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After The South China Sea Ruling

Resilience of the ASEAN Way: Consensual Diplomacy in Vientiane

By Alan Chong

Synopsis

The Vientiane communiqué of 25 July 2016 by ASEAN foreign ministers at their annual talks has been criticised as showing ineffectiveness. This is not the case if one examines it in the context of ASEAN's diplomatic style and the healthy imperfections of international law.

Commentary

POLITICAL OBSERVERS impatient for results over the South China Sea imbroglio have criticised the 49th ASEAN Foreign Ministers' Meeting in Vientiane last week for its silence on the 12 July ruling by the Permanent Court of Arbitration (PCA) in favour of the Philippine complaint against China. That decision represents international law in action - to deliver as clear a verdict as it reasonably could under difficult circumstances.

But international law is also a reflection of the imperfect relationships between equally sovereign nation states. International law can pass judgements only after weighing multiple grey areas and taking into account the rock-steady institution of national sovereignty, whereby enforcement of the decision is entirely left to voluntary compliance.

ASEAN Diplomacy at Work

This is where ASEAN and its diplomatic characteristics enter the picture to ensure that international dialogue can resume *despite* the judgement of international law. Since its inception, ASEAN has never been about making haste towards political

detriment. This regional organisation's *modus operandi* has been to make dialogues happen and, in cases where they have lapsed due to public acrimony between two governments, regenerate a positive atmosphere for the resumption of negotiation.

For both ASEAN member states and China, the consensual communiqué enables both sides to resume constructive dialogue about the South China Sea despite Beijing's anger at the PCA ruling and the Philippines' public assertions of victory. People forget that the spirit of diplomacy is to ensure that channels of communication do not lapse during moments of acute tension. China did say last week that it was willing to move forward on the drafting of a permanent Code of Conduct in the disputed area while the PCA judgement allows it to claim that the ownership of the Spratly islands has not been definitively decided.

Moreover, the extensive realities of China-ASEAN economic interdependence in trade, investment and technology had to be acknowledged in crafting ASEAN's communiqué. A compromise was ultimately reflected in the words committing all participants to "full respect for legal and diplomatic processes, without resorting to the threat or use of force, in accordance with the universally recognised principles of international law, including the 1982 United Nations Convention on the Law of the Sea".

The Diplomatic Dance

During the extended drafting process, some ASEAN states keen on avoiding antagonism towards China reportedly tried to derail any ASEAN consensus. Fortunately, all ASEAN members recovered their faith in the 'ASEAN Way' of consultation and trading off extreme positions. Any ASEAN consensus has rarely meant comprehensive unanimity on every detail.

Consensus can be operationalised as '10-x' or 10 members minus x number that are not ready to join hands. This is actually an ingenious way to facilitate a conciliatory atmosphere for dialogue amongst themselves and between ASEAN & the great powers despite internal dissension. In fact, the Vientiane communiqué reaffirmed the recurring and unspoken understanding that ASEAN does not need to resolve issues all the time.

It incrementally nurtures peace by facilitating a conducive atmosphere for dialogue through creative reinterpretation of the circumstances of a dispute, and thereby simultaneously depriving disputing parties of the anxiety that leads to military confrontation. There is no better vindication of this than Chinese Foreign Minister Wang Yi's comment that 'the page has turned' and 'we believe that the temperature surrounding the arbitration case should now be lowered'.

Healthy Imperfections of International Law

The resilience of the time-honoured ASEAN Way in mitigating disputes is also a direct complement to the diplomatic room afforded by the imperfections of international law. Indonesia and Malaysia obtained a mutually respected outcome over the Ligitan and Sipadan island dispute in 2002 because the diplomatic ground

had been prepared well in advance of what their respective lawyers had to argue at The Hague.

Likewise, Malaysia and Singapore's date at The Hague in 2008 over the Pedra Branca/Pulau Batu Putih dispute proceeded smoothly because both governments had agreed to allow an international court to arbitrate an outcome that both would respect regardless if one side 'won' or 'lost'. In both cases, compliance was trouble free and the loss of face hardly emerged as an issue. International legal proceedings generated space for political dialogues before and after the proceedings.

Notably, the PCA ruling awarded rights of access to Philippine commercial and military vessels in the waters off the Spratlys and undermined China's nine-dash line claim. But the PCA pointedly also refused to be drawn into confirming the definitive sovereignty of ownership over the Spratlys because determining sovereignty was not part of its judicial mandate.

Technically, China, Taiwan, the Philippines, Brunei, Malaysia and Vietnam remain official claimants awaiting further arbitration in principle. China could neither be accurately described as having 'lost' at the PCA since it declared that it did not recognise the Court's jurisdiction, nor could it be said to have constituted a formal party to the PCA's proceedings in this case.

Constructive Ambiguity?

The PCA ruling in fact generates an ambiguously helpful space for diplomatic manoeuvre as summarised in these words: 'The Tribunal considered that it would not need to implicitly decide sovereignty to address the Philippines' Submissions and that doing so would not advance the sovereignty claims of either Party to islands in the South China Sea'.

ASEAN can heal tensions in the South China Sea by demonstrating fairness, amity and a spirit of accommodation in its communiqués on the subject. Its member states do not need to end up replicating situations in the Middle East, sub-Saharan Africa, or Eastern Europe, when territorial disputes slide inevitably towards war because no inclusive regional security organisations existed to facilitate dialogue between protagonists.

ASEAN has no standing policy of deliberately naming enemies. This should remain so if only because it preserves room and face for peaceful negotiations, however prolonged it might be. This is how the Southeast Asian peace will be kept.

Alan Chong is Associate Professor in the Centre for Multilateralism Studies at the S. Rajaratnam School of International Studies (RSIS), Nanyang Technological University, Singapore.
