The Association of Southeast Asian Nations (ASEAN) and Conflict Management: Approach, Achievements and Challenges

By

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Abstract

The paper assesses the conflict management approach of the Association of Southeast Asian Nations (ASEAN). The ASEAN approach to conflict management is outlined and the context in which it has developed presented. The paper identifies and assesses the achievements reached by ASEAN and its member states in the field of conflict management. The challenges that ASEAN and its member states have been facing in the field of conflict management are also discussed. Three main dimensions are examined: first, the core elements of the approach; second, the role played by the Association in terms of conflict management; and, third, the possible impact of the ASEAN approach and its role in inter-state disputes among its members. In addition, the possible relevance of the ASEAN approach on disputes involving also non-member states, e.g. in the South China Sea, is explored.

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Purpose and Structure

The main aim of the paper is to assess the conflict management approach of the Association of Southeast Asian Nations (ASEAN) by examination of its approach to conflict management. Three main dimensions are examined: the core elements of the approach; the role played by the Association in terms of conflict management; and the possible impact and the ASEAN’s role in inter-state disputes among its members. In addition, the possible relevance of the ASEAN approach on disputes involving also non-member states, e.g. in the South China Sea, is explored.

The structure of the paper is as follows. First, conflict management mechanisms and the non-interference principle within ASEAN’s framework are identified and outlined through an overview of key ASEAN documents. Second, implementation of conflict management and non-interference is examined and their possible relevance for intra-state disputes and conflicts is discussed. Third, ASEAN efforts in relation to the South China Sea are addressed. Fourth, in a concluding section the main findings are summarised and conclusions are drawn.

Mechanisms for conflict management within the ASEAN framework

The mechanisms for dispute management are drawn from eight key ASEAN documents: “The ASEAN Declaration (Bangkok Declaration)”, the “Declaration of ASEAN Concord” (ASEAN Declaration I), the “Treaty of Amity and Cooperation in Southeast Asia” (TAC), the “Rules of Procedure of the High Council of the Treaty of Amity and Cooperation in Southeast
Asia”, the “Declaration of ASEAN Concord II (Bali Concord II)” (ASEAN Concord II), the “ASEAN Security Community Plan of Action” (ASCPA), “The Charter of the Association of Southeast Asian Nations” (ASEAN Charter), and the “ASEAN Political-Security Community Blueprint” (APSC Blueprint). These key documents are examined in chronological order based on the dates of adoption by ASEAN.

The ASEAN Declaration

The ASEAN Declaration, adopted on 8 August 1967, spells out the overall goals and aims of ASEAN and sets the stage for a process aiming at defining the way in which the Association should function and the mechanisms by which the goals and aims of the Association should be achieved. The references to conflict management in the Declaration are general in character as can be seen from the expressed desire to: “establish a firm foundation for common action to promote regional cooperation in South-East Asia in the spirit of equality and partnership and thereby contribute towards peace, progress and prosperity in the region;”2

Also the wording in the paragraph dealing specifically with the promotion of “regional peace” is general rather than specific.3

The importance of non-interference is explicit as outlined in the Preamble of the Declaration:

“CONSIDERING that the countries of SouthEast Asia share a primary responsibility for strengthening the economic and social stability of the region and ensuring their peaceful and progressive national development, and that they are determined to ensure their stability and security from external interference in any form or manifestation in order to preserve their national identities in accordance with the ideals and aspirations of their peoples;”4

The importance of the Charter of the United Nations in the context of promoting regional peace and the commitment of the member states of ASEAN to the Charter is also explicit as displayed in the following: “To promote regional peace and stability through abiding respect for justice and the rule of law in relationship among countries of the region and adherence to the principles of the United Nations Charter;”5
The ASEAN Concord I

The evolution that followed during the so-called “formative years”; i.e. 1967 to 1976, led to the signing of the ASEAN Concord I on 24 February 1976, in connection with the First Summit Meeting of ASEAN held in Bali.

The ASEAN Concord I relates to the member states of ASEAN. It contains both general principles relating to the overall goals of the Association and principles relating to the specific goal of managing disputes and expanding co-operation among the member states. One of the stated overall objectives is the ambition to establish a “Zone of Peace, Freedom and Neutrality” (ZOPFAN) in Southeast Asia. Emphasis is also put on the respect for the principles of “self-determination, sovereign equality and non-interference in the internal affairs of nations”.

The TAC

The TAC was adopted on 24 February 1976 in Bali. It provides specific guidelines in the field of conflict management particularly so in relation to the peaceful settlement of disputes. According to Article 18, the TAC “shall be open for accession by other States in Southeast Asia” in addition to the five founding members of ASEAN – Indonesia, Malaysia, the Philippines, Singapore, and Thailand. In Chapter I, “Purpose and Principles”, Article 2 outlines the fundamental principles that should guide the relations between the signatories to the Treaty:

“a. Mutual respect for the independence, sovereignty, equality, territorial integrity and national identity of all nations;

b. The right of every State to lead its national existence free from external interference, subversion of coercion;

c. Non-interference in the internal affairs of one another;

d. Settlement of differences or disputes by peaceful means;

e. Renunciation of the threat or use of force;
f. Effective co-operation among themselves.\textsuperscript{10}

These principles include three main factors for managing inter-state relations: non-interference in the internal affairs of other countries, peaceful settlement of disputes, and overall co-operation.

