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Dispute Settlement Mechanism between ASEAN States following the ASEAN Charter

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The Bangkok Declaration of 1967 had long been the main juridical instrument for ASEAN member states until the ASEAN Charter was adopted in 2007 at the 13th ASEAN Summit at Singapore. The Charter remained valid only until December 15th, 2008 when member states ratified it to act as a regional block for legal cases. However, the relationship between ten member states of ASEAN was not always cordial. There were disputes on regular basis about border or territorial annexation as in the case of Malaysia-Singapore at Batu Pateh, and Thailand-Cambodia border issue. Therefore, the need to devise a consistent, robust method of settlement of such disputes between ASEAN member states arose. The 2008 ASEAN Charter explains various methods of dispute settlement among member states, drawing attention to several articles of the Charter. The Charter also reiterated the need for a comprehensive analysis of the dispute settlement model regulated by the ASEAN Charter to ensure that it is acceptable to all parties concerned. This study demonstrates the implementation of the provisions of the ASEAN Charter as well as those of the Treaty of Amity and Cooperation in South-East Asia (TAC) which dealt with economic, legal and political disputes of the ASEAN nations.

Key words: *Juridical Analysis, Dispute Settlement, ASEAN Member State and ASEAN Charter.*

Introduction

The Association of Southeast Asian Nations (ASEAN), established on August 8, 1967, is one of the oldest regional organizations in Asia and in the international community. It is an association of nations with specific characteristics and diversity of each member nation. The Bangkok Declaration of 1967 proves to be a core and juridical instrument of ASEAN establishment. Based on this declaration, the ASEAN Charter was created in 2008 which

involved a long period and process. It was first initiated in January 2007 at the 12th ASEAN Summit at Cebu, which agreed to the formation of an ASEAN Community and signed a declaration of the Establishment of an ASEAN Community before 2015. In the 13th ASEAN Summit at Singapore, which took place on the 19-22 November 2007, two important documents were signed in order to ensure ASEAN cooperation— the ASEAN Charter, and the ASEAN Community Blueprint. The ASEAN Charter was effective from December 15, 2008 after the ratification of ten ASEAN member states, thus confirming the Charter that made ASEAN become a legitimate institution four decades after its establishment. In correlation with the formation of ASEAN Charter 2008, as a substitute for the Bangkok Declaration 1967 which has long been an instrument of establishment, ASEAN Charter 2008 became a new milestone for ASEAN to plan its future cooperation. The existence of the ASEAN Charter also made ASEAN sturdier by its "legal personality" which is often questioned by several parties.

The ASEAN Charter promised a reliable dispute settlement mechanism for trade related disputes in both domestic and multilateral businesses. Although it did not imitate the WTO dispute settlement mechanism, the ASEAN Charter did evolve into a relatively simple, diplomacy-based structure containing a detailed, legalistic, adjudication based mechanism which originated in the WTO. In correlation with the cooperation between the member states, the ASEAN Charter would prove a powerful legal instrument.

It is known that there is a fluctuating relationship between its ten member states, therefore the ASEAN Charter could be helpful in resolving the disputes or conflicts, if they arise. In particular that of the borders between Malaysia-Singapore on Batu Pateh, or between Thailand-Cambodia, etc. The disputes between member states are caused by conflicts of interest between each country. It is also undeniable that the territorial problem among them leads to physical clashes as demonstrated by the Cambodian-Thailand armies in 2010. Similarly, there are disputes over territorial claims of two nations such as Indonesia-Malaysia, disputing on Sipadan and Ligitan Island. This dispute which was tried at the International Court of Justice in 2002. There are many other similar disputes involving the ASEAN member states.

Indonesia also participated in signing the ASEAN Charter, 2008 and ratified it through Act No.38 of 2008. It was therefore "bound by agreement" and took initiatives in creating the ASEAN Community Blueprint for dispute settlement. Such a dispute settlement mechanism would have implications for Indonesia as well. This is because Indonesia was involved in disputes with other member states of ASEAN, and therefore must also accept any disputes settlement method that would be set out by this Charter. Indonesia had previously been involved in border and territorial conflicts on land and sea with other ASEAN member states such as Malaysia, Singapore and Philippines. Some were resolved through peace channels and negotiations, but many are still unresolved. Thus, it is a challenge for Indonesia to resolve these disputes peacefully and through the existing arrangements made by the ASEAN Charter.

