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ASEAN COURT OF JUSTICE: ISSUES, OPPORTUNITIES AND CHALLENGES CONCERNING REGIONAL SETTLEMENT DISPUTES

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ABSTRACT

Arbitration as a final mechanism of ASEAN dispute settlement is considered unfulfilling ASEAN state member needs to solve particular dispute especially region borders. This research uses normative-law research and secondary type data that comes from literature study sources such as literature, articles, and internet websites. Peaceful dispute settlements in ASEAN consist of dialogue, consultation, negotiation, good offices, mediation, conciliation, and arbitration. It can be seen that arbitration is a part dispute settlement in ASEAN. Several dispute settlement cases in the ASEAN member state end up in the International Court of Justice, and there is no ASEAN dispute settlement agency, especially disputes regarding to border area. In this discussion, ASEAN has a chance to form an ASEAN Court of Justice to solve ASEAN member states disputes, as stated in the United Nations (UN) Charter. However, in order to form, ASEAN would face several challenges that mostly are caused from the member states diversity.

Keyword: Dispute Settlement, ASEAN.

INTRODUCTION

Regional organizations role depends on the organizations characters themselves. Where is the location, how is the structure, and how is the human resourcing management (Merrills, 2011). One of the regional organization's roles is to resolve dispute between members that is one of the efforts of regional organization to maintain world peace and safety as stated in Article 52 of UN Charter. According to the UN Charter, ASEAN (General ASEAN, 2011), as one of the regional organizations in the south east has a responsibility to maintain world peace and safety in the South East Asia region. In order to operate its responsibility of maintaining world peace and safety in the South East Asian region, ASEAN refers to the ASEAN Charter (Hadaddi, 2015) to solve the disputes occurring between its member states as for the steps used in solving disputes according to Chapter VIII of the UN Charter includes dialogue, consultation, negotiation, good offices, conciliation, mediation, and arbitration. Besides regulated on the ASEAN Charter, dispute settlement of ASEAN is also regulated in the Declaration of ASEAN Concord, Treaty of Amity and Cooperation in Southeast, Protocol ASEAN Charter on Dispute Settlement Mechanism, and ASEAN Protocol of Enhanced Dispute Settlement Mechanism (Indien, 2014). However, based on all of the regulations, arbitration is the last mechanism in ASEAN. This

16
results in ASEAN to refer solving their disputes in the International Court of Justice as their permanent disputes settlement agency. 7

One of the disputes that occurred in the ASEAN's member state which ends up in the International Court of Justice is the Preah Vihear Case between Cambodia and Thailand (Dewa, 2012), another case is between Indonesia and Malaysia. This case relates to ownership of the Sipadan and Ligitan Island (Hasjim, 2013). This shows that ASEAN needs a judicial agency that is permanent with final and binding decision in order to solve disputes between member states of ASEAN. Based on this background, the problems that should be discussed in this research are how is the regulation of dispute settlement in ASEAN? And then, how is the dispute settlement procedure in ASEAN? The goal of this research is to describe regulations and procedures of dispute settlement ASEAN. The research method used is normative law and secondary type data which comes from literature study sources such as literatures, articles, and internet websites.

ASEAN's dispute settlement regulation is written in several agreements which have been agreed upon member states of ASEAN, those regulations are mentioned either generally or specifically. Thus, dispute settlement regulations of ASEAN can be categorized into two groups that are pre-ASEAN Charter and ASEAN Charter. Dispute settlement procedure in ASEAN is also mentioned in several ASEAN agreements. However, those procedures established by ASEAN currently caused new issues upon ASEAN that the dispute settlement mechanism are no longer fulfilling the ASEAN member states need in solving any disputes. It can be seen from cases which member states of ASEAN prefer to solve outside ASEAN. This would eventually lead a chance for ASEAN to form an ASEAN International Court of Justice (ACJ). But to be kept in mind that in forming this judicial agency, ASEAN would face numerous challenges from its own state members.

