

Not Quite Beyond the ‘ASEAN Way’? Southeast Asia’s Evolution to Rules-based Management of Intra-ASEAN Differences

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Introduction

On 20 November 2007, the Association of Southeast Asian Nations (ASEAN) formally adopted a charter, which subsequently entered into force on 15 December 2008.² This development led some observers to speculate on the changing nature of regional diplomacy in Southeast Asia from a hitherto longstanding preference for informality and consensus-based interactions to a rules-based and potentially compliance-oriented approach. This view of ASEAN regionalism builds on a conventional wisdom that Southeast Asia has traditionally been averse to legal solutions where its interstate relations are concerned. Purveyors of this argument invariably point to the diplomatic conventions and security norms and practices favoured by ASEAN, whose institutional design has long privileged consensus, consultation, informality, and inter-governmentality – the so-called ‘ASEAN Way’ (Acharya, 2003) – over obligation, precision, subsidiarity, and other ancillary principles typically associated with a highly institutionalised organisation like the European Union (EU). On the other hand, ASEAN member countries have only occasionally relied on legal means to manage and, where possible, settle their disputes with other states. It is likely that the inception of the ASEAN Charter marks the initiation of a long and arduous trek towards a new diplomatic convention and security practice amongst Southeast Asians, which the architects of the charter hope would be defined increasingly by rules rather than a set of loose and informal practices.

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² ‘Charter of the Association of Southeast Asian Nations’, 20 November 2007. <http://www.aseansec.org/publications/ASEAN-Charter.pdf>

The aim of this chapter is to trace Southeast Asia's embryonic experimentation with a rules-based (or legal) approach to the management of its intraregional and extra-regional relations, and to assess its implications for regional order and security.³ Understood here, **legalisation** involves the degree to which rules shape the behaviours of states, whether or not they actually go before the courts. Efforts in this respect include ASEAN's ongoing (and challenging) implementation of its charter and the selective resort by several ASEAN countries to legal means to settle disputes comprising trade and territorial concerns. Although Southeast Asia as a whole lags behind other regions in its willingness to countenance legalisation, a growing number of ASEAN countries have in fact relied on third-party arbitration and/or adjudication. That they have sought to settle disputes between themselves and external parties, on one hand, and amongst themselves on an intramural basis, on the other, implies a slow but gradual willingness to seek legal recourse. This is so even on concerns involving sovereignty and territoriality, a fair number of which have arisen since the entry into force of the Third United Nations Convention on the Law of the Sea (UNCLOS III) in 1994.⁴ Crucially, none of the examples of the pursuit of legal resolution of intra-ASEAN disputes – including the ones discussed below – involved reliance by regional states on ASEAN-based instruments and mechanisms. Ironically, ASEAN states are more liable to look to international legal organisations and dispute settlement mechanisms than to their own regional organisation (i.e. ASEAN) for mediation, arbitration, and/or adjudication.⁵

The region's relative ambivalence to legalisation – weak at the regional institutional level, on one hand, selective reliance on bilateral dispute settlement on the other – raises interesting questions for the outcomes, intended or otherwise, of ASEAN's efforts in regional security integration. How, for example, might a predominantly utilitarian approach to legalisation, which Southeast Asian countries seem to prefer, affect the ASEAN Community, which ASEAN members are still seeking to establish? And if ASEAN's vision of regional community presupposes the necessity of institutional innovation and reform, what are the prospects for such? Liberal scholars tend to assume legalisation is designed to achieve institutional change, and those who take umbrage with the ASEAN Charter for its purported flaws seem to presuppose the legal turn by ASEAN should be about the innovation and transformation of that regional organisation

³ This chapter builds upon an earlier effort by Tan (2015: 248–66).

⁴ UNCLOS III, which lasted from 1973 to 1982, entered into force on 16 November 1994 following ratification by Guyana, the 60th state to sign the treaty.

⁵ This is supported by a recent survey of Asian security and economic elites conducted by a leading Washington-based think tank. Survey respondents were asked how significant regional organisations are to their national and regional security. Unsurprisingly, the majority of respondents prized national security strategies and international bodies over and above regional organizations (Gill, Green, Tsuji, and Watts, 2009).

and the regionalism that has hitherto defined the region.⁶ But the instrumentality and strategy with which Southeast Asian countries approach their selective appropriations of the legal recourse in dispute settlement suggest the more likely outcome of their actions will be institutional continuity or stasis. Indeed, their relatively conservative approach to legalisation at the ASEAN level is also designed to ensure maintenance of the regional status quo (or continuity, in short).

This is not to imply that prospects for institutional and regional transformation are therefore slim, or that Southeast Asians are fundamentally opposed to change. If anything, an enhanced regional organisation armed with viable compliance-based regimes undergirding interstate relations in Southeast Asia would be integral, even essential, for the region's future peace and prosperity, not least to ensure a sustained commitment by ASEAN members – and, conceivably, external powers as well, say, co-signatories to the ASEAN Treaty of Amity and Cooperation (TAC) established in 1976 – to peaceful means of conflict management and resolution. Ultimately, a region-wide reliance on rules-based management of interstate differences could mean an increasing de-securitisation of trade and territoriality between and amongst the ASEAN countries themselves.

