DISPUTE SETTLEMENT IN ASEAN[1]

A Short Historical Background

The Association of Southeast Asian Nations, or ASEAN as it is more commonly called, was founded on 8 August 1967. At the time Southeast Asia was in an unsettled state. Indonesia had just recently undergone a regime change after an abortive communist coup. The change of regime had brought to an end the undeclared war between Indonesia and Malaysia, known as Konfrontasi. Singapore had been ejected from the Malaysian federation a short time before. Malaysia had a dispute with the Philippines concerning the sovereignty over Sabah. Looming over all these disputes was the shadow of the Vietnam War. As US allies, the Philippines and Thailand played host to American bases. The USAF Strategic Air Command flew bomber sorties over Indochina from U Tapao airbase in Thailand. 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. The five original members of ASEAN got together in order to create a framework for the peaceful development of the region free from external interference. This has remained the key role of ASEAN throughout its subsequent development.

ASEAN was founded by means of the Bangkok Declaration,[2] a modest document that did not even purport to be a treaty. The Bangkok Declaration stated that one of the primary aims of ASEAN 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. Indeed the parties to the Bangkok Declaration did not set up any institutional framework for ASEAN beyond calling for an annual meeting of Foreign Ministers.

In 1971 ASEAN issued the ZOPFAN Declaration,[3] which was "inspired by the worthy aims and objectives of the United Nations, in particular by the principles of respect for

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[1] The various ASEAN documents referred to in the following text can most conveniently be accessed through the website of the Centre for International Law, National University of Singapore at http://cil.nus.edu.sg/.

[2] Offcially, the ASEAN Declaration. 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).

[3] 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

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.[4]

It was only in 1976 that a dispute settlement mechanism was established. Two major results of the First ASEAN Summit held in Bali that year 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).[5] 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. Chapter IV of the TAC provided for the Pacific Settlement of Disputes.

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 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.

(Mr S Rajaratnam) and Thailand (Mr Thanat Khoman, then Special Envoy of the National Executive Council).

[4] The dispute between Malaysia and the Philippines over Sabah had led to a rupture of diplomatic relations between the countries in 1968. Singapore-Indonesian relations were fraught after the execution in 1968 of two Indonesian marines who had been captured during a raid on Singapore carried out in the course of the undeclared war or Konfrontasi (they had planted a bomb which had killed three civilians and were tried for murder since Indonesia had not formally declared war). These problems still occasionally raise ripples even today.

[5] 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).

In the meantime, the original five were joined by Brunei in 1984 upon decolonization.[6] The Cambodian imbroglio ended in 1991 with the withdrawal of Vietnamese forces and the election of a 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. Vietnam joined ASEAN in 1995,[7] Laos[8] and Myanmar[9] in 1997. After a couple of hiccups, Cambodia finally became the tenth ASEAN member in 1999.[10]

With the resolution of the Cambodian conflict, the focus of ASEAN shifted to enhancement of economic relations. In 1992 it was announced[11] that ASEAN would establish the ASEAN Free Trade Area (AFTA) using the Common Effective Preferential Tariff (CEPT) Scheme as the main driving mechanism. A 15-year timeframe from 1 January 1993 was envisaged. The Framework Agreement on Enhancing ASEAN Economic Cooperation was signed in Singapore on 28 January 1992. This Agreement provided in Article 9 that disputes should be settled amicably but created no mechanism for doing so. Rather vaguely, it was stated that "Whenever necessary, an appropriate body shall be designated for the settlement of disputes." It was only in 1996 that a dispute settlement mechanism was prescribed, in the Protocol on Dispute Settlement Mechanism (the Manila Protocol).[12] This was replaced in 2004 by the Protocol on Enhanced Dispute Settlement Mechanism (the Vientiane Protocol).[13]

By the first decade of the 21st century, it was increasingly felt that the old "ASEAN way" of informal and ad hoc arrangements could not continue if the organisation was to function efficiently. An Eminent Persons Group was set up to make recommendations on the promulgation of a proper Charter for ASEAN.[14] Their report was adopted by the Heads of State/Government of the ASEAN member countries at the 12th ASEAN Summit

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[6] Declaration of the Admission of Brunei Darussalam into ASEAN, signed in Jakarta on 7 January 1984. Brunei ratified the TAC on 6 June 1987.

[7] 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 TAC on 22 July 1995, having ratified it on 30 May.

