

DISPUTE SETTLEMENT THE ASEAN WAY¹

The Background

To an outsider looking at ASEAN from afar and through a glass darkly, it may appear that not much happens. The “ASEAN Way” is often derided by observers as being an ineffective fig-leaf, a cover for inaction. But ASEAN as an organisation functions very much *sub rosa* and it takes an observer with acute infra-red vision to discern the outlines of reality.

There are three essential aspects to the ASEAN Way: firstly, a desire not to lose face in public or to make other members lose face. Secondly, a preference for consensus rather than confrontation. Thirdly, a rejection of the notion that states have the right to interfere without consent in the internal affairs of other states.

None of these is absolute or static. The organisation is evolving, a point too easily forgotten when making a critical analysis of the ASEAN Way. In order to appreciate how dispute settlement functions in the ASEAN context, it is necessary to understand something of the history of ASEAN and its evolution over the four decades.

(1) A Short History of ASEAN

The Association of Southeast Asian Nations was founded on 8 August 1967 by means of the Bangkok Declaration (officially, the ASEAN Declaration), a modest document that did not even purport to be a treaty.² The Bangkok Declaration did not create an organisation. What it sought to do was to set up a mechanism to foster mutual trust among the original five founder-states.

At the time of ASEAN’s founding Southeast Asia was in an unsettled state. Malaysia was formed in 1963, comprising the Federation of Malaya and the former British colonies in Southeast Asia, namely Singapore, British North

¹ A note on sources: much of the information for this article comes from diplomatic and legal sources who have shared their experiences with me on the understanding that they will not be quoted directly. I would like to acknowledge my debt of gratitude to them for their invaluable assistance. I have attempted to distil the gist of the information I have obtained from various sources into this paper. The responsibility for errors of interpretation are of course mine.

² It was signed in Bangkok by the Foreign Ministers of Indonesia (Mr Adam Malik), Malaysia (Tun Abdul Razak, who was Deputy Prime Minister rather than Foreign Minister), the Philippines (Mr Narciso Ramos), Singapore (Mr S Rajaratnam) and Thailand (Mr Thanat Khoman). The Heads of State/Government were not involved.

Borneo (Sabah) and Sarawak.³ Indonesia had opposed this, seeing it as a neo-colonialist plot and an impediment to unification of the Malay archipelago.⁴ The idea of an Indonesia Raya (Greater Indonesia) had germinated during the Japanese occupation of 1942-45. Indeed, Indonesia's success in incorporating Dutch New Guinea in 1963⁵ may have given fresh life to the ambition to realise an Indonesia Raya. The Philippines too opposed the formation of Malaysia because of its claim to Sabah (British North Borneo).⁶ Indonesian hostility to Malaysia led to an undeclared war (euphemistically termed Konfrontasi, from the Dutch word for "confrontation"). Though fighting took place primarily along the jungle border between East Malaysia and Indonesian Kalimantan, there were repeated attempts to infiltrate Peninsular Malaysia (including a paratroop drop in the southern state of Johore) and one notorious incident where Indonesian marines detonated a bomb at MacDonald House in Singapore, killing three civilians. Konfrontasi came to an end with the fall of President Soekarno in October 1965 after an abortive communist coup.

However, all was not well even within Malaysia. Tensions between the state government of Singapore and the federal government in Kuala Lumpur came to a head in 1965 over the incendiary issue of whether the new Malaysian federation would be multi-racial (a line espoused by the People's Action Party in Singapore) or communal (which was the *leitmotiv* of Malayan politics ever since the demise of the short-lived Malayan Union in 1948). These tensions led to the ejection of Singapore from the Malaysian federation in August 1965.⁷ On the northern border, the remnants of the communist Malayan Peoples Liberation Army continued to lurk in the jungles of Thailand, continuing to pose a sporadic danger even after the end of the Malayan Emergency. Relations between Singapore and Indonesia were fraught after the conviction for murder in 1966 of the Indonesian marines who had perpetrated the MacDonald House bombing.⁸ Continued tensions between

³ Brunei declined to join Malaysia and remained under British protection until 1984, becoming a member of ASEAN that same year. See Declaration of the Admission of Brunei Darussalam into ASEAN, signed in Jakarta on 7 January 1984.

⁴ The history of the Malay independence movement and its Pan-Indonesian ambitions is recounted in Cheah Boon Kheng, Red Star Over Malaya, chapter 4 (Singapore University Press; 3rd Edition, 2003). The suspicions of the independence generation of Indonesians regarding the British are understandable, given the part that British and Indian troops played in restoring Dutch rule in the East Indies after the Japanese surrender from September 1945.

⁵ After the success of the Indonesian revolution, the only portion of the Dutch East Indies to remain under the suzerainty of the Netherlands was western New Guinea. This was placed under United Nations administration in 1962 and transferred to Indonesia in 1963. See Britannica Online: www.britannica.com/Ebchecked/29396/Papua/303094/History

⁶ See Severino, Southeast Asia in Search of an ASEAN Community (Institute of Southeast Asian Studies, Singapore, 2006), pages 2, 164-166.

⁷ The story is told (albeit from only one side) in Lee Kuan Yew, The Singapore Story: Memoirs of Lee Kuan Yew (Times Editions, 1998).

⁸ The Indonesian marines were in civilian clothes. They were tried and convicted of murder, the Federal Court in Singapore holding that they had forfeited the right to be treated as prisoners of war:

Malaysia and the Philippines over Sabah had led to the postponement of the 4th ASEAN Ministerial Meeting, which was supposed to have been held in 1970 in Manila.⁹

Looming over all these disputes was the shadow of the Vietnam War. The unspoken motive for the formation of ASEAN was fear of Communist expansion. It was felt that cooperation among the five non-Communist states of Southeast Asia was essential to meet the challenge. Four of the five founders were aligned to the Western bloc. As US allies, the Philippines and Thailand played host to American bases. Singapore was home to the major British naval base in the Far East, while the Training Depot for the British Brigade of Gurkhas was in Sungei Patani in West Malaysia. Indonesia was non-aligned and determined to remain so. ASEAN was not conceived as a military or security organisation. Given the unhappy history of international relations amongst the five original member countries, the primary objective of ASEAN was the fostering trust amongst the member states in order to meet the Communist threat and keep Southeast Asia free of big power rivalries.¹⁰

The foundation of ASEAN did not lead to an immediate outburst of fraternal feeling. In an assertion of newly-independent Singapore's prickly sovereignty, the Indonesian marines who had perpetrated the MacDonald House bombing were hanged in October 1968, an act which provoked severe anti-Singapore riots in Indonesia.¹¹ Also in 1968, information surfaced about a Filipino plot to infiltrate saboteurs in Sabah.¹² Racial riots racked Malaysia in May 1969, threatening to spill over into Singapore.¹³ Meanwhile, in Vietnam the North had launched the Tet offensive in 1968, which demonstrated to the world that the war would not be won by America. Against this backdrop, in 1971 ASEAN issued the ZOPFAN Declaration,¹⁴ which was "inspired by the worthy aims

see *Osman v Public Prosecutor* [1965-67] SLR (R) 402. The decision of the Federal Court was affirmed by the Privy Council [1968-70] SLR (R) 117.

⁹ The 4th AMM finally took place in March 1971.

¹⁰ See the Preamble to the 1967 ASEAN Declaration. The first four paragraphs emphasise the need for regional cooperation, solidarity and partnership while the final two paragraphs make plain the desire to exclude external meddling in the politics of the member states.

¹¹ Lee Kuan Yew, *From Third World to First: The Singapore Story 1965-2000* (Times Publishing, Singapore, 2000) pages 37-38.

¹² Severino, *Southeast Asia in Search of an ASEAN Community* (Institute of Southeast Asian Studies, Singapore, 2006), page 164. See also <http://countrystudies.us/philippines/93.htm>. This website contains online versions of books previously published by the Federal Research Division of the Library of Congress.

¹³ Lee Kuan Yew, *From Third World to First: The Singapore Story 1965-2000* (Times Publishing, Singapore, 2000) pages 38-40.

¹⁴ Officially, the Zone of Peace, Freedom and Neutrality Declaration, signed in Kuala Lumpur on 27 November 1971 by the Foreign Ministers of Indonesia (Mr Adam Malik), Malaysia (Tun Abdul Razak, who was by then Prime Minister and Foreign Minister), the Philippines (Mr Carlos Romulo), Singapore (Mr S Rajaratnam) and Thailand (Mr Thanat Khoman, then Special Envoy of the National Executive Council). For the background to this see Severino, *Southeast Asia in Search of an ASEAN Community* (Institute of Southeast Asian Studies, Singapore, 2006), pages 166-167.

and objectives of the United Nations, in particular by the principles of respect for the sovereignty and territorial integrity of all states, abstention from threat or use of force, peaceful settlement of international disputes, equal rights and self-determination and non-interference in affairs of States," according to its Preamble. This was the first explicit commitment to the peaceful settlement of disputes in ASEAN.

North Vietnam's victory over South Vietnam in 1975 gave a new impetus to regional cooperation. The heads of state/government¹⁵ of ASEAN met for the first time in Bali in February 1976. Two major results of the First ASEAN Summit were the Declaration of ASEAN Concord (or the Bali Concord, as it is known) and the Treaty of Amity and Cooperation (commonly referred to as the TAC).¹⁶ The Bali Concord solemnly declared that "Member states, in the spirit of ASEAN solidarity, shall rely exclusively on peaceful processes in the settlement of intra-regional differences." The member states renounced the use of force and committed themselves to settlement of differences or disputes by peaceful means in Article 2 of the TAC.

The end of the Vietnam War posed a challenge to ASEAN. The fall of South Vietnam, followed shortly by communist takeovers in Cambodia and Laos, created a fear that Thailand would be next. However, despite the gloomy prognostications of doomsayers at the time, it was Cambodia and not Thailand that provided the stage for the next act of the drama. In December 1978 Vietnamese forces invaded Cambodia and overthrew the Khmer Rouge regime. This placed the members of ASEAN in a quandary: Pol Pot and the Khmer Rouge were odious, but it would be an unfortunate precedent to acquiesce to a regime change imposed by Vietnamese bayonets. The ASEAN foreign ministers held a special meeting to "deplore" the Vietnamese invasion.¹⁷ The fear was of an escalation of fighting and an incursion across the Thai border.¹⁸ The situation in Indochina would occupy the political attention of ASEAN for more than a decade.

The diplomatic struggle over recognition of the new Cambodian government was a defining experience for ASEAN. ASEAN diplomats worked together in the United Nations and other international forums to ensure that the use of force to change a government was not legitimised. This cooperation forged

¹⁵ ASEAN Summits are meetings of the heads of government. Ceremonial heads of state (eg, the King of Thailand, the President of Singapore and the Yang di-Pertuan Agong of Malaysia) do not attend.

