The Dispute Settlement Mechanism of ASEAN Free Trade Area (AFTA) and Its Implications for SADC

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Abstract: The dispute settlement mechanism in the regional trade agreements, which is described as the "back bone of the multilateral trading system", is crucial for the development of regional integration. For the long term success of ASEAN Free Trade Area, a dispute settlement mechanism modeled on the dispute settlement procedures of the World Trade Organization (WTO) has been set up in the ASEAN's 2004 Protocol. The article first outlines the AFTA's dispute settlement mechanism, then makes a comparative analysis of the dispute settlement mechanisms under WTO and the ASEAN-China Free Trade Area (ACFTA), finally the article points out that due to the similarities between the dispute settlement mechanism of the AFTA and that of the SADC, it is necessary and possible for both side to cooperate with and learn from each other in developing an effective dispute settlement mechanism for each respectively.

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Introduction

The rise of trade blocs in Europe and North America such as the European Union (EU) and North American Free Trade Area (NAFTA) during the 1990s has inspired the leaders of the Association of Southeastern Asian Nations (ASEAN)[1] to make further economic integration in the area. A legal framework to promote the economic cooperation in the region was developed at the Singapore Summit of January 27-28, 1992, which was entitled the Framework Agreement on Enhancing Economic Cooperation (AFTA Framework Agreement). The document does not provide detailed implementing instructions but rather is a general framework listing plans for deepening economic cooperation among the ASEAN member states. The concept of "ASEAN Free Trade Area (AFTA)" is expressly stipulated in Article 2 (A), which provides that "All Member States agree to establish and participate in the ASEAN Free Trade Area (AFTA) within 15years."

Dispute settlement is the central pillar of the multilateral trading system. Without a means of settling disputes, the rules-based system would be less effective because the rules could not be enforced. However, there are no detailed provisions about the dispute settlement mechanism (DSM) in the AFTA Framework Agreement except for the general provision in Article 9, which left the possibility of creating a dispute settlement body in future. [2]Just 4 years after the adoption of the Framework, the ASEAN member states adopted The Protocol on Dispute Settlement Mechanism (1996 Protocol). The Preamble of the 1996 Protocol states that it was created in recognition of "the need to expand Article 9 of the Agreement to strengthen the mechanism for the settlement of disputes in the area of ASEAN economic cooperation". However, because of its excessive bureaucratic nature, the 1996 Protocol was perceived to be ineffective, and thus it had never been invoked until the ASEAN Protocol on Enhanced Dispute Mechanism (2004 Protocol) was established in 2004, which replaced the 1996 Protocol. The 2004 Protocol made significant

[1] The organization was created by the Bangkok Declaration of 1967, it currently has 10 member states: Thailand, the Philippines, Malaysia, Indonesia, Singapore, Brunei Darussalam, Vietnam, Laos, Myanmar, and Cambodia.

[2] Article 9 stipulates :"Any differences between the Member States concerning the interpretation or application of this Agreement or any arrangements arising therefrom shall, as far as possible, be settled amicably between the parties. Whenever necessary, an appropriate body shall be designated for the settlement of disputes."

improvements compared with the 1996 Protocol, though the new DSM created by the 2004 Protocol still lacks necessary implementing regulation.

The article first outlines the scope and procedure of the 2004 Protocol DSM, and then makes a comparative analysis of the DSM of CAFTA and WTO, Part III explores the inadequacies in the new AFTA DSM and puts forward some proposals for its improvement, finally Part IV points out the implication of AFTA DSM for SADC.

I. The Dispute Settlement Mechanism of AFTA: the Scope and Procedure

The 2004 Protocol has 21 articles, including 2 appendixes. It has detailed provisions about the scope and procedures, most of them are modeled on the WTO Dispute Settlement Understanding (DSU).

1. Scope

The rules and procedures of the 2004 Protocol shall apply to disputes brought by the Member States pursuant to the consultation and dispute settlement provisions of the AFTA Framework Agreement signed in Singapore on 28 January 1992, as amended by the Protocol to Amend the AFTA Framework Agreement signed in Bangkok on 15 December 1995 (the "Agreement"), as well as the agreements listed in Appendix I[3] and future ASEAN agreements (the "covered agreements"). [4]In case there is a difference between the rules and procedures of the 2004 Protocol and the special or additional rules and procedures on dispute settlement contained in the covered agreements, the special or additional rules and procedures shall prevail. [5]

The protocol also specifically provides that its provisions do not prejudice the rights of the Member States to seek recourse to other fora for the settlement of disputes involving other Member States. A Member State involved in a dispute can resort to other for a at any stage before a party has made a request to the Senior Economic Officials Meeting ("SEOM") to establish a panel in accordance with the Article 5 (1) of the 2004 Protocol. [6]

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[3] There are 46 agreements in Appendix I.
[4] Art. 1 (1) of the 2004 Protocol.
[5] Art. 1 (2) of the 2004 Protocol.
[6] Art. 1 (3) of the 2004 Protocol.

