



EXTRATERRITORIALITY PRINCIPLE IN INVESTMENT DISPUTE SETTLEMENT UNDER ASEAN ENHANCED DISPUTE SETTLEMENT MECHANISM

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ABSTRACT

Trade and Investment are among the ways that are often used by modern countries today to become one of the main sources of state income. Indonesia as a destination country for trade and investment also has an important role in economic growth both domestically and in the ASEAN region. Indonesia is also one of the initiators of the Free Trade Area (FTA). In the spirit of realizing ASEAN as a trade and investment friendly zone, ASEAN launched a method called the ASEAN Protocol on Enhanced Dispute Settlement Mechanism (EDSM). This customized mechanism is in accordance with the spirit of ASEAN, namely The ASEAN way. Accordingly, the author took the initiative to conduct research related to the extraterritorial principle of the mechanism of Non-ASEAN countries that are geographically proximate to the ASEAN region. This research is entitled "Extraterritorial Principles of ASEAN PROTOCOL ON ENHANCED DISPUTE SETTLEMENT MECHANISM (EDSM) in the Settlement of Trade and Investment Disputes". In this research, there is a formulation of problems that will be discussed, namely related to the application of the extraterritorial principle of the EDSM mechanism, the enforcement of EDSM rules against Non-ASEAN countries, and its implications for Indonesia. This is conducted, in an effort to make ASEAN an axis of investment destination countries that also have positive and dynamic regulations. Hence In the event of trade and investment disputes, the parties involved would not need to go to ICSID or the WTO, as ASEAN has provided solutions to resolve such disputes.

Keywords: dispute resolution; asean, edsm; prinsip ekstrateritorial.

I. INTRODUCTION

As a driving force for the economic cycle in a country, it is necessary to carry out a process called investment. According to Jogiyanto, investment can be said to be a postponement of current consumption to be used in effective production over a period of time, in order to achieve certain goals.¹ Meanwhile, according to Sukirno, investment is an activity carried out by the community continuously in increasing economic activity and employment opportunities. Investment in terms of macroeconomics can be used to increase national income and improving prosperity of the community.² Not only investment, but a country's trade with other countries can also turn the wheels of the economy. In this case, trade and investment can be considered as a big factor not only on a micro scale but also on a macro scale. If were talking about investment, there are at least two parties involved in it, namely the investor and the recipient of capital. In order to reach a certain agreement and for both parties to feel protected, both parties are involved in a contract which is fundamentally regulated by investment law.

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¹ Jogiyanto, *Teori Portofolio dan Analisis Investasi*, Edisi III, (Yogyakarta: BPFE, 2003), p. 5.

² Eduardus Tendelilin, *Analisis Investasi dan Manajemen Portofolio*, Edisi I, (Yogyakarta: BPFE, 2001), p. 1.

According to HS Salim, investment law is the overall legal rules that regulate the relation between investors and recipients of capital which are related to business fields open for investment, as well as regulating the procedures and conditions for making investments in a country.³ Thus, based on investment law, both parties are increasingly protected and will trust each other in improving the economy through investment. In terms of ASEAN, the scope of ASEAN economic cooperation: ASEAN economic cooperation covers the fields of industry, trade, investment, services and transportation, telecommunications, tourism, and finance.⁴ To overcome the current shortage, the practice of investing is constantly encouraged as an alternative in order to obtain funds for further national development. Investments made by foreign investors are one option to advance the capital market in Indonesia and nourish the national economy.⁵

Many investment opportunities are growing rapidly adjacent to the development of technology in today's world. In terms of investment, many countries are flocking to invest in other countries either through Foreign Indirect Investment or Foreign Direct Investment (FDI). As with international trade, Indonesia itself is one of the countries that contributes to the formation of a free trade zone or "Free Trade Area (FTA)". FTA provides space to trade commodities and services with certain tariffs and rules.

In terms of investment, the government had been keen to develop a favorable investing atmosphere, for the fact that the investment sector, both foreign and domestic, can create up to 10.7 million new jobs, which can lower the poverty rate up to 8-10% (data as of 2014).⁶ Not only that, investment in Indonesia is also expected to increase Indonesia's GDP up to IDR 481 trillion, which will not only strengthen Indonesia's position economically but also politically.⁷ The consequence of the economic development paradigm is the presence of foreign investment and transnational companies freely in large numbers.⁸ Of course, some of the positive things above are in accordance with the government's vision to advance the nation as well as in line with the Indonesian government's initiative to create UU Cipta Kerja that makes the investment atmosphere in Indonesia more favorable.

This investment atmosphere is also supported by Indonesia's closest regional organization, ASEAN. ASEAN also has an initiative that has been running quite effectively, which is the ASEAN Economic Community (AEC). The AEC has been around for a long time not only to improve the economy in ASEAN through investment and employment opportunities, but also to strengthen multilateral relations between countries in ASEAN, one of which is by creating and expanding FTAs.⁹ In line with this vision, ASEAN also has the spirit to create a dispute resolution model that essentially helps the development of trade and investment protection in the ASEAN region. As it is known, if there is a trade and investment dispute between countries, the case must be brought to the ICSID World Bank

³ Salim HS & Budi Sutrisno, *Hukum Investasi di Indonesia*, Edisi II, (Depok: Rajawali Pers, 2018), p. 8

⁴ Muhammad Reza Syariffudin Zaki & Abdul Rasyid, *Hukum Pariwisata Syariah di ASEAN*, Penerbit Prenadamedia Divisi Kencana, Jakarta, 2021, p. 17

⁵ Muhammad Reza Syariffudin Zaki, Marcelino Alfrediko Slaat, Bambang Pratama, Niken Savitri, Iron Sarira, Paulus Aluk Fajar Dwi Santo, & Juvina Jasmine Salsabila, *Hukum Investasi Multimoda dan Perdagangan Internasional di Era Pandemi Covid-19*, Penerbit Publica Indonesia Utama, Jakarta, 2022, p. 137

⁶ Chandra Kurniawan, "Pengaruh Investasi Terhadap Perekonomian", *Jurnal Media Wahana Ekonomika*, Vol. 12 No.4, p. 5

⁷ Daru Wahyuni, "Perilaku Investasi di Indonesia: Kajian Jangka Pendek dan Jangka Panjang", *Jurnal Ekonomi & Pendidikan*, Vol. 2 No. 1, p. 60

⁸ Muhammad Reza Syariffudin Zaki, Mursal Maulana, Prita Amalia, & Ardiansyah, *Pengantar Hukum Transaksi Bisnis Transnasional*, Penerbit Refika, Bandung, 2022, p. 16

