

**THE JURIDICAL REVIEW OF WITHDRAWAL ASEAN (ASSOCIATION OF
SOUTHEAST ASIAN NATIONS) MEMBER STATES FROM THE ASEAN
CHARTER BASED ON THE VIENNA CONVENTION 1969**

Journal

Diajukan untuk Memenuhi Sebagian Syarat-Syarat Memperoleh Gelar Kesarjanaan dalam
Ilmu Hukum

Oleh :

Galih Putri Sudarsono

NIM. 105010107121010



KEMENTERIAN PENDIDIKAN DAN KEBUDAYAAN

UNIVERSITAS BRAWIJAYA

FAKULTAS HUKUM

MALANG

2014

LEMBAR PENGESAHAN
TINJAUAN YURIDIS PENARIKAN DIRI NEGARA ANGGOTA ASEAN
(ASSOCIATION OF SOUTH EAST NATIONS) DARI PIAGAM ASEAN MENURUT
KONVENSI WINA 1969

Oleh :
Galih Putri Sudarsono
105010107121010

Skripsi ini telah disahkan oleh Majelis Penguji pada tanggal :

Ketua Majelis Penguji

Anggota

Nurdin, S.H. M.Hum
NIP. 19561207 198601 1001
Anggota

Setyo Widagdo, S.H. M.Hum
NIP. 19590320 198601 1003
Anggota

Agis Ardhiansyah, S.H., L.LM
NIP. 19840313 200911 001
Anggota

Heru Prijanto, SH. MH
NIP. 19560202 198503 1 003
Ketua Bagian Hukum Internasional

Hanif Nur Widhiyanti, S.H. Mhum
NIP. 19780811 200212 2 001

Nurdin, S.H. M.Hum
NIP. 19561207 198601 1001

Mengetahui,
Dekan Fakultas Hukum

Dr. Suhabudin, SH., MH
NIP 19591216 198503 1001

THE JURIDICAL REVIEW OF WITHDRAWAL ASEAN (ASSOCIATION OF
SOUTHEAST ASIAN NATIONS) MEMBER STATES FROM THE ASEAN CHARTER
BASED ON THE VIENNA CONVENTION 1969

Galih Putri Sudarsono
Setyo Widagdo, S.H. M.Hum, Agis Ardhiansyah, S.H. L.LM

Law Faculty, Brawijaya University
Email : galihputri_s@yahoo.com

State as the main subject of international law has the sovereignty to determine to stay or withdraw from membership of an international organization. ASEAN as an international organization has a constituent instrument. ASEAN member states are bound to comply the obligations specified in the ASEAN Charter. However, the ASEAN Charter as the constituent instrument does not set the withdrawal clause. Thus, the possibility of withdrawal of ASEAN members become blurred and indistinct.

Keyword : ASEAN Charter, Withdrawal, Vienna Convention 1969

A. INTRODUCTION

According to Article 2, paragraph 1 of the Vienna Convention on the Law of Treaties 1969, international organization is an inter-governmental organizations. The emphasizing of inter-governmental aspects is intended to distinguish between intergovernmental organization with organizations non-governmental or shortened by NGOs. Non-governmental organization is an organization consisting the bodies or private institutions of various countries.¹

ASEAN (Association of South East Asian Nations) is an international organization which membership regionally specific to countries located in Southeast Asia. Asian Charter is constituent instrument of the Association of Southeast Asian Nations (ASEAN) stipulates the legal personality of ASEAN as a subject of international law. However, the Charter does not set completely about membership of

¹ Sri Setianingsih Suwardi, **Pengantar Hukum Organisasi Internasional**, UI Press, Jakarta, 2004, hlm 5.

international organizations, especially regarding withdrawal membership of ASEAN. The absence of withdrawal clause in ASEAN Charter is a legal vacuum which rise legal question of the possibilty withdrawal from ASEAN. In addition, Indonesia as one of the founding members of ASEAN in 2008 intended to withdraw from ASEAN membership.²

Asian Charter as a binding agreement binding the ASEAN member to implement the contents of the treaty. However, the Charter does not set a withdrawal clause for ASEAN. Does state will be bound forever as member of ASEAN and if ASEAN member countries wish to withdraw from membership of ASEAN what are legal consequences of this manner.

