

# The Dispute Settlement Mechanism of ASEAN:

ASEAN's Efforts to be a Rules-based Organization

PARK, Bokhee

Introduction

ASEAN's efforts for the constitutionalization of "ASEAN law"

Dispute settlement mechanism of ASEAN

Dispute settlement practice

Outlook on "ASEAN will be a more rules-based organization?"

Conclusion

## Introduction

Since its establishment, the Association of Southeast Asia Nations<sup>1)</sup> (ASEAN) has evolved as a key player of international relations and it has been often referred to as the second most successful regional organization after the European Union (EU). However, there are quite significant differences between these two prominent regional organizations. The EU is a supranational organization, in which the member states have voluntarily agreed to give up their sovereignty in part. By contrast, ASEAN is an inter-governmental organization. ASEAN Member States (AMS) have not established the mechanism like the European Commission, which is able to exercise the pooled

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1) When ASEAN was founded on 8 August 1967, it was to set up for fostering mutual trust among the original five countries: Indonesia, Malaysia, Philippine, Singapore, Thailand. Soon after the independence from United Kingdom in 1984, Brunei became the sixth member state of ASEAN. Entering 1990s, Vietnam (1995), Laos and Myanmar (1997), and Cambodia (1999) joined ASEAN consecutively. At present, these ten states are making up ASEAN. According to Article 31 of the ASEAN Charter, the Chairmanship of ASEAN shall rotate annually, based on the alphabetical order of the English names of Member States. As of 2020, Vietnam is the chair of ASEAN.

sovereignty on behalf of the member states.

Focusing on the dispute settlement mechanism, while the EU has a European Court of Justice, a court is absent within ASEAN. It is not likely to establish an independent judiciary system, which supersedes each member's sovereignty in the near future.

The decision-making process of ASEAN, which is known as 'ASEAN Way' - a somewhat loose way to arrive at implicit agreements through consultation and consensus. The ASEAN way has presented the image of ASEAN to the international society as it is a group of sovereign nations operating on the basis of ad hoc understanding and informal procedures rather than within the framework of binding agreements arrived at through formal processes.<sup>2)</sup>

It was rather pronounced in the early years of the organization. The Bangkok Declaration of August 1967, a fundamental document for the foundation of ASEAN, was a mere declaration of two pages setting forth the ends and means of Southeast Asian cooperation. The foreign ministers, not the heads of states, of the five founding states signed it. It required no ratification.<sup>3)</sup>

It took almost ten years to conclude the first legally binding treaty. The heads of states of ASEAN adopted the Declaration of ASEAN Concord (or Bali Concord as renowned) in 1976 and concluded the first legally binding treaty - the Treaty of Amity and Cooperation (TAC). The 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 the settlement of differences or disputes by peaceful means in accordance with Article 2 of the TAC.

Entering 1980s, ASEAN concluded relatively minor agreements of a practical nature. The Agreement for the Promotion and Protection of Investment and the agreement on the standstill and rollback of non-tariff

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2) Address by Rodolfo C. Severino, Secretary-General of ASEAN, "The ASEAN Way and the Rule of Law" (3 September 2001) <[http://asean.org/?static\\_post=the-asean-way-and-the-rule-of-law](http://asean.org/?static_post=the-asean-way-and-the-rule-of-law)>.

3) *ibid.*

barriers were concluded at the third ASEAN Summit in 1987. Besides, there were the 1977 ASEAN currency swap arrangement, the 1979 agreement on the food security reserve, the 1985 agreement on the mutual recognition of drivers' licenses, and the 1986 establishment of the petroleum security reserve.

At the 1992 ASEAN Summit, the Agreement of the Common Effective Preferential Tariff for the ASEAN Free Trade Area (AFTA) was concluded. This is the significant launching of ASEAN's economic integration. Under this agreement, the first six members of ASEAN (Brunei, Indonesia, Malaysia, Philippine, Singapore, Thailand) are legally committed to reducing tariffs on their trade with one another to a range of zero to five percent by the beginning of 2002. The tariff reductions are to be carried out through national legal enactments by each party to the agreement in accordance with an agreed schedule.<sup>4)</sup>

On the security realm, ASEAN leaders signed the Southeast Asia Nuclear Weapons-Free Zone Treaty (SEANWFZ) in 1995, which legally commits their states not to develop, manufacture or otherwise acquire, possess or have control over nuclear weapons. AMS are obligated not to allow others to do so in their respective territories. They also undertook certain obligations pertaining to the non-proliferation of nuclear weapons and the peaceful uses of atomic energy.

