MOVING AWAY FROM THE "*ASEAN WAY*" APPROACH IN ASEAN DISPUTE SETTLEMENT MECHANISM

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ABSTRACT

Since the inception of the Association of Southeast Asian Nations (ASEAN) in 1967, ASEAN member states have signed and ratified several treaties and agreements to signify their commitments in achieving a single market and production base. However, these treaties and agreements remain to be soft law instruments as the ASEAN dispute settlement mechanism envisioned for ASEAN economic agreements under the ASEAN Protocol on Enhanced Dispute Settlement Mechanism ('EDSM 2004') has not been activated until today. This is contrary to the World Trade Organisation's Dispute Settlement Mechanism which has been widely used and adopted even by ASEAN countries. One of the limitations identified by scholars is the continuous reliance on the "ASEAN Way" principles by the ASEAN member states. Existing studies on the EDSM 2004 acknowledged the flaws in the ASEAN Dispute Settlement Mechanism to be the non-confrontational ASEAN WAY culture. This ought to be rectified in the EDSM 2019 but it was not. In fact, the ASEAN Protocol on Enhanced Dispute Settlement Mechanism 2019 ('EDSM 2019') which seeks to revamp the previous EDSM 2004 is fraught with the same limitations. Similar to markets, the ASEAN Way culture entrenched in the ASEAN society will not self-correct and heavier rules and regulations are necessary to shift ASEAN transition to a more rules-based governmental organisation. There exists a gap in knowledge on the comprehensive strategies to overcome the deeply entrenched ASEAN culture. This study is important as it will spark debates and discussions from which robust policy recommendations can be drafted to improve the existing EDSM 2019. This article employs the doctrinal research method wherein the primary data is obtained through systematic content analysis of literature review in the area of study, ASEAN declaration and relevant agreements, i.e., the EDSM 2004 and EDSM 2019. In this regard, 3 recommendations for improvements are identified to include ease of access to readily available information on the ASEAN Dispute Settlement Mechanism, improve the

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human resource and support of the ASEAN Secretariat and limit the choices of forum.

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ASEAN DISPUTE SETTLEMENT MECHANISM

Since the coming into force of the ASEAN Charter on 15.12.2008, ASEAN has been receptive to the idea of a more rules-based inter-governmental organisation. In spite of this, the ASEAN dispute settlement mechanism envisioned for ASEAN economic agreements under the ASEAN Protocol on Enhanced Dispute Settlement Mechanism ('EDSM 2004') has not been activated until today. Many scholars postulate that the non-activation of the ASEAN dispute settlement mechanism is a good indication that the ASEAN dispute settlement mechanism is working well. However, upon further scrutiny of the circumstances of the ASEAN member states' disputes and/or differences which have arisen and resolved throughout the years, it is observed that there has been a plethora of intra and inter ASEAN disputes resolved via third party dispute settlement mechanisms (i.e., the World Trade Organisation's Dispute Settlement Understanding ('WTO DSU')) or via the informal and non-confrontational approach consistent with the "ASEAN Way" principles[1].

The "ASEAN Way" is not new and has contributed to much economic cooperation in ASEAN through *musyawarah* and *mufakat*, rather than through rules and regulations. It is essentially premised on a "relationship-based" approach rather than a "rules-based" and "market-based" approach which the West adopts and abide by. This informal approach is in stark contrast to the formal legalism in the West.

One of the main objectives of the ASEAN Economic Community is to establish an integrated and cohesive economy in a unified single market and production base. It is hoped that this will increase ASEAN's competitiveness in the world market. However, the ASEAN economic agreements signed and ratified by ASEAN member states appear to have no teeth for they are not legally binding or unenforceable. In fact, Huala Adolf (2018)[2] compared the ASEAN Trade in Goods Agreement 2009 to a soft law instrument which is

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1 Hao Duy Phan, "Towards a Rules-Based ASEAN: The Protocol to the ASEAN Charter on Dispute Settlement Mechanism," Arbitration Law Review, 5, no 14 (2013): 254 – 276.