However, ASEAN faced several challenges to achieve its goals, including the lack of a monitoring mechanism required to ensure effective implementation of ASEAN agreements as well as mobilized resources. The Bangkok Declaration of 1967 did not comprise and regulated to set up a dispute settlement mechanism for member states. To survive, it had to lower tariffs and curb behind-the-border economic hurdles, while non-tariff barriers remained a major impediment. Moreover, the global liberalization in trade and services had slowed down the industry despite their importance in the Indonesian region. In this case, the resolution among them was to be settled by "ASEAN spirit" only. ASEAN therefore needed a dispute settlement mechanism which came in the form of the ASEAN Charter and the Enhanced Dispute Settlement Mechanism of 2004 (the Vientiane Protocol).

The 2008 ASEAN Charter explained various ways of disputes settlement among member states, drawing attention to several articles of the Charter. The Charter also reiterated the need for a comprehensive analysis of the dispute settlement model regulated by the ASEAN Charter and acceptable to all parties concerned. This article examines the significance and the scope of the dispute settlement mechanism in ASEAN especially the Vientiane Protocol. It studies whether the ASEAN Charter as well as the Vientiane Protocol filled up the void of having a tool of settlement of disputes between ASEAN member states.

Economic Disputes Settlement in ASEAN

Ever since its establishment more than four decades ago, ASEAN has seen its 10-member states of more than half a billion population, rising their economic growth rate up to 5.8%. This equates toa total GDP of more than US $1000 billion in 2006 while maintaining this growth in all sectors consistently (Ade, 2003). Meanwhile, the total population of ASEAN nations has also increased which requires an increasing growth and improvement in transactional activity and cooperation between ASEAN member nations. In addition, ASEAN has also become an extraordinary potential market for the outside trade.

The existence of negotiable agreements in ASEAN is part of a specific international dispute settlement mechanism in the economic sector. The legal construction of AFTA, according to the Vienna Convention on the Law of Treaties 1969 in Article 2, states "Treaty means an international agreement concluded between states in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation." Thus, it suggests that international treaties should be interpreted as an agreement established between countries and governed by international law, equipped by an instrument or any specific purpose. In this category, AFTA was categorized as an international agreement with legal binding.

In addition, the ASEAN Integration Priority Sector has implemented various commitments. The economic ministers of ASEAN states have held regular dialogues with representatives of

the private sector, including the textiles, automotive, and logistics sectors. The decisions were made to include twelve priorities of integration sectors which were identified as catalysts for economic integration in the region. This includes: Agro-based industries, air transportation, automotive, electronics, e-ASEAN/ICT, fisheries, health services, logistics, rubber and the offshoot, textiles and clothing, tourism, wood and its derivative products.

Legal Disputes Settlement in ASEAN

There are two types of international disputes in the study of public international law —one, legal or judicial disputes and two, political or no justiciable disputes. There are no absolute and generally accepted criteria in correlation with the two terms. The benchmark to call a dispute as a legal dispute is if it could be submitted and resolved by international court (Huala, 2004).

In addition, according to Malcolm N. Shaw (Malcolm, 1991), an international law expert, the international law, in principle, distinguishes international disputes politically (involving diplomatic procedures) and legally (involving adjudication). He further argues: "The former involves an attempt to resolve differences either by the contending parties themselves or with the aid of other entities by the use of discussion and fact-finding methods. Adjudication procedures involve the determination by a disinterested third party of the legal and factual issues involved, either by arbitration or by the decision of judicial organs".

A similar opinion was held by Boer Mauna (Boer, 2003) who stated that a dispute could be political or legal. The political dispute occurs when the state bases the claim on non-juridical considerations, for example, based on politics or other national interests. Legal dispute, however, occurs when there is a dispute or claim on the provisions in agreement or seeking their recognition by the international law (Boer, 2003).

On the other hand, there is also an argument that the distinction between legal and political disputes are not an issue if it is within the scope of an international dispute. However, there is no scientific justification and objective to demonstrate the distinction between political and legal disputes. Every single dispute between sovereign states has both political and legal aspects. Meanwhile, the International Court of Justice opined that an international dispute is a situation when two states have contradictory concern on whether the responsibilities in the agreement are carried out. The Court further states that "… whether there exists an international dispute is a matter for objective determination. The mere denial of the existence of a dispute does not prove its non-existence … There has thus arisen a situation in which the two sides hold clearly opposite views concerning the question of the performance or non-performance of treaty obligations. Confronted with such a situation, the court must conclude that international dispute has arisen." (Martin and Robert, 1991).

