

The Difficulty of ASEAN Decision Making Mode on South China Sea Dispute: The ASEAN Charter Perspective

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Abstract

This article is written from the perspective of the ASEAN Charter to explain the difficulty of ASEAN decision making mode on South China Sea dispute by examining ASEAN Charter. It expresses that the main difficulty of ASEAN to decide the case of South China Sea dispute is the decision-making mode of ASEAN under Article 20(1) of ASEAN Charter which based on consultation and positive consensus. This dispute has separated ASEAN into two groups such as (1) Group of parties into a dispute which consisted of Brunei, Malaysia, Indonesia, Philippines, and Vietnam, and (2) Group of non-parties into a dispute consisted of Thailand, Singapore, Lao PDR, Myanmar, and Cambodia. It is difficult in practice for ASEAN Summit to make a decision based on Article 20(1) and get consensus because ASEAN Summit is composed of the heads of state of each Member State who generally take decisions based on political interests of their own, not interest of ASEAN as the whole. Article 20(1) itself creates the lockdown by the fact that the group of non-parties into dispute tried to avoid the conflict between People's Republic of China (PRC) and the group of parties into dispute due to prevent their national interest more than ASEAN's interest. Hence the author proposes ASEAN to revise the decision-making mode of ASEAN under Article 20(1) of ASEAN Charter or apply another way of decision-making modes such as majority vote or negative consensus (reverse consensus) for ASEAN Summit instead of consultation and positive consensus.

Keywords: ASEAN Charter, South China Sea Dispute, ASEAN, ASEAN Decision Making Mode

Introduction

Since ASEAN ratified ASEAN Charter in 2007 and became the most well-known inter-governmental organization in South East Asia region, ASEAN has been criticized many times on issues on the failure of ASEAN to deal with dispute in South China Sea between People's Republic of China (PRC) and ASEAN Member States such as Brunei, Malaysia, Indonesia, Philippines, and Vietnam. The failure harshly caused the point of dividing

ASEAN and conquering the South China Sea (O'Neill, 2018: 216-217). Some has raised the point of escalating tensions between China and USA (Vukovic & Alfieri, 2018: 666-667; Time, 2018). Interestingly ASEAN Summit has never been reached the joint decision concerning on South China Sea dispute even half of ASEAN Member States are the parties into dispute. Hence this article explains what the difficulty of ASEAN decision making a mode to deal with South China Sea dispute from the perspective of the ASEAN Charter.

South China Sea Dispute and ASEAN

South China Sea Dispute: the South China Sea is in the Pacific Ocean which consisted of five main islands such as; (1) Spratly Islands, (2) Paracel Islands, (3) Pratas Island, (4) Macclesfield Bank, and (5) Scarborough Reef (Moore, 2018; Foreign Affairs, 2018; McDevitt, 2014: iii-iv).



Figure 1 Sovereignty Claims in the South China Sea
Source: McDevitt (2014)

As shown in Figure 1, the dispute involves both island and maritime claims between PRC and ASEAN Member States such as Brunei, Malaysia, Indonesia, Philippines, and Vietnam. Many rules such as the nine-dash line, the exclusive economic zone, and the maritime borderline are referred to claim the legitimacy from the Parties (O'Neill, 2018: 228-232; Hiebert, Nguyen & Poling, 2014: 27-28; Center for Strategic Studies CNA Corporation, 2014). Moreover the United States of America (USA) has claimed Freedom of Navigation Operations (FONOPs) under international law to defend its right to navigate the sea. This dispute divided into two disputes such as (1) the sovereignty dispute between PRC and ASEAN countries, and (2) the freedom of navigation dispute between PRC and USA (Vukovic & Alfieri, 2018: 667-668; Zhang, 2016: 181). This article is focused only on the sovereignty dispute between PRC and ASEAN countries.

ASEAN: On 8 August 1967, Indonesia, Malaysia, Philippines, Singapore, and Thailand signed ASEAN Declaration (Bangkok Declaration) to establish the Association of Southeast Asian Nations (ASEAN) at Bangkok, Thailand. Then Brunei Darussalam joined ASEAN in 1984.

After the end of Cold War in 1991, Vietnam joined in 1995, followed by Lao PDR and Myanmar in 1997 and Cambodia in 1999. ASEAN was reconstructed by ASEAN Charter on 15 December 2008 and created ASEAN Community (AC) which comprising three pillars, namely ASEAN Economic Community (AEC), ASEAN Political-Security Community (APSC), and ASEAN Socio-cultural Community (ASC) (ASEAN, 2017a). Today ASEAN is the most present successful rule-based regional intergovernmental organization in Southeast Asia region with 642.1 million peoples and GDP at 2,765.8 US\$ billion in 2017 (ASEAN, 2018b).

