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I. INTRODUCTION

The Association of Southeast Asian Nations ("ASEAN") was established in 1967.[1] The founding members of ASEAN are Indonesia, Malaysia, Philippines, Singapore and Thailand.[2] Five other countries have since joined ASEAN, including Brunei, Laos, Vietnam, Cambodia and Myanmar.[3] Today, ASEAN represents a strong economic organization which has Gross Domestic Product ranking top ten in the world.[4] As to why the founding members decided to establish such an

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1. ASS'N SE. ASIAN NATIONS (ASEAN), https://asean.org (last visited Feb. 23, 2023).
2. *Id.*
3. *Id.*
4. *See* Sherry M. Stephenson, *ASEAN and the Multilateral Trading System*, 25 L. & POL'Y INT'L BUS. 439 (1993-1994) (arguing ASEAN would surpass the United States in upholding free trade). The development of ASEAN's Free Trade Area is beyond the scope of this article, *but see* Peter Kenevan & Andrew Winden, *Flexible Free Trade: the ASEAN Free Trade Area*, 34 HARV. INT'L L.J. 177 (1993) (discussing ASEAN's economic integration); S. Tiwari, *Legal Implications of the ASEAN Free Trade Area*, SING. J. LEGAL STUD. 218 (1994) (looking at ASEAN's economic development); George White,

organization, Piris and Woon take the view that it was for the purpose of combating communism during the 1960s.[5] In 2007, a milestone event for ASEAN was the adoption of the ASEAN Charter ("the Charter"). The Charter is ASEAN's Constitution.[6] According to the Charter, some of the purposes of this organization are "to maintain and enhance peace, security and … to promote ASEAN identity … to create a single market and production base …"[7] There are a number of underlying principles including "respect for the independence, sovereignty, equality, territorial integrity and national identity of all ASEAN Member States …"[8] The Charter also sets up a number of bureaucratic structures within ASEAN such as the ASEAN Summit,[9] the ASEAN Coordinating Council,[10] the ASEAN Community Councils,[11] the Secretary-General of ASEAN and the ASEAN Secretariat.[12] In light of all the political and structural developments in respect to ASEAN, this article asks: is there true solidarity?[13] A related question is: in what areas do we see more solidarity than others?[14] In some aspects, one can see cooperation, such as in the investigation of criminal matters.[15] But commentators have different views on this. Narine says

From Snowplows" to Siopao—Trying to Compete in a Global Marketplace: the ASEAN Free Trade Area, 8 TULSA J. COMPAR. & INT'L L. 177 (2000-2001) (talking about the free trade area being centralized); George White, *Foreigners Beware? Investing in a Jungle With Many Predators: The ASEAN Investment Area*, 37 TEX. INT'L L.J. 157 (2002) (discussing the economic importance of the region).

5. JEAN-CLAUDE PIRIS & WALTER WOON, TOWARDS A RULES-BASED COMMUNITY: AN ASEAN LEGAL SERVICE 9 (Cambridge Univ. Press 2015).

6. Anselmo Reyes, *ASEAN and The Hague Convention*, 22 ASIA PAC. L. REV. 25, 28 (2014) (discussing the possibilities of ASEAN adopting the Hague Conventions).

7. Ass'n of Southeast Asian Nations [ASEAN] Charter art. 1. As to the transforming effect of the charter, see Simon Tay, *The ASEAN Charter: Between National Sovereignty and the Region's Constitutional Moment*, 12 SING. Y.B. INT'L L. 151 (2008) (arguing that the Charter could transform the region to become rules-based); INT'L & COMPAR. L.Q. 197 (2009) (discussing how the Charter is a legally binding instrument).

8. *Id.* art. 2.

9. *Id.* art. 7.

10. *Id.* art. 8.

11. *Id.* art. 9.

12. *Id.* art. 11.

13. Simon Chestman, *Does ASEAN exist? The Association of Southeast Asian Nations as an International Legal Person*, 12 SING. Y.B. INT'L L. 199 (2008) (Chesterman questions whether ASEAN exists: asking what new powers ASEAN has under the Charter); *see* Noel Morada, *The ASEAN Charter and the Promotion of R2P in Southeast Asia:Challenges and Constraints*, 1 GLOB. RESP. TO PROTECT 185 (2009) (arguing ASEAN has not developed to become people-centered); Nicholas Khoo, *Rhetoric vs-. reality ASEAN's clouded future*, 5 GEO. J. INT'L AFF. 49 (2004) (arguing ASEAN will not be able to provide security to its members).

14. Many have also asked what really was the point of having the Charter, *see* Sompong Sucharitkul, *ASEAN Activities With Respect to the Environment*, 3 ASIAN Y.B. INT'L L. 317 (1993) (asking whether environmental concerns are addressed); Eugene Tan, *The ASEAN Charter as "Legs to Go Places": Ideational Norms and Pragmatic Legalism in Community Building in Southeast Asia*, 12 SING. Y.B. INT'L L. 171 (2008) (asking is new norms are being crated); Kheng-Lian Koh, *ASEAN Environmental Protection in Natural Resources and Sustainable Development: Convergence Versus Divergence?*, 4 MACQUARIE J. INT'L & COMPAR. ENV'T L. 43 (2007) (asking if environmental protection will be realized); Paul Davidson, *The ASEAN Way and the Role of Law in ASEAN Economic Cooperation*, 8 SING. Y.B. INT'L L. 165 (2004) (arguing that law only played a minor part in ASEAN's development).

15. Vicheka Lay, *Treaty on Mutual Legal Assistance in Criminal Matters Between ASEAN Member States*, 3 J.E. ASIA & INT'L L. 213 (2010) (discussing the operation of the *Treaty on Mutual Legal Assistance in Criminal Matters*). On the other hand, some have praised the positive impact of the Charter, *see* Michael Ewing-Chow, *Culture Club or Chameleon: Should ASEAN Adopt Legalization for Economic Integration*, 12 SING. Y.B. INT'L L. 225 (2008) (discussing the usefulness of the laws created by the Charter); Koh Kheng-Lian and Nicholas Robinson, *Strengthening Sustainable Development in Regional*

when facing an economic crisis, the states were "weakly committed" to ASEAN.[16] Sucharitkul takes the view that cooperation can be seen in different aspects going beyond national borders,[17] whilst Koh says cooperation is not evident in the realm of securities regulation.[18]

This article argues that much of ASEAN's development and progress in terms of dispute resolution revolve around the economic sphere so that trade-related and investment-related disputes are better dealt with, whereas comparatively there is very little progress on dispute resolution concerning cultural heritage disputes. This trend is likely to continue as cultural heritage is the very foundation of national identity and national pride, and it does not seem likely that ASEAN states will relinquish their sovereignty by accepting a judicial body with the power to rule over their cultural heritage. Part I introduced ASEAN and asked whether ASEAN exemplifies true solidarity. Part II of this article will look into the tension surrounding the Temple of Preah Vihear, and how conflicts surrounding it went to the International Court of Justice twice. Part III focuses on ASEAN's dispute resolution mechanisms, and how they have evolved through several stages. Part IV examines ASEAN's Socio-Cultural Community, and how cultural heritage is an integral part thereof.

II. THE CASE CONCERNING THE TEMPLE OF PREAH VIHEAR *(CAMBODIA V. THAILAND)*

The Temple of Preah Vihear sits on a mountain in the Dângrêk Range on the border between Cambodia and Thailand. It is a temple of much cultural, as well as political, significance. Cambodia and Thailand have argued for many years over the territorial sovereignty of the temple. In 1962, the International Court of Justice ("ICJ") gave judgment in favor of Cambodia.[19] The origin of the dispute was a 1904 treaty between France and Thailand (then known as Siam) by which the border between Thailand and Cambodia, including areas near the temple, would be determined and separated by a watershed line.[20] Article 1 of the 1904 treaty provided:

The frontier between Siam and Cambodia starts, on the left shore of the Great Lake, from the mouth of the river Stung Roluos, it follows the parallel from that point in an easterly direction until it meets the river Prek Kompong Tiam, then, turning northwards, it merges with the meridian from that meeting-point as far as the Pnom Dang Rek mountain chain. From there it follows the watershed between the basins of the Nam Sen and the Mekong, on the one hand, and the Nam Moun,

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Inter-Governmental Governance: Lessons from the "ASEAN Way", 6 SING. J. INT'L & COMP. L. 640 (2002) (treating ASEAN as an ecosystem).

16. *See generally* Shaun Narine, *ASEAN in the Aftermath: the Consequences of the East Asian Economic Crisis* 8 GLOB. GOVERNANCE 179 (2002) (arguing not much cooperation was seen during the crisis).

17. Sompong Sucharitkul, *ASEAN Society, a Dynamic Experiment for South-East Asian Regional Co-Operation*, 1 ASIAN Y.B. INT'L L. 113 (1991) (discussing the progress made by the organization).

18. Pearlie Koh, *Securities Regulation in ASEAN- Is It Time for a Harmonious Tune to Be Sung?*, SING. J. LEG. STUD. 146 (1995) (discussing the potential of harmonizing securities laws).

19. Case Concerning the Temple of Preah Vihear (Cambodia v. Thai.), Judgment, 1962 I.C.J. Rep. 6 (June 15), https://www.icj-cij.org/sites/default/files/case-related/45/045-19620615-JUD-01-00-EN.pdf. I.C.J., https://icj-cij.org/home (last visited Mar. 27, 2023) (for more about the ICJ).