### **ASEAN's efforts for the constitutionalization of "ASEAN law"**

Entering the 2000s, the AMS had been endeavoring the constitutionalization of "ASEAN law". The leaders or ministers of the AMS had in common the aspiration of transforming the ASEAN into a more systemized and rules-based organization. They regarded the ASEAN Charter as the key tool of dispute settlement mechanism among the member states.

The 9th ASEAN Summit (October 2003) adopted the Declaration of ASEAN Concord II (also known as Bali Concord II), which called for the improvement of the existing dispute settlement mechanism to ensure expeditious and legally binding resolution of any economic disputes. The next year, at the

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4) *ibid.*

10th ASEAN Summit (November 2004), ASEAN leaders adopted the ASEAN Security Community Plan of Action. The Annex of this Plan of Action commits to work towards the development of ASEAN Charter. The Charter will reaffirm ASEAN's goals and principles in inter-states relations, in particular, the collective responsibilities of all AMS in ensuring non-aggression and respect for each other's sovereignty and territorial integrity: the promotion and protection of human rights: the establishment of the effective and efficient institutional framework for ASEAN.

In 2005, the ASEAN leaders issued the Declaration on the Establishment of the ASEAN Charter at the 11th ASEAN Summit. The declared aim of the Charter was to create the legal and institutional framework for ASEAN. To this end, an Eminent Persons Group (EPG) was set up and tasked with re-imagining ASEAN as an institution. The EPG was specifically asked to look into effective conflict resolution mechanisms.<sup>5)</sup>

The EPG Report was submitted to the leaders 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 EPG Report and setting up a High Level Task Force (HLTF) for the drafting of the ASEAN Charter. The Charter was presented by HLTF and was adopted at the 13th ASEAN Summit in Singapore (November 2007). The next year the Charter came into force.

Indeed, after the ASEAN Charter's entry into force on 15 December 2008, ASEAN could be regarded as a rules-based organization. Diane A. Desierto argues that ASEAN cooperation in the pre-Charter era featured more legislative (law-making) and executive (law-implementing) functions, rather than formal judicial oversight or interpretation.<sup>6)</sup> However, with the new Charter, the ASEAN laid the foundation to transit from a loose intergovernmental organization to a normative and institutional one. The fourteen Principles of the ASEAN Charter not only include pre-Charter norms from the formative

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5) Walter Woon SC, "Dispute Settlement the ASEAN Way", Center for International Law, Faculty of Law, National University of Singapore, p7 (2012).

6) Diane A. Desierto, ASEAN's Constitutionalization of International Law: Challenges to Evolution under the New ASEAN Charter, SSRM, p16 (2010).

instruments underlying ASEAN as an intergovernmental cooperation of states, but also formally set as key ASEAN Principles contemporary multilateral norms on free trade, democratic government, and the promotion and protection of human rights.<sup>7)</sup>

## **Dispute settlement mechanism of ASEAN**

The ASEAN Charter was designed to create the legal framework for ASEAN as a rules-based organization and includes the framework for the settlement of disputes — Chapter VIII of the Charter. The chapter VIII enunciates three categories of disputes and the way of settling each category.

First, disputes which do not concern the interpretation or application of any ASEAN instrument are to be resolved in accordance with Treaty of Amity and Cooperation (TAC).<sup>8)</sup>

Secondly, economic disputes will be settled by recourse to the ASEAN Protocol on Enhanced Dispute Settlement Mechanism (the Vientiane Protocol).<sup>9)</sup>

Thirdly, as for other sorts of disputes, the Protocol to the ASEAN Charter on Dispute Settlement Mechanisms (the DSM Protocol) is applied.

### **(1) The Treaty of Amity and Cooperation(TAC)**

As the first legally binding treaty, the TAC includes some articles on the Pacific Settlement of Disputes in chapter IV.

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 of the TAC also states that “the High Contracting Parties shall refrain from the threat or use of force and shall settle such disputes among themselves through friendly negotiations”. The dispute settlement mechanism under the TAC consists of a High Council

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7) *ibid*, p2.

8) ASEAN Charter, article 24(2).