¹⁶ Both of which were signed on 24 February 1976 in Denpasar, Bali by the President of Indonesia (Mr Soeharto), the Prime Minister of Malaysia (Dr Hussein Onn), the President of the Philippines (Mr Ferdinand Marcos), the Prime Minister of Singapore (Mr Lee Kuan Yew) and the Prime Minister of Thailand (Mr Kukrit Pramoj). Brunei ratified the Treaty of Amity and Cooperation in Southeast Asia (TAC) on 6 June 1987. Accession to the TAC has become a prerequisite for membership of ASEAN.

¹⁷ See the Joint Statement issued after the Special Foreign Ministers' Meeting (Bangkok, January 1979).

¹⁸ See the Joint Communiqué of the 12th AMM (Bali, June 1979).

close relationships among the members of that generation of diplomats who were on the front line of the campaign to deny recognition of the Vietnamese-installed Cambodian government.¹⁹

After more than a decade, the Cambodian imbroglio ended in 1991 with the withdrawal of Vietnamese forces and the election of a new government in Cambodia. At that point, it was felt that the inclusion of the Indochinese countries was necessary to ensure that there would be no recurrence of hostilities. Rapprochement came quickly. Vietnam joined ASEAN in 1995,²⁰ followed by Laos²¹ in 1997. At the same time, Myanmar²² also joined the organisation despite the chorus of international criticism following the military crackdown on civilian protesters after the general election. Cambodia's accession was delayed due to a coup by Second Prime Minister Hun Sen against First Prime Minister Prince Norodom Ranariddh.²³ The process of rounding out the membership of ASEAN was finally completed with the accession of Cambodia in 1999.²⁴

The accession of the four new members (commonly referred to by the acronym CLMV) demonstrated the inclusiveness of the ASEAN ideal. There were no preconditions as to form of government or political system. There was no shared history or culture binding the new members to the old, no common language or religion. The governing philosophy was entirely pragmatic. These were countries within Southeast Asia and had to be brought within the family group, warts and all.

It is easy in the light of this history to understand the aversion to outside interference in the internal affairs of member states. Suspicion of former colonial masters and big powers runs deep. Even within the family suspicions remain. There is a fairly high degree of trust and comfort among the founding

¹⁹ Former Singapore Foreign Minister Wong Kan Seng at the S Rajaratnam Lecture, 23 Nov 2011.

²⁰ Declaration of the Admission of the Socialist Republic of Viet Nam into the Association of Southeast Asian Nations, signed in Bandar Seri Begawan, Brunei Darussalam on 28 July 1995. Vietnam had acceded to the Treaty of Amity and Cooperation in Southeast Asia (TAC) on 22 July 1995, having ratified it on 30 May.

²¹ Declaration on the Admission of the Lao People's Democratic Republic into the Association of Southeast Asian Nations, signed in Subang Jaya, Malaysia on 23 July 1997. Laos had acceded to the Treaty of Amity and Cooperation in Southeast Asia (TAC) on 29 June 1992 and ratified it on 17 July 1996.

²² Declaration on the Admission of the Union of Myanmar into the Association of Southeast Asian Nations, signed in Subang Jaya, Malaysia on 23 July 1997. Myanmar ratified the Treaty of Amity and Cooperation in Southeast Asia (TAC) on 10 July 1996, having acceded to it on 27 July 1995.

²³ See www.britannica.com/Ebchecked/topic/90520/Cambodia/52491/Cambodia-since-1990.

The Joint Statement of the Special Meeting of the ASEAN Foreign Ministers on Cambodia (Kuala Lumpur, July 1997) glosses over this completely. Cambodia had made a formal application to join ASEAN, which was accepted at the 29th AMM (Jakarta, July 1996).

²⁴ Declaration on the Admission of the Kingdom of Cambodia into the Association of Southeast Asian Nations, signed in Hanoi, Vietnam on 30 April 1999. Cambodia ratified the Treaty of Amity and Cooperation in Southeast Asia (TAC) on 25 July 1995, having acceded on 25 January 1995.

members and Brunei (commonly referred to as ASEAN-6), born of the baptism by fire of the Vietnamese invasion of Cambodia. This narrative of ASEAN solidarity is not shared by the newer members. At the S Rajaratnam Lecture 2011²⁵ Singapore's former Foreign Minister Wong Kan Seng recounted how ASEAN diplomats had worked closely together for over a decade to deny international recognition of the Cambodian government installed by the Vietnamese after the invasion in 1978. At the end of the lecture the Cambodian ambassador stood up to make the point that the Vietnamese had not invaded Cambodia but had instead liberated the Cambodian people from the horrors of the Pol Pot regime. This lack of a shared narrative is a fault line that separates the CLMV countries from the ASEAN-6. In many ways they still remain outsiders. The process of building trust still remains a challenge. Shared sovereignty in the EU style was never on the agenda. For the young states of Southeast Asia, any erosion of their hard-won sovereignty is not something that can or will be easily accepted. These factors should be borne in mind when considering the legal effectiveness of dispute settlement mechanisms in ASEAN.

(2) The ASEAN Charter

The 9th ASEAN Summit adopted the Declaration of ASEAN Concord II (commonly referred to as Bali Concord II) in October 2003.²⁶ Bali Concord II stated that an ASEAN Community would be established consisting of three pillars, viz, political and security cooperation, economic cooperation and socio-cultural cooperation. The ASEAN Political-Security Community (APSC)²⁷ was not meant to coordinate the foreign or defence policies of the member states. Indeed, it was explicitly recognised that member states had a "sovereign right" to pursue individual foreign policies and defence arrangements. What was envisaged was closer cooperation in the political-security field. Similarly, the ASEAN Socio-Cultural Community (ASCC) was meant to foster social development and cultural cooperation. The meat was in the ASEAN Economic Community (AEC). The AEC envisaged economic integration of the economies of the member states by 2020. Integration meant creating a single market and production base. The development gap between the older members and the CLMV countries would be bridged. Significantly, Bali Concord II called for the improvement of the existing dispute settlement mechanism (DSM) to "ensure expeditious and legally binding resolution of any economic disputes".

²⁵ Held at the Shangri-La Hotel, Singapore on 23 Nov 2011.

²⁶ Declaration of ASEAN Concord II (Bali Concord II), signed in Bali on 7 October 2003.

²⁷ This is referred in Bali Concord II as the ASEAN Security Community, abbreviated ASC. It was later realised that the acronym ASC had already been used for the ASEAN Standing Community. In the ASEAN Charter the ASEAN Security Community was re-designated as the ASEAN Political-Security Community or APSC.

The 10th ASEAN Summit (Vientiane, November 2004) saw the signing of the Vientiane Action Programme (VAP) by the ASEAN heads of state/government. The VAP was a six-year plan designed to deepen economic integration and narrow the development gap between the ASEAN-6 and the CLMV countries. The ASEAN Security Community Plan of Action was also adopted. Buried in the Annex was a commitment to work towards the development of an ASEAN Charter “which will *inter alia* reaffirm ASEAN’s goals and principles in inter-state relations, in particular the collective responsibilities of all ASEAN Member Countries in ensuring non-aggression and respect for each other’s sovereignty and territorial integrity; the promotion and protection of human rights; the maintenance of political stability, regional peace and economic progress; and the establishment of effective and efficient institutional framework for ASEAN”.²⁸

The following year, the ASEAN foreign ministers agreed to work towards the promulgation of an ASEAN Charter which would “reaffirm the objectives, goals and principles of the ASEAN Community”.²⁹ The leaders issued the Declaration on the Establishment of the ASEAN Charter at the 11th ASEAN Summit held in Kuala Lumpur (December 2005). The declared aim of the Charter was to create the legal and institutional framework for ASEAN, which had hitherto been functioning on a rather informal basis. To this end, an Eminent Persons Group (EPG) was set up and tasked with re-imagining ASEAN as an organisation.³⁰ The EPG was enjoined to “put forward bold and visionary recommendations” as well as undertake a thorough review of the ASEAN institutional framework and propose improvements.³¹ Apart from institutional streamlining, the EPG was specifically asked to look into effective conflict resolution mechanisms.³²

The EPG Report was presented at the 12th ASEAN Summit in Cebu, the Philippines (January 2007). The Cebu Declaration on the Blueprint for the ASEAN Charter was issued, endorsing the Report of the Eminent Persons Group and setting up a High Level Task Force (HLTF) for Drafting of the

²⁸ Annex to the ASEAN Security Community Plan of Action 2004, para II.2.

²⁹ Joint Communique of the 38th ASEAN Ministerial Meeting (AMM), Vientiane, July 2005, para 6.

³⁰ The EPG consisted of the following: Pehin Dato Lim Jock Seng (Minister of Foreign Affairs and Trade II, Brunei); Dr Aun Porn Moniroth (Advisor to the Prime Minister and Chairman of the Supreme National Economic Council, Cambodia); Mr Ali Alatas (former Minister of Foreign Affairs, Indonesia); Mr Kamphan Simmalavong (Former Deputy Minister, Laos); Tan Sri Musa Hitam (former Deputy Prime Minister, Malaysia); Dr Than Nyun (Chairman of the Civil Service Selection and Training Board, Myanmar); Mr Fidel Ramos (Former President, Philippines); Professor S Jayakumar (Deputy Prime Minister, Singapore); Mr Kasemsamosorn Kasemsri (former Deputy Prime Minister and Minister of Foreign Affairs, Thailand); Mr Nguyen Manh Cam (former Deputy Prime Minister and Minister of Foreign Affairs, Vietnam).

³¹ Terms of Reference of the Eminent Persons Group on the ASEAN Charter, para 3.

³² Ibid, para 4.2(i).

