

C 2nd **AMA** **CONFERENCE**
Sheraton Imperial Hotel
Kuala Lumpur
24-25 February 2011
**Rediscovering Mediation
in the 21st century**

**DEVELOPING A MEDIATION UNIT WITHIN
ASEAN**

DANNY MCFADDEN
DIRECTOR
CENTRE FOR EFFECTIVE DISPUTE RESOLUTION
UK

Date:	24 February 2011 (Day 1)
Time:	12:00 noon to 1:00 pm
Venue:	Nusantara Ballroom 2 (L2)

Sponsored by



CLJ

Malaysia's leading Law Publisher

Developing a Mediation Unit within ASEAN

In this paper I would like to share some ideas about how a Mediation Unit might be developed within ASEAN but first would like to hasten to add that ASEAN is already currently conducting excellent work in the promotion of mediation within ASEAN and is also working with other organisations in the Asian region to create the environment for member states to utilise mediation.

The views expressed will draw heavily on the author's personal hands on experience of working in the United Nations¹ dispute resolution field, in particular in the development of the first Mediation Unit in the UN's Internal Justice System. This paper will also touch on the work of the UN Mediation Support Unit (MSU) which is designed to assist external parties/organisations with international disputes² and the author gratefully acknowledges the support of colleagues in the UN Department of Political Affairs in New York in both providing briefings and information regarding the important work the MSU does in conflict resolution.

Does ASEAN need a Mediation Unit?

Whilst ASEAN was not intended as a mechanism for conflict prevention and peace building it has increasingly had to handle some tough conflict situations in the region. It is submitted that mediation when used skilfully by professional well trained mediators is capable of assisting parties solve even the most intractable conflicts. However perhaps another important question should be, in order for a Mediation Unit to be successful is the timing right?

It is submitted that conditions are right for the setting up of Mediation Unit and that currently there is a need for the services it will be able to provide to ASEAN countries. For example:

- Work has begun to create an ASEAN Economic Community by 2015 however according to Edmund Sim many key foundations of an integrated market, such as the right to seek dispute resolution, are not as well grounded in ASEAN as they are in other regional blocs.³
- Regional commentator Michael Vatikiotis asserts that there is a glaring paucity of dispute-settlement mechanisms in ASEAN and notes that although mediation is certainly provided for in the new ASEAN charter "for the good offices of the ASEAN chair and

¹ In 2008 the author was seconded to United Nations Ombudsman's Office to assist in establishing its Mediation Division and was tasked to deliver a Report which provided the blueprint for this project. In 2009 Danny acted as the Interim UN Director of Mediation in the newly established Mediation Division during the first period after the commencement of the new Internal Justice System (July 2009)

² The author would like to thank UN colleagues in the Mediation Support Unit for their generous sharing of their knowledge and experience in this important area of UN activity.

³ The ASEAN Economic Community (AEC) 2009 Author: Edmund W Sim, Hunton & Williams, Singapore

secretary general to be deployed effectively, ASEAN's resource and institutional capacity needs strengthening".⁴

It has often been commented on that ASEAN faces a dilemma. ASEAN has indicated it would like to initiate initiatives to promote conflict prevention/resolution in the region, however the wish to act as peacemaker has been constrained by ASEAN at the same time trying to protect the sovereign rights of its members from external interference. This tension between interference and intervention has tended to constrain ASEAN in its approach to dispute resolution in the region.⁵

This paper does not intend to debate this issue in any depth but submits that a non-partisan independent Mediation Unit established by ASEAN itself could avoid some of the sensitivities in this area. The 'ASEAN Way' is regarded very much as being less confrontational⁶ in its approach to parties to a dispute and mediation would certainly not conflict with this methodology. Obviously there might need to be protocols established for example, not to use of mediators who are from the same country as the parties to a dispute in order to avoid the perception of conflict of interest. However in any case as the mediator will not be making a decision merely facilitating resolution the sovereign rights of the parties will not be impinged upon. Also the control of the mediation outcome remains at all times with the parties not the mediator. Finally at the end of the day the terms and conditions of any settlement are not binding until agreed to by the parties.