ASEAN and South China Sea Dispute in 2018: In order to promote peace and friendship in the South China Sea between ASEAN and PRC, Declaration on the Conduct of Parties in the South China Sea (DOC) signed in November 2002, at Cambodia (ASEAN, 2015). The DOC was not yet achieved to avoid any growth of tension between ASEAN and PRC due to not legally binding and lacking legal enforcement of the DOC (ASEAN, 2012).

In 2013, the Philippines instituted arbitral proceedings against PRC under Annex VII to United Nations Convention on the Law of the Sea 1982 (UNCLOS 1982) to the Permanent Court of Arbitration (PCA). In 2016 the tribunal of PCA gave a final award claiming that PRC has no legal basis or historical claim on Nine-dash line (Sellars, 2018: 261; Liu, 2017: 3; Permanent Court of Arbitration, 2016). PRC officially rejected the ruling while ASEAN issued the joint statement about South China Sea dispute to ensure and promote the peace, stability, and security in the region (Keith, 2017: 8; ASEAN, 2016a). The dispute situation is now significantly calmed down after ASEAN and PRC formally announced to negotiate the blueprint of the Code of Conduct (COC) which is an upgraded version of the DOC at 31st ASEAN Meetings in Manila (ASEAN, 2017b; Straitstimes, 2018).

Both DOC and COC are under ASEAN 2025's blueprint to maintain the South China Sea as a sea of peace, prosperity, and cooperation (ASEAN, 2015). However a legal binding COC issue is in a spot of people because without a legally binding mechanism; the COC will likely be based on the DOC which means an exclusion of any provisions for legal enforcement mechanisms in cases of violation (Diplomat, 2017).

Systematic of ASEAN Organization

There are four elements such as (1) ASEAN Charter, (2) ASEAN Organization Structure, (3) ASEAN Summit, and (4) ASEAN Decision Making Mode, to consider.

ASEAN Charter: ASEAN Charter was entered into force on 15 December 2008 after adoption at the 13th ASEAN Summit (ASEAN, 2007). ASEAN Charter mainly presents as the key ASEAN instrument by reorganizing the institutional framework of ASEAN through the rule of law (Wong, 2012: 671-672; Koh, Manalo & Woon, 2009). It consisted of 13 chapters and 55 articles as; Chapter 1 (Article 1-2) purposes and principles of Charter, Chapter 2 (Article 3) Legal personality, Chapter 3 (Article 4-6) Membership, Chapter 4 (Article 7-15) Organization organs, Chapter 5 (Article 16) Entities associated with ASEAN, Chapter 6 (Article 17-19) Immunities and privileges, Chapter 7 (Article 20-21) Decision making, Chapter 8 (Article 22-28) Settlement of disputes, Chapter 9 (Article 29-30) Budget and finance, Chapter 10 (Article 31-34) Administration and procedure, Chapter 11 (Article 35-40) Identity and symbols, Chapter 12 (Article 41-46) External relations, and Chapter 13 (Article 47-55) General and final provision.

As the main ASEAN instrument, the ASEAN Charter explains the ideals of ASEAN norms, rules, and values aim for ASEAN and offers accountability and compliance of ASEAN. Now ASEAN Charter is questioned about non-progressive and out-of-date of the instrument (Limsiritong, 2018a: 37). Philippines as the Chairman of 30th ASEAN Summit announced to consider factual updates and revisions of ASEAN Charter with ASEAN Senior Officials' Meeting (SOM) and Committee of Permanent Representatives to ASEAN (CPR) under the

supervision of ASEAN Ministers (ASEAN, 2017c; Singapore Institute of International Affairs, 2014; Leviter, 2010: 200-201).

ASEAN Organization Structure: As shown in Figure 2, the ASEAN organization structure mentioned under Chapter 4 (Article 7-15) of the ASEAN Charter. The key ASEAN bodies are principally consisted of ASEAN Summit as the supreme policy-making body, Secretariat-General of ASEAN as the administrative head, ASEAN Coordinating Councils, ASEAN Community Councils, ASEAN Sectoral Ministerial Bodies, Secretary-General of ASEAN and ASEAN Secretariat, Committee of Permanent representatives, ASEAN National Secretariats, ASEAN Human Rights Body and ASEAN Foundation (ASEAN, 2016b).