In Chapter III, ‘Co-operation’, the linkages between co-operation, peaceful relations and non-interference are displayed. Article 12 states that the signatories:

“in their efforts to achieve regional prosperity and security, shall endeavour to cooperate in all fields for the promotion of regional resilience, based on the principles of self-confidence, self-reliance, mutual respect, co-operation and solidarity which will constitute the foundation for a strong and viable community of nations in Southeast Asia.”\textsuperscript{11}

In Chapter IV, “Pacific Settlement of Disputes”\textsuperscript{11}, Article 13 outlines the way in which the signatories should behave in situations in which there is a risk that disputes may arise or have arisen. The Article stipulates that the signatories:

“shall have the determination and good faith to prevent disputes from arising. In case disputes on matters directly affecting them shall refrain from the threat or use of force and shall at all times settle such disputes among themselves through friendly negotiations.”\textsuperscript{12}

Article 14 is devoted to the creation and envisaged role of a High Council. The Council shall be made up of a representative at the ministerial-level from each of the signatories and its role should be to take “cognizance” of existing disputes or situation, which could potentially threaten regional “peace and harmony”.\textsuperscript{13} The High Council is envisaged as “a continuing body” which indicates that it should have been established in 1976.

Article 15 stipulates the mediating role of the Council. Such a role can be assumed in the event that no solution to a dispute is reached through “direct” negotiation between the parties to the dispute. As mediator, the Council can recommend to the parties to a dispute appropriate means of settlement; i.e. good offices, mediation, inquiry, or conciliation. It can also “constitute itself into a committee” of mediation, inquiry or conciliation.\textsuperscript{14}
Article 16 displays some limitations to the mediating functions of the Council by stating that the provisions of Articles 14 and 15 shall apply to a dispute only if the parties to the dispute agree to their “application”. Article 16 states that signatories who are not parties to such a dispute can offer assistance to settle it and the parties to the dispute should be “well disposed towards such offers”.15

The Rules of Procedure

On 23 July 2001 in connection with the 34th ASEAN Ministerial Meeting (AMM) held in Hanoi, the member states of ASEAN adopted the “Rules of Procedure of the High Council of the Treaty of Amity and Cooperation in Southeast Asia”. The rules of procedure consist of ten “Parts” encompassing 25 “Rules”.16 The following outlines the most relevant provisions with a focus on the dispute settlement procedure.

In Part I – “Purpose”, Rule 1, it is stated that in the “event of” a dispute between any provision of the rules of procedure and a provision of the TAC the latter should prevail.17 In Part III – “Composition”, Rule 3, Paragraph a, it is stated that the High Council shall comprise one representative at ministerial level from each of the “High Contracting Parties” that are Southeast Asia countries, i.e. at the time of adoption the ten member states of ASEAN. According to Rule 5 there shall be a Chairperson of the High Council. The Chairperson shall be the representative of the member-state that holds the Chair of the Standing Committee of ASEAN, or “such other” representative of a member-state of ASEAN “as may be decided by the High Council in accordance with these rules”.18

In Part IV – “Initiation of Dispute Settlement Procedure”, Rule 6, Paragraph 1, it is stipulated that the High Council “may take cognisance over a dispute or a situation provided for in Articles 14 to 16 of the Treaty”, i.e. the TAC. In Paragraph 2 it is stated that the “dispute settlement procedure” of the Council “shall be invoked only by a High Contracting Party which is directly involved in the dispute in question”. According to Rule 7, Paragraph 1, a High Contracting Party seeking to invoke the dispute settlement procedures must do so by written communication through diplomatic channels to the Chairperson of the Council and to the other High Contracting Parties. Rule 8 stipulates that once such written communication
has reached the Chairperson, the latter shall seek written confirmation from all other parties to the dispute that they “agree on the application of the High Council’s procedure as provided for in Article 16 of the Treaty”. Of crucial importance in this context is Rule 9 in which it is stipulated that: “Unless written confirmation has been received from all parties to the disputes in accordance with Rule 8, the High Council may not proceed further on the matter.” If the precondition set forward in Rule 9 is met then the High Council can proceed with the implementation of the dispute settlement procedure. If this is successful and the Council is to make a decision then Part VII – “Decision-making”, Rule 19, stipulates that the Council has to take all its decisions by consensus at “duly” convened meetings.

**The ASEAN Concord II**

The ASEAN Concord II, adopted on 7 October 2003 in connection with the 9th ASEAN Summit displays the continuity in the development of collaboration within ASEAN. In the preamble the member states are: “Reaffirming the fundamental importance of adhering to the principle of non-interference and consensus in ASEAN Cooperation”. This is further emphasised in the part of declarations. Declaration 4 stresses the commitment of the ASEAN member states to “resolve to settle long-standing disputes through peaceful means”. Declaration 5 states that TAC is “the key code of conduct governing relations between states and a diplomatic instrument for the promotion of peace and stability in the region;”.

To achieve a “dynamic, cohesive, resilient and integrated ASEAN community”, The ASEAN Concord II states that the Association will strive to create an “ASEAN Security Community” (ASC), an “ASEAN Economic Community” (AEC), and an “ASEAN Socio-Cultural Community” (ASSC).

The ASC is the most relevant to conflict management. Broadly speaking all twelve points of the ASC are relevant, but this paper only highlights the most relevant. Point 3 relates
to the fact that ASEAN shall continue to promote regional solidarity and cooperation and in this context it is stated that: “Member countries shall exercise their rights to lead their national existence free from outside interference in the internal affairs.”27 Point 4 also relates to this dimension but is more general and it states that:

“The ASEAN Security Community shall abide by the UN Charter and other principles of international law and uphold ASEAN’s principles of non-interference, consensus based decision-making, national and regional resilience, respect for national sovereignty, the renunciation of the threat or use of force, and peaceful settlement of differences and disputes.”28

Thus, both Points confirm continued relevance and importance of the principle of non-interference in the ASEAN framework for regional collaboration as well as continued commitment to the prohibition of the threat or use of force.