Regional Experience with Rules

At best, Southeast Asia's record in rules-based management of regional security has been patchy. As noted, the apparent ambivalence with which the region's countries have approached legalisation suggests, despite the establishment of the ASEAN Charter, that Southeast Asia still has a long way to go in emulating the legal character of more advanced international organisations, if indeed that is what Southeast Asians aim to do.⁷ To be sure, there are compelling reasons that argue against that, furnished by 'path-dependence' explanations favoured by scholars of historical institutionalism (Fioretos, 2011). As a former secretary-general of ASEAN once lamented, comparisons

⁶ In fairness, the language of the ASEAN Concord II of 2003 and the charter itself allude to the aspirations of its architects. See, 'Declaration of ASEAN Concord II (Bali Concord II)', 7 October 2003. <http://www.aseansec.org/15159.htm>

⁷ In this regard, there is a conceptual distinction between mimicry and emulation. To the extent ASEAN now has a charter and boasts a vision for building an ASEAN Community with economic, political-security, and socio-cultural pillars – the language is reminiscent of the European Community (EC) and the EU – one can say ASEAN is mimicking the EU in terms of the superficial borrowing of lexicon and institutional conventions. On the other hand, emulation involves greater effort and deep internalisation of the principles, norms, and practices of the organisation the emulating actor seeks to emulate. At this point, it is safe to say ASEAN is a mimicker of more advanced institutions, but whether it successfully evolves into an emulator of such remains to be seen. On mimicry/mimicking and emulation, see Johnston (2008: 45–73).

between ASEAN and the EU are neither fair nor judicious, especially if they are motivated by the assumption that Southeast Asian regionalists not only aspire to attain the institutional and legal standards and practices adhered to by their European counterparts, but that they should therefore be held accountable to those expectations.⁸ Indeed, European institutions today are showing signs of a willingness to countenance a more flexible approach (Cini, 2007).

What does the historical and contemporary record suggest about Southeast Asia's engagement with rules and legalisation? Two broad observations are noteworthy in this regard. The following discussion will focus first on ASEAN's own efforts at establishing a legal personality as a regional organisation, and second on the state-to-state level both within Southeast Asia as well as between ASEAN member countries and external powers.

Is ASEAN Institutionalising Established Rules or Creating New Ones?

The adoption of a charter by ASEAN in 2007 has evoked intense debate on whether this step towards rules constitutes an institutional and normative advance in regional affairs, or a mere entrenchment of existing norms and principles long held by the regional organisation. On the one hand, the charter's arrival has been heralded as a watershed moment in Southeast Asian regionalism, marking the region's embrace of rules that would facilitate the evolution of regionalism from a hitherto soft or minimalist variety to a more institutionalised form. On the other hand, detractors of ASEAN dismiss the charter as yet another flight of fancy that, as it has been with most visions and aspirations of ASEAN, would in due course be exposed as long in word but woefully short in deed (Jones and Smith, 2002). Others welcome the charter but lament ASEAN's inability to achieve its own targets, not least in terms of driving regionalism and regional economic integration (Severino, 2007). For still others, the quibble is not over ASEAN's intent to legalise about but the particular principles privileged by the charter, principally legal-rational norms such as sovereignty and non-interference, and social conventions such as the ASEAN Way.

There is much to be said for affirmative interpretations of the charter, not least where liberal implications for regional peace and security are concerned, should legalisation become the accepted approach amongst ASEAN countries for managing and hopefully

⁸ As Rodolfo C. Severino, Jr., Secretary General of ASEAN from 1998 to 2002, has written: 'Will ASEAN be like the EU? Most likely not. At least not exactly. As the EU itself acknowledges, it is unique as a regional organisation and will probably remain so. But we can expect domestic and external forces, the logic of globalisation, and the imperatives of regionalism to move ASEAN to resemble the EU more closely than it does today, and as ASEAN evolves, more closely than we can foresee today' (Severino, 2001). <http://www.aseansec.org/3112.htm>

resolving their intramural disputes and conflicts in an orderly nonviolent fashion.⁹ Needless to say, this is contingent on the sustained corporate commitments of Southeast Asian governments to a legal regime and their refusal to defect the regime – even at risk of incurring relative losses in the near term because of perceived absolute gains over the long haul (Hardin, 1965). In the language of neo-institutionalism, such a legal regime is robust only if state actors adhere to it on the basis of ‘appropriateness’ (commitment based on the belief that rules per se are an essential and inherent good for the region) rather than of ‘expected consequences’ (commitment based on the view that legalisation is a matter of instrumental choice purely on behalf of self-interest) (Goldman, 2005: 35–52). Given the relative nascence and immaturity of Southeast Asia’s legal regime, it is obvious no robust logic or ethic of appropriateness regarding legalisation exists in Southeast Asia just yet. On the other hand, it could be argued, as some indeed have done, that the ASEAN Way, which continues to enjoy legitimacy in regional conduct, retains its sense of appropriateness and suitability in the eyes of the ASEAN states (Acharya, 2001).

At the regional level, there is little question that Southeast Asian regionalism has historically eschewed legalisation. ASEAN’s institutional design has long emphasised an intergovernmental structure and informal decision-making process based on flexible consensus and consultation, and minimal delegation to quasi-judicial mechanisms (including a relatively weak secretariat) (Acharya, 1997). Its founding and ancillary documents are best conceived as multilateral declarations and not treaties per se (the regional organisation’s preferred nomenclature notwithstanding), certainly nothing of the sort that would commit the regional organisation to some form of political integration (Leifer, 1989). ASEAN regionalism has emphasised dispute management rather than resolution; member nations essentially agree to shelve rather than settle their disputes. And although ASEAN’s 1976 treaty specifies a High Council that would recommend ways of resolving disputes, the provision has never actually been activated. Further, if decisions had indeed been taken, the provisions do not come with a mechanism through which to enforce them. This much was clear when the foreign minister of Singapore, in his capacity as the chair of ASEAN in 2007 and faced with the Burmese military junta’s forceful suppression of dissidents in Yangon, conceded that ASEAN has ‘little leverage over the internal development [in Myanmar]. What we have is moral influence as members of the ASEAN family’.¹⁰

⁹ As Benjamin Schiff has put it, ‘Neoliberal institutionalists explain law as a tool to reduce the realm of disorder in international relations, making it a pragmatic step for states concerned not only with relative power, but even more with absolute well-being. Legal institutions arise as states seek to stabilise their relations by replacing political power conflict with orderly legal processes – labeled by some observers the process of ‘legalization’ (Schiff, 2008: 41).