20. *Id.* at 16–18.

on the other hand, and joins the Pnom Padang chain the crest of which it follows eastwards as far as the Mekong.[21]

During the early 20th century, much of Southeast Asia was in the hands of different colonizing powers including the British, the French and the Dutch. Cambodia was French colony, and strictly speaking, Thailand had never been colonized. The French Government published a number of maps, including one depicted the temple in Cambodia's territory. [22] In its 1962 Judgment, the ICJ held that the temple is in Cambodian territory and determined that since Thailand did not raise objections to the maps published by France for as long as 50 years, Thailand must have accepted those maps.[23]

Cambodia gained independence from French colonial rule in 1953. During this time, Sihanouk was the leader of Cambodia, leading the People's Socialist Community regime, which has been described as "Cambodia's first and last post-independence royalist regime."[24] Much has been written by commentators about the case. Kattan is of the view that the 1962 judgement has to be understood in the context of the Cold War.[25] It has been pointed out that there was significant US interest in the result of the case.[26] Another commentator, Lee, said of the ICJ ruling, "the map was so powerful a simulacrum that it redefined the past, nature and reality."[27] Ngoun explains that Sihanouk was using the temple and the success in the ICJ in 1962 for his nation-building project which utilized Cambodia's cultural heritage.[28] Ngoun writes that Cambodia did not have any television network at this time, and Sihanouk was using the state-owned radio network to broadcast to the whole nation the conflict with Thailand over the Temple of Preach Vihear.[29] The same was also used to denounce political enemies by accusing them of collaborating with Thailand so that Cambodia would be deprived of the temple.[30] When the ICJ decided that Cambodia was victorious in 1962, the temple became "a symbol of national pride."[31]

The conflict is not merely about which country owns the Temple of Preah Vihear. In other words, it is not just about territorial sovereignty. There is a huge cultural dimension that goes beyond the holding of the ICJ, and to the importance of this cultural icon on a global stage.

In 2008, Cambodia applied to have the Temple of Preah Vihear inscribed on the UNESCO World Heritage List. The International Council on Monuments and

21. *Id.* at 16.
22. *Id.* at 21.
23. *Id.* at 30–31.
24. Astrid Norén-Nilsson, *The Demise of Cambodian Royalism and the Legacy of Sihanouk*, 31 J. SOC. ISS. SE. ASIA 1, 3 (2016) (examining Cambodian royalism and how it collapsed due to its failure to achieve legitimacy).
25. Victor Kattan, *The Ghosts of the Temple of Preaah Vihear/ Phra Viharn in the 2013 Judgment*, 5 ASIAN J. INT'L. L. 16, 22 (2015) (explaining the politics behind the Temple of Preah Vihear).
26. *Id.* at 23.
27. Sang Kook Lee, *Revisiting the Territorial Dispute Over the Preah Vihear Temple*, 22 SE. ASIA RSCH. 39, 53 (2014) (explaining the initial use of maps by European societies to form the modern nation-states, and how the practice was applied to colonial Asia).
28. Kimly Ngoun, *From a Pile of Stones to a National Symbol*, 26 SE. ASIA RSCH. 194, 201 (2018) (discussing the post-colonial politics in Cambodia).
29. *Id*. at 197.
30. *Id*. at 198.
31. *Id*. at 199.

Sites (ICOMOS) in its evaluation said "the Temple of Preah Vihear developed in the 9th-12th centuries, and all its component parts have survived to the present day so that it is possible to trace its complex history."[32] Further, it was said, "the finest decoration is to be found on the *gopuras* (gateway towers), many of which are in an excellent state of conservation and clearly visible." [33] The ICOMOS concluded that "the authenticity of the property has survived intact … the property has survived almost without change … justifies consideration of this property for inscription on the World Heritage List for the uniqueness of the relationship between the temple and the natural landscape."[34]

The request was accepted, and the temple became a UNESCO World Heritage Site on July 7, 2008.[35] This outraged the Thai public and Thailand sent troops to the site.[36] Tensions between the two countries escalated to fighting at the border region, which led to the UN Security Council calling for a ceasefire in February 2011.[37] Again, some commentators have argued that one should understand the conflict from a political, rather than a cultural, perspective.[38] According to Silverman, the real motive for Cambodia to make the temple a UNESCO Heritage Site was about declaring "definitive victory over the Khmer Rouge."[39] Hun Sen, Cambodia's prime minister, filed a case with the ICJ requesting the court to interpret and confirm its 1962 judgment.[40] At the same time, Hun Sen was asking ASEAN to help with the view that peace would be achieved.[41] Traviss calls this parallel use of the ICJ and the ASEAN dispute settlement methods an integrated dispute resolution.[42] The ICJ gave its decision on 11 November 2013,[43] saying "the Temple was located in the territory under the sovereignty of Cambodia … as a consequence … Thailand was under an obligation to withdraw its forces …"[44] The court also said, "the Temple of

32. INT'L COUNCIL ON MONUMENTS AND SITES, ADVISORY BODY EVALUATION: PREAH VIHEAR (CAMBODIA) NO 1224 (2008), https://whc.unesco.org/en/list/1224/documents.

33. *Id.*

34. *Id.*

35. *See Cambodia Celebrates 12 Years of Preah Vihear Temple as a UNESCO World Heritage Site,* UNESCO WORLD HERITAGE CONVENTION (July 6, 2020), https://whc.unesco.org/en/news/2162.

36. *See* Request for Interpretation of the Judgment of 15 June 1962 in the Case Concerning The Temple of Preah Vihear (Cambodia v. Thai.), Judgment, 2013 I.C.J Rep. 281, 294 (Nov. 2013), https://www.icj-cij.org/sites/default/files/case-related/151/151-20131111-JUD-01-00-EN.pdf.

37. *Id.*

38. *See* Helaine Silverman, *Border Wars: The Ongoing Temple Dispute Between Thailand and Cambodia and UNESCO's World Heritage List*, 17 INT'L. J. HERITAGE STUD. 1 (2011) (explaining the politics behind the temple in Cambodia and Thailand).

39. *Id.* at 6.

40. For more on Hun Sen, see Kimly Ngoun, *Adaptive Authoritarian Resilience: Cambodian Strongman's Quest for Legitimacy*, 52 J. CONTEMP. ASIA 23 (2022) (examining Hun Sen's three decades of rule of Cambodia); Jonathan Sutton, *Hun Sen's Consolidation of Personal Rule and the Closure of Political Space in Cambodia*, 40 CONTEMP. SE. ASIA 173 (2018) (discussing Hun Sen's autocracy in Cambodia).

41. Michael P. Rattanasengchanh, *The Role of Preah Vihear in Hun Sen's Nationalism Politics*, 36 J. CURRENT SE. ASIAN AFF. 63, 77 (2017) (discussing how Hun Sen used the temple to advance his political goals).

42. Alexandra C. Traviss, *Temple of Preah Vihear: Lessons on Provisional Measures*, 13 CHI. J. INT'L. L. 317, 340 (2012) (discussing the use of provisional measures in the ICJ).

43. Request for Interpretation of the Judgment of 15 June 1962 in the Case Concerning The Temple of Preah Vihear (Cambodia v. Thai.), Judgment, 2013 I.C.J Rep. 281, 294 (Nov. 2013), https://www.icj-cij.org/sites/default/files/case-related/151/151-20131111-JUD-01-00-EN.pdf; *see* John D. Ciorciari, *International Decisions*, 108 AM. J. INT'L. L. 288 (2014) (explaining the decision of the ICJ in its 2013 judgment).

44. Ciorciari, *supra* note 43, at 316.

Preah Vihear is a site of religious and cultural significance … Cambodia and Thailand must co-operate between themselves … in the protection of the site as a world heritage."[45] When the United Nations Security Council called for a ceasefire between Cambodia and Thailand in 2011, it also expected ASEAN to play a role in resolving the conflict.[46] ASEAN did not exist in 1962, and at that time it made sense for the dispute to be brought to the ICJ because there was no other alternative. But at the time of the 2013 ruling, ASEAN had already been established for more than four decades and had its own dispute resolution mechanism.[47] So, a sensible route was to have the dispute resolved within the ASEAN framework. Thus how might ASEAN do so, and what dispute resolution methods were available? The next section of this article will examine these questions.

III. ASEAN'S DISPUTE RESOLUTION MECHANISMS

The legal systems found within ASEAN are indeed extremely diversified.[48] According to Hooker, there are both Oriental and Occidental Laws; the former comprising Indian, Islamic and Chinese legal traditions, and the latter comprising English, French, Dutch and Spanish-American laws.[49] It is thus not surprising that establishing a common dispute settlement regime that is agreeable to all is an inherently challenging task. As ASEAN matures, the formation of a comprehensive and centralized dispute resolution system becomes a necessary condition to sustain its economic relationships. Without a doubt, progress has certainly been made over time, predominately stemming from increased and intensified economic cooperation. A number of ASEAN instruments have entered into force for the purpose of creating a legally sound and protected environment for investors, both from within ASEAN and abroad. Regarding ASEAN's dispute resolution system, Davidson argues, "[I]ts establishment is a testament to the growing legalism in the field of international economic cooperation and is a promising development towards a more transparent approach to dispute settlement in the region."[50] This section shall trace the development of ASEAN's dispute settlement mechanism from virtually nothing to the modernized and internationally accepted approach recently put into place in the name of the ASEAN Charter.[51] The last part is devoted to the resolution of investment disputes as it is evident that the primary motivation behind dispute

