The Use and Abuse of the "ASEAN Way"

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I. Introduction

What contribution has ASEAN made to the improvement of political and social conditions of Myanmar? Some might say that their contribution is outstanding. Others might argue that their influence has been negligible compared to the pressure exerted by the United States and European countries. What is notable is that the answer to this question is to some extent dependent on the one's view on the ASEAN's time-honored policy of non-intervention in the affairs of other states. When the domestic conditions of Myanmar began to deteriorate in 1990s, Western developed countries sharply denounced the military regime of Myanmar and imposed sanctions in order to isolate Myanmar in the international community. However, ASEAN and its member states were critical of such policies because they were hostile and interventionist. They instead advocated the "constructive engagement" policy, stressing dialogue and persuasion as the appropriate means to improve the situation in Myanmar. A former ASEAN official argued that economic sanctions were generally not effective in attaining the regime change and those imposed by the United States and European countries only harmed the people of Myanmar. In his opinion, although the constructive engagement with Myanmar did not bring about regime change either, it could attain some improvement in the living standard of the people of Myanmar through its integration in the global economy, that is, through opening foreign markets for products of Myanmar and inducing foreign investment into Myanmar. Myanmar's admission into ASEAN in 1997 is a prime example of the "constructive engagement" policy. In the view of ASEAN, they had no reason to deny Myanmar's application for membership because of its domestic policy. The conditions for ASEAN membership were that the applicant country was geographically located in Southeast Asia and that it committed to the principles governing relations between member states.

This paper does not try to answer the above question of whether ASEAN with such "constructive engagement" policy did better than the Western hard line policy in promoting the human rights and democracy in that country. That question is beyond the ability of the author. Instead this paper first tries to identify the ASEAN's conception of international norms underlying such "constructive engagement" policy. Those norms have been articulated as the "ASEAN Way". This paper then locates that "ASEAN Way" within the contemporary debate on state sovereignty in International Law. In particular, it examines the question whether the "ASEAN Way" can be reappraised as the better way than the legalistic and coercive one in coping with issues of common concern such as promotion of human rights, protection of environment, management of global economy. Finally, the limit of the use of the "ASEAN Way" is examined by referring to the recent South China Sea Arbitration.

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II. What is the ASEAN Way?

The ASEAN Way is a catchword for the norms that is supposed to govern the relations between states in Southeast Asia. But there is no authentic definition of that ASEAN Way.

For some, it denotes a decision making process that features a high degree of consultation and consensus. It prefer regional interactions and cooperation based on discreteness, informality, consensus building and non-confrontational bargaining style, to those based on adversarial setting, majority vote and other legalistic decision making such as adjudication.

Two elements are essential in this conception. The first is preference for informality and the resultant dislike for formal institutions of cooperation. This point is outstanding as regards mechanisms for inter-state disputes within the region. The basic instrument for the purpose is the Treaty of Amity and Cooperation in Southeast Asia adopted in 1976. The treaty was originally concluded by Indonesia, Malaysia, Philippines, Singapore and Thailand. But now not only all the ASEAN member states but also other countries such as Australia, China, India, Japan, the United States are the parties. Article 14 of that treaty stipulates that to settle disputes through regional processes, the High Contracting Parties shall constitute, as a continuing body, a High Council comprising a Representative at ministerial level from each of the High Contracting Parties to take cognizance of the existence of disputes or situations likely to disturb regional peace and harmony. But that High Council came into existence only 2001, that is, 25 years after its conclusion. Moreover, that Council has never been set in motion for the settlement of concrete disputes so far.

The Second element is consensus as a principle of collective decision making. Consensus is distinguished from unanimity in that consensus does not require express consent of all members. Consensus on a decision is established when no one expressly object to the decision even if one party might not like that decision. It is hailed as a way of moving forward by establishing what seem to have broad support while ensuring that collective decision against vital interests of a state can be vetoed by that state.