[8] 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 TAC on 29 June 1992 and ratified it on 17 July 1996.

[9] 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 TAC on 10 July 1996, having acceded to it on 27 July 1995.

[10] Declaration on the Admission of the Kingdom of Cambodia into the Association of Southeast Asian Nations, signed in Hanoii, Vietnam on 30 April 1999. Cambodia ratified the TAC on 25 July 1995, having acceded on 25 January 1995.

[11] The Singapore Declaration, 28 January 1992, issued during the Fourth ASEAN Summit.

[12] Signed by the economic ministers of the ASEAN member states on 20 November 1996 in Manila.

[13]Signed by the economic ministers of the ASEAN member states at the 11th ASEAN Summit in Vientiane on 29 November 2004.

[14] Declaration on the Establishment of the ASEAN Charter, signed in Kuala Lumpur, Malaysia on 12 December 2005

in Cebu.[15] The Cebu Summit established a High Level Task Force (HLTF) for the Drafting of the ASEAN Charter. The completed Charter was presented to the 13th ASEAN Summit in November 2007[16] and came into force on 15 December 2008.[17] Chapter VII of the Charter sets out the dispute settlement mechanisms.

Subsequently, a High Level Legal Experts Group (HLEG) was set up by the 41st ASEAN Ministerial Meeting on 21 July 2008. The HLEG was tasked specifically with fleshing out the dispute settlement mechanisms provided for in Articles 25 and 26 of the Charter. This resulted in a Protocol to the ASEAN Charter on Dispute Settlement Mechanisms, which was signed by the Foreign Ministers of the ASEAN member countries in Hanoi on 8 April 2010.[18]

The Treaty of Amity and Cooperation

The Treaty of Amity and Cooperation in Southeast Asia or TAC was signed by the heads of state/government of the original five ASEAN member states at the First ASEAN Summit in Bali on 24 February 1976. Brunei acceded on 6 June 1987. In 1989 the first non-ASEAN state, Papua New Guinea, acceded to the TAC. Since then, apart from the new ASEAN member states, 18 other countries and organisations have become High Contracting Parties.[19]

Article 10 provides 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.[20] This High Council is supposed to take cognizance of any "disputes or situations likely to

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[15] Declaration on the Blueprint of an ASEAN Charter, signed in Cebu , the Philippines on 13 January 2007.
[16] Declaration on the ASEAN Charter, signed in Singapore on 20 November 2007.
[17] The impressions of the participants in the Charter negotiations are documented in The Making of the ASEAN Charter. Ed Tommy Koh, Rosario Manalo and Walter Woon. Singapore: World Scientific, 2008.
[18] According to the Table of Ratifications maintained by the ASEAN Secretariat this has yet to come into effect (see http://www.asean.org/ratification.pdf).
[19] Australia, Bangladesh, Canada, the People's Republic of China, France, India, Japan, Mongolia, New Zealand Pakistan, the Republic of Korea, the Russian Federation, Sri Lanka, Timor Leste, Turkey, the United States of America and the European Union and European Commission. See the Table of Ratifications maintained by the ASEAN Secretariat at http://www.asean.org/ratification.pdf.
[20] 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).

disturb regional peace and harmony."[21] 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".[22] 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.[23]

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 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 so-called "ASEAN way" from the very start. Any dispute settlement under the TAC will have to be consensual. One suspects that this is driven by *realpolitik*. International courts and arbitrators cannot be controlled by governments. In countries where the rule of law is weak, it is too much to expect that a government would willingly cede the power to decide a international political dispute to neutral outside parties.

The third weakness as far as ASEAN member states are concerned is that under rule 14 of the Rules of 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. Regional solutions for regional problems was the mantra. This view did not command the unanimous agreement of all the ASEAN members, but it remains strongly held in some quarters. As long as such a sentiment exists, the TAC dispute settlement mechanism is likely to remain unused.

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

[21] Article 14.
[22] Article 15.

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.

The Vientiane Protocol

Once the Cambodian problem was resolved, ASEAN’s attention turned to economic matters. The Singapore Declaration of 1992 committed ASEAN to establishing a free trade area. Free trade areas work only if there is some sort of means to deal with disputes amongst the members. Article 9 of the 1992 Framework Agreement on Enhancing ASEAN Economic Cooperation provided for the establishment of such a 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 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 as well as future ASEAN economic agreements (referred to as “covered agreements”). Article 4 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. Contrast this to Article 23 of the ASEAN Charter, where the Secretary-General may only act at the request of the parties to a dispute in offering good offices, conciliation or mediation.