45. *Id.* at 317.
46. *Id.* at 294.
47. *See* discussion *infra* Part III.
48. Purificacion V. Quisumbing, *Problems and Prospects of ASEAN Law: Towards a Legal Framework for Regional Dispute Settlement*, *in* ASEAN IDENTITY, DEVELOPMENT & CULTURE 302 (R. P. Anand & Purificacion V. Quisumbing eds., 1981).
49. M. B. HOOKER, A CONCISE LEGAL HISTORY OF SOUTH-EAST ASIA 6 (1978).
50. PAUL J. DAVIDSON, ASEAN: THE EVOLVING LEGAL FRAMEWORK FOR ECONOMIC COOPERATION 161 (2002). *See also* Paul J. Davidson, *The Role of International Law in the Governance of International Relations in ASEAN*, 12 SING. Y.B. INT'L L. 213 (2008) (explaining the transition to rule-based governance in ASEAN).
51. *See generally Significance of the ASEAN Charter*, ASS'N SE. ASIAN NATIONS, https://asean.org/asean-charter/ (last visited Apr. 19, 2023).

settlement mechanisms in ASEAN is to enhance economic integration among its members.[52]

a. Provisions for Dispute Settlement before 1996

In the 30-year span between the founding of ASEAN in 1967 and the adoption of the *1996 Protocol on Dispute Settlement Mechanism*,[53] there had not been an agreement fully devoted to dispute resolution. This may not come as a surprise because one might expect the preferred method of dealing with disputes amongst member states to be through dialogue and negotiation, which reflect Asian cultural values. Besides, as mentioned earlier, the creation of ASEAN was to combat communism which was growing in the region in the 1960s. The intention was not to establish a supra-national organization which would handle disputes in a formalized and systematic way.[54] However, the need for such a system became a reality when ASEAN matured necessitating formalized dispute resolution. However, it does not mean that during this period, there was not any effort devoted to or provisions dealing with dispute resolution. In fact, such provisions had been scattered in various formal instruments.

The very first ASEAN Summit was held in Bali, Indonesia in 1976. The Heads of State of Indonesia, Malaysia, Philippines, Singapore and Thailand attended this biannual event. At this time, ASEAN had only these five members. One of the first of formal instruments adopted at the meeting was the *1976 Treaty of Amity and Cooperation in Southeast Asia*. This treaty was adopted in order "to promote perpetual peace, everlasting amity and cooperation among their peoples which could contribute to their strength, solidarity and closer relationship."[55] It is said that the treaty contains "universal principles of peaceful coexistence."[56] Chapter IV covers specific methods of settlement dispute.[57] Article 13 is drafted in imperative terms which imposes the duty upon the contracting parties to "have the determination and good faith to prevent disputes from arising."[58] Under the same article, "friendly negotiations" is the preferred method of dealing with disputes when they arise.[59]

52. *See* discussion *infra* Part III (Part III of this article talks about the dispute resolution mechanisms within ASEAN, which apply to its member states only). Externally, ASEAN has entered into other agreements with different countries and such agreements could also provide dispute resolution mechanisms, but these are beyond the scope of this article, *see* Massimo Lando, *Enhancing Conflict Resolution 'ASEAN Way': The Dispute Settlement System of the Regional Comprehensive Economic Partnership*, 13 J. INT'L. DISP. SETT. 98 (2022) (discussing the Regional Comprehensive Economic Partnership).

53. *See* discussion *infra* Part III(b) (on the 1996 Protocol on Dispute Settlement Mechanism).

54. PIRIS & WOON, *supra* note 5, at 9.

55. 1976 Treaty of Amity and Cooperation in Southeast Asia, ASEAN, art. 1, Feb. 24, 1976 [hereinafter TAC]. *See* Diane A. Desierto, *Postcolonial International Law Discourses on Regional Developments in South and Southeast Asia*, 36 INT'L J. LEGAL INFO. 388 (2008) (discussing how international law was used for development in postcolonial Asia). Also adopted in the first ASEAN Summit was Bali Concord I Declaration which targeted partly shortages in energy and food as well as trading arrangements, *see* STEFANO INAMA & EDMUND SIM, THE FOUNDATION OF THE ASEAN ECONOMIC COMMUNITY: AN INSTITUTIONAL AND LEGAL PROFILE 20 (2015).

56. *Overview,* ASS'N SE. ASIAN NATIONS, https://asean.org/our-communities/asean-political-security-community/outward-looking-community/treaty-of-amity-and-cooperation-in-southeast-asia-tac/#:~:text=Publications-,Overview,in%20the%20region%20and%20beyond. (last visited Feb. 23, 2023).

57. TAC, *supra* note 55, ch. IV.

58. *Id*. art. 13.

59. *Id*.

Article 14 provides for the first ever dispute resolution process, which entails a representative at the ministerial level from each of the contracting parties to constitute the High Council.[60] Article 15 contains the duties of the High Council as follows:

> In the event no solution is reached through direct negotiations, the High Council shall take cognizance of the dispute or the situation and shall recommend to the parties in dispute appropriate means of settlement such as good offices, mediation, inquiry or conciliation. The High Council may however offer its good offices, or upon agreement of the parties in dispute, constitute itself into a committee of mediation, inquiry or conciliation. When deemed necessary, the High Council shall recommend appropriate measures for the prevention of a deterioration of the dispute or the situation.[61]

Thus, it can be seen that Article 15 has given the High Council very broad powers to resolve any disputes. Although the parties to a dispute are not subject to the High Council exercising its power under Article 15 unless they consent, nonetheless, they are to be "well disposed towards such offers of assistance" as may be provided by the other contracting parties.[62] The 1976 Treaty does not prevent disputing parties from bringing their disputes to be resolved at the international arena, but again, "friendly negotiations" should have been attempted and exhausted before doing so.[63] A major shortcoming of the constitution of the High Council is that it is "composed of ministerial level officials from the five member states [which] would tend to be more politically inclined rather than objective 'jurists' that they probably ought to be."[64]

Another of these formal instruments is the *2001 Rules of Procedure of the High Council of the Treaty of Amity and Cooperation in Southeast Asia*, adopted at the 34th ASEAN Ministerial Meeting, which provides details about the dispute settlement procedure pursuant to the 1976 Treaty.[65] Rule 3 provides for the composition of the High Council as follows:

> The High Council shall comprise:
>
> a. One Representative at ministerial level from each of the High Contracting Parties which are 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; and
>
> b. One Representative at ministerial level from each of the High Contracting Parties which are States outside Southeast Asia and are directly

60. *Id*. art. 14.
61. *Id*. art. 15.
62. *Id*. art. 16.
63. TAC, *supra* note 55, art. 17.
64. Quisumbing, *supra* note 48, at 314.
65. *See* TAC, *supra* note 55 (adopted by the Foreign Ministers in Hanoi, Vietnam on 23 July 2001).

> involved in the dispute which the High Council takes cognizance of pursuant to the Treaty and these Rules.[66]
>
> Rule 7 provides for the initiation process as follows:
>
> 1. A High Contracting Party seeking to invoke the dispute settlement procedure of the High Council shall do so by written communication, through diplomatic channels, to the Chairperson and to the other High Contracting Parties. The written communication shall contain a detailed statement of:
>
> a. the nature of the dispute or situation referred to the High Council;
>
> b. the parties to the dispute and their respective claims; and
>
> c. the basis upon which the High Council shall take cognizance of the dispute or situation pursuant to the Treaty.
>
> 2. A High Contracting Party shall, at least 14 days prior to giving written communication in accordance with paragraph 1 above, give written notice, through diplomatic channels, of its intention to do so to the other High Contracting Parties which are parties to the dispute.[67]

The 2001 instrument filled-in the gap in the 1976 Treaty by detailing the composition of the High Council as well as the procedure that should be used in order to have the High Council hearing a dispute. It must be kept in mind that creating a dispute resolution regime within ASEAN is by no means an easy task considering the diversity of the legal systems therein. The *1986 Ministerial Understanding on the Organizational Arrangement Cooperation in the Legal Field*, signed in Bali, Indonesia,[68] sought to bridge the gap and promote legal cooperation among the member states through exchange of legal materials, judicial cooperation and legal education and research.[69] Article 2 provides a basis for the Ministers of Justice of the member states to have regular meetings.[70] Moreover, by virtue of the adoption of the *2004 Treaty on Mutual Legal Assistance in Criminal Matters*,[71] the member

66. Rules of Procedure of the High Council of the Treaty of Amity and Cooperation in Southeast Asia, ASEAN, r. 3, July 23, 2001, https://asean.org/rules-of-procedure-of-the-high-council-of-the-treaty-of-amity-and-cooperation-in-southeast-asia/.

67. *Id.* at r. 7.

68. 1986 Ministerial Understanding on the Organizational Arrangement Cooperation in the Legal Field, Ministers of Justice Brunei, Indonesia, Singapore, Thailand, Malaysia, & Philippines, Apr. 12, 1986.

69. *Id.* art. 1.

70. *Id.* art. 2.