In terms of conflict management it can be noted that in Point 7 is devoted exclusively to the High Council and it is stated that:

“The High Council of the TAC shall be the important component in ASEAN Security Community since it reflects ASEAN’s commitment to resolve all differences, disputes and conflicts peacefully.”29

The ASCPA30

The process aiming at establishing the ASC was reinforced at the 10th ASEAN Summit held in Vientiane in late November 2004 when ASEAN adopted the ASCPA. The ASCPA outlines that the ASC should be based on “shared norms and rules of good conduct in inter-state relations; effective conflict prevention and resolution mechanisms; and post-conflict peace building activities.” The ASCPA also stresses that the ASC process shall be “progressive” and guided by:

“well-established principles of non-interference, consensus based decision-making, national and regional resilience, respect for the national sovereignty, the renunciation of the threat or the use of
force, and peaceful settlement of differences and disputes which has served as the foundation of
ASEAN cooperation.”

Thus, the ASCPA clearly displays a high degree of continuity and adherence to established principles for inter-state collaboration in ASEAN. It also states that ASEAN shall not only strengthen existing “initiatives” but also launch new ones and set “appropriate implementation frameworks”.

The ASCPA includes seven sections; “I. Political Development”, “II. Shaping and Sharing of Norms”, “III. Conflict Prevention”, “IV. Conflict Resolution”, “V. Post-conflict Peace Building”, “VI. Implementing Mechanisms”, and “VII. Areas of Activities”.

In the section on shaping norms it is stated that the aim is to achieve a standard of “common adherence to norms of good conduct among the members of the ASEAN Community”. In any norm setting activity the following principles must be adhered to:

“1. Non-alignment,
2. Fostering of peace-oriented attitudes of ASEAN Member Countries;
3. Conflict resolution through non-violent means;
4. Renunciation of nuclear weapons and other weapons of mass destruction and avoidance of arms race in Southeast Asia; and
5. Renunciation of the threat or the use of force.”

The ASCPA explicitly emphasises such core principles as the renunciation of the threat or the use of force, peaceful settlement of disputes, and the principle of non-interference.

**The ASEAN Charter**

The ASEAN Charter – adopted on 20 November 2007 in Singapore – reaffirms a number of fundamental principles governing inter-state relations among its member states. In paragraph 7 of the Preamble the following is stated: “Respecting the fundamental importance of amity
and cooperation, and the principles of sovereignty, equality, territorial integrity, non-interference, consensus and unity in diversity;”  

The importance of peace is also evident as stated in paragraph 6 of the Preamble and also explicitly outlined in Article 1 – “Purposes” – of Chapter I – “Purposes and Principles” – which states that the first purpose of ASEAN is: “To maintain and enhance peace, security and stability and further strengthened peace-oriented values in the region;”  

In Article 2 – “Principles” – both non-interference and peaceful dispute settlement are highlighted as displayed by the following principles that ASEAN member states should “act in accordance with”:

“(a) respect for the independence, sovereignty, equality, territorial integrity and national identity of all ASEAN Member States;

(b) shared commitment and collective responsibility in enhancing regional peace, security and prosperity;

(c) renunciation of aggression and the threat or use of force or other actions in any manner inconsistent with international law;

(d) reliance on peaceful settlement of dispute;

(e) non-interference in the internal affairs of ASEAN member-states;

(f) respect for the right of every Member State to lead its national existence free from external interference, subversion and coercion;

(…)

(k) abstention from participation in any policy or activity, including the use of its territory, pursued by any ASEAN Member State or non-ASEAN State or any non-State actor, which threatens the sovereignty, territorial integrity or political and economic stability of ASEAN Member States;”
The non-interference dimension is extensive and explicit in these principles. The strict adherence to the provisions of the Charter of the United Nations relating to the prohibition of the “threat or use of force” in inter-state relations is also notable.

In the context of settlement of disputes Chapter VIII is of direct relevance as it deals with “Settlement of Disputes”, relating to “specific ASEAN instruments” and with other kind of disputes. The “General Principles” in Article 22 stresses that the ASEAN member states “shall endeavour to resolve peacefully all disputes in a timely manner”. The role of ASEAN is to “maintain and establish dispute settlement mechanisms in all fields of ASEAN Cooperation”. Article 24 – “Dispute Settlement Mechanisms in Specific Instruments” – paragraph 2 states that:

“Disputes which do not concern the interpretation or application of any ASEAN instrument shall be resolved peacefully in accordance with the Treaty of Amity and Cooperation in Southeast Asia and its rules of procedure.”

In Article 24 the issue of “unresolved disputes” is addressed and it is stated that if a dispute is not “resolved” after the application of the “preceding provisions of this Chapter” then it “shall be referred to the ASEAN Summit, for its decision”.

In relation to the ASC it is stated in Preamble paragraph 11 of the ASEAN Charter that the Association is: “Committed to intensifying community building through enhanced regional cooperation and integration, in particular by establishing the ASEAN Community comprising the ASEAN Security Community,…”. Notably the ASEAN Charter refers to the “ASEAN Political-Security Community Council” in Paragraph 1, Article 9 “ASEAN Community Councils”, Chapter IV “Organs” and not to the ASC.

