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TOWARDS A RULES-BASED ASEAN: THE PROTOCOL TO THE ASEAN CHARTER ON DISPUTE SETTLEMENT MECHANISMS

Hao Duy Phan *

I. INTRODUCTION

Under the ASEAN Charter,¹ disputes arising from ASEAN economic agreements are resolved by the 2004 ASEAN Protocol on Enhanced Dispute Settlement Mechanism (eDSMP).² Disputes relating to specific ASEAN instruments shall be settled through the mechanisms and procedures provided by such instruments.³ Disputes that do not concern the interpretation or application of any ASEAN instruments may be resolved in accordance with the Treaty of Amity and Cooperation in Southeast Asia (TAC).⁴ Article 25 of the ASEAN Charter, in particular, provides that appropriate mechanisms, including arbitration, shall be established for the settlement of disputes relating to the interpretation or application of the ASEAN Charter and other ASEAN instruments.

To implement Article 25 of the ASEAN Charter, ASEAN Foreign Ministers signed the Protocol to the ASEAN Charter on Dispute Settlement Mechanisms (DSMP) on April 8, 2010.⁵ Two years later, they signed the Instrument to Incorporate the Rules for Reference of Non-Compliance to the ASEAN Summit in April 2012, marking the end

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¹ The Association of Southeast Asian Nations (ASEAN) was established in 1967 and currently consists of Brunei, Cambodia, Indonesia, Laos, Malaysia, Myanmar, the Philippines, Singapore, Thailand and Vietnam. The Charter of the Association of Southeast Asian Nations is a treaty establishing the legal and institutional framework for ASEAN. The ASEAN Charter entered into force on Dec. 15, 2008. *See* Charter of the Association of Southeast Asian Nations, Nov. 20, 2007 [hereinafter ASEAN Charter].

² *Id.* at art. 24(3). *See also* ASEAN Protocol on Enhanced Dispute Settlement Mechanisms, Nov. 29, 2008, *available at* <http://www.asean.org/asean/asean-summit/item/asean-protocol-on-enhanced-dispute-settlement-mechanism> (last visited Dec. 2, 2012) [hereinafter eDSMP]. The eDSMP was signed in Vientiane on November 29, 2004 by the ASEAN Economic Ministers and entered into force on the same day. The eDSMP was preceded by the Protocol on Dispute Settlement Mechanism in 1996 and applies to disputes arising under the 1992 Framework Agreement on Enhancing ASEAN Economic Cooperation as well as retroactively to earlier key economic agreements and to future ASEAN economic agreements.

³ *See* ASEAN Charter, *supra* note 1, at art. 24(1).

⁴ *See id.* at art. 24(2). The Treaty of Amity and Cooperation in Southeast Asia, Feb. 24, 1976, 1025 U.N.T.S. 15, 316 is the first legally binding document in the region affirming that settlement of disputes by peaceful means is a “fundamental principle” that guides the relationship between all High Contracting Parties. Until the ASEAN Charter came into force, it had been the only regional mechanism for resolving disputes of political and security nature in Southeast Asia. The TAC dispute settlement mechanism is not only for Southeast Asia nations or ASEAN member states. To date, many non-ASEAN countries have acceded to the treaty, including China, the United States, Japan, South Korea, North Korea, India, Pakistan, Russia, France, Timor-Leste, Australia, and the European Union, among others. The TAC has so far remained the only regional settlement mechanism for disputes arising between a Southeast Asian state and an extra-regional country.

⁵ *See* ASEAN, Statement of the ASEAN Chair on the Signing of the Protocol to the ASEAN Charter on Dispute Settlement Mechanisms, *available at* <http://www.asean.org/asean/asean-summit/item/statement-of-the-asean-chair-on-the-signing-of-the-protocol-to-the-asean-charter-on-dispute-settlement-mechanisms-by-the-foreign-ministers-of-asean> (last visited Dec. 2, 2012) [hereinafter Statement of the ASEAN Chair].

of the process of drafting necessary annexes to the DSMP.⁶ The DSMP has not yet entered into force, pending ratifications by all ten ASEAN member states.⁷ So far only Vietnam has ratified the DSMP.⁸ ASEAN member states nevertheless are obligated to refrain from acts that would defeat the object and purpose of the treaty.⁹ In the words of the Chairman of ASEAN, the signing of the DSMP has indicated “the determination of ASEAN in transforming ASEAN into a rules-based organization and serve to facilitate the implementation of the Charter and ASEAN Community building.”¹⁰

This paper focuses on the rules and procedures of the DSMP and its significance in further institutionalizing ASEAN into a rules-based regional organization.¹¹ The next section of the paper traces the process that led to the signing of the DSMP. It argues that the conclusion of the DSMP represents a step forward for ASEAN in translating its rhetoric of a rules-based organization to reality. The third section offers a thorough description and detailed analysis of how ASEAN will resolve disputes via the DSMP. It investigates the DSMP’s scope of application, examines the process of dispute settlement that ASEAN government officials have agreed upon, and reviews all dispute settlement mechanisms provided for in the DSMP that remain pending on ratifications by individual ASEAN member states.

The fourth section addresses the issue of unresolved disputes among ASEAN member states. It seeks to answer questions as to what constitutes an unresolved dispute, how unresolved disputes are addressed in the DSMP, and whether the reference of unresolved disputes to the ASEAN Summit may imply that disputes will be resolved through a political process at the expense of the rule of law. The fifth section focuses on the issue of enforcement and compliance with respect to the DSMP. Building on an analysis of ASEAN’s

⁶ See Chairman’s Statement of the 20th ASEAN Summit, Samdech Akka Moha Sena Padei Techo HUN SEN, Prime Minister of the Kingdom of Cambodia (Apr. 4, 2012), *available at* <http://cil.nus.edu.sg/rp/pdf/2012%20Chairmans%20Statement%20of%20the%2020th%20ASEAN%20Summit-pdf.pdf> (last visited Dec. 2, 2012).

⁷ Protocol to the ASEAN Charter on Dispute Settlement Mechanisms art. 19(4), Apr. 8, 2010 [hereinafter DSMP], *available at* <http://cil.nus.edu.sg/rp/pdf/2010%20Protocol%20to%20the%20ASEAN%20Charter%20on%20Dispute%20Settlement%20Mechanisms-pdf.pdf> (last visited Apr. 15, 2013).

⁸ See Government of Vietnam, Về việc phê chuẩn Nghị định thư Hiến chương ASEAN về các cơ chế giải quyết tranh chấp [Report to the President on the Ratification of the Protocol to the ASEAN Charter on Dispute Settlement Mechanisms], Official Note 213/TTr-CP, Aug. 29, 2012, *available at* http://baodientu.chinhphu.vn/Uploaded_VGP/dothanhhoai/20120904/QD%20213.pdf (last visited Feb. 1, 2013).

⁹ Vienna Convention on the Law of Treaties, art. 18, May 23, 1969, 1155 U.N.T.S. 331, 8 I.L.M. 679. Not all ASEAN member states are parties to the Convention but all of them have in fact applied different provisions in the Convention in their treaty relations with other countries.

¹⁰ See Statement of the ASEAN Chair, *supra* note 5; Instrument of Incorporation of the Rules for Reference of Non-compliance to the ASEAN Summit to the Protocol to the ASEAN Charter on Dispute Settlement Mechanisms, *infra* note 31.

¹¹ A rules-based international organization, we believe, should be premised on and operate according to a highly developed set of rules and norms. These rules and norms should effectively structure the interaction among state members of that organization. There should be effective mechanisms to ensure adherence and compliance to rules and norms. More generally, as the LexisNexis Group explains, the most important application of rules-based/rule of law approach is “the principle that governmental authority is legitimately exercised only in accordance with written, publicly disclosed laws adopted and enforced in accordance with established procedural steps that are called due process.” LexisNexis, *Rule of Law*, <http://www.lexisnexis.co.nz/en-nz/about-us/rule-of-law.page> (last visited Dec. 2, 2012).

procedural mechanisms for dispute settlement in the previous parts of the paper, this section will evaluate the likelihood of enforcement and compliance with the final results of dispute settlement mechanisms set up in the DSMP. The paper's final argument is that, whereas the DSMP does represent a step forward for ASEAN in the direction towards a rules-based organization, it contains inherent limitations that will constrain the development of highly effective mechanisms to resolve disputes among ASEAN member states. The goal of a rules-based ASEAN continues to require further institutional innovations, not least in the area of dispute settlement.

II. FROM THE ASEAN CHARTER TO THE PROTOCOL ON DISPUTE SETTLEMENT MECHANISMS

ASEAN announced its intention to create a "legal and institutional framework" in the form of a Charter in the Kuala Lumpur Declaration on the Establishment of the ASEAN Charter in 2005.¹² To implement the Kuala Lumpur Declaration, the Eminent Persons Group on the ASEAN Charter (EPG) was established to brainstorm "bold and visionary ideas"¹³ and recommend key elements of the ASEAN Charter that also included "effective conflict resolution mechanisms."¹⁴ In the span of one year from December 2005 to December 2006, the EPG had as many as eight meetings¹⁵ that resulted in a report submitted to the ASEAN Summit in December 2006. The Report recommended that "ASEAN shall put in place *effective* dispute settlement mechanisms which include mechanisms *similar to those available under the 2004 Protocol*."¹⁶ It suggested that ASEAN dispute settlement mechanisms should include advisory and consultative procedure as well as binding adjudication.¹⁷ Compliance monitoring and enforcement mechanisms should be established and ASEAN should have the power to take measures, including suspension of the rights and privileges of membership, to redress cases of serious breach of ASEAN's objectives, major principles, and commitments to important agreements.¹⁸ ASEAN should have a more flexible decision-making mechanism. "Decision-making by consultation and consensus should be retained for all sensitive

¹² Kuala Lumpur Declaration on the Establishment of the ASEAN Charter (Dec. 12, 2005), *available at* <http://www.asean.org/asean/asean-summit/item/kuala-lumpur-declaration-on-the-establishment-of-the-asean-charter-kuala-lumpur-12-december-2005> (last visited Dec. 2, 2012).

