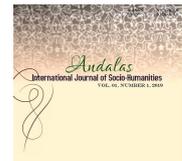




Available online at : <http://aijosh.lppm.unand.ac.id/index.php/aijosh/>

Andalas International Journal of Socio-Humanities

| ISSN 2715-601X (Online) |



Article

The Form of Dispute Settlement in The Border of Sea Region of Asean State Members and Its Implications to Indonesia

Delfiyanti¹

¹Faculty of Law, Universitas Andalas, Indonesia

ARTICLE INFORMATION

Received: May 16, 2020
Revised: June 24, 2020
Available online: July 27, 2020

KEYWORDS

Resolution of Sea Region Dispute, ASEAN State Members, ASEAN Charter, Implications and Indonesia.

CORRESPONDENCE

E-mail: defi_anti@yahoo.com

A B S T R A C T

The ASEAN Charter itself has been recently effective on 15th December 2008 after going through the ratification of the ASEAN state members that have ratified a charter that makes the regional bloc into an "legal" institution (Legal Personality) for the first time. As we know the relationship among ten ASEAN state members does not always work smoothly. Sometimes disputes arise also where the most frequently occurring case is concerned to the regional border or annexation of Malaysia-Singapore about the regional annexation of Batu Pateh, Thailand-Cambodia border as a seizure and the other border areas. Particularly in the sea region a dispute is often occurred among ASEAN state members since at some certain marine areas it is still not yet clear about the borders of its territory. This has resulted in overlapping claims among these countries. It influences the fishing areas where the fishing boats and fishermen would be considered illegal fishing when crossing the boundaries of sea claimed by a country. Though the sea areas are not yet clear about the ownership. Eventually it became a dispute among ASEAN state members. Hence, it takes ways of resolving disputes among ASEAN state members. In this case, the ASEAN Charter contains the methods for settling disputes among ASEAN state members. Indonesia itself is one of ASEAN state members which has sea border with some ASEAN state members which also have sea dispute. Therefore, Indonesia also participated and signed the agreement and will also be bound at later by the ways set out in the ASEAN Charter.

INTRODUCTION

ASEAN (Association of Countries in the Region of South East Asia), which was established on August 8, 1967 is one of the regional organization in Central Asia's long-standing and

accounted for in the international community. ASEAN is an association of nations that have specific characteristics and has a plurality of highly variant each other from any perspective. After 40 years of the founding of ASEAN, the current members have been covering 10 countries with a population of over half a billion and an economic growth rate of 5.8% and the total GDP of over US \$ 1,000 billion in 2006 and continued to increase in many areas.¹

After a long time the Bangkok Declaration of 1967 became the principal instrument and the juridical establishment of the ASEAN then in 2008 formed the ASEAN Charter. The process of the emergence of any of the ASEAN Charter requires time and a long process. It begins at a meeting of ASEAN leaders agreed that ASEAN cooperation is directed to the formation of the ASEAN Community. Later in the 12th ASEAN Summit in Cebu in January 2007 has been agreed "Declaration on the Acceleration of the Establishment of an ASEAN Community by 2015". In the end at the 13th ASEAN summit in Singapore on 19-22 November 2007 was signed two important documents in the framework of ASEAN cooperation, namely the ASEAN Charter and the ASEAN Community Blueprint. The new ASEAN Charter into effect on December 15, 2008 after going through the ratification of the ten ASEAN member countries that have ratified a charter that makes the regional bloc into a legitimate institution for the first time in the history of four decades since its founding. Associated with the formation of the ASEAN Charter in 2008 and as a replacement for Bangkok Declaration of 1967 that has long been the establishment of an ASEAN instrument the ASEAN Charter of 2008 come into a new milestone for ASEAN in view of its cooperative relations forward. The existence of the Charter (ASEAN Charter) that make ASEAN to more firmly with the legal personality that is often questioned by many various parties.

