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## ASEAN INVESTMENT DISPUTE SETTLEMENT MECHANISM THROUGH REGIONAL INVESTMENT COURT FRAMEWORK

Vida Azaria<sup>a</sup>; Prita Amalia<sup>b</sup>

### ABSTRACT

In this paper, the authors provide an overview and comparison of the ASEAN dispute settlement mechanism (DSM) in the 2004 Protocol on EDSM and the ASEAN Comprehensive Investment Agreement (ACIA 2009) and review ASEAN's experience with investor-state dispute settlement (ISDS). The paper then examines the challenges and possibilities of restructuring ASEAN DSM through a Regional Investment Court. This includes discussing the potential benefits and drawbacks of such restructuring and its potential implications for regional integration. Finally, the paper offers some thoughts on possible future developments in this area, including the potential impact of a Regional Investment Court on the overall stability and effectiveness of the ASEAN DSM.

**Keywords:** ASEAN dispute settlement mechanism; investor state dispute settlement; regional investment court.

### INTRODUCTION

The Association of Southeast Asian Nations, is a regional organization made up of states that are located in Southeast Asia with the primary objective is to deepen regional cooperation and establish political and economic stability in the area. ASEAN has emerged as a critically factor globally, notably in economics and trade.

More than 300 International Investment Agreements (IIAs) have been signed and agreed to by the ASEAN Member States (AMS) as a means of economic involvement and collaboration in the region due to its vast population and abundant natural wealth. As a result, The ASEAN region has surpassed other developing states to become the second-largest recipient of Foreign Direct Investment (FDI) worldwide, behind China. Advantageous provisions for protecting assets, as well as the nature and goals of the investments themselves, are included in IIAs. This trend is expected to continue. The percentage of global FDI inflows that the ASEAN receives is projected to expand to 11.7% in 2020-2021, up from 11.0% in 2018-2019 and an average annual rate of

<sup>a</sup> Master of Law, Faculty of Law, Universitas Padjadjaran, Jalan Banda No. 42 Bandung, email: [vida18002@unpad.ac.id](mailto:vida18002@unpad.ac.id)

<sup>b</sup> Universitas Padjadjaran, Jalan Ir. Soekarno KM. 21 Jatinangor Kab. Sumedang, email: [prita.amalia@unpad.ac.id](mailto:prita.amalia@unpad.ac.id)

7.4% in 2011-2017. FDI in the area has reached \$3.1 trillion, marking a 72% increase from 2015's level of \$1.8 trillion. In the ever-changing environment of economic integration, the ASEAN Member States (AMSs) are faced with the problem of striking a careful balance between stimulating intraregional investment and retaining the unique characteristics of their varied economies. This is a difficulty that they must overcome to meet the objectives of the ASEAN Economic Community (AEC). A rising debate has formed in response to the realization that such investments require more extra-legal guarantees and protections.

ASEAN has several mechanisms for resolving disputes regarding investment and trade policies. One such mechanism is the Economic Dispute Settlement Mechanism (EDSM 2004), which functions similarly to the Dispute Settlement Mechanism (DSM) of WTO by employing a tribunal and an Appellate Body to resolve economic disputes. However, unlike the WTO's DSM, which is primarily used to resolve trade disputes between member nations, ASEAN is limited to using the EDSM 2004 due to the ambiguity in Article 22 of the ASEAN Charter regarding the body responsible for peacefully resolving conflicts. This inconsistency in resolving trade disputes has resulted in the WTO's DSU becoming the preferred venue for doing so, despite attempts by ASEAN to counteract this trend by establishing the ASEAN Comprehensive Investment Agreement (ACIA 2009). More than a decade after EDSM and ACIA were established, their member nations have failed to make meaningful use of them. In this age of globalization, where disputes between nations are becoming more likely, legal professionals should devote more time and energy to responding to the issue. Jurisdictional overlap may occur in circumstances of investment disputes where agreements are signed between investors and governments to create contractual responsibilities and the forum for dispute resolution, raising worries about the potential loss of authority for domestic courts.<sup>1</sup> To retain domestic courts' traditional position as the primary means of resolving disputes within their jurisdiction, the traditional practice of exhausting local remedies before seeking international litigation has been developed. The principle of exhaustion of local remedies before resorting to international legal action necessitates a thorough investigation and complete utilization of all available options within the domestic jurisdiction. In most investment agreements, the requirement is simply to comply with the laws of the host country during the investment process.<sup>2</sup> However, certain investment agreements specifically mandate adherence to the

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<sup>1</sup> Ajinegara, S., Sood, M., & Martini, D. (2021). IMUNITAS NEGARA HOST COUNTRY DALAM PENYELESAIAN SENGKETA INVESTASI MELALUI ICSID (Studi Kasus Churchill Mining Plc dan Planet Mining Pty Ltd Vs Pemerintah Republik Indonesia). *Commerce Law*, 1(1), p. 42-54.