Background

In order to create a successful Mediation Unit it is submitted that there has to be strong support from all stakeholders in the system beginning with the appropriate legislative support to ground the work in the field. This support is currently to be found in the 2007 Charter of ASEAN which states;

Article 22. General Principles

1. Member States shall endeavour to resolve peacefully all disputes in a timely manner through dialogue, consultation and negotiation.

2. ASEAN shall maintain and establish dispute settlement mechanisms in all fields of ASEAN cooperation.

Article 23. Good Offices, Conciliation and Mediation

⁴ Asia Times Online 2009 Michael Vatikokis Asia Regional Director Centre for Humanitarian Dialogue

⁵ 3rd ASEAN/UN Conference on Conflict Prevention 18 February 2003

⁶ Gillian Goh 'The ASEAN Way' Stanford Journal of East Asian Affairs Volume 3 Number 1 Spring 2003 p117

1. Member States which are parties to a dispute may at any time agree to resort to good offices, conciliation or mediation in order to resolve the dispute within an agreed time limit.

*2. Parties to the dispute may request the Chairman of ASEAN or the Secretary-General of ASEAN, acting in an ex-officio capacity, to provide good offices, conciliation or mediation.*⁷

So as can be seen from the above there is a clear call to Member States to try mediation or other dispute mechanisms to resolve disputes and a duty for ASEAN as an organisation to establish such mechanisms.

Furthermore recent ASEAN dispute resolution initiatives demonstrate there is a growing groundswell of support for building organisational structures which can effectively promote mediation across ASEAN.

An example of this is the ASEAN Political-Security Community Blueprint which calls upon ASEAN to

“Build upon existing modes of pacific settlement of disputes and consider strengthening them with additional mechanisms as needed; strengthen research activities on peace, conflict management and conflict resolution; and develop ASEAN modalities for good offices, conciliation and mediation”.⁸

Among suggested initiatives are the

- study and analysis of existing dispute settlement modes and/or additional mechanisms with a view to enhancing regional mechanisms for the pacific settlement of disputes;
- holding of workshops on peace, conflict management and conflict resolution with relevant regional and international organisations, including the UN;
- development of a pool of experts from ASEAN Member States as resource persons to assist in conflict management and conflict resolution activities.⁹

United Nations best practice

The above suggestions are very much in line with the initiatives that the UN has adopted in recent years in its efforts supported by the UN General Assembly to promote alternative dispute resolution primarily mediation as means of both preventing and resolving disputes.

⁷ The 2007 ASEAN Charter is available to download on the ASEAN website

⁸ Workshop on Preventative Diplomacy and Peace Mediation ASEAN Secretariat, Jakarta, 25 August 2010

⁹ ASEAN Political Security Community Blueprint available at <http://www.aseansec.org>

As most are aware the UN is a global organisation with a need to not only provide appropriate conflict management and dispute resolution to its member states but also to its thousands of staff members scattered all over the world.

The Mediation Unit models that the UN is currently using to achieve this may, it is submitted, offer some guidance to ASEAN in establishing its own Mediation Unit. It is also worth noting that ASEAN countries like Indonesia and Vietnam strongly supported the UN mediation initiatives when they came before the General Assembly in New York. ASEAN and the UN have cooperated extremely closely in recent years not just in dispute resolution in areas like Aceh Indonesia but also in humanitarian efforts in places like Myanmar.

The United Nations has established two types of Mediation Unit to cater for different stakeholders which for the purposes of this paper can be categorised as internal and external Mediation Units.

