

論 文

# Intra-Regional Border Conflicts and the Institutional Design of ASEAN's Conflict Management

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An intra-regional conflict followed by the violent behaviour of conflicting states in Southeast Asia is one of some political issues in the ASEAN regional organizations. Notable cases of intra-regional conflicts are sourced, among others, by border disputes between two or more countries such as Thailand vs Cambodia on Preah Vihear Temple, and Indonesia vs Malaysia on Ambalat Block. However, in the case of Ambalat Block between Indonesia and Malaysia, the escalation has brought military as an instrument of conflict strategy. The last case of the border conflict between Thailand and Cambodia has risen to a violent armed conflict. ASEAN as a regional organization of Southeast Asia countries is often questioned about its strategic role and capacity to manage intra-regional conflicts. Basically, this paper offers a discourse on institutional design and implementation of ASEAN conflict management by looking at the case of border conflicts between its members. This paper is written based on a qualitative method using secondary data from the mass media, research reports, and documentation review.

## Introduction:

### Regional Organization and Country Members Border Dispute

Several regional organizations like the Arab League, the African Union, SAARC (South Asian Association for Regional Cooperation), and UNASUR (Union of South American Nations) may have different specific organization goals. However, regional organizations are basically formed to establish better international relations among the neighbouring countries. An understandable reason for establishing a regional organization is that neighbours are better in good relations than infraction or wars. The member countries can develop

more opportunities to enhance strategic cooperation in the economic, social, cultural, and political aspects. Regional organizations play an important role in realizing the opportunities in which the member states have a constructive relationship and ability to resolve intraregional conflicts peacefully. Therefore, regional organizations are required to manage intraregional conflicts that may occur among their member states by institutionalizing conflict management systems. This demand is also directed to ASEAN as a regional organization for Southeast Asian countries where intraregional conflicts still frequently occur by different issues. ASEAN was established in August 1967 in Bangkok, the capital city of Thailand. ASEAN basically aims to accelerate economic growth, social progress, cultural development among the members, and establish a peaceful regional community.<sup>1</sup> Recently ASEAN has ten countries as the respective members including Indonesia, Malaysia, the Philippines, Vietnam, Singapore, Thailand, Myanmar, Laos, Cambodia, and Brunei. However since its establishment, ASEAN has to deal with the issue of perpetuated border conflicts among the members.

The European Union (EU), by some scholars, is appointed a good model of regional organizations in dealing with intra-regional conflicts. The EU is more integrated and has more formal regional community while ASEAN is more open, equal, and loose. The EU member states have an obligation to comply with all of mechanisms such as in international economic cooperation with non-European countries; each member of the EU must make its obligations under the EU system. Instantly, the European Union must comply with the mechanism (a binding principle). Therefore, the EU's rotating presidency system can essentially create effective political leadership in dealing with conflicts such as the borders among the European Union member states. In ASEAN way, its member states have more opportunities to choose and make political and economic decision even when the decision is out of the ASEAN amity or charter. ASEAN has a similar system of 'presidency' rotation with EU's in terms of political leadership that deals with the more difficult nature of regional politics. In the case of the EU, as mentioned in the report of Michele Pace in "European Union Policy-Making towards Border Conflicts" (2005), the EU prefers its own mechanism which is followed consistently by its members to handle border conflicts among its members.<sup>2</sup>

ASEAN leaders have rejected the idea of using the EU model since it

is fundamentally different from the ASEAN's *non-interference* policy among its members for their internal affairs. Thus, since its establishment in 1967, ASEAN has seemed unwilling or unable to manage intra-regional conflicts in Southeast Asia area such as the border conflict cases. Sridharan mentions that the factors of inter-governmental arrangements, rather supranationalism or regionalism, weaken ASEAN's ability to handle and manage intra-regional conflicts.<sup>3</sup> However, some other scholars argue that ASEAN has different ways and a unique approach to managing intra-regional conflicts. These scholars see the non-interference policy and loose organizational structure as part of the ASEAN approach to conflict management. They say, this is the way the organization prevents or avoids intraregional conflicts among member states. "ASEAN Way" to avoid conflict is part of the regional norms. ASEAN is contextually different from the EU system. The very typical characteristic of ASEAN conflict management model is the ability to incorporate their principles enacted in ASEAN charter with a more implicit and passive approach to avoid conflicts of jurisdiction, reduce, or delay to deal with them for an uncertain period. This distinctive characteristic indicates that ASEAN takes a different form of conflict management from the other regional organizations.<sup>4</sup> However, while avoiding conflict is the ASEAN's shared norm both theoretically and empirically, the ASEAN Way becomes weak with keeping a lot of conflicts in the region behind the situation of harmony.

The purpose of conflict management for regional organizations is to prevent violent armed conflict in order to establish regional security. Several cases of intra-regional conflict in Southeast Asia such as the border conflicts between Thailand and Cambodia in disputing ownership of an ancient temple, Preah Vihear Temple, and the surrounding land has created a series of armed conflicts in which several civilians and soldiers were killed. Although the case of Malaysia and Indonesia on the Ambalat island dispute in 2010 did not go further to the escalation of violent conflict, the mobilization of the armed forces of the two countries around the disputed island has also threatened the ASEAN regional security. While the border conflicts encourage every country to mobilize violent means, including naval and air forces, ASEAN is questioned its role in regulating the conflict in order to keep regional security in Southeast Asia. There is a strong expectation for ASEAN to play a more important, proactive and strategic role in regulating intra-regional conflicts

among the members so that it can maintain its regional organization's values and norms.

