanisms with emphasis on diplomacy such as second tier diplomacy and informal workshops.The capacity of regional organizations to translate normative frameworks into legislative change or binding regulations may vary across members and between regions. In the ASEAN context, translating normative principles into politics of compliance and practice for policy implementation remains suboptimal, inefficient, and uneven, particularly in the absence of binding regulatory and enforcement mechanisms.

Closer examination of regional variation permits a better estimate of the benefits and cost of legalized institutions in sustaining cooperative and predictable outcome for both governments and private agents. It could be assumed that EU and North American provide an implicit benchmark for high legalization; the ASEAN region offers an important example of low legalization and possibly an explicit aversion to legalization. AMCs prefer to solve their disputes, if any, by mechanism, which is highly informal and explicitly rejected legalization in their design. Formal rules and obligations were limited in numbers, codes of conduct or principles have been favored over precisely defined agreements, and disputes have been managed, if not resolved without delegation to third party adjudication.

[55] GILLIAN TRIGGS, *Confucius and Consensus: International Law in the Asian Pacific*, in 21 *Melbourne University Law Review* 650, 1997, p 675.

Abstract

ASEAN has adopted the ASEAN Charter in 2008, which designed ASEAN as a 'rule-based' organization. The Charter legalized all of ASEAN's principles, agreements, and co-operations and they became legally binding commitments. After nearly a decade since the adoption of the Charter, ASEAN Member Countries (AMCs) still put state sovereignty as a higher priority than organization interests in some areas of co-operation as agreed in the ASEAN Blueprints. As consequence, the fulfillment of measures of AEC Blueprint 2015 had not completed yet in December 2015 as agreed deadline. This article argues that legalization of ASEAN has failed. It discusses the ASEAN Economic Community Blueprints (2009 and 2015) as a strategic tool to achieve the ASEAN vision as well as a legalized model in achieving the ASEAN Community in 2025. It examines whether ASEAN will continue to avoid legalization, especially in implementing a trade dispute settlement mechanism even though the Charter stated that "disputes which concern the interpretation or application of ASEAN economic agreement shall be settled in accordance with the ASEAN Protocol on Enhanced Dispute Settlement Mechanism 2004". It examines other regional organizations, such as the European Union and North American Free Trade Area, as closer examination of other regional variation allows a better understanding of the benefits and cost of legalized institutions in sustaining co-operative and predictable outcomes for both governments and private agents. This article also observes the WTO dispute resolution mechanism since ASEAN had utilized the WTO Dispute Settlement Understandings (DSU) as a role model for its dispute settlement mechanism as specified in the Protocol

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