〔論　説〕

Cooperation Between Regional and Universal Organizations: ASEAN, UN and the Conflict over Temple of Preah Vihear/Phra Viharn

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Introduction

Professor Kazuya Hirobe organized a research project on the regionalism in Asia-Pacific region. The objects of the project were twofold: to examine the policies of the universal organizations towards regional organizations and to inquire into the possible institutional and functional design of the future organizations in Asia-Pacific region. The result of the project was published in a book titled "*Chiiki-syugi No Seidoronteki-kenkyu* [*Institutional Approach to Regionalism*]." Professor Hirobe admitted that the project had gone halfway and the latter agendum had been left to be examined.[1]

This article, a contribution for celebrating the retirement of Professor Hirobe, is going to tackle one aspect of the remained agendum, i.e. possible form of the functional cooperation between the Association of Southeast Asian Nations (ASEAN), a major regional organization in Asia-Pacific region, and the United Nations (UN) with respect to the

1　*See* Kazuya Hirobe, Preface to *Chiiki-syugi No Seidoronteki-kenkyu* [*Institutional Approach to Regionalism*] (Tokyo: Fuma Syobo, Kazuya Hirobe ed., 2008), p. v.

dispute settlement in the region. It will examine, in particular, their ways of involvement in the Thai-Cambodian conflict over the Temple of Preah Vihear (Phra Viharn in Thai) and the territory around the Temple.

1. UN Intervention to the Conflict

The Temple of Preah Vihear was one of the Khmer architectural sites constructed mainly during the reign of Suryavarman I (1006-1050) and Suryavarman II (1113-1150) of the Angkorian kingdom. The Temple fell into ruin after the collapse of Angkor in 1431.[2] In the early nineteenth century, no mention of the Temple was marked on a strategic map of the region.[3] The Thai-French treaty of 1904 delimited the border between Thailand and Cambodia, then being a French protectorate, based on watershed. However, according to the map, later known as Annex I map, prepared by the joint committee for the demarcation which was constituted only of French officers, the Temple was shown inside Cambodian territory despite the fact that it was on the Thai side of the ridge of land that separarted two adjacent river systems.

After the fall of France to German forces in June 1940, Thailand regained the "*sia dindaen* [lost territory]" from Cambodia by occupying the Temple.[4] After the complete independence of Cambodia on November 9, 1953, Cambodian government found that Thai force stationed at the Temple.[5] Cambodia submitted the dispute over the Temple to the

2 As for the Temple, *see generally* Sachchidanand Sahai, *Preah Vihear: An Introduction to the World Heritage Monument* (Phnom Penh: Cambodian National Commission for UNESCO, 2009).

3 *See* Charnvit Kasetsiri et al., *Preah Vihear: A Guide to the Thai-Cambodian Conflict and Its Solutions* (Bangkok: White Lotus Press, 2013), pp. 23-24.

4 *See* Edmund W. Sim, The Outsourcing of Legal Norms and Institutions by the ASEAN Economic Community, *Indon. J. Int'l & Comp. L.,* Vol. 1 (2014), pp. 314, 328.

International Court of Justice (ICJ) in 1959. The ICJ is the principal judicial organ of the UN whose major objects include the maintenance of international peace.[6] In fact, the UN concerns not only international peace at large but also peace in certain regions. For example, Security Council Resolution 180 of 1963 determined that the situation in the territories under Portuguese administration was seriously disturbing "peace in Africa" rather than international peace.[7]

In 1962, the ICJ awarded, by a majority of nine to three, Cambodia the Temple, based on the finding that it was situated in the territory under Cambodian sovereignty. In consequence, it adjudged that Thailand was under an obligation to withdraw any military or other personnel, "stationed by her at the Temple, or in its vicinity on Cambodian territory."[8] The foundation of this judgment was the fact that the Thai authorities had tacitly admitted the border shown on the Annex I map. This judgment faced serious criticism. A most fundamental one was that the ICJ avoided engaging in difficult fact-finding through strategies of evasion by resorting to evidentiary rules.[9]

The Thai irredentist assertion was difficult to be sustained by the international community, because it was in contravention of the principle of law which required the application of the rules contemporary with the critical date for deciding ter case. Different cultures and dif-

5　*See* Hao Duy Phan, Procedures for Peace: Building Mechanisms for Dispute Settlement and Conflict Management Within ASEAN, *U.C. Davis J. Int'l L. & Pol'y,* Vol. 20 (2013), pp. 47, 65.

6　*See* UN Charter art. 1, para. 1.

7　*See* S.C. Res. 180, July 31, 1963, U.N. Doc. S/5380.

8　*See* Temple of Preah Vihear (Cambodia v. Thail.), *I.C.J. Reports 1962,* pp. 6, 36-37.

9　*See* Thomas M. Franck, Fact-Finding in the I.C.J., in *Fact-Finding Before International Tribunals* (Ardsley-on-Hudson, N.Y.: Transnational Publishers, Richard B. Lillich ed., 1992), pp. 21, 28 (*criticizing* such judicial procedures as "paper trials").

ferent eras may have different ways of talking about rights and obligations. The basic idea of law, however, is shared by all the members of the international community. That is the reason why lawyers should serve as cross-cultural connectors by applying the fundamental principles of law.[10] For instance, by reaffirming the principle of *uti possidetis,* the ICJ has enhanced the commitment of African countries to avoid territorial claims which would have otherwise opened up a "Pandora's Box," i.e. demands for redrawing the boundaries on the continent.[11] It is true that, in the early twentieth century, the British and French colonial powers took away Thailand's several tributary states, including Cambodia.[12] Therefore, it seems understandable that some Thai people claim even Angkor Wat as their national asset.[13] However, the prudence of law requires the respect for the principle of inter-temporal law.