⁹ Fajar Usman, "Masyarakat Ekonomi ASEAN (MEA) dan Daya Saing Investasi Indonesia", *Jurnal Lingkar Widayaiswara* Vol. 3 No. 1, p. 34

or WTO to be resolved, which is very far from the spirit of ASEAN in terms of geography and values.¹⁰ This collective investment is also in order to encourage many new inventions that contribute to cross border states.¹¹¹²

For this reason, ASEAN took the initiative to create a dispute settlement model that is not only geographically proximate but also in line with ASEAN's harmonized values. In addition, over the years ASEAN has also been very productive in conducting international trade through the "ASEAN Free Trade Area (FTA)" which is a flagship program of ASEAN. The ASEAN FTA itself has not only economic developments, but parallel laws that are quite important for the efficacy of any free trade agreement. However, because of these parallel laws, there are often disagreements that cause trade barriers and legal processes that apply, therefore there is a need for a dispute resolution mechanism that specifically applies in ASEAN.¹³

Along with efforts to deepen economic integration, Dispute Settlement Mechanisms (DSM) created by ASEAN through the ASEAN Charter in 2008 are essentially fundamental features of economic institutions to ensure optimal outcomes. Governments incorporate DSMs in international institutions to address collaboration issues and enhance the credibility of commitments, through disclosing free rides, ascertaining violations, and penalizing non-compliance between parties that are not in accordance with positive law. Economic actors need dispute resolution to be effective, although it does not have to be mandatory, so economic bargains will be respected.¹⁴ The DSM was later specifically included in the Protocol to the ASEAN Charter on Dispute Settlement Mechanisms and signed in April 2010, giving greater definition to the original DSM, known as the Enhanced Dispute Settlement Mechanism (EDSM). The EDSM itself is an extension of the Southeast Asian culture that emphasizes a humanist and collective spirit in dispute resolution. This spirit is also called "The ASEAN Way" which also inspires ASEAN countries to respect each other.¹⁵ The ASEAN EDSM is modeled on the WTO Dispute Settlement Understanding (DSU), which all ASEAN members have agreed to. The WTO also regulates investment agreements, namely Trade Related Investment Measure (TRIMS), which are trade-related investment provisions. Reducing or eliminate all policies in the field of investment that can hinder trade activities.¹⁶

These include independent panels, appeal bodies, strict timelines and options for sanctions. However, the ASEAN EDSM model has practical drawbacks. The timeline adopted is even more expedited than that of the WTO DSU, by adopting a halving timeline, which is difficult, even for the WTO itself to follow.¹⁷ Basically, the WTO DSU itself is a dispute settlement mechanism with a choice

¹⁰Erman Rajaguguk, "Harmonization of Law in ASEAN Countries Towards Economic Integration", *Jurnal Hukum Internasional* Vol. 9 No. 4, p. 530

¹¹Muhammad Reza Syariffudin Zaki, Muhammad Farhan Akmal, Covid-19 Vaccine Legal Protection Through Patent for Public Interest, *Transnational Business Law Journal*, Volume 2 Nomor 1, 2021, p.52

¹²Muhammad Reza Syariffudin Zaki, Agus Riyanto, & Okta Auliazahara, The Independence of the Trustee as an Organ Formed by the Public Company, 1st UMGESHIC International Seminar on Health, *Social Science and Humanities (UMGESHC-ISHSSH 2020)*, Atlantis Press, p. 607

¹³Jeffrey A. Kaplan. "ASEAN's Rubicon: A Dispute Settlement Mechanism for AFTA", *UCLA Pacific Basin Law Journal*, Vol. 4 No. 2, p.148

¹⁴Hilman Nur, "Peluang dan Ancaman Masyarakat Ekonomi ASEAN (MEA) Bagi Perkembangan Hak Kekayaan Intelektual Indonesia", *Jurnal Hukum Mimbar Justitia* Vol. 3 No. 2, p.158

¹⁵Nattapat Limsiritong, "The Deadlock of ASEAN Dispute Settlement Mechanisms and Why ASEAN Cannot Unlock It?", *RSU International Journal of College of Government (RSUIJCG)* Vol. 3 No. 1, p. 20

¹⁶Muhammad Reza Syariffudin Zaki, *Hukum Perdagangan Internasional*, Penerbit Prenadamedia Divisi Kencana, Jakarta, 2021, p. 224

¹⁷Michael Ewing-Chow & Alex W. S. Goh, "Are Asian WTO Members Using the WTO DSU 'Effectively'?" *Journal of International Economic Law*, Vol.16 Issue 3, p. 701

of forum basis, which has also been quite successful in resolving several investment cases in the world.¹⁸ Because a poor investment climate will have a negative impact on a country's economic growth, therefore, legal certainty is needed in resolving the dispute.¹⁹

Furthermore, the ASEAN Secretariat is tasked with supporting the EDSM process with administrative and logistical support and even experts. Therefore, one way to strengthen the structure and institution of EDSM is to use the extraterritorial principle, in which case EDSM can not only apply in ASEAN member countries, but also apply in Non-ASEAN countries. In the international world, there are also regional organizations that are still closely related to ASEAN, such as ASEAN + 3 and ASEAN +6. Where the organization contains countries that are geographically not too far from ASEAN and often invest in Indonesia, such as China, Japan, Australia, etc. These countries are quite closely related to the extraterritorial principle in the realm of international law, especially in the field of dispute resolution. Indeed, the extraterritorial principle has many challenges and problems, especially related to the applicable legal jurisdiction and positive law in each country. However, this does not mean that these challenges are deadlocked, the proof is that there are already many legal bases and legal models that apply extraterritorially, one of which is the GATT (General Agreement of Tariffs and Trade).²⁰

II. RESEARCH METHODS

In the social sciences, the term methodology applies to how one conducts research.²¹ The methodology essentially provides guidelines, on the ways in which a researcher studies, analyzes, and understands the environment he or she encounters.²² The research itself is aimed at understanding events that arise over time. This makes sense, because research aims to reveal the truth in a systematic, methodological, and consistent manner.²³ This research uses normative methods or legal research libraries, namely legal research conducted by examining library materials or secondary data.²⁴ This legal research has several approaches, namely: The statute approach and Conceptual approach.