71. 2004 Treaty on Mutual Legal Assistance in Criminal Matters, ASEAN, Nov. 29, 2004. *See* Tan Hsien-Li, *The ASEAN Human Rights Body: Incorporating Forgotten Promises for Policy Coherence and Efficacy*, 12 SING. Y.B. INT'L L. 239 (2008) (arguing for a human rights body); Suzannah Linton, *ASEAN states, Their Reservations to Human Rights Treaties and the Proposed ASEAN Commission on Women and Children,* 30 HUM. RTS. Q. 436 (2008) (discussing the need to establish an ASEAN human rights commission); David Malcom, *Human Rights and Asian Values: Developments in Southeast Asia,* LAWA J. 57 (1999) (discussing that there is little protection for individualism); Li-ann Thio*, Implementing Human Rights in ASEAN Countries: "Promises to keep and miles to go before I sleep,"* 2 YALE HUM. RTS. & DEV. L.J. 1 (1999) (discussing the silence of member states on human rights violations).

states are able to better cooperate with respect to investigations, collecting evidence, and dealing with properties in the context of cross-border criminal activities.[72] Koh argues that an ASEAN Convention, similar to the Brussels Convention in the European Union (EU), is needed for the recognition and enforcement of court judgments rendered by the different ASEAN member states.[73]

The *1987 Agreement Among the Government of Brunei Darussalam, The Republic of Indonesia, Malaysia, The Republic of the Philippines, the Republic of Singapore, and the Kingdom of Thailand for the Promotion and Protection of Investments* is the other pre-1996 instrument that contains important provisions relating to dispute resolution.[74] Articles IX and X of the 1987 Agreement are devoted to dispute resolution and provide as follows:

> Article IX – Dispute Between the Contracting Parties
>
> 1. Any dispute between and among, the Contracting Parties concerning the interpretation or application of this Agreement shall, as far as possible, be settled amicably between the parties to the dispute. Such settlement shall be reported to the ASEAN Economic Ministers (AEM).
>
> 2. If such a dispute cannot thus be settled it shall be submitted to the AEM for resolution.[75]
>
> Article X – Dispute Between Contracting Parties and Investors of Other Contracting Parties
>
> 1. Any legal dispute arising directly out of an investment between any Contracting Party and a national or company of any of the other Contracting Parties shall, as far as possible, be settled amicably between the parties to the dispute.

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72. 2004 Treaty on Mutual Legal Assistance in Criminal Matters, ASEAN, Nov. 29, 2004. *See* Tan Hsien-Li, *The ASEAN Human Rights Body: Incorporating Forgotten Promises for Policy Coherence and Efficacy*, 12 SING. Y.B. INT'L L. 239 (2008) (arguing for a human rights body); Suzannah Linton, *ASEAN states, Their Reservations to Human Rights Treaties and the Proposed ASEAN Commission on Women and Children,* 30 HUM. RTS. Q. 436 (2008) (discussing the need to establish an ASEAN human rights commission); David Malcom, *Human Rights and Asian Values: Developments in Southeast Asia,* LAWA J. 57 (1999) (discussing that there is little protection for individualism); Li-ann Thio*, Implementing Human Rights in ASEAN Countries: "Promises to keep and miles to go before I sleep,"* 2 YALE HUM. RTS. & DEV. L.J. 1 (1999) (discussing the silence of member states on human rights violations).

73. Pearlie M. C. Koh, *Foreign Judgments in ASEAN – A Proposal*, 45 INT'L & COMPAR. L.Q. 844, 845–46 (1996) (explaining how foreign judgments should be enforced in ASEAN). For the 1968 Brussels Convention, see *1968 Brussels Convention on jurisdiction and the enforcement of judgments in civil and commercial matters*, EUR-Lex, https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:41968A0927(01).

74. 1987 Agreement Among the Government of Brunei Darussalam, The Republic of Indonesia, Malaysia, The Republic of the Philippines, the Republic of Singapore, and the Kingdom of Thailand for the Promotion and Protection of Investments, ASEAN, Dec. 15, 1987 (signed in Manila Philippines on 15 December 1987 at the Third ASEAN Summit).

75. *Id.* art. IX, ¶ 1.

> 2. If such a dispute cannot thus be settled within six months of its being raised, then either party can elect to submit the dispute for conciliation or arbitration and such election shall be binding on the other party. The dispute may be brought before the International Centre for Settlement of Investment Disputes (ICSID), the United Nations Commission on International Trade Law (UNCITRAL), the Regional Centre for Arbitration at Kuala Lumpur or any other regional centre for arbitration in ASEAN, whichever body the parties to the dispute mutually agree to appoint for the purposes of conducting the arbitration.
>
> 3. In the event that the parties cannot agree within a period of three months on a suitable body for arbitration, an arbitral tribunal consisting of three members shall be formed. The Parties to the dispute shall appoint one member each, and these two members shall then select a national of a third Contracting Party to be the chairman of the tribunal, subject to the approval of the parties to the dispute. The appointment of the members and the chairman shall be made within two months and three months respectively, from the date a decision to form such an arbitral tribunal is made.
>
> 4. If the arbitral tribunal is not formed in the periods specified in paragraph 3 above, then either party to the dispute may, in the absence of any other relevant arrangement request the President of the International Court of Justice to make the required appointments.
>
> 5. The arbitral tribunal shall reach its decisions by a majority of votes and its decisions shall be binding. The Parties involved in the dispute shall bear the cost of their respective member to the arbitral tribunal and share equally the cost of the chairman and other relevant costs. In all other respects, the arbitral tribunal shall determine its own procedures.[76]

Article X of the original 1987 Agreement was entitled "Arbitration."[77] It was later renamed as "Dispute Between Contracting Parties and Investors of Other Contracting Parties."[78] It can be seen that Article X gave preference to using mediatory and conciliatory means, but it also provided for the use of dispute resolution bodies outside of the ASEAN framework such as the International Centre for Settlement of Investment Disputes (ICSID), based in Washington D.C., and the United Nations Commission on International Trade Law (UNCITRAL), which is based in Vienna.[79]

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76. *Id.* art. X.

77. *Id*.

78. This was pursuant to the 1996 Protocol to Amend the Agreement Among the Government of Brunei Darussalam, the Republic of Indonesia, Malaysia, the Republic of the Philippines, the Republic of Singapore, and the Kingdom of Thailand for the Promotion and Protection of Investments, ASEAN, Sept. 12, 1996, art. 5, https://asean.org/wp-content/uploads/2020/12/Protocol-to-Amend-the-ASEAN-IGA.pdf (which was signed at the 28th ASEAN Economic Ministers Meeting on September 12, 1996 held in Jakarta, Indonesia).

79. U.N. Commission on International Trade Law, https://uncitral.un.org (last visited Mar. 24, 2023).

b. The 1996 Protocol on Dispute Settlement Mechanism

The 27th ASEAN Economic Ministers Meeting was held in Brunei Darussalam in 1995.[80] At that meeting, ministers made a joint statement agreeing to establish "an umbrella DSM [Dispute Settlement Mechanism] which will cover disputes arising from all ASEAN agreements on economic cooperation."[81] It was thought that there was a need to "strengthen the mechanism for the settlement of disputes in the area of ASEAN economic cooperation."[82] The result was the *1996 Protocol on Dispute Settlement Mechanism*, which became a watershed in the development of ASEAN's dispute resolution regime.[83] For the first time since the founding of ASEAN in 1967, the subject of dispute settlement formed the whole of a single agreement reflecting its growing importance in the relationships between the member states. The scope of the 1996 Protocol is broad, and endeavors to cover all "future ASEAN economic agreements."[84] Furthermore, when the 1996 Protocol was made, ASEAN had been established for almost thirty years. During this period, member states had entered into numerous economic agreements.[85] The time was therefore ripe for a coherent set of dispute resolution procedures. The 1996 Protocol imposes a deadline after which the disputing parties are prevented to seek alternative recourse.[86] A two-step process is provided under Article 3 as follows:

> 1. Member States which are parties to a dispute may at any time agree to good offices, conciliation or mediation. They may begin at any time and be terminated at any time. Once procedures for good offices, conciliation or mediation are terminated, a complaining party may then proceed to raise the matter to SEOM.
>
> 2. If the parties to a dispute agree, procedures for good offices, conciliation or mediation may continue while the dispute proceeds.[87]

Thus, it is a prerequisite for the disputing parties to attempt good offices, conciliation, or mediation. However, the 1996 Protocol falls short of describing how a conciliator or mediator is to be chosen or the necessary qualifications one needs to

80. 1995 Joint Press Statement of the 27th ASEAN Economic Ministers' Meeting, ASEAN, Sept. 7–8, 1995, https://cil.nus.edu.sg/wp-content/uploads/2019/02/1995-27th-AEM.pdf.

81. *Id.* (discussed in Jeffrey A. Kaplan, *ASEAN's Rubicon: A Dispute Settlement Mechanism for AFTA*, 14 UCLA PAC. BASIN L.J. 147, 151 (1995-1996) (discussing ASEAN's free trade area and its dispute resolution system)).

82. 1996 Protocol on Dispute Settlement Mechanism, ASEAN, pmbl., Nov. 20, 1996, https://agreement.asean.org/media/download/20140119110714.pdf.

83. *Id.* (adopted in Manila, Philippines on November 20, 1996).

84. *Id.* art. 1(1).

85. *Id.* at append. 1. Appendix 1 contains a list of 47 different economic agreements which were in force at the time, *id.* The 1996 Protocol is applicable to these agreements, *id.* Some of these include (dates omitted): Basic Agreement of ASEAN Industrial Joint Ventures; ASEAN Customs Code of Conduct; Basic Agreement of ASEAN Industrial Complementation; ASEAN Framework Agreement on Services; ASEAN Framework Agreement on Intellectual Property Cooperation; Agreement of ASEAN Preferential Trading Arrangements; Agreement on the ASEAN Food Security Reserve; ASEAN Petroleum Security Agreement; Financial Regulations of the ASEAN Tourism Information Centre, *id.*

86. *Id.* art. 1(3).

