

The ASEAN Charter Dispute Settlement Mechanisms

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Introduction

The idea of peaceful and formal settlement of international disputes is not something that conspicuously marks the history of mankind. Until quite recent times the dictum of Clausewitz that "war is the continuation of policy by other means" reflected the attitude of great powers towards the

settlement of disputes with other peoples. All the members of ASEAN have had historical experience of gunboat diplomacy by external powers. It is not an experience that anyone would care to repeat in the 21st century.

ASEAN exists in order to “maintain and enhance peace, security and stability and further strengthen peace-oriented values in the region”. This is clearly stated in Article 1(1) of the Charter. ASEAN is a community, not just a group of nations thrown together by geographical proximity. The ultimate goal is to create a sense that each of us belongs to a family of countries in Southeast Asia, interlinked economically, politically and culturally.

To achieve this, it is necessary that there should be some means of peacefully settling disputes amongst member states. In the absence of a formal dispute settlement mechanism, disagreements between members could fester for years or generations and get in the way of closer cooperation. Thus, for the sake of ASEAN’s credibility, there has to be a way of resolving disagreements without being disagreeable.

How Disputes are Settled

Take the analogy of a quarrel between neighbours, as so often arises when people live close to one another. It may be over the sitting of a fence on the boundary line between their properties, or perhaps about the smoke from one neighbour’s bonfire when he burns leaves, or about how much each is to pay for shared services. If nothing is done, disagreement will turn into dispute and dispute into quarrel. The bad blood would prevent them from working together in harmony for the betterment of both. In extreme cases, there might be a spiral

of provocation and counter-provocation that could ultimately lead to violence. No civilised society could countenance this. That is why every member of ASEAN — indeed, every civilised society — has a formal means of settling such domestic disputes before they get out of hand.

In domestic law, such a dispute might be settled in several ways. Firstly, the parties might attempt to talk matters over with a view to clearing up the disagreement. Alternatively, a relative or friend might offer to mediate. In some societies, the village headman or clan elder might be called in to arbitrate. Finally, the parties might decide that the quickest and most decisive way is to submit the matter to a court for a binding judgement.

This commonsense approach to dispute settlement is mirrored in the ASEAN Charter. One starts with the general principle in Article 22(1) that “Member States shall endeavour to resolve peacefully all disputes in a timely manner through dialogue, consultation and negotiation”. As part of this process, the disputing states may agree to resort to good offices, conciliation or mediation at any time. They may request the Chairman or the Secretary-General of ASEAN to provide such good offices, conciliation or mediation. This basically means that the Chairman or Secretary-General will offer to help bridge the differences between the parties.

There was some discussion among the High Level Task Force (HLTF) as to whether the Charter should empower the Chairman or Secretary-General to offer good offices, conciliation or mediation without being requested. In the end, it was decided that it would be better to let the parties make a request rather than have others attempt to get involved

against the will of the disputants. To continue the analogy above, it does not usually help if interfering relatives try to butt into a dispute between neighbours. Such a course often exacerbates rather than ameliorates the dispute. Far better that well-intentioned relatives wait to be asked at a time when the parties are ready to be assisted.

Formal Dispute Resolution

It would be unrealistic to pretend that all disagreements can be resolved through dialogue, consultation and negotiation. The experience of other organisations, and of ASEAN itself, does not support the thesis that these are invariably effective. Something more is needed. This is why Article 22(2) requires that “ASEAN shall maintain and establish dispute settlement mechanisms in all fields of ASEAN cooperation”.

Where specific ASEAN instruments contain dispute settlement mechanisms, it is logical that disputes within the purview of the instrument should be settled in the manner stipulated. This is provided in Article 24(1) of the Charter. Thus, for instance, the Framework Agreement on Enhancing ASEAN Economic Cooperation 1992 provides in Article 9 that “any differences between Member States concerning the interpretation or application of this Agreement ... shall, as far as possible, be settled amicably between the parties. Where necessary, an appropriate body shall be designated for the settlement of disputes”. This Article was significantly expanded by a Protocol on Dispute Settlement Mechanism in 1996, which was in turn superseded by the ASEAN Protocol on Enhanced Dispute Settlement Mechanism of 2004 (the “Vientiane Protocol”).

The Vientiane Protocol is the most significant of the ASEAN dispute settlement mechanisms. It basically covers ASEAN economic agreements. Article 24(3) of the Charter reiterates this: “where not otherwise specifically provided, disputes which concern the interpretation or application of ASEAN economic agreements shall be settled in accordance with the ASEAN Protocol on Enhanced Dispute Settlement Mechanism”.

The heart of the Vientiane Protocol is the provision for the establishment of a panel to look into and objectively assess the dispute, make findings and recommend how it would best be resolved. The exact mechanics of this are beyond the scope of this chapter. The important thing to note is that in the case of economic agreements, there is a formal, comprehensive method for resolving disputes.