<sup>2</sup> Pratama, P., Rizky, P., & Amalia, P. (2020). The ISDS mechanism and standards of protection in the investment treaty. *Lentera Hukum*, 7, p. 144.

capital laws of the host country that govern investment receipts. As a result, it becomes crucial for the court to determine whether an investment falls within its jurisdiction by assessing if it must be carried out in accordance with the laws of the host country. This determination is of utmost importance, considering the intricacies involved in investment disputes and the need for consistency and clarity in their resolution.

The law of exhaustion of local remedies assures that domestic courts take precedence over international courts and that foreign action is considered only as a last resort after all other possibilities have been exhausted. To address these challenges, further research is needed to explore the potential of a Regional Investment Court (RIC) within the ASEAN framework. Building a framework that can support ASEAN's objectives for greater connectivity while preserving the unique identities and economic priorities of each member state is the objective. By navigating this complex route, the region hopes to create a future in which intra-regional investment thrives, mutual benefits are realized, and sustainable prosperity becomes a shared reality. Such research could address the complexities of investment dispute settlement legal issues and identify how a RIC could be integrated into existing investment agreements to enhance the dispute resolution process. The duty to exhaust local remedies can provide the necessary complementarity mechanisms to positively impact the domestic rule of law, which is achieved by aligning international and national dispute mechanisms.

With a focus on the discussion of the significance of establishing a RIC as a facilitator and means of resolving potential investment disputes between ASEAN states, more research is required in the author's primary area of interest, the application and potential growth of investment dispute settlement legal issues within the ASEAN framework. By exploring the potential for a RIC, AMS will have more information with which to modernize investment agreements and create a more efficient dispute settlement process.

## **RESEARCH METHOD**

The research employs a normative juridical research approach, which involves analyzing primary legal materials, including relevant laws and international conventions, to evaluate the efficacy of ASEAN EDSM 2004 and ACIA 2009. To address the potential and analyze the structure of the RIC, the author will also conduct a comparative study with other regional organizations, such as the European Union, to identify their methods of regional dispute settlement. This approach will enable the identification of the principles and norms required for the potential establishment of the RIC and ensure that it aligns with the increasing investment activities in ASEAN.

The research will collect data from various primary and secondary legal materials, including books, journal articles, and other materials that include governance discussions. Legal materials from other sources will also be used to provide a broader perspective on the issues related to the RIC. The data collected will be analyzed and compared to analyze the information comprehensively. Overall, the normative juridical research approach and the comparative study will allow for a thorough evaluation of the principles and norms required to establish the RIC in ASEAN and ensure that it is aligned with the best practices of other regional organizations.

## DISCUSSION

### **ASEAN Enhanced Dispute Settlement Mechanism 2004 and the ACIA 2009**

With the ASEAN Investment area and the ASEAN EDSM 2004, ASEAN has created several legal documents that can guide settling disputes between AMS. Despite this, this article aims to compare and contrast the ACIA 2009 with the ASEAN EDSM 2004. The purpose of the EDSM 2004 is to raise the level of legal clarity and confidence for business players in the ASEAN area and to ensure the stability of trade and investment in the region. Article 6 (1) of the EDSM stipulates that in the case of an economic disagreement between member states, the disputing parties may request that the Senior Economic Officials Meeting (SEOM) create a panel responsible for resolving the issue.<sup>3</sup> This panel will be responsible for resolving the economic dispute. The SEOM is a forum addressing economic concerns among the member nations. It is made up of senior economic officials from each of those members. The SEOM will take the actions necessary to assemble and adopt a panel report following the rules outlined in the EDSM. The panel will then issue the report.<sup>4</sup> The report of the group will include recommendations on how to resolve the conflict in a manner that is both peaceful and equitable.

The EDSM 2004 mechanism provides a platform for peacefully resolving trade disputes. It consists of three stages: first, mediation, which gives the disputing parties a chance to attempt to address the matter with an impartial mediator.<sup>5</sup> If mediation is unsuccessful, any party may request help from the ASEAN Dispute Panel. This panel comprises individuals who are well-versed in international commerce and will render a verdict that is impartial and impartial. Suppose the parties cannot agree with the decision made by the ASEAN Dispute Panel. In that case, they can seek help from international arbitrators to settle the dispute. Disputes that cannot be settled through

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<sup>3</sup> Article 6 (1) of the ASEAN Protocol of Enhanced Dispute Settlement Mechanism 2004 [“EDSM 2004”]

<sup>4</sup> *Ibid.* Article 2 (1)

<sup>5</sup> *Ibid.* Article 4 (1)

dialogue are sent to the Appellate Body (AB), which operates under the parameters of the EDSM 2004. An independent group of legal specialists, known as the AB, has been assigned the responsibility of analyzing and assessing the report produced by the panel that SEOM constituted.