9) ASEAN Charter, article 24(3).

comprising one representative at ministerial level from each ASEAN member states together with representatives of non-ASEAN member states which are directly involved in the dispute.<sup>10)</sup> If no solution is reached through direct negotiations, the High Council may recommend appropriate means of settlement such as good offices, mediation, inquiry or reconciliation.<sup>11)</sup>

As above-mentioned, the TAC is the first legally binding treaty in the realm of addressing political disputes among ASEAN states and has been regarded as the basic guideline for dispute settlement resolution from any potential or unexpected fallout.

However, there are three drawbacks in the mechanism of the TAC. Firstly, article 14 and article 15 do not apply unless the parties to the dispute agree. The non-mandatory nature of the procedure means that it would be used only if there is a significant change in the political mindset of the High Contracting Parties in favor of objective dispute settlement.<sup>12)</sup>

Secondly, the TAC procedure allows non-ASEAN member states to get involved in the dispute settlement process. Non-ASEAN member states may be represented as observers at meetings of the High Council.<sup>13)</sup> Regional disputes need to be resolved regionally, but the AMS could not reach the consensus on excluding non-member states from the dispute settlement process.

Thirdly, 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. Any dispute settlement under the TAC will have to be consensual rather than confrontational.<sup>14)</sup>

In consideration of these weaknesses of the TAC mechanism, the TAC is likely to be just used as an inspirational document, committing the High Contracting Parties to a peaceful settlement of their disputes.<sup>15)</sup> The dispute

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10) Treaty of Amity and Cooperation, article 14.

11) Treaty of Amity and Cooperation, article 15.

12) Walter Woon SC, "Dispute Settlement the ASEAN Way", Center for International Law, Faculty of Law, National University of Singapore, p12 (2012).

13) *ibid*, p13.

14) *ibid*, p13.

15) *ibid*, p14.

between Malaysia and Indonesia over the islands of Sipada and Ligitan, for example, was referred to the ICJ instead of the TAC mechanism. It is interesting to see the Special Agreement for submission of the case to the ICJ stated that the parties desired that this dispute should be settled in the spirit of friendly relations existing between the Parties as enunciated in the TAC.

## (2) Economic Disputes

The 1992 Framework Agreement of Enhancing ASEAN Economic Cooperation provided for the establishment of a dispute settlement mechanism. For the creation of an ASEAN Economic Community, some means of settling disagreements among the member states over interpretation and implementation of various economic agreements were essential and indispensable. At the 11th ASEAN Summit in 2005, the economic ministers signed the ASEAN Protocol on Enhanced Dispute Settlement Mechanism (the Vientiane Protocol).

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 settlement of a dispute.

The core of the dispute settlement mechanism is the mandatory procedure prescribed by the Vientiane Protocol.<sup>16)</sup>

If there is any dispute under the covered agreements, the aggrieved party will request consultations. The other party must reply within 10 days and enter into consultations within 30 days.<sup>17)</sup> If it fails to do so or if consultations do not result in a satisfactory resolution within 60 days, the matter may go to the Senior Economic Officials Meeting (SEOM). A panel will be established at the meeting of the SEOM. The function of the panel is to make an objective assessment of the dispute, and its findings and recommendations in relations to the case.<sup>18)</sup> The panel is obliged to submit its report and recommendations within 60 days. SEOM must adopt the report within 30 days unless there is a consensus not to

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16) *ibid*, p15.

17) Protocol, article 3(4).

18) Protocol, article 7.

do so or a party notifies its decision to appeal.

An Appellate Body is established by the ASEAN Economic Ministers Meeting. An appeal must be concluded within 60 days. The Appellate Body's report shall be adopted by SEOM within 30 days. The disputing parties are obliged to accept the report unconditionally and comply with 60 days of the report of the Appellate Body.

The Vientiane Protocol has similarities to the dispute settlement procedure of the WTO, especially with its strict timelines and provisions to ensure that the panel and appellate reports are adopted. However, even though the WTO Dispute Settlement Mechanism has been invoked by member states (Singapore vs. Malaysia, Singapore vs. the Philippines and the Philippines vs. Thailand), the ASEAN Mechanism has never been invoked, and no assessment of its effectiveness can be made. If ASEAN member states are eager to create an economic community, they need to take the Vientiane Protocol seriously when disagreements arise.

### **(3) Non-economic Disputes**

ASEAN foreign ministers signed the Protocol to the ASEAN Charter on Dispute Settlement Mechanisms (DSM Protocol) in 2010. The Protocol covers other disputes that do not fall within the scope of the TAC or the Vientiane Protocol.