87. *Id.* art. 3.

have in order to take up such a role. The Senior Economic Officials Meeting (SEOM) may establish a panel[88] or it may encourage amicable settlement in respect of the dispute without appointing a panel.[89] The panel has the duty to assist the SEOM in making a ruling by objectively assessing the dispute and examining the facts of the case.[90] The panel has 60 days to submit its findings in a report to the SEOM.[91] It is given powers to demand information and technical advice from any relevant person or body, and to an extent, this resembles the coercive and enforcement power of a court of law in requiring that information be produced.[92] This represented a significant step in having the disputing parties submitting to the authority of the panel. The panel is not without its limitations. For instance, Lim argues that "the ruling on disputes brought before the DSM Panel is determined through political and diplomatic discourse."[93] Although prompt disposal of a dispute is highly desirable, the 1996 Protocol allows a disposal period of 290 days.[94] An appeal mechanism is also in place under Article 8 which states:

> 1. Member States, who are parties to the dispute, may appeal the ruling by the SEOM to the ASEAN Economic Ministers ("AEM") within thirty (30) days of the ruling.
>
> 2. The AEM shall make a decision within thirty (30) days of the appeal … Economic Ministers from Member States which are parties to a dispute can be present during the process of deliberation but shall not participate in the decision of AEM. AEM shall make a decision based on simple majority. The decision of the AEM on the appeal shall be final and binding on all parties to the dispute.[95]

The 1996 Protocol was a good start, but it failed to provide enough detail on how this new ASEAN dispute resolution regime was going to operate. Nevertheless, it was significant and symbolic. It symbolized the institutionalization of dispute resolution in ASEAN which gave the impression that ASEAN was going down the path of creating an independent dispute resolution body.

88. *Id.* art. 4(2)(a), append. 2(I)(1) (providing that "[p]anels shall be composed of well-qualified governmental and/or non-governmental individuals, including persons who have served on or presented a case to a panel, served in the Secretariat, taught or published on international trade law or policy, or served as a senior trade policy official of a Member State. In the nomination to the panels, preference shall be given to individuals who are nationals of ASEAN Members States").

89. 1996 Protocol on Dispute Settlement Mechanism, ASEAN, art. 4(3)., Nov. 20, 1996, https://agreement.asean.org/media/download/20140119110714.

90. *Id.* art. 5(1).

91. *Id.* art. 6(2).

92. *Id.* art. 6(3).

93. Lim Yew Nghee, *Restoring Foreign Investor Confidence in ASEAN: Legal Framework for Dispute Settlement Processes*, 19 SING. L. REV. 151 (1998) (discussing ASEAN's dispute resolution mechanisms).

94. *1996 Protocol on Dispute Settlement Mechanism*, art. 10.

95. *Id.* art. 8.

c. Provisions for Dispute Settlement after 1996

The *2004 ASEAN Protocol on Enhanced Dispute Settlement Mechanism* sought to replace the 1996 Protocol.[96] Similar to its predecessor, the 2004 Protocol does not make it impermissible for disputing parties to seek alternative methods of dispute settlement fora outside ASEAN.[97] Also, the use of a panel, answerable to the SEOM, had been carried forward from the 1996 Protocol to the 2004 Protocol with the terms of reference clearly spelled out as follows:

> To examine in the light of the relevant provisions in (name of the covered agreements(s) cited by the parties to the dispute), the matter referred to the SEOM by (name of party) in (document) … and to make such findings as will assist the SEOM in the adoption of the panel report or in making its decision not to adopt the report.[98]

In contrast to the 1996 Protocol, the 2004 Protocol contains three new important features. First, the SEOM is made to be proactive in ensuring that its findings and recommendations are complied with. Article 15 relevantly provides:

> The SEOM shall keep under surveillance the implementation of the findings and recommendations of panel and Appellate Body reports adopted by it. The issue of implementation of the findings and recommendations of panel and Appellate body reports adopted by the SEOM may be raised at the SEOM by any Member State at any time following their adoption. Unless the SEOM decides otherwise, the issue of implementation of the findings and recommendations … shall be placed on the agenda of the SEOM meeting and shall remain on the SEOM's agenda until the issue is resolved … [99]

As a corollary of its surveillance duty, the SEOM is vested with the punitive power to authorize compensation and the suspension of concessions against a party who fails to comply with the findings of the SEOM. Article 16 relevantly states:

> 1. Compensation and the suspension of concessions or other obligations are temporary measures available in the event that the findings and

96. 2004 ASEAN Protocol on Enhanced Dispute Settlement Mechanism, ASEAN, Nov. 29, 2004 (adopted at the 10th ASEAN Summit in Vientiane, Laos on November 29, 2004).

97. 2004 ASEAN Protocol on Enhanced Dispute Settlement Mechanism, ASEAN, art. 1, June 18, 2012.

98. *Id*. art. 6(1). The 2004 Protocol, which was intended to be applied to the ASEAN Free Trade Area, has been criticized for overlapping with the dispute resolution mechanisms provided under the World Trade Organization ("WTO"), and since all of the ASEAN members are also members of the WTO, much confusion and conflicts have arisen, *id.;* Gonzalo Villalta Puig & Lee Tsun Tat, *Problems with the ASEAN Free Trade Area Dispute Settlement Mechanism and Solutions for the ASEAN Economic Community*, 49 J. WORLD TRADE 277, 285 (2015).

99. *Id.* art. 15(6).

recommendations of panel and Appellate Body reports adopted by the SEOM are not implemented within the period of sixty (60) days …

…

3. In considering what concessions or other obligations to suspend, the complaining party shall apply the following principles and procedures:

a) the general principle is that the complaining party should first seek to suspend concessions or other obligations with respect to the same sector(s) as that in which the panel or Appellate Body has found a violation or other nullification or impairment;

b) if that party considers that it is not practicable or effective to suspend concessions or other obligations with respect to the same sector(s), it may seek to suspend concessions or other obligations in other sector(s) under the same agreement;

c) if that party considers that it is not practicable or effective to suspend concessions or other obligations with respect to other sector(s) under the same agreement, and that the circumstances are serious enough, it may seek to suspend concessions or other obligations under another covered agreement;

…

4. The level of the suspension of concessions or other obligations authorized by the SEOM shall be equivalent to the level of the nullification or impairment.

…

6. … the SEOM, upon request, shall grant authorization to suspend concessions or other obligations within thirty (30) days of the expiry of the sixty (60) day-period …

7. However, if the Member State concerned objects to the level of suspension proposed, or claims that the principles and procedures … have not been followed … the matter shall be referred to arbitration …

…

9. The suspension of concessions or other obligations shall be temporary and shall only be applied until such time as the measure found to be inconsistent with a covered agreement has been removed … the SEOM shall continue to keep under surveillance the implementation of adopted

> recommendations and findings of the panel and Appellate Body reports adopted by the SEOM …[100]

The appeal mechanism was also substantially enhanced under the 2004 Protocol. Under that doctrine, the ASEAN Economic Ministers (AEM) had authority to establish an Appellate Body of 7 persons to hear appeal cases.[101] As to the qualifications of such persons, they "shall comprise of persons of recognized authority, irrespective of nationality, with demonstrated expertise in law, international trade and the subject matter of the covered agreements generally."[102] In addition, "they shall be unaffiliated with any government … and shall stay abreast of dispute settlement activities and other relevant activities of ASEAN."[103] Appeals heard by the Appellate Body are limited to issues of law only, as opposed to issues of fact, and this resembles the appellate structure of a typical court system.[104] The Appellate Body is not a completely autonomous entity; its working procedures are decided by the SEOM,[105] and the SEOM has the power to decline to accept a report of the Appellate Body.[106]

One should not assume that the creation of ASEAN necessarily meant there was solidarity among the member states. In fact, whether there is true solidarity is a question raised in this paper. Disputes between members states over territorial, border, ethnic, and environmental issues abound.[107] In particular, the South China Sea dispute is a major concern in the region.[108]

Six years after the signing of the 2004 Protocol, the *2010 Protocol to the ASEAN Charter on Dispute Settlement Mechanisms* was adopted pursuant to Article 22(2) of the ASEAN Charter.[109] In the Preamble to the 2010 Protocol, it is acknowledged that "having credible dispute settlement mechanisms would help ASEAN prevent festering conflicts and confrontation among the Member States, preserving the cooperative atmosphere for concerted efforts towards building a peaceful and prosperous ASEAN Community."[110] Whilst such an intention is clear, what remains in doubt is whether the 2010 Protocol carries the implication that the various dispute settlement mechanisms embodied in the instruments hitherto fell short of achieving that end. Furthermore, it is unclear to what extent the new 2010 Protocol overrides the scope and application of the previous instruments. Article 2 provides:

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100. *Id.* art. 16.
101. *Id.* art. 12(1).
102. *Id.* art. 12(3).
103. 2004 ASEAN Protocol on Enhanced Dispute Settlement Mechanism, ASEAN, art. 12(3), June 18, 2012.
104. *Id.* art. 12(6).
105. *Id.* art. 12(8).
106. *Id.* art. 12(13).
107. Kimkong Heng, *ASEAN's Challenges and the Way Forward*, DIPLOMAT, (Mar. 4, 2023), https://thediplomat.com/2020/08/aseans-challenges-and-the-way-forward/.
108. Aristyo R. Darmawan, *ASEAN Outlook to Solve South China Sea Dispute*, ASEAN POST (Mar. 4, 2023), https://theaseanpost.com/article/asean-outlook-solve-south-china-sea-dispute.
109. 2010 Protocol to the ASEAN Charter on Dispute Settlement Mechanisms ASEAN, Apr. 8, 2010 (adopted in Hanoi, Vietnam on April 8, 2010).
110. *Id.* at pmbl.