¹³ Report of the Eminent Persons Group on the ASEAN Charter, para. 2, *available at* <http://www.asean.org/archive/19247.pdf> (last visited Dec. 2, 2012).

¹⁴ Terms of Reference of the Eminent Persons Group, para. 4.2(i), *available at* <http://www.asean.org/archive/ACP-TOR.pdf> (last visited Dec. 2, 2012).

¹⁵ The Eminent Persons Group also held two other meetings with members of the civil society, private business sector representatives, and academics. *See* Report of the Eminent Persons Group on the ASEAN Charter, *supra* note 13.

¹⁶ *Id.* at para. 64 (emphasis added). Although the EPG Report did not elaborate on what it meant by "effective," several elements in the EPG's recommendations would be instructive in creating effective dispute settlement mechanisms under the ASEAN Charter. "The 2004 Protocol" is the eDSMP, which provides for decision-making on the basis of negative consensus rather than positive consensus. *See also id.* at para. 42.

¹⁷ *Id.* at para. 64.

¹⁸ *Id.* at para. 6.

important decisions [but], if the consensus cannot be achieved, decisions may be taken through voting, subject to rules of procedure determined by the ASEAN Council.”¹⁹

The EPG Report served as a basis for the High Level Task Force (HLTF) commissioned by the ASEAN Foreign Ministers at the 39th Meeting in Kuala Lumpur²⁰ to draft the ASEAN Charter, including Chapter VIII of the Charter on Settlement of Disputes.²¹ Within ten months from January to October 2007, the HLTF held a total of 14 meetings, including one informal meeting, made regular reports to the ASEAN Foreign Ministers, and managed to complete drafting specific provisions of the ASEAN Charter.²² In November 2007, the ASEAN Charter was signed by leaders of ten ASEAN member states at their 13th Summit in Singapore and it finally entered into force in December 2008, marking a major step forward in the evolution of the organization.²³

A close reading of the ASEAN Charter reveals that the EPG’s bold recommendations concerning sanction mechanisms against violators and decision-making through voting are not reflected in the Charter. Nevertheless, other ideas of the EPG were incorporated in the ASEAN Charter that has served the Association in many ways: helping to accord ASEAN legal personality, articulating ASEAN’s objectives and principles, strengthening ASEAN’s structure, mandating the ASEAN Secretary-General to monitor the implementation of ASEAN decisions and instruments, establishing a human rights body, and laying the foundation for the development of dispute settlement mechanisms in all fields of cooperation.²⁴ Article 25 of the ASEAN Charter, in particular, states that appropriate dispute settlement mechanisms, *including arbitration*, shall be established to address disputes relating to the interpretation or application of the ASEAN Charter and other ASEAN instruments.

The reference to arbitration in Article 25 is of notable significance because the award of an arbitral tribunal is binding upon the parties to the dispute. When the Article was drafted, there was in fact a long internal debate within the HLTF on whether an ASEAN

¹⁹ *Id.* at para. 8.

²⁰ ASEAN, Joint Communiqué of the 39th ASEAN Ministerial Meeting (AMM), *available at* <http://www.asean.org/communities/asean-political-security-community/item/joint-communique-of-the-39th-asean-ministerial-meeting-amm-kuala-lumpur-25-july-2006-3> (last visited Apr. 15, 2013).

²¹ While the EPG was composed of highly distinguished and well respected ASEAN citizens who did not serve in their governments at that time and would submit their report to the ASEAN Summit, the HLTF was composed of high-level government officials and would report the outcome of their work to the ASEAN Foreign Ministers. The biographies of the members of the Eminent Persons Group are *available at* <http://www.asean.org/archive/ACP-Bio-EPG.pdf> (last visited Dec. 2, 2012). The biographies of High Level Task Force members are *available at* <http://www.asean.org/archive/ACP-Bio-HLTF.pdf> (last visited Dec. 2, 2012). According to the HLTF TOR, which is *available at* <http://www.asean.org/archive/ACP-TOR.pdf> (last visited Dec. 2, 2012), the HLTF “shall draft the ASEAN Charter based on the directions given by the Leaders as reflected in the Kuala Lumpur Declaration on the Establishment of the ASEAN Charter and the Cebu Declaration on the Blueprint of the ASEAN Charter and in consideration of the recommendations made by the EPG and other relevant ASEAN documents.” *See id.*

²² ASEAN, Activities of the High Level Task Force, *available at* <http://www.asean.org/archive/HLTF-Activities.pdf> (last visited Apr. 15, 2013).

²³ *See* ASEAN, ASEAN Charter Enters into Force Next Month, *available at* <http://www.asean.org/asean/asean-charter/media-releases-on-the-asean-charter/item/asean-charter-enters-into-force-next-month-bangkok-15-november-2008> (last visited Apr. 15, 2013).

²⁴ *See* ASEAN, ASEAN Leaders Sign ASEAN Charter (Nov. 20, 2007), *available at* <http://www.asean.org/news/item/media-release-asean-leaders-sign-asean-charter-singapore-20-november-2007> (last visited Apr. 15, 2013).

court or arbitration should be referred to in Article 25. Some delegations were skeptical that ASEAN was not yet ready for such a formal mechanism. Others claimed such reference would be inconsistent with the ASEAN way of non-confrontation and informal, quiet diplomacy.²⁵ Yet others suggested that if ASEAN would follow a rules-based direction, then formal and binding dispute settlement mechanisms must be established.²⁶ The final language adopted in Article 25 represents a compromise in which the idea of an ASEAN court is not included but appropriate dispute settlement mechanisms would include arbitration.

To implement Article 25 of the ASEAN Charter, ASEAN Foreign Ministers agreed in July 2008 to form a High Level Legal Experts' Group on Follow-up to the ASEAN Charter (HLEG) to draft, among others, a legal instrument on ASEAN dispute settlement mechanisms. The HLEG negotiation process suggested that dispute resolution has never been an easy issue for ASEAN. In fact, whereas the EPG had eight meetings in one year to complete its Report on all major elements of the ASEAN Charter and the HLTF had 14 meetings in ten months to draft the ASEAN Charter, it took the HLEG as many as 19 meetings over 16 months to draft the DSMP. The HLEG's mandate was supposed to end in July 2009 but was extended until the end of 2009 so that the draft DSMP could be finished.²⁷ To be fair, the HLEG did not only draft the DSMP; it also worked on the Agreement on ASEAN's Privileges and Immunities. It should be noted, however, that when the DSMP was signed in Hanoi in April 2010, the DSMP was not even completed. The DSMP with four annexes, namely the Rules of Good Offices (Annex 1), the Rules of Mediation (Annex 2), the Rules of Conciliation (Annex 3), and the Rules of Arbitration (Annex 4), was signed by the ASEAN Foreign Ministers with the understanding that two more rules would have to be added later for the DSMP to be complete, namely the Rules for Reference of Unresolved Disputes to the ASEAN Summit and the Rules for Reference of Non-compliance to the ASEAN Summit.²⁸

Immediately after the DSMP was signed, the ASEAN Senior Officials' Meeting (SOM) decided to establish a working group called the ASEAN SOM Working Group on Drafting HLEG's Remaining Legal Instruments under the ASEAN Charter (Working

²⁵ The "ASEAN Way" is generally characterized by four elements: (1) respect for the internal affairs of other members; (2) non-confrontation and quiet diplomacy; (3) non-recourse to use or threat to use of force; and (4) decision-making through consensus, which is unique to ASEAN. See Hiro Katsumata, *Reconstruction of Diplomatic Norms in Southeast Asia: The Case for Strict Adherence to the 'ASEAN Way'*, 25 CONTEMP. SOUTHEAST ASIA 104, 106-07 (2003). See also Beverly Loke, *The 'ASEAN Way': Towards Regional Order and Security Cooperation*, 30 MELBOURNE J. POL. 8 (2005). According to Jurgen Haacke, 'the ASEAN way' is composed of six elements: sovereign equality, quiet diplomacy, non-recourse to use or threat to use of force, non-involvement in bilateral disputes, non-interference and quiet diplomacy. See Jurgen Haacke, *ASEAN's Diplomatic and Security Culture: A Constructivist Assessment*, 3 INT'L REL. OF THE ASIA-PACIFIC 57, 59 (2003).

²⁶ See Walter Woon, *Dispute Settlement in ASEAN* (Oct. 17, 2011) (unpublished paper) (on file with the Centre for International Law, National University of Singapore), available at <http://cil.nus.edu.sg/wp/wp-content/uploads/2010/08/DISPUTE-SETTLEMENT-IN-ASEAN-KSIL-ProfWalterWoon.pdf> (last visited Apr. 15, 2013).

²⁷ See ASEAN, *ASEAN Annual Report 2009 – 2010*, available at <http://www.asean.org/resources/publications/asean-publications/item/annual-report-2009-2010> (last visited Apr. 15, 2013).