Internal Justice System Mediation Unit

Background

In December 2007, the General Assembly adopted resolution 62/228, establishing the basic framework of a new independent, transparent, professionalized, and decentralized system of administration of justice. The new system covers staff in the global Secretariat as well as the separately administered Funds and Programmes. In the new system, when no resolution through informal means can be arrived at, cases will be heard by the United Nations Dispute Tribunal, as court of first instance. The UNDT is comprised of professional judges making binding decisions which has registries in New York, Geneva and Nairobi.

However the new system puts more emphasis on resolving differences voluntarily through informal means, such as mediation, before a case is steered to the path of formal litigation. A single integrated Office of the Ombudsman with branches in five other duty stations was established and a new Mediation Division under the supervision of the Ombudsman's Office was established in New York in 2009.

Mediation Division

The Mediation Division was established to provide a first class centre for dispute resolution as part of the new justice system. The Mediation Division working closely with and under the supervision of the UN Ombudsman offers mediation to all staff and management at the UN worldwide. It is also making a major effort on training, for staff at large, managers, judges and staff who will be working in the new system.¹⁰

¹⁰ In December 2010 CEDR the Centre for Effective Dispute Resolution delivered training over 8 days to over 100 UN staff members in conflict prevention, conflict management, dispute resolution and mediation.

The Mediation Division works on cases referred to it by parties in dispute, the Ombudsman and the United Nations Dispute Tribunal. It consists of a Director of the Mediation Division, internal Mediation Division Mediators and a list of on-call international professional mediators who are available to provide specialized mediation services when required.

The take-up of mediation by stakeholders at the UN since July 2009 has been impressive and the new judges in the internal justice system have both supported and actively encouraged parties to try mediation.

External Mediation Unit under the Department of Political Affairs

The Mediation Support Unit (MSU) has close relations with the Mediation Division but is a separate unit which as its name suggests has a different function to perform at the UN.

The MSU, based in the Department of Political Affairs (DPA), is a system-wide asset that assists the mediation initiatives of the United Nations, Member States, regional/sub-regional organizations and relevant partners. The MSU is the United Nations Headquarters focal point for mediation support and is the institutional repository of knowledge, lessons learned and best practices.

The MSU delivers services in three main areas:

- I. Technical and financial support for peace processes. The MSU provides support throughout the planning, implementation and evaluation phases of a mediation process. Available services include modest mediation start-up funding; strategy development and process design for mediation, facilitation and dialogue initiatives; as well as advice on thematic issues from a mediation perspective. These thematic issues include: security arrangements (ceasefires), constitution-making, power-sharing, natural resources (wealth-sharing) issues, and gender issues.
- II. In addition to Headquarters-based staff in the unit, the MSU is also home to a seven-member Standby Team of Mediation Experts. This team is available to all United Nations entities and can be deployed within 72 hours. For longer term deployments, the MSU manages a Mediation Roster, which maintains a database of senior mediators, operational level mediation support staff and thematic experts.
- III. Capacity building. MSU provides tailor-made training for mediators and their teams, conflict parties and regional organizations to facilitate their engagement in peace processes. Available training programmes include mediation and negotiation skills,

process design and mediation strategy development, as well as thematic issues in peace processes.¹¹

Both the Mediation Division and the Mediation Support Unit draw on the services of external on call expert mediators to support them in their work.¹²

As noted above the MSU has a seven member Standby Team who are full time mediators for the MSU and also a standby Mediation Roster comprised of experienced mediators in different parts of the world who form a second level of response to complement the Standby Team.

The Standby Team

Established in March 2008 as service of the Mediation Support Unit of the Department of Political Affairs, the Standby Team of Mediation Experts is a specialized resource that can be rapidly deployed on a temporary basis into the field to provide technical advice to UN officials and others leading mediation and conflict prevention efforts. The Team's services are available to current United Nation envoys, political and peacekeeping missions and country teams, as well as to regional organizations with whom the United Nations works closely in conflict mediation and good offices worldwide. Team members can be deployed in any configuration, either as individuals, a small group or the entire Team.