In addition, it could be stated that a dispute does not fall under an international law concerned when its settlement has no effect to the relations of the two parties. In the case of Northern Cameroons, for instance, the International Court of Justice first asked the parties to settle the dispute on the interpretation of UN trusteeship that was no longer usable. The applicant, in this dispute, did not claim anything to the other party. Thus, the Court refused to try the case by stating that in hearing a dispute, the decision issued must have a practical effect on the legal relations of the concerned parties. Therefore, in this case, it is required to establish a relationship between the dispute and the parties so that it can be categorized as an international one.

International Treaties and ASEAN Charter

International treaties play an important role in regulating life and relationships between countries. Through the use of a treaty, every single state outlines their cooperation basis, organizes activities, resolve problems for community for their survival. In the interdependence era, there is no country which is not governed by treaties for its international existence. International Treaties, as the main source of international law, is a legal instrument that accommodates the will and approval of the state or other international legal subjects to achieve the collective purpose based on international law. This is the base of regulation of states activities or other international legal subjects. The establishment of this agreement is a legal act that binds the parties on it.

According to Rebecca M. Wallace, the agreement represents the most substantial and reliable method on identification what has agreed by the states. This is because international agreement (in written) provides a guarantee of legal security to the concerned parties as well as the third one. For example: the contents, intentions, and objectives of parties implied can be known by reading and understanding the content (Wallace, 1996). Similarly, regarding the establishment method, binding and termination of validation, it has been regulated in a standard manner which is recognized and respected by all states in the world (Wayan Parthiana, 1990).

Furthermore, there is also a consideration by Article 2 paragraph 1 point of the 1969 Vienna Convention on International Treaties that: "Treaty means an international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two more related instruments and whatever its particular design". Therefore, based on the Convention, it is said that an International Agreement is an international treaty involved by the states in written and regulated by international law, whether in single, two instrument or more interrelated instruments regardless the name.

The ASEAN Charter has also been accepted as an International Treaty. Like an International Law, it increasingly regulates issues of the inter-state relationship or nations bound with

treaties. Since the beginning, even in its embryonic form, the Charter has been used to regulate inter-state relations and mutual problems of member nations (EdySuryono, 1984). Article 22 of the ASEAN Charter stated that 'ASEAN shall maintain and establish dispute settlement mechanisms in all fields of ASEAN cooperation'. Furthermore, Article 24 also stated that where specific ASEAN instruments contain dispute settlement mechanisms so that disputes within the purview of the instrument should be settled in the manner stipulated. However, for trade disputes, article 24 (3) ASEAN Charter stated:" …where not otherwise specifically provided, dispute which concern the interpretation or application of ASEAN economic agreements shall be settled in accordance with the Vientiane Protocol."

This clause was is the most important provision in the Charter, as it hinted at the economic integration of the region. It proved that in order to have a consistent economic integration, ASEAN should have binding dispute settlement mechanism to ensure a smooth trade transaction. The Vientiane Protocol was also a means to ensure that legally binding decisions should be made and enforced in the ASEAN region.

Juridical Analysis of Settlement of Border Disputes between ASEAN Member States according to the ASEAN Charter

The arrangements of ASEAN dispute settlement are provided in the Treaty of Amity and Cooperation in South-East Asia (TAC) signed in Bali, on February 24, 1976. There were three important agreements at the Bali Summit:

1. Treaty of Amity and Cooperation in South East (TAC)
2. Bali Concord I
3. Agreement Establishing the ASEAN Secretariat

Out of these three instruments of the Bali Summit, only the TAC was legally binding for all ASEAN member states, as this agreement included a mechanism for ratification of all member states so that the provisions in the agreement could be applied. The main elements of TAC were the principles that must be adhered by all ASEAN countries in dealing with each other, for example, mutual respect, non-interference, renunciation of use of force and peaceful settlement of dispute, etc. Moreover, the TAC stipulated in detail the efforts to strengthen relationship between countries, and insisted upon taking steps to improve cooperation among ASEAN states.

For the realization of ASEAN Community, it was mandatory for all ASEAN states to implement the TAC provisions, though so far, the High Council had not formally been established. This however does not mean to indicate the failure of ASEAN countries in implementation of TAC. Even though almost all Southeast Asian countries have border

disputes with another one, wars in Southeast Asia for the last few decades have been avoided. It is undeniable that what makes the Southeast Asia as one of the most stable regions in the world is its respect for TAC principles—particularly, renunciation of use of force and peaceful settlement of dispute.