III. DISCUSSION AND RESULTS

In the previous description related to the explanation of the extraterritorial principle, it has been stated that the extraterritorial principle is a principle that has been applied for a long time. In the approach to its application, it has been explained that there are two approaches that can be taken. The first is a more imposing approach commonly referred to as protective jurisdiction, while the second is an approach that prioritizes treaties. Both have the same intention to apply the extraterritorial principle, but have very different methods. In terms of the application of the extraterritorial principle in this case, it is necessary to know that it is related to the jurisdiction and legal authority that regulates it. In accordance with the author's interview with Ms. Prita Ammalia who said that basically in terms of extraterritorial principles in the scope of dispute resolution, it is necessary to know that there are aspects

¹⁸ John H. Jackson, "International Law Status of WTO Dispute Settlement Reports: Obligation to Comply or Option to "Buy-Out?", *The American Journal of International Law* Vol. 98 No. 1, p. 110

¹⁹ Muhammad Reza Syariffudin Zaki, *Pengantar Ilmu Hukum dan Aspek Hukum dalam Ekonomi*, Penerbit Prenadamedia Divisi Kencana, Jakarta, 2022, p. 37

²⁰ Lorand Bartels, "Article XX of GATT and the Problem of Extraterritorial Jurisdiction the Case of Trade Measures for the Protection of Human Rights", *Journal of World Trade* Vol. 36 Issue 2, p. 359

²¹ Soerjono Soekanto, *Pengantar Penelitian Hukum*, Jakarta: UI-Press, 2015, p. 6

²² *Ibid.*

²³ Soerjono Soekanto and Sri Mamudji, *Penelitian Hukum Normatif: Suatu Tinjauan Singkat*, Jakarta: Rajawali Pers, 1983, p. 1

²⁴ *Ibid.*, pp.13-14

of jurisdiction attached to the case concerned, the following explanation is related to several types of jurisdiction in the context of extraterritorial principles in the field of dispute resolution:

| Jurisdiction | Description | Example |
|------------------|---|--|
| Ratione Materiae | known as subject-matter jurisdiction refers to the adjudicative authority (either a court or an international body) to decide a particular case. It is jurisdiction based on the nature of the particular case and based on the type of relief or objection sought and the extent to which the court or international body can decide on the conduct of persons or the status of things. ²⁵ | <ul style="list-style-type: none"> As the context for dispute resolution through arbitration to assume "ratione materiae" jurisdiction, there must be a comprehensive investment treaty This is also in line with the International Center for Settlement of Investment Disputes (ICSID) Convention Article 25 (1) which reads "The jurisdiction of the Centre shall extend to any legal dispute arising directly out of an investment, between a Contracting State (or any constituent subdivision or agency of a Contracting State designated to the Centre by that State) and a national of another Contracting State, which the parties to the dispute consent in writing to submit to the Centre. When the parties have given their consent, no party may withdraw its consent unilaterally"²⁶ which basically explains that the arbitral tribunal discusses according to <i>proprio motu</i> (the principle of the wishes of the submitting party) both the definition of investment in the main agreement and the definition contained in the ICSID Convention where if the two parties have an agreement, the two parties will extend jurisdiction according to the material of the dispute itself. |
| Ratione Personae | Refers to the power of the court to bring a person into its adjudicative process. This is usually more related to the field of criminal law where it is in the personal rights of the defendant, not just in the interest of the defendant as a legal subject. Ratione Personae is derived from the Latin term meaning by reason of the person. ²⁷ However, in a broader context, Ratione Personae Jurisdiction can be explained as the will of the parties | For example, there is a tourist from Colombia who is on vacation in Canada and there he finds a case that is also committed by a Colombian, but in a Canadian location. He then files a claim or report against the Colombian. The claim or report may be rejected by the court for lack of ratione personae, where the court does not have the grounds and/or power to bring the person into its adjudicative process. |

²⁵Biscomb Thomas James, "Jurisdiction Ratione Personae" (Online), available at <https://jusmundi.com/en/document/publication/en-jurisdiction-ratione-personae> (January 21, 2023).

²⁶Article 25(1) ICSID Convention

²⁷Alexandre Skander Galand. *Chapter 1 Conceptions of Courts and Their Jurisdiction: In UN Security Council Referrals to the International Criminal Court*, (Leiden, The Netherlands: Brill), pp. 14-16.

involved in the dispute or the agreement between the parties to the dispute. This matter of agreement or agreement is better known in dispute resolution in the realm of civil law.

| | | |
|------------------|---|--|
| Ratione Temporis | refers to how long the jurisdiction of a proposed court of law is in relation to the length of time. Courts may lose provisional jurisdiction due to time limits set out in certain rules. For some cases the litigation of a particular action has ended, or it has provisional jurisdiction because it was launched within the prescribed time limit. ²⁸ | For example, arrangements related to ratione temporis jurisdiction are regulated in the field of international law contained in the Rome Statute. Article 11 of the Rome Statute states that "1. The Court has jurisdiction only with respect to crimes committed after the entry into force of this Statute. 2. If a State becomes a Party to this Statute after its entry into force, the Court may exercise its jurisdiction only with respect to crimes committed after the entry into force of this Statute for that State, unless that State has made a declaration under article 12, paragraph 3." ²⁹ which states that the International Criminal Court (ICC) as the adjudicating body only has jurisdiction over a perpetrator of a crime committed after the Rome Statute came into force, namely on July 1, 2002. |
|------------------|---|--|

In the concept of the extraterritorial principle, which is in accordance with the explanation of the three types of jurisdiction above, we can understand that terminologically there are three types of jurisdiction that can be applied in dispute resolution mechanisms. In the context of the extraterritorial principle, the jurisdiction of a court or international institution can carry out an "extension" of their jurisdiction based on the three jurisdictional criteria above, namely the material in dispute (*ratione materiae*), the parties or persons in dispute (*ratione personae*), and the time limit specified or agreed upon (*ratione temporis*). We can recapitulate, related to the standard for the occurrence of an extraterritorial principle, the main requirement is the need for an agreement or binding agreement between the parties. As explained by Pär Kristoffer Cassel in his book where in the domain of international law, the extraterritorial principle can be applied to individuals or legal subjects which can usually occur as a result of diplomatic negotiations. A diplomatic negotiation is a foundation that can become a treaty (international agreement). Thus, we can understand that this international treaty is the legal basis for the enactment of an extraterritorial principle³⁰.