Others see the essence of the "ASEAN Way" in the principle of non-intervention in the affairs of other states. Indeed that principle has been recognized by ASEAN member states from its early days. The Treaty of Amity and Cooperation in Southeast Asia (1976) counts "Non-interference in the internal affairs of one another" and "The right of every State to lead its national existence free from external interference, subversion or coercion" among the principles by which the High Contracting Parties shall be guided in their relations with one another. That emphasis on non-intervention should be understood with reference to the context of the Cold War. It was 1975 that Vietnam was unified by the communist regime. Thus the principle of non-intervention was to a considerable degree an expression of a collective commitment to the survival of non-communist regimes in the region against the communist intervention. It has been pointed out that in practice that principle has four components. First, it requires not criticizing the actions of a member government against its population. Second, it urges members to criticize the breach of the principle by other states. Third, it obliges member governments to deny recognition, safe haven and supports to the opposition groups seeking to overthrow governments of other member states. Finally, member governments are required to provide moral and material supports to efforts of other governments to suppress those opposition groups.

Thus the academic controversy on the precise definition of the "ASEAN Way" is still unsettled. One stresses

informality and consensus in cooperation between states while others advance the principle of non-intervention. It should be also noticed, however, that the two versions of the "ASEAN Way" we examined above do not exclude each other. Rather, both views are rooted in one and the same idea that is state sovereignty. Informality and consensus guarantee that the independence of a sovereign state shall not be restricted without its consent. That aspect of sovereignty has been long recognized in International Law. As early as in 1927, The Permanent Court of International Justice argued as follows:

> International law governs relations between independent States. The rules of law binding upon States therefore emanate from their own free will as expressed in conventions or by usages generally accepted as expressing principles of law and established in order to regulate the relations between these co-existing independent communities or with a view to the achievement of common aims. Restrictions upon the independence of States cannot therefore be presumed.

As for the principle of non-intervention, it also purports to protect state sovereignty. According to the International Court of Justice:

> In this respect it notes that, in view of the generally accepted formulations, the principle forbids all States or groups of States to intervene directly or indirectly in internal or external affairs of other States. A prohibited intervention must accordingly be one bearing on matters in which each State is permitted, by the principle of State sovereignty to decide freely. One of these is the choice of a political, economic, social and cultural system, and the formulation of foreign policy. Intervention is wrongful when it uses methods of coercion in regard to such choices, which must remain free ones.

Accordingly, despite differences in stress among scholars, it is safe to say that in essence the "ASEAN Way" prescribes the mutual respect of sovereignty between states in the Southeast Asia. Understood in that manner, the "ASEAN Way" is not the norms peculiar to that region. Rather it merely manifests and confirms the traditional international law of universal validity. But if that is the case, why ASEAN and its member states have called it the "ASEAN Way" as if it were the law peculiar to the region? That is because they put forward the "ASEAN Way" as a defense against the recent efforts in the international community to address the common issues such as promotion of human rights, protection of global environment and maintenance of global economy. Let us elucidate the point in the next section.

III. The "ASEAN Way" in Perspective

(1) The International Law of Coexistence

The traditional concept of sovereignty that stresses the freedom of states has been increasingly considered anachronistic especially since the end of the Cold War. International Law has pursued two purposes. First, it aims to

ensure the coexistence of states by preventing disputes and armed conflicts. For that purpose, international law has developed norms that delimit the scope of territorial sovereignty of each state, provide means for pacific settlement of international disputes and prohibit use of force between states. The principle of non-intervention assumes prime importance for ensuring the co-existence of sovereign states. In 1980s United States intervened in the affairs of Nicaragua to overthrow the Nicaraguan government, asserting that it established a totalitarian Communist dictatorship. Nicaragua brought the dispute before the International Court of Justice. The ICJ upheld the Nicaraguan claim, observing that "However the régime in Nicaragua be defined, adherence by a State to any particular doctrine does not constitute a violation of customary international law; to hold otherwise would make nonsense of the fundamental principle of State sovereignty, on which the whole of international law rests, and the freedom of choice of the political, social, economic and cultural system of a State." The ICJ also could not "contemplate the creation of a new rule opening up a right of intervention by one State against another on the ground that the latter has opted for some particular ideology or political system." Texts adopted in international fora that enshrine the principle of non-intervention, such as the General Assembly declaration on "Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations," envisage the relations among States having different political, economic and social systems on the basis of coexistence among their various ideologies.