The AB's jurisdiction is restricted to the legal concerns that were raised in the panel report as well as any legal mistakes that were made by the panel. In this scenario, the AB has the ability to either uphold, alter, or even overturn the legal findings and conclusions that were presented in the panel report.<sup>6</sup> Following the publication of the AB Report, the AB Report that cannot be addressed through the EDSM method will be transmitted to the SEOM, where it will be reviewed and adopted. The report of the AB will include recommendations on how the issue might be settled amicably and equitably. Once the SEOM and other relevant ASEAN bodies have received and adopted the panel report and the AB Report, a solution that has been mutually agreed upon is created and officially raised based on the provisions on consultation and dispute settlement contained in the agreement. This occurs unless the SEOM decides through consensus not to adopt the AB Report (reverse consensus) within 30 days of the report being circulated to the other member states.

The entire amount of time spent on the dispute resolution procedure cannot go above 445 days, as stipulated by the EDSM 2004.<sup>7</sup> The only exception to this rule is if there are exceptional circumstances that need more than 445 days, as outlined in Article 15 of the EDSM. This demonstrates that while developing the EDSM, AMS realized the necessity for a time restriction to address issues to create effective and efficient agreements. This is necessary to develop effective and efficient accords. The member states can settle their economic disagreements amicably and without resorting to international arbitration or taking the matter to court by using this system. However, its implementation faces some hurdles and barriers, one of which is that AMS has never used the EDSM 2004 framework to resolve economic disputes between members. This is one of the challenges that the implementation faces. This is since the primary barrier to the utilization of EDSM 2004 is the divergent opinions held by AMS over how this dispute mechanism ought to be put into practice. While some member nations are more likely to use the current dispute resolution processes at the international forum, such as the WTO DSM, other member states prefer to use DSM, that are easier to understand and more expedient.

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<sup>6</sup> *Ibid.* Article 12

<sup>7</sup> *Ibid.* Article 18

In addition, challenges stemming from a lack of commitment and compliance on the part of member states to the provisions outlined in EDSM 2004. This is still another barrier. Due to a lack of awareness of this mechanism among business actors, the ASEAN Dispute Panel does not receive a large number of disputes for resolution. Finding impartial and knowledgeable mediators to manage commercial disagreements can be difficult. There are still certain AMS that adhere to differing norms on the resolution of trade disputes, which causes friction with the process that was established in EDSM 2004. In addition to the fact that it has never been used, the EDSM 2004 framework has other flaws that make it challenging to resolve trade disputes in ASEAN. One of these flaws is that AMS can choose the dispute resolution venue that will be utilized, which is another of the organization's limitations. This is governed under Article 1 (3) of EDSM 2004, which provides that member nations of ASEAN have the freedom to pick the forum of dispute mechanism for any disputes that may arise. The implementation of EDSM in the states that make up the ASEAN is not necessarily required to take place. As a result of this, trade disputes in ASEAN may be settled in a manner that is both arbitrary and devoid of clear legal guidance.

Alongside the EDSM 2004, ACIA 2009 is one of the investment agreements developed by ASEAN. It was first signed in Cha-am, Thailand, on February 26, 2009. It did not become fully effective until March 29, 2012, when Laos ratified the ACIA 2009 on February 24, 2012. At the Cha-am Summit in 2009, for instance, the Agreement on the Promotion and Protection of Investments (IGA) from 1987, the Protocol to Amend the IGA from 1996, the Framework Agreement on the ASEAN Investment Area (AIA) from 1998, and the Protocol to Amend the AIA from 2001 were all replaced by the ACIA 2009. The ACIA 2009 comprises four investment pillars: liberalization, protection, promotion, and facilitation. The publication that was put out by the ACIA in 2009 has a total of 49 articles, and these pieces are separated into Parts A, Parts B, and Parts C, respectively.<sup>8</sup> Part B of the ACIA 2009 includes the ISDS mechanism established in Article X of the IGA (Article 28-41).