2. procedures

The SEOM shall administer the 2004 Protocol and, except as otherwise provided in a covered agreement, the consultation and dispute settlement provisions of the covered agreements. Accordingly, the SEOM shall have the authority to establish panels, adopt panel and Appellate Body reports, maintain surveillance of implementation of findings and recommendations of panel and Appellate Body reports adopted by the SEOM and authorise suspension of concessions and other obligations under the covered agreements.[7]The SEOM and other relevant ASEAN bodies shall be notified of mutually agreed solutions to matters formally raised under the consultation and dispute settlement provisions of the covered agreements.[8]

Member States which are parties to a dispute may at any time agree to good offices, conciliation or mediation. They may begin at any time and be terminated at any time. Once procedures for good offices, conciliation or mediation are terminated, a complaining party may then proceed with a request to the SEOM for the establishment of a panel. If the parties to a dispute agree, procedures for good offices, conciliation or mediation may continue while the panel process proceeds. The Secretary-General of ASEAN may, acting in an *ex officio* capacity, offer good offices, conciliation or mediation with the view to assisting Member States to settle a dispute.[9]

A. consultation

The 2004 Protocol encourages Member states to settle their differences arising from the implementation, interpretation, or application of the Agreement or any covered agreements in an amicable way. [10]If a Member State considers that any benefit accruing to it directly or indirectly under the Agreement or any covered agreements is being nullified or impaired, or that the attainment of any objective of the Agreement or any covered agreement in being impeded as a result of failure of another Member State to carry out its obligations under the Agreement or any covered agreement, or

[7] Art. 2 (1) of the 2004 Protocol.
[8] Art. 2 (2) of the 2004 Protocol.
[9] Art. 4 (1)、(2)、(3) of the 2004 Protocol.
[10] Art. 3 (1) of the 2004 Protocol.

the existence of any other situation, it may submit a written request for consultation to the other Member State concerned.[11] The Member State to which the request is made shall reply to the request within 10 days upon its receipt and shall enter into consultations within 30 days after the date of the receipt of the request. [12]

B. panel process

If the Member State to which the request for consultation is made does not reply or enter into consultations within the prescribed period, or the consultations fail to settle a dispute within 60 days after the receipt of the request, the complaining party can bring the matter to the panel established by the SEOM, unless the SEOM decides by consensus not to establish a panel.[13]The function of the panel is to make an objective assessment of the dispute before it, including an examination of the facts of the case and the applicability of and conformity with the sections of the Agreement or any covered agreements, and its findings and recommendations in relation to the case. [14]

Appendix II of the 2004 Protocol entitled "Working Procedure of the Panel" provides the composition and proceedings of the panel in detail. The panel shall be composed of well-qualified governmental and/or non-governmental individuals, including persons who have served on or presented a case to the panel, served in the Secretariat, taught or published on international trade law or policy, or served as a senior trade policy official of a Member State. In the nomination to the panels, preference shall be given to individuals who are nationals of ASEAN Member States.[15]Panel members should be selected with a view to ensuring the independence of the members, a sufficiently diverse background and a wide spectrum of experience.[16]Nationals of Member States whose governments are parties to the dispute shall not serve on a panel concerned with that dispute, unless the parties to the dispute agree otherwise.[17]

[11] Art. 3 (2) and (3) of the 2004 Protocol.
[12] Art. 3 (4) of the 2004 Protocol.
[13] Art. 5 (1) of the 2004 Protocol.
[14] Art. 7 of the 2004 Protocol.
[15] Art. I (1) of Appendix II.
[16] Art. I (2) of Appendix II.
[17] Art. I (3) of Appendix II.

Panels shall be composed of three panelists unless the parties to the dispute agree to a panel composed of five panelists.[18]The Secretariat shall propose nominations for the panel to the parties to the dispute. The parties to the dispute shall not oppose nominations except for compelling reasons.[19]If there is no agreement on the panelists, at the request of either party, the Secretary-General of ASEAN, in consultation with the SEOM shall determine the composition of the panel by appointing the panelists whom he considers most appropriate. The ASEAN Secretariat shall inform the Member States of the composition of the panel thus formed.[20]Panelists shall serve in their individual capacities and not as government representatives, nor as representatives of any organization. Member States shall therefore not give them instructions nor seek to influence them as individuals with regard to matters before a panel.[21]

In its proceedings the panel shall follow the relevant provisions of the 2004 Protocol. In addition, the working procedures in Appendix II shall apply. The panel shall meet in closed session,[22]and he deliberations of the panel and the documents submitted to it shall be kept confidential.[23]Before the first substantive meeting of the panel with the parties, the parties to the dispute shall transmit to the panel written submissions.[24]At its first substantive meeting with the parties, the panel shall ask the complaining party to present its case. Subsequently, the party complained against shall be asked to present its point of view.[25]All third parties which have notified their interest in the dispute to the SEOM shall be invited in writing to present their views during a session of the first substantive meeting, and they may be present during the entirety of this session.[26]Formal rebuttals shall be made at a second substantive meeting of the panel. The party complained against shall have the right to take the floor first to be followed by the complaining party. The parties shall submit, prior to that meeting, written rebuttals to the panel.[27]

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[18] Art. I (5) of Appendix II.
[19] Art. I (6) of Appendix II.
[20] Art. I (7) of Appendix II.
[21] Art. I (9) of Appendix II.
[22] Art. II (2) of Appendix II.
[23] Art. II (3) of Appendix II.
[24] Art. II (4) of Appendix II.
[25] Art. II (5) of Appendix II.
[26] Art. II (6) of Appendix II.
[27] Art. II (7) of Appendix II.