²⁸ See Statement of the ASEAN Chair, *supra* note 5.

Group).²⁹ Once the Working Group finalized the Rules for Reference of Unresolved Disputes to the ASEAN Summit, ASEAN Foreign Ministers signed an instrument to incorporate the Rules to the DSMP as Annex 5 in October 2010.³⁰ Finally, the Rules for Reference of Non-compliance to the ASEAN Summit were added to the DSMP as Annex 6 in April 2012.³¹ At the 20th ASEAN Summit, the signing of the Instruments of Incorporation of the Rules for Reference of Non-compliance to the ASEAN Summit to the DSMP was touted as marking “the completion of the process of developing the legal instruments identified under the Protocol to the ASEAN Charter on Dispute Settlement Mechanisms . . .”³² The DSMP is now open for ratification by ASEAN member states. Article 19 (4) of the DSMP requires ratifications by all ten ASEAN member states before it can enter into effect.³³

The potential implications for ASEAN to have the DSMP should not be underestimated. The conclusion of the DSMP realizes the goal stated in the ASEAN Charter of creating dispute settlement mechanisms in all fields of ASEAN cooperation.³⁴ Once the DSMP enters into force, ASEAN will for the first time in its history have a settlement mechanism for disputes concerning its Charter, something other regional organizations have had for quite some time. The European Union, for example, has the Court of Justice of the European Union³⁵ and the African Union has the African Court of Justice to resolve disputes relating to the interpretation and application of their constitutional documents.³⁶ Although the DSMP does not create a permanent judicial body for ASEAN like courts of justice for other international and regional organizations, it does offer a venue for ASEAN member states to pursue in case they have disputes concerning the interpretation and application of the ASEAN Charter.

²⁹ See *id.*; see also ASEAN, Joint Communiqué of the 44th ASEAN Foreign Ministers Meeting (July 19, 2011), <http://www.asean.org/news/asean-statement-communications/item/joint-communique-of-the-44th-asean-foreign-ministers-meeting-bali-indonesia-19-july-2011> (last visited Apr. 15, 2013).

³⁰ See ASEAN, Instrument of Incorporation of the Rules for Reference of Unresolved Disputes to the ASEAN Summit to the Protocol to the ASEAN Charter on Dispute Settlement Mechanisms (Oct. 27, 2010), available at <http://www.asean.org/images/archive/documents/Instrument%20of%20Incorporation%20of%20Rules%20or%20Reference%20of%20Unresolved%20Disputes.pdf> (last visited Apr. 15, 2013).

³¹ See ASEAN, Instrument of Incorporation of the Rules for Reference of Non-compliance to the ASEAN Summit to the Protocol to the ASEAN Charter on Dispute Settlement Mechanisms (Apr. 2, 2012), available at <http://www.asean.org/images/archive/documents/Instrument-ASEAN%20Charter%20on%20Dispute%20Settlement%20Mechanism.pdf> (last visited Apr. 15, 2013).

³² Sandech Aka Moha Sena Padei Techo HUN SEN, Prime Minister of the Kingdom of Cambodia, Chair of ASEAN, Chairman’s Statement of the 20th ASEAN Summit on Drug Free ASEAN 2015 (Apr. 3, 2012) (transcript available at CAMBODIA NEW VISION, <http://cnv.org.kh/en/?p=548> (last visited Mar. 10, 2013)).

³³ See DSMP, *supra* note 7, at art. 19(4).

³⁴ See ASEAN Charter, *supra* note 1, at art. 22(2).

³⁵ As part of its mission, the Court shall interpret European Union law at the requests of national courts and tribunals. See General Presentation, E.C.J. (CURIA), http://curia.europa.eu/jcms/jcms/Jo2_6999/ (last visited Mar. 10, 2013).

³⁶ As part of its mission, the Court shall interpret all provisions of the Charter. The African Court of Justice has been merged with the African Court of Human and People’s Right to become “The African Court of Justice and Human Rights.” The merging Protocol was adopted at the African Union Summit in 2008. See The African Court of Human and Peoples’ Rights, AFRICAN UNION, <http://www.au.int/en/organs/cj> (last visited Mar. 10, 2013).

With the DSMP, for the first time, ASEAN will have a mechanism of arbitration for political or security disputes. Prior to the DSMP, these types of disputes were considered either internal affairs among involved parties or too sensitive for ASEAN to address with a formal settlement mechanism. As a matter of fact, ASEAN has never had arbitration as a mode of dispute settlement mechanism before, except in the eDSMP where arbitration is only provided in cases of disputes concerning compensation and suspension of concessions.³⁷ For a region where respect for sovereignty and non-interference principles have long dominated international discourse and state behavior, the presence of an arbitration mechanism for disputes concerning sensitive issues of political and security nature would represent a step forward for ASEAN.

In sum, the conclusion of the DSMP demonstrates ASEAN commitment to peaceful resolution of disputes and reflects ASEAN's efforts to translate its rhetoric of a rules-based organization to reality. It should be noted that the HLEG was established to draft the DSMP even before the ASEAN Charter came into force. Members of the HLEG and later the Working Group had working meetings on a monthly basis for three years from 2008 to 2011 under several ASEAN chairmanships to complete the DSMP. Drafting the DSMP was seen as an important item on the agenda of ASEAN and completing the DSMP was always a priority for ASEAN. The fact that many ASEAN member states have seriously entertained and committed to the very real possibility of having dispute settlement mechanisms for all fields of ASEAN cooperation is an important sign that their moving in the rules-based direction is not merely rhetoric. That lofty goal of a rules-based ASEAN notwithstanding, whether the mechanisms provided for in the DSMP can prove effective in resolving disputes among ASEAN member states requires a more careful examination.

III. DISPUTE SETTLEMENT PROCEDURE AND MECHANISMS UNDER THE DSMP

A. *Scope of Application*

The DSMP puts in place different mechanisms to help ASEAN Member States resolve their disputes concerning the interpretation or application of the ASEAN Charter. As said, this is the first time ASEAN has a settlement mechanism for disputes concerning its “constitutional” document.

The DSMP also applies to disputes concerning the interpretation or application of “other ASEAN instruments.” Article 25 of the ASEAN Charter provides that “where not otherwise specifically provided, appropriate dispute settlement mechanisms, including arbitration, shall be established for disputes which concern the interpretation or application of this Charter and *other ASEAN instruments*.”³⁸ Yet, it is not clear what “other ASEAN instruments” implies. Reference to “ASEAN instruments” in a few other articles in the ASEAN Charter does not help clarify its meaning. Article 2(1) states that “ASEAN and its Member States reaffirm and adhere to the fundamental principles contained in the declarations, agreements, conventions, concords, treaties and *other*

³⁷ See eDSMP, *supra* note 2, at art. 16(7)-(8).

³⁸ ASEAN Charter, *supra* note 1, at art. 25 (emphasis added).

instruments of ASEAN.”³⁹ Article 52(1) provides that “[a]ll treaties, conventions, agreements, concords, declarations, protocols and *other ASEAN instruments* which have been in effect before the entry into force of this Charter shall continue to be valid.”⁴⁰ In Article 20(3), the term “instruments” is qualified into legal instruments that “[n]othing [...] shall affect the modes of decision-making as contained in the *relevant ASEAN legal instruments.*”⁴¹

Three potential questions may arise with respect to the kinds of instruments that Article 25 refers to. First, does “other ASEAN instruments” in Article 25 of the ASEAN Charter refer to all ASEAN instruments, including political statements, or only legal instruments, i.e., ASEAN treaties? Second, do ASEAN instruments include agreements concluded between ASEAN and an external party? Finally, does an ASEAN instrument need to have entered into force or does it have to be ratified by all ASEAN member states before the DSMP may be invoked? It is worth noting that certain ASEAN instruments such as the ASEAN Convention on Counter-Terrorism have entered into force even though not all member states had ratified them.⁴²

Answers to these questions can be found in Article 1 and Article 2 of the DSMP. To be consistent with Article 25 of the ASEAN Charter, the DSMP retains the term ASEAN instruments but specifies that these instruments must be “concluded” by ASEAN member states “in written form, that [give] rise to their respective rights and obligations in accordance with international law.”⁴³ Reading the definition of “ASEAN instrument” in the DSMP in line with the definition of “treaty” in the Vienna Convention on the Law of Treaties, which provides that “‘treaty’ means an international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation,”⁴⁴ one can reasonably conclude that in the DSMP, “ASEAN instruments” means ASEAN legal instruments or ASEAN treaties.

By stating that an “ASEAN instrument” needs to be concluded by member states “as ASEAN Member States,” the DSMP excludes from its purview any agreements concluded between states in their individual capacity and not in the capacity of ASEAN Member States. In the same vein, the DSMP also excludes agreements concluded between ASEAN as an inter-governmental organization and its member states or a third external party such as the Agreement between Indonesia and ASEAN on Hosting and Granting Privileges and Immunities to the ASEAN Secretariat (Host Country Agreement – HCA).⁴⁵ Under the Rules of Procedure for Conclusion of International Agreements by

³⁹ *Id.* at art. 2(1) (emphasis added).

⁴⁰ *Id.* at art. 52(1).

⁴¹ *Id.* at art. 20(3).

⁴² ASEAN Convention on Counter Terrorism, art. XXI(1), Jan. 13, 2007 (provides that the Convention “shall enter into force on the 30th (thirtieth) day following the date of the deposit of the 6th (sixth) instrument of ratification or approval with the Secretary-General of ASEAN in respect of those Parties that have submitted their instruments of ratification or approval.” In fact, the Convention entered into force on May 21, 2011 after the ratification by Brunei.).