> 1. This Protocol shall apply to disputes which concern the interpretation or application of:
>
> a) the ASEAN Charter;
>
> b) other ASEAN instruments unless specific means of settling such disputes have already been provided for; or
>
> c) other ASEAN instruments which expressly provide that this Protocol or part of this Protocol shall apply.
>
> 2. Paragraph 1(b) of this Article shall be without prejudice to the right of the Parties to such disputes to mutually agree that this Protocol shall apply.[111]

Thus, the parties to an investment dispute could rely on Article 2(2) to have their dispute resolved by virtue of the provisions of the 2010 Protocol even when the dispute clearly would have fallen into the scope of the other instruments that are specifically investment related. No other ASEAN instrument that had dealt with dispute settlement provided such rules of proceedings. This was indeed a very important milestone in the development of ASEAN's dispute settlement mechanism. Whilst some of the previous instruments made it permissible for parties to seek recourse to alternative fora, there is no specific mention of this in the 2010 Protocol.[112] It is again unclear whether seeking recourse in an overseas forum such as the ICSID is no longer encouraged by the ASEAN Community. In other words, is the jurisdiction to hear ASEAN disputes now vested with ASEAN dispute resolution process? What can be said with certainty is that the 2010 Protocol has moved ASEAN's dispute settlement mechanism beyond a mere regional cooperation, and has instilled in it an international character that is in line with international law and practices.[113]

Five methods of resolving disputes are provided under the 2010 Protocol. These are consultation (Article 5), good offices, mediation and conciliation (Article 6) and arbitration (Article 8).[114] Consultation has traditionally been viewed as the "ASEAN way" of dispute settlement with its emphasis on maintaining good relationships and avoiding the dispute developing into a full-blown court battle.[115] Generally, this process alerts a party to an issue or a potential issue in the hope that both parties will have an opportunity to discuss their concerns. Koh puts it succinctly by referring to the "preference of Asian societies for informality in the resolution of

111. *Id*. art. 2.
112. *See* 1987 Agreement Among the Government of Brunei Darussalam, The Republic of Indonesia, Malaysia, The Republic of the Philippines, the Republic of Singapore, and the Kingdom of Thailand for the Promotion and Protection of Investments, ASEAN, Dec. 15, 1987; discussion *infra* Part III(a).
113. 2010 Protocol to the ASEAN Charter on Dispute Settlement Mechanisms ASEAN, art. 3(1), Apr. 8, 2010 (stating that "this Protocol shall be interpreted in accordance with the customary rules of treaty interpretation of public international law").
114. *Id.* arts. 5, 6, 8.
115. *Id.* art. 5.

conflicts."[116] The idea is to resolve any conflict through dialogue and negotiation. In a similar tone, Narine points out that the Malay traditional practice of *musjawarah* and *mufukat* shape up the ASEAN Way.[117] That is the reason why consultation or mediatory styles of dispute resolution are invariably mentioned first in ASEAN instruments or documents before other methods such as arbitration which involves the imposition of a third party's decision. When faced with a request for consultation by a complaining party, it is the obligation of the responding party to treat the request seriously, as Article 5 relevantly provides:

> 1. A Complaining Party may request consultation with a Responding Party with respect to any dispute concerning the interpretation or application of the ASEAN Charter or other ASEAN instruments. The Responding Party shall accord due consideration to a request for consultation made by the Complaining Party and shall accord adequate opportunity for such consultation.
>
> …
>
> 3. If a request for consultation is made, the Responding Party shall reply to the request within thirty (30) days from the date of its request and shall enter into consultation within sixty (60) days from the date of receipt of the request for consultation, with a view to reaching a mutually agreed solution. The consultation shall be completed within ninety (90) days …[118]

With consultation, the goal is to discuss issues with the other party through dialogue. In such a process, no third-party is involved to help the disputing parties to reach any resolution. By comparison, the procedures for good offices, mediation and conciliation involve a third-party who would help the disputing parties to reach an amicable settlement. Under the 2010 Protocol, this is provided in article 7, and in Annexes 1, 2 and 3 of the 2010 Protocol. Good offices involves the third-party being a person of influence by which he/she may help disputing parties to settle their differences.[119] Under the 2010 Protocol, good offices shall be provided by the Chairman of ASEAN or the Secretary-General of ASEAN acting in an ex officio capacity, or any other person who proves to be suitable.[120] It is incumbent upon the

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116. Pearlie M. C. Koh, *Enhancing Economic Co-operation: A Regional Arbitration Centre for ASEAN*?, 49 INT'L & COMP. L.Q. 394 (2000) (explaining the development of economic enhancement and integration in ASEAN).

117. SHAUN NARINE, EXPLAINING ASEAN: REGIONALISM IN SOUTHEAST ASIA 31 (2002). According to Narine, "Musjawarah means "that a leader should not act arbitrarily or impose his will, but rather make gentle suggestions of the path a community should follow, being careful always to consult all other participants fully and take their views and feelings into consideration before delivering his synthesis conclusions," *id.* Mufukat means consensus and is the goal toward which musjawarah is directed," *see* Mely Caballero-Anthony, *Mechanisms of Dispute Settlement: The ASEAN Experience*, 20 CONTEMP. SE. ASIA 38 (1998) (explaining the sustained use of mediatory processes in a number of high-profile tensions between ASEAN member states).

118. 2010 Protocol to the ASEAN Charter on Dispute Settlement Mechanisms ASEAN, art. 5, Apr. 8, 2010 (adopted in Hanoi, Vietnam on April 8, 2010).

119. *Id*. annex 1.

120. *Id.* annex 1, r. 1(1).

person providing good offices to adhere to the principle of confidentiality,[121] and to remain independent, neutral and impartial during the process.[122]

In regards to mediation, the parties to a dispute have significant flexibility in naming the mediator,[123] and in deciding on the manner in which the mediation is to be conducted.[124] During the mediation, the parties can be represented by whomever they may choose,[125] and the principle of confidentiality must be observed by the mediator.[126] It is also provided that "a mediator shall help to facilitate communication and negotiation between the Parties to the dispute and assist them in an independent, neutral and impartial manner in order to resolve the dispute."[127]

In contrast to mediation, it is possible to have more than one conciliator in conciliation.[128] The Secretary-General of ASEAN is to maintain a list of persons from which the parties choose their conciliators.[129] It is the role of the conciliator to "be guided by principles of objectivity, fairness and justice, giving consideration to, among other things, the rights and obligations of the Parties to the dispute and the circumstances surrounding the dispute, including any previous practices between the Parties to the dispute."[130] The power to determine the manner in which the process is conducted vests with the conciliator,[131] who may make suggestions for settlement to the parties.[132]

If the holding of consultation could not be agreed to, or if held, it became ineffective in resolving the dispute, the complaining party may take the dispute to arbitration by requesting that an arbitral tribunal be convened.[133] However, if the responding party does not agree to such request, the complaining party may then refer the matter to the ASEAN Coordinating Council.[134] To become qualified as arbitrators, Article 11 provides as follows:

> 2. All arbitrators shall:
>
> a) have expertise or experience in law, other matters covered by the ASEAN Charter or the relevant ASEAN instrument, or the resolution of disputes arising under international agreements;
>
> b) be chosen strictly on the basis of objectivity, reliability, and sound judgment;

121. *Id.* annex 1, r. 4.
122. *Id.* annex 1, r. 2.
123. *Id.* annex 2, r. 1.
124. 2010 Protocol to the ASEAN Charter on Dispute Settlement Mechanisms ASEAN, annex 2, r. 5, Apr. 8, 2010.
125. *Id.* annex 2, r. 3.
126. *Id.,* annex 2, r. 7.
127. *Id.* annex 2, r. 2.
128. *Id.* annex 3, r. 1(1).
129. *Id.*
130. 2010 Protocol to the ASEAN Charter on Dispute Settlement Mechanisms ASEAN, annex 3, r. 4.2, Apr. 8, 2010.
131. *Id.* annex 3, r. 6.
132. *Id.* annex 3, r. 4(3).
133. *Id.* art. 8(1).
134. *Id.* art. 8(4).

> c) be independent of, and not be affiliated with or take instructions from, any Party to the dispute;
>
> d) not have dealt with the matter in any capacity; and
>
> e) disclose, to the Parties to the dispute, information which may give rise to justifiable doubts as to their independence or impartiality.[135]

The arbitral award shall be final and binding on the parties,[136] and the party who is required to comply with the same is to furnish a status report with the Secretary-General of ASEAN indicating its compliance.[137] The arbitration is to be conducted by three arbitrators; each party appointing one with the third arbitrator to be agreed to by both parties.[138] Arbitrators are chosen from a list of individuals, who possess the relevant qualifications, maintained by the Secretary-General of ASEAN.[139] Arbitrations are to be held at Jakarta, Indonesia, the ASEAN Secretariat, unless otherwise agreed by the parties,[140] and English language shall be used in all arbitrations.[141] In 2012, a new annex was inserted into the 2010 Protocol making provision for any party to a dispute who is affected by the non-compliance of the award by the other party to bring such non-compliance to the attention of the ASEAN Summit through the ASEAN Coordinating Council.[142] This new addition necessarily strengthened the enforcement mechanism under the 2010 Protocol.

d. Investment and Dispute Resolution

The creation of the ASEAN Investment Area has been hailed as "the most significant attempt at economic cooperation in the area of FDI [Foreign Direct Investment]."[143] The signing of the *1987 Agreement Among the Government of Brunei Darussalam, The Republic of Indonesia, Malaysia, The Republic of the Philippines, the Republic of Singapore, and the Kingdom of Thailand for the Promotion and Protection of Investments*, the *1998 Framework Agreement on the ASEAN Investment Area*[144] and the *2009 ASEAN Comprehensive Investment Agreement*[145] paved

135. *Id.* art. 11.
136. 2010 Protocol to the ASEAN Charter on Dispute Settlement Mechanisms ASEAN, annex 15(1), Apr. 8, 2010.
137. *Id.* art. 16(2).
138. *Id.* annex 4, r. 1.
139. *Id.* annex 4, r. 5.
140. *Id.* annex 4, r. 12.
141. *Id.* annex 4, r. 13.
142. 2010 Protocol to the ASEAN Charter on Dispute Settlement Mechanisms ASEAN, annex 6 Apr. 8, 2010; 2012 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, ASEAN, Apr. 2, 2012 (Rules for Reference of Non-Compliance to the ASEAN Summit was added to the 2010 Protocol pursuant to agreement by the Foreign Ministers at Phnom Penh, Cambodia on April 2, 2012).
143. MICHAEL G. PLUMMER, ASEAN ECONOMIC INTEGRATION: TRADE, FOREIGN DIRECT INVESTMENT, AND FINANCE 131 (2009).
144. 1998 Framework Agreement on the ASEAN Investment Area, ASEAN, Oct. 7, 1998 (signed at the 30th ASEAN Economic Ministers Meeting in Makati City, Philippines on 7 October 1998).
145. 2009 Comprehensive Investment Agreement, ASEAN, Feb. 26, 2009.

the way for greater cooperation in investment among the ASEAN member states. Each of these instruments includes provisions on dispute settlement.