Article 5 of the Protocol says that a complaining party may request a consultation with a responding party and the latter shall enter into consultation within 60 days. The consultation shall be completed within 90 days, or any other period mutually agreed by the Parties to the dispute from the date of the request of consultation.

According to article 6, the Parties to the dispute may at any time agree to good offices, mediation or conciliation, and may request the Chairperson of ASEAN or the Secretary-General of ASEAN to provide good offices, mediation or conciliation.

In addition, the complaining party may request for the establishment of an arbitral tribunal to resolve the dispute if the consultation does not result in settlement of the dispute.<sup>19)</sup> If the responding party does not agree to the

request for the establishment of an arbitral tribunal or fails to respond within the maximum of 45 days from the date of the notice from the complaining party, the complaining party may refer the dispute to the ASEAN Coordinating Council (ACC),<sup>20)</sup> which comprises the foreign ministers of the ASEAN members.

The ACC can direct the parties to settle the dispute by good offices, mediation, conciliation or arbitration.<sup>21)</sup> It has a maximum of 75 days to do this.<sup>22)</sup> If the ACC cannot come to a decision, the dispute will be referred to the Summit as an unresolved one.<sup>23)</sup>

Any member state, affected by non-compliance with an arbitral award or the result of any other dispute settlement mechanism, may refer the matter to the ASEAN Summit for a discussion, through a notification to the ACC.<sup>24)</sup> The ACC is to facilitate consultations among the parties to settle the matter without having to involve the Summit. If the problem cannot be resolved, the matter will be referred to the Summit within 90 days, or any other timeframe agreed by the Member States that are Parties to the dispute.<sup>25)</sup> The ASEAN Summit is the final tribunal of appeal from dispute settlement mechanisms. It is imperative to ensure that the decision of the Summit is firmly rooted in law in order to realize the desire of ASEAN Leaders in transforming ASEAN into a rules-based organization.

With Singapore's deposit of its instrument of ratification to ASEAN Secretary, DSM Protocol became in force on 28 July 2017.<sup>26)</sup> The DSM has

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19) Protocol to the ASEAN Charter on Dispute Settlement Mechanisms in 2010 Article 8(1).

20) Protocol to the ASEAN Charter on Dispute Settlement Mechanisms in 2010 Article 8(4).

21) Protocol to the ASEAN Charter on Dispute Settlement Mechanisms in 2010 Article 9(1).

22) Protocol to the ASEAN Charter on Dispute Settlement Mechanisms in 2010 Article 9(3).

23) Protocol to the ASEAN Charter on Dispute Settlement Mechanisms in 2010 Article 9(4).

24) Rule1(b) of the 2012 Rules for Reference of Non-Compliance to the ASEAN Summit.

25) Rule5 of the 2012 Rules for Reference of Non-Compliance to the ASEAN Summit.

never been invoked to date, but it is very important for ASEAN states to make use of their own system whether the DSM Protocol is abided by ASEAN states or not will determine how ASEAN will grow as a rules-based organization in the future.

### **Dispute settlement practice**

Until now, there has not been formal resort to the types of modalities written in the TAC or the Vientiane Protocol. The High Council foreseen within the TAC, as well as the dispute settlement mechanism in the ASEAN Charter, has never been invoked.

Nevertheless, the conflict between Cambodia and Thailand over the area surrounding the Preah Vihear Temple in 2011 could be worth being regarded as the unprecedented effort of utilizing ASEAN mechanism.

The conflict of the Temple of Preah Vihear is a classical boundary dispute between Cambodia and Thailand, which was brought to the ICJ by Cambodia in 1959 for the first time. The final decision of the ICJ on 15 June 1962 stated that the Preah Vihear Temple was located on territory under the sovereignty of Cambodia and, therefore, Thailand was under obligation to withdraw any military or police forces or other guards or keepers, stationed at the Temple.<sup>27)</sup>

The dispute between two states flared up again when Cambodia applied the ruins of Preah Vihear to be recognized as a UNESCO World Heritage site in 2008. On 4 February 2011, violent conflict occurred between Cambodia and Thailand in the vicinity of Preah Vihear, and it led to the loss of lives on both sides and the displacement of local populations in the affected border areas.

Facing this conflict, Cambodia has sought to multilateralize and internationalize this issue and asked for convening the relevant meeting of the United Nations Security Council. There were venues for mediating this conflict other than the UN, among them regional countries and ASEAN itself.<sup>28)</sup>

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26) <http://agreement.asean.org/search/index/3.html?q=instrument%20of%20ratification>

27) Sven Mibling, "A Legal View of the Case of the Temple of Preah Vihear" p58, World Heritage Angkor and Beyond, Gottingen University Press (2011).