The panel may at any time put questions to the parties and ask them for explanations either in the course of a meeting with the parties or in writing.[28]The parties to the dispute and any third party invited to present its views shall make available to the panel a written version of their oral statements.[29]The parties to the dispute shall make available to the panel a written version of their oral statements.[30]In the interest of full transparency, the presentations, rebuttals and statements referred to in the above shall be made in the presence of the parties. Moreover, each party's written submissions, including any comments on the descriptive part of the report and responses to questions put by the panel, shall be made available to the other party or parties. [31]

The 2004 Protocol provides the procedures for multiple complainants and third parties in article 10 and article 11, respectively. Where more than one Member State requests the establishment of a panel related to the same matter, a single panel may be established to examine these complaints.[32]The single panel shall organize its examination and present its findings and recommendations to the SEOM in such a manner that the rights which the parties to the dispute would have enjoyed had separate panels examined the complaints are in no way impaired.[33]If more than one panel is established to examine the complaints related to the same matter, to the greatest extent possible, the same persons shall serve as panelists on each of the separate panels and the timetable for the panel process in such disputes shall be harmonized.[34]

The interests of the parties to a dispute and those of other Member States under a covered agreement at issue in the dispute shall be fully taken into account during the panel process.[35]Any Member State having a substantial interest in a matter before a panel and having notified its interest to the SEOM (referred to in this Protocol as a "third party") shall have an opportunity to be heard by the panel and to make written submissions to the panel. These submissions shall also be given to the parties to the dispute and shall be reflected in the panel report.[36]Third parties shall receive the

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[28] Art. II (8) of Appendix II.
[29] Art. II (9) of Appendix II.
[30] Art. II (10) of Appendix II.
[31] Art. II (11) of Appendix II.
[32] Art. 10 (1) of the 2004 Protocol.
[33] Art. 10 (2) of the 2004 Protocol.
[34] Art. 10 (3) of the 2004 Protocol.
[35] Art. 11 (1) of the 2004 Protocol.
[36] Art. 11 (2) of the 2004 Protocol.

submissions of the parties to the dispute to the first substantive meeting of the panel.[37] If a third party considers that a measure already the subject of a panel proceeding nullifies or impairs benefits accruing to it under any covered agreement, that Member State may have recourse to normal dispute settlement procedures under this Protocol. Such a dispute shall be referred to the original panel wherever possible.[38]

The panel shall submit its findings and recommendations to the SEOM in the form of a written report within 60 days of its establishment. In exceptional cases, the panel may take an additional 10 days to submit its findings and recommendations to the SEOM.[39]Before submitting its findings and recommendations to the SEOM, the panel shall accord adequate opportunity to the parties to the dispute to review the report.[40] A panel shall have the right to seek information and technical advice from any individual or body which it deems appropriate. A Member State shall respond promptly and fully to any request by a panel for such information as the panel considers necessary and appropriate.[41]Panel deliberations shall be confidential.[42]

The SEOM shall adopt the panel report within 30 days of its submission by the panel unless a party to the dispute formally notifies the SEOM of its decision to appeal or the SEOM decides by consensus not to adopt the report. If a party has notified its decision to appeal, the report by the panel shall not be considered for adoption by the SEOM until after the completion of the appeal. SEOM representatives from Member States which are parties to a dispute can be present during the deliberations of the SEOM.[43]In the event that no meeting of the SEOM is scheduled or planned to enable adoption or non-adoption of the panel report, as the case may be, within 30 days, the adoption shall be done by circulation. A non-reply shall be considered as acceptance of the decision and/or recommendation in the panel report.[44]

C. Appellate Review

[37] Art. 11 (3) of the 2004 Protocol.
[38] Art. 11 (4) of the 2004 Protocol.
[39] Art. 8 (2) of the 2004 Protocol.
[40] Art. 8 (3) of the 2004 Protocol.
[41] Art. 8 (4) of the 2004 Protocol.
[42] Art. 8 (5) of the 2004 Protocol.
[43] Art. 9 (1) of the 2004 Protocol.
[44] Art. 9 (2) of the 2004 Protocol.

In case the parties to the dispute, not the third parties, appeal a panel report, an Appellate Body shall be established by the ASEAN Economic Ministers ("AEM"), which shall be composed of 7 persons, 3 of whom shall serve on any one case. Third parties, which have notified the SEOM of a substantial interest in the matter may make written submissions to, and be given an opportunity to be heard by the Appellate Body.[45]

The AEM shall appoint persons to serve on the Appellate Body for a four-year term, and the term may renew once.[46]The persons comprising the Appellate Body shall be of recognised authority, irrespective of nationality, with demonstrated expertise in law, international trade and the subject matter of the covered agreements generally. They shall be unaffiliated with any government. All persons serving on the Appellate Body shall be available at all times and on short notice, and shall stay abreast of dispute settlement activities and other relevant activities of ASEAN. They shall not participate in the consideration of any disputes that would create a direct or indirect conflict of interest.[47]

As a general rule, the proceedings of the Appellate Body shall not exceed 60 days from the date a party to the dispute formally notifies its decision to appeal to the date the Appellate Body circulates its report. In case of urgency, including those which concern perishable goods, the Appellate Body shall make every effort to accelerate the proceedings to the greatest possible. When the Appellate Body considers that it cannot provide its report within 60 days, it shall inform the SEOM in writing of the reasons for the delay together with an estimate of the period within which it will submit its report. In no case shall the proceedings exceed ninety 90 days.[48]

An appeal shall be limited to issues of law covered in the panel report and legal interpretations developed by the panel.[49]The Appellate Body shall address each of the issues during the appellate proceeding,[50]and then it may uphold, modify or reverse the legal findings and conclusions of the panel.[51]

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[45] Art. 12 (1)、(4) of the 2004 Protocol.
[46] Art. 12 (2) of the 2004 Protocol.
[47] Art. 12 (3) of the 2004 Protocol.
[48] Art. 12 (5) of the 2004 Protocol.
[49] Art. 12 (6) of the 2004 Protocol.
[50] Art. 12 (11) of the 2004 Protocol.
[51] Art. 12 (12) of the 2004 Protocol.