Pre-ASEAN Charter

Peaceful dispute settlement mechanism has been an agenda for a long period of time by the South-East Asian countries. It has been started since 1967 along side with the ASEAN Declaration or Bangkok Declaration establishment (Amer, 2011). The ASEAN Declaration was adopted on August 8, 1967, this declaration describe the overall purpose and aim that should be achieved by ASEAN. In this dispute settlement mechanism, the ASEAN declaration would only need to mention generally of five parts of ASEAN Charter. The regulation upon dispute settlement of ASEAN mechanism was formed not until February 24, 1976 or during the first ASEAN Summit in Bali. There are two main points produced in the conference which are the Declaration of ASEAN Concord or the Bali Concord and the Treaty of Amity and Cooperation in Southeast or the TAC (Woon, 2011). Article 6 of the Declaration of ASEAN Concord 1976 regulates that ASEAN member based on solidarity spirit must prioritize intra-region peaceful dispute settlement process. Therefore, Declaration of ASEAN Concord is an early regulation of ASEAN that regulates on peaceful dispute settlement.

Instead, the Treaty of Amity and Cooperation in Southeast or TAC formed alongside with the Declaration of ASEAN Concord, regulates on purpose and ground principles in friendly relationship and coordination between member states of ASEAN. Peaceful dispute settlement mechanism is also adopted within the TAC (Itasari, 2015). Through the establishment of TAC, it is expected that every disputes between member states of ASEAN could be resolved in the TAC framework. According to Article 13 of TAC, the peaceful dispute settlement process (which is

the same as in the UN Charter), regulated that member states of ASEAN must refrain themselves from threats or usage of arm force against each other, and should use peaceful dispute settlement through negotiation. Other regulations should follow in 2004 which is the ASEAN Protocol on Enhanced Dispute Settlement Mechanism (Termudomchai, 2016). This protocol contains dispute settlement procedure through the Panels formation of disputing parties (Termudomchai, 2016). Article 2 of ASEAN Protocol on Enhanced Dispute has established an agency of Senior Economics Officials Meeting (SEOM), followed by Article 3 which stated that member states that have disputes should first consult with the SEOM, which then the SEOM proceeds to recommend the disputing parties to solve their disputes through mediation, conciliation, and other peaceful dispute settlement process.

In 2008, all state members of ASEAN has reach into an agreement of the ASEAN Charter establishment, which regulates clearer dispute settlement mechanism to anticipate if there happens to be any difference of interpretation on the charter's substance and other ASEAN agreements (Koesrianti, 2011). The differences can be seen through interpretation on the charter's substance and other ASEAN agreements. Dispute settlement mechanism according to the ASEAN Charter is regulated in Article 22 and 23 which mentions that member states of ASEAN must resolve their dispute through a peaceful and precise lane which are through dialogue, consultation, negotiation, good offices, mediation, and conciliation. Besides that, it is also mentioned that the charter also contributes another mechanism for a right dispute settlement as in the arbitration which is made for disputes regarding to interpretation or implementation of the ASEAN Charter and other ASEAN Instruments (Koesrianti, 2011).

ASEAN Charter 2007

Basically, peaceful dispute settlement in ASEAN has been regulated in the ASEAN Charter. However, further regulation regarding to procedure and steps of the peaceful dispute settlement mechanism operation is regulated separately from the ASEAN Charter, such as the operational procedure of good offices, mediation, conciliation, and arbitration which are regulated detail in the Attachment 1 for good offices rules, Attachment 2 for conciliation rules, and Attachment 4 for arbitration rules in the Protocol to the ASEAN Charter on Dispute Settlement Mechanisms of 2010. The Protocol to the ASEAN Charter on Dispute Settlement Mechanisms of 2010 is a protocol regarding to ASEAN dispute settlement legalized in 2010 after the ASEAN Charter (Kraichitti, 2015).