UN Under Secretary General for Political Affairs, B. Lynn Pascoe commented at the time it was established:

*"Successful conflict mediation is a complex enterprise requiring precisely the kind of mobile expertise this new team can provide. Even the most experienced envoys cannot do it alone. They can benefit from the kind of timely and expert advice that this Team has to offer"*¹³

The principal operational role of the Standby Team is to provide expert advice to senior UN officials or other partners, upon request, either by deploying in person to the field or, in some cases by providing advice remotely. This support is flexible and can be adapted to the needs of the situation, and could include providing advice on procedural and agenda-setting issues, analysis of the positions of parties in negotiations including the identification of potential points of convergence as well as possible gaps or stumbling blocks, drafting of peace agreement text, leading workshops for parties on substantive or process issues, and giving general technical assistance.

¹¹ Information supplied by the Department of Political Affairs Mediation Service Unit New York

¹² The author is an On Call mediator for the Mediation Division.

¹³ UN Under Secretary General for Political Affairs, B. Lynn Pascoe, 5 March 2008

Team members are experienced in mediation situations and experts in a range of issues that arise frequently in negotiations, including security arrangements (ceasefires), constitutional processes, power-sharing, natural resources, and gender issues. When not deployed in the field, the members of the Team are on permanent standby, carrying out research and coordinating reviews of best practices in their area of expertise. Furthermore, the Team members are responsible for producing operational guidance notes and related training materials, and assisting the MSU with the development of a network of experts in their areas of expertise.

Administration of the Standby Team

The Standby Team support is provided in response to requests from UN officials or other partners. The Standby Team is a fully-funded resource and support is provided at no cost to requesting entities.¹⁴ All political and policy decisions regarding the use of the Standby Team are made by the Department of Political Affairs

The Mediation Roster

It is recognised at the UN that a relatively small team like the Standby Team could easily be swamped by a situation where a series of disputes occur at the same time in different parts of the world. Unlike commercial mediation where cases can be resolved in a relatively short time frame international disputes involving Member States, for example, can require a considerable investment of time by team members often involving a series of mediation sessions.

UN Secretary-General Ban Ki Moon has given his strong support to the importance of civilian rosters and standby capacities in the immediate aftermath of conflict and has encouraged the development of expert rosters in priority areas¹⁵ He believes that the rapid deployment of qualified mediators and experts is crucial for the success of peace negotiations.

The Mediation Roster is a second-level response capacity which complements MSU's existing staff expertise and Mediation Standby Team capacity, both of which can be mobilized within 72 hours. When MSU staff or Standby Team members are unavailable or cannot be deployed, the MSU will identify and deploy a suitable expert from the Mediation Roster.

The services provided by the Mediation Roster serve three main functions:

- I. Rapid response capacity intended to increase the quality of UN mediation processes through the rapid identification and deployment of qualified mediators and mediation experts;

¹⁴ Four members of the team work under a joint arrangement with the Norwegian Refugee Council (NRC), with support from the Government of Norway. Two other positions are funded by the European Commission, and the gender specialist is on secondment from UNIFEM.

¹⁵ UN Directive (A/63/881S/2009/304 para. 64).

- II. Second-level response capacity which complements MSU's existing staff expertise and Mediation Standby Team capacity;
- III. Strengthening the partnership in the mediation area between the United Nations and other relevant organizations.

Composition

Roster members are drawn from the United Nations, governments, universities and non-governmental organizations. They are mid- and senior level professionals with a minimum of seven years of relevant professional experience, education in mediation and hands-on involvement in peace-making processes. The Mediation Roster is relatively small and it is planned that it will not exceed approximately 200 qualified members. The profiles of the members are intended to be as diverse as possible regarding background, skills and area of expertise in order to respond to the different needs. The members are divided in the three following groups:

- I. Senior mediators, deployable as lead mediators or special envoys;
- II. Operational mediators, deployable as "Chiefs of Staff" or mediation team members assisting a senior mediator. They provide day-to-day management of the mediation process and remain in-country negotiating with warring parties and managing the mediation team;
- III. Thematic mediation experts, deployable for concise expert advice on specific topics, such as constitutional matters, disarmament technicalities or gender related issues.