On the other hand, it is also important to remember that the extraterritorial principle does not apply solely by force. Unlike the "protective jurisdiction" approach, which is imposed and has a high potential for "conflict of interest". In addition to the factors from the agreement or treaty, there are more specific factors that can help open up an extraterritorial principle. In this context, specifically the

²⁸*Ibid*

²⁹Article 11 of the Rome Statute

³⁰Pär Kristoffer Cassel, *Op. Cit.*, p. 9.

extraterritorial principle can apply in the ASEAN EDSM which is present as a trade and investment dispute settlement mechanism. The key word is Free Trade Area (FTA) or Free Trade Zone (FTZ). As discussed in the previous chapter, the FTA is an integration agreement between countries based on three main things that become the supporting pillars, namely trade in goods, trade in services, and investment. An FTA area that can form an integrated free trade area is generally outside the realm of the multilateral system or region concerned. This is one of the tasks of the secretariat (in this case ASEAN/SEOM) to determine and provide certain restrictions through FTA agreements.

This limitation is also basically something that must be applied based on the *temporis* jurisdiction in the previous description. The limitations in question can be in the form of deadlines, limitations related to certain materials, or limitations related to the parties to the dispute. As an example of limitation in the realm of multilateral international agreements, namely those contained in the Energy Charter Treaty (ECT). The ECT had the initial objective of integrating the energy sector of the Soviet Union and Eastern Europe at the end of the Cold War into the European market and the wider world³¹. Article 21 (1) says that "Except as otherwise provided in this Article, nothing in this Treaty shall create rights or impose obligations with respect to Taxation Measures of the Contracting Parties. In the event of any inconsistency between this Article and any other provision of the Treaty, this Article shall prevail to the extent of the inconsistency".³² The limitation in question is the limitation in the realm of tax between the two parties involved in the contract. This basically also needs to consider the rules of the domestic country involved in the contract. If the limitation is overstepped, a dispute will arise as happened in the case of investment or investment related to telecommunications between Penwell v. Kyrgyzstan in 2017. The tax-related limitations contained in domestic law should have been the basis of the host-state's consent, but the claimant felt that it was bypassed in the amendment of this agreement and was ultimately aggrieved. This case falls under Investor-State Dispute Settlement (ISDS) which was then settled using UNCITRAL procedural law, with the seat of arbitration in London, UK³³. However, the limitations given must also be adjusted to the material restrictions concerned. In the case of Penwell v. Kyrgyzstan, the limitation was related to the discussion of taxes, but the dispute forum was not limited.

Pasal 26 (4) Energy Charter Treaty

- "In the event that an Investor chooses to submit the dispute for resolution under subparagraph (2)(c), the Investor shall further provide its consent in writing for the dispute to be submitted to:
- (i) The International Centre for Settlement of Investment Disputes, established pursuant to the Convention on the Settlement of Investment Disputes between States and Nationals of other States opened for signature at Washington, 18 March 1965 (hereinafter referred to as the "ICSID Convention"), if the Contracting Party of the Investor and the Contracting Party party to the dispute are both parties to the ICSID Convention; or
 - (ii) The International Centre for Settlement of Investment Disputes, established pursuant to the Convention referred to in subparagraph (a)(i), under the rules governing the Additional Facility for the Administration of Proceedings by the Secretariat of the Centre (hereinafter
-

³¹ Weber Simon, "*Jurisdiction Ratione Materiae*", (Online) available at <https://jsumundi.com/en/document/publication/en-jurisdiction-ratione-materiae> (January 22, 2023).

³² Article 21 (1) *Energy Charter Treaty*

³³ Michael Darowski and Romilly Holland, "*Civil Unrest and Investor-State Claims in the Telecommunications Sector*" (Online), available at <https://globalarbitrationreview.com/guide/the-guide-telecoms-arbitrations/first-edition/article/civil-unrest-and-investor-state-claims-in-the-telecommunications-sector> (January 18, 2023).

referred to as the "Additional Facility Rules"), if the Contracting Party of the Investor or the Contracting Party party to the dispute, but not both, is a party to the ICSID Convention;"

It explains that a dispute under the ECT can be resolved through ICSID, but in fact in the case in question, it was not. The case used an arbitration forum with UNCITRAL procedural law. Thus, the limitation is only on the material, and does not eliminate the ability of both parties to determine the "choice of forum" and "choice of law".³⁴

Back to the discussion related to the FTA area earlier, that often the FTA area is outside the multilateral area which allows for the extraterritorial principle to apply. FTAs contain legal norms that combine norms between countries and the ASEAN Region. As explained in the previous chapter, there are several international agreements that support FTAs in ASEAN, namely ATIGA, AFAS, ACIA, and RCEP. These four agreements have their own trade and investment natures. Where ATIGA focuses on the delivery of goods or commodities between ASEAN, AFAS focuses on the integration of provision in the field of services, ACIA focuses on investment or investment made between ASEAN, and RCEP is quite unique because it is a comprehensive integration agreement that regulates both trade in goods and services and covers ASEAN + partner countries outside ASEAN. Each of these international agreements has a dispute settlement mechanism. However, the problem is that the dispute settlement has not been able to properly protect the parties. This is also agreed by Ms. Prita Amalia through her interview with the author, that even a comprehensive agreement like RCEP has not been able to show its "teeth" on an international scale. Even though RCEP is one of the comprehensive agreements that is quite proud of. RCEP is "The World Largest Trading Bloc" that controls almost half of the world's population and contributes around 29 percent to the world.³⁵³⁶ This is where the "legal gap" arises in terms of a legal vacuum, where ASEAN has a myriad of agreements and legal bases, but cannot be present as a solution. Basically, this is where ASEAN EDSM can be present as a special dispute resolution mechanism in the field of trade and investment that is comprehensive for the parties. The presence of ASEAN EDSM is in line with the theory of dispute resolution proposed by Dean G Pruitt and Jeffrey Z. That ASEAN EDSM is a way to resolve disputes or a problem server from a legal vacuum caused by a collision of interests between parties and a legal void.

This has also been stipulated in Article 2 of the ASEAN EDSM Protocol which has also been ratified by Indonesia through Presidential Regulation No 81/2022 which reads "SEOM shall administer this Protocol and, except as otherwise provided in a covered agreement, the consultation and dispute settlement provisions of the covered agreement. Therefore, SEOM has the authority to establish panels, adopt panel and Appellate Body reports, maintain oversight of the implementation of findings and recommendations in panel and Appellate Body reports adopted by SEOM and authorize the suspension of concessions and other obligations under covered agreements". In this case it is explained that there is a Party called SEOM (Seniof Economic Officials Meeting) which has an important position in the running of the EDSM. The presence of SEOM is very important in the operation of the legal certainty

³⁴Cornelia Furculita, "FTA Dispute Settlement Mechanisms - Alternative Fora for Trade Disputes: The Case of CETA and EUJEP", *Institute of European Law, Birmingham Law School Working Paper No.1*, p. 7.