Based on the background that has been presented, the authors are interested in doing research with the title “THE JURIDICAL REVIEW OF WITHDRAWAL ASEAN (ASSOCIATION OF SOUTHEAST ASIAN NATIONS) MEMBER STATES FROM THE ASEAN CHARTER BASED ON THE VIENNA CONVENTION 1969”.

B. LEGAL ISSUES :

1. How the arrangement of withdrawal ASEAN member states of the ASEAN Charter based on 1969 Vienna Convention?
2. What are the legal consequences of withdrawal from ASEAN member states from ASEAN charter based the Vienna Convention 1969?

C. ANALYSIS

1. The arrangement of withdrawal ASEAN member states from the ASEAN Charter based on 1969 Vienna Convention

The use of the term withdrawal of international agreements generally use Termination, Denunciation, Withdrawal. These terms generally referring the actions of state to exit from an international treaty.³ Vienna Convention 1969 distinguish those terms to determine the withdrawal action which performed. *Termination is the act of exit from international treaty as a whole, which means releasing all legal*

² Putusan Mahkamah Konstitusi No 33/PUU-IX/2011

³ U.N. Office of Legal Affairs, *Final Clausues of Multilateral Handbook*, at 109, U.N. Sales no. E.04.V.3 (2003)

*obligations of the contracting parties to perform treaty obligations.*⁴ Meanwhile, Denunciation is act of one contracting parties to terminate the legal obligation in treaty⁵, thus denunciation is the act of termination which perform by one of the parties from the treaty or legal obligations binding between the parties.⁶ Following the analogy of the Vienna Convention 1969 Article 70, paragraph 2 denunciation and withdrawal are similar act of discontinuance of treaty legal obligation.

Constituent instruments of international organizations is a form of international treaty governed by international treaty law. Article 5 Vienna Convention 1969 specifically states the scope of Vienna Convention 1969 includes constituent instruments and rules contained in the international organizations. The relationship Vienna Convention 1969 with constituent of international agreements especially for the interpretation and amendment of the constituent instrument.

The ASEAN Charter Section III entitled memberships regulates the only three articles. Article 4 provide the members of ASEAN, article 5 describes the rights and obligations of member states in the three-point and Article 6 regulates on receiving new members. In addition, the acceptance of new members of ASEAN will be determined by consensus at the ASEAN Summit by the recommendation of the ASEAN Coordinating Council⁷.

Vienna Convention 1969 as customary international law⁸ set the withdrawal clause of international treaty with strict limitations that must be complied with the party who wants to make a withdrawal. Vienna Convention 1969 does not provide a stipulation of unilateral withdrawal from the treaty without which does not clearly withdrawal clause unless by contracting parties permission.

Generally, the treaty parties may withdraw from treaty based on arrangement in accordance with the articles of the treaty or at any time in accordance with the agreement of all parties to the agreement.⁹ Article 42 of the Vienna Convention 1969 states that treaty will continue in force, party of treaty able to withdraw from treaty

⁴ Pasal 70 ayat 1 (a) Konvensi Wina 1969

⁵ Oliver Dörr & Kirsten Schmalenbach, *Vienna Convention on the Law of Treaties A Commentary*, Springer Heidelberg Dordrecht London New York, Berlin, 2012, hlm 947.

⁶ R Jennings/A Watts Oppenheim's International Law Vol I Parts 2-4 (9th edn 1992) 1300.

⁷ Article 6 Paragraph 3 *ASEAN Charter*

⁸ Security Council Resolution 276 (1970), Advisory Opinion, 1971 I.C.J. 16, 47 (June 21), States :“The rules laid down by the Vienna Convention on the Law of Treaties concerning termination of a treaty relationship on account of breach (adopted without a dissenting vote) may in many respects be considered as a codification of existing customary law on the subject.”