2 Huala Adolf, "ASEAN Trade in Goods Agreement (ATIGA) and Its Implementation," Indian Journal of International Economics Law, 1, IX (2018): 1 – 18.

essentially not legally binding or enforceable. In an effort towards globalisation, soft law has its benefits for being convenient and meeting overriding interest of justice[3]. However, soft legal instruments are also heavily dependent on mutual commitments of each ASEAN member state in accordance with the "ASEAN Way" through *musyawarah* and *mufakat*, rather than through rules and regulations[4].

Today, as ASEAN countries are rapidly developing and improving their trades and services, the informal and non-confrontational "ASEAN Way" approach appears to be unsuitable in most cases for the purpose of resolving the increasingly complex disputes and/or differences of inter and intra ASEAN.

The recurring argument that ASEAN member state leaders are not prepared for a rules-based dispute settlement mechanism that is beyond the 'ASEAN Way' approach cannot hold water anymore. In fact, least developing countries in ASEAN (including CLMV countries, i.e., Cambodia, Laos, Myanmar and Vietnam) have referred disputes and/or differences to the WTO DSU and other third-party dispute settlement mechanisms which are essentially premised on a rules-based approach. Over the years, intra ASEAN disputes were referred to the WTO DSU and they are as follows: -

(a) In 1995, Singapore requested for consultation with Malaysia on the prohibition of imports of polyethylene and polypropylene. Mutually agreed solution was notified to the WTO DSU on 23.3.1995.

(b) In 2008, Thailand requested for consultation with Philippines on the customs and fiscal measures on cigarettes. On 21.12.2020,

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3 A notable case example where the "ASEAN Way" approach was used to resolve disputes and differences is the Malaysian government's amicable settlement with the estate of Boonsoom Boonyanit in 2018 pursuant to the 1987 ASEAN Agreement for the Promotion and Protection of Investments. Although the estate of Boonsoom Boonyanit finally attained the justice which it had been seeking for decades, the exact settlement sum paid or to be paid was not disclosed. (Datuk Roger Tan, 'Let Justice be seen to be done', published on 14 August 2020, https://www.edgeprop.my/content/1723709/let-justice-be-seen-be-done)

4 Paul J. Davidson, "The ASEAN Way and the role of law in ASEAN Economic Cooperation", 2004 *Singapore Year Book of International Law and Contributors*, 8 SYBIL (2004): 165 – 176

Thailand and Philippines agreed to an 'Understanding between the Philippines and Thailand to pursue facilitator-assisted discussions aimed at progressing and resolving outstanding issues in regards to DS371'. On 31.3.2021, the Facilitator submitted to the Dispute Settlement Body ("DSB") its report.

(c) In 2015, Vietnam requested for consultation with Indonesia for the safeguard of certain iron or steel products. On 15.4.2019, Indonesia informed the DSB that it had adopted a regulation to remove the safeguard measure challenged by Vietnam in the dispute, which is considered as full implementation of the DSB recommendations and ruling.

Other than the WTO DSU system, intra ASEAN disputes were also referred to other third-party dispute settlement mechanisms and they are as follows: -

(a) In a dispute between Cambodia and Thailand on the Request for Interpretation of the Judgment of 15th June 1962 regarding the case concerning the Temple Preah Vihear from 2010 – 2013 and the dispute between Cambodia and Thailand on the case concerning the Temple Preah Vihear from 1959 - 1962, the disputes were referred to the International Court of Justice ("ICJ").

(b) In a dispute between Malaysia and Singapore on the Land Reclamation by Singapore and around the Straits of Johor in 2003, the dispute was referred to an Ad Hoc Tribunal. In 2005, Malaysia and Singapore signed a settlement agreement and jointly submitted a letter to the International Tribunal for the Law of the Sea ("ITLOS") requesting it to deliver a final binding award based on the settlement agreement.

(c) In a dispute between Malaysia and Singapore on the Sovereignty over Pedra Branca/Pulau Batu Puteh, Middle Rocks and South Ledge from 2003 – 2008, the dispute was referred to ICJ.

(d) In a dispute between Malaysia and Indonesia on the Sovereignty over Pulau Sipadan and Pulau Ligitan (2 islands in the Sulawesi Sea) from 1998 - 2002, the dispute was referred to ICJ.