The case of *Yaung Chi Oo Trading Pte Ltd v Government of the Union of Myanmar* is illustrative of the inconsistencies that have arisen between these successive instruments.[146] In that case, the claimant was a company incorporated in Singapore which entered into a joint venture agreement in 1993 with the Myanmar Foodstuff Industries and the State Industrial Organization of Myanmar for the operation of the Mandalay Beer Factory.[147] At the time, Myanmar was not yet a member of ASEAN. Upon its admission in 1997, Myanmar acceded to both the 1987 Agreement and the 1998 Framework Agreement.[148] The claimant alleged that around 1997 the respondent's armed servants took over the Mandalay Brewery, causing production stoppages and thereby profit losses.[149] The question for the tribunal was whether jurisdiction could be established either under the 1987 Agreement or the 1998 Framework Agreement.[150] The Tribunal held that "investment" in the 1987 Agreement is a different concept to "ASEAN investment" provided in the 1998 Framework Agreement. The tribunal said, "the definition of "investment" in the 1987 Agreement focuses on local incorporation and effective management … by contrast the concept of "ASEAN investment" focuses on the source of equity and on local content requirements."[151] This example illustrated how there was much room for improvement so that efficacy of the system could be achieved. The inconsistencies that had arisen were dealt with in subsequent instruments.

The 2009 Investment Agreement is the most comprehensive of the three which covers disputes between member states (Article 27) as well as disputes between an investor and a member state (Articles 28-41). It also brought coherence and improvement to the system. Article 32 limits the scope of investment dispute in respect of which an arbitration claim may be made:

> a) that the disputing Member State has breached an obligation arising under Article 5 (National Treatment), 6 (Most-Favoured-Nation Treatment), 8 (Senior Management and Board of Directors), 11 (Treatment of Investment), 12 (Compensation in Cases of Strife), 13 (Transfers) and 14 (Expropriation and Compensation) relating to the management, conduct, operation or sale or other disposition of a covered investment; and

146. 42 I.L.M. 540 (2003), ASEAN ID Case No. ARB/OII 1 (Mar. 31, 2003). The arbitration award was delivered by Professor Sompong Sucharitkul (President of the Tribunal), Professor James Crawford (Member) and Judge Francis Delon (Member) on 31 March 2003, *id.* This case was the first case brought under the 1987 Agreement. Dames notes that there was a second case brought under this instrument that involved a subsidiary of a Mexican cement company based in Singapore that brought an action against Indonesia in the ICSID, but the arbitration proceedings were discontinued, *id.* S*ee also* Rukia Baruti Dames, *Provisions for Resolution of Investment Disputes Within ASEAN: The First Arbitral Award and its Implications for ASEAN's Legal Framework*, 22 J. INT'L ARB. 540 (2005).
147. 42 I.L.M. 540 (2003), ASEAN ID Case No. ARB/OII 4 (Mar. 31, 2003).
148. *Id*. at 541.
149. *Id*.
150. *Id*. 547.
151. *Id*. at 557.

> b) that the disputing investor in relation to its covered investment has incurred loss or damage by reason of or arising out of that breach.[152]

In terms of choosing a forum for having a claim resolved, the 2009 Investment Agreement under Article 33 allows much flexibility to the disputing parties in that a claim may be referred:

> a) to the courts or administrative tribunals of the disputing Member State, provided that such courts or tribunals have jurisdiction over such claim; or
>
> b) under the ICSID Convention and the ICSID Rules of Procedure for Arbitration Proceedings …
>
> c) under the ICSID Additional Facility Rules …
>
> d) under the UNCITRAL Arbitration Rules; or
>
> e) to the Regional Centre for Arbitration at Kuala Lumpur or any other regional centre for arbitration in ASEAN; or
>
> f) if the disputing parties agree, to any other arbitration institution provided that resort to any arbitration rules or fora under sub-paragraphs (a) to (f) shall exclude resort to the other.[153]

However, it must be noted that an instrument providing for a dispute to be resolved in a particular forum does not necessarily mean that that forum will have the jurisdiction to deal with the merits of the dispute. International arbitration jurisprudence is full of such examples. For instance, the ICSID was denied jurisdiction in *Philippe Gruslin v Malaysia*.[154] The tribunal held that the claimant's certain investment in securities listed on the Kuala Lumpur Stock Exchange did not qualify as investment under the Inter-governmental Agreement between Malaysia and the Belgo-Luxemburg Economic Union on the ground it was not an approved project.[155] In *Fraport AG Frankfurt Airport Services Worldwide v The Republic of the Philippines*,[156] the tribunal took the view that the claimant failed to comply with the respondent's law which rendered its investment unlawful. An unlawful investment did not fall within the scope of the relevant bilateral investment treaty, and the claimant's claim had to be rejected for lack of jurisdiction.[157]

152. 2009 Comprehensive Investment Agreement, ASEAN, art. 32, Feb. 26, 2009.
153. *Id*. art. 33.
154. Philippe Gruslin v. Malaysia, ICSID Case No. ARB/99/3, Objections to Jurisdiction,¶ 10 (Aug. 9, 1999), 29 ICSID Rep 489 (the award was given by the sole arbitrator Mr. Gavan Griffith QC on November 27, 2000).
155. *Id*. at 510.
156. Fraport AG Frankfurt Airport Services Worldwide v. The Republic of the Phil., ICSID Case no. ARB/03/25, Objections to Jurisdiction, Certified Award ¶ 404 (2007), https://www.italaw.com/sites/default/files/case-documents/ita0340.pdf.
157. *Id*. ¶ 396-404; *see* Lim Yew Nghee, *Restoring Foreign Investor Confidence in ASEAN: Legal Framework for Dispute Settlement Processes*, 19 SING. L. REV. 145 (1998) (discussing a better dispute resolution mechanism is needed for foreign investors to have confidence).

The concept of "investment" is sometimes the subject of debate as in the case of *Malaysian Historical Salvors SDN, BHD v The Government of Malaysia*.[158] The claimant was a marine salvage company.[159] It entered into an agreement with the Malaysian Government for the salvage of the cargo of the British ship "DIANA" that sank off the coast of Malacca in 1817.[160] The question that had to be decided by the arbitral tribunal was whether the salvage work provided by the claimant amounted to investment under the Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of Malaysia for the Promotion and Protection of Investments, a bilateral investment treaty which became effective in 1988.[161] The respondent argued that, *inter alia*, the ICSID lacked jurisdiction over the dispute because the subject matter did not qualify as an investment under the bilateral investment treaty.[162] The arbitrator decided that the contract in question was not an investment and hence the ICSID could not deal with the dispute for want of jurisdiction.[163] The arbitrator said that to decide whether it was an investment, "the litmus test must be its overall contribution to the economy of the host State, Malaysia."[164] As the salvage work did not add much to the economy of the host State, in the sense that it was not "lasting", it was not considered as an investment.[165] What is important to note from the above cases is not that the concept of investment has given rise to many disputes. But rather, those disputes had been resolved through arbitration, which is a dispute resolution mechanism that is readily available under the relevant investment instruments. Investors and host states accept the use of it, and they have no difficulty submitting themselves to it. However, that is only a part of the dispute resolution picture of ASEAN. With respect to cultural heritage disputes, one does not see the same kind of clarity as to how disputes are to be resolved. In fact, the dispute resolution mechanism for cultural heritage disputes within the ASEAN framework can be described as underdeveloped. The next part will look into those issues.

IV. ASEAN SOCIO-CULTURAL COMMUNITY AND CULTURAL PROPERTY

In 2003 at Bali, the *Declaration of ASEAN Concord II* was adopted, and it was agreed by the members of ASEAN that an ASEAN Community would come into being in 2020.[166] The idea was to build a "common regional identity."[167] In 2007, the members of ASEAN signed the *Cebu Declaration on the Acceleration of an*

158. Malaysian Historical Salvors SDN, BHD v. Malaysia, ICSID Case No. ARB/05/10, Rejected for Lack of Jurisdiction, ¶ 146 (2007) http://icsidfiles.worldbank.org/icsid/ICSIDBLOBS/OnlineAwards/C247/DC654_En.pdf.
159. *Id.* ¶ 3.
160. *Id.* ¶ 7.
161. *Id.* ¶ 18.
162. *Id.* ¶ 42.
163. *Id.* ¶ 146.
164. Malaysian Historical Salvors SDN, BHD v. Malaysia, ICSID Case No. ARB/05/10, Rejected for Lack of Jurisdiction, ¶ 135 (2007) http://icsidfiles.worldbank.org/icsid/ICSIDBLOBS/OnlineAwards/C247/DC654_En.pdf.
165. *Id.* ¶ 144.
166. *Blueprint for the Socio-Cultural Community (2009-2015)*, 12 SING. Y.B. INT'L L. 319 (2008).
167. Declaration of ASEAN Concord II (Bali Concord II), ASEAN, Declaration 10, Oct. 7, 2003, https://asean.org/speechandstatement/declaration-of-asean-concord-ii-bali-concord-ii/.