(2) The International Law of Cooperation

Second, as the PCIJ's judgement we cited above confirms, international law is supposed to promote international cooperation "with a view to the achievement of common aims" in addition to the guarantee of co-existence of states with different ideologies. In the Cold War era, that part of international law that is called international law of cooperation played secondary role compared to the international law of co-existence. The most pressing need in that period was to ensure co-existence of states with hostile ideologies through the prevention of nuclear wars. The circumstances changed since the end of the Cold War. Violations of Human rights, deterioration of global environment and breakdown of global economy have gained prominence as issues that concern every member of the international community. Those issues need international collective action, because all states have common interests in coping with them but no state can singlehandedly resolve them. That collective action usually begins with the conclusion of multilateral treaties. Those treaties established objects and purposes that should be pursued collectively by contracting parties and lay down principles and rules legally binding the conduct of parties. In that manner those treaties limit the freedom previously enjoyed by states by virtue of the principle of state sovereignty. In addition, violations of those legal norms may lead to responsibility and sanctions that exert pressure upon violator states to comply with those norms. Finally, those multilateral treaties do not content with merely promulgating legal norms. They further establish international regimes whose mandate normally includes advising and supervising state parties concerning compliance with treaty norms, making new norms tailored to changed circumstances and settling disputes relative to interpretation and application of the treaty norms. Those regimes take a variety of forms. Some are established as formal international organizations provided with international legal personality such as WTO, IMF or EU. Others take form of conferences of contracting parties such as the COP of the United Nations Framework Convention on Climate Change. Still others

assume the character of international judicial procedure such as the European Court of Human Rights and the International Criminal Court.

(3) The "ASEAN Way" as a defense against the International Law of Cooperation

If we locate the "ASEAN Way" within that overall picture of modern international law, the "ASEAN Way" fits very well the international law of co-existence that was prevalent during the Cold War.

On the other hand, it apparently conflicts with the international law of cooperation that has gain momentum after the Cold War. Recall the main features of the "ASEAN Way". They are preference for informality as against formal institutions, consensus against majority voting, and non-intervention against coercion. Now it is easy to observe that those features may hamper the engagement with problems of common concern promoted through the international law of cooperation. That law establishes formal international institutions, makes legal norms restricting the freedom of states, and eventually allows coercion to enforce those norms. Consensus also sits uneasily with that law. The consensus approach tends to exclude contentious issues from formal multilateral agenda.

This is well demonstrated by the history of the development of the term "ASEAN Way". As we have seen above, respect for state sovereignty has long been accepted as a fundamental principle for the states in Southeast Asia. But it is only 1990s that it was articulated as the "ASEAN Way". That happened through the controversy on the policy towards Myanmar. The United States and European states attacked the violations of human rights and the suppression of democracy by the military regime of Myanmar and advocated imposing sanctions aimed at isolation of that regime in the international community. ASEAN and its member states persistently opposed to such a coercive policy and preferred managing the situation quietly in order to save the face of the military regime of Myanmar. And it is in this context that they invoked the "ASEAN Way" as a justification for such a conciliatory policy. The "ASEAN Way" thus developed as a means to fend off the human rights diplomacy with coercive measures pursued by western states.

Another instance where the "ASEAN Way" obstructs the effective engagement with issues of common concern is the coping with the transboundary pollution caused by forest fires in the region. In Indonesia, the practice of burning forests was widespread for cleaning lands for oil palm plantations. Such burnings have caused haze spreading across the border to pollute the air in neighboring countries such as Malaysia and Singapore. But at first Indonesia considered the fires to be its internal matters and declined assistance from ASEAN. It later changed the attitude and the cooperation within the region made progress leading to the adoption of the ASEAN Agreement on Transboundary Pollution in 2002. However Indonesia was the last to ratify the agreement only in 2014. Furthermore, the agreement itself is criticized that it largely relies on the voluntary cooperation by the contracting parties because it lacks mechanisms for ensuring compliance and enforcement. That reflects the aversion to establish formal institutions to ensure compliance with the agreement.