It deals with the relationship of cooperation between ASEAN member countries that require strong legal instruments such as the Charter to bridge it. As we know the relationship between the ten ASEAN member countries are not always run smoothly. Sometimes disputes arise also where the most common is concerning boundaries or seizure of territory, especially in the Mediterranean such as the dispute Indonesia - Malaysia in Ambalat. A dispute between the ASEAN member countries due to conflict of interest in each country, especially with regard to fishing areas and natural resources and minerals in the sea. In addition, there is also a dispute concerning the annexation of the island claimed by each party as their own who also has an impact on the determination of the ownership of the sea area such as the case of Indonesia - Malaysia relating to the ownership of Sipadan Island. And there are many other disputes involving ASEAN member countries as geographically more than half the member countries of ASEAN is surrounded by the sea so about each sea area between them.

Hence, it takes ways of resolving disputes against the seizure of marine areas into boundaries among ASEAN member countries. In this case, the Bangkok Declaration of 1967 never load and set methods for settling disputes among ASEAN members that the settlement of disputes among ASEAN member countries more resolved through "ASEAN spirit" alone.

This is in contrast with the ASEAN Charter in 2008 which has started to load the ways of settlement of disputes, including in the sea among ASEAN member countries are regulated in several articles contained in the ASEAN Charter. In this case needs deeper analysis of the models of dispute resolution such as whether that is set in the ASEAN Charter that can be accepted by the member countries of ASEAN to the dispute. For Indonesia itself which has

¹ Ade Maman Suherman, 2003, *International Organization and Regional Economic Integration in Perspectives of Law and Globalization*, Ghalia Indonesia, Jakarta, p.147.

signed the ASEAN Charter (ASEAN Charter) in 2008 and ratified by Law No. 38 of 2008 Indonesia "bound by the contents of the agreement". This has obvious implications for Indonesia where when Indonesia dispute with the members of ASEAN countries in the sea area, the other must also consider ways of resolving disputes which have been stipulated in the ASEAN Charter. Indonesia itself has some disputes with other ASEAN member countries such as Malaysia, Singapore and the Philippines related to the border conflict and annexation, both on land and at sea.

RESULT AND DISCUSSION

Juridical Review on The Form of Sea Border Dispute Settlement Between The Member States in The Review of ASEAN Charter

Before the ASEAN Charter formed the ASEAN dispute settlement arrangements contained in the Treaty of Amity and Cooperation in South-East Asia (TAC) signed in Bali, February 24, 1976. The results of the Bali summit there are three things, namely:

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

Of the three instruments, generated at the Bali summit, only the TAC only legally binding all ASEAN members, as listed in the treaty ratification mechanism all Member States of the provisions contained in the agreement can take effect. Towards the realization of the ASEAN Community in 2015, the expectations of the Treaty of Amity and Cooperation (TAC) functioning as a code of conduct for ASEAN countries is increasing. Many people expect the state - ASEAN countries can resolve disputes, especially disputes the sea area by using the way - the way defined by the TAC. However, the expectation - the expectation is based on several assumptions or misconceptions. Indeed, the provisions regarding the settlement of disputes TAC only a fraction of the entire TAC. Even the setting of the High Council comprising only two articles (Articles 14 and 15) of the 20 chapters that exist in the TAC. As the code of conduct interaction between the ASEAN countries, the scope of the TAC setting quite extensive.²

TAC main elements are the principles that must be obeyed by all ASEAN countries in their dealings with one another (e.g., the principle of mutual respect, non-interference, renunciation use of force and peaceful settlement of dispute, and others). TAC also details the about the efforts to strengthen the friendly relations between countries, as well as the steps that need to be done to boost ASEAN cooperation. Indeed, so far the High Council had never formally functioned. However, this fact does not necessarily reflect the failure of ASEAN countries in implementing the TAC. Although almost all Southeast Asian countries have disputed sea border with other Southeast Asian countries, the war in Southeast Asia in recent decades been averted. It is undeniable that the success of ASEAN's efforts to turn Southeast Asia as one of the most stable in the world is the respect for the principles of TAC, which is renunciation use of force and peaceful settlement of disputes. There is a mistake as though the settlement of disputes through High Council mechanism is something that is absolute and is an obligation according to TAC. The fact is the actual mechanism of the High Council are optional. TAC Article 16 explicitly states that the mechanism of the High Council can only be done if all parties to the dispute agree. The optional nature was reaffirmed by Article 17 TAC which states