¹⁰ ‘Straits Times’ Interview with Singapore Foreign Minister George Yeo’, *The Straits Times*, 2–3 October 2007. http://app.mfa.gov.sg/pr/read_content.asp?View,8389. On the question of moral influence and social persuasion within ASEAN, see Tan (2013: 233–65).

This is not to imply that ASEAN has no dispute settlement mechanism of its own (Caballero–Anthony, 1998). For example, there is the ASEAN Protocol on Enhanced Dispute Settlement Mechanism (EDSM). Also known as the Vientiane Protocol, the EDSM is a set of non-adjudicatory mechanisms as well as formal adjudicatory mechanisms for disputes brought under ASEAN economic agreements in general. It is modelled after the World Trade Organization (WTO) Dispute Settlement Body. Secondly, the ASEAN Charter has a protocol on dispute settlement mechanisms, which goes beyond consultation, good offices, mediation, and conciliation to emphasising arbitration, by third-parties if need be.¹¹ Disputing parties are expected to fully comply with the arbitral awards and settlement agreements resulting from these non-adjudicatory processes. Finally, there is also the Investor–State Dispute Settlement (ISDS) under the ASEAN Comprehensive Investment Agreement (ACIA), which allows investors of an ASEAN state, either natural or juridical persons, to bring a claim against the government of another ASEAN state for the loss or damage to their investment resulting from the breach of obligation under the ACIA (Ewing–Chow and Losari, 2015). By and large, these mechanisms ‘steer a middle path between compulsory adjudication and freedom of choice’, in the words of one assessment (Naldi, 2014: 105–38). While formal dispute settlement proceedings have been considered on a number of occasions, the fact remains that ASEAN Member States have yet to make use of the mechanisms provided for within their organisation’s legal framework.

Significantly, the charter also appears to underscore the ASEAN member countries’ evident preference for norms and principles such as ‘respect for the independence, sovereignty and territorial integrity of member states’, ‘peaceful settlement of disputes’, ‘non-interference in member states’ internal affairs’, and ‘right to live without external interference’.¹² For some this development is arguably regressive since it amounts essentially to a codification of existing agreements, declarations, and norms, and burnishing such with a legal patina. In the words of one observer:

Disappointment comes not so much from things that are found in the charter, but from things that are not but should be. The charter is by all accounts as good a lowest common denominator as could have been expected, given the disparate interests, histories and sensitivities of Southeast Asian countries. Taking in not many important recommendations from the EPG [Eminent Persons Group], the document reaffirms a state-centric ASEAN and institutionalises age-old values of consensus and non-interference. It lacks clear mechanisms for dispute settlement, accountability and redress. (Dang, 2008: 24)

¹¹ See Article 25 of the ASEAN Charter.

¹² As Walter Woon, who was involved in the work of drafting the charter, has clarified, the chapter in the charter on the settlement of disputes only concerns **interstate** disputes (Woon, 2016: 165).

Another observer has offered a blunter assessment:

The ASEAN Charter is a positive development; it moves ASEAN ahead. But it is a disappointment. ASEAN was at a crossroads, but with the adoption of the ASEAN Charter, the 10-member grouping decided to codify existing norms and maintain its historical identity as an intergovernmental organisation. ASEAN did less than it could have done. ASEAN had even gone backwards. (Desker, 2008)

Thus understood, to the extent Southeast Asia has yet to move (in the words of one analyst) ‘beyond the ASEAN Way’ (Caballero–Anthony, 2005), but has in fact extended or prolonged its longstanding *modus operandi*, then the legalisation of principles such as national sovereignty and non-intervention/non-interference could conceivably indicate the existence of a logic of appropriateness, as much as that of consequentiality, concerning the region’s apparent preference for a particular diplomatic cum security convention.

On the other hand, the charter’s architects, while acknowledging the political horse-trading that invariably comes with compromise agreements of this sort, have nonetheless argued that the charter constitutes an important achievement upon which further institutional developments and embellishments could and would be made. A year after the charter’s adoption, Tommy Koh, a member of the High Level Task Force that drafted the charter, furnished the following assessment:

[W]hat remains to be done? Negotiation on a protocol to implement the chapter in the Charter on dispute settlement is the most important unfinished business. One of ASEAN’s past failings was a culture of not taking its commitments seriously. The Charter seeks to change that by giving the Secretary–General the responsibility to monitor the compliance of member-states with their commitments. In the event of a dispute between two states over their commitments, the Charter sets out an ASEAN dispute settlement mechanism. Such an arrangement will give assurance to partners entering into agreements with ASEAN. (Koh, 2009)