There was a strong criticism in Thailand that the judgment had endorsed the wicked plan by the French demarcation team to steal the

10 *See* Anne-Marie Slaughter, Filling Power Vacuums in the New Global Legal Order, *B.C. L. Rev.,* Vol. 54 (2013), pp. 919, 934, 936.

11 *See* Charles Riziki Majinge, Emergence of New States in Africa and Territorial Disputes: The Role of the International Court of Justice, *Melbourne J. Int'l L.,* Vol. 13 (2012), pp. 462, 497-498.

12 *See* Puangthong R. Pawakapan, *State and Uncivil Society in Thailand at the Temple of Preah Vihear* (Singapore: Institute of Southeast Asian Studies, 2013), p. 40. Thai royalists believe that the loss of territories was a diplomatic genius of King, for it was a means to "save hands by sacrificing a finger." *See* Taksaporn Noikaew, *Preah Vihear: The Clash of National Identity Between Thailand and Cambodia*, available at http://www.sisaket.go.th/ssis/papers/english/Preah%20Vihear%20the%20clash%20of%20national%20identity%20between%20Thailand%20and%20Cambodia.pdf#search='preah+vihear+judgment+1962+pole+thailand', p. 22.

13 *See* Kasetsiri et al., *supra* note 3, pp. 13, 35. A ground for such an argument rests on the "fact" that Angkor Wat was founded by the Khom, i.e. ancestors of modern Thai, not by the Khmer. *See* Noikaew, *supra* note 12, p. 25. Such an invented claim reminds us of the reported Chinese "claim" to Okinawa.

Thai territory.[14] It, however, withdrew its forces from the Temple.[15] Thai military troops rejected to lower the Thai national flag at the Temple, and uprooted the flag-pole instead.[16] It is important to note that a resolution by the Thai Council of Ministers drew a line around the Temple and erected a barbed fence which divided the Temple ruins from the rest of the promontory of Preah Vihear.[17] Cambodia denied recognizing the fence and made protests several times. Although there were sporadic exchanges of verbal protests from a party against some activities of the other party, there was no armed skirmish until 2008.

2. Establishment of ASEAN

In the 1960s, the tension among Southeast Asian countries mounted. For example, Indonesia declared in 1965 that it would withdraw from the UN for contesting to the election of Malaysia as a member of the UN Security Council.[18] On August 8, 1967, Thailand established ASEAN with four countries in the region, i.e. Indonesia, Malaysia,

14 *See* Pawakapan, *supra* note 12, pp. 60-61. A judge declared that this conclusion derived from the principle of *caveat emptor* which might be applied in all walks of life. *See* Temple of Preah Vihear, *I.C.J. Reports 1962,* pp. 58-59 (separate opinion of Judge Fitzmaurice). Judge Fitzmaurice was totally ignorant of the possibility of bad faith of the cartographers as well as the disparity between the colonial powers and an Asian state which struggled to maintain its independence against these powers. In fact, Thailand was the sole state which kept being independent at that time among the current member states of ASEAN.

15 Compliance with a judicial decision may be in the interest of powerful states. When Nigeria lost a case before the ICJ, it could not simply disregard the judgment as far as it would like to assert its leadership in the region. *See* Majinge, *supra* note 11, p. 494.

16 *See* Noikaew, *supra* note 12, p. 27.

17 *See* Request for Interpretation of the Judgment of 15 June 1962 in the Case Concerning the *Temple of Preah Vihear* (Cambodia v. Thail.), *I.C.J. Reports 2013,* pp. 281, 293.

18 *See* Hisakazu Fujita, *Kokuren-Ho* [*United Nations Law*] (Tokyo: University of Tokyo Press, 1998), p. 251, n.27.

Singapore and the Philippines. At the beginning, a major purpose of ASEAN was to curb the hegemonic behavior of Indonesia.[19] Cambodia, for its part, experienced a difficult time because of the civil strife, including the massacre by the communist group "Khmer Rouge" in 1970s. After Brunei (1984), Viet Nam (1995), Myanmar and Laos (both in 1997), Cambodia acceded to ASEAN in 1999.

A most notable characteristic of ASEAN has been the "ASEAN Way," introducing a traditional principle of the rural community in Indonesia, namely "consultation and consensus" ("*Musjawarah* and *Mufukat*" in bahasa Indonesia). The particularity exists not in the consensus-based decision-making but in the lack of formal voting procedure to break an impasse in the case where consensus fails.[20] The ASEAN Way is a kind of relations-based governance rather than a rule-oriented government.[21] Critics contend that, following the ASEAN Way, ASEAN degenerates into "talk shop" and can pursue only those policies which satisfy the lowest common denominator.[22] It is true that

19 *See* Shaun Narine, *Explaining ASEAN: Regionalism in Southeast Asia* (Boulder, Colo.: Lynne Rienner, 2002), p. 15 (*analyzing* the motivations of Indonesia as well as other original member states for establishing ASEAN). In reality, the member states often defer to Indonesia as their unofficial leader. *See id.,* p. 32. *See also* Lee Leviter, The ASEAN Charter: ASEAN Failure or Member Failure?, *N.Y.U. J. Int'l L. & Pol.,* Vol. 43 (2010), pp. 159, 185 (*pointing out* that "the irony was that these original members initially developed the ASEAN Way to stave off Indonesian dominance; they were now adapting it to assist Indonesia's renewed efforts to dominate"). A current function of ASEAN is said to be check against the pursuit of deeper economic integration by Singapore and Thailand. *See* More Effort Needed: Free Trade in South-East Asia, *Economist,* July 29, 2004, available at http://www.economist.com/node/2968833.