In March 2009, ASEAN adopted the APSC (ASEAN Political Security Community) as a political attempt of ASEAN leaders in building regional peace and security in their respective areas. In the APSC document sub-chapter B.2, it is clearly stated that the Conflict Resolution and Pacific Settlement of Disputes have three main actions: (1) a mechanism for dispute resolution, (2) research activities on peace, conflict management and conflict resolution, and (3) regional cooperation with relevant regional organizations and the United Nations (UN). The Conflict Resolution and Pacific Settlement as the APSC blueprint is essentially the basis of the institutional design of ASEAN conflict management systems. Especially in the first act, it clearly explains the need to:<sup>5</sup>

- a. Study and analyze existing dispute settlement modes and/or additional mechanisms with a view to enhancing regional mechanisms for the pacific settlement of disputes;
- b. Develop ASEAN modalities for good offices, conciliation and mediation; and
- c. Establish appropriate dispute settlement mechanisms, including arbitration as provided for by the ASEAN Charter.

The APSC blue print may still need to be applied and practiced as a policy of the ASEAN for regional conflict management systems. Scholars argue that ASEAN's conflict management system is much better than SAARC's system (the neighbouring regional organization) because ASEAN has established diplomatic norms and rules and has achieved the common interests and values.<sup>6</sup> However, the real facts of the unresolved border conflicts and violence among ASEAN members proved different. ASEAN still faces serious problems in institutionalizing conflict management system in order to manage intra-regional conflicts peacefully. This paper mainly describes the way ASEAN establishes its institutional design of conflict management systems for handling intra-regional conflicts, and the political barriers during the creation and implementation of the systems. Through the case of the border conflict between Thailand and Cambodia on Preah Vihear Temple, this paper aims to discuss how ASEAN's conflict management systems are working on it.

## I. Conflicts and Border Conflicts

Conflicts are generally defined as a situation in which two or more interest groups are fought the limited resources to meet basic needs. Some scholars like Abraham Maslow, Max Neef, Marshal Rosenberg, and John Burton insist that the basic needs become the root cause of any type of conflict. A conflict occurs when there is a mismatch between the goals and actions of the actors to the limited resources for basic needs. Therefore, Wallensteen mentions three components of conflict: incompatibility, action, and actor.<sup>7</sup> The conflict components will occur in different forms of conflict, such as ethnic, religious, or industrial conflicts. Each form of conflict can create different conflict dynamics where actors act to determine whether or not the conflict will escalate. In some cases, this can create a violent situation, followed by hatred, armed mobilization, and social unrest.

Similar to Wallensteen, Bartos and Wehr argue that conflict is defined as a situation “in which the actors use conflict behaviour against each other to achieve incompatible goals and/or to express hostility.”<sup>8</sup> From the definition, the core of conflict is the goal incompatibility, hostility, and conflict behaviour that is rational or irrational. Incompatible goal is a condition of limited resource being contested by two or more actors of importance (individuals, groups, and states). When warring factions fight limited resources, many cases indicate that the emotional aspect comes in many forms of hostility such as hatred and vengeance. In essence, a conflict is not only caused by the incompatibility of goals but also due to the hostile feelings of social groups. In addition, the behaviour of the conflict is “any behaviour that helps the party to achieve its goals that do not match with that of the opponent or that expressing its hostility towards the opponent.”<sup>9</sup>

The border conflict can then be defined as an incompatible goal from two or more parties (individuals, communities, or states) on lands, rivers or seas which are claimed as part of each party's territory or possession. Wallensteen refers it to the term “the incompatibility over territory.”<sup>10</sup> In the case of inter-state border conflicts, borders may have rich resources in addition to cultural or social bonds for the conflicting actors. One case of border conflicts in Southeast Asia issued by the ownership of natural resources is between Indonesia and Malaysia on the Ambalat island. In the case of the border

conflict between Thailand and Cambodia, social and cultural ties seem so powerful in influencing the conflict. Both natural resources and socio-cultural ties also in some way are related to each other. In conflict management, to understand the main context and reason behind the border conflict is an important part of the analysis of the conflict.<sup>11</sup>

After understanding the definition of conflict, to answer the question of whether the conflict is resolvable or not is also important. Wallensteen argues that as a realistic proposition conflicts are resolvable. Many conflict cases in the world history took place in the form of war and violence; however, the conflicting parties could learn the best way to resolve the conflict.<sup>12</sup> When the conflicting parties use zero-sum game, they learn that the strategy can be devastating to both parties without any positive benefits. The conflicting parties can learn and try to find other ways to resolve their conflicts with mutual benefits.