⁹ Article 54 Vienna Convention 1969

since able show that withdrawal is intended in treaty. Following this analogy the International Law Commission argues as follow:

*It considerable, as a safeguard for the stability of treaties, to underline in a general provision at the beginning of this part that the validity and continuance in force of a treaty is the normal state of things which may be set aside only on the grounds and under the conditions provided for in the present articles.*¹⁰

In line with the analogy of Article 42 Vienna Convention 1969 the opinion of the International Law Commission above states that the termination and enforcement of a treaty able be done based on the rules contained in the agreement in order to balance the interests of the parties in treaty. Article 54 of the Vienna Convention states:

The termination of a treaty or the withdrawal of a party may take place:
(a) in conformity with the provisions of the treaty; or
(b) at any time by consent of all the parties after consultation with the other contracting States.

Article 54 of the Vienna Convention in 1969 reaffirms that withdrawal is required mutual consent and pursuant with arrangements of the international treaties and by permission of contracting parties.

In case of the basic instruments of international organizations that do not contained provisions of withdrawal, Article 56 of the Vienna Convention 1969 used as reference. Article 56 states:

- 1. A treaty which contains no provision regarding its termination and which does not provide for denunciation or withdrawal is not subject to denunciatioan or withdrawal unless :*
 - a. It is established that the parties intended to admit the possibility of denunciatioan or withdrawal; or*
 - b. A right of denunciatioan or withdrawal may be implied by nature of the treaty.*
- 2. A party shall give not less than twelve months' notice of its intention to denounce or withdraw from a treaty under paragraph 1.*

Article 56 describes withdrawal from international treaty which does not contain withdrawal clause as long as the parties intended to allow withdrawal and the right of withdrawal arises from the nature of the treaty. Based on state practice, paragraph 2 of Article 56 obliges parties to give prior notice less than twelve months

¹⁰ Int'l Law Comm'n, *Report of the International Law Commission on the Work of Its Eighteenth Session*, [1966] 2 Y.B. Int'l L. Comm'n 172, 236, U.N. Doc. A/6309/Rev.1.

before the withdrawal is done.¹¹ This clause is intended to protect the interests of withdrawal parties and other parties who bound in treaty to give sufficient time for further negotiation.¹² In the implementation, the interpretation of withdrawal of international treaty under Article 56 of the Vienna Convention are governed by the good faith principle.¹³ In addition, the withdrawal based on Article 56 of 1969 Vienna Convention should be interpreted carefully to avoid violation of an international treaty which regulates under Pacta Sunt Servanda principle.

Generally international agreements includes the withdrawal clause , but there are several treaties including the law-making conventions and international organizations statutes expressly do not include this clause in the treaty.

The ASEAN member states withdrawal based on Vienna Convention 1969 stipulates that withdrawal from international treaties which does not contain withdrawal clause can be performed since the contracting parties agree, on the contrary the unilateral withdrawal of ASEAN membership can not be done.

2. The legal consequences of withdrawal ASEAN members from ASEAN Charter based on the Vienna Convention 1969

State as the main subject of international law has the legal ability to make international agreements also withdraws from a treaties on the formation of international organizations. The international organization created by an international treaty thus international organizations categorized as treaty-based organization.¹⁴ International treaties which establish international organization become the constituent instruments of international organizations.

Association of South East Asian Nations (ASEAN) is a regional international organization in the southeast Asian region formed on August 8, 1967 in Bangkok Thailand by ASEAN Declaration ¹⁵. ASEAN Declaration is a short document which contains only five articles. The document declared the formation

¹¹ Villiger, Mark Eugen, *Commentary on the 1969 Vienna Convention on the Law of Treaties*, Martinus Nijhoff Publishers and VSP, Netherland, 2009, page 704

¹² Ibid.

¹³ R Jennings/A Watts Oppenheim's International Law Vol I Parts 2-4 (9th edn 1992) 1300..

