

***If You Built It They would not Come:  
ASEAN Dispute Settlement Mechanisms and  
Intra-ASEAN Disputes***

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**Ranyta Yusran**

Research Fellow, Centre for International Law (CIL)  
National University of Singapore

**CIL**  
**Centre for International Law**  
[www.cil.nus.edu.sg](http://www.cil.nus.edu.sg)



## The Association of Southeast Asian Nations (ASEAN)

- Established in 1967 however it was only in 2007 that it adopted its constituent document, the ASEAN Charter.
- It consists of Indonesia, Malaysia, Philippines, Singapore, Thailand (the original members), Brunei, Viet Nam, Lao PDR, Cambodia and Myanmar.
- ASEAN is in a **transition period from** a group that has always been regarded to operate based on informal understanding and impose no binding obligation **to** an organisation based on clear legal obligations
- Setting up its own dispute settlement mechanisms is a part of this legalisation effort.

## Overview

**1**

**ASEAN dispute settlement  
mechanisms**

**2**

**Why are they not used?**

**3**

**Will they ever be used?**

## 1976 Treaty of Amity and Cooperation in Southeast Asia (TAC)

- Covers disputes which do not concern the interpretation or application of any ASEAN instrument, e.g. political-security-related disputes (Charter Art. 24(2)).
- Requires the consent of all disputing parties
- High Council – representatives of all ASEAN Member States and representatives from non-ASEAN Member States which are directly involved in a dispute.
- Decisions of the High Council shall be made based on consensus
- The High Council is to recommend good offices, mediation, inquiry and conciliation as appropriate means of settlement. It may also offer its good offices.

## 2004 Protocol on Enhanced Dispute Settlement Mechanism (EDSM)

- Covers disputes arising from interpretation or application of ASEAN economic agreements (Charter, Art. 24(3)).
- Mandatory process involving a panel established by the Senior Economic Officials Meeting (SEOM).
- When consultation failed, SEOM may establish the panel based only on the request of the aggrieved party.
- Negative consensus – a panel will be established and its report will be adopted unless SEOM decides by consensus not to do so.
- The disputing parties are obliged to accept the report of a panel/appellate body unconditionally

## 2010 Protocol to the ASEAN Charter on Dispute Settlement Mechanisms (DSMP)

- Covers disputes that do not fall within the ambit of TAC and EDSM and disputes that arise from the interpretation and application of the ASEAN Charter (Charter, Art. 25).
- DSMP consists of consultation, good offices, mediation, conciliation and arbitration.
- Arbitration may be requested by an aggrieved party after consultation failed.
- A panel may only be established if all parties to a dispute agree.
- DSMP has not entered into force. So far only Viet Nam has ratified the Protocol.

## Is it a case of non-existence of disputes between ASEAN States?

Dispute	Parties	Period	Dispute Settlement	Base of Jurisdiction
Temple of Preah Vihear	Cambodia v. Thailand	2010 – 2013 1959 - 1962	ICJ	ICJ Statute, Arts. 60 & 36(2)
Thailand Cigarettes	Philippines v. Thailand	2008 - 2011	WTO	WTO DSU
Land Reclamation	Malaysia v. Singapore	2003	Ad hoc Tribunal	Annex VII UNCLOS
Pedra Branca	Malaysia/Singapore	2003 - 2008	ICJ	ICJ Statute, Art. 36(1)
Sipadan Ligitan	Indonesia/Malaysia	1998 - 2002	ICJ	ICJ Statute, Art. 36(1)

## ASEAN States' confidence in their ability to manage intra-ASEAN disputes

### 'ASEAN Way' of diplomacy (territorial/political disp):

- Based on ASEAN's reliance on consultation and consensus in decision-making, non-confrontation and non-interference in the internal affairs of one another
- Key features: informality, closed-door policy and non-involvement of third party, especially an ASEAN organ
- E.g. Sipadan-Ligitan case (29 years of negotiation) and Pedra Branca case (24 years of negotiation)
- A shift in this practice after the adoption of the Charter: the joint request of Thailand and Cambodia for the good offices of the ASEAN Chair to mediate the Preah Vihear dispute

## To manage Intra-ASEAN disputes (continued)

**Regular meetings of ASEAN organs responsible for implementation, monitoring or review of ASEAN instruments:**

- A tool to manage dispute arising from interpretation or implementation of ASEAN instruments.
- Questions on interpretation or implementation of an ASEAN instrument may be included as an irregular item (subject to the acceptance of all ASEAN States' representatives).
- If consensus cannot be reached and the gravity of the question was as such that it was imperative to be discussed then a closed-door meeting limited to heads of delegations.

## Preference to Utilise DSM outside of ASEAN framework

- Nothing in the Charter or ASEAN DSM prevents ASEAN States to bring their disputes to other DSM.
- Other international DSM have proven track record in resolving such disputes on the basis of international law
- Especially for territorial sovereignty disputes (highly political disputes)
  - The absolute principle of consensus decision-making in ASEAN, especially within the High Council of TAC
  - The nature of the TAC resemble that of a political party instead of an impartial dispute settlement body

## Those that are less likely to be used

- **High Council under the TAC**

- The absolute rule of consensus in the High Council's decision-making and membership of the disputing parties' ministers might prove resorting to the TAC as futile.
- The High Council does not produce binding decisions

- **Arbitration under DSMP**

- It is design to fail, unless all parties to a dispute agree to make it work. This is unlikely since no States, especially Southeast Asian States, want to be bound by compulsory dispute settlement particularly on highly political disputes.

## Those that are more likely to be used

- **EDSM**

- Economic disputes are generally regarded as less political
- Disputes arising from specific ASEAN economic instruments which are not covered under the WTO DSU

There are, however, challenges need to be addressed:

- Enhancing the capacity of EDSM Secretariat *vis a vis* the very limited timeframe of EDSM
- Roster of arbitrators
- Arbitration facilities

# Questions for Reflection

- The existence of other international dispute settlement mechanisms outside of ASEAN with proven track records ---- how useful will ASEAN dispute settlement mechanisms be?
- What does the future have in store for the application of TAC and the DSMP?

# Thanks for Your Attention

**Ranyta Yusran**

**Research Fellow, Centre for International Law (CIL)**

**National University of Singapore**

**Email: [cilry@nus.edu.sg](mailto:cilry@nus.edu.sg)**

**Website: [WWW.CIL.NUS.EDU.SG](http://WWW.CIL.NUS.EDU.SG)**