The APSC Blueprint

At the 14th ASEAN Summit held in Cha-am on 28 February to 1 March 2009 the APSC Blueprint was adopted and it was made explicit that the APSC is one of three pillars of the ASEAN Community. In accordance with the APSC Blueprint, the APSC Blueprint builds on
the ASEAN Security Community Plan of Action, a principled document, laying out the activities needed to realise the objectives of the APSC.  

In Paragraph 8 it is explicitly stated that the APSC Blueprint “upholds existing ASEAN political instruments” such as ZOPFAN, the TAC, and the “Treaty of the Southeast Asia Nuclear Weapon-Free Zone” (SEANWFZ).  

In Paragraph 10 it is stated that the APSC “envisages” the following three key characteristics:

“a) A rules-based Community of shared values and norms;

b) A Cohesive, Peaceful, Stable, and Resilient Region with shared responsibility for comprehensive security; and

c) A Dynamic and Outward-looking Region in an increasingly integrated and interdependent world.”

In the section “A.2. Shaping and Sharing Norms”, Paragraph 16 it is outlined that ASEAN promotes “regional norms of good conduct and solidarity” in accordance with the ASEAN Charter. ASEAN also upholds the TAC and the SEANWFZ as well as the “Declaration on the Conduct of the parties in the South China Sea” (DOC) relating to the South China Sea.  

Section “A.2.2” relates to the strengthening of cooperation under the TAC. Section “A.2.3” is devoted to ensuring the full implementation of the DOC and of the final adoption of a regional Code of Conduct in the South China Sea (COC)”. Section “A.2.4” is devoted to measures to ensure the implementation of the SEANWFZ.  

Section “B.2” is devoted to “Conflict resolution and pacific settlement of disputes”. In Paragraph 21 it is stated that the TAC “gives provision for pacific settlement of disputes at all time through friendly negotiations and for refraining from the threat or use of force to settle disputes.” In Paragraph 22 it is noted that ASEAN may also establish “appropriate” dispute settlement mechanism under the ASEAN Charter. The latter is further developed in section “B.2.1” which is devoted to how to build on existing modes of pacific settlement of disputes and also possibly how to create additional mechanisms if needed. The following actions are listed:
“i. Study and analyse existing dispute settlement modes and/or additional mechanisms with a view to enhancing regional mechanisms for the pacific settlement of disputes;

ii. Develop ASEAN modalities for good offices, conciliation and mediation; and

iii. Establish appropriate dispute settlement mechanisms, including arbitration as provided for by the ASEAN Charter.”

Although the non-interference principle is not specifically mentioned by name in the APSC Blueprint the essence of the principle is affirmed as displayed by the title of Section “B.1.4”:

“The emphasis on “respect for territorial integrity, sovereignty and unity” clearly displays the continued importance of the principle of non-interference within the ASEAN framework.

The APSC Blueprint puts more emphasis on various aspects of peaceful settlements of disputes and promoting collaboration and friendly relations than on non-interference per se. Although principles such as respect for territorial integrity and sovereignty are explicitly stated in the APSC Blueprint.

**Conflict management in ASEAN**

In the context of this paper it is important to examine the conflict management dimension in practice and how it relates to the ASEAN member states. The examination will deal with developments in an expanded ASEAN, i.e. developments since the mid-1990s – Vietnam joined in 1995, Laos and Myanmar joined in 1997, while Cambodia joined in 1999.

If the achievement in conflict management among the ASEAN member states is examined from the perspective of the prevention of militarised disputes the track record of ASEAN is impressive since no dispute has led to a militarised inter-state dispute between the
original member states since 1967. In fact earlier research suggests a high degree of success in managing disputes between the original member states of ASEAN.\textsuperscript{57}

The expansion of ASEAN membership in the 1990s brought additional disputes into the Association.\textsuperscript{58} Among the disputes involving the new member states, some have been settled while others remain unsettled. For example the level of tension relating to the unsettled border disputes varies considerably. This can be exemplified by the high level of tension between Myanmar and Thailand in the late 1990s caused by military actions along the border involving troops from Myanmar and/or groups allied to the central authorities operating against opposition groups based in the border area or in camps in Thailand.\textsuperscript{59} Another more recent example is between Cambodia and Thailand between 2008 and 2013 when differences in and relating to areas in the vicinity of the Preah Vihear temple has led to both periods of deep political tension and to sporadic clashes between Thai and Cambodian troops along the border.\textsuperscript{60}

In terms of conflict management strategy the member states of ASEAN have displayed a preference for bilateral talks and dialogue on the disputes with other members of the Association.\textsuperscript{61} However, in the 1990s Indonesia and Malaysia agreed to refer the sovereignty disputes over Pulau Sipadan and Pulau Ligitan to the International Court of Justice (ICJ) and Malaysia and Singapore did likewise with regard to the sovereignty dispute over Pedra Branca/Pulau Batu Puteh.\textsuperscript{62} This displays a willingness among some ASEAN members to seek international jurisprudence when bilateral efforts are not sufficient to bring about a solution to the disputes.

A key dimension is whether or not bilateral conflict settlement among the ASEAN member states is a sign of weakness of the regional ASEAN framework for conflict settlement or is it an integrated part of it? It can be argued that if the goals of ASEAN are promoted through bilateral conflict settlement that is in line with the regional framework, then it is not a sign of a weakness.\textsuperscript{63} An example is the progress in Vietnam’s border disputes settlement since the early 1990s. This has been achieved primarily through bilateral approaches, but in line with the ASEAN principles and mechanisms for conflict settlement.\textsuperscript{64} This line of argumentation draws on the logic that bilateral approaches are not in
contradiction with the regional approach as long as the bilateral approaches adhere to the same basic principles that the regional approach is based upon.