20 *See* Daniel Seah, The ASEAN Charter, *Int'l & Comp. L.Q.,* Vol. 58 (2009), pp. 197, 199.

21 *See* Paul J. Davidson, The Role of International Law in the Governance of International Economic Relations in ASEAN, *Singapore Y.B. Int'l L.,* Vol. 18 (2008), pp. 213, 214-215.

ASEAN has no teeth to enforce its decision so that its function depends on the "tongue" which may invoke some pressure from peer states.[23] It should be noted that, while rhetorical change is important for norm-generation, "ASEAN's credibility diminishes, when it is wholly incapable of implementing supposedly common norms.[24]

ASEAN had little independence at least until the ASEAN Charter of November 20, 2007, recognized its legal personality. It was exceptional that ASEAN participated in the Paris Conference on the Cambodian conflict held by the UN in 1991. The lack of independent entity character was one of the principal reasons why ASEAN was slow in reaching agreements as well as in implementing them.[25] Even under the Charter, however, which establishes some procedures to strengthen the collective actions of ASEAN, the ASEAN Way has not been changed in substance. It is said to be "inevitable" that, so long as the member states' political will to surmount the deficiencies of the ASEAN Way lacks, the

22 *See* Leviter, *supra* note 19, pp. 161, 206. *See also* Arif Havas Oegroseno, ASEAN as the Most Feasible Forum to Address the South China Sea Challenges, *Am. Soc. Int'l L. Proc.,* Vol. 107 (2013), p. 290.

23 The expected ASEAN human rights body will have a tongue which will have its uses. *See* Statement by Foreign Minister George Yao, *Singapore Parliamentary Reports,* Vol. 84 (Feb. 28, 2008), available at http://www.parliament.gov.sg/Publications/sprs.htm.

24 *See* Leviter, *supra* note 19, p. 210.

25 *See* Lin Chun Hung, ASEAN Charter: Deeper Regional Integration Under International Law?, *Chinese J. Int'l L.,* Vol. 9 (2010), pp. 821, 824. The lack of personality was real handicap for persuading private corporations to contribute funding support to ASEAN projects since ASEAN could not claim tax exemption status as a non-profit organization in the domestic laws of the member states. *See* Speech by the Secretary-General of the ASEAN, Ong Keng Yong, ASEAN and the 3 L's: Leaders, Laymen and Lawyers, July 31, 2012, available at http://www.asean.org/resources/2012-02-10-08-47-56/speeches-statements-of-the-former-secretaries-general-of-asean/item/asean-and-the-3-l-s-leaders-laymen-and-lawyers-by-he-ong-keng-yong-secretary-general-of-asean.

efforts to develop economic integration by drafting a strong charter cannot but end up in failure.[26] In addition, the inadequate budget will likely limit ASEAN's effectiveness.[27] An underfunded and understaffed institution must have been designed to accomplish very little.[28]

The member states of an international institution often adopt a functional approach to the interpretation of their foundational agreements that is different from the ordinal approach for contractual treaties. For the purpose of adapting a written agreement to the needs of the emerging situations, functional interpretation is often accompanied with the teleological interpretation and the recognition of the implied powers of the organs of the institution. It is certain that ASEAN organs are expected to adopt the contractual interpretation rather than the functional interpretation. The member states regard the ASEAN Charter not as a constitution for an independent organization but as a framework agreement for future articulation by themselves. The Charter should be seen as "more of a non-binding code of conduct [or] organizational guidelines rather than a rule-book or constitution."[29]

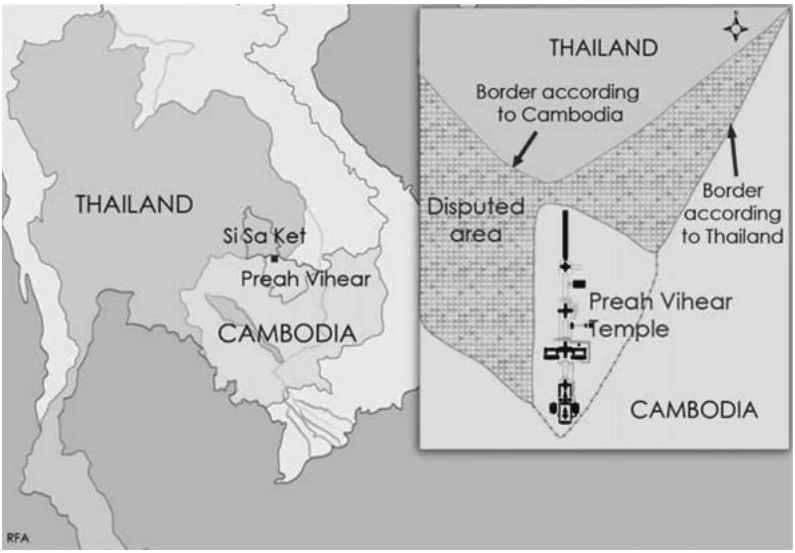
The conclusion of the ASEAN Charter has its meaning, of course. Under the Charter, a protesting minority state, such as Myanmar with regard to alleged human rights violation, may rely on the argument that "[i]t is no answer to say that the protesting minority has the

26 *See* Leviter, *supra* note 19, pp. 193-197.