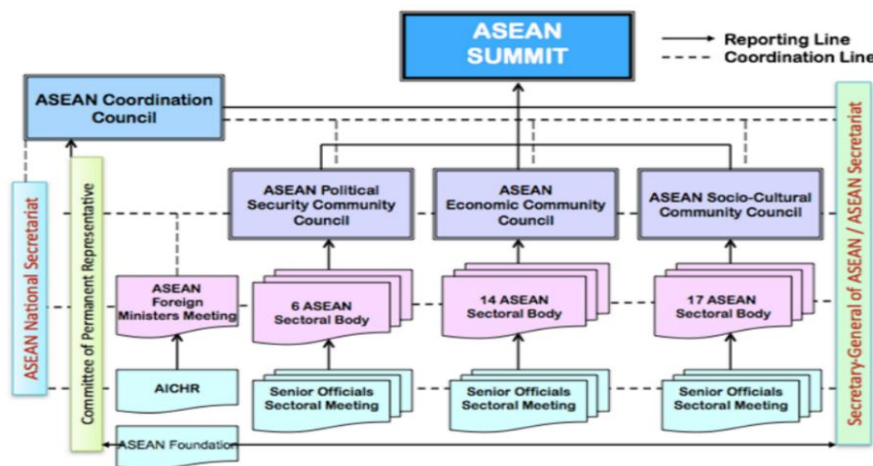


Figure 2 ASEAN Organization Chart

Source: Gender Development Association, 2017

ASEAN Summit: According to Article 7(2) of ASEAN Charter, ASEAN Summit is the supreme policy-making body of organization which consists of the ten heads of government of each ASEAN Member States. ASEAN Summit has duties to set the direction for ASEAN policies and objectives which deliberates, provides policy guidance, and takes decisions on critical issues relating to objectives of ASEAN, important matters of interest such as signing or endorsement of agreements, and the issuance of declarations by ASEAN Member States at the Summit. To exercise their authority, ASEAN Summit places the meeting twice a year and makes a decision based on their method of decision making under Article 21 of ASEAN Charter which consisted of consultation and consensus. The latest ASEAN Summits was the 33rd round at Singapore (ASEAN, 2018a).

ASEAN Decision Making Mode: According to Article 20(1) of the ASEAN Charter, all ASEAN bodies included ASEAN Summit required to make a decision based on a fundamental principle of consultation and consensus (ASEAN, 2016b). The method of ASEAN consensus is mostly the positive consensus which requires all ASEAN Member States in ASEAN Summit to agree with the decision. When the consensus cannot be reached, ASEAN Summit can do nothing because this rule of law was designed to respect and protect the minority right (Limsiritong, 2018a: 37; 2016: 22-23).



Figure 3 Relations between ASEAN Charter, ASEAN Organization Structure, ASEAN Summit, and ASEAN Decision Making Mode

As shown in Figure 3, ASEAN Charter as the principal ASEAN instrument established the new ASEAN organization structure through the rule of law (Wong, 2012: 671-672; Koh, Manalo & Woon, 2009). At this point, it also created the hierarchy of ASEAN bodies which was established by the idea of Top-Down power intergovernmental organization with ASEAN Summit as the center of ASEAN power. Rest of ASEAN bodies such as Secretariat-General of ASEAN, ASEAN Coordinating Councils, ASEAN Community Councils, ASEAN Sectoral Ministerial Bodies, Secretary-General of ASEAN and ASEAN Secretariat, Committee of Permanent representatives, ASEAN National Secretariats, ASEAN Human Rights Body, ASEAN Foundation, are the non-independent bodies with a limitation of decision-making power under Article 20 of ASEAN Charter (Limsiritong, 2018b: 27-28; 2016: 20). With the concept of Top-Down power organization, the decision-making issue of each ASEAN bodies shall be passed to ASEAN Summit for the final decision making under Article 20(1) of ASEAN Charter when ASEAN bodies cannot make the final decision.

Limitation of ASEAN Decision Making Mode under ASEAN Charter

Limitation of ASEAN Decision Making Mode under ASEAN Charter in case of South China Sea Dispute: To explain the limitation of ASEAN decision making mode under ASEAN Charter in case of South China Sea dispute, the difficulty of applying Article 20 of ASEAN Charter will be considered.