An Appellate Body report shall be adopted by the SEOM and unconditionally accepted by the parties to the dispute unless the SEOM decides by consensus not to adopt the Appellate Body report. In the event that no meeting of the SEOM is scheduled or planned to enable adoption or non-adoption of the report, as the case may be, within 30 days, adoption shall be done by circulation. A non-reply within the said 30 day period shall be considered as an acceptance of the Appellate Body report. The adoption process shall be completed within the 30 day period irrespective of whether it is settled at the SEOM or by circulation.[52]

D. Surveillance of Implementation

Since prompt compliance with the findings and recommendations of panel and Appellate Body reports adopted by the SEOM is essential in order to ensure effective resolution of disputes, parties to the dispute who are required to do so shall comply with them within the prescribed time.[53]When a party to the dispute requests for a longer time period for compliance, the other party shall take into account the circumstances of the particular case and accord favourable consideration to the complexity of the actions required to comply with the findings and recommendations. The request for a longer period of time shall not be unreasonably denied. Where it is necessary to pass national legislation to comply with the findings and recommendations, a longer period appropriate for that purpose shall be allowed.[54]

Any party required to comply with the findings and recommendations shall provide the SEOM with a status report in writing of their progress in the implementation of the findings and recommendations of panel and Appellate Body reports adopted by the SEOM.[55]Where there is disagreement as to the existence or consistency with a covered agreement of measures taken to comply with the findings and recommendations of panel and Appellate Body reports adopted by the SEOM, such dispute shall be decided through recourse to these dispute settlement procedures, including wherever possible resort to the original panel.[56]

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[52] Art. 12 (13) of the 2004 Protocol.
[53] Art. 15 (1) of the 2004 Protocol.
[54] Art. 15 (2) of the 2004 Protocol.
[55] Art. 15 (4) of the 2004 Protocol.
[56] Art. 15 (5) of the 2004 Protocol.

The SEOM shall keep under surveillance the implementation of the findings and recommendations of panel and Appellate Body reports adopted by it. The issue of implementation of the findings and recommendations may be raised at the SEOM by any Member State at any time following their adoption. Unless the SEOM decides otherwise, the issue shall be placed on the agenda of the SEOM meeting and shall remain on the SEOM's agenda until it is resolved. At least 10 days prior to each such the SEOM meeting, the party concerned shall provide the SEOM with a written status report of its progress in the implementation of the findings and recommendations.[57]

E. Compensation and Suspension of the Concession

Compensation and the suspension of concessions or other obligations are temporary measures available in the event that the findings and recommendations are not implemented within the period of 60 days or the longer time period as agreed upon by the parties. However, neither compensation nor the suspension of concessions or other obligations is preferred to full implementation of a recommendation to bring a measure into conformity with the covered agreements. Compensation is voluntary and, if granted, shall be consistent with the covered agreements.[58]

If the Member State concerned fails to bring the measure found to be inconsistent with a covered agreement into compliance therewith or otherwise comply with the findings and recommendations within the prescribed or agreed period, such Member State shall, if so requested, and no later than the expiry of the prescribed or agreed period, enter into negotiations with any party having invoked the dispute settlement procedures, with a view to developing mutually acceptable compensation. If no satisfactory compensation has been agreed within 20 days after the date of expiry of the prescribed or agreed period, any party having invoked the dispute settlement procedures may request authorization from the SEOM to suspend the application to the Member State concerned of concessions or other obligations under the covered agreements.[59]

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[57] Art. 15 (6) of the 2004 Protocol.
[58] Art. 16 (1) of the 2004 Protocol.
[59] Art. 16 (2) of the 2004 Protocol.

The SEOM, upon request, shall grant authorization to suspend concessions or other obligations within 30 days of the expiry of the 60 day-period or the expiry of the longer period agreed upon by the parties to the dispute, as the case may be, unless the SEOM decides by consensus to reject the request. In the event that no meeting of the SEOM is scheduled or planned to enable authorisation to suspend concessions or other obligations within the 30 day period, the authorisation shall be done by circulation. A non-reply within the said 30 day period shall be considered as an acceptance of the authorisation.[60]

If the Member State concerned objects to the level of suspension proposed, or claims that the principles and procedures set forth in Article 16 (3) have not been followed, the matter shall be referred to arbitration. Such arbitration shall be carried out by the original panel, if members are available, or by an arbitration appointed by the Secretary-General of ASEAN. Concessions or other obligations shall not be suspended during the course of the arbitration.[61]

The suspension of concessions or other obligations shall be temporary and shall only be applied until such time as the measure found to be inconsistent with a covered agreement has been removed, or the Member State that must implement recommendations and findings of the panel and Appellate Body reports adopted by the SEOM provides a solution to the nullification or impairment of benefits, or a mutually satisfactory solution is reached.[62]

II. The Comparison with the dispute settlement mechanisms of WTO and ACFTA

The WTO is a global organization and its dispute settlement mechanism has great influence on the bilateral and regional approaches to the dispute settlement. The ASEAN member states, except the Lao People's Democratic Republic, are also members of WTO, as will be seen below, the influence of the WTO dispute settlement mechanism is obvious. While ASEAN-China Free Trade Area (ACFTA) is established between ASEAN member states and China for the promotion intra-regional trade and

[60] Art. 16 (2) of the 2004 Protocol.
[61] Art. 16 (8) of the 2004 Protocol.
[62] Art. 16 (9) of the 2004 Protocol.

investment, doubtlessly, the dispute settlement mechanism of the ACFTA is also significant to the ASEAN member states.