² Abdul Kadir Jaelani, "The Settlement of ASEAN dispute based on Treaty of Amity", <https://kadirjailani.wordpress.com>, June 14,2014.

that the provisions of the TAC can not preclude the use of the dispute settlement mechanism set out in the UN Charter (this provision is reaffirmed in Article 28 of the Charter). Thus, in principle TAC still provide the broadest freedom to ASEAN countries to select the desired means of dispute resolution, including completing other mechanisms in addition to the mechanism of High Council.³

Therefore, Indonesia and Malaysia's decision to bring the case Sipadan - Ligitan to the International Court can't be regarded as a step that could reduce the credibility of the TAC. Instead, the decision is actually a reflection of the maturity of diplomacy to manage and resolve disputes between countries in accordance with Article 2 and Article 17 TAC. Based Article 24 of the Charter expressly provides that not all disputes can be resolved through the mechanism of TAC. TAC mechanisms can only be applied to disputes that are not related to the interpretation or application of the Charter or other ASEAN instruments. Article 14 states that the TAC dispute resolution used to resolve disputes relating to the political problems that could undermine the security of the region.

Furthermore, through the Charter created replaces the 1967 Bangkok Declaration of ASEAN already has legal instruments are new and more powerful than ever. One of the chapters contained in the ASEAN Charter is the dispute resolution set out in Chapter VIII of the Settlement which consists of Articles 22-28 of the UN Charter. Before looking at the dispute settlement provisions in the charter, we must first see the preamble contained in the ASEAN Charter. In the opening chapter stated that with respect friendship and cooperation as well as the principles contained in the TAC with some additional principles, namely, unity in diversity and consensus. By looking at the opening of the charter as it was, the TAC can be considered as one of the references used in the formation of the ASEAN Charter. Article 2 of the Charter which states the fundamental principles, in paragraph 2 points d, can be read that the peaceful resolution of disputes still one of the main principles of the ASEAN Charter.

If we turn to Chapter VIII, the ASEAN Charter, the chapter titles include the word Pacifiq (peace), the title of the chapter is written only Settlement of Dispute. The use of the title of the chapter looks inconsistent with the principles mentioned in Article 2 paragraph 2 point d. In fact, if we refer to in paragraph 1 in the same chapter, states that in achieving the objectives of ASEAN, should be based on the declaration, treaty, agreement, convention, concord and other instruments that exist in the ASEAN, the settlement of disputes which serve as references in the Charter must TAC 1976 . Conditions in the TAC clearly in Chapter IV, who uses the title Pacifiq Settlement of Disputes (Dispute Resolution by Damain). Although there were irregularities in naming the chapter title, now to be seen how the dispute settlement arrangements in the ASEAN Charter.

Article 22 of the UN Charter describes the principles adopted in the settlement of disputes under the Charter. The principle is the dialogue, consultation and negotiation (paragraph 1). In paragraph 2 stated that ASEAN should create a dispute resolution mechanism in all areas of cooperation. This may imply that in every area, among others, the political-security, economic and socio-cultural will have a dispute settlement mechanism, respectively.

Dispute settlement mechanism within the Charter only adheres to good offices, conciliation and mediation. Chairman of ASEAN or the Secretary General may be requested to provide such a mechanism (Article 23). This provision is far less than those defined in TAC, where the investigation (inquiry) is not included in the charter mechanism.

³ Ibid.

Article 24 of the UN Charter governing the settlement of disputes contained in the specific instruments. In Article 24, paragraph 1 stated if the particular instrument has set the dispute settlement mechanism, the mechanism was used. In the event of a dispute that is not associated with a specific instrument, the mechanism used is TAC in 1976 along with the rules and procedures of 2001. In his last paragraph is, when dealing with the economic agreement, the settlement of disputes resolved by using the mechanism of the ASEAN Protocol on Enhanced Dispute Settlement Mechanism 2003 in lieu of Dispute settlement mechanism in 1996.