Seen from this perspective, the charter represents a work in progress, a first step in what could be a long process towards building a culture of compliance to commitments. In October 2010, ASEAN’s foreign ministers, in anticipation of the Seventeenth ASEAN Summit, agreed to adopt two legal instruments – the Rules for Reference of Unresolved Disputes to the ASEAN Summit and the Rules of Authorization for Legal Transactions under Domestic Laws – both of which are critical to the realisation of the charter. At the same time, there are worrying signs that ASEAN continues to be

hampered by what its previous Secretary-General, Surin Pitsuwan, has called ‘problems in implementation’, not least those that affect the ASEAN Economic Community (AEC) as a consequence of the slowness of many ASEAN member countries to act upon agreements on economic integration (Kassim, 2011). In this regard, the apparent failure of member countries to implement collective agreements – the failure to follow through on institutional commitments, in other words – is a concern that could derail ASEAN’s quest for a viable legal charter and assumption espousal of a meaningful legal personality. In 2010, the ASEAN senior official with oversight of the AEC called for urgent concerted action by all ASEAN Member States to move their organisation from its longstanding brand of ‘process-based regionalism’ to a ‘results-based regionalism’ (Pushpanathan, 2010). Likewise in 2011, the Secretary-General of ASEAN urged the organisation to replace its ‘centrality of goodwill’ with a ‘centrality of substance’.¹³

Nearly a decade after the charter’s establishment, the perceived gap between ASEAN’s legal aspiration and reality has not significantly improved. For example, in 2016, members of the ASEAN Parliamentarians for Human Rights (APHR) criticised the apparent slowness with which their respective national governments are pursuing the improvement of the region’s human rights record as pledged in the charter. ‘ASEAN leaders must step up to the plate and make good on their promises’, according to the APHR. ‘That means taking concrete steps, including restoring democracy in Thailand and ending the persecution of opposition leaders in Cambodia and Malaysia, among many other to-dos’ (APHR, 2016). Yet all this does not necessarily imply that ASEAN member countries are not adhering to rules, if by that we mean the older diplomatic conventions of the ASEAN Way rather than the commitments specified in the ASEAN Charter.

How Are ASEAN States Settling Their Disputes?

The historical record suggests that the ambivalent treatment of legalisation at the regional institutional level has not precluded some ASEAN countries from relying on third-party adjudication to settle disputes involving trade and/or territorial jurisdiction. To be sure, such resort to legal mechanisms has been extremely selective.

¹³ Cited in Singh (2011).

Trade Disputes

In the area of trade-related disagreements, the WTO Dispute Settlement Understanding has been underutilised by Southeast Asian countries by and large (Table 1). Interestingly (and ironically), the first complaint lodged under this provision after it was introduced involved Singapore and Malaysia over import prohibitions on polyethylene and polypropylene – a case that was eventually resolved without WTO adjudication. In other words, the first countries ever to use the WTO provision were Southeast Asian – against another Southeast Asian nation, no less – both members of a regional organisation that explicitly rejects legalisation for dispute settlement. In January 1995, Singapore requested consultations with Malaysia on the issue, and followed up 2 months later with a request to establish a panel. However, in March 1995, Singapore opted to withdraw its complaint completely.¹⁴

Table 1: Number of WTO Disputes Involving ASEAN Countries, China, and the United States

| Country | As Complainant | As Respondent | As Third Party |
|----------------------------------|----------------|---------------|----------------|
| Brunei Darussalam | 0 | 0 | 0 |
| Cambodia | 0 | 0 | 0 |
| Indonesia | 10 | 14 | 13 |
| Lao People's Democratic Republic | 0 | 0 | 0 |
| Malaysia | 1 | 1 | 9 |
| Myanmar | 0 | 0 | 0 |
| Philippines | 5 | 6 | 14 |
| Singapore | 1 | 0 | 21 |
| Thailand | 13 | 4 | 72 |
| Viet Nam | 3 | 0 | 22 |
| People's Republic of China | 109 | 34 | 130 |
| United States | 109 | 126 | 131 |

ASEAN = Association of Southeast Asian Nations; WTO = World Trade Organization.

Source: All data compiled by author as of 20 June 2016 from the World Trade Organization website at: https://www.wto.org/english/tratop_e/dispu_e/dispu_by_country_e.htm

¹⁴ 'DS1: Malaysia-Prohibition of Imports of Polyethylene and Polypropylene', World Trade Organization. http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds1_e.htm. Also, see Ahn (2003: 3).

There was also a dispute involving Washington's restriction of shrimp imports into the United States (US), registered at the WTO jointly by Malaysia and Thailand (along with India and Pakistan) against the US in October 1996. In February 1997, following multiple requests by the complainants, the Dispute Settlement Body (DSB) finally convened a panel. In May 1998, the panel upheld Malaysia's and Thailand's claims; 2 months later the US appealed against that decision. Although the Appellate Body reversed the panel's finding that the US measure at issue was not within the scope of measures permitted under the chapeau of Article XX of the General Agreement on Tariffs and Trade (GATT) 1994, the body nonetheless concluded that the US measure satisfied the requirements of the chapeau of Article XX.¹⁵

The Philippines raised a number of complaints against its trading partners regarding what it perceived to be unfair import restrictions on its agricultural exports: against Brazil's prohibition on desiccated coconut in November 1995; the US on certain shrimp and shrimp products in October 1996; Australia on fresh fruit (including pineapples) and vegetables in October 2002, etc.¹⁶ In the case with the Brazilians, the DSB established a panel in March 1996 after two requests by the Filipinos. However, following the panel's initial dismissal of the complaint, the Philippines' appeal was subsequently rejected by the panel the following year. The case with the Americans is still pending. In the Australian case, following multiple requests from the Philippines to establish a panel, the DSB finally did so in August 2003. Before the establishment of the WTO, Thailand brought a dispute it had with the US on tobacco-related concerns before the GATT for arbitration. More recently, in April 2006, Thailand, not unlike its ASEAN members, brought a complaint against the US concerning anti-dumping measures on imports of frozen warm water shrimp. (Subsequently, Japan, Brazil, and China followed suit in joining the consultations.)