Investors in ASEAN are afforded a wide range of protection under the 2009 ACIA, including:

1. Most Favored Nations Treatment<sup>9</sup>

National treatment and Most Favored Nation (MFN) treatment, subject to caveats and exceptions, are two forms of protection offered by ACIA 2009 both before and after an investment is made. Unless otherwise specified, this indicates

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<sup>8</sup> Utz, C., Ohno, N., Rajah, T., Center, A., Hale, W. C. P., Dorr, L. L. P., & Wong Partnership, L. L. P. (2021). *The Asia-Pacific Arbitration Review 2020*. p. 30.

<sup>9</sup> Article 6 of the ASEAN Comprehensive Investment Agreement 2009 ["ACIA 2009"]

that investments are accorded the same status as domestic investments and the investments of other states party to the agreement. The concepts of national treatment and MFN treatment are defined and conditioned in ACIA 2009 in a way that they are not in Bilateral Investment Treaties (BITs). In addition, ACIA 2009 reaffirms the presence of some ASEAN-specific deviations from these general rules. Furthermore, unlike many other BITs, ACIA 2009 makes it clear that MFN treatment does not apply to ISDS.

2. Fair and Equitable Treatment<sup>10</sup>  
(Article 11 of the ACIA 2009) ensures that investors would be treated in an equitable manner throughout ASEAN states.
3. Compensation in case of strife<sup>11</sup>  
(Article 12 of the ACIA 2009) offers assurances to investors that they will be compensated for any losses sustained as a result of unrest or natural catastrophes in which their assets were affected.
4. The freedom to transfer funds grants investors the right to transfer their investment funds abroad<sup>12</sup>
5. ASEAN states will not unlawfully seize the assets of investors.<sup>13</sup>
6. Full protection and security grants investors and their investment assets in ASEAN are afforded full protection and security.<sup>14</sup>

When deciding to include ISDS as its dispute settlement clause, the ACIA 2009 took into consideration the various historical, economic, and political contexts of the states that make up the ASEAN bloc as well as the legal framework and judicial systems that exist in those states.<sup>15</sup> ISDS gives the parties concerned flexibility and autonomy, which is believed to be an improvement above the legal possibilities that are accessible in the processes of domestic courts. In comparison to national courts, the conflict resolution process that will take place in the future will be more impartial. The ISDS system has the potential to remove politics from investment disputes and give ASEAN investors a level playing field in front of a tribunal that is impartial, independent, and composed of qualified individuals. ASEAN investors are also able to begin, claim, and

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<sup>10</sup> *Ibid.* Article 11

<sup>11</sup> *Ibid.* Article 12

<sup>12</sup> *Ibid.* Article 13

<sup>13</sup> *Ibid.* Article 14

<sup>14</sup> *Ibid.* Article 17 and 18

<sup>15</sup> HSU, L. (2015). "Trade and investment dispute settlement mechanisms in ASEAN: The evolving landscape and major developments." *Singapore Management University*. p.12

resolve disputes independently of the approval of their home nations.<sup>16</sup> The investors who suffered losses are also compensated for their losses immediately by the awarded damages. Article 27 of ACIA 2009 allows for state-to-state dispute settlement, which was previously provided for under Article 17 of AIA and Article IX of IGA in the event that ACIA 2009 is misinterpreted or applied, the ISDS fails, or liberalization duties are breached. It also refers to the EDSM 2004, which provides a detailed specific mechanism for handling disputes related to ASEAN economic agreements between AMS. This mechanism is linked to the ASEAN fundamental instruments, and Chapter VIII of the ASEAN Charter provides a framework for the resolution of existing and future disputes, including those related to investment.<sup>17</sup>

The ACIA 2009 emphasizes the importance of peaceful resolution by providing for consultation and negotiation. Article 31 of the ACIA 2009 stipulates that before ASEAN investors can proceed to the adjudication stage, they must first attempt to resolve the dispute through non-confrontational means. Consultation and negotiation, in addition to procedures involving a third party that are not binding, are examples of non-confrontational techniques. This method of alternative dispute settlement is in line with the ASEAN Way of resolving conflicts since it lowers the priority of investor-state arbitration processes and increases the role of arbitration as a dispute resolution method of last resort. Article 32 of the ACIA 2009 creates a six-month cooling-off period, which begins on the date that the contesting state's request for consultation is received.

A conciliation is a form of alternative dispute resolution that can be started and stopped at any moment by the parties involved (Article 30 of the ACIA 2009). Since participation in conciliation is entirely voluntary, the parties' respective viewpoints during the procedure have no bearing on the outcome of any future arbitration proceedings. It is the intention of the ACIA 2009's joint decision process within ISDS to guarantee that the terms of the ACIA 2009 are read in accordance with the preferences of AMS. Before a specific issue arises, this safeguards the responsibility of AMS in interpreting the ACIA 2009. In addition, the ACIA 2009 includes a state-to-state dispute resolution process that submits legal problems to the ASEAN Summit, the highest political authority within ASEAN, in circumstances where the ISDS fails to resolve the dispute.<sup>18</sup> This political allusion relates to a unique ASEAN dispute settlement procedure, not found in most BITs and not analogous to the European Court.