27 *See* Michael Ewing-Chow, Culture Club or Chameleon: Should ASEAN Adopt Legalization for Economic Integration?, *Singapore Y.B. Int'l L.,* Vol. 12 (2008), pp. 225, 229, 234.

28 *See* Frans Viljoen, *International Human Rights Law in Africa* (Oxford: Oxford University Press, 2d ed. 2012), pp. 293-294 (*demonstrating* that the African Commission on Human and Peoples' Rights has such a problem).

29 *See* Eugene K.B. Tan, The ASEAN Charter as "Legs to Go Places": Ideational Norms and Pragmatic Legalism in Community Building in Southeast Asia, *Singapore Y.B. Int'l L.,* Vol. 12 (2008), pp. 171, 187.



Source: http://www.rfa.org/english/news/cambodia/temple-04222013173424.html/.

choice of remaining in or withdrawing from the Organization." The minority has a right to remain in the organization and to assert what it claims to be any infringement of its rights under the charter of that organization or any illegal use of power by any organ of the organization. No matter how frequently and consistently an organ had construed its authority to permit it to intervene in domestic matters, the majority has no power to extend, alter or disregard the charter.[30]

3. UNESCO as a Catalyst for Conflict to Resurface

It was ironical that a UN organ served as a catalyst for the conflict to resurface. The quieted conflict has been activated again when Cam-

30 *See* Certain Expenses, *I.C.J. Reports 1962*, pp. 196-197 (separate opinion of Judge Spender). *See also id.*, p. 201 (separate opinion of Judge Fitzmaurice) (*stating* that it is preferred to rely less on "subsequent practice" and more on ordinary reasoning, for the argument drawn from practice, if taken too far, can be question-begging).

bodia filed a request for inscription of the Temple in the world heritage list of the United Nations Educational, Scientific, and Cultural Organization (UNESCO). When Cambodia first applied for the instauration of the Temple in June 2007, the UNESCO postponed the decision, influenced by the heavy lobbying by Thailand. Thailand had claimed that Cambodia should not apply for installation by itself, for a map attached to the application referred Thai territory around the Temple as a buffer zone in Cambodian territory.

In January 2008, Cambodia applied again without attaching the map of the buffer zone which would be supplemented after the consultation between Cambodia and Thailand. On June 18, Cambodia and Thailand, with a representative of the UNESCO, announced a joint communiqué in which Thailand expressed its support for the Cambodian request for installation, while both parties agreed on the point that the expected world heritage would not include the area contested between these two countries.[31] On July 7, UNESCO declared that the Temple was installed in the world heritage list.[32] The next day, however, the constitutional court of Thailand issued an injunction that the joint communiqué was not in conformity with article 190 of the Thai Constitution of 2007.[33] The dispute became a "*bête noire*" in Thai domestic politics.[34] Some people criticized the government for "paying for its foolishness for the third time!"[35]

31 Available at http://www.cambodia.org/Preah_Vihear/images/jointcommunique-1.jpg.

32 In June 2011, Thailand expressed the intention to withdraw from the 1972 Convention Concerning the Protection of the World Cultural and Natural Heritage. Four months later, however, it retracted this declaration.

33 Article 190 of the Thai Constitution of 2007 stipulated that King had authority to conclude treaties, while, in case of treaties concerning the territorial change, the consent by the diet should be secured before ratification. The Foreign Minister of Thailand, Nappadon Pattama, resigned on July 10.

34 *See* Sim, *supra* note 4, p. 328.

In Thailand, confrontation between the United Front for Democracy Against Dictatorship (UDD), known as Red Shirts, and the People's Alliance for Democracy (PAD), known as Yellow Shirts, deteriorated after the collapse of the government of Thaksin Sinawatra by the *coup d'ētat* on September 9, 2006. The former supported Thaksin, while the latter was in opposition to him. Prime Minister Samak Sundaravej, served from January 29, 2008, to September 8, 2008, and concluded the joint communiqué, belonged to the UDD. The PAD held demonstration around the Temple. The Cambodian government closed the Temple against the Thai people. On July 15, approximately 50 Thai soldiers moved into the Keo Sikha Kiri Svara pagoda, about 300 meters in the west of the Temple, to which both parties claimed their sovereignty. Armed clashes occurred again on October 3 and 15, 2008, and then on April 2 and 3, 2009.

4. Collaboration Between the UN and ASEAN

(1) ASEAN Intervention Backed by the UN

When the conflict resurfaced, the ASEAN Chair could not serve as a neutral mediator. The ASEAN Chair was Thailand from 2008 to 2009 and Viet Nam in 2010. Although Cambodia invoked article 23, paragraph two, of the ASEAN Charter to request Viet Nam to mediate the dispute, it took no initiative when Thailand refused it to intervene in the conflict.[36] The ASEAN Secretary-General could not be an interlocutor either, for he was a former senior official of the then-ruling UDD

35 The first foolish act was the delegation of mapping to the French commission. The second one was the acceptance of the ICJ's jurisdiction. The third one should be the support to the Cambodian request for inscribing the Temple in the world heritage list. *Cf.* Pawakapan, *supra* note 12, p.62 (*citing* a claim made by Srisak Vallibhodom).