ASEAN Charter.³³ The HLTF was given until November 2007 to finish its task – less than the time the EPG had to formulate its “bold and visionary” recommendations. The Charter was ready by the deadline and was adopted at the 13th ASEAN Summit in Singapore (November 2007). It came into force on 15 December the following year.³⁴

The Eminent Persons Group (EPG) recognised that ASEAN’s main problem was not lack of vision; the main problem was following up on the grand declarations, plans of action and roadmaps. This has been a constant shortcoming identified by the current and former Secretaries-General not only to the EPG but also to the High Level Task Force (HLTF) on Drafting of the ASEAN Charter. It was stated baldly that “ASEAN must establish a culture of honouring and implementing its decisions and agreements, and carrying them out on time”.³⁵ To remedy the deficiency in carrying out commitments, the EPG recommended the establishment of dispute settlement mechanisms in all fields of ASEAN cooperation, including monitoring and enforcement mechanisms.³⁶

These recommendations were largely implemented when it came to the drafting of the Charter. Some High Level Task Force (HLTF) delegations initially expressed a view that a court should be set up. This idea was quickly scotched. ASEAN was not ready for a pan-ASEAN judicial institution. Although not explicitly articulated, it was clear that an ASEAN court could not be established as long as the rule of law was weak in some ASEAN states. Any court would have been compromised from the start if a judge had to take instructions from his country. Indeed, far from wanting a court, some member states appeared to be wary of any sort of compulsory adjudication, despite the clear mandate given by the EPG. One can only speculate as to the instructions that these delegations received, but it did appear that their preference was to keep the settlement of disputes on the political plane, to be

³³ The members of the HLTF were: Pengiran Dato Paduka Osman Patra (Permanent Secretary, Ministry of Foreign Affairs and Trade, Brunei); Dr Kao Kim Hourn (Secretary of State, Ministry of Foreign Affairs and International Cooperation, Cambodia); Mr Dian Triansyah Djani (Director-General, ASEAN-Indonesia, Department of Foreign Affairs, Indonesia); Mr Bounkeut Sangsomsak (Deputy Minister, Ministry of Foreign Affairs, Laos); Tan Sri Ahmad Fuzi Haji Abdul Razak (Ambassador-at-large, Malaysia); Mr Aung Bwa (Director-General, ASEAN-Myanmar, Ministry of Foreign Affairs, Myanmar); Mrs Rosario Manalo (Special Envoy, Department of Foreign Affairs, Philippines); Professor Tommy Koh (Ambassador-at-large, Singapore) [in addition, the author was an alternate member of the HLTF and took over as leader of the Singapore delegation when Professor Koh assumed the Chairmanship of the HLTF in the second half of 2007]; Mr Sihasak Phuangketkeow (Deputy Permanent Secretary, Ministry of Foreign Affairs, Thailand) [Mr Pradap Pibulsonggram (Deputy Permanent Secretary, Ministry of Foreign Affairs, Thailand) replaced Khun Sihasak in March 2007]; Mr Nguyen Trung Thanh (Assistant Minister, Ministry of Foreign Affairs, Vietnam).

³⁴ <http://www.asean.org/21861.htm>

³⁵ Report of the Eminent Persons Group on the ASEAN Charter, para 44. This remains a matter of concern even now; in conversation with this author, this issue was repeatedly raised by ASEAN officials and former Secretaries-General.

³⁶ Report of the Eminent Persons Group on the ASEAN Charter, Executive Summary, para 6.

dealt with by the ASEAN Summit. In any case, the lack of an ASEAN court is not a problem in practice. ASEAN member states can submit their disputes to the International Court of Justice. Indeed, this has been done three times: in 1997,³⁷ 2003³⁸ and 2011.³⁹ Two ASEAN countries have filed declarations recognising the compulsory jurisdiction of the ICJ: Cambodia on 19 September 1957 and the Philippines on 18 January 1972.⁴⁰ Both the ASEAN Charter and the TAC explicitly recognise the right of member states to have recourse to the dispute settlement mechanisms in the UN Charter,⁴¹ which includes submission to the ICJ.

The HLTF was conscious that there were existing dispute settlement mechanisms in the TAC and Vientiane Protocol. The decision was taken to use these as the basis for Chapter VIII of the Charter, filling in the gaps as necessary. The scheme of Chapter VIII is thus: the first line in settling a dispute is dialogue, consultation and negotiation.⁴² This was a concession to those who had reservations about too much law being involved in the process of dispute settlement. Article 23 then goes on to provide that the parties to the dispute may agree to resort to good offices, conciliation or mediation. These are the voluntary, non-binding modes of settlement favoured by some countries. It is provided that the parties to the dispute may request the Chairman of ASEAN or the Secretary-General to provide good offices, conciliation or mediation.⁴³

Where a specific ASEAN instrument provides for dispute settlement, the mechanisms and procedures set out should be utilised.⁴⁴ The main weakness of this is that the dispute settlement “mechanism” in some ASEAN instruments will likely prove ineffective in resolving disputes. For example, the 2002 ASEAN Agreement on Transboundary Haze Pollution provides that disputes will be settled amicably by consultation or negotiation,⁴⁵ which hardly inspires confidence that problems will be resolved in a legally-binding manner.

The mechanism in the Treaty of Amity and Cooperation in Southeast Asia (TAC) is to be used to resolve disputes that do not involve the interpretation or

³⁷ Case Concerning Sovereignty over Pulau Ligitan and Pulau Sipadan (Indonesia/Malaysia).

³⁸ Case Concerning Sovereignty over Pedra Branca/Pulau Batu Puteh, Middle Rocks and South Ledge (Malaysia/Singapore).

³⁹ Request for the Interpretation of the Judgment of 15 June 1962 in the Case Concerning the Temple of Preah Vihear (Cambodia/Thailand).

⁴⁰ The Declaration of Thailand recognizing compulsory jurisdiction of ICJ filed on 20 May 1950 appears to have been withdrawn.

⁴¹ Treaty of Amity and Cooperation in Southeast Asia, article 17; ASEAN Charter, article 28.

⁴² ASEAN Charter, article 22(1).

⁴³ ASEAN Charter, article 23(2).

⁴⁴ ASEAN Charter, article 24(1).

⁴⁵ See article 27 of the Treaty, which was signed in Kuala Lumpur on 10 June 2002. It has been ratified by all ASEAN member states save Indonesia, from which the haze principally originates.

application of any ASEAN instrument.⁴⁶ Again, the primary problem with the TAC is that the dispute settlement mechanism is voluntary. There is no means to force an unwilling party to settle a dispute under the TAC. This is discussed in more detail in the next section of this paper.

Finally, where there is no specific provision, disputes concerning ASEAN economic agreements are to be settled in accordance with the Vientiane Protocol on the Enhanced Dispute Settlement Mechanism.⁴⁷ This is one of the most crucial provisions in the Charter. The creation of an ASEAN community will be driven by economic integration. This was explicitly recognised by the EPG in its report.⁴⁸ Economic integration cannot happen without some means of binding dispute settlement. Hence the push for the creation of an effective dispute settlement mechanism in the economic field. The Vientiane Protocol was meant to ensure that legally-binding decisions could be made and expeditiously enforced,⁴⁹ a vital prerequisite for the creation of an economic community.

Any party affected by non-compliance with the result of a dispute settlement process may refer the matter to the Summit for a decision.⁵⁰ Unresolved disputes also go to the Summit for decision.⁵¹

The Dispute Settlement Mechanisms

The original 1967 Bangkok Declaration that founded ASEAN made no provision for institutions of any sort beyond a regular meeting of the foreign ministers. In the forty years after the Bangkok Declaration ASEAN functioned on an informal basis as far as law was concerned. The Charter was designed to create the legal framework for ASEAN as a rules-based organisation. The framework for the settlement of disputes is to be found in Chapter VIII of the Charter. To recapitulate: disputes which do not concern the interpretation or application of any ASEAN instrument are to be resolved in accordance with the Treaty of Amity and Cooperation in Southeast Asia (TAC).⁵² Economic disputes will be settled by recourse to the ASEAN Protocol on Enhanced Dispute Settlement Mechanism (the Vientiane Protocol).⁵³ As for other sorts of disputes, it is specifically stated in Article 22(2) that dispute settlement mechanisms must be established in all fields of ASEAN cooperation. In pursuance of this, a High Level Experts Group (HLEG) was set up and tasked

⁴⁶ ASEAN Charter, article 24(2).

⁴⁷ ASEAN Charter, article 24(3).

⁴⁸ See paras 14-15 of the Report of the Eminent Persons Group on the ASEAN Charter.

⁴⁹ See the Joint Media Statement of the 36th AEM (Jakarta, September 2004), paras 9-11.

⁵⁰ ASEAN Charter, article 27(2).

⁵¹ ASEAN Charter, article 26.

⁵² ASEAN Charter, article 24(2).

⁵³ ASEAN Charter, article 24(3).

with fleshing out the dispute settlement mechanism. The HLEG's recommendations resulted in the Protocol to the ASEAN Charter on Dispute Settlement Mechanisms (the DSM Protocol), signed by the foreign ministers of the ASEAN states on 8 April 2010 in Hanoi.⁵⁴ The DSM Protocol is meant to fill the gaps where the TAC and Vientiane Protocol do not apply.

(1) The Treaty of Amity and Cooperation

The Bangkok Declaration that created ASEAN stated that one of the primary aims of the organisation was:

“To promote regional peace and stability through abiding respect for justice and the rule of law in the relationship among countries of the region and adherence to the principles of the United Nations Charter.”

No mention was made of any mechanism to achieve this aim. In 1971 ASEAN issued the ZOPFAN Declaration,⁵⁵ which was “inspired by the worthy aims and objectives of the United Nations, in particular by the principles of respect for the sovereignty and territorial integrity of all states, abstention from threat or use of force, peaceful settlement of international disputes, equal rights and self-determination and non-interference in affairs of States,” according to its Preamble. This represented the first explicit reference to peaceful settlement of international disputes among ASEAN countries. Again there was no mechanism set up for the peaceful settlement of disputes. Troubles within the ASEAN family were settled by diplomacy or quietly allowed to fade into the background.⁵⁶

It was only in 1976 that a dispute settlement mechanism was established. The Declaration of ASEAN Concord (Bali Concord) declared that “Member states, in the spirit of ASEAN solidarity, shall rely exclusively on peaceful processes in the settlement of intra-regional differences.” The member states renounced the use of force and committed themselves to settlement of differences or disputes by peaceful means in Article 2 of the Treaty of Amity and Cooperation in Southeast Asia (TAC). Chapter IV of the TAC covers the Pacific Settlement of Disputes. The ASEAN Charter now provides that

⁵⁴ Though not yet in effect. See the Table of Ratifications maintained by the ASEAN Secretariat at <http://www.aseansec.org/document/Table%20of%20Agreement%20and%20Ratification%20as%20of%20June%202012.pdf>

⁵⁵ The Zone of Peace, Freedom and Neutrality Declaration (November 1971).

