

**PROSPECT AND CHALLENGES OF INTERNATIONAL LAW IN ASEAN AND IN INDONESIA
ASEAN CHARTER AFTERMATH:
INTERNATIONAL TREATY PERSPECTIVE**

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Abstract

After the establishment of ASEAN charter, the agenda to which ASEAN countries shall address is that its implementation urgently requires a strong political will and the sufficient supporting framework. For Indonesia, the prospect and challenge for the implementation of this charter is mostly in the form of the reformation of the law pertinent to the law of international organization. From international perspective, the position of Indonesia as the hosts of the ASEAN headquarter may significantly affect the development of international law, especially on the law of the international organization.

Keywords: International Law, ASEAN Charter, ASEAN agreement.

Introduction

Since the establishment in 1967, the existence of ASEAN as an international organization in the regional level and in the International level has far from satisfactory. Compared to other regional organization such as the European Union, ASEAN shares a low level of international personality and integrity level. ASEAN has The High Council in resolving international dispute among its member yet this body has never been utilized. In the Sipadan and Ligitan dispute between Indonesia and Malaysia for instance, the conflicting party preferred to resolve the dispute through the jurisdiction of the International Court of Justice (ICJ) rather than resolving the dispute in The High Council. Human right violations in Myanmar also never gain serious response by ASEAN. The Non-intervention principles has been implemented in a rigid manner in view of the absence of an Human Right tribunal in the regional level as shared by other regional organization is one of contributing factor. The motion of trade liberalization in the regional level has also proved to be problematic. In response to the issues above, the ten state members has made effort to strengthen ASEAN by drafting ASEAN Charter as analyst forecast that ASEAN would be more prominent aftermath the ratification of such charter. In the other hand, pessimistic views also arise, as the charter will not bring about much of a change. ASEAN will remain as it is; absence of authority and jurisdiction in responding to members who has committed violation on International Law. By the end of this year the ten member states has ratified the charter as the precondition for the Charter to be legally binding. It is therefore intriguing to discuss the question of how is the prospect and challenges of the law enforcement and international relation for Indonesia and ASEAN itself aftermath the ratification of ASEAN Charter.

History of ASEAN Charter

The birth ASEAN Charter as an international treaty¹ comes from a long negotiation process. Synchronizing and agreeing upon various aspect of interest of the tenth member of ASEAN² into a single common entity that is legally binding is only one part of a long hours diplomacy that all party have undertaken in order for drafting of ASEAN charter to be succesfull. Peace, stability, development, and welfare of the region has become the basic interest that unite the South East Asian Nation in one single entity ASEAN.

One of the long processes of negotiation can be seen in the Kuala Lumpur Declaration of establishment of ASEAN CHARTER in December 12th 2005 which agree upon the establishment of *The Eminent Persons Group on the ASEAN Charter* (EPG)³ and the *High Level Task Force on the Drafting of ASEAN Charter* (HLTF).⁴ The long process of negotiation also result the *Travaux Preparatoires* or the preparation documents of the ASEAN Charter that includes but not limited to Concluding Statements or Summary Records of the EPG, HLTF, Bali Concord II, Kuala Lumpur Declaration of the establishment of ASEAN Charter, and Cebu Declaration of the ASEAN Charter Blue Print.

After coming through the long negotiation process and resulting on the signing of the ASEAN Charter, the next process is the ratification⁵ by each member states of ASEAN which is important to be noted that internal process of ratification is not an easy matter. There are at least three member states⁶ of ASEAN that submit their ratification instrument⁷ in the time relatively close to the deadline of ASEAN Charter to be effective which is in the 14th meeting

¹ Definition of International Treaty according to article 2 (a) Vienna Convention on Law of Treaties 1969, "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; article 1(a) Undang-Undang No.24 Year 2000 on International Treaty "*Perjanjian Internasional adalah perjanjian, dalam bentuk dan nama tertentu yang diatur dalam hukum internasional yang dibuat secara tertulis serta menimbulkan hak dan kewajiban dalam hukum public*"; see also Anthony Aust, *Modern Treaty law and Practice*, Cambridge University Press, 2000, p.14

