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东盟争端解决机制研究：
与欧盟争端解决机制比较为视角

**The ASEAN Dispute Settlement Mechanism: Comparative
Study to European Union Dispute Settlement Mechanism**

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内容摘要

近三十年来，东南亚国家联盟（东盟）已发展成为第三世界国家中非常有成就的区域性国际组织，其经济发展速度是世界经济平均发展速度的两倍，国内生产总值（GDP）在世界的占比也翻了一番。东盟于 1976 年正式成立，但东盟宪章直到 2007 年才开始启用。东盟成员国之间曾发生了很多争端，但这些争端从未使用东盟的争端解决机制，它们基本上都是通过东盟争端解决机制之外的诸如国际法院、世贸组织等加以解决。缘此，本文拟围绕以下四个问题来实质性地研究东盟的争端解决机制：其一，为何东盟的争端解决机制从来未使用过？其二，东盟的争端解决机制存在怎样的法律问题？其三，东盟现行的争端解决机制是如何运行的？其四，从长远的角度看东盟的争端解决机制应怎样有效运作？

本文分为导论、正文（共四章）和结论三部分。

第一章导论涉及东盟争端解决机制的研究背景、基本文献要览、拟研究的问题、研究目的、研究方法、研究意义、研究的范围和限制以及对论文内容的概述。

第二章围绕上述问题二探讨东盟的争端解决机制，具体论题有四：第一，东盟法律解释机制疲软的问题；第二，东盟争端解决机制中调查、建议和决定等程序不具终局性的问题；第三，缺乏裁决的执行和遵守机制的问题；第四，东盟首脑会议解决争端之决策机制失当的问题。

第三章从欧盟法和欧盟争端解决机制的概念、欧盟的历史、组织机构、决策模式、欧盟争端解决机制之条约和运作体制、成案以及欧盟争端解决机制的影响等方面，述评欧盟的争端解决机制。

第四章就东盟的争端解决机制与欧盟的争端解决机制进行了详细的比较分析，并试图将比较分析的结论运用于回答第二章提出的四个问题。

内容摘要

第五章论证了完善东盟争端解决机制的两大建议：一是应将反向一致的模式引入东盟首脑会议解决争端之决策机制；二是增设“东盟法院”来解决东盟成员国间的争端。

第六章结论是对全文内容的总结，同时提炼主要观点，并提出未来东盟争端解决机制的研究建议。

关键词：东盟争端解决机制；东盟宪章；欧盟争端解决机制

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ABSTRACT

Over the past three decades, the Association of Southeast Asia (ASEAN) is a well-known as the most successful regional organization in the third world with the rate of world economic growth twice and their share in global GDP has doubled. Since the ASEAN was officially established in 1976 until launching ASEAN Charter in 2007, it found a fact that there are a lot of disputes between the ASEAN Member States but all disputes has never once settled by the ASEAN dispute settlement mechanism (ASEAN DSM). The disputes were basically settled by an outside ASEAN DSM instead such as the International Court of Justice (ICJ) and the World Trade Organization (WTO). Therefore, this dissertation essentially studies on the ASEAN DSM according to the four research questions (RQ): (1) Why has the ASEAN DSM never been applied to disputes in ASEAN? (2) What is the legal problem of ASEAN DSM? (3) How can the current ASEAN DSM work? and lastly (4) How can the ASEAN DSM effectively work in the long run?

This study consists of one introduction, four chapters, and one conclusion.

Chapter one-Introduction discusses on the research background of the ASEAN DSM, overview of literature, research questions, objectives of the study, research methodology, significance of the study, scope and limitation of the study, and the dissertation outline.

Chapter two reviews on the problems of ASEAN DSM according to the RQ2 and divided its problems into four topics such as (1). Weak interpretation of ASEAN instrument, (2).Non-finalized of findings, recommendations and decisions by ASEAN DSM, (3) Lack of enforcement or Compliance, and (4). An inappropriate decision making system of ASEAN Summit in case of dispute settlement.