⁵⁶ For instance, the dispute between Malaysia and the Philippines over Sabah which had led to a rupture of diplomatic relations between the two countries in 1963 remains unresolved even today. The Philippines has not yet formally dropped its claim to Sabah. See Severino, Southeast Asia in Search of an ASEAN Community (Institute of Southeast Asian Studies, Singapore, 2006), pages 164-166.

disputes that do not concern the “interpretation or application of any ASEAN instrument” shall be resolved in accordance with the TAC.⁵⁷

Article 10 of the TAC states that “Each High Contracting Party shall not in any manner or form participate in any activity which shall constitute a threat to the political and economic stability, sovereignty, or territorial integrity of another High Contracting Party.” Article 13 obliges the High Contracting Parties to refrain from the threat or use of force and settle disputes among themselves through friendly negotiations. The dispute settlement mechanism under the TAC consists of a High Council comprising one representative at ministerial level from each of the ten ASEAN member states together with representatives of non-ASEAN states which are directly involved in the dispute.⁵⁸ This High Council is supposed to take cognizance of any “disputes or situations likely to disturb regional peace and harmony.”⁵⁹ If negotiations do not succeed in settling the dispute, the High Council’s role is to recommend “appropriate means of settlement such as good offices, mediation, inquiry or conciliation”.⁶⁰ The High Council itself may offer its good offices. If the parties agree the High Council may constitute itself as a committee of mediation, inquiry or conciliation.⁶¹

There are three glaring weaknesses in the scheme set up in Chapter IV of the TAC. Firstly and most significantly, articles 14 and 15 do not apply unless the parties to the dispute agree. This means that one of the disputants can block the use of the dispute settlement mechanism. The non-mandatory nature of the procedure means that it will be used only if there is a significant change in the political mindset of the High Contracting Parties in favour of objective dispute settlement. As things stand, the solution to any dispute threatening to disturb peace and harmony in the region will be political.

The second weakness as far as ASEAN member states are concerned is that the TAC procedure allows countries other than ASEAN member states to get involved in the dispute settlement process. At the 3rd ASEAN Summit held in Manila in 1987 the TAC was amended to allow for the accession of states outside Southeast Asia. At the time of writing 19 countries and the European Union and Commission have done so.⁶² Under rule 14 of the Rules of

⁵⁷ ASEAN Charter, article 24(2). Strictly speaking, the TAC only applies to disputes that are likely to disturb regional peace and harmony. The mechanism created by the TAC is probably too cumbersome to be invoked for other sorts of disputes.

⁵⁸ Treaty of Amity and Cooperation in Southeast Asia, article 14 (as amended by the First Protocol, signed in Manila on 15 December 1987) and Rule 3 of the Rules of Procedure (adopted on 23 July 2001 in Hanoi).

⁵⁹ Treaty of Amity and Cooperation in Southeast Asia, article 14.

⁶⁰ Treaty of Amity and Cooperation in Southeast Asia, article 15.

⁶¹ Ibid.

⁶² Viz, Papua New Guinea (10 August 1989); the People’s Republic of China (8 October 2003); India (8 October 2003); Japan (2 July 2004); Pakistan (2 July 2004); Republic of Korea (27 November

Procedure non-ASEAN member states may be represented as observers at meetings of the High Council. This means that these non-ASEAN states will be able to watch and (with the permission of the High Council) speak at meetings. Washing of dirty linen in public is bad enough; washing it in full view of people outside the family is worse. There is a view among some ASEAN members, ventilated during the negotiations on the ASEAN Charter, that “outsiders” should not be part of any dispute settlement mechanism. This is probably the underlying motive for the amendment of the TAC in 2010 to provide that a non-ASEAN High Contracting Party will not form part of the High Council unless that party is directly involved in a dispute to which the TAC applies.⁶³ Regional solutions for regional problems is the mantra. Although this view does not command the unanimous agreement of all the ASEAN member states, it nonetheless remains strongly held in some quarters. In the light of the history of Southeast Asia, the wariness about interference by outside powers is entirely understandable.

The third weakness is that there is no explicit provision for arbitration or adjudication by a court or tribunal. Good offices, mediation, inquiry and conciliation essentially are non-legal modes of dispute settlement. They supplement direct political negotiations. This reluctance to submit to binding dispute settlement has characterised the “ASEAN way” from the very start. Any dispute settlement under the TAC will have to be consensual rather than confrontational. More importantly, there will not be a public loss of face. This approach accords with the primary role of ASEAN as a mechanism to foster trust among the member states.

The drafters of the TAC clearly recognized the limitations of the dispute settlement mechanism that they had created. In Article 17 it is specifically provided that nothing in the TAC shall preclude recourse to the modes of settlement in Article 33(1) of the UN Charter, though the High Contracting parties are “encouraged” to solve disputes by “friendly negotiations” before resorting to such other modes of dispute settlement. This provision is mirrored in Article 28 of the ASEAN Charter.

2004); the Russian Federation (29 November 2004); Australia (28 July 2005); Mongolia (28 July 2005); New Zealand (28 July 2005); France (13 January 2007); Timor Leste (13 January 2007); Bangladesh (1 August 2007); Sri Lanka (1 August 2007); the European Communities and European Union (28 May 2009); Democratic People’s Republic of Korea (24 July 2008); the United States of America (22 July 2009); Canada (23 July 2010); Turkey (23 July 2010). In addition, Brazil will become a party upon completion of its domestic procedures, as announced at the 19th ASEAN Summit in Bali in November 2011. See the Table of Ratifications maintained by the ASEAN Secretariat at: <http://www.aseansec.org/document/Table%20of%20Agreement%20and%20Ratification%20as%20of%20June%202012.pdf>.

⁶³ Third Protocol Amending the Treaty of Amity and Cooperation in Southeast Asia, article 2. In force 12 June 2012.

The TAC might have been invoked in the dispute between Malaysia and Indonesia over the islands of Sipadan and Ligitan. Indonesia wanted to bring the Ligitan/Sipadan dispute to the High Council but Malaysia refused, fearing that other ASEAN members would be partial to Indonesia.⁶⁴ In the end the dispute was referred to the ICJ instead.⁶⁵ Interestingly, the Special Agreement for submission of the case to the ICJ stated in the preamble that the parties desired “that this dispute should be settled in the spirit of friendly relations existing between the Parties as enunciated in the 1976 Treaty of Amity and Cooperation in Southeast Asia”.⁶⁶

A more recent occasion for possible invocation of the TAC was the dispute between Thailand and Cambodia over the area surrounding the temple of Preah Vihear (discussed in more detail below). In July 2008 Singapore held the Chairmanship of ASEAN. The foreign ministers met informally in Singapore to discuss the issue. The possibility of using the TAC was raised but not accepted by the parties. Without the cooperation of the disputing parties, ASEAN could do nothing further (see below).

The TAC mechanism is not likely to be used to settle disputes between ASEAN member states. The process is too public, involving the convening of a High Council at which non-ASEAN High Contracting Parties may be represented as observers. Rather, the TAC is likely be used as an inspirational document, committing the High Contracting Parties to peaceful settlement of their disputes. If a legally-binding result is desired, the TAC does allow other international dispute settlement mechanisms to be invoked. This might even mean recourse to the ICJ, as in the Sipadan/Ligitan case. It is also possible that the TAC route will lead indirectly to the arbitration procedure now provided in the 2010 Protocol to the ASEAN Charter on Dispute Settlement Mechanisms (discussed below).

(2) Economic Disputes

Economic integration is now the cornerstone of ASEAN community. Of the three pillars, this is the most advanced. The creation of an ASEAN Economic Community cannot take place without the existence of some means of settling

⁶⁴ See Severino, Southeast Asia in Search of an ASEAN Community (Institute of Southeast Asian Studies, Singapore, 2006), pp 12-13.

⁶⁵ President Soeharto decided to submit the matter to the ICJ despite the objections of his officials. Indonesia lost the case. See Case Concerning Sovereignty over Pulau Ligitan and Pulau Sipadan (Judgment 17 December 2002).

⁶⁶ The Special Agreement was signed on 31 May 1997 by Mr Ali Alatas, Foreign Minister of Indonesia, and Datuk Abdullah Ahmad Badawi, Foreign Minister of Malaysia. Mr Alatas was a member of the Eminent Persons Group that conceptualised the Charter. Datuk Abdullah Badawi was Prime Minister of Malaysia when the Charter was presented to the 13th ASEAN Summit in Singapore.

disagreements amongst the member states over interpretation and implementation of the various economic agreements. The creation of such a dispute settlement mechanism was an early priority of ASEAN.

Article 9 of the 1992 Framework Agreement on Enhancing ASEAN Economic Cooperation provided for the establishment of a dispute settlement mechanism but it took four more years before the ASEAN states signed the Manila Protocol on Dispute Settlement Mechanism. The Manila Protocol was superseded in 2004 by a Protocol on Enhanced Dispute Settlement Mechanism, signed in Vientiane by the economic ministers at the 11th ASEAN Summit (the Vientiane Protocol).

The Vientiane Protocol is administered by the Senior Economic Officials Meeting (SEOM). It applies to disputes arising under the 1992 Framework Agreement on Enhancing ASEAN Economic Cooperation or other economic agreements set out in Appendix I to the Protocol, as well as future ASEAN economic agreements (referred to as “covered agreements”). The Charter extended the coverage of the Vientiane Protocol to all ASEAN economic agreements.⁶⁷ Article 4 of the Protocol provides for good offices, conciliation or mediation. It is specifically provided that the Secretary-General of ASEAN may offer good offices, conciliation or mediation with a view to assisting in the settlement of a dispute, giving him a potentially significant role in resolution of such disputes. The High Level Task Force on ASEAN Economic Integration recommended the creation of an ASEAN Compliance Monitoring Body (ACMB) modelled on the Textile Monitoring Body of the WTO.⁶⁸ This provides an informal non-binding means of resolving disputes. A request may be made for ACMB members from states not involved in the dispute to review the case and make findings within a stipulated timeframe. If a finding of non-compliance is made, the guilty state should correct the situation; otherwise the matter has to go to formal dispute settlement.

The core of the dispute settlement mechanism is the mandatory procedure prescribed by the Vientiane Protocol. If there is any dispute under the covered agreements, the aggrieved party will request consultations.⁶⁹ The other party must reply within 10 days and enter into consultations within 30 days. If it fails to do so, the complainant may raise the matter to SEOM.⁷⁰ Similarly, the matter may go to SEOM if consultations do not result in a satisfactory resolution of the problem within 60 days.

⁶⁷ ASEAN Charter, article 24(3). This applies “where not otherwise specifically provided”.

⁶⁸ This report was annexed to Bali Concord II, adopted at the 9th ASEAN Summit (October 2003).

⁶⁹ 2004 Protocol on Enhanced Dispute Settlement Mechanism, article 3.

⁷⁰ 2004 Protocol on Enhanced Dispute Settlement Mechanism, article 5(1).

Once the dispute is raised to SEOM, a panel will be established unless SEOM decides by consensus not to do so.⁷¹ This means in practice that all the members of SEOM must either agree not to do so or acquiesce in that decision. SEOM has 45 days to decide. The decision will be taken either at a SEOM meeting or by circulation. It is specifically provided that non-reply by any member is taken as agreement to the establishment of a panel. This is to avoid the well-known tactic of keeping silent and hoping that the problem will go away. Thus, the default position is that a panel will be established.

