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ASEAN’s weak role in bilateral dispute settlement: The case of Preah Vihear (Phra Wihan)

Gabriela Steinemann

Abstract

This paper examines the role of ASEAN in the resolution of territorial conflicts between its member states. It studies the border dispute cases of Vietnam-Cambodia and Indonesia-Malaysia, before turning its focus to the Thai-Cambodian conflict over Preah Vihear (Phra Wihan).¹ The domestic political contexts in both countries provided important reasons for the weak role ASEAN has been able to play. But the association’s struggle to find a meaningful place in dispute settlement is not limited to Preah Vihear, and it will likely continue as long as member states are unwilling to make use of the mechanisms they once created. At the same time, the paper argues that ASEAN has been instrumental in providing venues for informal discussions as well as in the ad hoc diplomacy of its secretary-general and proactive chairs.

Introduction

Since the founding of ASEAN in 1967, territorial disputes have arisen between several of its member states. Concurrently, the association has adopted a series of agreements that stipulate, albeit weakly, mechanisms and modalities aimed at resolving such conflicts. Yet it seems that in practice, the national sovereignty concerns of member states have not allowed ASEAN to play a meaningful role. Bilateral conflicts tend to be managed bilaterally. Has this been true for the three cases studied, and if so to what extent?

This paper was originally written against the backdrop of what was portrayed in the Thai and international media as ASEAN’s failed attempts to help put an end to the border clashes between Thailand

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and Cambodia in February and again in May 2011. We begin by examining the possibilities ASEAN has at its disposal to facilitate the settlement of politico-security disputes between two member states, before reviewing the implementation in practice of relevant provisions.

ASEAN provisions for dispute settlement

ASEAN Declaration (Bangkok Declaration) 1967

The association’s founding declaration was silent as to what dispute settlement meant in practice. As Ramses Amer points out, this is paradoxical in the sense that one of the very motivations to establish ASEAN was the peaceful management of conflicts in the region.3 The Declaration did state as one of its general aims and purposes the promotion of regional peace and prosperity. This was to be achieved by “abiding respect for justice and the rule of law ... and adherence to the principles of the United Nations Charter.”4

Treaty of Amity and Cooperation in Southeast Asia (TAC, or Bali Treaty) 1976

Nine years after its foundation, ASEAN adopted the TAC. As a code of conduct for the settlement of bilateral disputes, the TAC foresaw the establishment of a “High Council” made up of one ministerial representative from every member state. Along with its role to “take cognizance of the existence of disputes or situations likely to disturb regional peace and harmony,”5 the Council would also mediate if bilateral negotiations failed.6 However, there was a lack of consensus among scholars as to whether member states could bring a dispute to the High Council or not.7 That they indeed could was not confirmed until 25 years later; during this time span, the High Council remained a mere intention and did not exist.

Although the TAC is open for accession by non-ASEAN states,8 its first protocol concluded in 1987 restricts participation in the High Council to those non-members who are directly involved in the dispute under consideration. This reflects the members’ desire to prevent outside interference in regional matters.
The High Council received its first clear modus operandi at the 34th ASEAN Ministerial Meeting in Hanoi in 2001. The Rules of Procedure provided clear guidelines for the work of the High Council. In principle, this was quite an achievement. But in practice, the body is not very strong—it cannot be, given the hesitant stance of member states towards it: they took 25 years to clarify the precise role they want it to play. This seems all the more astonishing as the Council does not have any legalistic-coercive power. Rather, it is a venue for discussion, seeking solutions through consensus. There is no risk for any party to be dictated to. In spite of this, the High Council has never been invoked. We may ask ourselves why. Is it because conflicting parties don't expect the Council to bring them further progress—having already tried bilateral negotiation, which they see as more practical than going multilateral? Or do they prefer not to involve ASEAN in their disputes for fear of creating tensions with other member states, given that they all depend on maintaining good relations with one another? The International Court of Justice (ICJ), in contrast, seems to be a more acceptable option because it is an external, entirely legal body detached from the politics of Southeast Asia.

**ASEAN Charter 2008**

The Charter dedicates a whole chapter (VIII) to the settlement of disputes. Article 22 states that “ASEAN shall maintain and establish dispute settlement mechanisms in all fields of ASEAN cooperation.” Article 23 allows conflicting parties to “request the Chairman of ASEAN or the Secretary-General of ASEAN, acting in an ex-officio capacity, to provide good offices, conciliation or mediation.” The High Council is reaffirmed as an instrument for conflict settlement in article 24.

**Political-Security Community Blueprint 2009**

The Blueprint reinforces the spirit of the Charter by declaring that “more efforts are needed in strengthening the existing modes of pacific settlement of disputes to avoid or settle future disputes.” In addition, it proclaims an early warning mechanism to defuse conflict, fight terrorism, combat piracy and promote good governance.
ASEAN dispute settlement in practice

Why haven’t mediation efforts been more effective? Conflict resolution provisions merely state the aims of cooperation, and existing mechanisms are not utilized. Informal diplomacy between ASEAN members, or ad hoc offers of help from third countries to mediate a bilateral conflict, have been more common. More often than not, however, such help has been refused in practice, one example being the Indonesian proposals to mediate and send observers to the Thai-Cambodian border.