Chapter three is the literature reviews on European Union dispute settlement mechanism (EU DSM) through EU law concept, EU DSM concept, EU history, structure of organization, decision making mode, EU DSM treaties, EU DSM working system, case study and lastly impacts of actions of the EU DSM.

ABSTRACT

Chapter four is the literature reviews on ASEAN DSM through ASEAN law concept, ASEAN DSM concept, ASEAN history, structure of organization, decision making mode, ASEAN DSM instruments, ASEAN DSM working system, case study and lastly impacts of actions of the ASEAN DSM.

Chapter five provides a detailed discussion of the ASEAN DSM comparative to the EU DSM, and then performed an analysis result to apply into the problems mentioned in Chapter two.

Chapter six proposes the recommendations of dissertation by (1) applying the model of reverse consensus into the decision making mode of ASEAN Summit in case of dispute settlement, and (2) separately establishing the ASEAN Court to settle the dispute for ASEAN Member States.

Conclusion provides a final conclusion of dissertation, discussion of findings, and suggestions for future study.

Key Words: ASEAN DSM; ASEAN Charter; EU DSM

ABBREVIATIONS

ABBREVIATIONS

AC	ASEAN Community
ACC	ASEAN Coordinating Council
AEM	ASEAN Economic Ministers Meeting
AEC	ASEAN Economic Community
AIA	Framework Agreement on the ASEAN Investment Area
AMM	ASEAN Foreign Ministers Meeting
ARF	ASEAN Regional Forum ASEAN
ASA	Association of Southeast Asia
ASC	ASEAN Socio-cultural Community
ATM	ASEAN Transport Ministers Meeting
ADMM	ASEAN Defense Ministers Meeting
AEAM	ASEAN Ministerial on Energy Meeting
AFAS	ASEAN Framework Agreement on Services
AFMM	ASEAN Finance Ministers Meeting
AFTA	ASEAN Free Trade Agreement
ALMM	ASEAN Labour Ministers Meeting
AMCA	ASEAN Ministers Responsible for Culture and Arts
AMME	ASEAN Ministerial Meeting on the Environment
AMMY	ASEAN Ministerial Meeting on Youth
AMRI	ASEAN Ministers Responsible for information
APSC	ASEAN Political-Security Community
ASED	ASEAN Education Ministers Meeting
AHMM	ASEAN Health Ministers Meeting
ACCSM	ASEAN Conference on Civil Service Matters
AMAFL	ASEAN Ministers Meeting on Agriculture and Forestry

ABBREVIATIONS

AMBDC	ASEAN Mekong Basin Development Cooperation
ASEAN	Association of Southeast Asian Nations
AMMDM	ASEAN Ministerial Meeting on Disaster Management
AMMST	ASEAN Ministerial Meeting on Science and Technology
AMMTC	ASEAN Ministerial Meeting on Transnational Crime
AMMin	ASEAN Ministerial Meeting on Minerals
ATIGA	ASEAN Trade in Goods Agreement
ALAWMM	ASEAN Law Ministers Meeting
AMMSWD	ASEAN Ministerial Meeting on Social Welfare and Development
AMRDPE	ASEAN Ministers on Rural Development and Poverty Eradication
ASEAN DSM	ASEAN Dispute Settlement Mechanism
COJ	The Court of Justice of the European Union
COP	Conference of the Parties to the ASEAN Agreement on Trans boundary Haze Pollution
CoR	The Committee of the Regions
CPR	Committee of Permanent Representatives
CEPT	The Common Effective Preferential Tariff
CFSP	The Common Foreign and Security Policy
DSM	Dispute Settlement Mechanism
EC	European Commission
EU	European Union
ECB	The European Central Bank
ECJ	The Court of Justice of European Union
EEC	European Economic Community
EIB	European Investment Bank
EPG	ASEAN Eminent Persons Group
EAEC	European Atomic Energy Community
ECSC	The European Coal and Steel Community