² Brunei Darussalam, The Philippines, Indonesia, Cambodia, Laos, Malaysia, Singapura, Myanmar, Thailand, and Vietnam

³ Term of References (TOR) of the EPG was concluded in the 11th meeting of ASEAN head of state or ASEAN summit in Kuala Lumpur, Malaysia, December 2005. The TOR stated that EPG consist of '*highly distinguished and well respected citizens*' from all member states of ASEAN vested the mandate to '*examine and provide practical recommendations on the directions and nature of the ASEAN Charter relevant to the ASEAN Community as envisaged in the Bali Concord II and beyond, taking into account, but not limited to the principles, values and objectives contained in this Declaration*'; furthermore, EPG is ask to "...examine ASEAN in all areas of its cooperation activities, codify, and build upon all ASEAN norms, principles, values, and goals as contained in ASEAN milestone agreements, treaties and declarations, as well as undertake a thorough review of the existing ASEAN Charter, which will serves as the legal and institutional framework for ASEAN Charter, which will serve as the legal and institutional framework for ASEAN, aimed at enabling the building of strong, prosperous, caring, and sharing ASEAN Community that is cohesive, successful and progressing in the 21st century.

⁴ Term of Reference of the HLTF is concluded on the 11th meeting of ASEAN head of state meeting or ASEAN Summit in Kuala Lumpur, Malaysia, December 2005. In the HLTF TOR which comprise senior official of each member state of ASEAN, HLTF is vested with the mandate to "...*draft the ASEAN Charter based on the directions given by the Leaders as reflected in the Kuala Lumpur declaration on the Establishment of the ASEAN Charter and the Cebu Declaration on the Blueprint of the ASEAN Charter and in consideration of the recommendations made by the EPG and other relevant ASEAN documents.*"

⁵ Article 47 (2) of the ASEAN Charter "*this Charter shall be subject to ratification by all ASEAN Member States in accordance with their respective internal procedures*"

⁶ Three ASEAN states that submits the last ratification instruments is The Philippines on 12th November 2008, Indonesia on 13th November 2008, and Thailand on 14th November 2008.

⁷ Article 47 (4) ASEAN Charter "*This Charter shall enter into force on the thirtieth day following the date of deposit of the tenth instrument of ratification with the Secretary general of ASEAN*"

of ASEAN Head of State 14th December 2008 in Thailand. In Indonesia, the ratification process has to be under the approval of the Commission I Indonesia's parliament, which has given its own meaning in the whole process. The proactive and critical participation of the member of the parliament in scrutinizing the ASEAN Charter gave valuable inputs in preparing ASEAN Charter follow-ups.⁸ After long going through hours of debating, on 6th November 2008 ASEAN Charter becomes part of Indonesian legal system through Legislation No. 38 Year 2008 regarding Legitimatization of Charter of the Association of Southeast Asian Nations.

ASEAN Charter⁹ signed on November 20th 2007 and ratified by all member states in a *de jure* perspective has changed ASEAN from a loose regional organization to a rule-based organization. The existence of ASEAN Charter gave ASEAN a legal and institutional framework in to develop as a single community that shares the value of peace, security, stability, sustainable economic development, welfare, and social progress.¹⁰

ASEAN Charter Follow-Ups

After signing ASEAN Charter, the Ministers of Foreign Affairs of ASEAN conceded follow-ups measures by assembling a task force to discuss legal issues that might emerge in the implementation of ASEAN Charter. The task force is called *The High Level Legal Experts Groups on the Follow-Up to the ASEAN Charter* (HLEG) which its members consist of legal expert representative of each ASEAN member states.¹¹ Several central legal issues that was discussed is mainly regarding ASEAN Legal personality and capacity, ASEAN Dispute Resolution Mechanism, immunity and privilege right of ASEAN.