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<sup>16</sup>Kabre, R. J., & Ziegler, A. R. (2021). "Private Counsel and the Proposed Reforms of Investor-State Dispute Settlement (ISDS). In *Private Actors in International Investment Law*". Springer. p.247

<sup>17</sup>Nipawan, P. (2015). "The ASEAN way of investment protection: an assessment of the ASEAN comprehensive investment agreement." *University of Glasgow*. p.83

<sup>18</sup>Purwaningsih, S., & Widyorini, S. R. (2022). "National Investment Policy for the Implementation of Asean Comprehensive Investment Agreement (ACIA)." *International Journal of Educational Research & Social Sciences*, 3(1). p. 478.

A number of challenges have arisen during the implementation of ACIA 2009, despite the fact that it contains more thorough investment provisions than the IGA and AIA, with clear rules and wider DSM based on the principle of protecting investments in accordance with the ASEAN Way. One of these difficulties is that, as per Paragraph 1 of Article 48 of the ACIA 2009, all AMS must ratify the agreement before it may go into effect. The fact that in order for there to be. In order to solve these issues, it will take the collective effort of all ten ASEAN states to work together to execute this method efficiently and effectively. It is vital to enhance the degree of involvement of business players in resolving trade disputes, to raise the level of grasp that business actors have of this mechanism, and to increase the level of awareness that business actors have of it.

The ACIA 2009 obliges ASEAN member states to confirm their foreign investment policies to the pact's provisions. Article 27 of ACIA 2009 refers to EDSM 2004 to resolve disputes between or among member states, while section B of ACIA 2009 can be used to resolve disputes between investors and member states. However, ACIA 2009 is not included in the list of covered agreements in Appendix I of EDSM 2004, and its definition as the future economic agreement under Article 1(1) of EDSM 2004 is ambiguous. Despite this, Article 27 of the ACIA 2009 specifies that the EDSM 2004, as amended, shall govern the resolution of disputes concerning the interpretation or application of the agreement. This implies that EDSM 2004 will only be utilized in disputes between or among member states and will be limited to disputes involving the interpretation or application of ACIA 2009. ISDS is governed by Section B (Articles 28-41) of the 2009 ACIA, which is outside the scope of this article. Despite the fact that EDSM 2004 was derived from the WTO DSU in order to enhance ASEAN DSMs, the application of EDSM 2004 in case law interpretation of ACIA 2009 creates difficulties due to criticisms of ASEAN's organizational structure and decision-making perspective, the practical efficacy of which is still in question. The ASEAN method concept grants the ASEAN Summit supreme authority, and there have been criticisms of the effectiveness of SEOM under EDSM 2004 in the case of ACIA 2009, as SEOM cannot decide on a party participating in the ASEAN Summit.

### **The ASEAN View on Investor-State Dispute Settlement**

Investors receive more robust substantive protections under IIAs than they would under the laws of AMS, and with the legal protection of IIAs, investors have the option to enforce their rights outside the courts of the host country through international arbitration, more specifically the process known as Investor-State Dispute Settlement (ISDS). Increasing litigation by foreign investors against host nations is a hallmark of ISDS. A wide range of corporations and private citizens comprise the investors suing the

host nation. Over 3,000 IIAs across the globe employ ISDS, an ad hoc methodology for resolving disputes.<sup>19</sup> ASEAN member states have faced numerous investment disputes filed with the ICSID. These cases involve parties such as Amco Asia Corporation and others v. the Republic of Indonesia, Cemex Asia Holdings Ltd v. the Republic of Indonesia, Oleovest Pte. Ltd. v. Republic of Indonesia, Churchill Mining PLC and Planet Mining Pty Ltd v. Republic of Indonesia, Government of the Province of East Kalimantan v. PT Kaltim Prima Coal and others, Malaysian Historical Salvors, SDN, BHD v. The Government of Malaysia, Philippe Gruslin v. Malaysia, and Rafat Ali Rizvi v. Republic of Indonesia. These tribunal decisions demonstrate that the issue of overlapping jurisdiction between national and state presents significant challenges. Cross-border disputes differ from those involving parties inside the same country due to variations in jurisdiction, culture, and the requirement to gather evidence from several countries. Numerous nations throughout the globe, particularly in the EU, have started moves to replace the ad hoc ISDS system due to concerns that it lacks the independence and predictability needed for an international dispute settlement process.<sup>20</sup> The European Union, the African Union, and South America are just a few examples of other regions around the world that have begun the process of defining regional investment courts, highlighting the significance of bolstering synergy among countries in a regional area to accelerate more effective dispute resolution while also taking into account the unique characteristics of the region's jurisdiction and culture.