ABBREVIATIONS

EDSM	ASEAN Protocol on Enhanced Dispute Settlement Mechanism
ERDF	European Regional Development Fund
EDSM 1996	The Protocol on Dispute Settlement Mechanism
EDSM 2004	The Protocol for Enhanced Dispute Settlement Mechanism
EU DSM	European Union Dispute Settlement Mechanism
EU Law	European Union Law
Euratom	European Atomic Energy Community
GATT	General Agreement on Tariffs and Trade 1994
HLTF	The High Level Task Force
ICJ	International Court of Justice
JHA	The Justice and Home Affairs
MEPs	The Members of European Parliament
MRAs	ASEAN Framework Agreement on Mutual Recognition Arrangement
M-ATM	Meeting of the ASEAN Tourism Ministers
NGOs	Non-Governmental Organization
OHIM	Harmonization in the Internal Market
OLAF	The European Anti-Fraud Office
PCA	Permanent Court of Arbitration
PDSM	Protocol to the ASEAN Charter on Dispute Settlement Mechanisms
PPU	The urgent preliminary ruling procedure
QMV	Qualified majority vote
SEA	The Single European Act
SEOM	The Senior Economic Official Meeting
SEATO	Southeast Asia Treaty Organization
SEANWFZ	The Treaty on the Southeast Asia Nuclear-Weapon-Free Zone
Statue	Protocol No.3 on the Statute of the Court of Justice of the European Union
TAC	Treaty of Amity and Cooperation in Southeast Asia
TEU	Treaty of the European Union

ABBREVIATIONS

TEEC	Treaty establishing the European Economic Community
TFEU	Treaty of the functioning of the European Union
TEAEC	Treaty establishing the European Atomic Energy Community
TELMIN	ASEAN Telecommunications and Information Technology Minister Meeting
UN	United Nation
US	United States of America
USSR	The Union of Soviet Socialist Republics
UNCLOS	The United Nations Convention on the Law of the Sea
WTO	World Trade Organization
WTO DSU	World Trade Organization Dispute Settlement Understanding
ZOPFAN	Zone of Peace, Freedom and Neutrality Declaration

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CHAPTER ONE:

Introduction

1.1 Introduction

This dissertation analyzes the Dispute Settlement Mechanism (DSM) of ASEAN comparative study to the DSM of European Union (EU). At the present time, Regional organizations are emerging as an actor in their own light within global governance institutions. In South-east Asia region, Association of Southeast Asian Nations (ASEAN)^① was officially established on 8 August 1967 by the ASEAN Declaration (Bangkok Declaration)^② while European Union (EU) was traced its origins from the European Coal and Steel Community (ECSC)^③ on 18 April 1951 by the Treaty of Paris,^④ and the European Economic Community (EEC)^⑤ and the European Atomic Energy Community,^⑥ better known as Euratom on 25 March 1957 by the Treaty of Rome respectively.^⑦ In order to establish the full law based institutional framework for ASEAN, the ASEAN decided to launch the ASEAN Charter on 15 December 2008^⑧

① ASEAN, ASEAN Overview [EB/OL]. <http://www.asean.org/asean/about-asean/overview>, 2013-09-23.

② ASEAN Declaration (Bangkok Declaration) [EB/OL]. http://www.asean.org/index.php?option=com_content&view=article&id=5, 2014-03-23

③ The European Union, History [EB/OL]. http://europa.eu/legislation_summaries/institutional_affairs/treaties/treaties_introduction_en.htm, 2013-09-23

④ Treaty establishing the European Coal and Steel Community (TECSC) or Treaty of Paris [EB/OL]. <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:11951K/TXT>, 2014-10-15.

⑤ Treaty establishing the European Economic Community (TEEC) or Treaty of Rome [EB/OL]. <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:11957E/TXT>, 2014-09-15.