Generally, ASEAN Charter on Dispute Settlement Mechanism Protocol contains dispute settlement procedure through good offices, conciliation, mediation, and formation of the arbitration assembly procedure for the first time (Phan, 2013). The same is the case with article 23 The ASEAN Charter, stated in the protocol in Article 6 that the disputing parties can resolving the dispute with several mechanisms such as merit, mediation and conciliation. The Protocol also states that every disputing party could with hold agreement through good offices, mediation, and conciliation in every occasion. Just as Article 23 of ASEAN Charter stated, Article 6 of the Protocol mentioned that the disputing parties could resolve their disputes through several mechanisms such as good offices, mediation, and conciliation. Besides that, Article 5 regulates that if peaceful mechanism has been experienced but fails to produce any form of agreement, then ASEAN could form a Panel based on the parties' plea. This is regulated in the ASEAN Protocol on Enhanced Dispute Settlement Mechanism.

Dispute Settlement Issue in ASEAN

Based on the ASEAN dispute settlement regulations, it shows that arbitration is in fact the last stage of a dispute settlement mechanism in ASEAN. However, Article 26 of the ASEAN Charter stated that if a case is unable to solve after an implementation of arbitration, then this case of dispute should be referred to the ASEAN Summit for its decision. Afterwards, disputing parties can ask for ASEAN to form a Panel, as sorted in Article 4 of the EDSM Protocol. But the Panel's formation can only occur if the disputing parties submit their pleas to ASEAN. Therefore, in solving disputes in ASEAN there is no permanent and final agency that has the authority to solve a disputing case. Thus, it is not uncommon if several cases of ASEAN's member states end up in the International Court of Justice, not to mention the absence of an ASEAN dispute settlement agency, especially regarding to region border.

One of the disputes occurring in ASEAN that ends up in the International Court of Justice is the Preah Vihear Temple case between Cambodia and Thailand. This dispute relates to Preah Vihear Temple's ownership which does not have an obvious borderline between Cambodia and Thailand. ASEAN's effort to solve this borderline dispute between Thailand and Cambodia is through the diplomatic effort (Shuttle Diplomacy). Besides that, an Informal ASEAN Foreign Minister's Meeting was held with a single agenda to discuss the dispute settlement between Thailand and Cambodia's conflict (Masari, 2015). However, the results were failure on the diplomatic effort which then leads both countries to hand the disputes to the International Court of Justice (Dewa, 2012). In their verdict of June 15, 1962, (The Hague Judgment of 15 June 1962), the ICJ decides that Cambodia is indeed the rightful owner of the Preah Vihear Temple and as an outcome, Thailand has to withdraw its military enforcement or guardians around the temple or Cambodia's sovereign border area (Dewa, 2012).

Another example of disputes is between Indonesia and Malaysia. This dispute relates to the ownership on Sipadan and Ligitan Island (Butcher, 2013). The early stage of the dispute settlement is through negotiation from both countries. However, after years of negotiating, it has lead to a dead end. Afterwards, Indonesia filed a proposal to solve this case to ASEAN specifically the ASEAN High Council good offices based on the TAC. Unfortunately, Malaysia declined the offer from Indonesia (Hasjim, 2013) in which on May 31, 1997, both countries agreed to solve the dispute through the International Court of Justice (ICJ) (Tuhulele, 2011). According to Article 59 and 60 of the ICJ Statute, the verdict of the ICJ is binding, final, and cannot be appealed. Therefore, disputing countries must perform the established decision by the ICJ.

ASEAN's Opportunity in Dispute Settlement

Based on the mentioned cases, it can be seen that the ASEAN countries cannot solve several disputes, particularly cases that relate with the country borders. Therefore, ASEAN needs a judicial agency that is permanently formed with final and binding decision in order to perform dispute settlement between member states of ASEAN. Currently, the final step of dispute settlement in ASEAN is limited to arbitration in which is not permanent as the ICJ. In this case, ASEAN has a chance to form an ASEAN Court of Justice, this is due to Article 52 of the UN Charter which stated that a regional organization is given authority to deal with disputes that threatens the world peace and safety by the UN as long as those regulations and organ formed by

the regional organization is intact with UN's principles and purposes. The court's formation to solve regional organization disputes has been operated by the European Union (23) through the formation of the Court of Justice of the European Union (CJEU) (Bobek, 2014). The CJEU is the highest court in the EU region and even higher than the national court (Indien, 2014) Because of it, ASEAN has an opportunity to form a high court like the EU by forming the ASEAN Court of Justice (ACJ). If the EU is able to perform using the EU Law, than ASEAN can realize the ACJ through the ASEAN Charter amendment as stated in Article 48 of the ASEAN Charter (Desierto, 2010) and formulate a statute as the ACJ source of law.