## II. Conflict Management Perspectives

As a theoretical perspective, conflict management is not a new comer in peace and conflict studies. But, there has been a long debate about the ultimate goal or achievement of conflict management. Some scholars insist that conflict management is to contain and prevent violence in the dynamics of the conflict while others refuse it by mentioning that conflict management aims to resolve the root causes of conflict. In the first place, some scholars have argued that conflict management is primarily a mechanism to contain and prevent violence from a conflict situation.<sup>13</sup> Rubenstein states that conflict management aims to moderate or civilize conflict consequences without addressing its root causes.<sup>14</sup> Conflict management theory also explains that not all conflicts need to be resolved, but there should be a process to reduce the escalation of violence. Carpenter and Kennedy suggest that the challenge for managers is not to remove the conflicts but to deal with discrepancies as creative as possible.<sup>15</sup> Therefore, conflicts become more productive by creating problem-solving and sustainable peace.<sup>16</sup>

Conflict management mechanisms based on non-violence perspective can be undertaken by the conflicting parties when they have the awareness of peace in resolving their conflicts through peaceful negotiations, a process

of dialogue and negotiation table. However, the conflicting parties often find it difficult to bring themselves into the peace talks when they get on a cycle of violent conflict trap. In this situation, a third party may come into conflict dynamics when the conflicting parties are not able to go into a process of negotiation or dialogue by several reasons like a trap in a spiral of violence, retaliatory circle, and hatred.

A third party with the specific authority can intervene in critical situations where the conflicting parties are trapped in a vicious cycle of violence, especially when violence has destroyed, killed and suffered the population. A third party is mandated to stop and eliminate violence through a mission called “peace-making and peace-keeping.”<sup>17</sup> Basically, other than to stop violence, the other main task of the third party is to bring the conflicting parties to the peace talks with the use of capital or power resources such as legal authority, political power, and strong military forces. Therefore, there are two main missions of the third-party in conflict management which are to reduce or eliminate violence from the conflict dynamics and to bring two or more conflicting parties to peace talks. Furthermore, based on the two main missions of conflict management, according to Rioux in his article, “Third Party Intervention as Conflict Management: The Case of Africa” (2003), third parties play a highly strategic function in a variety of methods and dimensions including fact-finding, good offices, condemnation, mediation or conciliation, arbitration, and peace keeping.<sup>18</sup>

The second perspective of conflict management is emphasizing broader and more complex concepts. Hamad mentions that the definition of the term should be explored to better understand the overall discipline, which includes the emergence of conflict, its escalation, subsequent complications, containment, resolution and transformation as sub-topics.<sup>19</sup> Hamad pulls in conflict resolution and transformation into his theory where conflict management does not only attempt to contain and prevent violence, but also to address the root causes of conflict. In conflict analysis, the root causes of conflict refer to incompatibility such as poverty and social injustice. Hamad’s thought essentially extends the concept of conflict management as an “umbrella name.”<sup>20</sup>

Conflict management as an umbrella concept basically interprets the meaning of management. Hamad urges that “management” has a wider

meaning than the narrow sense of “to manage” or “to cope with.” This includes the meaning of “to administer.” He states that the use of the terms is already common in other disciplines. Many disciplines of social and economic sciences are all familiar with the terms management business and business administration. However, in a conflict, management is not just understood in terms of administration, in which the conflicting actors may, in some cases, even look for conflicts and deter solutions.<sup>21</sup> In this perspective, Hamad furthermore argues that conflict settlement, conflict resolution, conflict prevention and conflict transformation are still part of the conflict management theory. He asserts that conflict management is a discipline that covers the concepts in conflict studies.<sup>22</sup>

As an umbrella concept, according to Hamad conflict management as a discipline should be analyzed by the method of positivism of social sciences.<sup>23</sup> The fact is that any approach of conflict studies has its own philosophy, theory, and methodology. Habermas argues that every theory and tradition has its own importance and rationality such as positivism with its technical interest, humanism or social construction with its inter-subjective communication, and critical theory with its emancipation.<sup>24</sup> Wallensteen also mentions that a lot of scholars’ methodological approach is comparative.<sup>25</sup> There are many approaches to conflict management by following the context of its theory and practice.

This paper prefers to use the first perspective of conflict management on conflict resolution that focuses in transforming violence into a peaceful dialogue and negotiation. As its primary mission to reduce, prevent, and transform violence into peaceful dialogue and negotiation, conflict management as a concept has three major steps to make it happen. The first or basic step sees the dimensions of the conflict, the current situation of conflict whether it increases in violent conflicts or not, who the actor are, and surrounding issues.

The second step is to understand the actors’ conflict management strategies being involved. Some scholars like Miall Ramsbotham and Woodhouse use the term conflict strategy. They mention that there are four conflict strategies commonly used by the conflicting parties, which are contending, yielding, withdrawing, and problem-solving model. Contending-conflict strategy plays a zero-sum game in which each party mobilizes every

way to win the conflict, including violent ways. Yielding-conflict strategy is usually done by the lower and weaker party that surrenders any decision to the opponent. Withdrawing-conflict strategy is the behaviour of each actor that avoids conflicts with others in order to avoid trouble. Problem-solving strategy is signed by both good commitment and political will to find a better alternative way out of the conflict through the mechanism of peace talks. In reality, however, the problem-solving strategy is not easily done by two conflicting parties until the presence of a third party.<sup>26</sup>