⑥ The Treaty establishing the European Atomic Energy Community (TEAEC) or Euratom Treaty has been amended at different stages. In each case, the specific amendments have been made in protocols annexed to the Treaty of Lisbon, See the consolidated version of the TEAEC [EB/OL]. <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:11957A/TXT&from=EN>, 2014-09-09.

⑦ See TEEC or Treaty of Rome.

⑧ ASEAN Charter (adopted in 2007, enter into force on 15 December 2008) [EB/OL]. <http://www.asean.org/asean/asean-charter>, 2013-09-23.

and will be soon integrated to the ASEAN Community (AC)^① by 31 December 2015. Whereas, the EU was established under its current name by launching the Treaty of Maastricht^② on 1 November 1993 and having latest major amendment to the constitutional basis by launching the Treaty of Lisbon^③ on 1 December 2009. It is likely that the ASEAN is following the footprint of EU and will be soon developed to be a powerful organization in Southeast Asia region as same as the EU in Europe. Interestingly, some scholar^④ argued that the EU is just an inspiration for the ASEAN and the ASEAN will not emerge as the EU because the ASEAN would proceed at their own way and one important part of the ASEAN to achieve it is to make their own Dispute Settlement Mechanism (DSM).^⑤

There is a fact showing that both of ASEAN and EU are currently the law-based regional organization and have their own DSM appeared on their rule of law.^⑥ The ASEAN, performs as an intergovernmental organization^⑦ based mainly on a principle of non-interference and the ASEAN way,^⑧ provides the provision of DSM stated in

① The decision to establishment of ASEAN Community by 2020 made in the Declaration of ASEAN Concord II in Bali, Indonesia, on 7 October 2003, and in order to accelerate the establishment of ASEAN Community, the 12th ASEAN Summit in Cebu, Philippines, on 13 January 2007, made the declaration to accelerate the establishment of ASEAN Community by 2015. See AEC Blueprint [EB/OL]. <http://www.asean.org/archive/5187-10.pdf>, 2013-10-09. See the Declaration of ASEAN Concord II (Bali Concord II) [EB/OL]. <http://www.asean.org/news/item/declaration-of-asean-concord-ii-bali-concord-ii>, 2013-09-23

② Treaty of European Union (TEU) or Treaty of Maastricht [EB/OL]. <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=OJ:C:1992:191:TOC>, 2014-09-09.

③ Treaty of Lisbon [EB/OL]. <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:12007L/TXT>, 2014-09-09.

④ Professor Sanchita Basu Das from Institute of Southeast Asia Studies gave an interview on topic of be ASEAN be another EU organized by CNC report (2013-02-08) [EB/OL]. http://en.cncnews.cn/news/v_show/31326_Will_ASEAN_be_another_EU.shtml, 2013-10-03. See PITSUWAN, SURIN, a former ASEAN secretary-general, Outgoing Surin urges ASEAN to think regionally, the nation newspaper (2013-01-10) [EB/OL]. <http://www.nationmultimedia.com/politics/Outgoing-Surin-urges-asean-to-think-regionally-30197615.html>, 2013-10-03.

⑤ WOON, WALTER. The ASEAN Charter Dispute Settlement mechanisms in the Making of the ASEAN Charter [Z]. ASEAN Law Association 10th General Assembly, 2012. 5.

⑥ WAH, CHIN KIN & SURYADINATA, LEO. ed. MICHAEL LEIFER: Selected Works on Southeast Asia [M]. Singapore: ISEAS Publishing, 2005. 307-316.

⑦ See ASEAN Charter. Art.3. See the Rules of Procedure for the Interpretation of the ASEAN Charter (adopted on 2 April 2012 but not yet into force) [EB/OL]. <http://cil.nus.edu.sg/2012/2012-rules-of-procedure-for-the-interpretation-of-the-asean-charter-adopted-on-2-april-2012-in-phnom-penh-cambodia/>, 2014-04-20.

⑧ Id., Art. 2(2)(e)

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