36 *See* International Crisis Group, Waging Peace: ASEAN and the Thai-Cambodian Border Conflict, *Asia Rep.*, No. 215 (2011), pp. 1, 15, available at http://www.crisisgroup.org/~/media/Files/asia/south-east-asia/thailand/215%20Waging%20Peace%20--%20ASEAN%20and%20the%20Thai-Cambodian%20Border%20Conflict.pdf.

which had bitterly opposed to the PAD then in power with Prime Minister Abhisit Vejjajiva who assumed office on December 17, 2008, and served until August 5, 2011.[37] The ASEAN's collective purpose was threatened by the internal political pressures within member States and the opportunistic antagonisms which the hostility over the Temple symbolized.[38]

When Indonesia succeeded as the ASEAN Chair in 2011, Indonesia was willing to take an initiative to facilitate the settlement of the conflict. The environment for reconciliation was ready when Yingluck Shinawatra of UDD was inaugurated as Thai Prime Minister on August 5, 2011. She served until May 7, 2014. Indonesia informed the UN Security Council of its intention to offer an observer mission. Indonesia, by invoking article 23, paragraph two, of the ASEAN Charter, organized an informal meeting of the ASEAN foreign ministers,[39] offered good offices and engaged in shuttle diplomacy. It proposed a corps of monitoring mission under the ASEAN *chapeau*, as well.[40] Such measures of the ASEAN Chair, supported by the UN organs, succeeded in facilitating the cooling-down of the conflict.[41]

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37 It was a problematic action that Cambodian premier Hun Sen appointed Thaksin as special advisor to the Cambodian government and the premier on October 24, 2009. *See* Kasetsiri et al., *supra* note 3, p. 58.

38 *See* Seah, *supra* note 20, p. 212.

39 This meeting is said to be historical because it was the first time that ASEAN dedicated one entire meeting to discuss a dispute between two of its member states. *See* Phan, *supra* note 5, p. 70.

40 The fact that the agreement to deploy the Indonesian observers referred Indonesia as "current Chair of ASEAN" instead of "the Chair of ASEAN" is said to imply that the role of Indonesia would extend beyond its one-year chairmanship. *See* International Crisis Group, *supra* note 36, p. 20.

41 A reason why ASEAN succeeded in settling the Sabah conflict between Malaysia and the Philippines was the fact that it had never attempted to resolve the conflict itself and contented itself with the assistance for de-escalating the tension between the parties. *See* Phan, *supra* note 5, p. 64.

(2) UN in Cooperation with ASEAN

Cambodia attempted to draw more parties into the dispute settlement process by bringing the matter to the UN Security Council. When the armed clash on February 4, 2011, caused casualties, the chairperson of the Council announced a statement regarding this conflict for the first time, urging the parties to agree on the permanent ceasefire.[42] In addition, it declared that the members of the Council "expressed support for ASEAN's active efforts in this matter and encouraged the parties to continue to cooperate with the organization in this regard. They welcomed the upcoming Meeting of Ministers for Foreign Affairs of ASEAN on February 22."[43] The armed clash, however, continued until April 7 and reoccurred on April 22 and continued until April 26.

On April 28, Cambodia filed an Application to the ICJ and, at the same time, requested an order of provisional measures. In its Application, Cambodia asked the ICJ to declare that the obligation incumbent upon Thailand to withdraw its personnel stationed at the Temple, or in its vicinity on Cambodian territory was a particular consequence of the general and continuing obligation to respect the integrity of the territory of Cambodia, that territory having been delimited in the area of

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42 Cambodia had sent a letter to the UN Security Council to call attention to the incursion of the Thai troops into the Temple on July 20, 2008. *See* Cambodia Reports Thai Incursions to U.N., CNN, July 20, 2008, available at http://edition.cnn.com/2008/WORLD/asiapcf/07/20/cambodia.thailand/index.html?iref=mpstoryview.

43 Security Council Press Statement on Cambodia-Thailand Border Situation, Feb. 14, 2011, U.N. Doc. SC/10174, available at http://www.un.org/press/en/2011/sc10174.doc.htm. States in question, as members of the organization, have no right to simply ignore the recommendations by that organizations. They are bound to give them due consideration and to explain the reasons for their decision. As for the case of the UN, *see* Voting Procedure on Questions Relating to Reports and Petitions Concerning the Territory of South West Africa, *I.C.J. Reports 1955,* pp. 118-119 (separate opinion of Judge Lauterpacht).

the Temple and its vicinity by the line on the Annex I map, on which the 1962 Judgment was based.[44] Cambodia requested the ICJ to indicate three provisional measures as follows: ① an immediate and unconditional withdrawal of all Thai forces from those parts of Cambodian territory situated in the area of the Temple; ② a total ban on military activities by Thailand in the area of the Temple; ③ that Thailand refrain from any act that could interfere with the rights of Cambodia or aggravate the dispute in the principal proceedings.