IV. Sovereignty as a Guarantee of Inclusiveness in the Age of Global Governance

We have so far observed that the "ASEAN Way" appears to contradict with the contemporary international

law of cooperation. It has developed to counter the western demands for sanctions against Myanmar in order to press it to respect human rights and democracy.

But is it necessarily the case that the "ASEAN Way" is incompatible with that international law of cooperation to tackle issues of common concern? Let me address the question now. My argument is that when we take into consideration recent opinions that point out flaws in the prevalent conception of the international law of cooperation, it is arguable that the "ASEAN Way" that includes informality, consensus and abstention from coercion can better serve the engagement with common issues.

(1) Management Model v. Enforcement Model

As we have seen, those who advocate the international law of cooperation usually emphasize the importance of sanctions to enforce the legal norms enshrined in formal multilateral treaties. However it is argued that sanction has not been effective in ensuring compliance with legal norms. Certainly that argument agrees with the dominant opinion that treaty practice has increasingly moved to multilateral regulatory agreements coping with common problems such as trade, monetary policy, resource management, security, environmental degradation and human rights that require cooperative action among states over time. However, it refutes the view that coercive enforcement measures are the effective means to ensure compliance with treaty norms. First, such view is based on the incorrect analogy to domestic legal systems where deployment of coercion monopolized by central governments is deemed to be essential in ensuring compliance with legal norms. Second, sanctions are very costly. Military sanctions usually bring about loss of many lives that would be unacceptable to the governments that take the military action. Non-military sanctions require heavy political investments to mobilize and maintain over time coordinated action among states while it usually takes very long time to change the behavior of violators. Third, consequently practice of sanctions has been incoherent and sporadic, which makes sanctions unreliable for enforcing legal norms. It also signifies that sanctions lack legitimacy because they contravene the axiom of equality that like cases shall be treated alike when they are imposed inconsistently among similar cases.

If that is the case, then what is the alternative to sanctions? Those who criticize sanctions put forward a management model that relies on cooperative, problem-solving approach to compliance. According to this model, it is supposed that in the contemporary setting of the international community the concept of sovereignty has transformed from the freedom of states to act independently in pursuit of national self-interests into good membership in international regimes that make up the substance of international life. As states need good positions in international regimes, it is presumed that they are willing to comply faithfully with legal norms unless that will is overturned by stronger countervailing considerations. Non-compliance does not usually result from the bad faith of states concerned. Rather, it is caused by ambiguity of norms, limitations on the capacity of states to comply with norms, and changes in circumstances over time that undelay the norms at the time of the conclusion of the treaties in question. In such cases of non-compliance, the compliance process should be verbal, interactive and consensual, as it would not help to resort to coercive sanctions. It proceeds through a kind of discourse between states, international organizations, and other stakeholders in order to identify the non-compliance, to diagnose causes of non-compliance, and to assist and empower

the non-compliant states to comply with norms. Accordingly, a flexible, non-binding process is preferred to adversarial formal adjudication.

(2) Sovereignty as Democratic Legitimacy

Another point to make is the role of consensus in guaranteeing democratic legitimacy. Certainly when consensus of all the parties is required for collective decisions, every party has veto power. If states abuse the power for pursuing selfish national interests they can obstruct advances in international cooperation for tackling issues of common concern. Multilateral treaty making based on consensus is thus highly costly in terms of speed and flexibility. First, it is time consuming. The engagement with the haze problem we have seen illustrates how long it took to have Indonesia ratify the ASEAN Agreement on Transboundary Pollution. Second, it is inflexible. Powerful developed countries are often forced to make concession to buy the consent from weaker countries in order to secure consensus on their agenda. Thus they prefer decision making methods that give more privileged position to them like the UN Security Council' decision making procedure. Developing countries may also demand majority voting methods because the consensus approach enables a few developed countries to block the decision that is supported by the majority that is developing countries.