The third is to identify and evaluate conflict management as an institutionalized system within society, including the regional and international community, whether built legally or normatively. Several scholars stress that conflict management for community in a state, at some degrees, is different from regional or international community. The main problem here is that the main actors in the regional conflicts are more than one state.<sup>27</sup> Conflict management for the international community is more complex in case it is related to issues on sovereignty and independence. According to Ghebremeskel, conflict management at the regional level requires a strong international organization like the UN to carry out mechanisms and procedures. However, a strong state role in settling bilateral conflicts is often strategically important.<sup>28</sup>

The main steps in analyzing conflict management help the conflict actors, both conflicting and third parties, to undertake peacemaking and peacekeeping, good office, arbitration, mediation and negotiation.<sup>29</sup> The measures can be used by the conflicting and third parties. However, some conflict management mechanism is only done by a third party such as mediation, good offices, and arbitration. As a system, conflict management provides a mechanism when and how mediation, good offices, and arbitration should take place. In the intra-regional conflict, regional organizations such as ASEAN, the EU, and SAARC with a certain degree of authority, legitimacy, and political power should ideally have such mechanism.

### III. Border Conflicts in ASEAN

Most ASEAN member states were once colonized by Western countries, except Thailand. After they gained independence, the Southeast Asia countries

are still making efforts to maintain national unity and territorial identity. However, countries with boundaries established by colonial maps have a lot territorial issues to resolve. The countries found that demarcation drawn unilaterally by the colonists was mostly obscure and disputable. The colonists planted improper territorial lines, which are never demarcated by the survey or physical markings for the actual area.<sup>30</sup>

Ramses Amer summarizes both settled and unsettled territorial disputes from 1960-1990s. Some settled border conflicts in Southeast Asia countries by using a bilateral diplomacy can be seen in table 1 as follow<sup>31</sup>:

**Table 1: Settled Border Conflicts in Southeast Asia**

No	Year	Conflicting Countries	Issues
1	1967 (2002)	Indonesia and Malaysia	Ownership of Simpadan and Ligitan islands
2	1971	Indonesia and Malaysia	Agreement on the borders of the continental shelf in the northern part of the Malacca Strait
3		Indonesia, Thailand, and Malaysia	The formation of Tri-junction point (common point) on the continental shelf
4	1973	Indonesia and Singapore	Agreement to restrictions on the Singapore Strait
5	1990	Vietnam and Laos	Agreement on the status of the border line with agreed land boundary
6	1990	Malaysia and Thailand	Malaysia-Thailand Joint Authority to settle disputes in the territorial sea in the Strait of Malacca and the Gulf of Thailand
7	1992	Malaysia and Vietnam	Joint development in the areas of overlapping claims to the continental shelf to the south-west of Vietnam and east-north-east of Peninsular Malaysia
8	1994	Myanmar and Laos	“Convention” to resolve the boundaries of their lands along the Mekong River
9	1997	Thailand and Vietnam	Agreement on continental shelf and the EEZ (Exclusive Economic Zone).
10	1977	Brunei Darussalam and Malaysia	Maritime boundaries in the South China Sea and EEZ areas
11	1998	Territorial Vietnam and Cambodia	Land border and maritime

However there are still many unsettled border conflicts in the region of Southeast Asia. The unsettled border conflicts in Southeast Asia can be seen at table 2 as follow<sup>32</sup>:

**Table 2:** *Unsettled Border Conflicts in Southeast Asia*

No	Year	Conflicting Countries	Issues
1	1979	Indonesian and Malaysia	Ambalat Block
2	1958	Brunei Darussalam and Malaysia	Maritime boundaries in the South China Sea and EEZ areas
3	1995	The Philippines and Indonesia	Maritime boundary in the Celebes Sea
4	1995	Malaysia and the Philippines	The maritime boundaries of Sulu Sea, Celebes Sea, and South China Sea
5	1979	Malaysia and Singapore	The ownership of Pedra Branca/ Pulau Batu Puteh and maritime boundaries.
6	1968	Vietnam and Malaysia	The ownership status of the Spratly islands
7	1980	Thailand and Laos	Dispute boats along the Mekong River border
8	1985	Myanmar and Thailand	2400 kilo meters of land borders and maritime boundaries in the Andaman Sea

In the case of Malaysia-Indonesia border conflicts, during 2005, 2008, and 2010, both countries deployed their military forces along the border due to the escalation of the conflict over Ambalat Island. In 2010 the two countries sent their warships and this escalated political tensions. Indonesia built a lighthouse near Ambalat Island and sent troops to the island. The escalation was sparked by the arrest of three Indonesian patrol officers from the ministry of marine and fishery affairs by the Malaysian marine police as retaliation for seven Malaysian fishermen were arrested by Indonesian authority on the same day. Despite high internal political pressures, Indonesia and Malaysia chose peace talk and diplomacy to resolve the dispute. War was not an option with consideration of public safety in ASEAN. Indonesia's President, Susilo Bambang Yudoyono, stated through a press release in response to escalation and internal political pressure on Indonesia-Malaysia that considering the strong friendship and the role of both countries in ASEAN (ASEAN pillars),

peace talk, negotiation and diplomacy track should be used. He said that “So let us fight for our national interests and character in the spirit of keeping the peace.”<sup>33</sup> Similar to Indonesian President, the Prime Minister of Malaysia Datuk Seri Najib Tun Razak also urged that the border conflict “needed to be resolved in an amicable manner through diplomatic channels.”<sup>34</sup> Basically both Malaysia and Indonesian government have agreed to settle the border conflict by peaceful means bilaterally. However, ASEAN’s role in this case is not embraced since the countries have chosen a bilateral diplomacy.