In February 2008, the panel convened by the DSB upheld Thailand's claim that the US acted inconsistently with Article 2.4.2 of the Anti-Dumping Agreement, which in turn prompted the Americans to appeal the panel's decision. In July 2008, the Appellate Body similarly upheld the panel's conclusion. In April 2009, the US reported to the DSB that it had taken steps to implement the latter's recommendations and rulings.¹⁷

¹⁵ 'DS58: United States – Import Prohibition of Certain Shrimp and Shrimp Products', World Trade Organization. http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds58_e.htm. Also see, Hsu (n.d.).

¹⁶ See, 'DS22: Brazil – Measures Affecting Desiccated Coconut', World Trade Organization. http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds22_e.htm; 'DS61: United States – Import Prohibition of Certain Shrimp and Shrimp Products', World Trade Organization. http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds61_e.htm; 'DS270: Australia – Certain Measures Affecting the Importation of Fresh Fruit and Vegetables', World Trade Organization. http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds270_e.htm

¹⁷ 'DS343: United States – Measures Relating to Shrimp from Thailand', World Trade Organization. http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds343_e.htm

Indonesia has not been directly involved in WTO-related disputes with any ASEAN member although it was a third party in the case brought by the Philippines against Brazil involving desiccated coconut. It did however bring complaints against Argentina, South Africa, the Republic of Korea, and the US over concerns involving clove cigarettes (a major Indonesian product), footwear, and/or paper.¹⁸ To date amongst the ASEAN countries, Thailand is the most active complainant with 13 cases (as well as a third party with 72 cases) and Indonesia is the most active respondent with 14 cases (see Table 1 above).

Territorial Disputes

ASEAN countries have not shied away from resolving their bilateral disputes over territory amicably through bilateral negotiation, or by bringing their bilateral territorial disputes before the International Court of Justice (ICJ). Two oft-cited cases are the dispute over the Ligitan and Sipadan islands between Indonesia and Malaysia, which Malaysia eventually won, and the dispute over Pedra Branca (or Pulau Batu Puteh) island between Malaysia and Singapore, which Singapore eventually won (Merrill, 2002; Jayakumar and Koh, 2009). In the Ligitan and Sipadan case, the ICJ ruled in Malaysia's favour by virtue of the 'effective occupation' and/or 'effective administration' that Malaysia historically exercised over the islands (Colson, 2003: 398–406). 'The Court noted that the activities relied upon by Malaysia, both in its own name and as successor State of Great Britain, are modest in number but that they are diverse in character and include legislative, administrative, and quasi-judicial acts', according to the ICJ judgement rendered on 17 December 2002. The judgement went on to say about those Malaysian activities: 'They cover a considerable period of time and show a pattern revealing an intention to exercise State functions in respect of the two islands in the context of the administration of a wider range of islands'.¹⁹ Nor did Indonesia (or the Netherlands before it) ever register its disagreement or protest with Malaysia (or Britain before it) when those activities were carried out, including the construction of lighthouses on the islands.

¹⁸ 'DS123: Argentina – Safeguard Measures on Imports of Footwear', World Trade Organization. http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds123_e.htm; 'DS217: United States – Continued Dumping and Subsidy Offset Act of 2000', World Trade Organization. http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds217_e.htm; 'DS312: Korea – Anti-Dumping Duties on Imports of Certain Paper from Indonesia', World Trade Organization. http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds312_e.htm; 'DS374: South Africa – Anti-Dumping Measures on Uncoated Woodfree Paper', World Trade Organization. http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds374_e.htm; 'DS406: United States – Measures Affecting the Production and Sale of Clove Cigarettes', World Trade Organization. http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds406_e.htm

¹⁹ See, paragraph 148 in *Sovereignty over Pulau Ligitan and Pulau Sipadan (Indonesia v Malaysia): Judgement*, ICJ Reports 2002, p. 625.

The case of Pedra Branca, which included two nearly islets Middle Rocks and South Ledge, was notified to the ICJ in July 2003 and formally presented by the contesting parties before the Court in November 2007. The Court's initial conclusion was that the sovereignty of Pedra Branca was historically with the Johor Sultanate, which is now part of Malaysia. After studying the history of Johor Sultanate and the Dutch and British positions on control of Southeast Asia, and also the role of the East India Company, the Court concluded 'the Sultanate of Johor had original title to Pedra Branca'.²⁰ This conclusion was implicitly an objection to Singapore's previous argument that Pedra Branca was *terra nullius* (ownerless), so that it was eligible for 'lawful occupation'. In May 2008, the Court ruled in favour of Singapore on the basis of Malaysia's historical failure to respond to Singapore's conduct *à titre de souverain*, that is, its concrete manifestations of the display of territorial sovereignty over Pedra Branca.²¹ However, the Court disagreed with Singapore's claim that Pedra Branca, Middle Rocks, and South Ledge comprised a single entity and awarded the latter two formations to Malaysia instead.