Negotiation and decision-making: The “ASEAN Way”

Many scholars have invoked the “ASEAN Way” to explain why progress towards action-oriented cooperation has been slow, including in mediation. The concept has been defined as consisting of four elements: informality; inclusivity; consensus; and non-interference. As illustrated by the conflict resolution provisions mentioned earlier, the main priority of ASEAN member states is to manage bilateral disputes through peaceful means. Formal resolution mechanisms are not desirable because of fears they may disrupt relations between the disputing parties: Amer explains that dispute settlement is an aim for ASEAN countries, but not when it comes at the expense of maintaining stable relations with other members. Government representatives, especially security officials, have seen formalized mediation and enforced compromise to be signs of weakness and threats to sovereignty. Instead, they prefer to build confidence and understanding of each other’s positions by holding more informal meetings and taking decisions by consensus.

The roles of the chairman and secretary-general

The chairman and the secretary-general of ASEAN both have a potential role to play in the settlement of disputes, as suggested in the 2008 Charter. However, their involvement will continue to depend on the commitment and ad hoc efforts of each individual. Surin Pitsuwan was very proactive and effective in conflict-resolution diplomacy, for example after Cyclone Nargis in May 2008 and in the case of the Thai-Cambodian border clashes in October 2008. Nonetheless, Michael R.
J. Vatikiotis advocates the provision of more resources in ASEAN to allow the good offices of the secretary-general and the chairman to be deployed effectively, which the relatively small Secretariat currently makes impossible.\textsuperscript{14}

Throughout his tenure, Surin Pitsuwan called for greater discussion of domestic problems within ASEAN and for members to support the “space between states”\textsuperscript{15}—civil society and NGO initiatives—arguing that these had been successful in helping conflicting parties come to a lasting agreement, thanks to the fact that they built on local knowledge in peacemaking. However, as long as there is no high-level support for low-level mediation efforts, sustainable peace will be hard to achieve.

**Case studies: Bilateral territorial disputes and ASEAN’s role**

**Vietnam-Cambodia: border disputes**

Vietnam and Cambodia have been in disagreement over their land and maritime borders since the end of the First Indochina War in 1954. General tensions between the two countries were for a long time supported by mutual perceptions of the other as enemy and by different understandings of history: while Cambodia considers “that Vietnam has expanded its territory at the expense of Cambodia, ... in Vietnam the so-called march to the South is perceived as a gradual migration movement, not as an expansion at the expense of Cambodia.”\textsuperscript{16} Also, Amer sees the discrimination of and attacks against ethnic Vietnamese in Cambodia up to the late 1990s as an integral part of overall bilateral relations since 1954.\textsuperscript{17}

Clashes along the common land border erupted in 1975. Diplomatic efforts were disrupted in 1977, when border skirmishes turned into a full-scale war, ending in the taking of Phnom Penh by the Cambodian resistance forces and Vietnamese troops in late 1978.\textsuperscript{18} The heavy involvement of Vietnam in the People’s Republic of Kampuchea during the 1980s facilitated relations between the two countries and allowed the adoption of several agreements relating to their border disputes. The Treaty on the Delimitation of the Vietnam-Kampuchea Frontier, adopted in 1985, stipulated that the frontier would be the same as at independence. However, the pact was not accepted by the
opposition Coalition Government of Democratic Kampuchea, and the dispute continued.

Border tensions rose again in 1996 when First Prime Minister Prince Ranariddh accused Vietnam of encroaching on Cambodian soil in three border provinces and of annexing parts of its territory. In Amer's opinion, Ranariddh's generally tough talk was meant to enhance his nationalistic image and fuel anti-Vietnamese feelings: he was using foreign policy to achieve domestic goals. A series of bilateral meetings led to the creation of working groups, a joint border commission, and commitments to solve the disputes through peaceful dialogue. In 2005, finally, the adoption of the Supplementary Treaty (to the 1985 pact) started border demarcation a year later.

Since 2005, the official slogan of Vietnamese-Cambodian relations has been “good neighborliness, traditional friendship, comprehensive cooperation and long-term stability.”

Notes

1 The temple's denomination is one element of the dispute. In this paper, the internationally used Cambodian name is applied as reflecting the 1962 decision of the International Court of Justice (ICJ), which attributed the temple to Cambodia.

2 Various terms have been used in discussing the resolution of interstate disputes. Ramses Amer explains that “conflict management” encompasses a wide variety of methods to achieve the absence of conflict, including prevention and transformation. Although, according to Amer, “dispute settlement” is only one (judicial) part of conflict management, the term is nonetheless applied in this paper to describe the general process of resolving bilateral problems. “Dispute settlement” is also the term officially used by ASEAN. See Ramses Amer, 'Conflict management and constructive engagement in ASEAN's expansion,' Third World Quarterly, 20, 5, October 1999, p. 1045.

3 Amer, 'Conflict management,' p. 1031.


6 1976 TAC, article 15.
7 Amer, ‘Conflict management,’ p. 1034.
8 1976 TAC, article 18.
11 ASEAN Secretariat, ASEAN Political-Security Community Blueprint (Jakarta: ASEAN Secretariat, 2009), article 22, p. 10.
13 Amer, ‘Conflict management,’ p. 1036.
17 Amer, ‘Cambodia and Vietnam,’ pp. 102-103. Amer expresses an arguably one-sided point of view by mentioning only Cambodia’s perception of Vietnam as an enemy, not vice-versa.
18 Amer, ‘Cambodia and Vietnam,’ pp. 93-95.
19 Amer, ‘Cambodia and Vietnam,’ pp. 96-97.
21 Amer, ‘Cambodia and Vietnam,’ p. 105. As will be seen later in this paper, it is possible to draw parallels between Ranariddh’s behaviour (as portrayed by Amer) and the ambitions of Thai nationalists (according to Pavin).