³⁵Siti Halimah Indrani Anwar and Rehulina Sri Wartini Arie Afriansyah, Akbar Kurnia, Gregorius Sri Nurhartanto, I Made Budi Arsika, M. Reza Syariffudin Zaki, *State Practice of Asian Countries in International Law (Indonesia)*, Asian Year Book of International Law, BRILL, Volume 26, 2023, p. 224.

³⁶Muhammad Reza Syariffudin Zaki, Muhammad Yaasir Syauqii Pohan, Neisya Aulia, Duta Imanuel Sitorus, *Compatibility of Regional Comprehensive Economic Partnership (RCEP) Agreement on Trade in Services (GATS) and the Impact of Special Safeguard Measures (SSM) on the Balance of Trade in Service Liberalization in Indonesia*, International Conference on Law Studies (INCOLS 2022), Atlantis Press, 2022, p 206.

of the EDSM itself. This can basically more or less answer the problem of the previous dispute resolution mechanism, namely related to institutions. Jeffrey Kaplan explained that ASEAN as a regional organization often prioritizes free economic development (FTA), but has not been followed by the protection of binding legal certainty so that it often causes many opportunities in the economic field that have legal gaps³⁷. In this case, ASEAN as an international organization should follow the example of countries in the North American region that formed the NAFTA (North American Free Trade Area) alliance. From the outset, dispute settlement was a priority area for NAFTA negotiators. NAFTA constituent governments dedicated one of the original nineteen NAFTA negotiating groups exclusively to dispute settlement. Both Canada and Mexico prioritized the creation of a robust dispute settlement mechanism to check the United States' ability to impose unilateral sanctions under its domestic trade laws. For Canada and the United States, the dispute settlement system mitigates concerns that reliance on the Mexican legal system will weaken NAFTA enforcement.³⁸ Hence the need for the ASEAN EDSM as a dispute settlement forum of choice for countries involved in FTAs. If this is not used, only the FTA dispute settlement mechanism is available. If there is a dispute regarding the violation of norms outside the ASEAN region that is still involved in the FTA, it will cause confusion which leads to "forum shopping". On the other hand, there is ASEAN EDSM that can be the answer. Given that the ASEAN EDSM itself is a mirroring rule of the WTO DSM.³⁹

Regarding the implementation of FTA in ASEAN is indeed a very brilliant idea, but in this case it must provide comprehensive legal certainty. Beyond that, the presence of ASEAN EDSM must also be able to reach ASEAN partner countries, especially those that are openly involved in RCEP. This is where the extraterritorial principle of ASEAN EDSM can play its role in accordance with the extraterritorial principle explained above. From the FTA data as of June 2022, ASEAN already has various FTAs as follows:

| No | FTA Partner Nations | Name of FTA Agreements |
|----|---------------------------|---|
| 1 | Among ASEAN Member States | <ul style="list-style-type: none"> • ASEAN Comprehensive Investment Agreement (ACIA) • ASEAN Trade in Goods Agreement (ATIGA) • ASEAN Framework on Services (AFAS) |
| 2 | Australia | <ul style="list-style-type: none"> • ASEAN-Australia-New Zealand FTA (AANZFTA) • Indonesia-Australia Comprehensive Economic Partnership Agreement (IACEPA) |
| 3 | New Zealand | ASEAN-Australia-New Zealand FTA (AANZFTA) |
| 4 | Jepang | <ul style="list-style-type: none"> • ASEAN-Japan Comprehensive Economic Partnership (AJCEP) • Indonesia-Japan Economic Partnership Agreement (IJEPA) |
| 5 | Korea Selatan | ASEAN - Korea FTA (AK-FTA) |
| 6 | Pakistan | ASEAN - Korea FTA (AK-FTA) |
| 7 | Chile | Indonesia-Chile Economic Partnership Agreement (Trade in Goods) |

³⁷Jeffrey A. Kaplan, *Op. Cit.*, p. 150

³⁸Gary Clyde Hufbauer & Jeffrey J. Schotr, *North American Free Trade: Issues and Recommendations*, (New York: NYU Press, 1992), pp. 24-25.

³⁹Lorand Bartels, "Applicable Law in WTO Dispute Settlement Proceedings", *Journal of World Trade* Vol. 35 Issue 3, pp. 502-503.

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|----|---|--|
| 8 | India | ASEAN-India FTA (AIFTA) |
| 9 | Tiongkok | ASEAN-China Free Trade Agreement (ACFTA) |
| 10 | Hongkong | ASEAN-Hongkong, China Free Trade Area Agreement (AHKFTA) |
| 11 | Pakistan | Indonesia-Pakistan Preferential Trade Agreement (IPPTA) |
| 12 | EFTA (European Free Trade Association), terdiri atas Islandia, Norwegia, Swiss, Liechtenstein | Indonesia-EFTA Comprehensive Economic Partnership Agreement (IECEPA) |
| 13 | D8 (Deklarasi Istanbul), terdiri atas Bangladesh, Indonesia, Iran, Malaysia, Mesir, Nigeria, Pakistan, dan Turki. | Preferential Trade Agreement Among D-8 Member States (D-8 PTA) |
| 14 | Mozambik | Indonesia-Mozambique Preferential Trade Agreement (IMPTA) |
| 15 | Negara Anggota ASEAN ditambah Cina, Jepang, Korea Selatan, Australia, dan New Zealand | Regional Economic Comprehensive Partnership (RCEP) |

As mentioned in the previous chapter there are three FTA agreements that become the pillars of the FTA region for ASEAN member countries. This agreement is an important pillar for the realization of the implementation of a broader FTA Area considering that the three main pillars in the FTA Area are trade in goods, services, and investment which are regulated in AFAS, ATIGA, and ACIA. The existence of AFAS as a framework can progressively liberalize trade in services, so domestic service providers will benefit from more open market access. Service providers will also benefit from new processes and ideas that emerge due to the opening up of the services sector. ASEAN trade liberalization in services in terms of revenue reached 50% with billions of dollars in revenue, from the total flow of Foreign Direct Investment, this significant and promising increase will have a positive impact on the development and progress of the economic sector⁴⁰. Then ATIGA has the main objective to facilitate the flow of goods through the ease of trade facilitation of goods to create a single market and production base in ASEAN, then ACIA as a support in the field of investment aims to achieve a free and open investment environment in the region through progressive investment liberalization and increase transparency and predictability of investment rules, regulations and procedures conducive to increased investment.⁴¹

In addition to the three main agreements, from the table above we can find out that ASEAN, in this case Indonesia, have quite a lot of trade and investment agreement cooperation through FTAs. Where we see also many countries that are basically not members of ASEAN. Here the author wants to explain that the ASEAN EDSM can also apply the extraterritorial principle to countries that are not members of ASEAN. In accordance with the nature of the extraterritorial theory that has been explained, the extraterritorial principle can work if there is an agreement between the parties involved, considering that some of the trade and investment agreements above also involve other multilateral organizations besides ASEAN. Although there are no disputes resolved through the ASEAN EDSM (because considering that the EDSM was only inaugurated in 2019), this does not mean that the extraterritorial principle cannot be applied outside the FTA agreement. The following example is related to an FTA agreement that uses a dispute settlement mechanism outside its jurisdiction as an extraterritorial principle:

⁴⁰Ida Bagus Wyasa Putra, *The Law of International Contract*, First Printing (Bandung: PT Refika Aditama, 2017), p. 24.