1. the dispute settlement mechanism of WTO

Most people consider the WTO dispute settlement system to be one of the major results of the Uruguay Round, It is embodied in the Understanding on Rules and Procedures Governing the Settlement of Disputes, commonly referred to as the "DSU". The DSU sets out the procedures and rules that define today's dispute settlement system. The Uruguay Round agreement introduced a more structured process with more clearly defined stages in the procedure. It introduced greater discipline for the length of time a case should take to be settled, with flexible deadlines set in various stages of the procedure. The Uruguay Round agreement also made it impossible for the country losing a case to block the adoption of the ruling. Now, rulings are automatically adopted unless there is a consensus to reject a ruling.

A dispute arises when one country adopts a trade policy measure or takes some action that one or more fellow-WTO members considers to be breaking the WTO agreements, or to be a failure to live up to obligations. A third group of countries can declare that they have an interest in the case and enjoy some rights.

A WTO dispute proceeds through three main stages: consultation; formal litigation; and, if necessary, implementation. All disputes start with a request for consultations, in which the member government bringing the case to the WTO sets out its objections to the trade measure(s) of another member government. The two sides are then required to consult for 60 days with the goal of negotiating a mutually satisfactory solution to the dispute. In case of failure, they can also ask the Director-General of the WTO to mediate or try to help in any other way.

If consultations fail to reach a mutually satisfactory solution, the complaining party can request a panel proceeding, marking the start of the formal litigation stage. Panels are comprised of three to five persons with a background in trade law, agreed to by the parties on a case-by-case basis. The panel is helping the Dispute Settlement Body (DSB) make rulings and recommendations. The panel then circulates an "interim report," offering both sides an opportunity to comment and seek clarification. The

complainant and defendant can still negotiate a settlement at this point. If not, the panel issues its final report, which is then adopted by the WTO, unless one of two things happens. First, the two sides can agree not to adopt the panel report for whatever reason. Second, one or both sides (but not third parties) can appeal the panel's report.

The Appellate Body (AB) handles these appeals. Unlike panels, the AB is a standing body of jurists of recognized authority in the field of law and international trade, not affiliated with any government. The AB is to examine whether the panel have erred in its legal reasoning, it can not reexamine existing evidence or examine new issues. The AB can uphold or overturn the panel's legal findings and conclusions, and its decision is final. If this verdict favors the complainant, the dispute may proceed to the implementation stage.

When a defendant is ruled against, the panel and (or) AB calls for it to bring its measures into compliance with its WTO obligations. If the complainant feels that the defendant has not taken appropriate steps, it can subsequently request a "compliance" panel. This panel, which is often comprised of the original panel members, must determine whether the defendant's efforts have, in fact, brought its measure(s) into compliance. If not, the complainant can request a second panel to set the level at which it can "retaliate" against the defendant. This typically involves imposing tariffs on the defendant's exports.

As can be seen from comparison, most of the provisions of the 2004 Protocol are just modeled on the DSU, especially the provisions on consultation, panel proceeding, procedures for multiple complaints and third parties, appellate review, surveillance of implementation, and compensation and the suspension of concession. The WTO dispute settlement system is typically rules-based resolution, much of its procedure resembles a court or tribunal. The 2004 Protocol's copy of DSU procedure, instead of adopting the traditional "ASEAN way",[63] a phrase that is used to describe ASEAN's unique consensus approach, to settle dispute, reflects the ASEAN's determination to ensure the Agreement negotiated are adhered to and the member state in breach of the

[63] For the description of the ASEAN way, to see Alyssa Greenwald, "The ASEAN-China Free Trade Area (ACFTA): A Legal Response to China's Economic Rise?" 16 Duke J. Comp. & Int'L. 193. p. 203.

Agreement is sanctioned, which will in turn secure a stable and predicable legal environment for commerce to thrive in. However, the efficacy of the ASEAN DSM is still waiting to be tested, until now, it has not been utilized. In fact, the need for an AFTA dispute settlement system has long been recognized for its success, and it has been submitted that AFTA must incorporate its own unique mechanism in character with ASEAN's more consensus-based decision making while drawing on some useful, effective elements of the WTO and other regional dispute settlement systems.[64] Unfortunately, there are no specific provisions that are unique to the ASEAN's situation. Besides, the current AFTA dispute settlement mechanism does not address the "non-violation claim" and "special procedures involving the least developed country members" just as those stipulated in the DSU, it is not known whether it is a willful or neglected omission.

2. the dispute settlement of ACFTA

The idea of a free trade area between China and ASEAN was first proposed by Chinese Premier Zhu Rongji at the November 2000 China-ASEAN summit. After a long negotiation and preparation process, the leaders from both sides signed the Framework Agreement on Comprehensive Economic Co-operation" (ACFTA Framework Agreement) at the Eighth China-ASEAN Summit held on 5 November 2002 in Phnom Penh. This agreement has served as a roadmap for the development of the free trade area. According to the ACFTA Framework Agreement, a free trade area covering trade in goods and services, investment, etc., between China and the original 6 ASEAN members, Brunei Darussalam, Indonesia, Malaysia, Philippines, Singapore, Thailand, will be completed by 2010. The newer 4 ASEAN member states, Cambodia, Lao PDR, Myanmar and Viet Nam, are expected to fully join by 2015. The agreement on trade in goods between China and ASEAN implementing the ACFTA Framework Agreement entered into force on 1 July 2005, which marked the beginning of ACFTA.