⁴³ DSMP, *supra* note 7, at art. 1(1)(a).

⁴⁴ Vienna Convention on the Law of Treaties, art. 1(1)(b), May 23, 1969, 1155 U.N.T.S. 331.

⁴⁵ The Agreement between Indonesia and ASEAN on Hosting and Granting Privileges and Immunities to the ASEAN Secretariat was signed on April 3, 2012. This Agreement is not an ASEAN instrument but rather an international agreement by ASEAN as an intergovernmental organization in its conduct of

ASEAN, documents such as the HCA are now called “international agreements by ASEAN.”⁴⁶ Finally, that the term “concluded” rather than “signed” indicates that “other ASEAN instruments” would have to enter into force before dispute settlement mechanisms in the DSMP may be triggered.

As stated in Article 2 of the DSMP, the Protocol shall apply to disputes concerning the interpretation or application of any “other ASEAN instruments unless specific means of settling such disputes have been provided for” (Article 2(1)(b)) or any “other ASEAN instruments that expressly provide this Protocol or part of this Protocol shall apply” (Article 2(1)(c)). In this regard, one might argue that Article 2(1)(c) seems unnecessary as the phrase “other ASEAN instruments unless specific means of settling such disputes have already been provided for” has, in effect, encompassed “other ASEAN instruments which expressly provide that this Protocol or part of this Protocol shall apply.”

It is also interesting to note that the DSMP shall be interpreted “in accordance with the customary rules of treaty interpretation of public international law”⁴⁷ instead of the Vienna Convention on the Law of Treaties. Not many ASEAN instruments have a provision on the application of customary international law. The reason why the Vienna Convention on the Law of Treaties was not specifically referred to in the DSMP is probably because not all ASEAN member states are a party to the Convention. In fact, Cambodia, Laos, Malaysia, Myanmar, the Philippines, and Vietnam are parties to the Convention whereas Brunei, Indonesia, Singapore, and Thailand are not.⁴⁸

In sum, the DSMP may be applied to disputes relating to all ASEAN legal instruments concluded by member states as ASEAN Member States, except for economic instruments or other instruments that already have their own separate dispute settlement mechanisms. A future ASEAN Convention on Human Rights, for example, would be subject to dispute settlement mechanisms under the DSMP if that Convention does not provide for its own specific dispute settlement mechanisms. In case there is an objection to the jurisdiction of an arbitral tribunal over a dispute, Rule 16 of Annex 4 (Rules of Arbitration) of the Protocol provides that the arbitral tribunal will determine the questions as to its own jurisdiction (*competence sur la competence*).⁴⁹

B. Dispute Settlement Procedure

In terms of procedure under the DSMP, when a dispute arises, the complaining party may make a consultation request to the responding party. The responding party has 30 days to reply to this request and must enter into consultation “with a view to reaching a

external relations as provided in Article 41(7) of the ASEAN Charter. *See* ASEAN Charter, *supra* note 1, at art. 41(7).

⁴⁶ *See Rules of Procedure for Conclusion of International Agreements by ASEAN*, Nov. 16, 2011, available at <http://cil.nus.edu.sg/wp/wp-content/uploads/2012/12/Compilation-OI-ASEAN.pdf> (last visited Apr. 15, 2013).

⁴⁷ DSMP, *supra* note 7, at art. 3(1).

⁴⁸ *See* U.N Treaty Section, Status of the Vienna Convention on the Law of Treaties (Mar. 10, 2013), http://treaties.un.org/pages/ViewDetailsIII.aspx?&src=TREATY&mtdsg_no=XXIII~1&chapter=23&Temp=mtdsg3&lang=en (last visited Apr. 15, 2013).

⁴⁹ DSMP, *supra* note 7, at annex 4, r. 16.

mutually agreed solution” within 60 days from the date of receiving the request.⁵⁰ Obligation to consult or exchange views is common in international treaties; for instance, the United Nations Convention on the Law of the Sea (UNCLOS)⁵¹ or the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU) of the World Trade Organization (WTO).⁵² Consultation gives involved parties a chance to try to resolve their dispute in a manner perceived as less formal and confrontational. Consultation is also very much consistent with ASEAN’s traditional practice.⁵³ Furthermore, a requirement for consultation is also in line with Article 22(1) of the ASEAN Charter.⁵⁴

When the HLTF drafted Article 22(1) of the Charter, there was a proposal to break with the tradition by providing ASEAN member states the right to use legal means to resolve the dispute from the beginning. Other members, however, had reservations about the prospect that too much law would be involved in the initial stage of the dispute settlement process.⁵⁵ In the end, it was concluded that, as a general principle, parties to the dispute should hold direct dialogue, consultation and negotiation first before employing any legally binding dispute settlement mechanism. Finally, as the procedure stipulates, within 30 days after the consultation request is made, if the responding party fails to respond or if consultation does not help resolve the dispute within 90 days from the date of receipt of the consultation request, the complaining party may request the establishment of an arbitral tribunal.⁵⁶ As the award of an arbitral tribunal is binding and final,⁵⁷ the fact that one party may go directly to arbitration after only a brief period of consultation is indeed a major change for ASEAN in terms of dispute settlement. For comparison, in the case of the eDSMP, if consultation fails, the matter has to go through the Senior Economic Officials Meeting (SEOM) first, then to a dispute settlement panel, and after that to an appellate body should there be an appeal before recommendations and findings become final.⁵⁸

Once the arbitration request is made, the responding party has 15 days to positively respond to the complaining party; otherwise the complaining party may refer the dispute to the ASEAN Coordinating Council (ACC).⁵⁹ The ACC then has 45 days to make a decision in which it may “direct” the parties to the dispute to use good offices, mediation, conciliation or arbitration to have their dispute settled.⁶⁰ During the whole process, the

⁵⁰ *Id.* at art. 5(3).

⁵¹ U.N. Convention on the Law of the Sea, art. 283, Dec.10, 1982, 1833 U.N.T.S. 397 [hereinafter UNCLOS].

⁵² See Understanding on Rules and Procedures Governing the Settlement of Disputes, art. 4, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, annex 2, 1869 U.N.T.S. 401 [hereinafter DSU].

⁵³ A lot of ASEAN cooperation agreements, in fact, do not specify any dispute settlement mechanisms but merely call for friendly dialogues and amicable negotiations.

⁵⁴ Article 22(1) of the ASEAN Charter provides that, if a dispute arises, ASEAN Member states must endeavour to peacefully resolve their dispute through dialogue, consultation and negotiation. See ASEAN Charter, *supra* note 1, at art. 22(1).

⁵⁵ See Woon, *supra* note 26.

⁵⁶ See ASEAN Charter, *supra* note 1, at art. 8(1).

⁵⁷ See *id.* at art. 15.

⁵⁸ See eDSMP, *supra* note 2, at art. 5-15.

⁵⁹ See ASEAN Charter, *supra* note 1, at art. 8(4).

⁶⁰ See *id.* at art. 9(1)-(2).

parties to a dispute may also at any time agree to go through good offices, mediation or conciliation to resolve their disagreements.⁶¹

The fact that the DSMP chooses to use the term “direct” instead of other possible terms like “suggest,” “propose,” or “recommend” is actually worth noting. “Direct” often carries a stronger force than either “suggest,” “propose,” or “recommend.” When parties to the dispute receive a direction from the ACC, they are expected to comply with the ACC decision even if that decision includes settlement through an arbitral tribunal. In fact, during the negotiation of the DSMP, this issue was the subject of a long debate within the HLEG. One argument was that ASEAN might not be ready for arbitration upon agreement between the concerned parties, let alone arbitration upon the direction of the ACC. There were also concerns that this provision may not be in accordance with the principle of non-interference that ASEAN has long upheld. One may argue, however, that compliance to the principle of non-interference is still maintained because the ACC – composed of all ASEAN member states, including the concerned parties – makes its decisions on a consensus basis.⁶² This basically guarantees that, if one of the concerned parties does not agree, the ACC cannot “direct” them to resort to arbitration to have their dispute resolved.

C. Means of Dispute Settlements

While arbitration is a formal and binding form of dispute resolution, good offices, mediation or conciliation are voluntary mechanisms that do not always result in a definite solution of the dispute. They are, after all, not intended to produce binding conclusions but rather to assist the parties in reaching a mutually agreed upon resolution.

When the ACC directs that the dispute be resolved by good offices, it shall request the ASEAN Chairman or the ASEAN Secretary-General acting in an *ex-officio* capacity, or a suitable person to provide good offices.⁶³ In their efforts to resolve the dispute, the concerned parties may also take the initiative to request the ASEAN Chairman or the ASEAN Secretary-General provide good offices, conciliation or mediation.⁶⁴ They may also choose mediators, conciliators, or arbitrators from the list drawn up and maintained by the ASEAN Secretary-General.⁶⁵ The effectiveness of the ASEAN Chair in this role, however, would probably depend on various factors, including the policy of the government that holds the ASEAN Chairmanship and even personal preferences of the head of state or the foreign minister of that government.⁶⁶ For the ASEAN Secretary-General, Article 4(3) of the eDSMP gives him a more active role where the Secretary-General “may offer” to provide good offices, conciliation or mediation with a view to assisting the parties to settle their dispute. There were certain opinions within the HLTF and the HLEG in favor of empowering the ASEAN Secretary-General or the ASEAN Chairman to proactively offer good offices, conciliation or mediation without having to be requested in

⁶¹ See *id.* at art. 6-7.