The preceding two cases signal an embryonic willingness by some Southeast Asian countries to adopt a rules-based recourse to settle vexing bilateral disputes over territory. Questions of sovereignty and territoriality have been the chief reason behind most bilateral tensions between ASEAN countries. This is generally true of Asia as well (Emmers, 2009). The settlement of such cases, to the extent they are possible, have often taken a long time. For example, Hassan Wirajuda, the former foreign minister of Indonesia, noted in 2009 that it took his country and Viet Nam 32 years to arrive at a bilateral agreement over their adjacent exclusive economic zones in the South China Sea. In the case of Singapore with whom Indonesia had a dispute over a relatively short stretch of marine border on their respective western boundaries, it took Jakarta and Singapore 5 years to settle their dispute (Osman, 2009). A more recent case for the same two countries involving the joint demarcation of maritime boundaries in the eastern stretch of the Singapore Strait took 3 years – with the start of technical discussions in 2011 to the signing of the treaty in 2014 – to settle (Hussain, 2014). Whether via bilateral negotiation or through the ICJ or other third party, the readiness of states to adopt such avenues – and, crucially, accept and adhere to decisions that go against them – is really the key challenge. As an Indonesian observer opined following the ICJ's judgement on Pedra Branca: 'This case reminds us of the earlier dispute over the islands of Sipadan and Ligitan, decided in 2002 between Indonesia and Malaysia. Then Malaysia won.'

²⁰ See, paragraph 69 in *Sovereignty over Pedra Branca/Pulau Batu Puteh, Middle Rocks and South Ledge (Malaysia v. Singapore): Judgment*, ICJ Reports 2002, p. 12.

²¹ See, paragraph 39 in *Sovereignty over Pedra Branca/Pulau Batu Puteh, Middle Rocks and South Ledge (Malaysia v. Singapore): Judgment*.

Now Malaysia has lost. However, no matter what the result is, there is significant progress whenever territorial disputes are resolved between nations' (Arsana, 2008).

The longstanding dispute between Cambodia and Thailand over the border area surrounding the Preah Vihear temple led Cambodia in April 2011 to seek an interpretation of the ICJ concerning its 1962 ruling, which had awarded the temple to Cambodia (and paved the way for a successful effort by Cambodia to have the temple included in the United Nations Educational, Scientific and Cultural Organization [UNESCO] World Heritage listing in July 2008). On its part, Thailand acknowledged Cambodian ownership of the temple but claimed ownership of 4.6 kilometres of land adjacent to the temple. Fighting between Cambodian and Thai forces broke out in February 2011, following which the foreign ministers of both countries appeared before the United Nations (UN) Security Council. Following Cambodia's request in April that year to the ICJ for an interpretation 'on the meaning and scope of the 1962 ruling',²² Indonesia tried to mediate between the two conflicting parties at the side lines of the ASEAN Summit in May – pursued at Jakarta's discretion in its role as chair of ASEAN – but its efforts proved inconclusive. In July, the Court ruled that both countries were to withdraw their troops from a newly defined provisional demilitarised zone around the temple area and to allow ASEAN-appointed observers to enter the zone (Paragraph 64 of the ICJ order).²³ Further, the two claimant states were to continue working with ASEAN with the latter playing a 'facilitating' role in the resolution of the conflict. In November 2013, the ICJ unanimously upheld its 1962 ruling and clarified that the whole territory of the promontory of Preah Vihear belonged to Cambodia.²⁴ Both countries have indicated their respective governments and militaries would honour the ICJ's decision (Sokheng, 2013).

In contrast, there have been less happy conclusions to bilateral territorial disputes in Southeast Asia. The Ambalat region, a sea block in the Celebes Sea off the coast of Indonesian East Kalimantan and southeast of Sabah in East Malaysia, has been a bone of contention between Indonesia and Malaysia since the 1980s. Reportedly rich in oil and natural gas, the issue erupted following the decision by Petronas, the Malaysian state-owned oil company, to grant a concession for oil and gas exploration to its subsidiary, Petronas Caligari, and to the Anglo-Dutch oil giant Shell, in a part of the Sulawesi Sea that Jakarta claims as its territory (Kassim, 2005). Petronas' action triggered fierce

²² *Request for Interpretation of the Judgment of 15 June 1962 in the Case concerning the Temple of Preah Vihear (Cambodia v. Thailand) (Cambodia v. Thailand): Judgment*, ICJ Reports 2013, p. 3.

²³ *Request for Interpretation of the Judgment of 15 June 1962 in the Case Concerning the Temple of Preah Vihear (Cambodia v. Thailand) and Request for the Indication of Provisional Measures (Order)*, ICJ Reports 2011, p. 151.

²⁴ 'UN court rules for Cambodia in Preah Vihear temple dispute with Thailand', UN News Centre, 11 November 2013. <http://www.un.org/apps/news/story.asp?NewsID=46461#.V2jTW00kqM8>

reactions from Indonesia, which claimed the Ambalat region pursuant to Articles 76 and 77 of UNCLOS III. Worse, it roused nationalist sentiments and both countries came to the brink of armed conflict, with Jakarta scrambling fighter aircraft and warships in response. As recently as 2009, the Indonesian armed forces (TNI) accused Malaysia of having ‘breached the law’ by entering the disputed zone on no less than nine occasions in 2009 alone.²⁵ Further, a map produced by Malaysia in 1979, which depicted Ambalat or at least a large portion of it as under Malaysian sovereignty, evoked objections not only from Indonesia but other Southeast Asian neighbours (the Philippines, Thailand, and Viet Nam) as well as China. Whether the ferocity of the Indonesian reaction could be attributed, at least partly, to residual anger against having ‘lost’ the Ligitan and Sipidan islands to the Malaysians was unclear. It also raised questions over whether Indonesia, having been bitten once, would subsequently prove twice as shy to bring the Ambalat dispute and/or other territorial disputes it has with Malaysia to the ICJ or other legal body. In June 2013, it was reported that both countries were prepared to shelve their dispute in favour of joint exploration of natural resources in the region (Mattangkilang, 2013). In February 2015, following the lack of progress despite technical teams from both countries having met 26 times, both countries appointed ‘special envoys’ to initiate ‘exploratory’ negotiations over the dispute (Panda, 2015).