On July 18, the ICJ indicated the provisional measures.[45] It obligates, first, both parties to immediately withdraw their military personnel currently present in the provisional demilitarized zone (PDZ), as defined in paragraph 62 of the Order, and refrain from any military presence within the PDZ and from any armed activity directed at the PDZ.[46] Secondly, it requires Thailand not to obstruct Cambodia's free access to the Temple or Cambodia's provision of fresh supplies to its nonmilitary personnel in the Temple.[47] Thirdly, it demands both parties to refrain from any action which might aggravate the dispute before the Court. In addition, it is notable that the ICJ ordered that both parties "shall continue the co-operation which they have entered into within ASEAN

44 *See Requête introductive d'instance enregistrée au Greffe de la Cour le 28 avril 2011: Demande en interpretation de l'arrêt du 15 juin 1962 en l'affaire du temple de Préah Vihéar* (*Cambodge c. Thaïlande*), p. 36.

45 As for the provisional measures, *see* ICJ Statute art. 41. The ICJ declared that a provisional measure may be legally binding. *See* LaGrand (Germany v. U.S.), *I.C.J. Reports 2001,* pp. 466, 502-506.

46 *See* Request for Interpretation of the Judgment of 15 June 1962 in the Case Concerning the *Temple of Preah Vihear* (Cambodia v. Thail.), *I.C.J. Reports 2011,* pp. 537, 555. Both parties pulled their soldiers out of the PDZ in July 2012, a year after the order. *See* Cambodia Urged to Show Restraint in Border Row, Radio Free Asia, Apr. 22, 2013, available at http://www.rfa.org/english/news/cambodia/temple-04222013173424.html/.

47 *See* Request for Interpretation of the Judgment of 15 June 1962, *I.C.J. Reports 2011,* p. 555.

and, in particular, allow the observers appointed by that organization to have access to the provisional demilitarized zone."[48]

The ICJ rendered its judgment on November 11, 2013. It declares that the 1962 Judgment had decided that Cambodia had sovereignty over the whole territory of the promontory of Preah Vihear, as defined in paragraph 98 of the Judgment, and that Thailand was under an obligation to withdraw the Thai personnel from that territory.[49] Paragraph 98 of the judgment articulates that the limits of the promontory of Preah Vihear to the south of the Annex I map line consist of natural features. There was little difference of opinion with regard to the southern and eastern borders, as well as most part of the western border of the Temple.[50] In the north, the ICJ finally recognized that the limit of the promontory was determined by the Annex I map line, from a point to the north-east of the Temple where that line abuted the escarpment to a point in the north-west where the ground began to rise from the valley, at the foot of the hill of Phnom Trap.[51]

The ICJ seems to act *ultra vires* when it delimited the border between Thailand and Cambodia. The original subject of the dispute submitted to it was "confined to a difference of view about sovereignty over the region of the Temple of Preah Vihear. This is a dispute about territo-

48　*See id.*

49　*See* Request for Interpretation of the Judgment of 15 June 1962, *I.C.J. Reports 2013,* p. 318.

50　To the east, south and south-west, the promontory drops in a steep escarpment to the Cambodian plain. This escarpment and the land at its foot are under Cambodian sovereignty. To the west and north-west, the land drops in a slope into the valley which separates Preah Vihear from the neighboring hill of Phnom Trap. The Phnom Trap itself lies outside the disputed area. The promontory of Preah Vihear ends at the foot of the hill of Phnom Trap. *See* Request for Interpretation of the Judgment of 15 June 1962, *I.C.J. Reports 2013,* p. 315.

51　*See id.*

rial sovereignty."[52] As the principal judicial organ of the UN, the ICJ has performed not only "judicial function" *in strict sense* but also governmental function by stepping forward to delimit the frontier between the parties and preventing the escalation of the armed clashes.[53] The 1962 judgment was incomplete in terms of dispute settlement. The incompleteness was caused not by the ICJ's carelessness but by the Cambodian formulation of the subject of the dispute: it requested the ICJ neither to declare the border line, nor to define the limit of the "region" or "promontory" of the Temple of Preah Vihear.

5. Conclusion

(1) Modes of Cooperation Between ASEAN and the UN

Professor Hirobe enumerates five types of the cooperation between regional organizations and universal organizations: ① consultation, ② diplomatic support——such as the "friends of the Secretary-General" of the UN[54]——, ③ operational support, ④ co-deployment, and ⑤ joint operations.[55] One more type may be added to these types, namely political support.[56] The statement of the UN Security Council regarding the conflict over the Temple of Preah Vihear was not a positive involvement by a concrete measure but a strong political support

52 See Temple of Preah Vihear, *I.C.J. Reports 1962,* p. 14 (*citing* Temple of Preah Vihear (Cambodia v. Thail.), *I.C.J. Reports 1961,* pp. 17, 21).

53 *See* Fujita, *supra* note 18, p. 12.

54 As for the friends of the Secretary-General, *see, e.g.,* Jochen Prantl, *The UN Security Council and Informal Groups of States* (Oxford: Oxford University Press, 2006), ch. 6 (*discussing* the function of the group of friend of the Secretary-General on El Salvador).

55 *See* Kazuya Hirobe, Kokusai-rengo To Chiiki-syugi: Chiikiteki-kokusai-soshiki Tono Kankei Wo Chushin-ni [United Nations and the Regionalism: With the Focus on the Relationship with the Regional Organizations], in *Chiiki-syugi No Seidoronteki-kenkyu, supra* note 1, pp. 133-136 (*citing* the Report of the Secretary-General on the Work of the Organization: Supplement to an Agenda for Peace: Position Paper of the Secretary-General on the Occasion of the Fiftieth Anniversary of the United Nations, U.N. Doc. A/50/60-S/1995/1 (1995), § 86).

towards the parties of the conflict for encouraging the acceptance of the assistance by ASEAN in the settlement of the dispute.