Based on past intra ASEAN disputes that were referred to third party dispute settlement mechanisms, it is evident that there has been a

shift in the mindset of ASEAN member states with regards to the "ASEAN Way" of full consensus only approach.

In light of this, the ASEAN dispute settlement mechanism should be improved and revamped to keep up with the shift in mindsets. Similarly, the ASEAN Secretariat should also take heed of this and implement the necessary improvements to the existing system.

From an economist point of view, the private bargaining reached between ASEAN member states appears to be efficient due to the minimization of costs and maximisation of joint profits between parties – whereby least cost is spent when ASEAN leaders reach a consensus informally without having to abide by the rule of law in courts. However, in the long run, the politicised dispute settlement system controlled and manoeuvred by ASEAN leaders would cause the foreign investors to lose trust and confidence in the ASEAN trade and services.

It is observed that the lacklustre commitment to develop the ASEAN dispute settlement mechanism over the years could be due to the fact that it is essentially a peer review mechanism. However, the protectionist trait of previous ASEAN leaders as displayed in amongst others as well as the infamous territorial dispute on the sovereignty over Pulau Sipadan and Pulau Ligitan between Malaysia and Indonesia in the early 1990's[5] does not necessarily reflect the attitudes of ASEAN leaders today.

The ASEAN Secretariat should take heed of the increasingly cooperative attitudes of ASEAN leaders today and revamp the ASEAN dispute settlement mechanism. Once developed, tried and tested, certainly ASEAN member states will develop trust and confidence in the ASEAN dispute settlement mechanism.

Some existing limitations of the ASEAN dispute settlement mechanism which ought to be addressed by the ASEAN Secretariat are as follows: -

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5 John G. Butcher, "The International Court of Justice and the Territorial Dispute between Indonesia and Malaysia in the Sulawesi Sea," *Contemporary Southeast Asia*,. 35, no. 2 (2013): 235 – 257.

There are no readily available information and easily accessible system to the ASEAN dispute settlement mechanisms

Unlike the WTO DSU system which is clearly explained in the official website of WTO, any and/or all information on the ASEAN dispute settlement mechanism is lacking even on the official website of ASEAN, wherein: -

(a) There is no link to the ASEAN dispute settlement system on the ASEAN website;
(b) While a copy of the ASEAN economic agreements and the EDSM 2004 are available on the ASEAN website, there is no page dedicated to the ASEAN dispute settlement mechanisms that provides further information, assistance and/or legal support;
(c) There is no information on the composition of the Senior Economic Officials Meeting and the panel in the EDSM 2004;
(d) There is no information on past cases which was referred to the ASEAN dispute settlement mechanism but thereafter resolved via peaceful means;
(e) There are no e-learning modules, legal texts, documents and/or background papers for the purpose of increasing familiarity, transparency and confidence.

To this end, members of the public have to resort to the information and analysis found in articles and legal texts prepared by scholars and/or other organisations. For example, WTO and the United Nations[6] each provide a brief explanation to the ASEAN Dispute Settlement Mechanism on their official website.

In comparison with the WTO DSU system, there is a link to 'Dispute Settlement' on the WTO official website homepage and there is a plethora of documents, legal texts, case summaries and case reports that are available for public reading. There is also a 2019 edition of the WTO Dispute Settlement: One Page Case Summaries from 1995 – 2018 which provides concise summaries of past cases determined by the WTO DSU panel.

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6 United Nations Conference on Trade and Development: Dispute Settlement, "Regional Approaches 6.3 ASEAN" (2003).

The ASEAN Secretariat lacks resources and human support

There is a clear lack of resources and human support, including legal and financial support in order to ensure that the ASEAN dispute settlement mechanism is workable. Whilst Article 17 of the EDSM 2004 provides for an ASEAN DSM Fund which is to be separate from the ASEAN Secretariat regular budget, it is only intended to meet the expense of the panels, Appellate Body and other administration costs of the ASEAN Secretariat. Every other cost and expense incurred, such as legal research, legal representation and support are expected to be borne by the ASEAN member states themselves, including the least developing ASEAN member states such as Cambodia, Laos, and Myanmar. Certainly, this creates an unnecessary hurdle and burden on disputing parties who are from less developed countries.