⁴¹Zewei Zhong, "The ASEAN Comprehensive Investment Agreement: Realizing a Regional Community", *Asian Journal of Comparative Law* No. 6, p.3.

| Agreement Name | The Euro-Mediterranean Partnership (EMP) |
|--|--|
| Countries Involved | European Union with Mediterranean Countries such as Morocco, Israel, Jordan, Egypt, Algeria, Lebanon and Tunisia. |
| Explanation of Agreement Content | The Euro-Mediterranean Partnership (EMP), known as the 'Union for the Mediterranean' (UfM), is a comprehensive agreement that establishes cooperation in the areas of political and security partnership, economic and trade partnership and partnership in social, human and cultural affairs. This partnership has also evolved into an FTA Area. ⁴² Under the EMP Agreement, Morocco received €1.6 billion in funding from the MEDA program, the financial arm of the EMP, between 1995 and 2006, making it a major beneficiary of the Euro-Mediterranean Partnership. ⁴³ |
| Implementation of the Extraterritorial Principle | <p>Over time, they signed dispute settlement mechanism protocol agreements in 2010 and 2011, as a result of the authorization granted by the Council in February 2006. The aim is to complement the deepening and complex trade relations in the Euro-Mediterranean region with a simpler and more effective instrument for resolving trade disputes that may arise, based on other dispute settlement mechanism agreements signed in recent years by the EU13 and the WTO DSU, although clearly adapted to the bilateral context⁴⁴.</p> <p>In this case, EMP has its own authorized dispute settlement mechanism that complies with the WTO DSU. However, if there is a dispute that cannot be resolved through this mechanism, they agree to use other means of dispute resolution. In this case, they agreed to use the European Court of Justice (CJEU). Where basically the authority of the CJEU is only in the European Union Region. Why does this happen? The EMP states that the scope of action of the dispute resolution mechanism is the Euro-Mediterranean region, refers exclusively to trade disputes, and applies only to the Euro-Mediterranean region,</p> <p>This can happen because this agreement binds the European Union with Morocco, where the European Union is still under the auspices of the CJEU. This can happen, because there is an agreement between the parties to choose the same dispute resolution forum (the principle of "choice of forum"). Choice of forum can occur if both parties agree to use a particular forum in a particular case. In addition, the big differentiating factor is that the CJEU has a strong institutionalization so that it can extend not only jurisdiction, but binding legal certainty even for Morocco, which is not in the European Union.</p> <p>This case concerns the EU's trade relations responsibility for extending the terms of the EU-Morocco agriculture and fisheries agreement to the Western Sahara region. The EU-Morocco agreement concerns a number of problematic issues ranging from agriculture to fisheries. It originally allowed Morocco to export commodities from the contested Western Sahara, and was previously ratified by the European Parliament. In the latest ruling, the court said the</p> |

⁴²Beverly Crawford, "The Impact of EU Enlargement on the Euro-Med Partnership", *Jean Monnet/Robert Schuman Paper Series* Vol.5 No.23, p.2.

⁴³Michal Natorski, "The Meda Program in Morocco 12 years on: results, experiences and trends", *Documentos CIDOB Mediterráneo* No. 11, p.7.

⁴⁴Miguel Ángel, "The Protocols Concerning the Settlement of Trade Disputes in the Euro-Mediterranean Area" (Online), available at <http://portal.amelica.org/amei/journal/474/4742146005/4742146005.pdf> (January 20, 2023).

Council had erred and decided to revoke the agreement saying they imposed obligations on the people of Western Sahara without their consent.⁴⁵

What described through the table above is one example that the extraterritorial principle in the dispute resolution mechanism can include other countries that are not within its jurisdiction using the forum concerned. So can this also happen in the ASEAN region and ASEAN EDSM? The answer is quite simple, to what extent partner countries that are not ASEAN member states want to make agreements with ASEAN or ASEAN member states. Because the main key for this principle to apply is through an agreement. The real example, although it has not happened directly, but it can happen in the RCEP comprehensive agreement. RCEP does have its own dispute settlement mechanism contained in Chapter 19 RCEP. But the question is, how can the mechanism provide legal certainty considering RCEP does not have a strong institution? This was also answered by Ranitya Kusumadewi from the Directorate of ASEAN Negotiations, Ministry of Trade of Indonesia through an interview with the author, that the EDSM should be here as a credible mechanism because it can transmit strong institutions to countries that are not members of ASEAN. Given that EDSM has an institution attached to ASEAN, and of course if the legal force is still not strong (because it is relatively new) ASEAN as an institution can fight for legal certainty through international forums, such as the ASEAN Summit.

This needs to be carefully criticized because there are too many dispute settlement agreements that eventually tend to accumulate, resulting in "forum shopping". For example, ASEAN and China had an FTA called ACFTA in 2000. However, the agreement did not specifically regulate, so another agreement was made specifically for their dispute settlement, namely 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". This is certainly quite complicated not only in concept, but in implementation. In addition, another point that needs to be criticized is that each agreement has a dispute resolution mechanism where China has its own mechanism, Korea has its own, etc. Here, there is an imbalance between one mechanism and another. As a context, Korea's mechanism looks more detailed than the dispute settlement mechanisms of China and Japan. Where in terms of the formation of the panel does not require the approval of all parties under it. Then at another point the Korean mechanism says that the panel needs to be formed automatically in the event of a dispute. Similarly, while the Chinese and Korean mechanisms say that a panel will be established if the original panel is unable to do its job.⁴⁶ This overlap would certainly not occur if the ASEAN EDSM could become a codification of the trade and investment dispute settlement mechanism. Because for example, the rules related to panels in the ASEAN EDSM are specifically regulated in Article 7 of the ASEAN EDSM (ratified through Perpes 81/2022) which states:

⁴⁵Ángela Suárez-Collado, "The European Court of Justice on the EU-Morocco agricultural and fisheries agreements: an analysis of the legal proceedings and consequences for the actors involved", *The Journal of North African Studies* Vol. 27 No. 6, p. 1161.