In addition, towards the realization of the ASEAN Community 2015, there were advanced expectations for the TAC to be able to function as a code of conduct for ASEAN countries. A lot of parties expected that ASEAN countries could resolve their disputes, especially territorial problem, by using the methods vested in TAC. However, the expectations were based on a few mistaken assumptions and understandings. This was proven a fact when, despite having applied the TAC regulations, all efforts by Indonesia and Malaysia for dispute settlement of the Sipadan-Ligitan through the International Court of Justice were subjected to criticism of many parties.

Consequently, henceforth the TAC mechanism was never applied in any dispute's settlement by member states nor the TAC provisions were used to determine any functions of ant dispute mechanism. The provisions of TAC on dispute settlement were just the fragments of entire contents. Even the regulation on the High Council consisted of only two articles (No. 14 and 15) out of 20 articles in the TAC. As a code of conduct of association between ASEAN countries, the scope of TAC arrangements was though extensive (Abdul, 2019). Hence, the first common mistake was to assume that the TAC was a legal instrument which regulated the mechanism of dispute settlement in ASEAN through a High Council.

The second mistake was the assumption that disputes settlement through the High Council mechanism gave the effect of something absolute and an obligation of the TAC. In fact, the High Council mechanism was optional. Article 16 of the TAC expressly stated that the High Council mechanism could be carried out if all disputed parties agreed. The optional characteristic was reaffirmed by Article 17 of the TAC which stated that the provisions in the TAC cannot preclude the use of dispute settlement mechanisms as stipulated in the UN Charter (the provision was reaffirmed in Article 28 of the ASEAN Charter). Therefore, in principle, the TAC still provided the possible extensive freedom to ASEAN countries to choose the desired method of dispute settlement, including other mechanisms besides the High Council mechanism (Abdul, 2019).

Furthermore, when the ASEAN Charter 2007 replace the Bangkok Declaration 1967, ASEAN already had a new and powerful legal instrument than before. One of the chapters of the ASEAN Charter was the settlement of disputes regulated in Chapter VIII (Articles 22-28). Before looking at the provisions on dispute settlement, first we must consider the preamble of the ASEAN Charter. In the opening, it stated that there must be respect for friendship and cooperation as well as the principles of TAC with several additional principles—united in

differences and consensus. Hence TAC was deemed to be a reference to establish the ASEAN Charter. Likewise, Article 2 of the ASEAN Charter stated the fundamental principles, in paragraph 2, could be claimed as a clause for peaceful settlement of dispute and as the main principles of the ASEAN Charter.

While turning to Chapter VIII of the ASEAN Charter, it was found that the title of chapter did not include the term of *pacifiq* (peace), but only a Settlement of Dispute. The title seemed inconsistent with the principle mentioned in Article 2, paragraph 2, point d. whereas paragraph 1, of the same article, stated that in order to achieve the target, it must be based on declarations, treaty, agreement, convention, concord and other instruments in ASEAN. The settlement of dispute referred to in the charter was undeniably TAC 1976. The provisions of the TAC were thus well defined in Chapter IV, which used the title Pacific Settlement of Disputes. Although there are irregularities in labelling of chapter titles, it must be considered to know how the dispute settlement was arranged in the ASEAN Charter.

Article 22 of ASEAN Charter describes the principles adopted in dispute settlement which included the principles of dialogue, consultation and negotiation (paragraph 1). In paragraph 2, the Charter stated that ASEAN must establish a dispute settlement mechanism for all cooperation sectors. It can be interpreted that the Charter recommends dispute settlement mechanisms in every single section such as politics, security, economy and socio-culture. The Charter also stated that the dispute settlement mechanism should adhere to good services, conciliation and mediation. The Chairperson or Secretary General of ASEAN may be requested to provide the mechanism (Article 23). The provision was less than stipulated in the TAC; and inquiry was not included in the charter mechanism.

The Article 24 of the ASEAN Charter deals with the settlement of dispute in specific instruments. The Paragraph 1 states that when an instrument is to be set up, a mechanism must be applicable. If the dispute is not related to a specific instrument, the mechanism would be TAC 1976 with the rules and procedures of its 2001 version. In the last paragraph, when it comes to the economic cooperation, it adheres to the dispute settlement by using the ASEAN Protocol on Enhanced Dispute Settlement Mechanism 2003, in lieu of the Dispute settlement mechanism, 1996.