⁶² See *id.* at art. 20(1) (stipulating that, as a basic principle, decision-making in ASEAN shall be based on consultation and consensus).

⁶³ DSMP, *supra* note 7, at annex 1, r. 1(2).

⁶⁴ See ASEAN Charter, *supra* note 1, at art. 23(2).

⁶⁵ DSMP, *supra* note 7, at annex 4, r. 5(1).

⁶⁶ See Woon, *supra* note 26.

the first place. Yet, concerns remained that a very active Secretary-General might be too ready to intervene.⁶⁷ It was ultimately decided that it would be better to let the concerned parties make the request rather than allow outside actors to actively attempt to get involved.⁶⁸

According to the DSMP, the person providing good offices shall assist the parties in resolving the dispute by communicating directly with them in an independent, neutral and impartial manner.⁶⁹ Parties to the dispute shall render the person providing good offices all necessary assistance to enable this person to carry out his or her responsibilities.⁷⁰ A mediator shall have a quite similar role. He or she shall help to facilitate communication and negotiation between the parties with a view to resolving the dispute.⁷¹ He or she may invite the parties to the dispute to meet with him or her or may communicate with the parties together or separately, orally or in writing.⁷²

Compared with the person providing good offices or the mediator, a conciliator has a more active role to play. He or she may, at any stage of the conciliation proceedings, make proposals for a settlement of the dispute.⁷³ Parties to the dispute have the obligation to cooperate in good faith with the conciliator. They shall endeavour to comply with requests by the conciliator to submit written materials, provide evidence and attend meetings.⁷⁴ A conciliator may formulate and submit the terms of a possible settlement to the parties for their observations. A conciliator may also draft or assist the parties in drafting the settlement agreement.⁷⁵

Good offices, mediation or conciliation shall end if one or both parties or the person providing good offices, the mediator or the conciliator inform the ACC or each other that good offices, mediation or conciliation should be terminated or are no longer necessary or justified. Good offices, mediation or conciliation shall also cease on the date the parties inform the ACC that the dispute has been resolved or on the date a settlement agreement is signed.⁷⁶ Where the parties reach a settlement of the dispute, they shall negotiate and sign an agreement. By signing the agreement, they put an end to the dispute and are bound by the agreement.⁷⁷

Under the DSMP, an arbitral tribunal is composed of three arbitrators.⁷⁸ Each party to the dispute shall appoint one arbitrator. If one party fails to do so, the other party shall request the ASEAN Secretary-General to appoint the second arbitrator.⁷⁹ The ASEAN Secretary-General shall, within fifteen (15) days from the date of receiving the request and in consultation with the party that has failed to appoint an arbitrator, appoint the second arbitrator, preferably from the list of individuals who may serve as

⁶⁷ *See id.*

⁶⁸ WALTER WOON, *The ASEAN Charter Dispute Settlement Mechanisms, in THE MAKING OF THE ASEAN CHARTER* 69, 71 (Tommy Koh *et al.* eds., World Scientific Publishing Co., 2009).

⁶⁹ DSMP, *supra* note 7, at annex 1, r. 1(2), 2.

⁷⁰ *Id.* at annex 1, r. 1(2).

⁷¹ *Id.* at annex 2, r. 2.

⁷² eDSMP, *supra* note 2, at annex 2, r. 4.

⁷³ *Id.* at annex 3, r. 4(3).

⁷⁴ *Id.* at annex 3, r. 8.

⁷⁵ *Id.* at annex 3, r. 10(2).

⁷⁶ *Id.* at annex 1, r. 5; annex 2, r. 8; annex 3, r. 12.

⁷⁷ *Id.* at arts. 7(2)-(3).

⁷⁸ *Id.* at annex 4, r. 1(1).

⁷⁹ *Id.* at annex 4, r. 1(3).

arbitrators.⁸⁰ This list is drawn up and maintained by the Secretary-General of ASEAN who shall keep the Member States updated of any change to the list. Every member state shall be entitled to make ten nominations to that list.⁸¹

The third arbitrator shall be appointed upon agreement by the parties.⁸² If the parties fail to do so, any party may request the ACC Chair to appoint the third arbitrator who shall be the chair of the arbitral tribunal.⁸³ Here again, the ACC Chair cannot proactively offer to appoint the third arbitrator but has to be invited to do so. An active ACC Chair like Indonesia may informally offer to help, but not all ASEAN member states would do the same if they assume the ASEAN Chairmanship.⁸⁴ Thus, to enhance the role of the ACC in expediting the arbitration process, ASEAN needs to create a sustainable mechanism and cannot count on being fortunate enough to have an active chair.

It is also interesting to note, however, that while the ASEAN Secretary-General may also appoint the second arbitrator, he or she does not have the authority to appoint the third one. This restriction stems from the reluctance of ASEAN member states to give too much power to the Secretary-General. The Secretary-General can make a recommendation to the ACC Chair on the appointment of the third arbitrator, but before the recommendation is made, he or she must consult with the Committee of Permanent Representatives to ASEAN (CPR).⁸⁵ Whether it is the CPR or the ACC, the decision shall be made on the basis of consensus. Even if the ACC Chair can appoint the third arbitrator and is actually obliged to appoint the third arbitrator within 15 days from the date of receipt of a request,⁸⁶ it is likely that he will consult with his colleagues from other ASEAN member states, in particular the concerned states, before making any decision. In making his appointment, the ACC Chair shall appoint a national of an ASEAN Member State, who shall be on the list of arbitrators unless he concludes that exceptional circumstances require otherwise.⁸⁷ If the ACC Chair is a national of one of the parties to the dispute, the appointment of the third arbitrator shall be made by the next ACC Chair who is not a national of one of the parties to the dispute.⁸⁸

As required by the DSMP, arbitrators shall possess expertise or experience in law and in the matters covered by the ASEAN Charter or the relevant ASEAN instrument.⁸⁹ They are chosen on the basis of objectivity and reliability.⁹⁰ They are neither affiliated with nor take instructions from any parties to the dispute. The Chair of the arbitral tribunal shall not be a national of the parties and shall preferably be a national of an

⁸⁰ *Id.*

⁸¹ *Id.* at annex 4, r. 5(1).

⁸² *Id.* at annex 4, r. 1(4)(a).

⁸³ *Id.* at annex 4, r. 1(4)(b) & (c).

⁸⁴ See International Crisis Group, *Waging Peace: ASEAN and the Thai-Cambodian Border Conflict*, Asia Report No. 215 (2011), available at <http://www.crisisgroup.org/en/regions/asia/south-east-asia/cambodia/215-waging-peace-asean-and-the-thai-cambodian-border-conflict.aspx> (last visited Dec. 2, 2012).

⁸⁵ See eDSMP, *supra* note 2, at annex 4, r. 1(4)(c).

⁸⁶ DSMP, *supra* note 7, at annex 4, r. 1(4)(c).

⁸⁷ *Id.* at annex 4, r. 1(4)(d).

⁸⁸ eDSMP, *supra* note 2, at annex 4, r. 1(4)(e).

⁸⁹ *Id.* at art. 11(2).

⁹⁰ *Id.*

ASEAN Member State.⁹¹ Parties to the dispute may challenge an arbitrator if circumstances indicate justifiable doubts as to his or her impartiality or independence.⁹²

After being established, an arbitral tribunal shall fix the timetable for the arbitral proceedings.⁹³ Each party shall have an opportunity to submit to the tribunal in writing the facts of its case as well as its arguments and anticipated counter-arguments. Any timetable the tribunal sets shall include deadlines for submissions by the parties and shall provide for at least one hearing for the parties to present their case to the tribunal.⁹⁴ The tribunal shall examine the facts of the case and decide the case in light of relevant provisions in the ASEAN Charter and other ASEAN instruments and shall provide reasons for its ruling.⁹⁵ It may also apply relevant rules of public international law or decide a case *ex aequo et bono* if so agreed by the parties.⁹⁶ Decisions of the arbitral tribunal shall be reached by a majority vote of its arbitrators.⁹⁷ Where there is no majority, the Chair of the tribunal shall have a casting vote.⁹⁸

With regard to the timeframe provided for in the dispute settlement process, one may notice that the time periods provided for in the DSMP are generally longer than ones provided for in the eDSMP. For instance, the eDSMP – not unlike the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU) of the World Trade Organization (WTO) – allows the responding state ten days to respond and 30 days to enter into consultation after receiving a consultation request. In the DSMP, however, the responding party has 30 days to reply to such a request and must enter into consultation within 60 days. This difference may be explained by the fact that the two Protocols deal with two different sets of dispute. The eDSMP deals with economic disputes whereas the DSMP aims to address those arising from divergent interpretation and application of the ASEAN Charter and other ASEAN instruments. The latter kind of disputes is usually political, social and cultural in nature and often considered more complicated and sensitive within ASEAN.

It is also interesting to note that the dispute settlement procedure is quite transparent to other ASEAN member states that are not a party to the dispute. Although detailed matters relating to the proceedings are kept confidential, all other ASEAN member states receive notifications on all major steps of the process. Even at the initial stage of consultation when it may involve information that the concerned parties might want to keep confidential, Article 5 still requires parties to a dispute to notify all other member states of the request for consultation, as well as its resulting outcome.

⁹¹ *Id.* at art. 11(3).

⁹² *Id.* at annex 4, r. 2(2).

⁹³ *Id.* at annex 4, r. 8(2).

⁹⁴ *Id.* at annex 4, r. 8(3).