⁴⁶Comparison between *Article 7.7 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*, *Article 6.7 Agreement on Dispute Settlement Mechanism under the Framework Agreement on Comprehensive Economic Cooperation among the Governments of the Member Countries of ASEAN and the Republic of Korea*, and *Article 72.2 Agreement on Comprehensive Economic Partnership among Member States of the Association of Southeast Asian Nations and Japan*.

Table 3.5 ASEAN EDSM

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|---|
| Article 7 ASEAN EDSM |
| <p>“1. Panels shall have the following terms of reference unless the parties to the dispute agree otherwise within 20 days from the establishment of a panel: “To examine in the light of the relevant provisions in (name of the covered agreement(s) cited by the parties to the dispute), the matter referred to the SEOM by (name of party) in (document) ... and to make such findings as will assist the SEOM in the adoption of the panel report or in making its decision not to adopt the report.”</p> <p>2. Panels shall address the relevant provisions in any covered agreement or agreements cited by the parties to the dispute. Panels shall address those claims on which a finding is necessary in order to ensure effective resolution of disputes.”</p> |

Thus, ASEAN EDSM can certainly invite countries that are not members of ASEAN (provided there is an agreement) and at the same time can be an answer to the legal imbalance that has been explained earlier.

As a trade and investment mechanism, ASEAN EDSM presents a comprehensive choice of forums. In terms of trade and specifically investment, the host State is the gatekeeper of all investments. If desired, the host State can require prospective investors' consent to dispute settlement in certain categories of claims, either by the host State itself or by its nationals, as a condition of investment entry. This is where ASEAN and including Indonesia "bargain" to prioritize our identity. Where as an example of ASEAN EDSM itself in the process of forming panels and SEOM which geographically occurs at the ASEAN Secretariat, namely in Jakarta, in accordance with Article 8 of the ASEAN EDSM:

Table 3.6 ASEAN EDSM

| |
|---|
| Article 8 ASEAN EDSM: |
| <p>“1. Panels shall be composed of well-qualified governmental and/or non-governmental individuals, including persons who have served on or presented a case to a panel, served in the ASEAN Secretariat (Hereinafter referred to as 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 Member States.”</p> |

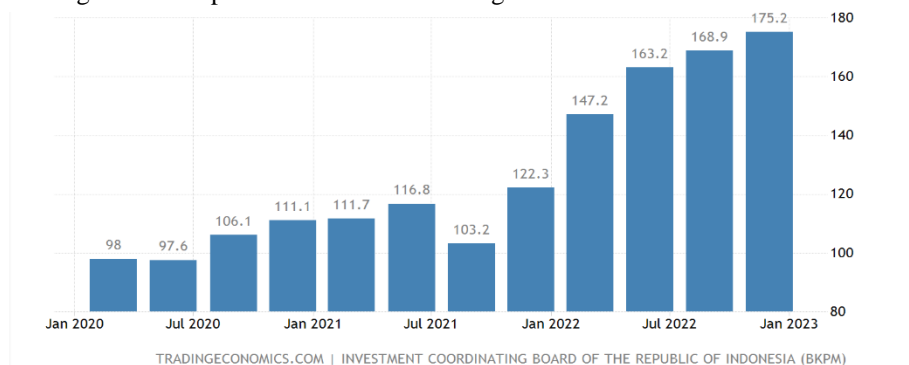
In addition, it should be remembered that since the rules in the ASEAN EDSM are a reflection of the WTO DSU which has basically been agreed upon and practiced by almost all countries in the world, it should not be a foreign rule for non-Asean member countries. Admittedly, there are still some points in the ASEAN EDSM that need to be revitalized, such as the role of SEOM. Many say revitalization needs to focus on the EDSM Protocol and the Panel created by SEOM. As an institution that resolves disputes between countries, the Panel does not have a firm position on its structure and secretariat, so the system is not trusted by the countries involved in resolving their disputes. The structure of the Panel is also considered illegitimate, as SEOM will eventually establish the Panel during or after a dispute, so the Panel's position itself is not permanent.⁴⁷ However, this can indeed be trained by its implementation, as SEOM has a fairly frequent meeting agenda and the panel in question is also basically an extension of ASEAN itself, which has an "ASEAN Way" approach. This is in accordance

⁴⁷Ahmad Syofyan, et.al, "Reinforcement and Revitalization of ASEAN Dispute Settlement Body", *Research Article International Journal of Entrepreneurship* Vol.24 Issue.5

with Article 9 of the EDSM which stipulates the position of the panel, namely "The function of the panels is to make an objective assessment of the dispute brought before it, including an examination of the facts of the dispute before it, including an examination of the facts of the case and the applicability of and conformity with the relevant provisions of the Agreement or any covered agreements, and to make its findings and recommendations in relation to the case. Panels should consult regularly with the parties to the dispute and give them adequate opportunity for the parties to reach a mutually satisfactory solution."

Speaking with the "ASEAN Way" approach, Indonesia has an important role in the procession of ASEAN EDSM as an international treaty. On the other hand, Indonesia also gets quite good implications. The EDSM Protocol will emphasize equal rights and obligations for Indonesia and other ASEAN member states, including efforts to secure various export commodities from entering Southeast Asian countries. So, a complaint of infringement may only be a judgment but does not violate the rules or agreements. Once the point is ruled out, disputes are limited to cases that are found to violate the agreement, especially in the areas of trade and investment. This was explained by the Director General of International Trade Negotiations of the Ministry of Trade, Imam Pambagyo.⁴⁸ It should be noted that the ASEAN EDSM is a dispute settlement mechanism that is on the subject of trade and investment, where Indonesia itself has benefited greatly in the sector concerned. In the trade sector, for example, through the ASEAN-China Free Trade Area (ACFTA) Indonesia experienced a surplus of food commodities amounting to USD 2.72 billion, in non-food agriculture (agricultural raw materials), the surplus came from natural rubber) around USD 336.9 million.⁴⁹ In the field of investment Indonesia also has a fairly good increase. Indonesia's Foreign Direct Investment increased by 44.2% to Rp654.4 trillion or \$45.6 billion in 2022, led by inflows into the base metals (\$11 billion) and mining (\$5.1 billion) sectors. The largest sources of funds are Singapore, China and Hong Kong. Considering the last quarter of 2022, FDI surged 43.3% year-on-year to reach a record high of IDR 175.2 trillion or \$12.2 billion. The data does not include investment in the banking and oil and gas sectors. Below is a graphical table of the increase in investment as of January 2023 in trillion rupiah (Trading Economics and Ministry of Investment/BKPM data).⁵⁰