ASEAN needs such political support, for it has no effective mechanism for enforcing peace among its member states. The maintenance of the peace in the region depends on the voluntary action of the member states. Some argue that both uniform laws of the region and a regional court are necessary for promoting the economic integration in the region.[57] All of the ASEAN processes for the dispute settlement, however, remain options rather than mandates. In fact, no dispute has ever been submitted to the panel under the Protocol on Dispute Settlement Mechanism (DSM) of November 20, 1996,[58] to the panel, appellate body or arbitration under the Protocol on Enhanced Dispute Settlement Mechanism (EDSM) of November 29, 2004,[59] and to the High Council anticipated by the Treaty of Amity and Cooperation in Southeast Asia (TAC) of February 24, 1976.[60]

There is a lack of confidence in the EDSM arbitration and general reluctance to use the ASEAN procedures for dispute settlement.[61] These

56 Ultimately, the crucial element for maintaining the peace in the region is not well-designed institutions, either universal or regional, but a stable balance of power. Without the superpower of the United States which overlay to prevent a putative hegemonic power of the People's Republic of China, the rule of law in the region should be "flights of fantasy." *See* Seah, *supra* note 20, p. 211.

57 *See* Megan R. Williams, Note, ASEAN: Do Progress and Effectiveness Require a Judiciary?, *Suffolk Transnat'l L. Rev.,* Vol. 30 (2007), pp. 433, 456-457. *See also id.,* p. 453 (*advocating* that the European Union (EU) can be a model for ASEAN).

58 The DSM was said to be "little more than an agreement to engage in consensus." *See* Leviter, *supra* note 19, p. 182.

59 EDSM follows the mechanism of those of the World Trade Organization (WTO). *Compare* EDSM *with* Annex Two of the WTO Agreement: Understanding on Rules and Procedures Governing the Settlement of Disputes, Apr. 15, 1994.

ASEAN processes would have been politically uncomfortable both for the governments of the parties involved and for those who asked to decide on the matter, for they would have involved the ASEAN peers reviewing and determining the sensitive issues and the general population of these states would not necessarily accept decisions made by the ASEAN institutions.[62] For example, when Indonesia tried to bring the dispute over the sovereignty of a couple of islands, i.e. Pulau Ligitan and Pulau Sipadan, to the High Council, Malaysia refused to do so because of the fear that the other ASEAN member states were partial to Indonesia. Consequently, Indonesia brought the dispute to the ICJ.[63] In spite of the long debate on whether the ASEAN Charter should establish an ASEAN court, article 25 of the Charter confines itself to mention the future establishment of an "appropriate dispute settlement mechanisms, including arbitration."[64]

The ASEAN member states often have resorted to the universal institutions of dispute settlement instead of ASEAN's procedures. A most notable example of the ASEAN member states' dependence on the UN, especially the Security Council, was the civil strife in Cambodia which they failed to solve within the region.[65] As well, they often have turned to international judicial or quasi-judicial bodies such as the

60 *See* Sorpong Peou, The Subsidiarity Model of Global Governance in the UN-ASEAN Context, *Global Governance,* Vol. 4 (1998), pp. 439, 442. Under article 16 of the TAC, the jurisdiction of the High Council is based on the consent of all of the parties of a dispute. Hence, a reluctant party may prevent it from being formed. *See* Rules of Procedure of the High Council of the Treaty of Amity and Cooperation, July 23, 2001.

61 *See* Sim, *supra* note 4, pp. 327, 330.

62 *See id.*, p. 318.

63 *See* Rodolfo C. Severino, *Southeast Asia in Search of an ASEAN Community: Insights from the Former ASEAN Sevretary-General* (Singapore: Institute of Southeast Asian Studies, 2006), pp. 12-13.

64 *See* Phan, *supra* note 5, p. 58.

65 *See* Peou, *supra* note 60, p. 443.

ICJ,[66] International Tribunal for the Law of the Sea (ITLOS) [67] and WTO dispute settlement bodies.[68] Not only territorial disputes but also disputes about the violation of human rights in a member state have been referred to the UN rather than ASEAN. Despite the fact that article 14 of the ASEAN Charter stipulates that the ASEAN member states would establish an ASEAN human rights body,[69] they are aware that it has little leverage against the violator of the human rights of its own nationals and has to make a gesture for saving the violator's face. Therefore, the ASEAN member states have no choice but to seek the UN's assistance.[70]

ASEAN has held a number of cooperation activities with the UN and other international organizations in the effort to promote peace and stability.[71] ASEAN has been recognized the observer status for the UN.[72] Since the ASEAN summit in Singapore in 1992, ASEAN repeatedly acknowledged the UN as a key instrument for maintaining international peace, declared its commitment to the UN's peacekeeping efforts, and agreed to enhance its cooperation with the UN. For instance, it published its intention to cooperate with the UN in strength-

66 Sovereignty over Pulau Ligitan and Pulau Sipadan (Indon. v. Malay.), *I.C.J. Reports 2002,* p. 625; Sovereignty over Pedra Branca/Pulau Batu Puteh, Middle Rocks and South Ledge (Malay. v. Sing.), *I.C.J. Reports 2008,* p. 228.

67 Land Reclamation by Singapore in and Around the Straits of Johor (Malay. v. Sing.), Provisional Measures, *I.T.L.O.S. Reports 2003,* p. 10; Delimitation of the Maritime Boundary (Bangl. v. Myan.), Judgment, Mar. 14, 2012, available at https://www.itlos.org/fileadmin/itlos/documents/cases/case_no_16/C16_Judgment_14_03_2012_rev.pdf.