It is well recognized that the success of a regional trade agreement will depend an effective rules-based dispute settlement mechanism. "The existence of a dispute settlement mechanism will ensure that all parties to such an arrangements take their obligation seriously and that an effective method of redress exists should they violate

[64] Jeffrey A. Kaplan, "ASEAN's Rubicon: A Dispute Settlement Mechanism for AFTA", 14 UCLA PAC. BASIN L.J. 147. p. 175.

or fail to live up to such obligations".[65]Therefore, the ACFTA Framework Agreement requires that the parties shall within 1 year after the date of its entry into force (that is 1 July 2003) establish appropriate formal dispute settlement procedures and mechanism. [66] On 29 November 2004, the Agreement on Dispute Settlement Mechanism of the Framework Agreement on Comprehensive Economic Co-operation Between the Association of Southeast Asian Nations and the People's Republic of China (the Agreement on Dispute Settlement Mechanism) was adopted and it took effect on 1 January 2005.

The Agreement on Dispute Settlement Mechanism applies to disputes arising under the ACFTA Framework Agreement, including the Annexes and the contents therein and future legal instruments agreed pursuant to it unless where the context otherwise provides. [67]It also provides the possibility for the complaining party to select a forum to exclude any other for the dispute, unless the parties to a dispute expressly agree to the use of more than one dispute settlement forum in respect of that particular dispute.[68]

Just like the DSM of AFTA and WTO, the complaining party who has been affected due to the failure of the party complained against to carry out its obligations under the ACFTA Framework Agreement, should first submit a written request for consultation, and the party complained against should accord due consideration and adequate opportunity for such consultations.[69]The parties to a dispute may at any time agree to conciliation or mediation. They may begin at any time and be terminated by the parties concerned at any time, and the proceeding is confidential and without prejudice to the rights of any party in any further or other proceedings.[70]If the confidential consultations fail to settle a dispute within the prescribed time, the complaining party may make a written request to the party complained against to appoint an arbitral tribunal.[71]

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[65] Gus Mandigora, "Comments on the Importance of Dispute Settlement Mechanisms in Bilateral and Regional Trade Arrangements", http://rta.tralac.org/scripts/content.php?id=6130.
[66] Art. 11 of the ACFTA Framework Agreement.
[67] Art. 2 (1) of the Agreement on the Dispute Settlement Mechanism.
[68] Art. 2 (6) and (7) of the Agreement on the Dispute Settlement Mechanism.
[69] Art. 4 (1) and (2) of the Agreement on the Dispute Settlement Mechanism.
[70] Art. 5 of the Agreement on the Dispute Settlement Mechanism.
[71] Art. 6 (1) of the Agreement on the Dispute Settlement Mechanism.

The Agreement on Dispute Settlement Mechanism has detailed provisions about the appointment, composition, functions, and proceedings of the arbitral tribunal. Unless otherwise provided in the Agreement on Dispute Settlement Mechanism or the parties agree, the arbitral tribunal shall have 3 members.[72] The parties shall appoint their respective arbitrator, the third arbitrator who shall serve as chair is appointed according to the parties' agreement. If they can not reach an agreement on the chair of the arbitral tribunal, they shall request the Director-General of WTO to appoint the chair and such an appointment shall be accepted by them.[73] Any person appointed as a member or chair of the arbitral tribunal shall have expertise or experience in law, international trade, other matters covered by the Framework Agreement or the resolution of disputes arising under international trade agreements, and shall be chosen strictly on the basis of objectivity, reliability, sound judgement and independence. Additionally, the chair shall not be a national of any party to a dispute and shall not have his or her usual place of residence in the territory of, nor be employed by, any party to a dispute.[74]

The function of an arbitral tribunal is to make an objective assessment of the dispute before it, including an examination of the facts of the case and the applicability of and conformity with the ACFTA Framework Agreement. Where the arbitral tribunal concludes that a measure is inconsistent with a provision of the ACFTA Framework Agreement, it shall recommend that the party complained against bring the measure into conformity with that provision. In addition to its recommendations, the arbitral tribunal may suggest ways in which the party complained against could implement the recommendations. In its findings and recommendations, the arbitral tribunal cannot add to or diminish the rights and obligations provided in the ACFTA Framework Agreement.[75] An arbitral tribunal shall take its decision by consensus; provided that where an arbitral tribunal is unable to reach consensus, it may take its decision by majority opinion.[76] The decision of the arbitral tribunal shall be final and binding on the parties to the dispute.[77]

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[72] Art. 7 (1) of the Agreement on the Dispute Settlement Mechanism.
[73] Art. 7 (2) and (3) of the Agreement on the Dispute Settlement Mechanism.
[74] Art. 7 (6) of the Agreement on the Dispute Settlement Mechanism.
[75] Art. 8 (1) of the Agreement on the Dispute Settlement Mechanism.
[76] Art. 8 (5) of the Agreement on the Dispute Settlement Mechanism.
[77] Art. 8 (4) of the Agreement on the Dispute Settlement Mechanism.