The panel's function is to make a report to SEOM,⁷² having objectively considered the facts and provisions of the relevant agreements.⁷³ The panel is obliged to submit its report and recommendations within 60 days.⁷⁴ SEOM must adopt the report within 30 days unless there is a consensus not to do so or a party notifies its decision to appeal.⁷⁵ If the decision to adopt is not done at a formal meeting, it will be done by circulation and a non-reply is again treated as agreement to adopt.

Appeals go to an appellate body established by the ASEAN Economic Ministers Meeting.⁷⁶ An appeal must be concluded within 60 days.⁷⁷ Appeals are limited to issues of law and interpretation. The Appellate Body's report shall be adopted by SEOM within 30 days unless there is a consensus not to do so.⁷⁸ The disputing parties are obliged to accept the report unconditionally⁷⁹ and comply within 60 days of the report of the panel or Appellate Body, as the case may be.⁸⁰ SEOM is to oversee compliance.⁸¹ Non-compliance attracts sanctions under the Protocol. Compensation may be paid by the offending party. Article 16(2) sets out a timeframe within which negotiations for compensation must be entered into. If no satisfactory compensation has been agreed within the stipulated period, the aggrieved party may request authorization from SEOM to suspend concessions or other obligations under the covered agreements.⁸² SEOM is obliged to grant such authorization unless there is a consensus to reject the request.⁸³ Compensation and suspension of concessions are temporary measures. The

⁷¹ Ibid.

⁷² 2004 Protocol on Enhanced Dispute Settlement Mechanism, article 6(1).

⁷³ 2004 Protocol on Enhanced Dispute Settlement Mechanism, article 7.

⁷⁴ 2004 Protocol on Enhanced Dispute Settlement Mechanism, article 8(2). Exceptionally, it may take a further 10 days if necessary.

⁷⁵ 2004 Protocol on Enhanced Dispute Settlement Mechanism, article 9(1).

⁷⁶ 2004 Protocol on Enhanced Dispute Settlement Mechanism, article 12.

⁷⁷ 2004 Protocol on Enhanced Dispute Settlement Mechanism, article 12(5); exceptionally, the Appellate Body may take longer, but the maximum is 90 days.

⁷⁸ 2004 Protocol on Enhanced Dispute Settlement Mechanism, article 12(13).

⁷⁹ Ibid.

⁸⁰ 2004 Protocol on Enhanced Dispute Settlement Mechanism, article 15(1).

⁸¹ 2004 Protocol on Enhanced Dispute Settlement Mechanism, article 15(6).

⁸² 2004 Protocol on Enhanced Dispute Settlement Mechanism, article 16(2).

⁸³ 2004 Protocol on Enhanced Dispute Settlement Mechanism, article 16(6).

offending state is obliged to comply with its obligations under the covered agreements.⁸⁴ If the offending party continues to be recalcitrant, the matter may be referred to the ASEAN Summit for a decision under Article 27(2) of the ASEAN Charter.

The Vientiane Protocol has clear similarities to the dispute settlement procedure of the World Trade Organisation,⁸⁵ especially with its strict timelines and provisions to ensure that the panel and appellate reports are adopted unless there is a consensus against it. Such a mechanism is vital if the ASEAN Free Trade Area is to function properly. It has never been invoked, so no assessment of its effectiveness can be made.⁸⁶ However, the WTO Dispute Settlement Mechanism has been invoked by Singapore against Malaysia,⁸⁷ Singapore against the Philippines and the Philippines against Thailand.⁸⁸ The Singapore case against Malaysia was withdrawn after the underlying cause of complaint was addressed. The second Singapore case against the Philippines was settled amicably after consultations between then-Minister of Trade and Industry George Yeo and his Filipino counterpart Mar Roxas. The two had excellent relations, which allowed the matter to be resolved without convening a panel. The Philippines paid some compensation. The Philippine case against Thailand is the only one to have proceeded to adjudication.

The Philippines requested consultations with Thailand on 7 February 2008. A panel was established and duly presented its final report, finding in favour of the Philippines. Thailand appealed and lost. The Appellate Body's report was adopted on 15 July 2011. On 11 August 2011 Thailand informed the Dispute Settlement Body that it intended to implement the recommendations and rulings "in a manner that respects its WTO obligations". Thailand was given a reasonable time to do this after negotiations with the Philippines. The sharp contrast with the Preah Vihear case should be noted. This matter arose at almost exactly the same time as the Preah Vihear problem. The WTO proceedings did not provoke the kind of reaction that Preah Vihear elicited in Thailand. One infers that this was because the issue did not become politicised by contending factions in Thailand.

⁸⁴ 2004 Protocol on Enhanced Dispute Settlement Mechanism, article 16(1) and (9).

⁸⁵ See the WTO's Understanding on Rules and Procedures Governing the Settlement of Disputes.

⁸⁶ One commentator has criticised the timelines as unrealistic: see Vergano, *The ASEAN Dispute Settlement Mechanism and its Role in a Rules-Based Community: Overview and Critical Comparison*, Asian International Economic Law Network (AIELN) Inaugural Conference, 30 June 2009, http://aieln1.web.fc2.com/Vergano_panel4.pdf.

⁸⁷ Dispute DS1, 1995.

⁸⁸ Dispute DS371, 2008. The panel report recommending that Thailand bring the offending measures into conformity with its obligations was adopted on 15 July 2011.

The Philippines/Thailand dispute could have been resolved in accordance with the Vientiane Protocol.⁸⁹ It was not. In conversation with this author a senior ASEAN official expressed the view that member states are still not confident of the effectiveness of the ASEAN DSM. If this is true, it is a bad portent for the creation of a rules-based ASEAN Economic Community by the declared deadline. One can only speculate as to the exact nature of the reservations on the part of the Philippines, which was the complainant state. From the point of view of the Ministry of Foreign Affairs of any ASEAN state, referred a dispute to a binding dispute settlement mechanism is a serious step. When given the choice between a tested mechanism and an untested one, caution dictates that the tested mechanism should be chosen. This leads to a policy dilemma: if no member state chooses to use the Vientiane Protocol, it will never be tested; but if the Protocol is invoked and something goes wrong, there will be recriminations. No one wants to be first into uncharted waters. Therefore, a policy decision has to be made at the highest level to prefer the ASEAN route to the WTO one. If ASEAN member states are serious about creating an economic community by 2015, they need to take the Vientiane Protocol seriously when disagreements arise.

(3) Non-economic Disputes

The Protocol to the ASEAN Charter on Dispute Settlement Mechanisms (the DSM Protocol)⁹⁰ covers other disputes that do not fall within the ambit of the TAC or the Vientiane Protocol.

The parties to a dispute may agree to resort to good offices, conciliation or mediation.⁹¹ The DSM Protocol provides detailed rules of procedure for this in Annexes 1-3. Note the rather strict and artificial distinction between mediation and conciliation. The role of the mediator is to “help facilitate communication and negotiation between the parties.”⁹² A conciliator, in contrast, may make proposals for settlement of the dispute.⁹³ In practice, mediation often blends into conciliation in seamless manner.⁹⁴ It would be unwise to keep the two modes as distinct as the DSM Protocol envisages.

⁸⁹ See Dispute DS371. The Philippines had requested consultations with Thailand on 7 February 2008. The Vientiane Protocol came into force on 29 November 2004.

⁹⁰ This was signed by the foreign ministers of the ASEAN states on 8 April 2010 in Hanoi but is not yet in effect. See the Table of Ratifications maintained by the ASEAN Secretariat at <http://www.aseansec.org/document/Table%20of%20Agreement%20and%20Ratification%20as%20of%20June%202012.pdf>

⁹¹ ASEAN Charter, article 23(1).

⁹² Annex 2 to the DSM Protocol, rule 2.

⁹³ Annex 3 to the DSM Protocol, rule 3(3).

⁹⁴ For example in 2011 Indonesian Foreign Minister Marty Natalegawa mediated the dispute between Cambodia and Thailand over the temple of Preah Vihear. Not only did he shuttle between the parties,

The aim of good offices, conciliation or mediation is to achieve an amicable settlement of the dispute, viz, one under which neither party loses face. Given the consensual nature of ASEAN relations, this is likely to be the preferred mode of dispute settlement.

The parties may also request the Chairman of ASEAN or the Secretary-General to provide such good offices, conciliation and mediation.⁹⁵ Note the similarity to the scheme under the TAC and the Vientiane Protocol. Unlike under the Vientiane Protocol, however, the Secretary-General is not to take the initiative to offer assistance. This is deliberate. There appeared to be a concern on the part of some HLTF delegations that an activist Secretary-General would butt in without being invited. However, the Charter does not prohibit the Secretary-General volunteering his good offices, etc. Nor does the Charter state that all the parties to the dispute must concur in requesting good offices, etc. It would accord with the spirit of the Charter (which provides that disputes should be resolved peacefully in a timely manner)⁹⁶ as well as the recommendations of the EPG if any party could make such a request. Otherwise, an intransigent party could block settlement of the dispute indefinitely. This would hardly conduce to creating a community based on the rule of law, which is one of the primary aims of the Charter.⁹⁷ The involvement of the Chairman of ASEAN in dispute settlement gives a greater significance to the role of the ASEAN Chair, which rotates among the member states in alphabetical order. The effectiveness of the Chair depends largely on the personality of the foreign minister and head of government of the country that holds it; effectiveness is not a function of size alone.

However, it would be unwise to have a dispute settlement mechanism based entirely on consensual mechanisms. When trouble broke out between Cambodia and Thailand in 2003 over alleged remarks by a Thai actress regarding ownership of Angkor Wat, the incumbent Secretary-General Ong Keng Yong offered ASEAN's assistance in resolving matters; he was rebuffed by Cambodia.⁹⁸ In 2008, a dispute flared up between Cambodia and Thailand over the Temple of Preah Vihear. Singaporean Foreign Minister George Yeo, who occupied the Chair at that time, hosted an informal gathering of ASEAN foreign ministers at the Botanic Gardens in Singapore. At first the Thai Foreign Minister declined to attend. However, Foreign Minister Yeo managed to persuade him to come to Singapore. The ASEAN foreign ministers offered the "facilities of ASEAN" to mediate the dispute, recognising the importance of

he also brokered a ceasefire and suggested the insertion of Indonesian observers. This is discussed in more detail below.

⁹⁵ ASEAN Charter, article 23(2).

⁹⁶ ASEAN Charter, article 22(1).