It was reported that the DSM Fund has reached USD$ 345,000.00[7], however, no clear information can be found on the use of the DSM Fund in the ASEAN website, especially considering no cases were referred to it as of today.

There is a lack of knowledge and familiarity on the ASEAN Dispute Settlement Mechanism. The ASEAN Secretariat, which is relied on for legal advice also does not have enough legal advisors and it was reported by Natthada Temudomchai (2016) that there are only 5 lawyers within the ASEAN Secretariat's Legal Services and Agreements Division in 2014.

In order to set up a training programme (online and physical courses and modules, webinars, conferences, booklets, hypothetical scenarios to show how disputes are resolved under the ASEAN Dispute Settlement Mechanism) for the purpose of equipping each ASEAN member state (leaders, officers and relevant private sectors) with the requisite knowledge to refer disputes to the ASEAN dispute settlement mechanism, the ASEAN Secretariat must have sufficient funds in order to have enough manpower and experts to assist and facilitate all parties. However, Natthada Temudomchai (2016) reported in his article that Dr Surin Pitsuwan, the ASEAN Secretary General is reportedly employing only 260 personnel including 79 staff recruited from the ASEAN member states. In comparison to WTO's employing of 600 staff to

[7] Natthada Temudomchai, "ASEAN Dispute Settlement Mechanism: A Study of its Ineffectiveness in Resolving Economic Disputes," *Assumption University Law Journal*, 7, no. 2 (2016),

handle only trade cooperation and settlement of disputes in 2016, the lack of efficiency of the ASEAN Dispute Settlement Mechanism is clearly attributable to the lack of human resource support and the immense workload.

To further minimise the transaction costs of the ASEAN dispute settlement mechanism and encourage ASEAN member states to opt for the same, the DSM Fund should be utilized to ensure that the ASEAN Secretariat headquarters in Jakarta, Indonesia and the respective ASEAN member states offices are sufficiently equipped with the physical and technological facilities for online and substantive consultation, mediation and hearings.

It is noteworthy that the ASEAN Secretariat and the respective ASEAN member states offices have shown sufficiently adequate technological facilities for online conferences and meetings during the Covid-19 pandemic. However, there should be a check and survey to ensure that the existing offices and technological facilities are sufficiently adequate to facilitate and/or conduct online and/or physical consultation, mediation and hearings.

There are too many choices of forum

Due to the flexibility and freedom of choice afforded under the 'ASEAN Way' principle, ASEAN member states are allowed to opt to resolve their disputes and/or differences via other forums, i.e., a referral to the ICJ, the WTO DSU and even a referral to the ASEAN Summit (which only comprises of political leaders). More often than not, disputes and/or differences between ASEAN member states are resolved at the ASEAN Summit between the political leaders.

As a result, ASEAN member states forum-shop and opt for forums other than the ASEAN dispute settlement mechanism which is still at infancy stage.

Further to the above, the EDSM 2004 allows a flexible choice of forum thereby defeating its very purpose of being the primary mode of ASEAN dispute settlement mechanism. While the flexibility and freedom of choice afforded to ASEAN member states under EDSM 2004 are in line with the 'ASEAN Way' approach, it overrides the overall intention to gradually move ASEAN dispute settlement mechanism into a more rule-based and quasi-judicial system.

In addition, although EDSM 2004 is meant to be the primary mode of dispute settlement mechanism for 'covered agreements', however, the term 'covered agreements' is not defined and the list of covered agreements are in fact attached in a list annexed to the EDSM 2004 thereby requiring continuous modification of the EDSM 2004 in order to cover future treaties and/or agreements. In comparison, the WTO DSU does not envisage the use of alternative forums for its covered agreements.

STRATEGIES TO OVERCOME THE LIMITATIONS

As a way to revamp the ASEAN dispute settlement mechanism, the ASEAN member states had on 20.12.2019 signed the ASEAN Protocol on Enhanced Dispute Settlement Mechanism 2019 ('EDSM 2019'). However, the EDSM 2019 has yet to come in force pending the date on which the 10th ASEAN member state notifying the Depository of its completion of the internal procedures necessary for the entry into force of the Protocol.