The bilateral efforts to manage and settle disputes can be facilitated and/or supported by the mechanisms for conflict management created by ASEAN and by enhancing the effectiveness of these mechanisms. This relates to ASEAN’s role as facilitator rather than as an active third-party mediator in the disputes. However, it does not preclude that the role of ASEAN itself can be enhanced as long as it is within the limits set by the ASEAN framework for conflict management. There is also a need for a political consensus among the parties to the disputes that ASEAN should play such a role.

What role that the ASEAN framework for conflict management can play in the context of the disputes among the member states of the Association? The core dimension is how to enhance the framework’s relevance in meeting the challenge of existing and potential future disputes. The first step would be to establish the High Council. This has proven to be a difficult task as it took 25 years after the adoption of the TAC before ASEAN managed to adopt, in July 2001, the Rules of Procedure of the High Council a necessary development in order to possibly establish the High Council in the future. The importance of the High Council has been reaffirmed in the ASEAN Concord II of 2003 and in the ASCPA of 2004. The ASCPA calls on the ASEAN member states to “endeavour to use existing regional dispute mechanisms and processes” and in its “Annex” the member states are urged to “use the High Council of the TAC as a preferred option”.

The long period needed in order to reach an agreement on the Rules of Procedure indicates that the informal and formal political co-operation among the ASEAN members could be enhanced in order to remove the lingering feelings of suspicion about the intentions of other members of the Association. Another factor that has to be taken into consideration is that a High Council created on the basis of the provisions of the TAC could have considerable power through decisions-making relating to disputes. Making the High Council a decision making body would increase the degree of institutionalisation within ASEAN and this would be a step away from the more informal approach preferred within the Association. Also of relevance are concerns about the possible multilateralisation of bilateral disputes. This would
not be an attractive scenario for member states that are involved in disputes with other members of ASEAN. Or for states which would fear that the opposing party to a dispute has a higher degree of diplomatic influence or leverage within the Association.

Reverting back to the adoption of the Rules of Procedure it can be said that the agreement on such rules indicate that the ASEAN member states are committed to the establishment of the Council and to strengthen the regional conflict management mechanisms. Furthermore, by agreeing on the Rules of Procedure the member states display an enhanced level of trust towards each other or at least a diminishing level of mistrust.

It can be argued that through the adoption of these Rules of Procedure ASEAN has brought about conducive conditions for the establishment and activation of the High Council, a Council to which the member states could turn for assistance in resolving border disputes if negotiations between the parties to the disputes fail. Such a High Council, if established, may be attractive as an alternative to the ICJ. This should not be understood as an argument implying that parties to a dispute should not bring such disputes to the ICJ no matter the circumstances. On the contrary, the ICJ can still be used as an alternative if the bilateral and regional conflict management approaches and efforts fail to lead to a settlement of a dispute.

The adoption of the Rules of Procedure implies that the member states of ASEAN have established regional mechanisms that can be utilised for managing disputes between the member states if bilateral and/or multilateral efforts by the parties to a dispute are not adequate or sufficient to manage and/or resolve the dispute. Whether or not the High Council will be activated and be allowed to assume such a role will depend on the willingness and readiness of the member states of ASEAN to bring disputed issues to such a regional body. The Rules of Procedure ensure that the Council cannot be used against any of the member states. The later was most probably a necessary condition in order to secure the adoption of the rules and it is likely to be a key factor in enabling a future activation of the Council itself. Only after it has been established will it be possible assess how effectively and how often the High Council will be used by ASEAN member states.

The fact that the High Council has yet to be activated over a decade after the Rules of Procedures were adopted in 2001 indicates that not all member states of ASEAN are ready to
bring disputes with other members to such a High Council. This seems to imply that there is still lingering mistrust among some of the member states of ASEAN and that enhanced efforts are needed to addressed such lingering mistrust.

It is necessary to clarify that ASEAN is not intended to formally act as a third-party mediator in the disputes involving its member states unless it is ascribed to do so or asked to do so by the member states. Instead the Association is intended to serve as a vehicle to promote better relations among its member states. This is done by creating conducive conditions for increased interaction through the overall co-operation carried out under the ASEAN-umbrella. Another role that ASEAN can play is as a norm creator. ASEAN can do so through the formulation and adoption of mechanisms, which can be utilised by the member states to manage their disputes. ASEAN can also establish principles for how its member states should behave towards each other and this has been done through the ASEAN Concord I and the TAC of 1976 and the ASEAN Concord II of 2003. In this context the strong emphasis put on dispute settlement in the ASCPA of 2004, in the ASEAN Charter of 2007 as well as in the APSC Blueprint of 2009 is of relevance.

This implies that in order to achieve peace and stability in Southeast Asia the member states of ASEAN must act in such a way as to peacefully manage the existing and potential inter-state disputes among them. Consequently, failure to do so can be attributed to the member states involved in the disputes and not to the Association as such. Furthermore, ASEAN can urge its member states to seek peaceful solutions to such disputes. However, ASEAN cannot force them nor directly intervene to try and halt a dispute unless the parties to the dispute ask ASEAN to intervene in such a manner.

**The ASEAN Framework and Disputes Involving Non-ASEAN Countries**

Three protocols amending the TAC are of importance in context of disputes and relations with non-Southeast Asian countries. The first protocol was adopted on 15 December 1987 in connection with the Third Summit Meeting of ASEAN in Manila. The second protocol was
adopted on 25 July 1998 in connection with the 31st AMM in Manila. The third protocol was signed on 23 July 2010 in connection with the 43rd AMM in Hanoi.