ASEAN Charter follow-ups mainly discussed implementation of each provision of ASEAN Charter, which pose prospects and challenges of its own to each member states including Indonesia. Interestingly, as each member states are given the right to review the Charter in 2013¹² the implementation of ASEAN Charter will most certainly colors the development of international law in ASEAN and in Indonesia.

ASEAN Charter as an International Treaty

A. The Anatomy of ASEAN Charter

ASEAN Charter consist of fourteen main chapter including preamble that enshrine foundation of the construction of ASEAN Charter. The fourteenth main chapter derived to fifty five articles that regulates not only the

⁸ Several issues that has been the concern of Commission I Indonesia's parliament is the mechanism of policy making, sanction, Human Right Body, and society participation issues that has not been addressed.

⁹ ASEAN Charter entry into force in 14th December 2008

¹⁰ See ASEAN Charter Preamble

¹¹ HLEG Terms of Reference (TOR) was concluded on the ASEAN Foreign Minister Retreat in Singapore, 20th February 2008. In the TOR mentioned, HLEG is requested "...address the implementation of legal matters in the ASEAN Charter"

¹² Article 50 ASEAN Charter 'this carter may be reviewed five years after its entry into force or as otherwise determined by the ASEAN Summit'

organization of ASEAN but also general provision that has to be used by member states in interacting with other member States, mechanism of dispute resolution for instance.

The first Chapter of the ASEAN Charter is the backbone of the charter, which enshrine Purpose and Principles. In this part, encapsulate 15 Purpose of the Charter and 14 ASEAN principles that must be respected by all member states of ASEAN.¹³ In regard to this foundation, it can be said that the whole part of the purpose and principles stated is an constructed, evolved, and custom of ASEAN since 1967 till this moment of time.¹⁴

The part that is relatively new and is reflected as part of the development of time is in the Chapter VII regarding Decision Making, Chapter VIII regarding Dispute Resolution, and Chapter IV regarding Organ especially article 14 which regulate obligation to assemble Human Right Body. In Chapter VII regarding Decision Making, ASEAN Charter has step forward from the consensus principle that has been used without discrimination in the past years. Chapter VII especially article 20 (2) has enable other mechanism other than enforcing consensus principle with precondition that such principle is not possible.¹⁵ This mechanism is handed into the authority of ASEAN Summit, which not only decide upon a certain issue but also to resolve it. The phrase *“how a specific decision can be made”* gave the room for such authority.

Chapter VIII regarding dispute resolution is the perfection of dispute resolution mechanism in ASEAN. Other than giving the acknowledgement of the existing mechanism,¹⁶ chapter VIII also vest mandate to ASEAN to construct **“appropriate dispute settlement mechanism[s]”**.¹⁷ Most interestingly from the existence of Chapter VIII, especially article 25, is that it embedded explicitly all kinds of dispute resolution mechanism that is known by the international community¹⁸ except mechanism of judicial proceeding. However, it is not impossible in the future that we will witness the birth of a judicial body of ASEAN thru the provision in article 25 mentioned above.

Chapter IV especially article 14 ASEAN Charter explicitly oblige ASEAN to assemble an ASEAN Human Right Body. The provision regarding ASEAN Human Right Body at this moment of time is still in the process of

¹³ See article 1 and 2 of ASEAN Charter

¹⁴ ASEAN is established thru Declaration of Bangkok 8th August 1967.

¹⁵ Article 20 (2) ASEAN Charter *“where consensus cannot be achieved, the ASEAN Summit may decide how a specific decision can be made”*

¹⁶ See article 24 ASEAN (1) Disputes relating to specific ASEAN instruments shall be settled through the mechanisms and procedures provided for insuch instruments. (2) Disputes which do not concern the interpretation or application of any ASEAN instrument shall be resolved peacefully in accordance with the Treaty of Amity and Cooperation in Southeast Asia and its rules of procedure. (3) Where not otherwise specifically provided, disputes which concern the interpretation or application of ASEAN economic agreements shall be settled in accordance with the ASEAN Protocol on Enhanced Dispute Settlement Mechanism

