

# The Taxonomy of Disputes and the Architecture of ASEAN Dispute Resolution

4<sup>th</sup> Asian Society of International Law Conference

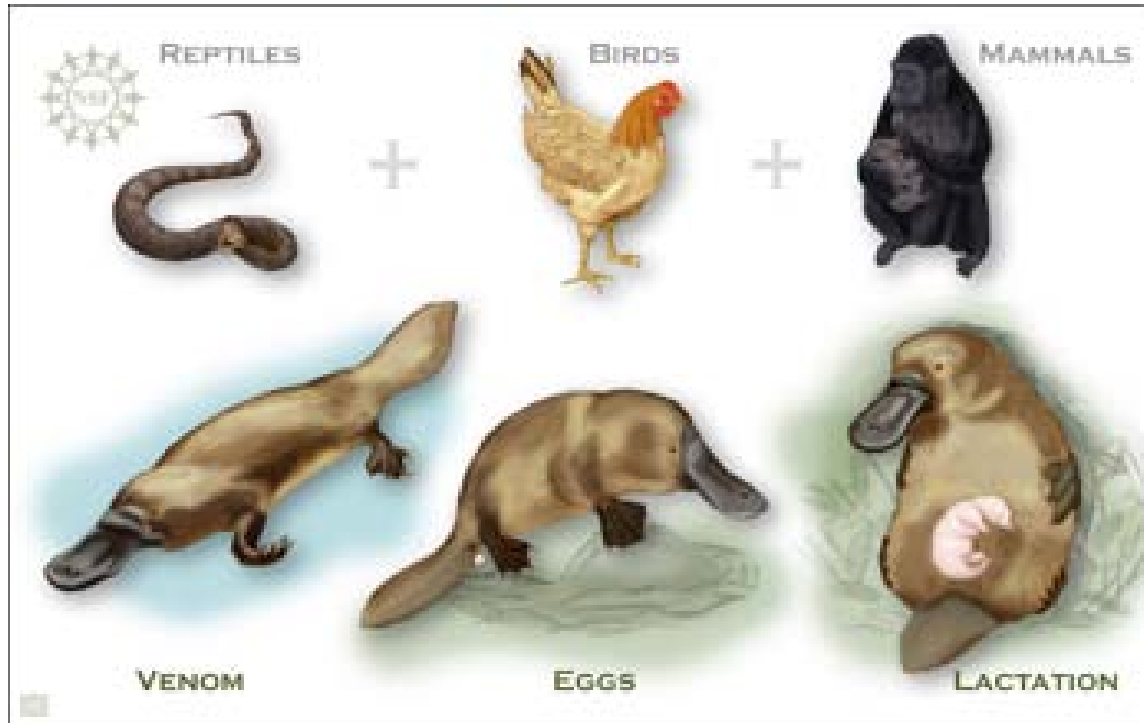
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# Controversial Taxonomy

- The platypus...





**Just Peace**

1967 to ...

# Dimension 1: Sources of Conflict

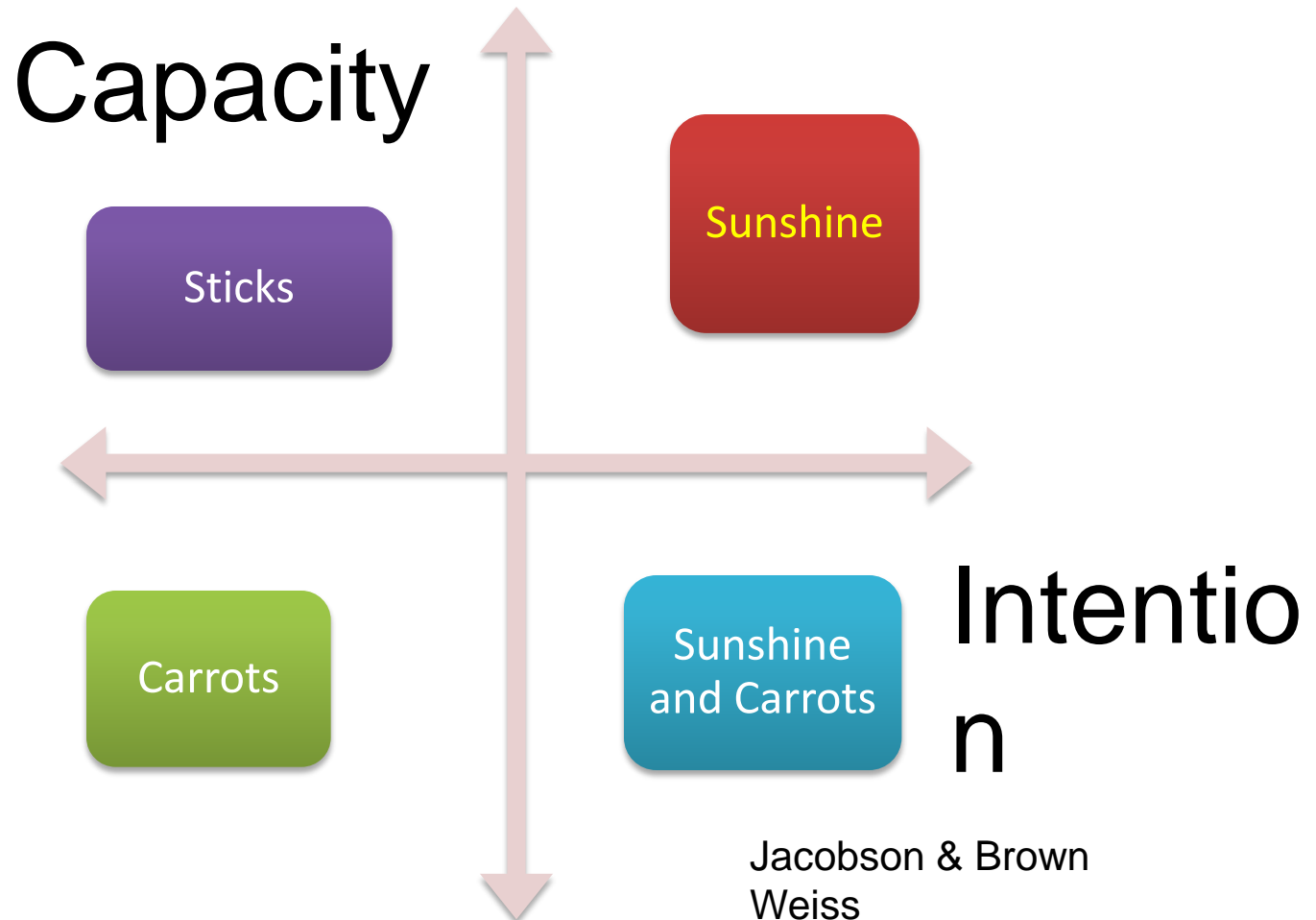
Failures of:

1. Compliance
2. Cooperation
3. Coordination
4. Coherence
5. Clarity
6. Capacity

# Legalization

- Abbot, Keohane, Moravcsik, Slaughter and Snidal:
  1. Obligation
  2. Precision
  3. Delegation (Third Party Adjudication)
- Most conflicts are resolved extra-adjudication.
- *E.g.* Administration (Monitoring & Reporting)
- But under the shadow of Adjudication...

# Methods for Compliance



# Dimension 2: Actors Involved

Claimants/Respondents:

1. States
  2. Domestic Population
  3. Aliens (e.g. foreign investor, migrant)
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1. International Community
  2. International Governmental Organizations
  3. Non-Governmental Organizations

# Dimension 3: Outcomes Desired

- Cessation of Conflict
- Avoidance of Conflict
- De-escalation of tensions
- Adjudication with finality of award
- Damages or Compliance
- Mutually agreed solution
- Technical Cooperation
- Common epistemic understanding



# Dimension 4: Stakes of Dispute

- Regime Change
- War
- Sanctions
- Tensions
- Damages
- Compliance
- Clarification
- Consultation



+ Counterfactual Costs

# DS Management Methods

1. Compulsory Adjudication
2. Non-Compulsory Adjudication
3. Consultation
4. Monitoring
5. Technical Coordination
6. Clarification

# Intra-ASEAN DSM

- 1976 TAC (general principles)
- 2004 Enhanced DSM (economic disputes – compulsory and negative consensus)
- 2007 ASEAN Charter (general obligations)
- 2010 Protocol to the ASEAN Charter DSM (all other disputes that do not have specific DSM)
  
- Plus option for recourse to international infrastructure of ICJ, WTO, ITLOS

# Pedra Branca

- Source: Clarity on sovereignty
- Actors: State to State
- Stakes: Loss of territory v Escalating conflict
- Outcome: Avoidance and De-escalation
- Result: ICJ for finality of award
- DS Methods: Consultation (failed) resulting in submission to Adjudication (ICJ) (alternatively TAC or 2010 DSM – avoidance only)

# Intra-ASEAN Trade Disputes

- Malaysia – Polyethylene and Polypropylene [WTO DS1] (Singapore) (1995)
- Thailand – Cigarettes from the Philippines [WTO DS371] (Philippines) (2008)
- Note: Common Enhanced Preferential Tariffs (CEPT) non-compliance during Asian Financial Crisis settled without reference to ASEAN DSM

# Intra-ASEAN Trade Disputes

- Source: Lack of Compliance (clear rules)
- Actor: State to State (private interests)
- At Stake: Compliance or Damages
- Outcome: MAS or Compliance/Damages
- DS Method: Adjudication (under the shadow)
- Result: WTO Reports (could have been EDSM but lack of institutional capacity and capital at ASEC)

# Yaung Chi Ooi v Myanmar (ISDS)

- Source: Lack of Compliance (clear rules)
- Actor: Alien (Investor) to State
- Outcome: Damages (and depoliticization)
- At Stake: Compliance or Damages
- DS Method: ISD Arbitration (under the shadow of adjudication)
- Result: ICSID pursuant to 1987 ASEAN IGA

# ASEAN and Human Rights

- Source: Clarity (maybe also Capacity)
- Actors: Domestic v State (int'l concern)
- At Stake: Potential Regime Change v Tensions
- Outcome: Common epistemic understanding
- DS Method: Clarification (and Monitoring)
- Result: No DSM – desensitization and constructivist AICHR



# Taxonomy of Disputes & DS Architecture

- Usually Political/Security, Economic and HRs
- Others look at Actors
- Suggestion: Source of Conflict and Stakes (both Actual and Counterfactual)
  
- Outcome Driven DSM Design
- Purpose Oriented
- Constructivist - c.f. SADC tribunal

# DS Design Checklist

1. Do you know what outcome you don't want?
2. Do you know what outcome you want?
3. What are the actual stakes?
4. What are the counterfactual (non-resolution of dispute/conflict) costs?
5. Have the actors been culturalized to accept the obligations and process? (*e.g.* democracy, aware of the counterfactual costs etc.)
6. What are the existing institutional capacities?



***We may not always have similar views,  
but we have a similar goal...***

**From just peace to A Just Peace**

# ASEAN Foreign Ministers' (AMM) Retreat

Hua Hin, Prachuap KhiriKhan, Thailand

13-14 August 2013