The core of the dispute settlement mechanism is the mandatory procedure prescribed by the Vientiane Protocol. If there is any dispute under these agreements, the aggrieved party will request consultations.[24] 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.[25] Similarly, the matter may go to SEOM if consultations do not result in a satisfactory resolution of the problem within 60 days.

Once the dispute is raised to SEOM, a panel will be established unless SEOM decides by consensus not to do so.[26] Basically, 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-

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[23] Ibid.
[24] Article 3.
[25] Article 5(1).
[26] Ibid. This means in practice that all the member states must either agree not to do so or acquiesce in the decision.

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.

The panel's function is to make a report to SEOM,[27] having objectively considered the facts and provisions of the relevant agreements.[28] The panel is obliged to submit its report and recommendations within 60 days.[29] 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.[30] 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 ("AEM").[31] An appeal must be concluded within 60 days.[32] 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.[33] The disputing parties are obliged to accept the report unconditionally[34] and comply within 60 days of the report of the panel or Appellate Body, as the case may be.[35] SEOM is to oversee compliance.[36] Non compliance attracts sanctions.[37]

The Vientiane Protocol has clear similarities to the dispute settlement procedure of the World Trade Organisation,[38] especially with its strict time-lines 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.[39]

The ASEAN Charter

The ASEAN Charter is meant to provide a proper legal framework for the organisation. The original Bangkok Declaration made no provision for institutions of any sort beyond a regular meeting of the foreign ministers. In the forty years after the Bangkok Declaration

[27] Article 6(1).
[28] Article 7.
[29] Article 8(2). Exceptionally, it may take a further 10 days if necessary.
[30] Article 9(1).
[31] Article 12.
[32] Article 12(5); exceptionally, the Appellate Body may take longer, but the maximum is 90 days.
[33] Article 12(13).
[34] Ibid.
[35] Article 15(1).
[36] Article 15(6).
[37] Article 16.
[38] See the WTO's Understanding on Rules and Procedures Governing the Settlement of Disputes.
[39] The WTO Dispute Settlement Mechanism has been invoked by Singapore against Malaysia (Dispute DS1, 1995) and the Philippines against Thailand (Dispute DS371, 2008; adoption of panel report 15 July 2011).

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.

Central to this ambition were the dispute settlement mechanisms in Chapter VIII. When drafting the Charter the High Level Task Force (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, filling in the gaps as necessary. Thus, the Vientiane Protocol would be used where economic disputes arise.[40] Disputes not relating to an ASEAN instrument would fall within the TAC,[41] which applies where there is a threat to peace.

Initially, some delegations expressed a view that a court should be set up. However, it became quickly apparent that ASEAN is not ready for a court. Although this was 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.

It was also 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. Again 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 adjudication 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). There was a debate on the inclusion of specific reference to arbitration, with some delegations opposed to any such mechanism. Their stance was that disputes should be settled by negotiations rather than by third-party arbitration. In the end, the view of those who preferred formal dispute settlement prevailed.

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. The parties may request the Chairman of ASEAN or the Secretary-General to provide such good offices, conciliation and mediation. Note the similarity to the scheme under the TAC and the Vientiane Protocol. Unlike in the Vientiane Protocol, however, the Secretary-General cannot of his own accord offer to

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[40] This is the effect of articles 24(1) and 24(3).
[41] Article 24(2).

assist; it was felt by some that an activist Secretary-General might prove to be too ready to intervene. However, one suspects that in practice the Secretary-General would make clear to the disputing parties his readiness to offer good offices, conciliation or mediation if so requested. The inclusion of the Chairman of ASEAN gives a greater significance to the role of the ASEAN Chair. This 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.

Article 24 is the key provision. Where the dispute arises in relation to a specific ASEAN instrument, it shall be settled in accordance with the mechanism provided in that instrument.[43] If there is no effective dispute settlement mechanism, an appropriate one shall be established.[44] This may include arbitration. 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 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.[45]

The DSM Protocol is based on the Vientiane Protocol. It provides for consultations within a fixed timeframe, failing which the complainant may request the appointment of an arbitral tribunal. If the respondent does not agree to the appointment of an arbitral tribunal, the matter will be referred to the ASEAN Coordinating Council, which consists of the foreign ministers of the ASEAN members.[46] The ASEAN Coordinating Council can direct the parties to settle the dispute by good offices, conciliation, mediation or arbitration. The DSM Protocol provides rules for these matters in the annexes.