In Article 1 of the first protocol the amendment deals with the provisions relating to which states can accede to the TAC and stipulates: “States outside Southeast Asia may also accede to this Treaty by the consent of all States in Southeast Asia which are signatories to this Treaty and Brunei Darussalam.” Article 2 contains an amendment to Article 14 in the TAC and relates to the formation of a High Council with representatives from all the signatories. The amendment is as follows:

“Howevever, this article shall apply to any of the States outside Southeast Asia which have acceded to the Treaty only in cases where that state is directly involved in the dispute to be settled through the regional processes.”

In the second protocol the amendment to the TAC relates to Article 18, Paragraph 3 of the Treaty and it is amended as follows:

“States outside Southeast Asia may also accede to the Treaty with the consent of all States in Southeast Asia, namely, Brunei Darussalam, the Kingdom of Cambodia, the Republic of Indonesia, the Lao People’s Democratic Republic, Malaysia, the Union of Myanmar, the Republic of the Philippines, the Republic of Singapore, the Kingdom of Thailand and the Socialist Republic of Vietnam.”

In the third protocol the first amendment to the TAC also relates to Article 18, Paragraph 3 of the Treaty and is amended as follows:

“This Treaty shall be open for accession by States outside Southeast Asia and regional organisations whose members are only sovereign States subject to the consent of all the States in Southeast Asia, namely, Brunei Darussalam, the Kingdom of Cambodia, the Republic of Indonesia, the Lao People’s Democratic Republic, Malaysia, the Union of Myanmar, the Republic of the Philippines, the Republic of Singapore, the Kingdom of Thailand and the Socialist Republic of Viet Nam.”
The second amendment in the third protocol relates to Article 14, Paragraph 2 of the TAC and reads as follows: “However, this article shall apply to any of the High Contracting Parties outside Southeast Asia only in cases where that High Contracting Party is directly involved in the dispute to be settled through the regional processes.”

These three protocols and the amendments in them imply that the TAC is open for accession also by non-Southeast Asian states, provided that the Southeast Asian signatories give their consent. The non-Southeast Asian states can also be represented in the High Council if they are directly involved in disputes to be settled through the “regional processes”. By adopting the amendments the ASEAN-members have agreed to expand the dispute management process and mechanisms of the TAC to countries outside the Southeast Asian region and to disputes involving not only Southeast Asian states but also other countries.

The Rules of Procedure of the High Council are also relevant in this context. First, in Part III, Rule 3, Paragraph a, it is stated that the High Council shall comprise the ten member states of ASEAN. In Paragraph b, it is stated that the Council shall also comprise one representative at ministerial level from “each” of the High Contracting Parties that are not from Southeast Asia and “are directly involved in the dispute which the High Council takes cognisance of”. Furthermore, in Part IV – “Initiation of Dispute Settlement Procedure”, Rule 6, Paragraph 1, it is stated that the “dispute settlement procedure” of the Council “shall be invoked only by a High Contracting Party which is directly involved in the dispute in question”. Also in this context it is relevant to note the de facto “veto power” that is implied in Rule 9. All references made in Part IV of the rules of procedure are to High Contracting Parties as well as to the non-Southeast Asian countries which may become High Contraction Parties.

The relevance of the adoption of the rules of procedure of the High Council in ASEAN’s external relations is more limited than at the intra-ASEAN level only to disputes that directly involve external powers. One possible area of relevance would be in the dispute situations in the South China sea involving one or more member states of ASEAN and China, e.g. the dispute situations in and around the Spratly archipelago which involves China, Taiwan, Brunei Darussalam, Malaysia, the Philippines, and, Vietnam. A key and necessary
development was China’s accession to the TAC on 8 October 2003. This implies that China can be a member of the High Council if a dispute between China and an ASEAN member state is eventually brought to the Council. Thus, the High Council can potentially be used in relation to disputes in the South China Sea involving not only members of ASEAN but also those involving ASEAN members and China.

**ASEAN and the South China Sea Situation**

ASEAN pursues a proactive role in response to developments in the South China Sea. This is reflected in its statements relating to developments in the area, through its dialogue with China, and through the ASEAN Regional Forum (ARF) which held its first working meeting in 1994.

Among the ASEAN statements the most important one is the “ASEAN Declaration on the South China Sea” issued in 1992. The Declaration’s main feature is its emphasis on the necessity to settle disputes by peaceful means. In addition all parties concerned are urged to exercise restraint in order to create a positive climate for the future resolution of disputes in the area.

The ASEAN-China dialogue relates to the overall relationship between the Association and China in political and economic fields. Gradually the two sides agreed to include developments in the South China Sea into the agenda of their dialogue process. Interestingly enough the ASEAN-China dialogue brings together the ASEAN member states with claims in the South China Sea alongside China.

As the driving force behind and within the ARF, ASEAN has sought to put the South China Sea developments on the ARF agenda. This has eventually succeeded after China withdrew its earlier opposition to discussions on the South China Sea in the multilateral setting of the ARF.