This discussion is not complete without mention of the case initiated in January 2013 by the Philippines against China before the arbitral tribunal set up under Annex VII of UNCLOS III. While China’s refusal to participate in the proceedings has received a great deal of attention, it is not the first time a party has chosen not to appear before a UNCLOS dispute settlement body.²⁶ What is reportedly interesting about the Chinese case are the persistent efforts made by Beijing, despite its refusal to participate in the proceedings, at advancing its legal argument through both formal and informal channels.²⁷ While China’s inconsistent stance has likely rendered the arbitral proceedings more complicated than they already are, its actions have arguably created the semblance of what one observer calls a ‘quasi-appearance’ at the tribunal (Nguyen, 2015).

²⁵ ‘TNI moves to secure Ambalat’, *The Jakarta Post*, 31 May 2009. <http://www.thejakartapost.com/news/2009/05/31/tni-moves-secure-ambalat.html>

²⁶ Also in 2013, the Netherlands initiated its case before the International Tribunal for the Law of the Sea (ITLOS) against Russia for its seizure of a Dutch-flagged vessel belonging to Greenpeace, the Arctic Sunrise, which was protesting against oil drilling. Russia has made clear it would not appear before the arbitral tribunal. ‘Arctic Sunrise case: Russia ordered to pay damages’, BBC News, 24 August 2015. <http://www.bbc.com/news/world-europe-34045493>

²⁷ ‘Chinese legal experts refute Philippine claim in South China Sea’, CCTV America, 7 May 2016. <http://www.cctv-america.com/2016/05/07/chinese-legal-experts-refute-philippine-claim-in-south-china-sea>. Official means include, inter alia, a ‘Position Paper of the Government of the People’s Republic of China on the Matter of Jurisdiction in the South China Sea Arbitration Initiated by the Republic of the Philippines’, put out by China’s Ministry of Foreign Affairs on 7 December 2014. http://www.fmprc.gov.cn/mfa_eng/zxxx_662805/t1217147.shtml

No Rules-based Imperative (Yet) in Southeast Asia?

The aforementioned illustrations underscore the ambivalence in the attitudes of ASEAN states (and regional powers like China) toward legalisation. Assurances given by states that they would abide by decisions taken by the WTO, the ICJ, the International Tribunal for the Law of the Sea (ITLOS), and other legal and/or dispute settlement bodies do not necessarily imply their normative commitment to seeking legal recourse in the future. Commitment to the legal regime remains weak and selective. They lead one to conclude legalisation in Southeast Asia is neither an imperative nor is it an inexorable process. That is to say, there is no general acceptance of and inevitable advance towards legalisation as a standard prescription for dispute settlement – but an instrumental and strategic choice which regional countries employ selectively vis-à-vis their ASEAN neighbours as well as extra-regional countries (Kahler, 2000). Thus understood, ASEAN's longstanding eschewal of legalisation, not least until the appearance of its charter in 2007, cannot be adequately explained by recourse to diplomatic and security culture alone. If anything, keeping ASEAN as a consensus organisation²⁸ is as much as a pragmatic and/or strategic decision on the part of its member nations, not least the founding members who helped define the regional organisation's governing conventions.

Paradoxically, the institutionalisation of the 'ASEAN Way' in the ASEAN Charter could prove problematic for the regional organisation and its member states in that it has the potential to stultify the organisation by leeching it of the flexible consensus it once enjoyed. Not unlike the way in which the ASEAN Regional Forum has suffered through an inadvertent process of formalisation that arguably has hampered attempts toward progress in security cooperation (Emmers and Tan, 2011), ASEAN could face a similar predicament as a consequence of its enshrinement of pre-existing norms and principles that hitherto governed intramural relations but in a sufficiently flexible way that 'permitted' the occasional contraventions of the ASEAN Way (as when ASEAN members intervened in one another's domestic affairs – an infringement of ASEAN's non-interference norm – in order to preserve the regional order [Jones, 2012]). The concern has to do with a potential loss of institutional flexibility. For example, past practice amongst ASEAN economic ministers allowed for member countries to agree on economic liberalisation agreements on the basis of the '10 minus x' and/or '2 plus x' principles. This ensured that member states that wished to embark on cooperative initiatives at a pace faster than the rest of the grouping could proceed. However, the ASEAN Charter allows for arrangements made on the 'ASEAN minus x'

²⁸ According to Walter Woon, consensus in the ASEAN context means 'no member state feels strongly enough about a matter to block it; it does not mean that everyone agrees' (Woon, 2016: 157).

and other ancillary formulae for flexible participation only if there is consensus to do so (Desker, 2008). As such, what has hitherto been a practice based on a flexible consensus has, by virtue of the charter, been transformed into an uncompromising principle based on unanimity.

The irony here should not be missed: just as highly legal organisations such as the EU are today seeking to develop more flexible modalities that would give them greater manoeuvrability (Cini, 2007), ASEAN appears to be moving in the **opposite** direction.²⁹ There is, to be sure, a silver lining of sorts in this dark cloud for ASEAN, albeit a potentially farcical one: should ASEAN members continue their poor record of successful implementation of agreements and action plans to which they have committed themselves, then they could conceivably eschew getting trapped in excessive formalisation and proceduralism, while retaining a regional nimbleness.