The legal protection provided by ASEAN does not measure up to the requirements imposed by other regional organizations like the European Union. In March 2018, the EU Council authorized the European Commission to explore the proposal of a MIC. The suggested changes include the Multilateral Investment Appellate Mechanism (MIAM) and the MIC's planned two-tier framework.<sup>21</sup> The Comprehensive Economic and Trade Agreement (CETA) between the EU and Canada required the establishment of a brand-new Investment Court System (ICS) by the European Commission. The ICS incorporates a permanent tribunal composed of 15 judges appointed by the public and chosen for a predetermined term by the CETA Joint Committee<sup>22</sup>. The parties to a dispute must abide

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<sup>19</sup>European Commission. (2017). a Multilateral Between Foreign Investors and States. *European Commission*, Available online from: [https://trade.ec.europa.eu/doclib/docs/2017/september/tradoc\\_156042.pdf](https://trade.ec.europa.eu/doclib/docs/2017/september/tradoc_156042.pdf) [Accessed January 16, 2023]

<sup>20</sup>Hallak, I. (2020). Multilateral Investment Court: Overview of the reform proposals and prospects. European Parliamentary Research Service, Available online from: [https://www.europarl.europa.eu/RegData/etudes/BRIE/2020/646147/EPRS\\_BRI\(2020\)646147\\_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/BRIE/2020/646147/EPRS_BRI(2020)646147_EN.pdf). [Accessed January 16, 2023]

<sup>21</sup>Kedgley Laidlaw, A., & Kang, S. (2018). "The Dispute Settlement Mechanisms in Major Multilateral Treaties." *NUS Centre for International Law Research Paper*. p. 12.

<sup>22</sup>Heyl, K., et.al. (2021). "Free Trade, Environment, Agriculture, and Plurilateral Treaties: The Ambivalent Example of Mercosur, CETA, and the EU-Vietnam Free Trade Agreement." *Sustainability*, 13(6), 3153. p. 8.

by the tribunal's rulings, which can be enforced through the legal systems of the EU or Canada, depending on which one is applicable.

To achieve a more integrated regional legal process, ASEAN can analyze the proposal of the establishment of ICS by the CETA, which can be summarized as the initiation of the formation of a permanent two-tier tribunal body consisting of the First Instance Tribunal and the Appeal Tribunal (AT). The provisions on the composition of these bodies discuss the number of members, appointment process, term of office, retainer and availability, qualifications and ethics of their members, as well as some procedural rules (including process transparency) are also included. Based on these grounds, the Appeal Tribunal may reject an appeal, making the decision of the First Instance Tribunal final or uphold an appeal, in which the appellate tribunal may modify the entire or part of the decision or reverse legal findings for the first instance tribunal and issue a revised award.<sup>23</sup> Additionally, the appellate tribunal must be able to grant or deny appeal based on the annulment grounds of the ICSID Convention (Article 52). This will ensure that the appeal option is integrated into the ICSID system. The appeals procedure expands the ICSID Convention's grounds for annulment to encompass faults in law. This award may be upheld, altered, or overturned by the AT.<sup>24</sup> When an appeal is unsuccessful, the original Tribunal ruling is upheld. If an appeal is upheld, the AT may reconsider or overturn the legal findings and conclusions in the initial award. The AT cannot change final awards. The original Tribunal must issue a new award within 90 days of receiving the AT's report.<sup>25</sup> CETA's ICS has been deemed consistent with the rights to due process, a fair trial, and the values of individual autonomy and equal treatment by the EU's highest court. The CJEU's decision on the ICS in CETA sets the bar for future investment dispute mechanisms. ICS significantly changes the way ISDS is handled in BITs.<sup>26</sup> Special tribunals were established to determine claims and hear appeals in each new EU agreement to replace the ad-hoc arbitration mechanism known in IIA regimes.

ISDS, which is part of the ASEAN Investment Agreement, is a way for foreign investors to file claims against member states if they think their rights as investors, as laid out in the agreement, have been violated. As the primary mechanism for executing

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<sup>23</sup> Calamita, N. J., & Giannakopoulos, C. (2022). "ASEAN and the Reform of Investor-State Dispute Settlement: Global Challenges and Regional Options". *Edward Elgar Publishing*. p. 113.