Indonesia, as the chair of ASEAN in 2011, has sent its foreign minister Dr. Marty Natalegawa to Cambodia and Thailand on 7 and 8 February respectively. The new ASEAN Charter allows the parties to a dispute 'to request the Chairman of ASEAN or the Secretary-General of ASEAN to provide good office, conciliation or mediation.'

Dr. Marty Natalegawa and the foreign ministers of Cambodia and Thailand were invited to the 14 February UNSC meeting. At the meeting, the Council President, Brazil, issued a statement calling on 'the two sides to display maximum restraint and avoid any action that may aggravate the situation' and 'to establish a permanent ceasefire and resolve the situation peacefully and through effective dialogue'. It went on: 'The Council members expressed support for ASEAN's active efforts in this matter and encouraged the parties to continue to cooperate with the organization in this regard. They welcomed the Meeting of ASEAN foreign ministers on 22 February.'<sup>29)</sup>

The 22 February ASEAN foreign ministers' meeting was hosted and chaired by Indonesia. It resulted in sophisticated compromises among Thailand's call for bilateral negotiations, third-party intervention, and ASEAN's role. While the statement released at the end of the meeting underscored bilateral talks, it also referred to Indonesia, which the ministers called on to send ceasefire observers on both sides of the disputed territory in the capacity of ASEAN's chair.

This is the first time that the UNSC has called upon ASEAN to ensure an effective dialogue in search of a lasting solution to the border dispute between two Member States. The late Secretary-General of ASEAN, Dr. Surin Pitsuwan once reiterated, "UNSC's open and official support for conciliation efforts to the ASEAN Chair is a sign that the UN has faith in ASEAN to help its Member States find amicable regional solutions to bilateral problems such as this."<sup>30)</sup>

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28) K. Kesavapany, ASEAN and the Cambodia-Thailand Conflict, East Asia Forum, IS-EAS (March 2011).

29) *ibid.*

30) ASEAN Secretariat homepage, "Historic Firsts: ASEAN Efforts on Cambodian-Thai Conflict Endorsed by UNSC" (February 2011) <<http://asea.org/historic-firsts-asean-eforts-on-cambodia-thai-conflict-endorsed-by-unsc>>.

Despite these efforts, peace at the affected border area was not permanently secured. Hostilities resumed on 22 to 23 April 2011, only weeks before the ASEAN Summit in May. With the imminent regional insecurity, the ASEAN leaders adopted the Chairman's Statement titled "Current Situation in the Cambodia-Thailand Border" in the occasion of the 18th ASEAN Summit in Jakarta on 7 to 8 May.<sup>31)</sup> The statement says that "we appreciate that Cambodia and Thailand have agreed on the text of the Terms of Reference on the Indonesian Observer Team in the affected areas following the incidents in February 2011 and encourage the attainment of an environment conducive to their assignment. We also expressed our appreciation and support for the continuing effort of Indonesia, current Chair of ASEAN, to facilitate the process through its appropriate engagement which would help advance our collective efforts to attain the ASEAN Community."

Additional significant international recognition of the role of ASEAN in maintaining the peace between Cambodia and Thailand came from the ICJ through its provisional measures announced on 18 July 2011. The ICJ was unequivocal in calling on the two sides to continue to cooperate within ASEAN and for the ASEAN observer team to monitor the provisional demilitarized zone.<sup>32)</sup>

The TAC was not officially invoked in addressing the outbreak of border incidents between Cambodia and Thailand in 2011, but its norms and principles have been of real relevance. The principles for the peaceful settlement of disputes embodied within the TAC were reinforced in a succession of seminal ASEAN treaties and documents, including the ASEAN Charter (Article 2 Principles). The ASEAN Political-Security Community Blueprint 2025 has given further weight to such a commitment, including through its requirement to

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31) ASEAN Secretariat homepage, "Chair's Statement of the 18<sup>th</sup> ASEAN Summit, Jakarta, 7 to 8 May 2011: ASEAN Community in a Global Community of Nations" <<http://asea.org>>.