Conclusion

This study highlighted the arrangements of ASEAN dispute settlement as it existed before formation of the ASEAN Charter 2007. The study also discussed the Treaty of Amity and Cooperation in South-East Asia (TAC) signed in Bali, February 24, 1976. The main instruments of the TAC were the principles that must be obeyed by all ASEAN countries in dealing with one another (for example, the principle of mutual respect, non-interference, renunciation use of force and peaceful settlement of dispute, etc.). The TAC aimed at

strengthening friendly relationship between the member states, as well as take steps required to enhance ASEAN cooperation. While the ASEAN Charter 2007 regulated the mechanism for dispute settlement in principle, the TAC stated that ASEAN must establish a dispute settlement mechanism in all cooperation sectors, such as politics, security, economy and socio-culture. The TAC also provided for an economic agreement, for the settlement of economic disputes to be resolved by using the ASEAN Protocol on Enhanced Dispute Settlement Mechanism, 2003.

REFERENCES

Abdul, K.J.(2019). Penyelesain Sengketa ASEAN berdasarkan Traety of Aminity. https://kadirjailani.wordpress.com accessed on Agust 14, 2019.

Ade, M. (2003). *rganisasiInternasionaldanIntegrasiEkonomi Regional dalamPerspektifHukumdanGlobalisasi*,Ghalia Indonesia, Jakarta

Amiruddin dan Zainal, A. (2010). *PengantarMetodePenelitianHukum*,Grafindo, Jakarta.

Beverly, M. C. (2001). *Trade and Developing World in the 21 th Century*, Transnational Publisher, New York

Boer, M. (2003). *Hukum Internasional, Pengertian, Peranandan Fungsi Dalam Era Dinamika Global.* PT. Alumni, Bandung.

Bucklin, W. (1975). Regional Economic Cooperation in Southeast Asia. Ann Arbor: University Microfilms International.

Davidson, P. J. (1997). The Legal Framework for International Economic Relations. Singapore: Institute of Southeast Asian Studies.

Davidson, P. J. (2002). ASEAN-The Evolving Legal Framework fo Economic Cooperation. Singapore: Times Academic Press.

EdySuryono, (1984). *PraktekRatifikasiPerjanjianInternasional di Indonesia*,RemadjaKarya, Bandung

Huala, A. (2004). *HukumPenyelesaianSengketaInternasional.* SinarGrafika, Jakarta, hlm.3.

Huala, A. (2005). *HukumEkonomiInternasional, SuatuPengantar*, PT. RajaGrafindoPersada, Jakarta

John, H. J. (1985). *International Economic Law*, dalam R. Bernhardt (ed), Encyclopedia of Public International Law, Instalment.

Kausarian, H., Sri Sumantyo, J. T., Kuze, H., Aminuddin, J., & Waqar, M. M. (2017). Analysis of polarimetric decomposition, backscattering coefficient, and sample properties for identification and layer thickness estimation of silica sand distribution using L-band synthetic aperture radar. *Canadian Journal of Remote Sensing*, *43*(2), 95-108.

Kausarian, H., Sumantyo, J. T. S., Kuze, H., Karya, D., & Panggabean, G. F. (2016). Silica Sand Identification using ALOS PALSAR Full Polarimetry on The Northern Coastline

of Rupat Island, Indonesia. *International Journal on Advanced Science, Engineering and Information Technology*, *6*(5), 568-573.

Kausarian, H., Batara, B., Putra, D. B. E., Suryadi, A., & Lubis, M. Z. (2018). Geological Mapping and Assessment for Measurement the Electric Grid Transmission Lines in West Sumatera Area, Indonesia. *International Journal on Advanced Science, Engineering and Information Technology*, *8*(3), 856-862.

Koh, T. (2009). The Making of The ASEAN Charter. Singapore: World Scientific Publishing Co.Pte.Ltd.

Malcolm, N. S. (1991). *International Law.* Grotius Publication Limited, England.

Martin, D. and Robert, M. (1991). *Cases and Materials on International Law.* London: Blackstone.

Rebecca, M. W. (1996). *International Law*, Sweet & Maxwell, London,1986, diterjemahkanolehBambangArumanadi, HukumInternasional, IKIP Semarang Press, Semarang.

The ASEAN Secretariat, (2009). *Roadmap for an ASEAN Community 2009-2015,* Jakarta.

Wayan Parthiana, I. (1990). *Pengantar Hukum Internasional*, Mandar Maju, Bandung.