But, arguably, the consensus approach can play the more positive role in the international law of cooperation. That law is different from the more traditional international law of co-existence largely in the two points. First, it is getting more and more intrusive into the matters whose regulation has been traditionally left to the freedom of states. Second, international regimes such as the UN, the EU, the COPs and international courts are actively involved in the management of that law. Those two factors in combination lead to the result that regulation on matters that affects the local population is imposed from those regimes on those while they cannot have a say on the making of the regulation. That is sometimes called "democracy deficit". Some American lawyers have been critical of international regimes like the WTO, the NAFTA and the International Criminal Courts. In their opinion, rule making by those international regimes undermines the institutional strategy of the US Constitution that is institutional checks and balances and popular accountability to protect liberty. Sovereignty in American law is intimately bound up with the constitutional commitments of procedural nature that American people expect that decisions affecting them will be made through specified constitutional processes by people who are accountable to them. They fear that law making and law enforcement by international regimes might sideline those domestic democratic arrangements.

To redress that flaw and make international law more democratic a variety of ideas has been put forward. One envisages a kind of parliamentary system at the international level. That idea has been partially realized in the EU through the establishment of the European Parliament. Others press for introduction into the international community of the principle of accountability to those affected by their activities. But what seems easier to realize is to bolster the consensus approach. The requirement of consensus in decision making in international regimes protects freedom of states. And as regards states that adhere to democracy, that freedom is used by democratically elected governments. Decisions by consensus in international regimes accordingly secure democratic legitimacy through governments elected by the popular vote.

V. Limits of the "ASEAN Way": the South China Sea Arbitration

1 Restraining the China through the "ASEAN Way": The DOC and the TAC

We have argued that the "ASEAN Way" does not necessarily obstruct international cooperation for the purpose of promoting common interests. Far from that, the main features of the "ASEAN Way", namely informality, consensus and abstention from coercion, can better serve the purpose than the other method that deploys formal enforcement measures based on non-consensual decisions in international regimes can. The latter is costly and consequently applied unequally between like cases. It further suffers from the democracy deficit.

It should be recalled, however, that that argument supposes that states are willing to comply faithfully with legal norms because they pursue to enhance their position in international regimes as fora of international cooperation to tackle issues of common concern. When that indispensable condition is not met, the vice of the "ASEAN Way" will come to the fore. So if a country pursues its national self-interests disregarding its position in international regimes, the "ASEAN Way" will not help to solve the issues. In such cases it may be necessary to resort to more formal, adversarial and coercive procedure such as international courts. The recent South China Sea Arbitration well illustrates the point.

The South China Sea Arbitration dealt with the Chinese activities in the South China Sea. As you all know, the territorial sovereignty and jurisdiction over maritime features like islands, rocks or law-tide elevations in the South China Sea has been claimed by neighboring states including Brunei, Malaysia, People's Republic of China, Taiwan and Vietnam. This arbitration was instituted by Philippine against the Peoples Republic of China in accordance with the dispute settlement provisions in the United Nations Convention of the Law of the Sea (UNCLOS). The UNCLOS allows a party to eventually unilaterally bring any dispute concerning the interpretation or application of this Convention to a judicial procedure even if the other party to the dispute does not consent to the judicial settlement. Philippine claimed among others that China's claims to sovereign rights jurisdiction, and to "historic rights", with respect to the maritime areas of the South China Sea encompassed by the so-called "nine-dash line" are contrary to the Convention and without lawful effect to the extent that they exceed the geographic and substantive limits of China's maritime entitlements expressly permitted by the UNCLOS. It also asserted that the maritime features such as Scarborough Shoal generates no entitlement to an exclusive economic zone or continental shelf and that China has unlawfully interfered with the enjoyment and exercise of the sovereign rights of the Philippines with respect to the living and non-living resources of its exclusive economic zone and continental shelf.