32) ICJ, "Reports of Judgments, Advisory Opinions and Orders. Request for Interpretation of the Judgment of 15 June 1962 in the case concerning the Temple of Preah Vihear. Request for the Indication of Provisional Measures. Order of 18 July, 2011" <<http://www.icj-cij.org>>.

strengthen respect for and recognition of the TAC and to utilize the Protocol to the ASEAN Charter on Dispute Settlement Mechanisms and its relevant rules.<sup>33)</sup>

### **Outlook on “ASEAN will be a more rules-based organization?”**

As above-mentioned, the dispute settlement mechanism of ASEAN itself has not played a direct role in the resolution of bilateral disputes or conflicts as of 2020. Most of all AMS are extremely reticent to be the first to openly flout the commitment to avail of ASEAN instruments,<sup>34)</sup> but its relevance cannot be underestimated. The commitment to the non-use of force enunciated within the TAC has had a critical restraining effect on the behavior of AMS involved in the disputes.

Despite the current situation, it is expected ASEAN to be transformed into more rules-based organization in the future not only by the geopolitical or intra-states agenda but also by its own voluntary will.

There are some issues or agenda faced by AMS, which are potentially threatening the regional peace and security: for example, the maritime claims in the South China Sea, transboundary haze pollution, territorial disputes among AMS, and so on.

On the issue of the South China Sea, four ASEAN member states (Brunei, Philippines, Malaysia, and Vietnam) are the claimants, and all AMS and China are participating the substantive negotiations towards the early conclusion of an effective and substantive Code of Conduct (COC) in the South China Sea. With the deteriorating situation of the US-China conflict, this issue could be triggering complex frictions which possibly entangle the related ASEAN states into a New Cold War in the regional context.

Because ASEAN countries have to continuously rely on both the US and

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33) ASEAN Secretariat homepage, “ASEAN Political-Security Community Blueprint 2025” <<http://asea.org>>.

34) Marty Natalegawa, “Does ASEAN Matter?”, p28, ISEAS-Yusof Ishak Institute in 2018.

China for trade and investment, they tend to have a balanced approach in dealing with the rivalry between the two major powers. While ASEAN claimant states have continuously criticized China's aggressive behaviors in the South China Sea, ASEAN as a whole is reluctant to castigate China by name in their official statements or communiqués, recently as observed at the 36th ASEAN Summit in June 2020.

ASEAN seems likely to find out the peaceful resolutions from its own established dispute settlement mechanism, not to mention the participation of negotiation of COC. In the case of outbreak of unplanned encounters like fishing boat collision, ASEAN could invoke the TAC mechanism because China, along with India, was accessed to the TAC in 2003 as the first non-ASEAN state.

On the contrary to the South China Sea case, transboundary haze pollution is a mainly regional environmental issue, especially among the three specific nations, namely Indonesia, Malaysia and Singapore. While the ASEAN Agreement on Transboundary Haze Pollution (AATHP) was concluded in 2002, the establishment and operationalization of the ASEAN Coordinating Centre for Transboundary Haze Pollution Control has not been implemented by the conflict between Indonesia and Singapore.

Besides, there are still some territorial disputes among AMS. The Philippines' Sabah Claim against Malaysia, the Ligitan and Sipidan dispute (Malaysia vs. Indonesia), the Pedra Branca dispute (Malaysia vs. Singapore) are the examples. These unresolved territorial disputes are not comparatively serious, and are stably managed by related states. However, nationalistic domestic fervor and dynamics may make territorial disputes complex. Considering the sensitiveness of territorial sovereignty, the preemptive preparedness for future conflicts or unexpected disputes in a regional way cannot be overemphasized.

Above all, ASEAN itself has been striving for being a systemized and rules-based organization since the adoption of the ASEAN Charter in 2007. The ASEAN Political-Security Community Blueprint 2025 includes the key elements of the rules-based, people-oriented, people-centered community. In particular, it states that "ASEAN resolves differences and disputes by peaceful means, in accordance with the ASEAN Charter and principles of international law,

including refraining from the threat or use of force as well as adopting peaceful dispute settlement mechanisms".<sup>35)</sup>

ASEAN is also persuading as many as non-ASEAN member states to be the contracting party of the TAC. Starting from China in 2003 to Republic of Peru in 2019, twenty-seven countries already be accessed to the TAC. Moreover, ASEAN leaders continuously reaffirm the importance and enduring value of the TAC as a vital instrument in the promotion of an ASEAN-centered regional architecture, and a foundation for the maintenance of regional peace and stability. ASEAN leaders welcomed the adoption of the ASEAN Foreign Ministers' Statement on the Occasion of the 40th Anniversary of the TAC by the 49th ASEAN Ministers' Meeting in Vientiane in July 2016 which, among others, reiterates their firm commitment to uphold the purposes and principles of the TAC and explores a legally binding instrument building upon the TAC for the wider region.<sup>36)</sup>