Paradoxically, the success of such a dispute settlement mechanism can be measured not by the number of disputes settled but rather by the scarcity of such cases. This is because where such a mechanism exists, the parties will often make the extra effort to come to terms with rather than push the matter to adjudication. Continuing with the analogy of a domestic dispute between neighbours, the knowledge that either party can ultimately have recourse to the courts is a powerful incentive for the disputants to come to an amicable settlement rather than risk a penalty and possible loss of face should the case go for adjudication. This is a phenomenon well-known to lawyers; clients can often be persuaded to settle rather than incur the risk of litigation, with all its attendant uncertainties.

In the case of disputes not involving an ASEAN instrument, Article 24(2) of the Charter provides that the modes of dispute settlement prescribed in the Treaty of Amity and

Cooperation in Southeast Asia (TAC) and its rules of procedure will be used. The TAC envisages that disputes threatening peace should be referred to a High Council consisting of representatives from each of the High Contracting Parties. However, this can only be done if the parties to the dispute agree. The alternative is for the parties to have recourse to the modes of peaceful settlement contained in Article 33(1) of the Charter of the United Nations. This of course includes reference to the International Court of Justice in The Hague. Settling disputes by reference to an international court is the civilised way of doing things.

Not all ASEAN instruments contain dispute settlement mechanisms, hence the need to establish some sort of mechanism to cover such areas. Otherwise, there would be an obvious lacuna. Thus, Article 25 states that “appropriate dispute settlement mechanisms, including arbitration, shall be established for disputes which concern the interpretation or application of this Charter and other ASEAN instruments”. The exact form of the dispute settlement mechanism under this Article has yet to be determined. The Report of the Eminent Persons Group on the ASEAN Charter recommended that the mechanism should be similar to the Vientiane Protocol. There was some discussion by the HLTF on whether to provide for adjudication as well as arbitration. It was decided that, on balance, ASEAN is not quite ready yet for a formal court. Much remains to be done to build legal capacity among ASEAN states. At the present stage of development, something along the lines of the Vientiane Protocol is more appropriate. However, Article 25 allows ASEAN to create a court should that prove to be necessary in future.

It will be noted that the Charter itself does not set up any mechanism for resolution of disputes regarding interpretation of the Charter. This was deliberate. Many, if not most, of the queries regarding interpretation of the Charter will relate to practical problems of implementation rather than disputes between member states. Where there is a question, Article 51(1) provides that the ASEAN Secretariat shall undertake the task of interpretation. The procedure for reference to the Secretariat is to be determined by the ASEAN Coordinating Council. It is only where a member state disputes the interpretation made by the Secretariat or proposed by another member state that reference will be made to the dispute settlement mechanism established under Article 25. This will probably be the exception rather than the rule.

The Role of the ASEAN Summit

If after application of the appropriate dispute settlement mechanisms the matter remains unresolved, Article 26 provides that it will have to be referred upwards to the highest organ of ASEAN, the ASEAN Summit. The procedure for this has yet to be determined. As the Summit is not a judicial body, presumably the most practical way to dispose of an unresolved dispute would be to have it referred to international arbitration or even to adjudication, where appropriate. In any case, member states always have the right to use the modes of dispute settlement prescribed by Article 33(1) of the Charter of the United Nations. This is explicitly set out in Article 28 of the Charter.

Once a decision has been rendered in a dispute, the Secretary-General is entrusted with the task of monitoring

compliance. He has to submit a report to the Summit. A member state which is affected by non-compliance with the findings, recommendations or decisions resulting from an ASEAN dispute settlement mechanism may refer the matter to the Summit for decision. It will be for the Summit to prescribe what measures should be taken to ensure respect for the decision. Needless to say, refusal to comply would be an extremely serious breach of the obligations of an ASEAN member state. It would undermine the whole concept of rule of law, which is one of the key principles of ASEAN.

Conclusion

The question uppermost in everyone's mind is: will it work? One can take heart from the example of the European Union. At the beginning of the 20th Century, European powers were the most aggressive on the planet. The century began with British intervention in South Africa, a European expeditionary force in China, and French, German and Italian adventures in Africa, until the assassination of the Austrian Archduke Franz Ferdinand in Sarajevo lit the European powderkeg. The resultant explosion set off a second Thirty Years' War (1914–1945) which devastated the Continent (and much of the rest of the world) more thoroughly than the first Thirty Years' War (1618–1648).

After dragging themselves out of the rubble and ashes, the Europeans forswore war as a continuation of policy by other means and consciously set out to build a system based on peaceful resolution of disputes. In the last fifty years they have been conspicuously successful in this endeavour. The prospect of war between members of the European Union is

unthinkable. If the Europeans, with their history of bellicosity and imperialism, can achieve this in the space of less than two generations, there is no reason why ASEAN cannot do the same. The key to this is the creation of a formal system for the peaceful settlement of disputes, and the cornerstone of the dispute settlement regime of ASEAN is the Charter.