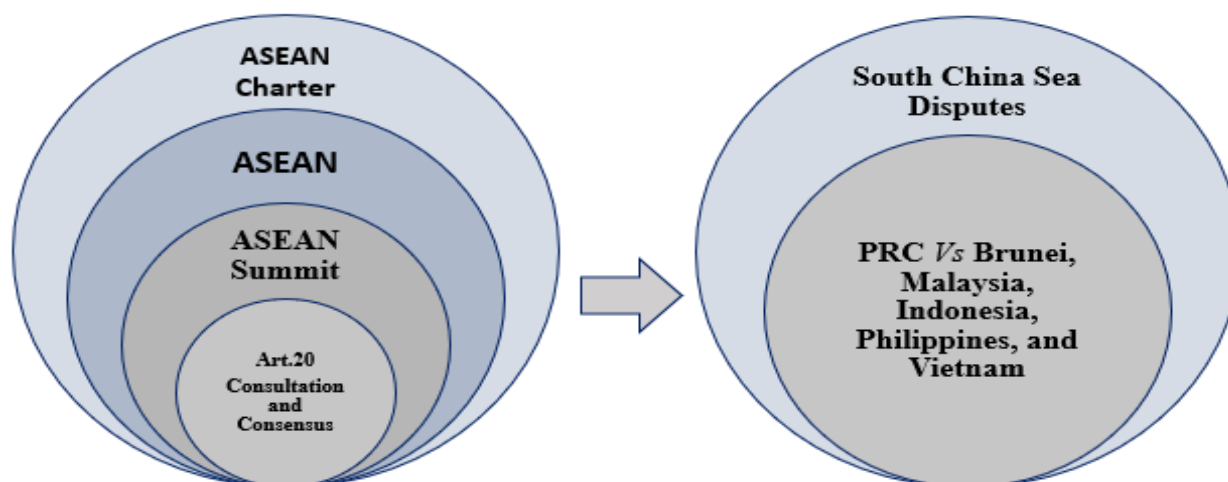


Figure 4 Relations between ASEAN and South China Sea Dispute under ASEAN Charter

As shown in Figure 4, Article 20 of the ASEAN Charter requires the ASEAN Summit to make any decisions by consultation and consensus. If consensus cannot be achieved, ASEAN Summit can decide a specific decision-making mode. It would mean all ASEAN Member States needs to agree on the resolution.

In South China Sea situation ASEAN Member States are divided into two groups such as (1) Group of parties into dispute which are consisted of Brunei, Malaysia, Indonesia, Philippines, and Vietnam, and (2) Group of non-parties into dispute which are consisted of

Thailand, Singapore, Lao PDR, Myanmar and Cambodia. Importantly to get the joint announcement in this situation, the consensus under Article 21 of ASEAN Charter is a need. Hence it would mean that all ASEAN Member States included a group of non-parties into dispute need to agree on this solution too.

The interesting question is how possible the group of non-parties into dispute will agree with the group of parties into a dispute on this situation against their wills to be more friendly with PRC. It is impossible for Brunei, Malaysia, Indonesia, Philippines, and Vietnam to ask Thailand, Singapore, Lao PDR, Myanmar, and Cambodia to get involved in the South China Sea dispute. Because this situation created the lockdown by the fact that the group of non-parties into dispute tried to stay away from the conflict between PRC and the group of parties into dispute due to prevent their national interest more than ASEAN's interest (Limsiritong, 2018a: 36-37; 2017: 77; Seng, 2014: 85).

Conclusion and Recommendation

To summarize, as mentioned above, the decision-making mode of ASEAN based on consensus under Article 21(1) of ASEAN Charter is mostly the prerogative of ASEAN Summit which is the supreme body of ASEAN and is composed of the heads of state of each Member State who generally take decisions based on their own political interests. It clearly shows that ASEAN decision-making mode under ASEAN Charter is designed to confirm a principle of ASEAN Way which promises that all of the ASEAN decisions will be decided by positive consensus and none of ASEAN Member State will interfere in the activities of another no matter what the situation is.

On the one hand, Article 21(1) of the ASEAN Charter effectively works to protect the ASEAN principle of non-interference. On the other hand, it creates the opportunity to lobby supporters by the third party such as PRC in case of South China Sea dispute, especially Group of non-parties into dispute such as Thailand, Singapore, Lao PDR, Myanmar, and Cambodia. Hence without the agreement of a group of non-parties into dispute, ASEAN could not get involved into South China Sea dispute because ASEAN could not reach a consensus under Article 21(1) of ASEAN Charter.

More importantly, the consensus now works as a part of the principle of non-interference which plays the key role to keep ASEAN together by avoiding a legally binding solution as shown in the COC for South China Sea dispute or ASEAN Human Rights Declaration in case of Rohingya crisis (Fisher, 2018: 4-5; Limsiritong, 2018a:32-33; 2017: 73-74).

For recommendation, to resolve this limitation of ASEAN Summit in this case, ASEAN Summit can apply a specific decision under Article 20 (2) of the ASEAN Charter which stated that "where consensus cannot be achieved, the ASEAN Summit may decide how a specific decision can be made." This article empowers ASEAN to use their considerations to apply another way of decision-making modes such as majority vote or negative consensus (reverse consensus) for ASEAN Summit in case of some specific situations such as South China Sea dispute (Star, 2017; Today, 2017; Limsiritong, 2017: 78; 2016: 23).

New Challenging in the Future

This is not the first time that the scholars criticized ASEAN that ASEAN decision-making mode sometimes is deadlock for dealing with the dispute (O'Neill, 2018:216-217; Limsiritong, 2016: 23). As long as ASEAN Member States still focus on their interests more than ASEAN's interest, the decision-making mode of ASEAN under Article 21(1) of ASEAN Charter could not be picked up to revise. However soon or later ASEAN needs to revise the decision-making mode of ASEAN Charter if ASEAN would like to protect ASEAN harmony as well as to make a balance between the intra-ASEAN Member States and ASEAN external relations.

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