Facing the increasing rivalry between the US and China, ASEAN is trying to balance its position and not to be swayed by the major powers. As an act of diplomatic and political assertion by ASEAN, the Leaders adopted the ASEAN Outlook on the Indo-Pacific at the 34th ASEAN Summit in 2019 which will help guide ASEAN's engagement and cooperation in the wider Indo-Pacific region. They reaffirmed ASEAN centrality, inclusiveness, complementarities, a rules-based order anchored upon international law, and commitment to advancing economic engagement in the region as the main principles of the ASEAN Outlook on the Indo-Pacific.<sup>37)</sup>

The Leaders also encourages external partners to work with ASEAN in promoting the principles as contained in the ASEAN Outlook on the Indo-Pacific and to undertake cooperation with ASEAN on the four key areas of collaboration, namely maritime cooperation, connectivity, sustainable development and economic cooperation, in order to realize practical projects.

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35) ASEAN Political Security Community Blueprint 2025, p22.

36) Chairman's Statement of the 28th and 29th ASEAN Summits Vientiane, 6 to 7 September 2016.

37) Chairman's Statement of the 34th ASEAN Summit, Bangkok 2019.

The Outlook is of tremendous importance as it reaffirms ASEAN's outward-looking perspective beyond Southeast Asia.<sup>38)</sup>

With a population exceeding 642 million and an area of more than 1.7 million square kilometers, ASEAN represents a market with immense potential, a dynamic economy and a bright spot in the global economy.<sup>39)</sup> ASEAN has been vigorous becoming a major economic force in Asia and a driver of global growth. ASEAN is expected to be the fourth largest market after the EU, the US and China by 2030 if it keeps at current growth rates.<sup>40)</sup> With its increasing visibility in international relations and potential capacities as a regional organization, ASEAN will be likely to express its centrality and to exert its diplomatic tactics with other countries.

In the meantime, ASEAN high-level officials have been pressured to take the lead on their neighbor's or regional issues. One of the hot issues faced by ASEAN is the treatment of the Rohingya in Rakhine State, which could be the litmus test for whether ASEAN can demonstrate its integrated capacity of the resolution of regional affairs.

The Organization of Islamic Cooperation(OIC) and the UN Council on Human Rights criticized Myanmar to violate the provisions of the Genocide Convention and requested a safe return to Myanmar of the victims of the Rohingya. In particular, the Gambia, on behalf of the OIC, filed a case at the ICJ and called for provisional measures on 11 November 2019. Because ASEAN has been grappling with the Rohingya case, it should have offered constructive and positive support to Myanmar. However, ASEAN could not ensure the international society, especially the UN, that it has the will and capacity to address the crisis.

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38) Marty Natalegawa, "Reinforcing ASEAN's Core Whilst Going Global", ASEAN Focus Issue4/2019, p17, ASEAN Studies Center of ISEAS-Yusof Ishak Institute (20 August 2019).

39) Deputy Prime Minister and Minister of Foreign Affairs of Vietnam Pham Binh Minh, "ASEAN Chairmanship 2020 for a cohesive and responsive ASEAN", Vietnam News on 23 January 2020.

40) Investing in ASEAN 2013-2014 <<http://www.usasean.org/system/files/downloads/investmentinASEAN2013-2014>>.

Facing the pressure from the OIC and the UN, Myanmar tends to depend on the support from its ASEAN colleagues. In the case of unexpected clashes or conflicts, Myanmar may provoke the TAC mechanism. For other ASEAN member states, it is imperative to build the appropriate “comfort level” among the Myanmar authorities in regard to the neighboring countries’ concern and engagement on the issue.

## **Conclusion**

ASEAN was established as a regional organization for enhancing mutual trust at first. However, as it went through the more than fifty years’ history, ASEAN has transformed itself into a more systemized organization, and it is requested to play more significant roles not only in the regional agenda but also in international issues. ASEAN leaders of the all sectors encompassing political-security and socio-economic affairs seem to envision affirmative ASEAN in common as indicated in respective statements, communique, blueprints, plans of action, etc. How to manage intra-ASEAN issues that may have global repercussions will be the litmus test for the future of ASEAN.