ASEAN Community by 2015.[168]In the same year, , the members adopted the *ASEAN Socio-Cultural Community Blueprint* in 2007 ("Blueprint").[169] This Blueprint is a comprehensive document, part E of which speaks to Building ASEAN Identity.[170] The second section of part E is devoted to Preservation and Promotion of ASEAN Cultural Heritage.[171] A number of "actions" are listed thereunder including: "develop the traditional handicraft village," "promote the protection of cultural properties against theft, illicit and illegal trade and trafficking," and "encourage community participation" as well as other provisions aimed at promoting ASEAN cultural heritage.[172] However, the Blueprint falls short of setting any dispute settlement mechanism. In fact, the members of ASEAN have made other agreements in the sphere of cultural heritage with the aim of addressing dispute resolution. The *ASEAN Declaration of Cultural Heritage* was signed in 2000.[173] Besides the promises of "documentation, conservation, preservation, dissemination and promotion" in respect of cultural heritage, there is also the pledge to pour in "increased resources" in order to achieve those ends.[174] Moreover, the *Declaration on ASEAN Unity in Cultural Diversity: Towards Strengthening ASEAN Community,* was signed in 2011 in order to promote "an ASEAN mindset" and further cooperation in the cultural field. [175] It has also been noted that the *Jakarta Declaration on Architectural Heritage* has been agreed to for the purposes of protecting tangible cultural assests such as architectural heritage.[176] Furthermore, the *ASEAN Declaration on Heritage Parks 2003* was signed for the establishment of heritage parks.[177]

The picture presented to the outside world seems as though there is much harmony between the members of ASEAN when it comes to cultural heritage. But in fact, disputes relating to cultural heritage within ASEAN are well-documented. Koh talks about the dish called "Yu Sheng/Lo Hei," and an ongoing dispute as to whether it is a dish of the Singaporean Chinese or the Malaysian Chinese.[178] Further, Malaysia and Indonesia have conflicts over a song called "Terang Bulan," which is Malaysia's national anthem, but Indonesia claims that it was stolen from them.[179]

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168. Cebu Declaration on the Acceleration of the Establishment of an ASEAN Community by 2015, ASEAN, Jan. 13, 2007, https://asean.org/cebu-declaration-on-the-acceleration-of-the-establishment-of-an-asean-community-by-2015/.

169. *Id.*

170. ASEAN Socio-Cultural Community Blueprint, ASEAN (Nov. 20, 2007), https://asean.org/wp-content/uploads/images/archive/5187-19.pdf.

171. *Id.* at 22.

172. *Id.*

173. ASEAN Declaration of Cultural Heritage, ASEAN (July 25, 2000), https://arc-agreement.asean.org/file/doc/2015/02/asean-declaration-on-cultural-heritage.pdf.

174. *Id.* arts. 13, 14.

175. Declaration on ASEAN Unity in Cultural Diversity: Towards Strengthening ASEAN Community, ASEAN, art. 1 ¶ 1, Nov. 7, 2011, https://asean.org/wp-content/uploads/2021/01/Declaration-on-ASEAN-Unity-in-Cultural-Diversity-Towards-Strengthening-ASEAN-Community.pdf.

176. KOH KHENG-LIAN ET AL., ASEAN ENVIRONMENTAL LEGAL INTEGRATION: SUSTAINABLE GOALS? 98–99 (2016); *see also* Koh Kheng-Lian, *Transboundary and Global Environmental Issues: The Role of ASEAN*, 1 TRANSNAT'L. ENV'T. L. 67 (2012) (discussing ASEAN's role in dealing with transboundary environmental problems).

177. Koh Kheng-Lian, *ASEAN Cultural Heritage-Forging an Identity for Realization of an ASEAN Community in 2015?*, 44 ENV'T. POL'Y & L. 237, 244 (2014) (discussing some disputes within ASEAN on heritage).

178. *Id.* at 238.

179. *Id.*

There are numerous examples of such cultural disputes, including one Chong discusses regarding the "pendet" which is a dance of the Balinese, and in a series of documentaries, Malaysian claimed that the dance was theirs, which led to Malaysia making an apology.[180] The dispute was handled by an Eminent Persons Group which played a facilitative role.[181] What is apparent is that whilst there are developments in the protection of cultural heritage within ASEAN, the formal avenues for the resolution of disputes in this area are not as developed.[182]

V. CONCLUSION

There have been numerous suggestions that a centralized and supranational ASEAN judicial body should be established. Koh argues for an ASEAN arbitration center.[183] Williams calls for an ASEAN Court.[184] Similarly, Syofyan et al. want a permanent court to be established.[185] Many have also argued that substantive laws should be harmonized. Lim calls for the harmonization of contract laws.[186] Endeshaw calls for intellectual property laws to be harmonized.[187] Similary, Nguyen takes the view that patent laws should be unified, the doing of which would strengthen ASEAN.[188] And it has been noted that ASEAN leaders do not desire to follow the European Union in having a supranational judicial system.[189]

Much comparison has been made between the ASEAN and the European Union.[190] This kind of comparison may not be suitable all the time. Establishing a supranational court involves the sensitive issues of sovereignty. In Europe, the formation of sovereign states has a long history which can be traced to early modernity marked by the signing of the Peace of Westphalia and the collapse of the Roman

180. Jinn Winn Chong, *"Mine, Yours or Ours?": The Indonesia-Malaysia Disputes over Shared Cultural Heritage* 27 J. SOC. ISSUES SE. ASIA 1, 2 (2012) (arguing for collaboration when it comes to shared-heritage).

181. *Id.* at 36 (noting that a list of eminent persons is kept under the ASEAN Charter, and there is one eminent person representing each ASEAN member state).

182. *See* Jeffrey A. Kaplan, *ASEAN's Rubicon: A Dispute Mechanism for AFTA*, 14 UCLA PAC. BASIN L.J. 147, 149 (1996) (arguing that ASEAN's political cooperation far exceeded its legal construction).

183. Koh, *supra* note 73.

184. *See generally* Megan R. Williams, *ASEAN: Do Progress and Effectiveness Require a Judiciary?*, 30 SUFFOLK TRANSNAT'L. L.R. 433 (2006-2007) (comparing ASEAN to the EU which has a supranational court structure).

185. *See generally* Ahmad Syofyan et al., *Reinforcement and Revitalization of Dispute Settlement Body*, 24 INT'L. J. ENTREPRENEURSHIP 1 (2020) (arguing a permanent court would be more effective when solving disputes); Ahmad Syofyan et al., *ASEAN Court of Justice: Issues, Opportunities and Challenges Concerning Regional Settlement Disputes*, 24 J. LEGAL ETHICAL & REGUL. ISSUES 1 (2021) (discussing why an ASEAN court of justice is needed).

186. *See generally* Lim Yew Nghee, *A Case for Harmonisation of ASEAN Contract Laws*, 17 SING. L. REV. 373 (1996) (arguing such harmonization would bring economic growth).

187. *See generally* Assafa Endeshaw, *Harmonization of Intellectual Property Laws in ASEAN: Issues and Prospects*, 2 J. WORLD INTELL. PROP. 3 (1999) (arguing such harmonization would bring fairness).

188. *See generally* Christian Nguyen, *A Unitary ASEAN Patent Law in the Aftermath of TRIPS*, 8 PAC. RIM L. & POL'Y J. 453 (1999) (arguing the harmonization is needed in order for ASEAN to be competitive).

189. Lin Chun Hung, *ASEAN Charter: Deeper Regional Integration Under International Law?* 9 CHINESE J. INT'T. L. 821, 831 (2010) (discussing the effect of the Charter).

190. *See generally* Laurence Henry, *The ASEAN Way and Community Integration: Two different Models of Regionalism*, 13 EUR. L.J. 857 (2007) (comparing ASEAN and European Union structurally and functionally).

Catholic Church as the dominant power in control of the continent.[191] The formation of the European Union and the European Court of Justice have fundamentally changed understandings of the concept of sovereignty.[192] The history of Southeast Asia is very different. The formation of sovereign states, or to be more precise, gaining independence from colonialism, happened in the twentieth century. Nation-building was a major concern for ASEAN states in the last century or so. They have fought hard against the colonizing powers in the process. On the other hand, setting-up a supranational court inevitably would mean each member state has to relinquish some degree of sovereignty[193] Sovereignty was hard-fought and hard-earned, and it would be regarded as something more important than having a supranational court. Thus what we see is a big dilemma. On one hand, ASEAN is portraying to the world that there is solidarity among its member states. It would be in the interest of all member states to portray such impression for reasons such as defense, attracting investment and so on. But on the other hand, the degree of solidarity has not developed to the stage where there is a unified court system which is binding on all member states on the ground that no state would be happy to give up some of its sovereignty. This is illustrated in the area of cultural property disputes which often would involve sensitive issues of national identity and national pride. Therefore, for ASEAN states, it is to be expected that mediatory, dialogue-type, dispute resolution methods should remain the norm.

191. Daniel Philpott, *Sovereignty*, STANFORD ENCYCLOPEDIA OF PHILOSOPHY (June 22, 2020), https://plato.stanford.edu/archives/fall2020/entries/sovereignty/.

192. Martin Loughlin, *Ten Tenets of Sovereignty*, *in* SOVEREIGNTY IN TRANSITION 55, 81 (Neil Walker ed., 2006).

193. *See generally* George Shenoy, *The Emergence of a Legal Framework for Economic Policy in ASEAN*, 29 MALAYA L. REV. 116 (1987) (arguing having a community law involves many changes to the member nations' laws).