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Can ASEAN Overcome the ‘Consensus Dilemma’ over the South China Sea?

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EXECUTIVE SUMMARY

- As a regional grouping of countries with extremely diverse national backgrounds, ASEAN has relied greatly on the principle of consultation and consensus for its success.
- However, as the regional setting goes through rapid changes, this principle constrains ASEAN’s ability to address urgent security issues, especially the South China Sea disputes.
- Institutional innovations should be developed to allow for a certain level of flexibility so that member countries can effectively address important regional security issues in general and the South China Sea disputes in particular.
- ASEAN should maintain the consensus-based decision-making mechanism where possible, and adopt a majority-vote system in dealing with issues on which consensus is impossible.
- These innovations may be in the form of an ASEAN Commission for the Management of the South China Sea Disputes, an intra-ASEAN caucus on the issue, or a caucus of regional states inside as well as outside ASEAN which share concerns about the disputes.

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INTRODUCTION

With the Association of Southeast Asian Nations (ASEAN) celebrating its 50th anniversary next year, it may be the right time now for it to do some soul-searching about its future. One key question worth pondering over is how the grouping is to become more effective in addressing emerging security challenges. Most worrisome is of course ASEAN's present inability to present a common position on the South China Sea disputes. This weakness is due to the association's long-held principle of consensus.

This essay analyses why and how the principle of consensus undermines ASEAN's relevance and effectiveness, especially in addressing the South China Sea disputes. It proposes that in order to solve this problem, ASEAN should consider either procedural reforms or institutional innovations.

Specifically, where consensus is impossible, ASEAN should adopt a majority-vote decision-making mechanism. Alternatively, there should be institutional innovations made to allow for a certain level of flexibility for member countries to effectively address important regional security issues in general and the South China Sea disputes in particular.

Possible institutional innovations may include an ASEAN Commission for the Management of the South China Sea Disputes, an intra-ASEAN caucus on the issue, or a caucus of regional states inside as well as outside ASEAN which share concerns about the disputes.

THE SIGNIFICANCE OF THE CONSENSUS PRINCIPLE

Due to their extremely diverse national backgrounds, ASEAN members adopts consultation and consensus as a key principle in its operations. Officially enshrined in Article 20 of the ASEAN Charter, the principle ensures equality among member states and prevents the marginalization of any member in major decisions. Moreover, as many countries in the region traditionally have a democratic deficit, they tend to be guarded against external interference in their internal affairs. As such, the consensus principle allows them to function regionally without fear of forfeiting their domestic political interests.

Although the principle helps ASEAN maintain unity and makes member states feel comfortable about their participation in the Association, it also weakens ASEAN's capacity to act effectively on certain security issues. For example, ASEAN failed to forge a united response to the September 11 terrorist attacks on the US and the subsequent US-led war on terror, especially in the Middle East.¹

In March 2010, when North Korean torpedoes sank a South Korean corvette (Min, 2010), ASEAN's response was muted. Similarly, ASEAN's response to North Korea's nuclear tests is also typically weak. For example, in early 2016 when North Korea detonated a hydrogen bomb, ASEAN foreign ministers did not even condemn or express concern over North Korea's action in their joint statement (ASEAN, 2016). In most of these cases, the

¹ Interview with a former official of the ASEAN Secretariat.

sympathy that some ASEAN members had for North Korea explained why the Association could not have stronger reactions against Pyongyang.²

ASEAN's difficulty in reaching consensus seemed to become increasingly acute after the Association expanded its membership from six to ten. Larger membership makes it harder for the Association to find a common denominator among its members. Their national interests do not always converge. At the same time, ASEAN's expanded membership also facilitates the interference of external powers in the grouping's decision-making process. As the consensus principle effectively gives any member the power to veto any decision, an external power can easily make use of its influence over an ASEAN member to block decisions it considers harmful to its interests.

THE CONSENSUS PRINCIPLE AND THE SOUTH CHINA SEA

Over the past few years, dealing with the South China Sea disputes and with China's increasing assertiveness there, has divided ASEAN. At the 45th ASEAN Ministerial Meeting (AMM) hosted by Cambodia in July 2012, for example, Cambodia refused to accommodate other members' request to include references to incidents in the South China Sea in the final communiqué. Cambodia's intransigence ultimately led to the AMM's failure for the first time in its history to issue a joint statement. More recently, at their 49th annual meeting in July 2016, ASEAN foreign ministers also failed to reach a consensus on mentioning in their joint communiqué the landmark ruling issued just two weeks before by an international arbitral tribunal on the *Philippines v. China* case on the South China Sea disputes.

China's ambition to exert its control over the whole strategic waterway by building and gradually militarizing massive artificial islands is unnerving not only most ASEAN members, but also extra-regional countries that rely on this vital waterway for their trade and military operations. ASEAN's failure to have a common voice on the South China Sea dispute is therefore particularly worrying.