The ASEAN-China dialogue relating to the South China Sea was initially focused on the search for mutually agreeable mechanisms to manage the situation in the area. The two sides set up the “ASEAN-China Working Group on the Regional Code of Conduct on the South China Sea” in 2000. The issue was also addressed at various levels of the ASEAN-
China Dialogue. The difficulties in reaching an agreement on the content and scope of such mechanisms focused on how to reconcile an ASEAN proposal and a Chinese proposal. Within ASEAN the process of agreeing to a common proposal was a difficult one. There were indications of differences among ASEAN member states relating to the “scope of application” of such mechanisms, i.e. which areas of the South China Sea ought to be encompassed. Eventually the ASEAN members managed to reconcile their differences and so did ASEAN and China. This paved the way for the signing of the “Declaration on the Conduct of Parties in the South China Sea” (DOC) by the ASEAN member states and China on 4 November 2002.

The intra-ASEAN dimension displays that in order to formulate an ASEAN policy towards the South China Sea the views and interests of the member states with claims in the South China Sea have to be reconciled, i.e. not only the four claimants to all or parts of the Spratly archipelago – Brunei Darussalam, Malaysia, the Philippines, and Vietnam – but also Indonesia who claims maritime zones in the South China Sea. In addition views and interest of the five member states with no claims in the South China Sea have to be taken into consideration.

Another relevant dimension of the intra-ASEAN process relates to how the member states perceive China and its policies and actions. This was of particular relevance in the 1990s when tensions relating to the South China Sea between Vietnam and China and between the Philippines and China, respectively, caused considerable concern in the region. At the same time Cambodia and Thailand had good and close relations and no border disputes with China. Different perceptions of and relations with China within the Association complicate the process of formulating a clear-cut ASEAN policy towards China on the South China Sea, among other things.

Recent developments have again displayed how bilateral tension with China relating to the South China Sea situation – in particular between the Philippines and China – can lead to public differences between member states of ASEAN, e.g. Cambodia and the Philippines in 2012, which had ramifications on ASEAN cohesion.
The ASEAN-China dialogue relating to the South China Sea situation does provide a boost for confidence building measures and avenues for the parties to the disputes to talk. The DOC is the most important agreement reached thus far. The aim is to defuse tension and promote the peaceful management of the situation. Furthermore, the respect of the status quo is promoted. The agreement between the member states of ASEAN and China in July 2011 on the “Guidelines for the Implementation of the DOC” is a positive development. The on-going discussions within ASEAN as well as between ASEAN and China relating to a possible Code of Conduct (COC) for the South China Sea are further positive steps.

A major challenge for ASEAN is how to respond to the periods of tension between its member states and China. In such situations ASEAN solidarity calls for other member states to support the so-called “front-line state”, but at the same time they do not want to jeopardise their overall relationships with China, which is of great importance both economically and geo-strategically. This dilemma also affects the responses and policies of the Association as a whole.

Concluding remarks

As displayed in the overview of the key ASEAN documents non-interference is a cornerstone within the ASEAN framework for regional collaboration. Furthermore, the peaceful settlement of inter-states disputes and the prohibition of the threat or use of force are also fundamental aspects of the ASEAN framework.

As observed above, in order to properly understand and assess what ASEAN does and could possibly do in terms of conflict management it is necessary to clarify that ASEAN is not intended to formally act as a third-party mediator in the disputes involving its member states unless it is ascribed to do so or asked to do so by the member states. Instead the Association is intended to serve as a vehicle to promote better relations among its member states. This is done by creating conducive conditions for increased interaction through the overall co-operation carried out under the ASEAN-umbrella. Another role that ASEAN can play is through the formulation and adoption of mechanisms, which can be utilised by the member states to manage their disputes. ASEAN can also establish principles for how its
member states should behave towards each other and this has been done through the ASEAN Concord I and the TAC of 1976, through the ASEAN Concord II of 2003, through the ASCPA of 2004, and through the ASEAN Charter adopted in 2007. The envisaged APSC will further reinforce the existing principles and mechanisms as well as strive to develop new ones.

It has been observed that in order to achieve peace and stability in Southeast Asia the member states of ASEAN must act in such a way as to peacefully manage the existing and potential inter-state disputes among them. Consequently, failure to manage inter-state disputes among the member states of ASEAN can be attributed to the states involved in the disputes and not to the Association as such. Furthermore, ASEAN can urge its member states to seek peaceful solutions to such disputes, but it cannot force them nor directly intervene to try and halt a dispute unless the parties to the dispute ask ASEAN to intervene in such a manner.

The relevance of the regional mechanisms for conflict management as developed and formulated through collaboration within ASEAN would be considerably enhanced if the member states of ASEAN would more actively seek to utilise them when managing and settling disputes. The fact that the High Council has yet to be activated and that no dispute has been brought to it indicates that regional mechanisms for conflict settlement are after 45 years not yet the preferred option when the member states fail to reach a bilateral agreement in a dispute situation. To make regional mechanisms the preferred option would be a major boost for ASEAN’s efforts aiming at strengthening conflict settlement in the region as envisaged in the ASCPA and in establishing the ASEAN Community.

As seen from the perspective of the ASEAN conflict settlement framework bilateral dispute settlement that is in line with the regional framework is not a sign of weakness of the ASEAN framework, but rather supportive of it. On the other hand if or when bilateral approaches fail the decision by the parties to such a dispute situation to bring the case to international jurisprudence, e.g. to the ICJ, without first fully utilising the regional mechanism and framework, e.g. the High Council, can be seen as weakening the relevance of the ASEAN dispute settlement framework.
In the context of regional security the strong emphasis on non-interference, non-threat or use of force and peaceful settlement of disputes within the framework of ASEAN regional collaboration contribute to enhance regional security and stability. Non-interference reduces the risk of neighbouring countries intervening in disputes within other countries. The adherence to the prohibition of threat or use of force in inter-state relations diminishes the risk of militarised inter-state disputes and conflicts between the countries of the region. The stated preference for peaceful settlement of disputes further diminishes the risk of disputes and differences leading to militarised conflicts between the countries of the region.