It should be noted first of all that the disputes over the South China Sea has long been addressed in accordance with the "ASEAN Way". Firstly, in 2002 the Foreign Ministers of ASEAN and the People's Republic of China adopted the "Declaration on the Conduct of Parties in the South China Sea (DOC)." It provides as follows:

> 1. The Parties reaffirm their commitment to the purposes and principles of the Charter of the United Nations, the 1982 UN Convention on the Law of the Sea, the Treaty of Amity and Cooperation in Southeast Asia, the Five Principles of Peaceful Coexistence, and other universally recognized principles of international law which shall

each serve as the basic norms governing state-to-state relations;

4. The Parties concerned undertake to resolve their territorial and jurisdictional disputes by peaceful means, without resorting to the threat of force, through friendly consultations and negotiations by sovereign states directly concerned, in accordance with universally recognized principles of international law, including the 1982 UN Convention on the Law of the Sea;

5. The Parties undertake to exercise self-restraint in the conduct of activities that would complicate or escalate disputes and affect peace and stability including, among others, refraining from action of inhabiting on the presently uninhabited islands, reefs, shoals, cays, and other features and to handle their differences in a constructive manner.

The declaration thus preferred friendly dialogue and self-restraint to adversarial and coercive measures to resolve the issue. Furthermore the parties followed the informal approach as the declaration was not legally binding. A legally binding code of conduct was opposed to by Malaysia. It however foresaw the adoption of such legally binding code of conduct by stipulating that "The Parties concerned reaffirm that the adoption of a code of conduct in the South China Sea would further promote peace and stability in the region and agree to work, on the basis of consensus, towards the eventual attainment of this objective."

Secondly, in 2003 ASEAN member states successfully got China to ratify the Treaty of Amity and Cooperation in Southeast Asia (TAC). As we have mentioned above, the TAC has been considered as the embodiment of the "ASEAN Way". The relevant provisions are as follows:

Article 13. The High Contracting Parties shall have the determination and good faith to prevent disputes from arising. In case disputes on matters directly affecting them should arise, especially disputes likely to disturb regional peace and harmony, they shall refrain from the threat or use of force and shall at all times settle such disputes among themselves through friendly negotiations.

Article 14. To settle disputes through regional processes, the High Contracting Parties shall constitute, as a continuing body, a High Council comprising a Representative at ministerial level from each of the High Contracting Parties to take cognizance of the existence of disputes or situations likely to disturb regional peace and harmony.

Article 15. In the event no solution is reached through direct negotiations, the High Council shall take cognizance of the dispute or the situation and shall recommend to the parties in conciliation. The High Council may however offer its good offices, or upon agreement of the parties in dispute, constitute itself into a committee of mediation, inquiry or conciliation. When deemed necessary, the High Council shall recommend appropriate measures for the prevention of a deterioration of the dispute or the situation.

> Article 16. The foregoing provisions of this Chapter shall not apply to a dispute unless all the parties to the dispute agree to their application to that dispute. However, this shall not preclude the other High Contracting Parties not party to the dispute from offering all possible assistance to settle the said dispute. Parties to the dispute should be well disposed towards such offer of assistance.
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> Article 17. Nothing in this Treaty shall preclude recourse to the modes of peaceful settlement contained in Article 33(1) of the Charter of the United Nations. The High Contracting Parties which are parties to a dispute should be encouraged to take initiatives to solve it by friendly negotiations before resorting to the other procedures provided for in the Charter of the United Nations.

Those provisions clearly indicate that the TAC aims at dispute settlement by agreements of the parties concerned brought about by peaceful negotiations. It also averts from judicial procedure rendering legally binding decision. Thus even when a dispute is referred to the High Council by the agreement of parties to the dispute, its power is always limited to making recommendation.

The DOC and the Chinese accession to the TAC were at that time seen as a success for the ASEAN member states. It seemed that China was committed to de-escalation and peaceful settlement of the disputes over the South China Sea. That view turned out to be wrong. The negotiation on the legally binding code of conduct was protracted. China did not stop occupying the disputed maritime features and strengthening military presence in the South China Sea. China also made some success in making discord between ASEAN member states over the policy towards China. In 2012 ASEAN Ministerial Meeting in Cambodia failed to issue any joint communique because consensus was not attained. Cambodia persistently opposed to the language that referred to the Chinese activities in Scarborough Shoal and called for respect for exclusive economic zones or continental shelves belonging to other states. Clearly the "ASEAN Way" proved to be helpless to restrain China.