⁹⁵ *Id.* at art. 12.

⁹⁶ *Id.* at art. 19(4).

⁹⁷ *Id.* at annex 4, r. 14.

⁹⁸ *Id.* One may argue that this Rule is not necessary as the arbitral tribunal is composed of three arbitrators and always makes decisions by majority.

IV. REFERENCE OF UNRESOLVED DISPUTES TO THE ASEAN SUMMIT

A. *Referring Unresolved Disputes to the ASEAN Summit*

Unlike in many other international and regional institutions where disputes of a political or security nature remain untouched unless all parties to the disputes agree to address them, Article 26 of the ASEAN Charter provides that, if concerned parties fail to resolve the dispute after the application of all relevant dispute settlement mechanisms such as TAC, eDSMP or DSMP, the dispute shall be referred to the ASEAN Summit for its decision. During the drafting process of the DSMP there was a debate on whether or not to address Article 26 of the ASEAN Charter in the DSMP. Some countries maintained that the DSMP should only focus on different dispute mechanisms, including good offices (Annex 1), mediation (Annex 2), conciliation (Annex 3) and arbitration (Annex 4). Other countries insisted that the DSMP needed to deal with the issue of reference of unresolved dispute to the ASEAN Summit; otherwise it would be difficult for them to sign the DSMP as it was. They argued that the idea behind Article 26 of the ASEAN Charter, as well as the entire Chapter VIII of the ASEAN Charter, was that all ASEAN disputes shall eventually be resolved and the issue of unresolved dispute needed to be addressed if ASEAN wanted to build a strong community in a rules-based direction. In the end, by way of a compromise, all member states agreed to sign the DSMP with only the above four annexes but the then ASEAN Chair – Vietnam – had to issue a Statement, saying that two more rules would be annexed for the DSMP to be completed, including the Rules for Reference of Unresolved Disputes to the ASEAN Summit and the Rules for Reference of Noncompliance to the ASEAN Summit.⁹⁹

According to the Rules for Reference of Unresolved Disputes, before an unresolved dispute can reach the ASEAN Summit, it has to go through the ACC.¹⁰⁰ The ACC would give the parties another chance to resolve their dispute without having to go to the ASEAN Summit. This requirement is justified by the fact that the ACC is entrusted by the ASEAN Charter with the preparation for the meetings of the ASEAN Summit.¹⁰¹ However, since it is the right of Member States to refer unresolved disputes to the ASEAN Summit, the role of the ACC at this stage does not necessarily create another layer that might prevent the unresolved disputes from reaching the ASEAN Summit. The ACC cannot “direct” but can only “consider suggesting, recommending or providing assistance, as appropriate, to the Parties to the dispute to resolve the dispute through some other dispute settlement mechanisms provided for under this Protocol.”¹⁰² In any case, it is far from easy for the ACC to propose any specific suggestions or recommendations given the rule of making decisions on a consensus basis.

Reference of an unresolved dispute to the ASEAN Summit shall be accompanied by memoranda or submissions prepared by the parties to the dispute and a report of the ACC that contains the dispute summary, actions taken by the concerned parties, actions taken by the ACC to resolve the dispute, and the ACC’s recommendations on how the

⁹⁹ ASEAN, Statement of the ASEAN Chair, *supra* note 5.

¹⁰⁰ eDSMP, *supra* note 2, at annex 5, r. 2.

¹⁰¹ ASEAN Charter, *supra* note 1, at art. 8(2)(a).

¹⁰² eDSMP, *supra* note 2, at annex 5, r. 3(2) (emphasis added).

dispute may be resolved.¹⁰³ It is interesting to note that at this stage, the ACC may recommend that a panel of experts be established to advise the ASEAN Summit on the resolution of the dispute.¹⁰⁴ In reality, however, this provision can be difficult to implement as the ACC is required to achieve a consensus, i.e. all parties to the dispute agree to make any specific recommendations such as establishing an expert panel to resolve the dispute.

During the reference process, parties to the dispute may jointly withdraw the reference of their unresolved dispute to the ASEAN Summit. In addition, the right to withdraw the reference is also applicable to the case of unilateral withdrawal by the party that has notified the ACC of the unresolved dispute. It should be noted that a reference to the ASEAN Summit could be withdrawn only on the basis that a dispute has already been resolved or the concerned parties agree that dispute will be resolved in another way. Otherwise, withdrawal of a reference of a dispute to the ASEAN Summit while the dispute remains unresolved is not allowed.

B. The Significance of Referring Unresolved Disputes to the ASEAN Summit

An argument can be made that, in the current context of ASEAN, too many disputes will remain “unresolved” to be referred to the ASEAN Summit.¹⁰⁵ There is also concern that if countries are allowed under Article 26 and Annex 5 of the DSMP to bring unresolved disputes to the ASEAN Summit, then they will bypass the legally provided dispute settlement mechanisms and go directly to the ASEAN Summit in search for a resolution. A tendency might result to have disputes resolved through a political solution at the expense of the rule of law. These legitimate cautions notwithstanding, they may not be as worrisome as it seems for several reasons.

First, not all countries or parties to a dispute wish to refer their dispute to the ASEAN Summit or have their dispute regionalized. In the Preah Vihear dispute between Thailand and Cambodia,¹⁰⁶ for instance, Thailand preferred to settle the dispute between just the two direct parties while Cambodia sought the involvement of the international community, i.e., the United Nations Security Council, the International Court of Justice and ASEAN.¹⁰⁷ After years of inactivity, ASEAN, under the Indonesian Chairmanship,

¹⁰³ DSMP, *supra* note 7, at annex 5, r. 4(3).

¹⁰⁴ *See id.*

¹⁰⁵ Termsak Chalermphanupap, *The ASEAN Secretariat and Legal Issues Arising from the ASEAN Charter*, 6 *INDONESIA J. INT’L L.* 178, 182 (2009).

¹⁰⁶ It should be noted that the Preah Vihear dispute is not a dispute concerning the interpretation or application of an ASEAN instrument.

¹⁰⁷ In 2001, Cambodia proposed to the United Nations Education, Scientific and Cultural Organization (UNESCO) that the Temple be added to the World Heritage list. When UNESCO listed the Temple as a World Heritage in July 2008, Thailand objected the listing on the grounds that the land around the Temple remained a subject of border dispute. As tensions increased, both sides sent troops to the frontier. On 14 February 2011, at the request of Cambodia, the United Nations Security Council (UNSC) held the first meeting on the situation. As fighting broke out again in April 2011, Cambodia decided to file an application asking the ICJ to interpret its 1962 judgment. In July 2011, the Court rejected Thailand’s argument that it had no jurisdiction and decided on the following provisional measures: first, both parties must immediately withdraw their troops from the provisional demilitarized zone; second, Thailand shall not obstruct Cambodia’s free access to the Temple; third, both parties shall continue the cooperation within ASEAN and allow ASEAN observers to have access to the zone; fourth, both parties shall refrain from any

was able to host an urgent meeting on the situation in February 2011. This meeting was organized at the ASEAN ministerial level, however, rather than at the Summit level.¹⁰⁸ In this regard, the mere possibility of reference would play a certain role in creating more pressures for involved member states to resolve the dispute among themselves without one party having to refer the matter to the ASEAN Summit for the consideration of all other member states.

Second, in order for a dispute to boil up to the ASEAN Summit, it has to be deemed “unresolved.” A dispute is considered unresolved only after it has exhausted all procedures and mechanisms provided for in the DSMP and remains unresolved. Specifically, disputes are considered unresolved after it has gone through multiple stages. First of all, consultation must fail to produce any specific results or be impossible to conduct. Then either the responding party rejects a request for the establishment of an arbitral tribunal or all concerned parties fail to agree on the establishment of an arbitral tribunal or using good offices, mediation, or conciliation to resolve the dispute. Furthermore, the ACC has to prove unable to reach a decision on how to direct the parties to resolve a dispute¹⁰⁹ or the parties must fail to carry out the ACC direction.¹¹⁰ Disputes are considered unresolved only after the parties have carried out the ACC direction but the dispute cannot be settled¹¹¹ or the parties mutually decide they are unable to resolve the dispute through the application of dispute settlement mechanisms under the DSMP upon which they have agreed.¹¹² In this case, there is a possibility that parties to the dispute cannot come to an agreement that they are unable to resolve their dispute and, thus, the unresolved dispute cannot be referred to the ASEAN Summit. In short, if a country wants to refer the dispute to the ASEAN Summit, it first has to seek consultation; then it has to try good offices, mediation, or arbitration and go to the ACC to look for direction. Only after these mechanisms fail can it refer the unresolved dispute to the ASEAN Summit.

Finally, the ASEAN Summit will not play the role of an “ASEAN Supreme Court” to resolve disputes among its members. It is unlikely that a particular leader of an ASEAN country would let eight or nine other leaders resolve a dispute it has with another regional country. It is worth remembering that the ASEAN Summit is a policy-making body¹¹³ that comprises all ASEAN member states, including parties to a dispute, and makes decisions on a consensus basis. Thus, the course of action the ASEAN Summit would most likely take in the case of an unresolved dispute is simply to express their concerns and then to recommend, urge or call upon the concerned parties to resolve the dispute by other peaceful means.

In short, the DSMP – an implementing instrument of the ASEAN Charter – does not produce any pathbreaking institutional innovation to address all unresolved disputes among members of the Association. It simply specifies the procedures of reference for unresolved disputes to the ASEAN Summit as already provided in Article 26 of the

action which might aggravate or extend the dispute; and fifth, both Parties shall inform the Court of their compliance with the provisional measures. *See International Crisis Group Policy, supra* note 84.