⁹⁷ ASEAN Charter, Preamble & articles 1(7), 2(2)(h), 2(2)(n).

⁹⁸ Severino, Southeast Asia in Search of an ASEAN Community (Institute of Southeast Asian Studies, Singapore, 2006), pp14-15.

maintaining peace and stability of the region.⁹⁹ A proposal was made for the formation of an ASEAN Contact Group to help support the efforts of the disputing parties to find a peaceful solution.¹⁰⁰ There was no consensus among the group however, neither Cambodia nor Thailand being willing at that point to have ASEAN involved. In 2010, Cambodian Foreign Minister Hor Namhong wrote to Vietnamese Foreign Minister Pham Gia Khiem in his capacity as ASEAN Chair requesting mediation of the dispute under the Charter.¹⁰¹ This time Thailand again declined to let the ASEAN Chair mediate.¹⁰² Clearly something more robust is required if disputes between member states are to be settled by legally-binding means.

Article 25 of the Charter is the key provision. During the Charter drafting process there was some hard bargaining before agreement was reached on this. There was a serious difference of opinion over the wording of Article 25. An initial proposal to require the establishment of appropriate dispute settlement mechanisms “including adjudication” ran into resistance. It was apparent during the negotiations that some member states preferred less-formal means of dispute settlement. The feeling was that there should be non-legal avenues for dispute settlement rather than a formal process. This view did not commend itself to the majority of the HLTF members. It was felt that any dispute settlement mechanism that did not allow for a legally-binding settlement of disputes could not be taken seriously. The compromise reached is encapsulated in Article 25, which provides that “appropriate dispute settlement mechanisms, *including arbitration*, shall be established for disputes which concern the interpretation or application of this Charter and other ASEAN instruments” (emphasis added).

Arbitration is now provided for in articles 10-17 and annex 4 of the DSM Protocol. The first step is a request for consultations. The DSM Protocol provides that a Complainant may request consultations, which must be completed within 90 days unless the parties otherwise agree.¹⁰³ If the Respondent does not agree to enter into consultations or the consultations do not result in a settlement of the dispute, the Complainant may request the appointment of an arbitral tribunal.¹⁰⁴ If the respondent does not agree to the appointment of an arbitral tribunal, the matter will be referred to the ASEAN Coordinating Council (ACC),¹⁰⁵ which comprises the foreign ministers of the

⁹⁹ See Statement by Singaporean Minister for Foreign Affairs George Yeo, 22 July 2008. http://www.mfa.gov.sg/content/mfa/media_centre/press_room/pr/2008/200807/press_20080722_09.html

¹⁰⁰ Ibid.

¹⁰¹ International Crisis Group Asia Report No 215, “Waging Peace: ASEAN and the Thai-Cambodian Border Conflict” (6 December 2011), footnote 105.

¹⁰² Ibid, page 15.

¹⁰³ Protocol to the ASEAN Charter on Dispute Settlement Mechanisms 2010, article 5.

¹⁰⁴ Protocol to the ASEAN Charter on Dispute Settlement Mechanisms 2010, article 8(1).

¹⁰⁵ Protocol to the ASEAN Charter on Dispute Settlement Mechanisms 2010, article 8(4).

ASEAN members.¹⁰⁶ The ACC can direct the parties to settle the dispute by good offices, conciliation, mediation or arbitration.¹⁰⁷ The ACC has a maximum of 75 days to do this.¹⁰⁸ If the ACC cannot come to a decision, the matter will be referred to the Summit as an unresolved dispute.¹⁰⁹ Contrast this to the “negative consensus” system under the Vientiane Protocol. Under that Protocol a panel will be established unless there is a consensus not to do so; in other words, the respondent cannot block the establishment of a panel. Under the DSM Protocol there must be a consensus to refer the matter to arbitration. It will be realised that an intransigent party can insist on a political solution by preventing the ACC from coming to a consensus. There will of course be a political price to be paid for this.

Generally, an arbitral tribunal will consist of three arbitrators.¹¹⁰ Arbitrators are to be chosen from a list maintained by the Secretary-General, each member state being entitled to nominate ten persons.¹¹¹ Crucially, arbitrators must be independent of the parties and not take instructions from them.¹¹² Each party appoints one arbitrator. They must concur on the third arbitrator, failing which the appointment will be made by the Chair of the ACC on the recommendation of the Secretary-General (who has to consult the Committee of Permanent Representatives).¹¹³ Significantly, article 11(3) implicitly recognises that arbitrators can come from outside ASEAN, since it is stated that the Chair of the arbitral panel shall “preferably” be a national of an ASEAN state. However, this will happen only in exceptional circumstances.¹¹⁴ This is another example of the desire to keep matters within the family when it comes to dispute settlement.

As a mechanism to produce a legally-binding settlement, the DSM Protocol is set up to fail. A dispute will only go to arbitration if there is a positive decision on the part of the ACC to allow it. Since ASEAN works on consensus¹¹⁵ this will only happen if all the members agree (or can be induced by peer-pressure

¹⁰⁶ ASEAN Charter, article 8(1).

¹⁰⁷ Protocol to the ASEAN Charter on Dispute Settlement Mechanisms 2010, article 9(1).

¹⁰⁸ Protocol to the ASEAN Charter on Dispute Settlement Mechanisms 2010, article 9(2) and 9(3).

¹⁰⁹ Protocol to the ASEAN Charter on Dispute Settlement Mechanisms 2010, article 9(4). Rules for Reference of Unresolved Disputes to the ASEAN Summit were incorporated as Annex 5 to the DSM Protocol on 27 October 2010.

¹¹⁰ Rule 1(1) of Annex 4 to the DSM Protocol. Where more than one member state is involved in the dispute, there may be more arbitrators subject to agreement among the parties: Rule 6(1) to Annex 4 of the DSM Protocol.

¹¹¹ Rule 5 of Annex 4 to the DSM Protocol. Some members may have capacity problems in populating the list. It is not expressly provided that member states can only nominate their nationals, so it is always open to them to appoint eminent jurists who are not their nationals, though one expects that this will be rare.

¹¹² Protocol to the ASEAN Charter on Dispute Settlement Mechanisms 2010, article 11(2)(c).

¹¹³ Rule 1(4)(b) of Annex 4 to the DSM Protocol. Note the implicit desire to keep the Secretary-General on a short leash.

¹¹⁴ Rule 1(4)(d) of Annex 4 to the DSM Protocol.

¹¹⁵ ASEAN Charter, article 20(1).

to acquiesce). Thus, it is likely that disputes will continue to be settled by political means, the DSM Protocol notwithstanding. The Protocol has not even been ratified by a single ASEAN member state at the time of writing. The willingness of the member states to do so is a litmus test of the true depth of their commitment to creating a rules-based organisation.

(4) Non-compliance with the result of a DSM

If there is non-compliance with an arbitral award or the result of any other dispute settlement mechanism, an aggrieved party may refer the matter to the Summit.¹¹⁶ The notification is to be done through the ASEAN Coordinating Committee,¹¹⁷ at least where the matter concerns an arbitral award or settlement agreement under the DSM Protocol. Nothing is explicitly provided regarding awards under the Vientiane Protocol or settlements pursuant to the Treaty of Amity and Cooperation. One expects that a similar procedure will be followed in such cases despite the absence of explicit rules. The ACC is to facilitate consultations among the parties to settle the matter without having to involve the Summit.¹¹⁸ If the problem cannot be resolved, the matter must be referred to the Summit within 90 days or such longer period as the parties to the dispute may agree.¹¹⁹ The ACC will annex a report with its recommendations when the matter is referred to the Summit.

It will be appreciated that once the matter goes to the ASEAN Summit, the resolution of the dispute will not be entirely on the basis of the law. Inevitably, the recommendations of the ACC will be political and not legal in nature. However, there is nothing to prevent the Summit from establishing a legal panel of some sort to assist the leaders in deciding what to do if there is an unresolved dispute or non-compliance with the decision of a dispute settlement body. If ASEAN is serious about becoming a rules-based organisation, it would be far better that some independent legal body advise the leaders instead of having them decide on basis of the political recommendations of the ACC. It would be immensely damaging to ASEAN's credibility if the result of an arbitration could be overturned or modified on political grounds.

¹¹⁶ ASEAN Charter, article 27(2).

¹¹⁷ Rule 1(a) of the Rules for Reference of Non-Compliance to the ASEAN Summit. These rules have been incorporated as Annex 6 to the DSM Protocol as of 2 April 2012. There are also Rules for Reference of Unresolved Disputes to the ASEAN Summit, which were incorporated as Annex 5 to the DSM Protocol on 27 October 2010. Confusingly, rule 2(1) of Annex 5 characterises non-compliance with the instructions of the ACC as an unresolved dispute.

¹¹⁸ Rule 3 of the Rules for Reference of Non-Compliance to the ASEAN Summit.

¹¹⁹ Rule 5(a) of the Rules for Reference of Non-Compliance to the ASEAN Summit.

In time to come, the ASEAN Summit may evolve into a kind of final tribunal of appeal from dispute settlement bodies. If and when this happens, it would be imperative to ensure that the decisions of the Summit are firmly rooted in law in order to realise the vision of ASEAN as a rules-based organisation adhering to the rule of law. Trust in institutions is vital if ASEAN is to fulfil its declared ambitions. That trust can only be fostered if the member states respect the decisions of the dispute settlement mechanisms they have agreed to.

Dispute Settlement in Practice

(1) The Preah Vihear Case¹²⁰

Cambodia was not one of the original five ASEAN member states, having joined only in 1999.¹²¹ Only by looking back at history can one understand the nature of the problem. The Siamese and the Khmers are traditional foes. The kingdom of Angkor arose in the 9th century.¹²² This kingdom exercised control over a territory that today extends into southern Laos and northeastern Thailand. The temple dates from the 11th century, though it can be traced back to a 9th century hermitage founded by Prince Indrayudha, the son of King Jayavarman II.¹²³ From the 13th century Angkor was increasingly challenged by Thai kingdoms, principally Ayutthaya to the west. The borders shifted with the ebb and flow of power of the competing polities. The temple complex of Angkor Wat and the city of Angkor Thom were eventually abandoned (though not forgotten, despite French claims to have “discovered” the ruins in the 19th century) and the capital moved eastwards near the present-day Phnom Penh. The historic rivalry between Cambodia and Thailand lends a particular sensitivity to claims of sovereignty on that border. Siem Reap, where Cambodia’s premier national symbol Angkor Wat is located, is roughly translated as “Victory over Siam”. Even the false accusation that a Thai actress had questioned the sovereignty of Cambodia over Angkor Wat was sufficient to provoke anti-Thai riots in Phnom Penh in 2003.