2 The South China Sea Arbitration

It is against this background that Philippine decided to refer its dispute with China to the judicial procedure provided by the UNCLOS in 2013. Accordingly it was Philippine that is the original member of ASEAN, that in the judicial process downplayed the "ASEAN way" while it was China that underlined it in order to evade the judicial decision. China asserted in particular that the arbitration was precluded by the agreement between the Parties to resolve their disputes in the South China Sea through friendly consultations and negotiations. The relevant article of the UNCLOS is Article 281 that provides:

> 1. If the States Parties which are parties to a dispute concerning the interpretation or application of this Convention have agreed to seek settlement of the dispute by a peaceful means of their own choice, the procedures provided for in this Part apply only where no settlement has been reached by recourse to such means and the agreement between

the parties does not exclude any further procedure.

2. If the parties have also agreed on a time-limit, paragraph 1 applies only upon the expiration of that time-limit.

The question was thus whether the DOC and the TAC were the agreements to "seek settlement of the dispute by a peaceful means of their own choice" and whether the agreements excluded any further procedure that included the judicial procedure under the UNCLOS if they were considered as such agreements.

(1) The DOC

As for the DOC, China insisted that by signing the DOC, the Philippines and China have undertaken a mutual obligation to settle their disputes in relation to the South China Sea through "friendly consultations and negotiations" and thus "agreed to seek settlement of the dispute by a peaceful means of their own choice" within the meaning of Article 281. China further argued that although the DOC contained no phrase expressly excluding further procedure, an express exclusion was not necessary. In China's view, the exclusion of any third-party settlement obviously emerged from the paragraph 4 of the DOC as wells as the Parties' reaffirmation in the DOC and other instruments of negotiations as the means for settling disputes. China reinforced its position by stressing the "ASEAN Way" aspect of the DOD. It referred to the importance of the DOC's positive role in building trust and maintaining peace and stability in the South China Sea and warned that denying the DOC's significance could lead to a "serious retrogression" in the current relationship between China and the ASEAN member States.

Philippine altogether denied Chinese arguments; first, the DOC was merely a non-binding political document and consequently it was not an agreement within the meaning of Article 281. Second, it did not exclude recourse to the judicial procedure under the UNCLOS. In Philippine's view, in order to exclude recourse to the dispute settlement procedures under the UNCLOS it was necessary for agreements to expressly and specifically so provide. Third, the DOC did not implicitly exclude the judicial procedure under the UNCLOS because paragraphs 1 and 4 of the DOC referred to the UNCLOS and these references must necessarily include that procedure.

The Arbitral Tribunal ruled in favor of Philippine; The DOC was not intended to be a legally binding agreement with respect to dispute resolution. It was an aspirational political document. Article 281 required some clear statement of exclusion of further procedures while such statement was absent in the DOC. And in any event no such exclusion can be implied from the DOC.

(2) The TAC

As regards the TAC, China merely incidentally referred to it and accordingly did not expressly invoke it to deny the jurisdiction of the Arbitral Tribunal. However, the Tribunal called on Philippine to reveal their opinion on the relevance of the treaty for the purpose of the application of Article 281, since the TAC apparently was an agreement between the Parties that includes a range of choices for peaceful means of dispute settlement.

Philippine insisted that the TAC should not bar the judicial procedure from proceeding in accordance with Article 281. First, it does not constitute an agreement to settle disputes in any particular manner. Although Article 13

refers to "friendly negotiations" and Articles 14 and 15 refer to a set of procedures for a High Council to "recommend" certain non-adversarial means of dispute resolution, those methods shall not apply to a dispute unless "all the parties to the dispute agree to their application to that dispute" under Article 16. In particular no dispute shall be referred to the High Council without mutual consent of the parties to the dispute and neither China nor Philippine has consented to the recourse to the High Council. Finally, the TAC does not exclude recourse to the procedures under the UNCLOS. To the contrary, the language in Article 17 makes it "crystal-clear" that the Contracting States may have recourse to the modes of peaceful settlement identified in Article 33(1) of the Charter, which include "arbitration" and "judicial settlement".