#### IV. ASEAN’s Conflict Management

ASEAN claims that conflict management system has been institutionalized in its own unique way. In the case of ASEAN, a conflict management system that provides a strong and legal mechanism is obviously not found. Many scholars see conflict management in ASEAN is appeared to be more a non-formal institution. Before current steps of ASEAN with new ASEAN Charter and protocol for dispute mechanism, conflict management system was based on the ASEAN principles and values.

The conflict management system consisted of summit meetings, foreign ministers meetings (FMMs), economic and environmental ministers meetings and senior officials meetings (SOMs) that held for averagely 230 meetings annually. The system also included bilateral joint committees and commissions to handle the border conflicts and military co-operation. Those meetings were planned to let ASEAN Member States interacting at many forums even when they might be in a conflict situation. Askandar stated that ASEAN principles explicated that they controlled themselves from being aggressive, and not to choose violence to resolve conflicts among ASEAN members. In this sense, it was notable that ASEAN has built “the mutual restraint without resorting to deterrence (the balance of power)”.<sup>35</sup>

However, some critics linked the non-formal mechanism of conflict management system to some unsettled intraregional conflicts in Southeast Asia that prove ASEAN’s inability in managing conflict. Acharya mentions that the incapability of ASEAN in solving intraregional conflicts, particularly border conflicts, was caused by the failure of establishing tangible institutional design and mechanism for handling the conflict cases. ASEAN’s tendency

in hiding its intraregional conflicts, rather than attempting to search a sustainable problem solving, could be seen as the weakness of ASEAN Way.<sup>36</sup> Therefore, some cases of intraregional conflicts, particularly the border conflict cases, could not be resolved using ASEAN method. As in the current case of Preah Vihear Temple and Ambalat Island, the conflict escalations were marked by armed-force mobilization and showdowns.

ASEAN Way on conflict management system was normatively named as ASEAN Dispute Settlement Mechanism (ASEAN DSM) which was basically built on the ASEAN values and norms that documented in ASEAN Charter, Concord, and Treaty. In Bangkok declaration (1967) the spirit of regional peace was clearly mentioned to promote “the spirit of equality and partnership and thereby contribute towards peace, progress and prosperity in the region” and the vision of “regional peace and stability.” Regarding with DSM, there are five points in ASEAN purposes that emphasize on peace and security and related to regional conflict management. The five points are as follow<sup>37</sup>:

1. To maintain and improve peace, security and stability and, further on, to strengthen peace oriented values in the region.
2. To enhance regional resilience by promoting political, security, economic, and socio-cultural cooperation.
3. To preserve Southeast Asia as a Nuclear Weapon-Free Zone and free from all other weapons of mass destruction.
4. To ensure that the peoples and Member States of ASEAN live in peace with the world at large in a just, democratic and harmonious environment.
5. (number 8) To respond effectively, in accordance with the principle of comprehensive security, on all forms of threats, transnational crimes and trans-boundary challenges.

ASEAN Members must reaffirm and adhere to the fundamental principles in the charter:

1. Respect for the independence, sovereignty, equality, territorial integrity and national identity of all ASEAN Members.
2. Shared commitment and collective responsibility in enhancing regional peace, security and prosperity.
3. Renunciation of aggression and of threats or use of forces or other actions in any manner inconsistent with international law.

4. Reliance on peaceful settlement of disputes
5. Non-interference in the internal affairs of ASEAN Members.
6. Respect for the rights of every Member to lead its national existence, free from external inference, subversion, and coercion.

Basically, ASEAN DSM could be traced more specifically through the Treaty of Amity and Cooperation in Southeast Asia (1976) that based on ASEAN Concord I. The Treaty, Article 2, mentions about the principles for the conflicting parties (High Contracting Parties)<sup>38</sup>:

1. Mutual respect for the independence, sovereignty, equality, territorial integrity and national identity of all nations;
2. The right of every State to lead its national existence free from external interference, subversion or coercion;
3. Non-interference in the internal affairs of one another;
4. Settlement of differences or disputes by peaceful means;
5. Renunciation of the threat or use of force; and
6. Effective co-operation among themselves.

In Chapter IV on Pacific Settlement of Disputes from articles 13-17, the Treaty of Amity has built the conflict management mechanism. Basically, the chapter rules the State Members not to use violence or to “refrain from threat or use of forces.” It designates that the conflicting parties (High Contracting Parties) constitute a High Council comprising Representatives at ministerial level, which should take cognizance of the dispute and recommend good offices, mediation, inquiry or conciliation. The High Contracting Parties should be encouraged to take initiatives to solve the dispute by friendly negotiations before resorting to other procedures, for example, stipulated in the Charter of the United Nations.