¹²⁰ Much of the author’s information comes from diplomatic sources and should therefore be treated with suitable caution. Any conclusions drawn are tentative and subject to revision when a more authoritative record of events is available.

¹²¹ Cambodia’s membership was delayed on account of the uncertain political situation following hostilities between supporters of the two co-Prime Ministers, Prince Norodom Ranariddh and Hun Sen. See the Joint Statement of the Special Meeting of the ASEAN Foreign Ministers on Cambodia (Kuala Lumpur, July 1997) and Severino, Southeast Asia in Search of an ASEAN Community (Institute of Southeast Asian Studies, Singapore, 2006), pp57-67. In reality, Hun Sen had launched a coup against his co-Prime Minister Prince Ranariddh.

¹²² For a general introduction to the historical background see Ricklefs et al, A New History of Southeast Asia (Palgrave Macmillan, 2010), chapters 3, 5 and 10.

¹²³ See the Historical Description on the UNESCO World Heritage List website, <http://whc.unesco.org>.

The disputed border was demarcated in 1907 by treaty between the Kingdom of Siam and the French colonial authorities who had control over Cambodia, a process which was not entirely accepted by the Thais. After the fall of France in 1940, Siam took the opportunity to regain the “lost” territory in a short war against the French colonial authorities in 1941.¹²⁴ The end of the Pacific War saw the return of these territories to French control.¹²⁵ Despite this, Thailand occupied portions of the Cambodian province of Kompong Thom, including Preah Vihear, in 1949.¹²⁶ Prince Norodom Sihanouk took control of Cambodia’s government in 1952 and won recognition for an independent Cambodia at the Geneva Conference in 1954, which had been convened to reach a settlement of the First Indochina War.¹²⁷ That same year Thai troops occupied the ruins of Preah Vihear.¹²⁸

In 1959 Cambodia instituted proceedings against Thailand in the International Court of Justice. Both countries had filed declarations accepting the compulsory jurisdiction of the court.¹²⁹ The original dispute about sovereignty was settled by the decision of the International Court of Justice in 1962.¹³⁰ The ICJ held by nine votes to three that the temple stood in territory under the sovereignty of Cambodia. This judgment did not solve the problem, merely postponed the reckoning. The ICJ only trimmed the weeds without digging out the roots.

The dispute flared up again when Cambodia applied to have the ruins of Preah Vihear accepted as a UNESCO World Heritage site in 2008.¹³¹ Although Thailand under Prime Minister Thaksin Shinawatra and his successor was initially supportive, the issue became entangled in Thai domestic politics. Thaksin had been deposed by a coup in 2006 and his political foes used the Preah Vihear issue as a weapon to destabilise the

¹²⁴ <http://www.britannica.com/EBchecked/topic/589625/Thailand/52682/The-Phibun-dictatorship-and-World-War-II> : Britannica Online.

¹²⁵ Thailand was allied to Japan. It managed nonetheless to escape post-war retribution beyond retrocession of territories taken from Burma, Malaya, Cambodia and Laos during the War. See Ricklefs et al, A New History of Southeast Asia (Palgrave Macmillan, 2010), pp299-300, 360-362. France never accepted the forcible annexation by Thailand of the territories in French Indochina in 1941. These territories were retroceded in an accord dated 17 November 1946: see Annex VI to Cambodia’s Application Instituting Proceedings in the Case Concerning the Temple of Preah Vihear (15 September 1959), page 79, para 2.

¹²⁶ Para 1 of the Application Instituting Proceedings in the Case Concerning the Temple of Preah Vihear (15 September 1959).

¹²⁷ <http://www.britannica.com/EBchecked/topic/90520/Cambodia/52487/Independence> : Britannica Online.

¹²⁸ Para 1 of the Application Instituting Proceedings in the Case Concerning the Temple of Preah Vihear (15 September 1959).

¹²⁹ Thailand on 20 May 1950 and Cambodia on 19 September 1957. A check on the ICJ website reveals that Thailand has withdrawn its declaration.

¹³⁰ Case Concerning the Temple of Preah Vihear (Merits), judgment dated 15 June 1962.

¹³¹ The background to this is recounted in International Crisis Group Asia Report No 215, “Waging Peace: ASEAN and the Thai-Cambodian Border Conflict” (6 December 2011), pages 4-6, 9-12.

government. The UNESCO listing took place in July 2008. In that same month an informal meeting of the ASEAN foreign ministers took place in Singapore, which held the Chair of ASEAN. Singapore's Foreign Minister George Yeo announced that the foreign ministers had placed ASEAN's facilities at the disposal of the parties for the settlement of the dispute.¹³² A proposal was made for a Contact Group to support the parties in their effort to reach a peaceful resolution. However, the parties would not accept the assistance of their ASEAN colleagues at that time. Indeed, the Thai Foreign Minister stated that a constitutional amendment (introduced after the coup that deposed Prime Minister Thaksin Shinawatra) precluded him from negotiating territorial matters, on pain of being charged with treason. This constitutional prohibition was raised by successive Thai Foreign Ministers when pressed by their ASEAN colleagues to negotiate a settlement. Sporadic fighting broke out at the site from October 2008 to early 2009.¹³³ Nothing moved during the chairmanship of Thailand the following year, as might be expected. The domestic political situation in Thailand remained extremely volatile.¹³⁴ Vietnam took over the chair of ASEAN in 2010. Cambodian Foreign Minister Hor Namhong wrote to Vietnamese Foreign Minister Pham Gia Khiem requesting mediation of the dispute but Thailand declined.¹³⁵ On 4 February 2011, in an escalation of the dispute, fighting broke out between Thailand and Cambodia in the vicinity of Preah Vihear.

ASEAN was lucky to have Indonesia in the chair at that precise moment in time. It was pure serendipity; Brunei was supposed to have taken the chair of ASEAN, but had at Indonesia's request swapped slots. Indonesian Foreign Minister Marty Natalegawa was a seasoned diplomat. He had been Indonesia's Permanent Representative to the United Nations and Director-General in charge of ASEAN matters in the Indonesian Foreign Ministry and therefore was intimately familiar with how the system works. He was immediately on the phone to Cambodian Foreign Minister Hor Namhong and Thai Foreign Minister Kasit Piromya. On 7 and 8 February he was in Phnom Penh and Bangkok for talks. The Thais preferred to keep the dispute at a bilateral level. The Cambodians, no doubt calculating that they would be seen as the wronged party, insisted on bringing the matter to the UN Security Council.

¹³² See Statement by Singaporean Minister for Foreign Affairs George Yeo, 22 July 2008. http://www.mfa.gov.sg/content/mfa/media_centre/press_room/pr/2008/200807/press_20080722_09.html

¹³³ International Crisis Group Asia Report No 215, "Waging Peace: ASEAN and the Thai-Cambodian Border Conflict" (6 December 2011), page 6.

¹³⁴ Clashes between different political factions had forced the cancellation of the ASEAN Summit that was to have been held in Pattaya in April, an enormous humiliation for Thailand. See BBC news, 11 April 2009: <http://news.bbc.co.uk/2/hi/asia-pacific/7994465.stm>

¹³⁵ International Crisis Group Asia Report No 215, "Waging Peace: ASEAN and the Thai-Cambodian Border Conflict" (6 December 2011), page 15.

On 14 February Indonesian Foreign Minister Marty Natalegawa, speaking as the Chair of ASEAN, told the UNSC that ASEAN wanted an observer mission. The UNSC, which had more pressing matters to deal with than a minor border skirmish in Southeast Asia, left it to ASEAN to sort out.¹³⁶ Armed with this mandate, Foreign Minister Natalegawa began shuttling between the disputing parties, as the Cambodian and Thai Foreign Ministers would not meet face-to-face. With the backing of the other ASEAN Foreign Ministers, he persuaded the Thais and the Cambodians that a continuing dispute would not be good for ASEAN solidarity. There were no threats of armed intervention, economic sanctions or even diplomatic isolation. The appeal was to enlightened self-interest. An informal (ie, previously unscheduled) meeting of ASEAN Foreign Ministers was held on 22 February in Jakarta. Foreign Minister Natalegawa briefed the other ministers on the result of his visits to Phnom Penh and Bangkok and his appearance before the UNSC. Thai Foreign Minister Kasit Piromya and Cambodian Foreign Minister Hor Namhong presented their countries' respective positions. A statement was issued by the Foreign Ministers¹³⁷ welcoming Indonesia's efforts in her capacity as Chair of ASEAN and requesting that those efforts continue. The disputing parties accepted (with varying degrees of enthusiasm) the proposal that Indonesian observers be deployed on both sides of the border to prevent a resumption of hostilities. Singaporean Foreign Minister George Yeo shed some light on the manoeuvres behind the scenes when he answered a parliamentary question on 3 March 2011. He revealed that even though the Thais had been unwilling to accept Indonesian observers initially, faced with peer pressure from the other nine members they eventually relented.¹³⁸ The foreign ministers requested Indonesia to continue ASEAN's efforts to find a peaceful resolution of the dispute.

This unfortunately did not lead to the settlement of the problem. Although the Thai government may have agreed to accept Indonesian observers, the Thai military remained recalcitrant. The Cambodians pursued a parallel dispute settlement process, applying to the ICJ for interpretation of its 1962 judgment¹³⁹ and for provisional measures¹⁴⁰ on 28 April 2011. The ICJ pronounced its decision regarding provisional measures on 18 July 2011,¹⁴¹ ordering both parties to withdraw their military personnel from a defined provisional demilitarized zone and refrain from taking any action to aggravate

¹³⁶ See the Press Release of the ASEAN Secretariat entitled "Historic Firsts: ASEAN Efforts on Cambodian-Thai Conflict Endorsed by UNSC", 21 February 2011.

¹³⁷ Statement by the Chairman of ASEAN on 22 February 2011.

¹³⁸ See MFA Press Release regarding FM George Yeo's remarks in the Singapore Parliament:
http://www.mfa.gov.sg/content/mfa/media_centre/press_room/pr/2011/201103/press_20110303_01.html

¹³⁹ Under article 60 of the Statute of the Court and article 98 of the Rules of Court.

¹⁴⁰ Under article 41 of the Statute and article 73 of the Rules.

¹⁴¹ Request for the Interpretation of the Judgment of 15 June 1962 in the Case Concerning the Temple of Preah Vihear, Order dated 18 July 2011.

the situation. The parties were enjoined to “continue the co-operation which they have entered into within ASEAN and, in particular, allow the observers appointed by that organization to have access to the provisional demilitarized zone.” The Court remains seised of the matter. At the time of writing the Indonesian observers have yet to be deployed.