The party complained against shall inform the complaining party of its intention in respect of implementation of the recommendations and rulings of the arbitral tribunal. [78]If it is impracticable to comply immediately with the recommendations and rulings of the arbitral tribunal, the party complained against shall have a reasonable period of time in which to do so. [79]Where there is disagreement as to the existence or consistency with the Framework Agreement of measures taken within the reasonable period of time to comply with the recommendations of the arbitral tribunal, such dispute shall be referred to the original arbitral tribunal, wherever possible.[80]

According to the Agreement on Dispute Settlement Mechanism, the compensation and the suspension of concessions or benefits are temporary measures available in the event that the recommendations and rulings are not implemented within a reasonable period of time. However, neither compensation nor the suspension of concessions or benefits is preferred to full implementation of a recommendation to bring a measure into conformity with the ACFTA Framework Agreement. Compensation is voluntary and, if granted, shall be consistent with the ACFTA Framework Agreement.[81]

It has been admitted that "in theory, ACFTA is intended to be WTO-consistent".[82]As can be seen, there exist some similarities in the value orientation, time-frame and even the terms between the ACFTA DSM and that of WTO. But as a regional free trade area, it has some peculiarities which make it necessary for its DSM to be different from the WTO DSM. Unlike the AFTA DSM, it did not entirely copy the WTO procedures, but adopted some different provisions from those of the DSU, which suits its peculiarities as a regional free trade area. For example, there are no institutional dispute settlement body and appellate review in the ACFTA DSM, which makes its procedure less formal than that of the WTO which has the nature of quasi-justice. Take into account the fact that the main subject maters of the ACFTA DSM relate to the trade in goods, especially in agricultural products, it is not necessary for it to be so formal and complicated. In general, perhaps it is a wise choice for ACFTA to settle the dispute through arbitration.[83]The adoption of arbitration and the arbitral tribunal shall

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[78] Art. 12 (1) of the Agreement on the Dispute Settlement Mechanism.
[79] Art. 12 (2) of the Agreement on the Dispute Settlement Mechanism.
[80] Art. 12 (3) of the Agreement on the Dispute Settlement Mechanism.
[81] Art. 13 (1) of the Agreement on the Dispute Settlement Mechanism.
[82] Alyssa Greenwald, supra note 62.
[83] Shen Sibao, "Comment on the Agreement on Dispute Settlement Mechanism of the Framework Agreement on Comprehensive Economic Co-operation Between the Association of Southeast Asian Nations and the People's

take their decision by consensus to some degree reflect its consistence with the ASEAN way. Just as mentioned above, before the 2004 Protocol of AFTA was drafted, a scholar had made such a suggestion that an AFTA dispute settlement mechanism must fit comfortably into ASEAN's informal, consultative style, and that any AFTA dispute settlement mechanism must incorporate two features: a consultation process and an arbitration process.[84]But it is a great disappointment that the ASEAN leader did not pay much attention to the suggestion. A commentator has observed that from long run, "the success of ACFTA will depend on ASEAN's ability to adopt more legalistic measures, particularly an enhanced dispute settlement mechanism."[85]Nevertheless, the inadequacies in the 2004 Protocol, and "ASEAN's significant in experience with a DSM"[86] could constitute an obstacle for the success of ACFTA.

III. Some Inadequacies in the Current AFTA's Dispute Settlement Mechanism and Its Improvement

Although the 2004 Protocol is a significant step in the development of the AFTA DSM, some inadequacies still exist in it compared with DSM of WTO and those of other regional trade agreements. Most notably, under the current AFTA DSM, the "non-violation claims" are not addressed; the private parties, such as the companies or the individual persons, are not granted access to DSM; there are no special procedures for the least developed countries. These issues are of great importance for the success of the AFTA, which should be improved when amending the 2004 Protocol.

1. non-violation claims

According to the 2004 Protocol, currently only the disputes arising from the AFTA Framework Agreement and the covered agreements can be accepted. In this respect, the 2004 Protocol did not copy the provisions of article 26 of DSU on the "non-violation complaints". However, it is necessary to grant the AFTA dispute settlement mechanism jurisdiction over both violation and non-violation claims to ensure AFTA's long-term integrity. Accepting such non-violation claims will prevent

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Republic of China", 8 Journal of Shanghai University of Finance and Economies, No. 2, 2006. p.34.

[84] Jeffrey A. Kaplan, supra note 64.

[85] Alyssa Greenwald, supra note 63.

[86] Id.

AFTA member governments from performing actions not explicitly covered by AFTA but which seriously damage trade benefits AFTA was intended to deliver.[87]

2. private actors' participation in the AFTA DSM

As the case of the WTO and ACFTA, the dispute settlement mechanism of AFTA is only available for member states, the private actors, whether individuals, entities, or non-governmental organizations, are formally excluded from AFTA dispute settlement, they cannot commence or be forced to defend against complaints. The private actors play an important role in ASEAN's economic development, and they are crucial to AFTA's success,[88] therefore, the ideal AFTA dispute settlement should encourage active private actors' participation. Accordingly, the AFTA dispute settlement mechanism should be "responsive to both the needs of AFTA member states and the private sector", and "accepting private sector dispute into AFTA dispute settlement mechanism should properly be viewed as a tangible expression of ASEAN's private sector-centered perspective on trade".[89]Thus, any person, whether an individual, an entity, or an member state of AFTA, who has suffered or will suffer a loss or damage caused by another person due to an interpretation or application of an AFTA agreement or a measure that is or will be inconsistent with an AFTA agreement or cause a nullification or impairment of a benefit created by AFTA, may initiate an complaints.[90]