Should it continue to fail in addressing the intensifying tensions in the South China Sea, its ability "to maintain and enhance peace" (ASEAN, 2007; Art. 1) will be questioned. More importantly, by failing to act on an issue that is so critical to the region's peace and security, ASEAN will encourage certain concerned members and external partners to seek arrangements outside ASEAN to address the issue. This will ultimately jeopardize the Association's unity and centrality.

Since the consensus principle lies at the root of ASEAN's impotence on this issue, it is essential for the Association to discuss how to reframe and better implement the principle so that national interests can harmonize with the regional interests, thereby helping to maintain ASEAN centrality in the regional security architecture. This urgent need has been emphasized by several scholars, and even national leaders.

For example, Tang (2016) contends that ASEAN must reassess its consensus-based decision-making by removing the power to veto by any one member state and consider

² Ibid.

instead extending the application of the “ASEAN Minus X” principle to political issues. Similarly, Manning (2016) has suggested that ASEAN should adopt majority-vote decision-making, or decision by two-thirds majority, “to retain its relevance and create a more secure and prosperous Asia-Pacific”. More notably, at the 38th Singapore Lecture in late August 2016, Vietnamese President Tran Dai Quang also postulated that although consensus is a fundamental principle for ASEAN, “newly emerging issues” have made it necessary for ASEAN to establish “supplementary mechanisms” to allow for flexibility in managing these challenges.³

SOLVING ASEAN’S ‘CONSENSUS DILEMMA’ IN THE SOUTH CHINA SEA

This section discusses possible ways for ASEAN to escape its “consensus dilemma”, especially in the South China Sea disputes.

Procedural reforms: Towards majority-vote decision-making mechanisms

Adopting majority-vote decision-making is not a new proposal for ASEAN. For example, the Wise Man’s Commission appointed by ASEAN in the 1990s (Manning, 2016) and the Eminent Persons Group (EPG) on the ASEAN Charter have both recommended this mechanism. In particular, in its 2006 report, the EPG observed that although ASEAN’s consensus-based decision-making “has served ASEAN well and should be preserved as the guiding principle”, it “should aid, but not impede, ASEAN’s cohesion and effectiveness.” With the range of ASEAN activities increasing, the EPG (2006, p. 6) suggested that ASEAN “consider alternative and flexible decision-making mechanisms”, including voting.

In addition to the “ASEAN Minus X” formula in the economic field, there have also been a few precedents of majority-vote decision-making in the political and security areas as well. For example, Article 8 (8) of the 1995 Treaty on the Southeast Asia Nuclear Weapon-Free Zone,⁴ which provides for the establishment and operation of the Commission for the Southeast Asia Nuclear Weapon-Free Zone, stipulates that:

Except as provided for in this Treaty, decisions of the Commission shall be taken by consensus or, failing consensus, by a two-thirds majority of the members present and voting.

As such, it can be argued that adopting a majority-vote decision-making mechanism in political and security issues should not be seen as a “mission impossible” for ASEAN. The problem is how the mechanism is to be designed to appeal to all member countries. First, a voting mechanism based on a supermajority of two-thirds will in any case be a reasonable starting point to consider. Accordingly, each member should be entitled to one vote of equal weight, and any decision to be adopted should be endorsed by at least seven out of ten members. In case the two-thirds majority is deemed too low a bar, ASEAN may consider a higher threshold. For example, a majority of three-quarters may be applied in

³ For more information about President Quang’s comments, see Hiep (2016).

⁴ Full text of the Treaty can be found at:

<<http://agreement.asean.org/media/download/20131230234315.pdf>>

issues of critical significance, in which decisions should be endorsed by at least eight members.

Second, if ASEAN is to adopt a majority-vote decision-making mechanism, certain countries may at some point view the rule as an unacceptable liability to their national interests. The ASEAN Charter should therefore provide for member countries' exit from the Association as well. Currently, the Charter lacks such provisions, although it provides for the admission of new members. It is unlikely that any ASEAN member will ever invoke such provisions, but the Charter, as the basic law of ASEAN, should comprehensively address its membership issue.

Third, where consensus is impossible, there should be a clear distinction between two types of issues:

1. Type One: Issues that have obvious implications on the sovereignty, territorial integrity, and domestic autonomy of a given member country; and
2. Type Two: Issues that have obvious implications on the region's peace and security.

ASEAN members must seek consensus on decisions regarding issues of Type One, unless the country involved decides otherwise. Where issues of Type Two are concerned, majority-vote decision-making should be applied. Accordingly, if an issue under consideration does not clearly impact a given member's sovereignty, territorial integrity or political autonomy but has significant implications for the region's peace and security, that member country should not be allowed to veto against the interests of the nine other member states and at the expense of regional peace and security.