¹⁴ Laurence R. Helfer, *Exiting Treaties*, Virginia Law Review, November 2005, hlm 1647

¹⁵ Flores, Maidan Jamil, *ASEAN Functional Cooperation Toward a Caring Community*, ASEAN Secretariat, Jakarta, 2000, hlm 17.

of the association of regional cooperation among the countries of Southeast Asia and outlines the aims and objectives of ASEAN.

ASEAN Charter was formed in November 2007 in Singapore at the ASEAN Summit 13th. ASEAN Charter came into force on 15 December 2008 after all ASEAN members expressed ratification with the Secretary-General of ASEAN.¹⁶

In membership chapter of ASEAN Charter or other sections do not found any provision regarding the withdrawal clause of the ASEAN membership. In the preparation of the UN Charter, there was some disagreements between State party regarding the inclusion of clause withdrawal in charter. The Soviet Union is a party who wishes to incorporate withdrawal clause in treaty since the right of withdrawal is consequence of the existence of state sovereignty.¹⁷ Other Parties of treaties that have different views argued if sovereignty implies the existence right of withdrawal from the organization, means that the sovereign state is only bound by an international treaties as long as the state will.¹⁸ Thus, undeniable that the international organizations established by international treaties have essential functions to limit the sovereignty of its members.

Vienna Convention 1969 as customary international law set the withdrawal of international treaties with the limitations of the Convention which must be complied by a party who want to perform a withdrawal. Withdrawal according the Vienna Convention in 1969 was an act of mutual or agreement of the parties.

State as a subject of international law has a sovereign right to be able to determine political stance in international relations. States able to withdraw or stay as member of an international organization. The law of treaty prohibits withdrawal from the international treaty because it is contrary with Pacta Sunt Servanda principle. However, withdrawal can be done for existence of change in the contents treaty and there is existence which alter the basic contents of the agreement as regulate under Rebus Sic Stantibus.

In a case of member states insist to withdraw unilaterally from a constituent instruments of international organizations which do not regulate withdrawal clause,

¹⁶ Article 47 Paragraph 2 ASEAN Charter

¹⁷ Hans Kelsen, *Withdrawal from the United Nations, The Western Political Quarterly*, Maret 1948, hlm 29.

¹⁸ *ibid*

this manner includes as unlawful. Member states which unilaterally withdraw from ASEAN Charter implicate his duties as a member of ASEAN which include as breach of duty. Article 5, paragraph 3 of the Charter states:

In the case of a serious breach of the Charter or non-compliance, the matter shall be referred to the ASEAN Summit for Decision.”

Furthermore, in Article 20, paragraph 4 stated:

In the case of a serious breach of the Charter or non-compliance, the matter shall be referred to the ASEAN Summit for decision.”

ASEAN Summit is an ASEAN conference consists of the heads of State or Government of the member countries of ASEAN. ASEAN Summit held regularly every two years. The authority of the ASEAN Summit as follow:

- a. The highest policy decision-making body of ASEAN;
- b. Discuss, provide policy guidance and take decisions on major issues concerning the realization of ASEAN objectives, the subject matters of interest to the member states, and all the issues referred to by the ASEAN Coordinating Council, the ASEAN Community Councils and ASEAN Sectoral Ministerial Bodies;
- c. Instruct the relevant Ministers in each Council concerned to hold meetings between the Minister of ad-hoc, and discuss important issues that cut across the ASEAN Community Council. Rules of procedure for meetings shall be adopted by the ASEAN Coordinating Council;
- d. Handle situations affecting ASEAN by taking the appropriate actions;
- e. Authorized the establishment and dissolution of the Sectoral Ministerial Bodies and agencies other ASEAN;
- f. Appoint the Secretary-General of ASEAN.

Pursuant with Article 20 paragraph 4 of the ASEAN Charter the breach of duty will be discussed on the ASEAN Summit. Moreover, as the highest policy-making body within ASEAN under Article 7, paragraph 2 of the Charter, the ASEAN Summit authorities to take policy on issues affecting ASEAN.