68 The very first WTO dispute settlement proceeding in 1995 involved Singapore and Malaysia. Malaysia: Prohibition of Imports of Polyethylene and Polypropylene, WT/DS1/1 (Withdrawed).

69 *See* Terms of Reference of the ASEAN Intergovernmental Commission on Human Rights, available at http://www.aseansec.org/DOC-TOR-AHRB.pdf.

70 *See* Tan, *supra* note 29, p. 193.

ening the existing modes of pacific settlement of disputes to avoid or settle future disputes and undertaking conflict management and conflict resolution research studies.[73] However, it is pointed out that ASEAN has not accompanied by real action its rhetoric about enhancing its institutional cooperation with the UN in the security field.[74]

(2) Future Functional Design of ASEAN

The states in the Asia-Pacific region have embraced highly legalized institutions on a global basis beyond the confines of the region, contradicting the assertion that the region is averse to the legalization in its international relations.[75] ASEAN itself, however, regards the absence of legalism, both regional and national levels, as a critical problem for

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71 In the field of economic cooperation, the UN has been involving in the regional matters in Asia-Pacific through Economic and Social Commission for Asia and the Pacific (ESCAP) ——former Economic Commission for Asia and the Far East (ECAFE). *See, e.g.,* ESCAP Reaffirms Commitment to Support ASEAN Community, ASEAN Secretariat News, June 10, 2014, available at http://www.asean.org/news/asean-secretariat-news/item/escap-reaffirms-commitment-to-support-asean-community.

72 As early as in the midst of the 1990s, it is suggested that the UN Secretary-General should attend the annual Post-Ministerial Conferences or the ASEAN Regional Forum (ARF) as an observer. *See* Jusuf Wanandi, *Asia Pacific After the Cold War* (Centre for Strategic and International Studies, 1996), pp. 223-230.

73 ASEAN Political-Security Community Blueprint, March 1, 2009, available at http://www.asean.org/archive/5187-18.pdf. More than that, ASEAN would share information among its member States on submission to the UN Register of Conventional Arms (para. B.1.1), hold workshop on peace, conflict management and conflict resolution with the UN (para. B.2.2), as well as carry out technical cooperation with the UN to exchange expertise in maintaining peace and security (para. B.2.3.).

74 *See* Peou, *supra* note 60, p. 446.

75 *See* Jose E. Alvarez, Institutionalised Legalisation and the Asia-Pacific "Region," *N.Z. J. Pub. & Int'l L.,* Vol. 5 (2007), pp. 9, 22-25. *See also* Hisashi Owada, The Rule of Law in Globalizing World: An Asian Perspective, *Wash. U. Glob. Stud. L. Rev.,* Vol. 8 (2009), pp. 187, 200.

the ASEAN integration.[76] It is clear that violation of the ASEAN agreements seldom pains the guilty party, but certainly hurts ASEAN as a whole.[77] It is notable that African states has been said to face similar challenges. While the alleged "African preference" for non-judicial methods of resolving disputes, in which dialogue and conciliation are emphasized, has some weight, such an analysis fails to capture the reality of the present-day African society where increasing urbanization, acculturation, and population concentration have contributed to the disintegration of traditional authority.[78]

ASEAN Charter established neither judicial organ nor obligation to utilize the ASEAN institutions for settling the disputes between the member states. ASEAN may, however, establish appropriate dispute settlement mechanisms by concluding a protocol. In fact, Protocol to the ASEAN Charter on Dispute Settlement Mechanisms was signed in 2010 and completed by the signing of 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 on April 2, 2012.[79] As far as the principles of the ASEAN Charter

76 *Cf.* Richard Frimpong Oppong, *Legal Aspects of Economic Integration in Africa* (Cambridge: Cambridge University Press, 2011), p.115 (*observing* that the African Union has faced with similar kind of problem).

77 *See* Ong Keng Yong, ASEAN Challenges in the 21st Century: Speech in the SIIA Forum Series 2006, *cited in* Tan, *supra* note 29, p. 178.

78 *See* Viljoen, *supra* note 28, pp. 458-459. *But see* Ruxton McClure, Note, "Can the Leopard Change Its Spots?": A Call for an African Dispute Resolution Mechanism, *Ohio St. J. on Disp. Resol.,* Vol. 29 (2014), pp. 333, 362-363 (*criticizing* that such an analysis is not sufficient because the traditional authority continues to exist in rural part of Africa and the non-judicial methods of dispute settlement play important role for reconciliation).

79 Chairman's Statement of the 20th ASEAN Summit, April 4, 2012, p. 2, available at http://www.mofa.go.jp/mofaj/gaiko/fta/j-eacepia/pdfs/aseanchst.pdf#search='Protocol+to+the+ASEAN+Charter+on+Dispute+Settlement+Mechanisms+has+been+adopted'.

are consistent with those of international law and the Charter makes reference to, the choice of institution may not make so much difference.[80] The functional design of the ASEAN dispute settlement mechanism should not necessarily be closed and autonomous one. It can be open one and supplemented by external procedures of the universal institutions.

80 *See* Simon S.C. Tay, The ASEAN Charter: Between National Sovereignty and the Region's Constitutional Moment, *Singapore Y.B. Int'l L.,* Vol. 12 (2008), pp. 151, 167.