<sup>24</sup> *Ibid.*

<sup>25</sup> Aimsiranun, U. (2020). "Comparative study on the legal framework on general differentiated integration mechanisms in the European Union, APEC, and ASEAN." *ADB Working Paper Series*. p. 22.

<sup>26</sup> Anggriawan, R. (2020). "Insolvency Proceedings: ASEAN and EU Comparison on the Rules of Foreign Court Jurisdiction." *Indonesian Comparative Law Review*, 3(1), p. 39.

ISDS rules, IIAs are closely tied to ISDS provisions. In 1970, the Netherlands and Kenya entered into an agreement that featured the first-ever ISDS clause.<sup>27</sup>

ISDS has been controlled in the ASEAN region through the ACIA 2009 and about 315 IIAs.<sup>28</sup> These IIAs come in the form of both Bilateral Investment Treaties (BITs) and FTAs, which have been agreed upon between member states and either other AMS or third nations. When it comes to investment disputes between ASEAN and ASEAN FTA partners, the Philippines has opposed the inclusion of the ICSID arbitration clause in IIAs and instead insisted that individual agreements be established with the disputed investor. It demonstrates how nations can alter their approach to investment disputes to best suit their circumstances.

In contrast to the extensive external references made by the ISDS provisions to the New York Convention and the UNCITRAL Rules, the ASEAN Arbitration Center and its Rules are directly mentioned in the ACIA 2009.<sup>29</sup> For instance, the Kuala Lumpur Regional Centre for Arbitration (KLRCA) in Malaysia incorporates rules customized to Islamic law-based conflicts. The Singapore International Arbitration Centre (SIAC) is another prominent arbitration institution with some novel rules. Regarding expedited procedures and emergency arbitrators, the SIAC was the first Asian institution to offer these in 2010. The KLRCA, on the other hand, has included various ASEAN-specific provisions, most notably the KLRCA Model Islamic Arbitration Clause, making its regulations more in tune with the interests of AMS (KLRCA i-Arbitration Rules). Based on a reworking of the UNCITRAL Arbitration Rules, these guidelines govern disagreements over Shariah-compliant business contracts in the majority-Muslim ASEAN (Islamic law).

### **An Analysis of the Regional Investment Court as the Future of ASEAN Economic Dispute Settlement Mechanism**

The number of cases brought by investors seeking ISDS has grown dramatically during the past 20 years. By the end of 2020, over a thousand ISDS cases had been filed<sup>30</sup>. Indonesia, which has the most ISDS proceedings in ASEAN, lacks a national system for

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<sup>27</sup>Nikièma, H. S., & Maina, N. (2020). "The Risk of ISDS Claims Through National Investment Laws." *International Institute for Sustainable Development*. p.3.

<sup>28</sup>ASEAN Secretariat, *Op.Cit.*, p.13.

<sup>29</sup>Sengpunya, P. (2019). "ASEAN E-Commerce Legal Framework and Alignment of Lao PDR: A Review." *Lentera Hukum*, 6(3), p. 382.

<sup>30</sup>The United Nations Conference on Trade and Development. (2022). Facts on Investor – State Arbitrations in 2021: With A Special Focus on Tax-Related ISDS Cases. In *IIA Issues Note* (Issue 1), Available online from: [https://unctad.org/system/files/official-document/diaepcbinf2022d4\\_en.pdf](https://unctad.org/system/files/official-document/diaepcbinf2022d4_en.pdf). [Accessed January 16, 2023]

responding to investor arbitration claims.<sup>31</sup> This lack of clarity has led government agencies and departments to handle these allegations based on their political and sectoral egos, and cooperation between them is haphazard.<sup>32</sup>

The number of IIAs held by ASEAN/AMS is large and varied. Multiple agreements, including those between individual AMS and the same ASEAN FTA partners, the ACIA 2009 between ASEAN as a community and its FTA partners, and the IIAs between individual AMS and third countries (neither AMS nor ASEAN FTA partners), can bind AMS to a wide range of investment obligations. These IIAs have a wide range of obligations because they are mostly first-generation IIAs. Since there is still a lack of knowledge and examination of these problems, based on reservations about the application of one rule for all circumstances, ASEAN should look into a more accessible DSM for member countries and investors to investigate further the dangers and critical reasons for reforming and restructuring ISDS in current or future investment legal instruments.

ASEAN can adopt the reform proposals identified to be applied to disputes arising from existing and future IIAs in each country in two ways: Firstly, by amendment of agreements based on international law. ASEAN's DSM reform requires bilateral or plurilateral renegotiation for each of the thousands of IIAs that have been agreed upon, so it does not appear efficient or effective to change the ISDS regime across the entire network of IIAs. Secondly, states can participate in and implement the reform by signing the convention.