Furthermore, the ASEAN DSM, specifically, could be traced to the 1996 ASEAN Protocol on Enhanced Dispute Settlement Mechanism and the 2003 ASEAN Protocol based on Bali Concord II. Based on Bali Concord II, ASEAN DSM basically was emphasized on the framework of ASEAN Security Community (ASC) with twelve points of regional security. First article of ASC basically ruled intraregional conflicts, such as border conflict. It is stated that “The ASEAN Security Community is envisaged to bring ASEAN’s political and security cooperation to a higher plane to ensure that countries in the region live at peace with one another and with the world at large in a just, democratic

and harmonious environment. The ASEAN Security Community members shall rely exclusively on peaceful processes in the settlement of intra-regional differences and regard their security as fundamentally linked to one another and bound by geographic location, common vision and objectives.”<sup>39</sup>

In article 2 of the DSM Protocol 2003, SEOM (Senior Economic Official Meeting) was the competent institution of the Protocol administration. The ASEAN DSM was derived from the Protocol implemented on disputes brought under the ASEAN economic agreement and consisted of a set of non-adjudicatory mechanisms, such as, consultation, good office, conciliation and a set of procedures at adjudicatory steps which comprised of proceedings before the panel, the Appellate Body’s review, and procedures for compliance monitoring. The ASEAN DSM was adopted from WTO DSU by some differences based on regional framework of ASEAN.<sup>40</sup> Based on the Protocol, the mechanism could be seen at the table 3 of ASEAN Dispute Resolution Mechanism as follow<sup>41</sup>:

**Table 3: Unsettled Border Conflicts in Southeast Asia**

Duration	Process and Action
60 days	Pre-adjudication consultations and mediations
45 days	SEOM establishes DSM panels and appoints panelists
60-70 days	Panel reports, containing legally binding findings and recommendations, to be submitted to SEOM
30 days	SEOM to decide on report adoption (if no appeal)
60-90 days	Appeal proceedings to be reviewed by DSM Appellate Body whose report is to be submitted to SEOM
30 days	SEOM to decide on adoption of appeal report
60 days	Compliance by AMS concerned to report findings and recommendations (unless parties in dispute agree on a longer timeframe for compliance)

In April 2010, the Foreign Ministers meeting was held in Hanoi and agreed to sign the Protocol of Dispute Mechanism Resolution that would transform ASEAN DSM as a legal entity. This agreement was the effort of ASEAN Member States to follow up the ASEAN Charter 2007. As reported by *Bangkok Post*, ASEAN Members’ foreign ministers had common vision and commitment on ASEAN DSM. Foreign Minister from Singapore, George Yeo, testifies that the protocol encouraged the ASEAN Members to have

more political commitment by establishing a dispute settlement mechanism which would realize the agreements more concretely. ASEAN Secretary General Surin Pitsuwan also pointed out that the protocol was a “rather comprehensive” document that would realize stability and security in the region.<sup>42</sup>

The new part of Protocol is about the arbitrary mechanism. Before the arbitration, the request was from a complaining party for new consultations. Good offices, mediation or conciliation, might be resorted by the parties if they were able to improve the disputes into a conflict resolution. The Chairman of ASEAN or the Secretary-General of ASEAN, acting in an *ex officio* capacity, could also undertake good offices, mediation or conciliation if requested by the conflicting parties. When the dispute could not be resolved by consultations or good offices and mediation and conciliation processes, an arbitration mechanism could be conducted under certain circumstances.

According to Tiwari, the mechanism to conduct arbitration needs to follow the Rules of Arbitration annexed to the Protocol, but subjects to such modifications as the conflicting actors to the conflict might concur upon. The number of arbitrators and the methods in which they are to be chosen or replaced is to be prescribed in the Rules of Arbitration annexed to the Protocol. Furthermore, Tiwari urges that the award of the arbitral tribunal is ultimate and obligatory on all parties to the conflict and has to be obeyed by them fully. Likewise, the conflicting parties have to comply, too, with resolution agreements resulting from the conflict management means, such as good offices, mediation and conciliation. Progress in fulfillment with arbitral awards and resolution agreements is to be observed and monitored through status reports applied to the Secretary-General of ASEAN.<sup>43</sup>

## V. The Implementation of ASEAN DSM: Case of Thailand and Cambodia Border Dispute

The recent cases of border conflicts in the countries of Southeast Asia with armed clashes occurred in the case of Thailand and Cambodia on the Preah Vihear Temple. In the case of border land conflict on Preah Vihear Temple, Thailand and Cambodia have mobilized their troops in a series of armed clashes. Since July 2008, the Thai-Cambodian military has been involved in

five low intensity fire fights, in October 2008, April 2009, January and April 2010, and currently in February 2011. The clashes have killed lives on both sides, the hottest issue being the Bangkok and Phnom Penh's decision to deploy military forces in the border conflict dynamics.<sup>44</sup>

The conflict over Preah Vihear basically started a century ago. Based on the completion of the border between the French colonial government of Cambodia and the Kingdom of Siam, the temple of Preah Vihear and surrounding areas belonged to Cambodia. However, in 1938 the Thai government reiterated that it was part of their territory. Therefore, the Thai government occupied it until 1958 when the two warring parties held a series of negotiations to find a solution. There was no agreement reached. Both warring parties agreed to take the case to the International Court of Justice in July 1959.<sup>45</sup>