It should be noted that before the SADC trade panel also only member states may initiate and defend against a complaint, but with the establishment of the SADC Tribunal in 2005, the situation is likely to change. The SADC Tribunal not only has jurisdiction over disputes between member states, but also over disputes between natural or legal persons and member states, and natural or legal persons and the SADC Community, if such disputes are "arising from the interpretation or application of the SADC Treaty, in interpretation, application or validity of Protocols or other

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[87] Jeffrey A. Kaplan, supra note 64.
[88] Art. 6 of the AFTA Framework Agreement entitled "private sector participation" stipulates: "Member States recognise the complementarity of trade and investment opportunities, and therefore encourage, among others, cooperation and exchanges among the ASEAN private sectors and between ASEAN and non-ASEAN private sectors, and the consideration of appropriate policies aimed at promoting greater intra-ASEAN and extra-ASEAN investments and other economic activities."
[89] Jeffrey A. Kaplan, supra note 64.
[90] Id.

subsidiary instruments made under the SADC Treaty, which can not be settled amicably".[91]These provisions leave the possibility for the private actors to bring the dispute arising from the SADC Protocol on Trade to the SADC Tribunal for settlement.[92]

3. the special procedures for the least developed countries

Article 24 of the DSU provides the special treatment given to the least developed member countries. Under this article, at all stages of the determination of the cause of a dispute and of dispute settlement procedures, "particular consideration shall be given to the special situation of least developed country members;" "due restraint" shall be exercised in initiating the complaint against a least developed country and in asking for compensation or seeking authorization to suspend the concession against a least developed country in breach of its obligation; and in all dispute settlement cases involving a least developed country, the least developed country is entitled for the good offices, conciliation, and mediation from the Director-General or the Chairman of the DSB.

Considering the different levels of development of the ASEAN member states, it is necessary for the AFTA dispute settlement mechanism to adopt such a special procedure to protect the least developed countries such as Laos, Cambodia and Myanmar. But the current AFTA dispute settlement mechanism offers no such special treatment, which may provide an incentive for ASEAN members that are not least developed to submit their complaint against least developed ASEAM members to an AFTA panel, instead of a WTO panel, and similarly, the situation may influence least developed ASEAN members to bring their disputes to the WTO instead of AFTA, just as the case of SADC.[93]SADC has realized such a question, at their meeting on 2 July 2001 in Maputo, the SADC Industry and Trade Committee of Ministers (CMT) put forward some amendment proposals tabled by Mozambique in that regard.[94]

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[91] Art. 32 of the amended SADC Treaty.
[92] Joost Pauwelyn, "Going Global, Regional, or Both? Dispute Settlement in the Southern African Development Community (SADC) and overlaps with the WTO and Other Jurisdictions", 13 Minn. J. Global Trade 231, 2004, p.257.
[93] Id. P.259.
[94] Jan Bohannes, " A Few Reflections on Annex VI to the SADC Trade Protocol", www.tralac.org/pdf/tralac_WP3.2005_Bohanes_Jan.pdf.

IV. Conclusion: the Implication for SADC

Dispute settlement procedures are provided for through Article 32 of the SADC Trade Protocol as amended and s substantive Annex VI concerning the "Settlement of Disputes Between the Member States of SADC". As the case of the AFTA dispute settlement mechanism, the dispute settlement procedure under SADC are also a simplified version of the international dispute settlement process of the WTO as contained in the DSU. There are also some other similarities between them, which can be manifested as the follows: first, their member states both have diversified domestic legal systems,[95]different forms of government, varied culture due to the long colonial rule in their histories, and they vary considerably in the economic development, which make the regional integration more difficult; Second, the member states of AFTA and SADC are poorly experienced with the dispute settlement mechanism, until now, they have never utilized their respective dispute settlement mechanisms, and their participation in the WTO dispute settlement process in also very low,[96]this in turn will become a great barrier for them to develop an effective dispute settlement mechanism; third, both the dispute settlement mechanisms of the AFTA and SADC face the problem of the jurisdictional overlaps with other global and regional mechanisms. As for the AFTA, there are the jurisdictional overlaps with WTO mechanisms and ACFTA mechanisms, and for SADC, there are jurisdictional overlaps with the WTO mechanisms and the mechanisms within Africa such as the Southern African Customs Union (SACU) mechanisms, the Common Market for Eastern and Southern Africa (COMESA) mechanisms. [97] These similarities between the AFTA and SADC mechanisms provide the possibility for them to cooperate with and learn from each other in future in developing its own dispute settlement mechanism.

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[95] For example, some countries in the AFTA and SADC region have civil law, some have common law, and some have a hybrid of two or more legal tradition.

[96] It is thought that the low participation of SADC member countries in the WTO dispute settlement system is due to the following factors: the low intra-trade among member countries in the region; the high cost of the WTO dispute settlement process; the non-existence of clear, procedural and national mechanism for private sector to petition their government to initiate the process at WTO; the relative lack of legal expertise in WTO law and the capacity to organize information pertaining to trade; and also the threats of aid withdrawal by the developed countries. To see "WTO Trade Dispute Settlement: Need for SADC/COMESA Countries to Develop National Mechanism", http://www.mccci.org/wto_dss.doc.

[97] For a detailed description of the jurisdictional overlaps of SADC with the global and regional mechanisms, to see Joost Pauwelyn, supra note 92.