In relation to the South China Sea situation within the ASEAN dispute management framework the TAC is the key mechanism to maintain peace and stability in the South China Sea since both the ASEAN members and China are parties to it. The TAC provides three core principles for managing inter-state relations: non-interference in the internal affairs of other countries, peaceful settlement of disputes, and overall co-operation. In addition the potential to use the High Council in disputes involving China has been made possible through China’s accession to the TAC in 2003.

ASEAN and China should strive to strengthen the existing mechanisms for managing the situation in the South China Sea. This can be achieved by moving beyond the DOC and develop new arrangements, e.g. an ASEAN-China Code of Conduct. Such a COC could encompass guidelines for self-restraint, co-operation, and the application of international law. The adoption of guidelines for the implementation of the DOC in 2011 is a positive step. The on-going discussions relating to a possible COC among the member states of ASEAN as well as between ASEAN and China are further positive steps.

The major lesson from the process leading to the DOC is that ASEAN must reconcile into a unified position and then through negotiation with China reach an agreement on a joint COC. In other words the path to a future COC involves two processes: an intra-ASEAN one and an ASEAN external relations one.
Endnotes


3 Ibid.

4 Ibid.

5 Ibid.


10 Ibid.

11 Ibid.

12 Ibid.

13 Ibid.

14 Ibid.

15 Ibid.

Ibid.

Ibid.

Ibid.

Ibid.

Ibid.

Ibid.


Ibid.

Ibid.

Ibid.

Ibid.

Ibid.

Ibid.


Ibid., p. 3.


The SEANWFZ was signed in Bangkok on 15 December 2009 by all ten Southeast Asian countries (“Treaty on the Southeast Asia Nuclear Weapon-Free Zone”, from the website of the Association of Southeast Asian Nations (http://www.asean.org/asean/asean-summit/item/treaty-on-the-southeast-asia-nuclear-weapon-free-zone) (accessed on 20 September 2014)).

APSC Blueprint, p. 2.

It can be noted that in the “ANNEX for ASEAN Security Community Plan of Action” in order to ensure the implementation of the DOC the following measures are outlined, to establish an “ASEAN-China Working Group on the Implementation of the DOC”, to establish a review mechanism on the implementation of the DOC; and to work towards “the adoption of the code of Conduct in the South China Sea (COC)” (ASCPA Annex).

APSC Blueprint, p. 7.

This section draws on the approach used in Amer, The Conflict Management, pp. 52–57.

For details on the expansion process of ASEAN and the main factors behind it see Ramses Amer, “Conflict management and constructive engagement in ASEAN’s expansion”, Third World Quarterly; Special Issue on New Regionalisms, Vol. 20, No. 5 (1999), pp. 1031-1048.

For a broad overview of bilateral tensions within the Association with a focus on the original five members and Brunei Darussalam see N. Ganesan, *Bilateral Tensions in Post-Cold War ASEAN*, Pacific Strategic Studies, Vol. 9, Regional Strategic and Political Studies Programme (Singapore: Institute of Southeast Asian Studies, 1999). For an overview of bilateral relations in the Association as well as nine case studies of bilateral relationships – Cambodia-Vietnam, Indonesia-Malaysia, Indonesia-Philippines, Indonesia-Singapore, Malaysia-Philippines, Malaysia-Singapore, Malaysia-Thailand, Myanmar-Thailand, and Vietnam-Thailand – see *International Relations in Southeast Asia: Between Bilateralism and Multilateralism*, edited by N. Ganesan and Ramses Amer (Singapore: Institute of Southeast Asian Studies, 2010) (hereafter Ganesan and Amer, *International Relations*).


For a broader discussion on this issue see N. Ganesan and Ramses Amer, “Conclusion”, in Ganesan and Amer, *International Relations*, pp. 333–336.

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58 For a broad overview of bilateral tensions within the Association with a focus on the original five members and Brunei Darussalam see N. Ganesan, *Bilateral Tensions in Post-Cold War ASEAN*, Pacific Strategic Studies, Vol. 9, Regional Strategic and Political Studies Programme (Singapore: Institute of Southeast Asian Studies, 1999). For an overview of bilateral relations in the Association as well as nine case studies of bilateral relationships – Cambodia-Vietnam, Indonesia-Malaysia, Indonesia-Philippines, Indonesia-Singapore, Malaysia-Philippines, Malaysia-Singapore, Malaysia-Thailand, Myanmar-Thailand, and Vietnam-Thailand – see *International Relations in Southeast Asia: Between Bilateralism and Multilateralism*, edited by N. Ganesan and Ramses Amer (Singapore: Institute of Southeast Asian Studies, 2010) (hereafter Ganesan and Amer, *International Relations*).


63 For a broader discussion on this issue see N. Ganesan and Ramses Amer, “Conclusion”, in Ganesan and Amer, *International Relations*, pp. 333–336.

65 ASCPA.

66 ASCPA Annex.

67 In the context of this paper the High Council is not regarded as activated. However, in the author’s discussion with officials in Hanoi in October 2001 it was said that the High Council held its first meeting among the Foreign Ministers of the ASEAN member states in Hanoi in July 2001. According to this information the de facto activation of the High Council took place in connection with the 34th AMM in Hanoi in July 2001. Information on the website of ASEAN does not state that the High Council has been activated.


71 Protocol Amending.

72 Ibid.

73 Second Protocol, p. 146.

74 Third Protocol.

75 Ibid.