Clearly, there are many limitations to the ASEAN dispute settlement mechanism which have dampened the public's trust and confidence in the mechanism. However, there are strategies to overcome these limitations and the same are addressed as follows. From the past trend of disputes and/or differences intra ASEAN, clearly there is an increasing inclination to the rules-based and quasi-judicial approach and a move away from the "ASEAN Way" approach.

Some scholars in the likes of Edmund Sim (2020) commented that in light of ASEAN's experience with the WTO DSU system which displays severe delays and ineffectiveness due to the unresolved dispute between Philippines and Thailand on customs valuation of imported cigarette disputes since 2008 and the increasing number of backlog cases in the WTO DSU system by other WTO members, there might be a keener interest by ASEAN member states to refer to the ASEAN dispute settlement mechanism. Therefore, there is an urgency to quickly revamp the ASEAN dispute settlement mechanism.

It is suggested that a special Eminent Persons Group (EPG) comprising of leaders of each ASEAN member state and lawyers with specialisation in international laws and trade could be formed for the purpose of reviewing, assessing and strategizing ways to increase the

effectiveness and credibility of the function and operation of the ASEAN dispute settlement mechanism. At the same time, it could increase awareness and publicity of the ASEAN dispute settlement mechanism to members of the public. Some of the suggested strategies to curb the existing limitations are addressed as follows:

Ease of access to readily available information on the ASEAN Dispute Settlement Mechanism

The ASEAN Secretariat should take the effort to disseminate information pertaining to the ASEAN dispute settlement mechanism by way of publication on the ASEAN website, online publicity and physical training of ASEAN member state leaders, officials and other relevant persons. Just like the WTO DSU system, the ASEAN Secretariat could incorporate the following in the ASEAN website: -

(a) Information on how to obtain assistance and legal support when intending to refer disputes and/or differences to the ASEAN dispute settlement mechanism;
(b) Reports on the meetings held by the Senior Economic Officials Meetings;
(c) Composition of the Senior Economic Officials Meetings and panels;
(d) Case summaries of cases referred to the ASEAN dispute settlement mechanism but eventually resolved via peaceful means (information of which could be redacted or not subject to the approval and consent of the disputing parties);
(e) Hypothetical case scenarios of how disputes and/differences under different ASEAN instruments and agreements are resolved and decided; and
(f) E-learning modules, legal texts and documents and background papers on the ASEAN dispute settlement mechanism.

Aside from the above, the ASEAN Secretariat could increase awareness and publicity of the ASEAN dispute settlement mechanism by having international moot competitions for students from each ASEAN member state based on hypothetical scenarios of disputes and/or differences under different ASEAN agreements which are resolved using the ASEAN dispute settlement mechanism. As a starting point, the ASEAN Secretariat could refer to previous cases which has since been resolved under the WTO DSU.

Leaders of ASEAN member states could also take initiatives to disseminate information on the ASEAN dispute settlement mechanism in their respective countries using the English language and their national language. In this way, layman and private business sectors will find it easier to understand the system and procedures that they have to adhere in order to lodge a complaint.

Further thereto, it is suggested that there should be an additional guideline paper to ensure that ASEAN member state leaders and officials take steps to undergo courses and training in order to understand the ASEAN dispute settlement mechanism better.[8]

Improve the human resource and support of the ASEAN Secretariat

Some scholars in the likes of Locknie Hsu[9] (2013) suggested setting up a legal unit within the ASEAN Secretariat comprising of specialised international lawyers to solve trade and investment issues. This could be a network of government agencies, one from each ASEAN member state to allow private sectors to cut through red tapes. Other than this, the ASEAN Secretariat could also: -

(a) Set up training programmes for the leaders, officials, officers and other relevant persons in charge or involved in the ASEAN dispute settlement mechanism within the ASEAN Secretariat and in each of the ASEAN member states;
(b) Set up a complementary and complimentary legal and human resource unit within the ASEAN Secretariat comprising of staffs and specialised international and trade lawyers to advise, assist and/or provide legal opinion and representation to ASEAN Member States in the English language and the ASEAN member states respective national languages;
(c) Set up a sub-unit of staff specifically to prepare legal texts, booklets, case summaries, hypothetical case scenarios and other online texts and documents in the English language and the ASEAN member states respective national languages to be published on the ASEAN website; and

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8 Edmund W. Sim, "ASEAN Further Enhances Its Dispute Settlement Mechanism," *The Indonesian Journal of International & Comparative Law* (2020).