In 1962 International Court of Justice ruled that the temple belonged to Cambodia by the request of Prince Norodom Sihanouk. The Prince commanded the Thai force to leave the temple after long occupation. And in July 2008 UNESCO listed Preah Vihear Temple as a world heritage that belongs to Cambodia. The UNESCO's decision on Preah Vihear Temple has triggered protest of Thailand people such Thai's People Alliance for Democracy. This organization gives a strong political pressure to current Thai administration on the issue of Preah Vihear Temple. Recently, in the beginning of February 2011 military forces from both countries fired each other across the disputed border. BBC News reported that the fighting claimed five lives and thousands of villagers around the temple were displaced. The part of Preah Vihear Temple collapsed because of the fighting. The armed clash was triggered by the arresting of seven Thai people by Cambodian authority as espionage.<sup>46</sup> VOA News reports that seven Cambodians, including two civilians, were killed during the clash.<sup>47</sup>

According to Nugroho, from a regional viewpoint, the Thailand-Cambodian border conflict is only the tip of the iceberg. There are many of other border conflicts among Southeast Asian countries which mostly are settled down by bilateral mechanisms.<sup>48</sup> Border conflicts in Southeast Asian countries are obviously influencing what ASEAN tries to create, namely a regional peace and security community. As Singh states that later on, ASEAN has grown, as de facto, to be a successful security regional community. And, eventually,

the mobilization of armed forces have fired violence across the Thailand-Cambodia border with four more incidents, endangering ASEAN's image as a regional area with peaceful condition. More annoying is the possible threats as there are many unresolved conflict issues within the region of Asia. While China's claim on South China Sea and its minus of inhibition to use force causes trouble, most of ASEAN member-states have not settled the land and maritime border conflict issues.<sup>49</sup>

Is ASEAN DSM able to settle down border conflict in the Thailand-Cambodia conflict on Preah Vihear Temple? Indonesian Foreign Minister, Marty Natalegawa, states that it would be up to the conflicting parties themselves, including ASEAN Members, whether they want to use ASEAN DSAM or not. In the case of Thai-Cambodia border conflict on Preah Vihear Temple, both parties have a free status whether they would use ASEAN DSM or not. Natalegawa states, "When all is said and done, the most important thing is the political will to use or not to use such a mechanism."<sup>50</sup> Using Natalegawa statement on ASEAN DSM, it could be interpreted quite clearly that the ASEAN's conflict management system is basically only an option with no obligation to follow. It is not the main mechanism of conflicting parties to resolve conflicts in Southeast Asian countries, including the case of Thai-Cambodia conflict. Indeed, the ASEAN DSM practically now is challenged by current border conflicts with armed clash, such as between Thailand and Cambodia. If ASEAN is unable to manage the border conflicts by settling them down, Singh reminds that ASEAN's security role in the region of ASIA is a failure which means that the region of Southeast Asia is possibly back to the past in using violence to settle any disputes and conflicts.<sup>51</sup>

The armed clash in Thailand and Cambodian's border conflict is a regional political symptom that shows the ASEAN security community is still far from achieving. Both the Thai government and Cambodian's have been using a contending conflict strategy in which zero-sum game is being played. With this conflict strategy, by giving up the settlement process to the conflicting parties, the hope to find a solution to the problem is impossible. Thai and Cambodia politically disobeyed ASEAN principles and values. Therefore, the conflicting parties have violated the shared norms, values, and principles of ASEAN. At the same time, ASEAN, as the regional organization, and its conflict management system seemed to be very weak; its conflict management system

cannot be undertaken ideally. When the Members of ASEAN deploy means of violence to resolve border disputes, there is no systemic action, such as, giving sanction to the violator of ASEAN norms. Based on ACT and ASEAN Charter, it is clear that the Member States must use a peaceful conflict resolution. However, what can ASEAN do to practice the norms?

In recognition of the armed clash, Indonesia, as the current chairman of ASEAN, sent its foreign minister, Marty Natalegawa, to Cambodia and Thailand after the armed violent clash. Indonesia also has sent its observers to the conflicted area to find out the latest situation in the field. Based on new ASEAN Charter, the parties were allowed “to request the chairman of ASEAN” or “the secretary-general of ASEAN” to undertake conflict management system, such as good offices, conciliation or mediation. Marty, as well as representatives from Cambodia and Thailand, attended the UN Secretariat briefing requested by the UN Security Council.<sup>52</sup> The chairman of ASEAN also pushed Thai and Cambodian governments to hold peace talks to end deadly armed clashes. However, as reported by CNN, Marty M. Natalegawa states that the issue “can only be addressed bilaterally.” After some dialogues with the conflicting Member States, Phnom Penh and Bangkok had a commitment to bring the conflict through peaceful mechanism by using dialogues and negotiation processes. The question here was: did the conflicting parties want to use ASEAN DSM to help them in solving the problem? Or, was there an obligation for conflicting parties to obey ASEAN DSM?

Based on foreign minister meeting held in Jakarta, the chairman of ASEAN offered good office and mediation by providing a neutral place in Indonesia to hold a peace talk in early April 2011. At the beginning, the conflicting parties agreed it. However, as reported by media, military force of Thailand preferred a bilateral diplomacy to solve the border conflict on Preah Vihear Temple. The rejection basically was to de-legitimate Indonesia's leadership and weaken ASEAN's strategic role in managing intraregional conflict within its own region.<sup>53</sup> At the same time, ASEAN, through its chairman, could not force the Member States to continue using ASEAN DSM. This case was just evidence that ASEAN DSM had vital weakness. Nugroho stated that the conflicting parties were not obliged to accept the mediation of the other members of the High Council.<sup>54</sup> There was no power and authority of ASEAN as regional organization of Southeast Asian countries to obligate its

members to obey its own conflict management system.