ASEAN Challenges in the Formation of ASEAN Court of Justice

Court of Justice formation is not an impossible vision, as done by other regional organization which is the EU. However, in the process of formation, ASEAN will face challenges, either from the regulations' formulation or member states of ASEAN. One of the assuring challenges is the member state of ASEAN that would likely use their own national regulation in their dispute settlement. This is shown from the slow process of ratification towards the Protocol to the ASEAN Charter on Dispute Settlement Mechanisms of 2010. As mentioned before, that the Protocol to the ASEAN Charter on Dispute Settlement Mechanisms was formed since 2010 (Desierto, 2010), but the protocol itself have entered into force by July 28, 2017. With the long period of time of ratification, it clearly shows that protocol regulations are not so urgent to be ratified by ASEAN's member states.

As previously stated, that in order to form a court, it would need an amendment in the ASEAN Charter, and to do so, then a negotiation between all member states of ASEAN is very necessary. In the process of negotiation, countries would likely argue and deliberate to reach for consensus (Leviter, 2010). Which means, it is not uncommon if during a process negotiation, an argument would occur; because all decision making process in ASEAN based by consensus tend to be negotiable and political/diplomatic instead of achieving the natures of law (Kraichitti, 2015). This should be a challenge for ASEAN to reach a deal, including the formation of a court. Therefore, ASEAN will only adopt a policy that has come to terms of agreement by all member state. Because of it, the court cannot be established without the ASEAN's member states' approval.

Another challenge is differences in dispute settlement approach between member states of ASEAN. Basically, enforcement on the arbitration system of dispute settlement mechanism beneath ASEAN is difficult to apply in ASEAN's member states due to the different law system and approaches in their acknowledgment and enforcement towards foreign arbitrations' decision. Even though the member states of ASEAN is a party in the Convention on the Recognition and enforcement of Foreign Arbitral Awards or the New York Convention 1958 but the arbitration and legislation of dispute settlement in several ASEAN's state member is still identified not fully linear to the convention and its implementation (Kraichitti, 2015). These differences are indeed a challenge for ASEAN to reach an agreement in forming the ASEAN Court and ACJ statute that correspond with the ASEAN's member state.

CONCLUSION

ASEAN has numerous regulations regarding to dispute settlement. However, the final fact is that member states of ASEAN prefer to submit their dispute settlement to the permanent International Court of Justice. Based on several disputes experience that have occur between ASEAN states which end up in the International Court of Justice, it can be concluded that ASEAN needs a permanent court equal to the International Court of Justice to solve disputes which later be called the ASEAN Court of Justice. ASEAN will face challenges such as member states of ASEAN that often use their national regulations in solving their disputes, negotiation process between ASEAN member states based by consensus that tend to be negotiable and political/diplomatic instead of paying attention to the nature of law, and differences in dispute settlement approaches of ASEAN countries. Therefore, ASEAN needs a comprehensive mechanism dispute settlement with comparative approach as the European Union.

RECOMENDATION

Based on the challenges description that ASEAN will face in forming a permanent court, ASEAN will face bigger challenges that tend to be subjective and political. Therefore, it is recommended that ASEAN can learn and review from previous permanent court dispute settlement mechanism formation by other regional organization such as the European Union. Or perhaps, ASEAN can coordinate with the United Nations to form a permanent court. In this case, ASEAN would be able to decide its ASEAN Court of Justice jurisdiction corresponding to the needs of ASEAN countries' region and formulate the ASEAN Court of Justice Statute through the amandement of the ASEAN Charter 2007.

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