(2) Some general observations

The ASEAN Charter provides a tool-kit for the resolution of disputes among ASEAN members. Like any good took-kit it contains a variety of screwdrivers and spanners to loosen stubborn screws and bolts before one resorts to the hammer of binding arbitration or adjudication. It is vital to appreciate that recourse to arbitration or the ICJ is a political decision, not a legal one. Unlike in the case of domestic dispute settlement, the complainant has to factor in the cost in terms of damage to bilateral relations with the respondent¹⁴² and possibly with other ASEAN states that may have urged the parties to come to an amicable settlement. The strength of the complainant’s legal case is only one factor to be considered. It may not even be the decisive factor. Once a complainant crosses the Rubicon by invoking a binding dispute settlement mechanism, the die is cast; anything short of victory means a loss of face and domestic political credibility. Where the government is weak domestically, political opponents can hijack nationalistic sentiments for short-term political advantage. Only a secure government can afford to run the political risk; ironically, a democratic government facing elections or dependant on coalition partners may be less willing to resort to binding international dispute settlement than an authoritarian regime.

Whatever the situation may be in Europe, to which ASEAN is often compared, nationalism in Southeast Asia is not dead. The colonial interlude kept the regional disputes in check. The Preah Vihear case reminds us that these problems still fester. The disagreement over Preah Vihear became a piece in a rowdy game of domestic political one-upmanship in Thailand.¹⁴³ Governments may be willing to be bound by international norms, but they may be constrained by *realpolitik* in what they can do. A strong military with a history of political interventionism does not help. The Philippine/Thailand WTO

¹⁴² In the Preah Vihear case bilateral relations between the disputing parties were at a low ebb when reference was made to the ICJ. At one point the Cambodian government appointed ousted Thai Prime Minister Thaksin Shinawatra as adviser to Prime Minister Hun Sen, a move that could only have been calculated to irritate the Thais. See International Crisis Group Asia Report No 215, “Waging Peace: ASEAN and the Thai-Cambodian Border Conflict” (6 December 2011), pages 12-13. Relations have improved since the election of the new government under Thaksin’s sister Yingluck.

¹⁴³ The political background is explained in detail in the International Crisis Group Asia Report No 215, “Waging Peace: ASEAN and the Thai-Cambodian Border Conflict” (6 December 2011).

case¹⁴⁴ provides a sharp contrast. That matter arose at almost exactly the same time. Thailand lost the case and agreed to implement the decision of the WTO Dispute Settlement Body. This was possible because the matter did not become enmeshed in the web of Thai domestic politics.

The Preah Vihear case is the first to have arisen after the coming into operation of the Charter. ASEAN member states had previously brought boundary disputes to the ICJ on two occasions: the Ligitan/Sipadan case between Indonesia and Malaysia in 1998¹⁴⁵ and the Pedra Branca case between Malaysia and Singapore in 2003.¹⁴⁶ Both of these cases might have been dealt with under the TAC, but as has been pointed out above that procedure is more political than judicial. The submission of the Ligitan/Sipadan dispute to the ICJ was a decision taken at the highest level, despite the reservations of officials.¹⁴⁷ Interestingly, in submitting the dispute to the ICJ the parties explicitly referred to the TAC.¹⁴⁸ Similarly, the Pedra Branca case was submitted to the Court after negotiations had proven unsuccessful. In both instances there was sufficient political will to have the matter resolved finally by adjudication.¹⁴⁹ It is probably no coincidence that in both cases the governments of the disputants were secure and did not face domestic political instability.

The Preah Vihear case is different in that it reached the Court at the instance of only one party; Thailand was opposed to the process. Thailand's reluctance can be explained in a large part by the volatility of its domestic politics.¹⁵⁰ However, the procedure under Article 60 of the Statute of the ICJ allows one party to request interpretation and that was sufficient for the Court to be

¹⁴⁴ Dispute DS371, discussed above.

¹⁴⁵ Case Concerning Sovereignty over Pulau Ligitan and Pulau Sipadan, judgment dated 17 December 2002.

¹⁴⁶ Case Concerning Sovereignty over Pedra Branca/Pulau Batu Puteh, Middle Rocks and South Ledge, judgement dated 23 May 2008.

¹⁴⁷ Indonesia had tried to bring the Ligitan/Sipadan dispute to the High Council under the TAC but Malaysia refused, fearing that other ASEAN members would be partial to Indonesia: see Severino, Southeast Asia in Search of an ASEAN Community (Institute of Southeast Asian Studies, Singapore, 2006), pp 12-13. President Soeharto decided to submit the dispute to the ICJ, overriding the objections of his officials.

¹⁴⁸ The Special Agreement (signed on 31 May 1997 by the Foreign Ministers of the two countries, viz, Mr Ali Alatas and Datuk Abdullah Badawi) stated in the preamble that the parties desired "that this dispute should be settled in the spirit of friendly relations existing between the Parties as enunciated in the 1976 Treaty of Amity and Cooperation in Southeast Asia"

¹⁴⁹ Singapore and Malaysia have been particularly assiduous in using third-party adjudication mechanisms to settle disputes. Singapore invoked the WTO Dispute Settlement Mechanism against Malaysia in 1995: see Dispute DS 1; the complaint was eventually withdrawn when the underlying cause of complaint was redressed. On 5 September 2003 Malaysia submitted a Request for Provisional Measures to the International Tribunal on Law of the Sea (ITLOS) in relation to Singapore's land reclamation activities near their common maritime boundary: see Case Concerning Land Reclamation by Singapore in and around the Straits of Johor. The parties came to a settlement of their differences.

¹⁵⁰ See the International Crisis Group Asia Report No 215, "Waging Peace: ASEAN and the Thai-Cambodian Border Conflict" (6 December 2011), pages 11-12, 21-22.

seised of the matter despite the opposition of the Thais. What of the ASEAN Charter provisions? At the time that the dispute arose, the 2010 Protocol had already been signed, though it was not yet in force. The weakness of the Charter is that there is no mechanism to force a settlement of any dispute. Recourse to the TAC is provided for in article 24(2) of the Charter, but the TAC mechanism is voluntary. Even if it were mandatory, the TAC route would not produce a legally-binding result.

Nonetheless, the existence of the ASEAN Charter gave the ASEAN Chair the cover needed to attempt to effect a peaceful resolution of disputes. This happened both in 2008 when Singapore held the Chair and in 2011 when Indonesia was the incumbent. The first attempt by Singaporean Foreign Minister George Yeo proved abortive in the face of resistance by the disputants; one cannot force unwilling parties to compromise, short of sending in troops or imposing sanctions. This is not practical in an ASEAN context, or indeed in an international context.¹⁵¹ The second attempt by Indonesian Foreign Minister Marty Natalegawa to broker a deal in his capacity as ASEAN Chair was more successful. Faced with peer pressure from the other nine, the Thais agreed to accept the Indonesian suggestion for the deployment of observers. Whatever the exact words of the Charter may be, it is clear that the actions of the Chair were considered to be fully in accordance with the spirit of the treaty. The Statement issued after the informal Foreign Ministers meeting¹⁵² explicitly referred to the TAC and the Charter as the basis for the intervention of the Chair in the dispute.

The three ICJ cases highlight the weakness of the adjudication process: it is a zero-sum game. There is always a loser. The loss may rankle a generation after the court decision, as the Preah Vihear case demonstrates. The loser loses face. That is not desirable in an ASEAN context. The reluctance to submit territorial disputes to binding adjudication is not confined to ASEAN, as the current spat between South Korea and Japan over Takeshima/Dokdo demonstrates. The ASEAN way is to seek compromise, using the Charter and peer pressure as levers. Eventually, the ICJ will pronounce again on Preah Vihear. One wonders whether a second pronouncement will have any greater effect than the first in dealing with the roots of the dispute. More promising would be the efforts within ASEAN to seek a solution that does not result in a loss of face for one party; a possibility would be some sort of joint cooperation to exploit the potential of the area. When two neighbours argue

¹⁵¹ Those who complain about the ineffectiveness of the ASEAN Way should ask whether the international community has been any more successful in brokering peace among unwilling parties over the last half century. One need only mention the current situation in Syria and the Israeli-occupied territories on the West Bank.

¹⁵² Statement issued by the Chairman after the Informal Meeting of the Foreign Ministers of ASEAN on 22 February 2011, which referred explicitly to the TAC and the Charter as the basis for the intervention of the Chair in the dispute.

about the ownership of a durian tree, it doesn't make any sense to let the durians fall and rot on the ground while they try to settle their differences.

Changing the political mindset will take time, but the Charter is a document that creates a new paradigm. The Preah Vihear case is illuminating. On one hand, it demonstrates graphically the limitations that a politically-appointed Secretary-General works under. The incumbent Secretary-General, Dr Surin Pitsuwan, had been Foreign Minister of Thailand in the past. He clearly could not be a neutral interlocutor in a case between his country and Cambodia. On the other hand, the Charter gave Indonesian Foreign Minister Marty Natalegawa the moral authority to broker a compromise. The episode was a tribute to his leadership and diplomatic skill. Whether this precedent will be followed in future remains an open question. So much depends on the personalities involved. The Chair passed to Cambodia after Indonesia. Brunei will follow. The next Secretary-General will be Vietnamese. The agreement to accept Indonesian observers has not yet been implemented. The saga continues.

Conclusion

The ASEAN Charter is an ambitious document. Article 2(2)(d) of the Charter restates ASEAN's commitment to "reliance on peaceful settlement of disputes" as one of the governing principles of the organisation. Adherence to the rule of law as an aspirational goal is so important that it is stated thrice in the Charter: in the Preamble, as one of the purposes of ASEAN¹⁵³ and as a governing principle.¹⁵⁴ It is easy for the cynic to characterise all this as empty rhetoric. But aspirations are important for ASEAN. They provide a goal to aim for. The transformation of ASEAN into an rules-based organisation is a generational project. Progress may be slow, but there is movement in the right direction. One should not expect that progress will be linear; backsliding will occur. The public affirmation of rule of law and peaceful settlement of disputes as core principles of ASEAN allows peer pressure to be brought upon a member state that strays from the declared norm. The workings of ASEAN are not a Shakespearean drama full of sound and fury signifying nothing. It is more an Indonesian *wayang kulit*; behind the shadows on the screen the *dalang* are working quietly to move the story along. One glimpses this in the actions of the Chair during the Preah Vihear troubles. That is the nature of diplomacy; it should never be forgotten that the resolution of disputes between countries is a matter of diplomacy more than law.

¹⁵³ ASEAN Charter, article 1(7).

¹⁵⁴ ASEAN Charter, article 2(2)(h).

Professor Walter Woon SC
Deputy Chairman, Centre for International Law
David Marshall Professor, Faculty of Law
National University of Singapore