Sim, in his article, urges that the border conflict of Thai and Cambodia was basically fuelled by internal politics in both countries; it has become a threat to ASEAN's positive record in preventing violent conflicts among the members. The intervention of Indonesia as the chairman of ASEAN, thus, momentarily strengthened ASEAN institutions at a hard time.<sup>55</sup> The norm of "avoiding violent disputes," as mentioned previously, was then likely to become a regional political fallacy system. Ideally, any intraregional conflict should be handled and solved by certain and legal mechanism of ASEAN. However, ASEAN DSM had a weak side, namely, inability to force its member states to follow the system. Even the new ASEAN Charter has mentioned about the conflict management system, namely, good office, mediation, and conciliation; its realization depended only on political will, as the chairman of ASEAN stated previously. When conflicting parties, such as in Thai and Cambodia case, did not accept ASEAN DSM, they could just go for other mechanisms.

That weakness of ASEAN DSM did not provide a good track for building ASEAN Community Security. Many intraregional conflicts in the region of Southeast Asia are settled down mostly outside of the ASEAN DSM. The Singapore-Malaysia ICJ litigation on Pedra Branca could be the sample of intra-ASEAN dispute handled by non-ASEAN mechanism. It also happened recently to non-border conflict, such as when Thailand invited a World Trade Organization (WTO) to handle Thai customs valuation of cigarettes that brought by the Philippines. Sigitan and Simpadan dispute was also resolved without ASEAN DSM. Sim mentions, "A relatively low-profile, lower-stakes economic dispute involving the ASEAN Economic Community would be brought to the WTO instead of the ASEAN dispute settlement system evidences a lack of confidence in the ASEAN system".<sup>56</sup>

The lack of regionalism feeling and poor institutionalized conflict management system of ASEAN will obviously create more cases of unresolved intraregional conflicts. The member states will easily escape from their 'obligation' to participate in the governance of ASEAN which is on the way towards establishing ASEAN Community 2015. The implementation of ASEAN DSM in managing border conflicts, in general intraregional conflicts, may have been undertaken optimally as its way. However, this paper found that the weakness side of ASEAN conflict management was on the non-

binding mechanism and institutionalized conflict management system which was not concrete. Therefore, instantly, it can be said that in the future, the region will face many intraregional conflicts, including border conflicts, with the mobilization of means of violence. There should be more active efforts to establish a stronger regionalism feeling, solidarity, unity, and governance system of ASEAN.

## Conclusion

This paper found the fact of ASEAN's conflict management system is very loose and weak. As elaborated earlier, ASEAN DSM was not built as a legal binding system to guide intraregional conflict to find a problem solving. The ASEAN Charter and ACT may provide some ideal mechanisms of conflict management. However, the system does not tie the ASEAN Member States in order for them to utilize and follow its mechanism consistently. At the same time, ultra-nationalism is much larger than a regionalism feeling of ASEAN people, or even leaders. When Indonesia and Malaysia disputed Simpadan and Ligitan, ultra-nationalism protests occurred in a larger scale compared with the people who value more regionalism feeling. The protest demanded the Indonesian government to declare war and close down its embassy in Malaysia. The protest occurred again during the Ambalat block dispute. The phenomenon also rose up in Bangkok regarding to the status of border conflict around the Preah Vihear Temple. ASEAN needs to conduct more peace campaigns focusing on the regionalism feeling to the ASEAN people. Peace education program for the ASEAN youth will help the ASEAN people to gain more regionalism feeling and reduce ultra-nationalism.

Institutionally, ASEAN DSM is dealing with the classic issue of the principle of "non-interference" to member sovereignty. As Abad, Jr. mentioned in his article that the principles hampered ASEAN to conduct more responsive conflict management. He stated that ASEAN has built a collective agreement to broadly comprehend and monitor its very important policy of "non-interference in the internal affairs of one another"; it will be hard to assume a more effective and practical role in conflict management, especially when the dispute or conflict is not inter-state in nature. Clearly, ASEAN has to develop further confidence among respective members. This issue, however, cannot

be separated from ASEAN states' national political systems.<sup>57</sup> However, as clearly written in APSC (ASEAN Political Security Community) blue print, the organization has an opportunity to strengthen its conflict management system.

As a blueprint, APSC is a new regional capital to handle the two problems mentioned above. The ASEAN Members have more responsibility to engage fully by looking at APSC that has been produced by them. The discourse of some scholars to build more concrete and well-established conflict management system with more regional political legitimacy cannot be ignored politically. As a regional political entity, ASEAN has an obligation to create more formal regional instrument for managing intraregional conflicts. By creating more formal settlement mechanisms and legal binding ones, ASEAN can step much closer to APSC. At the same time, ASEAN cannot only rely on the political will of its members; it also needs stronger leadership and better governance. In the case of Preah Vihear Temple case, Marty Natalegawa, then, mentions that one big purpose of ASEAN's DSM has been achieved; it was marked by the cease fire and agreement to hold peace talk between Thailand and Cambodia. However, there should be more confidence in leadership among the ASEAN Members to handle intraregional conflicts.

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