¹⁷ Bold and underline writing is added by author to describe number of mechanism that is more than on; see article 25 ASEAN Chapter *“Where not otherwise specifically provided, appropriate dispute settlement mechanisms, including arbitration, shall be established for disputes which concern the interpretation or application of this Charter and other ASEAN instruments”*

¹⁸ Article 22 ASEAN Charter instated Dialogue, Consultation, and Negotiation. Article 23 ASEAN Charter instated Good Faith, Mediation, and conciliation. Article 25 ASEAN Charter instated Arbitration. Article 33 ASEAN Charter instated external resolution from United Nation or other instruments.

negotiation by the High Level Panel on an ASEAN Human Rights Body or HLP, which consist of senior official representative of each ASEAN states.¹⁹

B. Right and Obligation Party of ASEAN Charter

In general, the right and obligation of each member states is not regulated in specific considering the character of the ASEAN Charter that is loose and again very general. The Charter only instated that each member states bear equal obligation and right in ASEAN.²⁰ For example in regard to state obligation to ASEAN, each member state bear equal obligation to pay annual membership fee US \$ 900,000. Concerning its right, each member states of ASEAN has the right to vote in every decision making.

C. Comparison of ASEAN Charter and Formation of Other Regional Organization

Comparing ASEAN Charter to other charter forming other regional organization which posses character of non-supranational organization i.e. ; *Organization of African Union 1863 (OAU)*, *Organization of American States 1948 (OAS)*, and *Organization of Islamic Conference 1974 (OIC)*, comparing the governed issues it can be said that ASEAN Charter is relatively more comprehensive. For example, for the three regional organization mentioned above which is OAU, OAS, and OIC only ASEAN Charter that govern in specific order regarding the mechanism of dispute resolution even though ASEAN is has the smallest state member.²¹ Other interesting fact is that concerning the scope of its purpose and principles embedded, ASEAN Charter is relatively more comprehensive.²²

ASEAN Charter as a Law Making Treaty in ASEAN

The implementation of ASEAN Charter implicate in the development of international law in ASEAN as well as in Indonesia. In the ASEAN region, the existence of this Charter has become one of the sources of International Law for all member of ASEAN.²³ Concerning the substance of the treaty, ASEAN Charter is not an ordinary International treaty but an International Treaty that posses special character that may be used as a ground for other International treaty and instruments. ASEAN Charter has the special character as a law making instruments for other ASEAN treaty or instruments derivatively subordinate or equally coordination.

¹⁹ *Terms of Reference* of HLP was concluded on the ASEAN Foreign Minister Retreat in Singapore, 20th February 2008. In the TOR mentioned, HLP among other matter, is requested to “..(4) the High Level Panel shall draft the Terms and References of the ASEAN human right body in conformity with the purposes and principles of the ASEAN Charter relating to the promotion and protection of human right and fundamental freedoms (5) the High Level Panel shall address the mandate, membership and of ASEAN human right body, as well as its relationship with other relevant human right bodies in ASEAN (6) The High Level Panel shall undertake consultations with the appropriate stakeholders in ASEAN...”

²⁰ Article 5 ASEAN Charter (1) Member States shall have equal rights and obligations under this Charter. (2) Member States shall take all necessary measures, including the enactment of appropriate domestic legislation, to effectively implement the provisions of this Charter and to comply with all obligations of membership. (3) In the case of a serious breach of the Charter or non-compliance, the matter shall be referred to Article 20.

²¹ Membership per 2008: OAU 32 member states, OAS 146 member states, and OIC more than 14 member states.

²² ASEAN Charter embedded 15 Purposes and 14 Principles, OAU Charter 5 Purposes and 7 Principles, OAS Principles 8 Purposes and 14 Principles, OIC Charter 7 purposes and principles.

²³ See Article 38 Statute of the International Court of Justice.