Conclusion

This chapter has shown that, on the whole, Southeast Asia's slowness to develop a strong rules-oriented regime within ASEAN has not precluded a number of ASEAN countries from seeking peaceful solutions to their disputes with one another as well as with non-ASEAN countries through bilateral negotiation as well as third-party arbitration and adjudication. Where the latter avenue is concerned, ASEAN countries have pursued settlement through international bodies, not through ASEAN just yet. Their willingness to do so implies a nascent but growing regional confidence in rules-based management. However, their resort to rules has been conducted largely for strategic rather than normative reasons. This trend possibly suggests that where reliance on rules in regional management is concerned, they have hitherto been aimed less at regional innovation or transformation (i.e. moving ASEAN regionalism beyond the ASEAN Way) than at regional conservation (i.e. maintaining the social order or status quo of the region). It also suggests that, while ASEAN member states are not loathe to adopt a rules-oriented approach, they nonetheless value the informality of the ASEAN Way – so much so that they have rendered the ASEAN Way into a rule in itself via the ASEAN Charter. On a more charitable note, it could perhaps be said that the ASEAN Way is less under threat as much as it is evolving to include increasingly rules-based management as one amongst a number of implements in the diplomatic toolkits of ASEAN countries. They see international bodies like the WTO, the ICJ, and so on as complements to the ASEAN process.

²⁹ This raises intriguing questions for sequencing where institutional formation is concerned. On the when and how sequencing matters in the development of institutions, see Drezner (2010: 791–804).

While this looks increasingly to be the common outlook of the ASEAN countries, it is still not the case in their relations with China, however. For example, a rules-based arrangement like the Declaration on the Conduct of Parties in the South China Sea (DOC), hailed as a milestone when it was established between ASEAN and China in 2002, has clearly failed in its aim to foster trust amongst claimant states and prevent the dispute from escalating, whilst the process of establishing a Code of Conduct for the South China Sea (COC) has encountered its fair share of false dawns (Mingjiang, 2014). More recently, in response to Singapore's call to apply the Code of Unplanned Encounters at Sea (CUES), a coordinated means of communication to maximise safety at sea, to the South China Sea, ASEAN and China agreed in March 2016 to discuss Singapore's proposal (Beng, 2016). Subsequently, in Vientiane in September 2016, the two sides cemented their joint support for a voluntary and nonbinding CUES agreement – but one that covers only naval vessels and not (as Singapore had proposed) coastguard vessels.³⁰ Given the ubiquity of coastguard vessels in the South China Sea – Chinese coastguard vessels are amongst the most active and assertive, not to mention the largest, in the disputed waters (Torode, 2016) – China's reluctance to include the coastguard in this CUES arrangement implies a persistent disregard for rules-based management of its actions in the South China Sea.

Granted, the adoption of rules-based approaches by the ASEAN countries and China is as much driven by strategic motives as anything else. The fact that small and weak countries tend to emphasise rules – whether through their participation in international institutions or support for international law, usually both – is strongly supported in the international relations literature (Keohane, 2006). But where the ASEAN member countries are concerned, perhaps it also reflects the normative belief that when confronted by a preponderant power that disregards international legal decisions so long as they run counter to its ambition – at least where the South China Sea is concerned – even small states have to make a firm stand for rules-based management no matter the risks they incur. For example, at the 2016 edition of the Xiangshan Forum, China's version of the Shangri-La Dialogue annual defence forum, the ministerial representative from Singapore informed his Beijing audience that Singapore strongly advocates 'a rules-based world order' because, as a small city-state, Singapore 'cannot survive in a world where might is right' (Beng, 2016). The remark was clearly in response to Chinese anger against Singapore for its appeal, rendered in the wake of the Permanent Court of Arbitration's ruling on the South China Sea dispute between China and the Philippines,

³⁰ 'Joint Statement on the Application of the Code for Unplanned Encounters at Sea in the South China Sea', 7 September 2016. <https://www.asean2016.gov.la/kcfinder/upload/files/Joint%20Statement%20on%20the%20Application%20of%20the%20Code%20for%20Unplanned%20Encounters%20at%20Sea%20in%20the%20South%20China%20Sea.pdf>

to all parties ‘to fully respect legal and diplomatic processes’.³¹ For its trouble, Singapore received numerous warnings from the Chinese, veiled and otherwise, to avoid interfering in the South China Sea disputes and, as the designated coordinator for ASEAN–China relations (2015–2018), to focus its energies instead on promoting Sino–ASEAN cooperation.³² Perhaps countries like Singapore advocate rules-based management of regional security not only because they see it as the appropriate thing to do, but because their own experiences at the intra-ASEAN level have confirmed it.

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³¹ ‘Singapore urges respect for court ruling on South China Sea’, *Today*, 12 July 2016. <http://www.todayonline.com/singapore/singapore-south-china-sea-ruling-reaction>

³² ‘As Singapore is not a claimant in the South China Sea’, warned Chinese Vice-Foreign Minister Liu Zhenmin, ‘we hope that the Singapore Government, on the condition of not interfering in South China Sea issues, will actively promote cooperation between China and ASEAN’. Cited in ‘Chinese Social Users Lash Out at Singapore over S. China Sea Dispute’, *Today*, 23 August 2016. <http://www.m.todayonline.com/chinaindia/china/chinese-social-media-users-lash-pit-at-singapore-over-s-china-sea-sispute>

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