State as the main subject of international law does have the authority to be able to perform all activities under his will, but the sovereignty of state is restricted by international law when it is bound by an international treaty. State has bound under an agreement that has been given. ASEAN member states have a goal to be

achieved. These agreements binding each other among ASEAN member implicate unilaterally withdrawal from the ASEAN Charter is violation of international law.

ASEAN Charter as binding international treaty does not include a clause of withdrawal. Article 54 of the Vienna Convention of 1969, emphasizes the mutual agreement of all parties on the withdrawal of an international agreement that does not include a withdrawal clause in the treaty. Following the analogy Vienna Convention 1969, the Charter has appointed the ASEAN Summit as the highest institution consisting of the Heads of State or Government of the member countries of ASEAN to jointly decide on the issues that have an impact ASEAN.

The description given, it can be concluded that the unilateral withdrawal of the ASEAN Charter can not be done. As the provisions laid down in the Vienna Convention of 1969, state has made a treaty thus gives the obligation contained in the treaty. This unilateral withdrawal from a ASEAN Charter is clearly a violation of international treaty thus, state able bring claim before the International Court of Justice.

D. CONCLUSION

ASEAN Charter as a legal basis for ASEAN not regulating the withdrawal clause from ASEAN. Particularly the ASEAN Charter has no provisions regarding the period or termination of the charter as an international organization. ASEAN Charter is an international treaty relating to the establishment of a regional cooperation in the field of security, political, economic and socio-cultural. This Cooperation has a tendency have unlimited period of time, especially for the states of Southeast Asia whose has a special bond.

From the description given, it can be concluded that withdrawal of ASEAN Charter is allowed since the approval of contracting parties treaty otherwise unilateral withdrawal of the Charter is unlawful. The states as the main subject of international law have the authority to be able to perform all activities under his will, but the sovereignty of the country is restricted by international law when it is bound by international agreements. The state has bound under an agreement that has been given.

The description given, it can be concluded that the unilateral withdrawal of the ASEAN Charter can not be done. As the provisions laid down in the Vienna Convention of 1969, state has made a treaty thus gives the obligation contained in the

treaty. Thus unilateral withdrawal from a ASEAN Charter clearly is a violation of international treaty and state able to sue before International Court of Justice.

E. RECOMENDATION

ASEAN Charter is one of the few international organizations that do not include a withdrawal clause in the instrument essentially

This is due to concern to drive the parties to withdraw from the treaty. In addition, this treaty deliberately intended not specified clause of withdrawal to provide unlimited period treaty. In the opinion of the author this approach ignores the principles of democracy and to conform with the future challenges for states party to protect its interests. It is better to incorporate a clause on withdrawal as EU did, because there are some countries that are forced to be bound thereby causing unproductive member states in the organization.

BIBLIOGRAPHY

BOOKS :

Suwardi, Sri Setianingsih, **Pengantar Hukum Organisasi Internasional**, UI Press, Jakarta, 2004.

U.N. Office of Legal Affairs, *Final Clausues of Multilateral Handboo*, U.N. Sales no. E.04.V.3,2003

Flores, Maidan Jamil, *ASEAN Functional Cooperation Toward a Caring Community*, ASEAN Secretariat, Jakarta, 2000.

Journal

Lea Brilmayer 7 Isaias Yemane Tesfalidet. *Treaty Denunciation and “Withdrawal” from Customary International Law: An Erroneous with Dangerous Consequences*. The Yale Law Journal Online.

Mark E. Vileger, Mark Eugen, *Commentary on the 1969 Vienna Convention on the Law of Treaties*, Martinus Nijhoff Publishers and VSP, Belanda, 2009

Oliver Do” rr l Kirsten Schmalenbach, *Vienna Convention on the Law of Treaties A Commentary*, Springer Heidelberg Dordrecht London New York, Berlin, 2012

R. Helfer, Laurence, *Exiting Treaties*, Virginia Law Review, November 2005

Resolution

Security Council Resolution 276 (1970), Advisory Opinion, 1971 I.C.J. 16, 47 (June 21

Convention

ASEAN Charter

Vienna Convention 1969