¹⁰⁸ *See id.*

¹⁰⁹ DSMP, *supra* note 7, at annex 5, r. 2(3).

¹¹⁰ *Id.* at annex 5, r. 2(1).

¹¹¹ *Id.* at r. 2(2).

¹¹² *Id.* at r. 2(4).

¹¹³ ASEAN Charter, *supra* note 1, at art. 7(2)(b).

ASEAN Charter. The fact that any party has the right to refer an unresolved dispute to the ASEAN Summit for the latter's decisions¹¹⁴ is still quite significant as it may create pressures for concerned parties to work together and try to resolve disputes among them and thereby avoid having the matter considered by all other member states and facing the "naming and shaming" that may follow. This is probably the most important effect the procedure of reference has in terms of facilitating dispute settlement in accordance with the DSMP.

V. ENFORCEMENT AND COMPLIANCE

In the best-case scenario, the final result of dispute settlement by good offices, mediation or conciliation is a settlement agreement among the parties concerned and the final result of dispute settlement by arbitration is an arbitral award. Both arbitral awards and settlement agreements are binding. In other words, parties to the dispute are obliged to "comply with the arbitral awards and settlement agreements resulting from good offices, mediation and conciliation."¹¹⁵

The ASEAN Secretary-General is tasked with the role of monitoring compliance with the final results of these dispute settlement mechanisms.¹¹⁶ In order for the ASEAN Secretary-General to perform this duty, he or she shall be notified whenever a mutually agreed upon settlement is reached.¹¹⁷ If the dispute is resolved by an arbitral award or a settlement agreement, parties to the dispute are required to provide the Secretary-General with a written status report stating the extent of its compliance with the arbitral award or settlement agreement.¹¹⁸ The Secretary-General certainly cannot, and does not, work alone but has the assistance of the ASEAN Secretariat and other designated bodies of ASEAN.¹¹⁹ He or she has to prepare and submit to the ASEAN Summit a report on compliance to dispute settlements for the latter's consideration. Since the DSMP has not entered into force and no dispute has been resolved under the DSMP, the Secretary-General has not produced any reports in this regard, and it is not clear what a future report would look like. Neither is it clear how often the Secretary-General has to submit her reports and, more importantly, what the ASEAN Summit would do with them. It remains unclear as well whether the reports can be made public and whether the Secretary-General has to submit a different report for each case or combine all cases in one report about compliance in general. These issues need to be clarified if ASEAN continues to refine and develop the monitoring scheme of its dispute settlement mechanisms.

What will happen if a party fails to comply with an arbitral award or a settlement agreement? The DSMP provides that cases of non-compliance with an arbitral award or a settlement agreement achieved through good offices, mediation or conciliation may be

¹¹⁴ *Id.* at art. 26 (providing that unresolved disputes "*shall* be referred to the ASEAN Summit for its decision") (emphasis added).

¹¹⁵ *Id.* at art. 16, 27(1).

¹¹⁶ *Id.* at art. 27(1).

¹¹⁷ *Id.* at art. 3(2).

¹¹⁸ *Id.* at art. 16, 27(1).

¹¹⁹ *Id.* at art. 27(1).

referred to the ASEAN Summit for its consideration and decision.¹²⁰ This reference should be done by the member states aggrieved by non-compliance, not by the ASEAN Secretary-General. Before going to the ASEAN Summit, however, the matter has to be considered by the ACC. In this regard, the ACC potentially has an active role to play in helping concerned parties to find a way to comply with arbitral awards or settlement agreements before having the instance of non-compliance referred to the ASEAN Summit. Specifically, the ACC shall attempt to conduct consultations among concerned parties with a view to facilitating compliance.¹²¹ The ACC may also authorize its Chair or any other person to facilitate consultations and report their outcomes.¹²² If the party aggrieved by non-compliance is satisfied with the consultation outcome, it may decide to withdraw the reference to the ASEAN Summit.¹²³

In referring instances of non-compliance to the ASEAN Summit, the ACC shall submit to the ASEAN Summit a report which contains information provided by the relevant parties on actions taken to ensure compliance with the arbitral award or settlement agreement in question, information on actions taken by ACC to facilitate consultation, and reference to the report of the Secretary-General pursuant to Article 27(1) of the ASEAN Charter. The ACC report submitted to the ASEAN Summit may also include the ACC's recommendations on any measures to ensure compliance.¹²⁴

Reference of non-compliance to the ASEAN Summit is an important attempt by ASEAN to promote compliance with decisions of the DSMP. Not all international or regional dispute settlement mechanisms provide for a reference to the highest political body composed of heads of states or governments in an instance where non-compliance is recorded. The mere reference is itself helpful when it comes to the issue of enforcement as it may have a "naming and shaming" effect, which may contribute to creating pressure for states to comply with arbitral awards or settlement agreements. It should be noted, however, that since the role of the ASEAN Summit is inherently limited by the consensus-based decision-making process, ultimately it will not be able to take any strong actions against the non-compliant state. The EPG, in fact, was aware of this limitation and, in an attempt to address it, proposed that serious violations of ASEAN commitments should incur consequences, including suspension of the rights and privileges of membership. This bold recommendation, unfortunately, was not adopted in the ASEAN Charter. As a result, in the final analysis there is not much that the ASEAN Summit can do except to issue a statement encouraging the concerned parties to comply with the decision and further update the ASEAN Summit on the compliance matter.

VI. CONCLUSION

The DSMP represents a step forward for ASEAN in the direction towards a rules-based organization. It helps realize the ASEAN Charter's goal of having dispute settlement mechanisms available in all fields of ASEAN cooperation and demonstrates that ASEAN's commitment to peaceful resolution of disputes is not merely rhetoric. The

¹²⁰ eDSMP, *supra* note 2, at art. 20, annex 6, r. 1(b).

¹²¹ *Id.* at art. 20, annex 6, r. 3(a).

¹²² *Id.* at art. 20, annex 6, r. 3(b).

¹²³ *Id.* at art. 20, annex 6, r. 4.

¹²⁴ *Id.* at art. 20, annex 6, r. 5(b)(v).

existence of an arbitration mechanism, the authority of the ACC to direct parties to resolve their disputes, and the possibility that unresolved disputes and non-compliance can be referred to the ASEAN Summit are all noteworthy. In short, the DSMP, if fully ratified by all ten ASEAN member states, holds hopes for solving disputes in the region by international law and regional mechanisms. Unfortunately, a more careful examination of the institutional design of the DSMP suggests that, for several reasons, such hopes are not very likely to be met with practical effectiveness.

First, unlike the eDSMP, the DSMP chooses positive consensus over negative consensus in its *modus operandi*. The traditional way of making decisions on a consensus basis means that it is not easy for the dispute settlement mechanisms under the DSMP to be invoked. In the early 1990s, for example, Malaysia blocked the use of the TAC dispute settlement mechanism when Indonesia sought to refer the Ligitan/Sipadan territorial dispute to the Chairperson of the High Council of the TAC.¹²⁵ Similarly, in 2010, Cambodia invoked Article 23 of the ASEAN Charter to request Vietnam – then the ASEAN Chairman – to mediate its dispute with Thailand over the Preah Vihear. Mediation did not follow because Thailand declined, insisting that the bilateral process should continue to proceed.¹²⁶ Although these disputes were not concerning the interpretation or application of a particular ASEAN instrument, the instances indicate that consensus has in fact constrained the role of ASEAN as a venue for resolving disputes involving its member states.

Article 9 of the DSMP seems to suggest that there are two scenarios in which a dispute may be brought to arbitration or another means of dispute settlement such as good offices, mediation or conciliation: the first one arising from mutual consent of concerned parties and the second one resulting from the ACC's direction.¹²⁷ In reality, there is only one scenario for a dispute to be brought to arbitration, i.e. where the consent of all concerned parties is forthcoming. The consensus principle that operates in the arbitration process actually relies on a somewhat circular logic. An unresolved dispute is referred to the ACC because the responding state does not accept arbitration. However there is not much the ACC can do when the responding state does not accept arbitration because the ACC proceeds on a consensus basis and it cannot reach a consensus without the nod of the responding state.

The consensus basis of the decision-making process within ASEAN not only constrains the operation of the ACC in particular but also affects the effectiveness of the entire Protocol. Even though consensus is not uniformity, the final results of any negotiations must reflect the basic viewpoints and sensitivities of all parties.¹²⁸ By implications, ASEAN decisions could not be adopted if even one single country consistently rejects it, which is likely to happen in case of disputes involving important national interests of a member state. Of particular relevance to the dispute settlement

¹²⁵ RODOLFO C. SEVERINO, *SOUTHEAST ASIA IN SEARCH OF AN ASEAN COMMUNITY: INSIGHTS FROM THE FORMER ASEAN SECRETARY-GENERAL* 12-13 (2006).

¹²⁶ International Crisis Group, *supra* note 84.

¹²⁷ DSMP, *supra* note 7, at art. 10.