If ASEAN is rooted for becoming a rules-based organization, it is prerequisite to set up as independent legal body. This body needs to be entitled to advise the leaders on the basis of the rule of law, not on the basis of the political recommendations. Besides, because all ASEAN states have deposited their instrument of ratification to ASEAN Secretariat, the Dispute Settlement Mechanisms of the ASEAN Charter is an appropriate tool for addressing every kind of disputes and conflicts from small trade friction to integral national interests among ASEAN countries.

In general, states are often reluctant to bring their internal or bilateral issues to either multilateral or international arenas. With the declaration of the start of the ASEAN Community in 2015, AMS are on-demand to feel solidarity or commonality as family. The concerns of the ASEAN family on matters relating to one of its own should not be reviewed as interference or an unfriendly act, but rather one stemming from genuine goodwill as neighbors belonging to a common community.<sup>41)</sup> If ASEAN is to truly make irreversible

the transformation of the trust deficit to strategic trust, the continued reticence for the use on the ASEAN dispute settlement mechanism needs to be changed. In other words, AMS must have trust in, and entrust, the various mechanisms that they themselves have created.

Moreover, ASEAN has to enhance a sense of common ownership and participation and will have to keep raising awareness of ASEAN among its peoples. All ASEAN states are to make collaborative efforts of the dissemination of information about ASEAN and practical achievements through ASEAN by making use of their own newspapers, TV programmes, social media and so on.

ASEAN also needs to strategically nurture third-party non-state entities in addressing their own conflicts or disputes. AMS have to consider maintaining a roster of conflict-resolution experts to whom they could turn to facilitate the prevention, management and resolution of disputes. Before a dispute or conflict is exacerbating, related countries shall make consultations with their regional experts on how to reach a peaceful resolution of the disputes.

It is critical that the ASEAN Secretariat be provided with the facilities, resources and systems commensurate with the increased expectation placed upon it. Despite the regular expression of support for the work of the ASEAN Secretariat, the reality is that it has been under-resourced. AMS are required to ensure vigorous follow-up of agreements to strengthen the capacities of the ASEAN Secretariat.

Because the ASEAN Charter emphasizes<sup>42)</sup> the roles of the Secretary-General of ASEAN in the dispute settlement process among AMS, it is time that the ASEAN Secretariat should be equipped with qualified staffs of international laws and regulations. Most of all, ASEAN leaders have realized the necessity of more systemized and professional Secretariat like the UN Secretariat and have called upon the strengthening the ASEAN Secretariat on behalf of ASEAN itself. In order to be seen as a “neutral breaker” in the

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41) Marty Natalegawa, “Does ASEAN Matter?”, pp55-56, ISEAS-Yusof Ishak Institute in 2018.

42) Article 23 of the ASEAN Charter.

company of Great Powers in East Asia, ASEAN would have to transform itself by revamping its Secretariat into a powerful and knowledgeable body and by empowering a high profile Secretary-General for ASEAN.<sup>43)</sup>

With the increasing economic exchanges and cooperation among ASEAN countries, the possibility of trade friction and economic feud seems to be considerably high. Making use of ASEAN dispute settlement mechanism by AMS from the trade issues is a good starting point for making ASEAN own system meaningful and materialized because economy-related issues are relatively less affecting the basic national pride and interests in comparison with territorial sovereignty.

Dr. Marty Natalegawa, the former foreign minister of Indonesia, argues “the most significant change that has taken place since the establishment of ASEAN, is a critical paradigm shift; an opening for ASEAN to concern itself with issues that would have been considered to be the exclusive preserve of its sovereign member states”.<sup>44)</sup> With the adoption of ASEAN Community Vision 2025 in 2015, ASEAN leaders declared its vision of becoming a people-oriented, people-centered ASEAN. In order to transit from a state-centric to a more people-centric ASEAN, member states must be willing to put them into effect and to empower the capacities they have established.<sup>45)</sup> ASEAN are to be recommended as a “constructive engagement” player. It is essential that ASEAN constantly refines such an approach.

By contrast to the reality of ASEAN, the ASEAN Charter may be excessively ambitious. However, adherence to the rule of law as an aspirational goal is quite important for the future development of ASEAN. It is closely connected with and will contribute to the transformation of ASEAN into a people-oriented, people-centered ASEAN.

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43) Joshua Kurlantzick (2012), “ASEAN’s Future and Asian Integration”, Council on Foreign Relations.

44) Marty Natalegawa, Does ASEAN Matter?, p212 (ISEAS- Yusof Ishak Institute 2018).

45) Ibid, p217.