In addressing these concerns, ASEAN may adopt various options for reform, including establishing mechanisms for parties involved in contracts to provide joint interpretation of agreements binding on investor-state tribunals. One step toward unifying investment law in Southeast Asia may be observed in establishing a RIC within the ASEAN framework. Therefore, nations that are big global investors are beginning to re-evaluate their commitments to investment agreements under IIAs that employ arbitration as the principal means of ISDS. The debate on ISDS is inevitable and has attracted the attention of academics, particularly international institutions such as the United Nations Commission on International Trade Law (UNCITRAL).<sup>33</sup> The aim of this is to ensure that agreements with binding force are interpreted fairly and without prejudice to either party. Additionally, mechanisms may be established for the referral

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<sup>31</sup> Surbakti, S. P. (2021). "Suatu Tinjauan Terhadap Kekuatan Eksekutorial Dalam Pelaksanaan Putusan Arbitrase." *LEX PRIVATUM*, 9(6), p. 12.

<sup>32</sup> Liu, B. (2022). Reform Trend of Investor-State Dispute Settlement in International Investment. *Asian Journal of Social Science Studies*, 7(2), p. 28.

<sup>33</sup> Baltag, C., Joshi, R., & Duggal, K. (2023). Recent Trends in Investment Arbitration on the Right to Regulate, Environment, Health and Corporate Social Responsibility: Too Much or Too Little?. *ICSID Review: Foreign Investment Law Journal*, p. 3.

of disputes involving sensitive issues or interpretation of specific provisions in IIAs to joint determination by the contracting parties before or during the arbitration. This aims to reduce the number of disputes that must be resolved through arbitration by facilitating early resolution. Further, mechanisms may be established for non-disputing states to participate in arbitration. This aims to ensure that all parties involved have an opportunity to provide input and influence the arbitration process and to remove specific issues or investments from the scope of arbitration clauses in specific sectors. This aims to limit the cases that may be brought to arbitration and ensure that only relevant issues are resolved through these mechanisms. These options for reform may be applied at any level of policy-making, whether bilateral, regional, or multilateral level.

The existing DSM is not a source of worry for all nations or groupings of nations since investment disputes involving AMS have been relatively few and far between over a long time; using a special investment dispute court with permanent judges as a reform option will not be efficient if applied to all ASEAN/AMS IIAs in general. This is because it will be challenging to produce consistent interpretations of the extensive and diverse IIA network and the high costs of preparing a RIC to resolve disputes that appear to be few and far between, thus not reducing the possibility of creating alternative methods. When creating opt-in mechanisms to activate more effective DSM, AMS should keep this web of interconnected accords in mind. In an ideal case, unwanted duplicate agreements would be terminated, for instance, by an agreement to minimize duplication in the opt-in convention itself. This would be a step in the right direction, but it is impossible. When this is not politically viable or desirable, AMS can guarantee that revised ISDS provisions in the opt-in convention protect all IIAs with the appropriate counterparty. As a result, not every nation or set of nations has the same reform goals; therefore, it is essential to weigh the needs and goals of each nation or group of states when considering potential reforms.

The lack of an integrated ASEAN voice on the preferred mechanisms for ISDS reform in the region may be a disadvantage. If all of the AMS and the other contracting parties agree to the opt-in instrument and to the inclusion of all IIAs between them in the document, then only the dispute resolution provisions of the relevant IIAs would be affected by this approach. In the absence of any of these two requirements, the single offer system described above will revert, and foreign investors intending to claim an ASEAN member will still be allowed to engage in treaty shopping by selecting an IIA that, in their view, provides more favorable substantive protection. Nevertheless, AMS remains reluctant towards structural, systemic solutions like the EU MIC.

## CONCLUSIONS

Establishing a Regional Investment Court (RIC) can revolutionize the way international investment disputes are resolved within ASEAN Member States. A RIC could play a crucial role in enhancing investment agreements and bolstering investor confidence in the region by providing a more modernized and efficient dispute settlement process. However, the issue of jurisdictional overlap between national and international fora in public international law poses a significant challenge. To address the challenges faced in both national and regional environments, ASEAN must consider new and innovative cross-regional solutions, as well as work more intentionally across the region in implementing existing instruments and enhancing regional cooperation. ASEAN should also evaluate the institutional capabilities and role of the ASEAN Secretariat in maintaining organizational coherence and regional identity. At this stage, ASEAN should support the development of legal norms and effective policy-making systems across the ASEAN region, enabling the region to address the current challenges it faces.

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