¹²⁸ Amitav Acharya, *Ideas, Identity, and Institution-Building: From the 'ASEAN way' to the 'Asia-Pacific way'*, 10 *THE PAC. REV.* 319, 331 (1997). See also Tobias Ingo Nischalke, *Insights from ASEAN Foreign Policy Cooperation: The 'ASEAN Way': a Real Spirit or a Phantom*, 22 *CONTEMP. SOUTHEAST ASIA* 89, 113 (2000); Beverly Loke, *The 'ASEAN Way': Towards Regional Order and Security Cooperation*, 30 *MELBOURNE J. POL.* 8 (2005).

procedure under the Protocol, the consensus requirement makes the ASEAN Summit unlikely to come up with a decision on how to address an unresolved dispute or an instance of non-compliance. Consensus, in effect, causes immense difficulties for ASEAN to play the role of an independent, neutral and effective institution that disputants usually look for if they want their dispute with another member state to be resolved by a third party. This explains why countries in the region have rarely chosen ASEAN to help resolve their disputes but would rather go to a judicial body such as the International Court of Justice when they are ready and determined to seek a definitive resolution to their dispute.¹²⁹

Second, although the ASEAN Secretary-General is assigned the role of monitoring the compliance of dispute parties with the arbitral awards and settlement agreements resulting from good offices, mediation and conciliation, the Secretary-General is not empowered to refer specific cases of non-compliance to the ASEAN Summit or initiate any actions to ensure compliance. It is not clear in the DSMP how the Secretary-General will conduct his or her monitoring mandates. The only mandate the Secretary-General has is derived from the provisions that require concerned parties to notify him or her of the outcome of the dispute settlement and send him or her a status report.¹³⁰ Yet, those essentially involve self-reports by the state parties regarding their compliance with the arbitral award or settlement agreement, not an objective report on the compliance or lack thereof by other parties to the dispute.

Given the limited mandate and power, one may wonder how the Secretary-General shall determine the basis and monitoring indicators on which to verify and evaluate state compliance. One may also question whether the Secretary-General has the authority to request concerned parties to provide further clarifications on measures that they have taken to ensure compliance. Even if the Secretary-General has the authority to do so, it is not clear whether concerned parties will be obligated to respond to the Secretary-General's request. Nor is it obvious if the Secretary-General will submit one annual report to the ASEAN Summit or whether she may be able to bring up instances of failure to comply and refer to the ASEAN Summit any time she would like to. From the practice of ASEAN, it is likely that the report of the Secretary-General would be simply a compilation of status reports submitted by concerned parties and, if this is the case, then the monitoring role of the Secretary-General is essentially administrative. Questions may arise as to what the ASEAN Summit – a policy-making body that makes decision on a consensus basis – will do with the Secretary-General's reports. Concerns may also be raised on whether the ASEAN Secretariat is provided with full capacity to assist the Secretary-General in her monitoring job.

¹²⁹ See SEVERINO, *supra* note 125, at 13. Examples of disputes that have been brought to the International Court of Justice (ICJ) include Cambodia – Thailand Sovereignty Dispute over the Preah Vihear Temple, Indonesia – Malaysia Sovereignty Dispute over Sipadan and Ligitan Islands, Singapore – Malaysia Sovereignty Dispute over Pedra Blanca, Middle Rocks and South Ledge, Cambodia's 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). For the full list of the ICJ contentious cases they are available at <http://www.icj-cij.org/docket/index.php?p1=3&p2=3> (last visited Dec. 2, 2012). Malaysia and Singapore also brought the Dispute concerning Land Reclamation by Singapore in and around the Straits of Johor (Provisional Measures) to the International Tribunal for the Law of the Sea (ITLOS); information and documents are available at <http://www.itlos.org/index.php?id=104> (last visited Dec. 2, 2012).

¹³⁰ DSMP, *supra* note 7, at art. 16(2).

Third, the DSMP does not expressly confer upon any bodies the right to undertake a specific act against non-compliant state parties. The EPG did recommend that ASEAN should have the power to take measures, including suspending the rights and privileges of membership, to redress cases of serious breach of ASEAN's objectives, major principles, and commitments to important agreements.¹³¹ This recommendation, however, was not reflected either in the ASEAN Charter or in the DSMP. This potential shortcoming notwithstanding, one has to admit that this is the reality of ASEAN as well as many other institutions. Given a lack of political will and profound reluctance on the part of many governments to accept an international institution with a strong enforcement mechanism, enforcement under many treaties or institutions mostly takes the form of a voluntary system. Consequently, these institutions can hardly impose any type of substantial sanctions when countries fail to comply with their obligations. As Ian Brownlie observes, in general international law, the settlement of disputes by formal and legal procedures rests on the consent of concerned parties.¹³² In this regard, the DSMP does not prove to be an exception, especially in a region where sovereignty remains the primary concern in the mind of leaders of the Member States.

Given these structural constraints, if ASEAN genuinely wants to fulfill its goal of establishing a political and security community, taking responsibility for its own peace and security, each of its member states has to invest more political will in ASEAN collective action. It needs to change its hitherto inflexible way of framing an issue as a domestic affair. A dispute between two member states should be, at the beginning, considered a regional issue instead of an internal affair. If ASEAN really "desires" to have "practical, efficient and credible mechanisms in place to resolve disputes in an *effective and timely* manner,"¹³³ it cannot just rely on consensus, which is usually difficult, and many times virtually impossible, to achieve in case of disputes involving important interests of a member state. Moreover, the spirit of the ASEAN Charter and the DSMP is that disputes between ASEAN member states on ASEAN instruments should be resolved in a timely manner. Consensus, even if it is achievable, usually requires a lengthy process of negotiation and compromise to build up and, thus, will not help to resolve disputes in timely manner. Meanwhile, certain circumstances and escalating disputes may undermine regional peace and security and, therefore, cannot wait until consensus arises.

Positive consensus may have worked in the past and in other areas of ASEAN cooperation, but may now have turned into an impediment to directing and monitoring dispute settlement mechanisms, especially at a time when ASEAN member states are convinced that "having credible dispute settlement mechanisms would help ASEAN

¹³¹ Report of the Eminent Persons Group on the ASEAN Charter, para. 6, *available at* <http://www.asean.org/archive/19247.pdf> (last visited Dec. 2, 2012).

¹³² IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 708 (1990). It should be noted that the United Nations Convention on the Law of the Sea has Part XV on Settlement of Disputes. This Part contains Section 2 which provides compulsory procedures entailing binding decisions. States expressing their consent to be bound by the Convention shall also be bound by the compulsory dispute settlement mechanisms under the Convention. The Convention was "one of an extremely small number of global treaties that prescribe mandatory jurisdiction for disputes arising from interpretation and application of its terms." See NATALIE KLEIN, DISPUTE SETTLEMENT IN THE UN CONVENTION ON THE LAW OF THE SEA 2 (2005).

¹³³ See DSMP, *supra* note 7 (emphasis added).

prevent festering conflicts and confrontation among the Member States, preserving the cooperative atmosphere for concerted efforts towards building a peaceful and prosperous ASEAN Community.”¹³⁴ In other words, the decision-making process based on consensus should not be rigidly adhered to; instead, there should be more cases where Article 20(2) is deemed applicable. Article 20(2) of the ASEAN Charter provides that “[w]here consensus cannot be achieved, the ASEAN Summit may decide how a specific decision can be made.”¹³⁵ Article 20(3) of the ASEAN Charter further states that “[n]othing in paragraphs 1 and 2 of this Article shall affect the modes of decision-making as contained in the relevant ASEAN legal instruments.” This implies that ASEAN may review and amend its consensus rule in the DSMP as it has done with the eDSMP.¹³⁶ The negative consensus rule of the eDSMP means that the ACC will automatically decide to “direct” the parties to resolve their disputes by good offices, mediation, conciliation or arbitration, unless there is a consensus not to do so.

Last but not least, the ASEAN Charter has enhanced the role of the Secretary-General in monitoring compliance with “the findings, recommendations or decisions resulting from an ASEAN dispute settlement mechanism.”¹³⁷ At issue is how to implement these provisions of the ASEAN Charter in a meaningful way. There should be more specific guidelines for the Secretary-General and the ASEAN Secretariat to fulfill their assigned responsibilities. ASEAN Member States should establish a strong reporting mechanism or procedure whereby the ASEAN Secretary-General would receive information not only on compliance by a party to the dispute but also on non-compliance by the other party. The procedure should also empower the Secretary-General to initiate action to ensure compliance or at least request a party to the dispute to provide clarifications and answer inquiries about its self-report on compliance. The role of legal service and lawyers within the ASEAN Secretariat should be strengthened as well since the Secretariat has to assist the Secretary-General not only in monitoring compliance, but also in mediating disputes, if the Secretary-General is so requested, and in providing neutral and good service to good offices, conciliation and arbitration, including appointing arbitrators in case the parties fail to do so. As provided in the DSMP, the ASEAN Secretariat’s duty is not merely technical or administrative, it also has the responsibility to assist the arbitral tribunals and persons providing good offices, mediation and conciliation in dealing with the substantive legal, historical and procedural aspects of the dispute.¹³⁸ To fulfill these greater expectations, the ASEAN Secretariat should have sufficient resources allocated to strengthen its capacity. A strong Secretariat is needed if ASEAN wants to effectively implement the DSMP, achieve closer integration and advance further in a rules-based direction.

¹³⁴ *See id.*

¹³⁵ ASEAN Charter, *supra* note 1, at art. 20(2).

¹³⁶ The eDSMP was concluded to replace the Protocol on Dispute Settlement Mechanism in 1996. One of the major changes of the eDSMP, compared to the Protocol on Dispute Settlement Mechanism in 1996, is the application of the negative, instead of positive consensus rule.

¹³⁷ ASEAN Charter, *supra* note 1, at art. 27(1).

¹³⁸ DSMP, *supra* note 7, at art. 18(1).