Institutional innovations: The South China Sea focus

In case ASEAN members are unable to reach a "consensus on non-consensus" to move towards a majority-vote decision-making mechanism, it may become necessary for them to seek new institutional arrangements to circumvent the deadlock caused by the consensus principle and to deal with urgent security issues, especially the South China Sea disputes, in a more effective manner.

First, ASEAN should consider establishing an ASEAN Commission for the Management of the South China Sea Disputes. This Commission should be a permanent body consisting of the four ASEAN claimant states and other ASEAN members who are interested in the issue. Similar to the Commission for the Southeast Asia Nuclear Weapon-Free Zone, this Commission should make decisions by consensus, or by a two-thirds majority of the members present and voting in case consensus cannot be reached and if none of the four claimant states objects. The primary purpose of the Commission is to coordinate ASEAN's position on the South China Sea, and act as the contact point for ASEAN in coordinating with China regarding the management of the disputes. It can also act as a facilitator of cooperative activities among ASEAN member states as well as between ASEAN and China in the South China Sea. As such, the Commission should be entrusted with the task of shaping ASEAN's common responses to incidents in the South China Sea and drafting the section on the South China Sea disputes in ASEAN's joint statements and other relevant

documents. If established, the Commission will represent a major institutional breakthrough towards more effective management by ASEAN of the South China Sea disputes.

Second, if the proposed Commission cannot be established, ASEAN claimant states may want to revive their caucus on the South China Sea, which used to be a venue for Brunei, Malaysia, the Philippines and Vietnam to exchange views and formulate a common position on the South China Sea disputes ahead of ASEAN meetings. Their common position would then be submitted to ASEAN under the assumption that ASEAN would endorse the group's position and use it as a reference for shaping ASEAN's stance on the issue. Unfortunately, due to rising differences in the approach of the four claimants as well as other ASEAN member states to the South China Sea issue, the caucus has in recent times failed to achieve its intended purposes.

If the caucus is revived, and especially if it is institutionalized and expanded to include interested ASEAN non-claimant states as well, it could serve as yet another relevant, though less formal, venue for ASEAN countries to address the South China Sea disputes. The caucus should adopt a decision-making mechanism similar to that of the ASEAN Commission for the Management of the South China Sea Disputes proposed above. In terms of functions, the caucus's main purpose will be to shape a common position among its own members, and thereby facilitating the achievement of an ASEAN-wide consensus on the disputes. In addition, under certain circumstances, it may issue separate statements on the South China Sea disputes in ASEAN-related meetings if ASEAN fails to reach a joint statement that sufficiently addresses the caucus's concerns. The main setback of this solution is that it tends to undermine ASEAN unity, and since it may not include all ASEAN members, may not be considered a formal ASEAN-sponsored arrangement.

Finally, in case all the above options cannot materialize, like-minded countries in the region, regardless of whether or not they are claimant states or ASEAN members, should work together to form a group of states that have shared concerns about the South China Sea disputes. This caucus, acting outside the framework of ASEAN, may help coordinate its members' position on the disputes, especially in region-wide platforms such as the ASEAN Regional Forum, or the East Asia Summit. As caucus members are like-minded, it may be easier for them to reach consensus on the issue.

In the long run, where circumstances allow and if member countries are interested, the caucus may involve into a regional security arrangement that supplements ASEAN-led mechanisms. While a caucus of such a nature may undermine ASEAN's unity and centrality, it is perhaps the only feasible way for interested countries to address the disputes in a truly effective manner should ASEAN fail to move beyond the deadlock caused by its consensus principle.

CONCLUSION

The principle of consultation and consensus has so far been essential to ASEAN's success. However, as the regional setting rapidly changes, especially due to the rise of China, the principle is rendering ASEAN ineffectual in addressing urgent regional security matters.

To overcome this challenge, ASEAN should consider either procedural reforms or institutional innovations. ASEAN could, for example, adopt a majority-vote mechanism acceptable to all member states in dealing with relevant issues where consensus cannot be achieved. In case this solution cannot materialize, institutional innovations could at least be made to allow for a certain level of flexibility in addressing urgent regional security issues, especially the South China Sea disputes. These innovations may be in the form of an ASEAN Commission for the Management of the South China Sea Disputes, or an intra-ASEAN caucus on the issue, or a caucus of regional states inside as well as outside ASEAN which share concerns about the disputes.

That said, it is still in ASEAN's best interest to maintain the consensus principle in as many important issues as possible, and if the South China Sea disputes cease to present themselves as a serious threat to regional peace. Towards this end, there should be more trust building, cooperation and dialogue among ASEAN members as well as between ASEAN and China. All ASEAN members should try to strike a balance between national interests and the broader interests of the region.

Meanwhile, China should also be more sensitive to ASEAN states' security concerns, and act accordingly to turn the South China Sea into a sea of peace and prosperity rather than an arena of tensions and rivalry.

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