Again the Arbitral Tribunal upheld the Philippine's position, finding that the TAC does not oblige to the parties a particular form of dispute settlement and does not exclude recourse to compulsory dispute settlement procedures. According to Article 16 it is necessary to make an additional agreement to identify the specific method of dispute settlement chosen by the parties to a particular dispute. Thus the TAC as such is not an agreement "to seek settlement of the dispute by a peaceful means of their own choice." In addition, the TAC "does not exclude any further procedure" because Article 17 refers to the modes of peaceful settlement contained in Article 33(1) of the Charter of the United Nations that includes arbitration.

Overall, the irony in the South China Sea Arbitration process is that the main features of the "ASEAN Way" embodied in the DOC and the TAC, such as informality, aversion to formal institutions, consensus, and non-adversarial dialogue is now expressly discredited by one of the ASEAN member states. The DOD is an informal agreement that prefers peaceful settlement of disputes through self-restraint and friendly negotiations. The TAC is certainly a legally binding multilateral treaty with a formal institution that is the High Council but emphasizes consensual and non-adversarial ways of dispute settlement by subjecting the setting into operation of the Council to the mutual consent of parties and by not endowing it with power to make legally binding decisions. This case therefore indicates that the "ASEAN Way" no longer helps even ASEAN member states to deal with issues of common concern when a country persistently blocks regional processes (ab)using the "ASEAN Way".

Conclusion

Let me summarize the results of the examination.

First, the "ASEAN way" is the catchword for norms applicable to international relations in the Southeast Asia advocated by ASEAN and its member states. Different understandings of it have been put forward since no authentic definition exists. One highlights the preference for consensus and informality that brings about aversion to formal international institutions, while others refer to the principle of non-intervention that proscribes coercive measures. They, however, have in common the prime purposes of the "ASEAN Way" that is the maximum respect for the state sovereignty that is the freedom of states

Second, the contemporary international law pursues two distinct purposes, namely, that of securing coexistence of sovereign states on the one hand and that of enhancing cooperation between states for addressing issues

of common concern. Norms of international law regarding peaceful settlement of international disputes, non-use of force and non-intervention serve first of all the co-existence of states, while the international law of cooperation deploys formal multilateral treaties that lay down legal norms limiting the freedom of states and establish formal international regimes to ensure compliance with those norms by states and to make new norms adapting to changing circumstances. Furthermore those regimes often impose sanction upon non-compliant states.

Third, although the "ASEAN Way" that stresses informal and consensual approaches to international relations appears to conflicts with the international law of cooperation, it is not necessarily the case. Certainly it hampers international cooperation when a state pursuing selfish national interests vetoes the collective decision and hampers efforts by international regimes. However, provided that every state is committed to the promotion of common interests and accordingly willing to cooperate with each other, the "ASEAN Way" may be the better way to enhance international cooperation than the alternative one that resorts to coercive sanctions to enforce international norms based on non-consensual decisions. Firstly, sanctions are not appropriate for the majority of cases of non-compliance caused by ambiguity of norms, limitations on the ability of states, and changed circumstances. In such cases an informal and consensual process of dialogue and persuasion is preferable. Secondly, the consensus approach redresses the democracy deficit of international regimes. The requirement of consensus in decision making in international regimes can promote democratic legitimacy of those regimes when voices of the local people influences the decision making through the votes of governments which are democratically elected.

Finally, the question of whether the "ASEAN way" promotes international cooperation through international regimes depends on whether each state is willing to cooperate to address issues of common concern. The recent South China Sea Arbitration indicates that when one state is not disposed to cooperate, the "ASEAN Way" obstruct international cooperation. In such a case, it may be necessary to have recourse to more formal and adversarial procedure like international courts.

In sum, although the "ASEAN Way" has been criticized for hampering international cooperation to promote common interests, it can help to effectively address issues of common concern, on the condition that states concerned are willing to cooperate with each other. However, as the South China Sea Arbitration illustrates, it is not taken for granted that the condition is always met. Accordingly the "ASEAN Way" cannot get along without formal and non-consensual procedure. It may be that ASEAN should develop some kind of international judicial procedure to regionally deal with cases like the South China Sea dispute.