The MSU tries to ensure a balanced gender and a geographic representation of candidates in the Mediation Roster. Special emphasis is put on the identification and promotion of mediation expertise coming from the "Global South" and the integration of women mediation practitioners. In addition MSU also actively seeks candidates with expertise in gender issues related to mediation with regard to different thematic areas, such as process management and planning.

Administration of the Mediation Roster

Experts are selected for the roster after being referred to MSU by UN staff or by MSU partners. A Mediation Roster Panel is put in place to vet the candidates and to decide on who should be invited to join the Mediation Roster. It is important to note that being selected for the Mediation Roster does not guarantee actual deployment or generic training opportunities.

The Canadian government currently funds the development of the Mediation Roster has been kindly provided by the Government of Canada. The mediation roster is currently administered by a Roster Manager.

Requesting an expert from the Mediation Roster

The primary clients of the Mediation Roster are DPA Envoys, Special Political Missions and DPKO field presences who can request the services of the Mediation Roster by contacting the MSU.. Also roster mediators may also be deployed in response to a request by member states, regional or sub-regional organizations and non-governmental organizations.

The experts can be deployed in various ways:

- Field missions (e.g. supporting on-going mediation activities);
- Teaching and training activities (e.g. mediation training for conflict parties);
- Long distance advice and backstopping (e.g. advice on thematic issues);
- Research activities (e.g. development of options papers).¹⁶

Issues concerned with the actual deployment of a Mediation Roster member is assessed on a case-by-case basis. It could be the responsibility of the requesting entity, of MSU or in some limited cases of one of MSU's partners on the roster.

As can be seen from the range of activities the MSU undertakes it is not just about stopping or resolving conflicts through classic mediation The aim is to try and make sure new disputes do not break out with the ultimate goal being to encourage policies that promote long-term stability, reconciliation and functioning states.

In 2011 the head of the UN Department of Political Affairs (DPA) stated, "Our focus has to be on preventive action, with the aim of stopping potential crises early before they escalate to the point where massive and costly international interventions become necessary,"¹⁷

Conclusion

Establishing an ASEAN Mediation Unit would require a significant amount of work and require the full support of the ASEAN Member States. The UN Mediation Unit initiative, for example, driven by the UN Ombudsman's Office worked with all stakeholders in the organisation over a 2 year period to establish the groundwork for its successful launch.¹⁸ It is submitted that it would require the conducting of a conflict audit to ascertain exactly what ASEAN's needs are, followed

¹⁶ Information provided by the UN MSU office New York

¹⁷ Under-Secretary-General B. Lynn Pascoe; Source UN News 20 January 2011 Washington

¹⁸ The author Danny McFadden drafted the blueprint for the UN Mediation Division and was the acting Director of the Division in 2009.

by the designing of appropriate dispute systems for the early identification, analysis and cost effective resolution of disputes. This would need strong political support, just as much as the allocation of resources.

Provided this support is forthcoming it is submitted that it would be useful for ASEAN to take note of how the United Nations has established its Mediation Units. Many of the problems that the UN has faced in dealing with trade or political disputes and armed conflict have been greatly assisted by the use of a core body of trained mediation professionals based in a Mediation Unit. As mentioned the UN and ASEAN now have a track record of working together in dispute resolution and since as international organisations they share many of each other's characteristics it would seem to make sense for best practice knowledge sharing to take place in the mediation field.

It is submitted that the timing is right to establish a Mediation Unit in ASEAN and that the current legislative support can be built on to create a culture of resolving disputes informally using mediation. The "ASEAN Way" of quietly working with parties to resolve disputes would be enhanced by the creation of a mechanism like a Mediation Unit containing professional mediation expertise that can be called on to assist ASEAN when the need arises.