9 Locknie Hsu, "ASEAN Dispute Settlement Systems" *The ASEAN Economic Community: A Work in Progress*, p 382 – 410, available at http:/works.bepress.com/locknie-hsu/5

(d) Set up a sub-unit of staff and specialized international and trade lawyers to run the process of the ASEAN dispute settlement mechanism.

Prior to implementing the above strategies, it is suggested that the ASEAN Secretariat first carry out a transparent check and survey to determine whether the existing facilities at the ASEAN Headquarters at Jakarta, Indonesia and the relevant ASEAN member states offices are adept for the purpose of physical and online consultation, mediation and/or hearings.

In order to do carry out the above suggestions, obviously the ASEAN DSM Fund has to be replenished constantly. Therefore, it is suggested that Article 17 of EDSM 2004 be amended to include mandatory yearly contribution by all ASEAN member states for the setting up and maintenance of the legal and human resource unit for the ASEAN dispute settlement mechanism system. In light of the varying levels of development of each ASEAN member states, different allocation of contribution can be agreed between them. Any and/or all use of the DSM Fund should thereafter be published on the ASEAN website every quarterly to ensure transparency.

Limit the choices of forum

Over the years, ASEAN member states have increasingly shown an inclination towards a rules-based organisation, albeit via a different forum, i.e., the WTO DSU. Therefore, it is suggested that the ASEAN Secretariat conduct a survey and produce a report with regards to the many different dispute settlement mechanisms under the various agreements, treaties and instruments intra ASEAN and inter ASEAN and impose only one dispute settlement mechanism.

In order to increase the attractiveness of the ASEAN dispute settlement mechanism, it is suggested that the EDSM 2004 be amended to allow the participation of non-ASEAN member states, albeit only as amicus curiae, like the WTO DSU. Indirectly, other foreign investors from WTO member states or from faraway region including economically stronger countries could develop trust and confidence in ASEAN's structure and systems.

Further to the above, Article 1 of the EDSM 2004 should also be amended so that it does not only cover a specific list of covered

agreements (which has not been updated since 2004), but cover the agreements or instruments which would fall under the definition of "covered agreements" in the EDSM 2004. As a result, there is no need to continuously revise other ASEAN agreements which refer to the outdated Protocol or the EDSM 2004 (itself or its amendment) for the list of covered agreements so that there is better clarity of the ASEAN dispute settlement mechanism.

With a stronger, clearer and unified ASEAN dispute settlement mechanism, ASEAN member states can be habituated with following the rule of law of the region. In the same vein, the rest of the world can have better trust and confidence in the organisation.

CONCLUSION

There are many more deficiencies in the ASEAN Dispute Settlement Mechanism which requires improvement. Certainly, further research and investigation on the ASEAN Dispute Settlement Mechanism is required and necessary. However, a perusal of the proposed Enhanced Dispute Settlement Mechanism 2019 signed and ratified by ASEAN member states in December 2019 exhibits similar deficiencies as its predecessor[10]. Therefore, it is fair to conclude that the current ASEAN Dispute Settlement Mechanisms (EDSM 2004 and EDSM 2019) warrants improvement.

The ASEAN Secretariat and ASEAN member states ought to keep up with the shift in mindset of the ASEAN member states and move beyond the 'ASEAN WAY' approach. This move will not abrogate the 'ASEAN Way' or ASEAN culture but an evolution to a more efficient system like the WTO DSU system. The ASEAN Dispute Settlement Mechanism is an essential secondary tool to ensure that the ASEAN member state commitments are complied with and implemented. ASEAN member state leaders must therefore be encouraged to use the ASEAN Dispute Settlement Mechanism, instead of using third party dispute resolution mechanisms.

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[10] Locknie Hsu, "The ASEAN Dispute Settlement System: A Work in Progress," *The ASEAN Economic Community*, (2013).

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