Dispute Settlement in Practice: The Preah Vihear Case[47]

Cambodia was not one of the original five ASEAN member states, having joined only in 1999.[48] Only by looking back at history can one understand the nature of the problem.

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[42] Article 25(1).
[43] Article 24(1).
[44] Article 25.
[45] Though not yet in effect. See the Table of Ratifications maintained by the ASEAN Secretariat at http://www.asean.org/ratification.pdf.
[46] See article 8 of the Charter.
[47] 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.

The Siamese and the Khmers are traditional foes. The kingdom of Angkor arose in the 9th century.[49] This kingdom exercised control over a territory that today extends into southern Laos and northeastern Thailand. 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 disputed border was demarcated by treaty between the French colonial authorities who had control over Cambodia and the Kingdom of Siam in 1907, 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 (including the temple of Preah Vihear) in a short war. The end of the Pacific War saw the return of these territories to French control.[50] This is the background to the dispute. It lends a particular sensitivity to claims of sovereignty on that border. Siem Riep, 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.

The original dispute about sovereignty was settled by recourse to the International Court of Justice in 1962.[51] 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 merely trimmed the weeds without digging out the roots. There were sporadic incidents in the area thereafter. 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 the precise moment in time when fighting broke out again this year over Preah Vihear. 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 Natagelawa is a seasoned diplomat. He had been Indonesia's Permanent Representative to the United Nations and Director-General

[48] 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 Severino, Southeast Asia in Search of an ASEAN Community (Institute of Southeast Asian Studies, Singapore, 2006), pp57-67.
[49] 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.
[50] 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.
[51] Case Concerning the Temple of Preah Vihear (Merits), judgment dated 15 June 1962.

in charge of ASEAN matters in the Indonesian Foreign Ministry. He knew 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. On 14 February Foreign Minister Marty Nagatelawa, 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. Armed with this mandate, Foreign Minister Nagatelawa 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 Nagatelawa briefed the other ministers on the result of his visit 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 Ministers[52] 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.

This unfortunately did not lead to the settlement of the problem, which had become entangled in the web of Thai domestic politics in the run-up to a general election. The Cambodians pursued a parallel dispute settlement process, applying to the ICJ for interpretation of its 1962 judgment[53] and for provisional measures[54] on 28 April 2011. The ICJ pronounced its decision regarding provisional measures on 18 July 2011,[55] ordering both parties to withdraw their military personnel from a defined provisional demilitarized zone and refrain from taking any action to aggravate 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.

[52] Statement by the Chairman of ASEAN on 22 February 2011.
[53] Under article 60 of the Statute of the Court and article 98 of the Rules of Court.
[54] Under article 41 of the Statute and article 73 of the Rules.
[55] 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 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 1998[56] and the Pedra Branca case between Malaysia and Singapore in 2003.[57] 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.[58] Similarly, the Pedra Branca case was submitted to the Court after negotiations had proven unsuccessful. In both instances the political will was present to have the matter resolved finally by adjudication.[59]

The Preah Vihear case is different in that it reached the Court at the instance of one party; Thailand was opposed to the process. However, the Article 60 procedure allows one party to request interpretation and that was sufficient for the Court to be seised of the matter. What of the 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.

Nonetheless, the existence of the ASEAN Charter gave the Indonesian Foreign Minister the cover he needed to broker a deal in his capacity as ASEAN Chair.[60] Whatever the 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 three ICJ cases highlight the weakness of the adjudication process: it is a zero-sum game. There is always a loser, and the loss may rankle a generation after the court decision, as the Preah Vihear case 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

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[56] Case Concerning Sovereignty over Pulau Ligitan and Pulau Sipadan, judgment dated 17 December 2002.

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

[58] Rodolfo Severino, former Secretary-General of ASEAN, reported that 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.

[59] 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. 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.

[60] See the 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.

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.

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. Changing the political mindset will take time, but the Charter is a document that creates a new paradigm. Progress along the path will not be in a straight line and there will be rocks and potholes. But the manner in which the Preah Vihear case is being dealt with within ASEAN gives hope for the future.

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