Figure 3.1 Graph of the Increase in Foreign Direct Investment in Indonesia



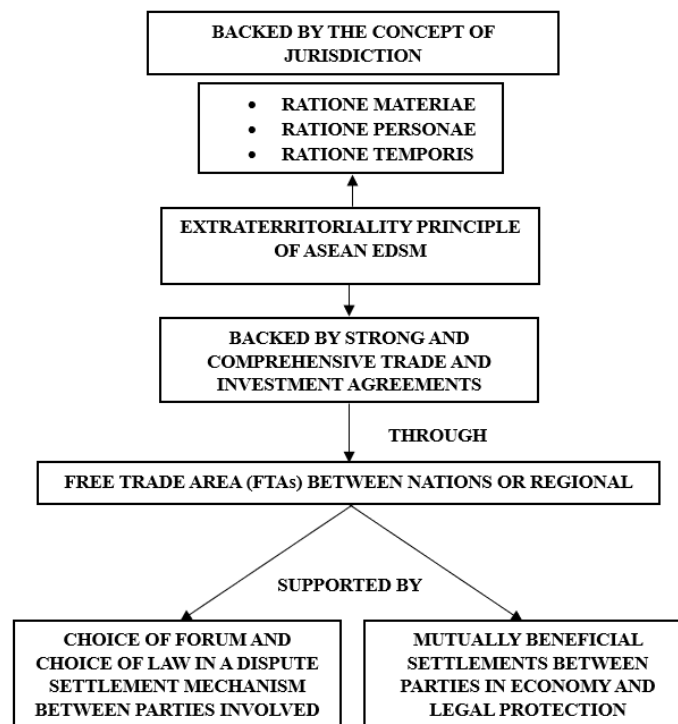
Source: Indonesia Foreign Direct Investment data from January 2020 to January 2023
 (New York City: Trading Economics, 2023)

⁴⁸Yashinta Difa Pramuyani Suharto, "Indonesia signs ASEAN Protocol on dispute settlement" (Online), available at <https://en.antaranews.com/news/135715/indonesia-signs-asean-protocol-on-dispute-settlement> (January 23, 2023).

⁴⁹Nasrudin, et.al, "The Impact of ASEAN-China Free Trade Agreement (ACFTA) on Indonesia's Economic Performance and Agriculture Sector", *Scientific Bulletin of Trade Research and Development*, Vol. 9 No. 1, pp. 9

⁵⁰Trading Economics, "Indonesia Foreign Direct Investment" (Online), available at <https://tradingeconomics.com/indonesia/foreign-direct-investment> (January 24, 2023).

The impact that the author above is the impact received in the realm of the Indonesian economy, but what are the implications for Indonesian law? The most important point is that the ASEAN EDSM itself has been ratified by the Indonesian government through Presidential Regulation 81 of 2022, which indicates that Indonesia has adapted the ASEAN EDSM as a dispute resolution mechanism that is in line with Indonesian positive law. This point is also in line with the theory of dispute resolution related to conflict resolution (problem solving) based on a mechanism rather than a spontaneous reaction. This mechanism is a means of protection for the parties concerned. Beyond this point, in the case of a trade and investment dispute, a cultural approach to Southeast Asian culture is needed, which is manifested through the ASEAN EDSM. The typical Southeast Asian culture of deliberation is manifested in several points in the ASEAN EDSM which basically provides space to resolve problems with a win-win solution. The appeal body or "Appellette Body" of ASEAN EDSM also geographically involves Indonesia in its implementation, considering that the ASEAN secretariat office is located in Jakarta. From this geographical factor, we can also provide an illustration to other countries that want to cooperate with Indonesia that Indonesia can also be the center of a comprehensive dispute resolution mechanism. Through the ratification of the ASEAN EDSM, it also shows clear evidence that the Indonesian government wants to have its own settlement mechanism in a more *reliable* scope. What is meant is a dispute resolution mechanism that is close to us (both geographically and philosophically) which can represent Indonesian culture in every cooperation, especially in the fields of trade and investment⁵¹. In addition, Presidential Regulation 81/2022 can be the legal basis used in the event of further trade and investment agreements, both State-State Dispute Settlement (SSDS) and Investor-State Dispute Settlement (ISDS) mechanisms. To sum up explanations of this subchapter, the author will conclude through a chart as a symbol of the explanation of the ASEAN EDSM Extraterritoriality Principle in Trade & Investment Dispute Settlement for Non-ASEAN Countries.



51 Ranitya Kusumadewi, interview with the author via Zoom, December 17, 2022

IV. CONCLUSIONS

The application of the extraterritorial principle of the ASEAN Protocol on Enhanced Dispute Settlement Mechanism (EDSM) in the settlement of investment disputes for non-ASEAN countries and its implications for Indonesia, fundamentally the extraterritorial principle can apply to a dispute settlement mechanism even though a country is not a member state registered in it. In the case of the ASEAN EDSM as a dispute resolution mechanism, the EDSM can provide extraterritorial principles to non-member states of ASEAN. Based on Article 2 of the ASEAN EDSM and Presidential Regulation No. 81 of 2022, the ASEAN EDSM and SEOM have full responsibility for the implementation of the EDSM. This can be achieved based on the three jurisdictional criteria that have been explained, namely the material in dispute (*ratione materiae*), the party or person in dispute (*ratione personae*), and the time limit specified or agreed upon (*ratione temporis*) in question and supported by trade and investment agreements through FTA agreements between parties and supported by strong agreements in both the economic and legal protection and the selection of "choice of forum" and "choice of law" for the parties involved. Coupled with the explanation by Pär Kristoffer Cassel, the extraterritorial principle can be applied to individuals or legal subjects which can usually occur as a result of diplomatic negotiations. A diplomatic negotiation is a foundation that can become a treaty (international agreement). Thus, we can understand that this international treaty is the legal basis of the enactment of an extraterritorial principle. The implications for Indonesia are quite positive. The ratification of the ASEAN EDSM also shows that the Indonesian government aspires for a reliable settlement mechanism within its own scope. What is meant is a dispute resolution mechanism that represents Indonesian culture in every cooperation, especially in the fields of trade and investment. In addition, Perpres 81/2022 can be the legal basis used if there are further trade and investment agreements with countries that want to cooperate with Indonesia.

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