Implications for Indonesia

Protocol to the ASEAN Charter on Dispute Settlement Mechanisms hereinafter called the Protocol on Dispute Settlement Mechanism and its fourth Attachment signed by the ASEAN Foreign Ministers on ASEAN Summit 16th in Hanoi, Vietnam on April 8, 2010. Fourth Protocol annex in question is (i) Rules of Good Offices; (ii) Rules of Mediation, (iii) Rules of Conciliation and (iv) Rules of Arbitration. In the process, has made the signing of the Instrument of Incorporation of (i) Rules for Reference of unresolved Disputes at the ASEAN Summit 17th in Hanoi, Vietnam dated October 27, 2010 and (ii) Rules for Reference of Non-Compliance to the ASEAN Summit to the Protocol to the ASEAN Charter on Dispute Settlement mechanism in 20th ASEAN Summit in Phnom Penh, Cambodia on April 3, 2012. The signing of the Instrument of Incorporation do to make both of these documents as attachments and inseparable part of the Protocol on Dispute Settlement mechanism. In connection with this matter, and as a follow-up to the signing of the Protocol on Dispute Settlement Mechanism, the Indonesian government should immediately start the process of ratification of the Protocol shall through Presidential Regulation by reference to Law No. 24 of 2000 on the International Treaty and Law Number 12 Year 2011 on the Establishment Legislation.

The purpose of ratification is to provide a legal basis for the entry into force of the Protocol on Dispute Settlement Mechanism. In Article 19 of this Protocol stipulated that the Protocol on Dispute Settlement Mechanism shall be ratified by all the member states of ASEAN in accordance with the laws and regulations of each country. This Protocol entered into force on the later of the date of deposit of the tenth instrument of ratification with the Secretary-General. With the ratification of the Protocol shall, ASEAN has a mechanism for settling disputes relating to the interpretation or application of the Charter and other ASEAN instruments if not regulated so as to strengthen the implementation of the ASEAN Charter and other ASEAN instruments that do not have their own dispute settlement mechanism.

Ratification of this Protocol will provide benefits for the Government of Indonesia, among other things, for:

1. Realizing Indonesia's commitment to the ASEAN agreement on the maintenance of peace, security and stability and further reinforce the values oriented to peace in the region.
2. Realizing Indonesia's commitment to the ASEAN agreement to act in accordance with the principles of the ASEAN Charter that emphasizes the peaceful resolution of disputes.
3. Provide a forum for Indonesia in the settlement of disputes related to the interpretation ASEAN charter and other ASEAN instruments which do not have a dispute settlement mechanism.

4. Provide legal certainty to Indonesia for the settlement of disputes related to the interpretation of the ASEAN Charter and other ASEAN instruments which do not have a dispute settlement mechanism.

CONCLUSIONS

1. ASEAN dispute settlement arrangements before the establishment of the ASEAN Charter in 2007 is contained in the Treaty of Amity and Cooperation in South-East Asia (TAC) signed in Bali, February 24, 1976. The main elements of the TAC are the principles that must be obeyed by all countries - ASEAN countries in their dealings with one another, while the ASEAN Charter in 2007 set the dispute with the mechanism principles is dialogue, consultation and negotiation Article 22 (paragraph 1). In paragraph 2 stated that ASEAN should create a dispute resolution mechanism in all areas of cooperation. This may imply that in every area, among others, the political-security, economic and socio-cultural will have a dispute settlement mechanism respectively. Dispute settlement mechanism within the Charter only adheres to good offices, conciliation and mediation. Chairman of ASEAN or the Secretary General may be requested to provide such a mechanism (Article 23). Besides, Article 25 determines the dispute settlement mechanism using arbitrage mechanism, if the mechanisms available within ASEAN is not there anymore. Article 26 governs the dispute can't be resolved by a variety of mechanisms that have been set in this charter, then the dispute will resolved through the summit. In general the United Nations Charter put forward the settlement of disputes among ASEAN member countries, including in marine areas using a "peaceful" manners and not through violence.
2. Implications of ASEAN dispute settlement involving Indonesia related to the participation of Indonesia in signing the ASEAN Charter, among others bound and obliged to prioritize the mechanisms that have been set in this protocol in settling the disputes by peaceful means through negotiation mechanisms, mediation, conciliation, and arbitration, If Indonesia has entered into agreements with other ASEAN member countries, the dispute settlement mechanism will apply if the agreement made is not expressly regulate its own dispute settlement mechanism.

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