ASEAN Charter is said to have *law making* character (*traitlois*) in the ASEAN region for several reason; (i) govern general rules, (ii) multilaterally drafted in the ASEAN region, and (iii) does not annul any other obligation incorporated in other treaty.²⁴ In category; (i) ASEAN sets parameter in giving basic principles in interactions among member states of ASEAN, (ii) ASEAN Charter is a result of regional negotiation which coexist all national interest of its member in an agreement that is legally binding, and in category (iii) ASEAN Charter does not annul any other treaty but even acknowledge and declares that the previous agreement concluded before the formation of ASEAN Charter is still valid so long it does not contradict with the Charter.

A. ASEAN Instrument Pre- ASEAN Charter

According to the ASEAN Secretary, at this moment of time there are more than 300 instruments concluded by the ASEAN States since 1967.²⁵ This instrument is divided in several forms starting from declarations, mutual statements, Memorandum of Understandings, and international treaty in various field which is mostly in the field of economic cooperation.

Concerning the existence of such instruments mentioned above, ASEAN Charter with its *law making* characteristic acknowledge and declares the status of the instruments concluded before the forming of ASEAN Charter is still valid so long as the pre existing instruments does not contradict with ASEAN Charter and does not pose detriment implication to ASEAN, even though in-depth analysis confirms that this matter have potential detriments for the future. For example, the over 300 existing instruments has not yet been able to be classified which legal instruments that might bear obligation and right.

The problem of qualification if legal instruments correlate with the mechanism of dispute resolution for the reason that this legal instrument is most disputed. If a certain instrument does not clearly regulate of the legal right and obligation and a certain party does not complete its obligation, the question is can the occurrence be consider as the basis of starting a dispute? Other example is concerning the more than 300 instrument, is there any hierarchy relation from one to another or each instrument has equal status? This issues needs to be address by ASEAN to avoid potential dispute in the future.

B. ASEAN Instruments ASEAN Chapter Aftermath

ASEAN Instrument ASEAN Chapter aftermath should comply with a certain system that is coherence with the ASEAN Charter. The qualification that includes but not limited to the hierarchy and status of each instrument either legal or political instruments should be concluded upon.

²⁴ See John O'Brien, *International law*, Routledge Cavendish, 2001 p.82; see also Jan Klabbers, *The Concept of International Law*, Martinus Nijhoff Publisher, 1996, p.13-20; see also Rudiger Wolfrum and Volker Roben, *Development of International Law in Treaty Making Process*, Springer 2005, p.39.

²⁵ ASEAN Secretary Report submitted to HLEG and has been classified as official document of the Summary Record of HLEG's meeting.

Other than a good qualification system, there are several derivative issues of the ASEAN Charter that should be a homework for ASEAN i.e. treaty upon immunity and privilege as mandated by Chapter VI of the Charter, agreement of the ASEAN Human Right Body accordingly to the Article 14 of Chapter, and agreement of the mechanism of dispute resolution consistent to article 25 of the Chapter. Furthermore, ASEAN Secretary will play significant role as the center of ASEAN activity including ASEAN instruments formation in the future.

With the existence of ASEAN Charter, international law especially in the ASEAN region will point to a certain condition of a better legal certainty than ever before. It would be interesting to observe the implementation of ASEAN Charter in the future either in the form of treaty or other derivative instruments subordinated or equal coordination. The biggest prospect and challenge to the international law in the context of ASEAN is classical and has been the biggest fear of international law implementation, which is the political will of each member states to comply with the provision written in the ASEAN Charter.

C. ASEAN Charter as Sources of Indonesia National law

With the ratification of ASEAN Charter by Indonesia therefore the ASEAN Charter is officially becomes part of Indonesia's National Law. Several legal implication of ASEAN Charter for Indonesia mainly is the recognition to ASEAN as an international regional organization which posses legal capacity in regard to Indonesia National Law. The meaning of Legal Capacity is among other; (i) Drafting Contracts, (ii) Trading property, and (iii) right to sue and be sued before judicial court. How far is the limit for an international regional organization to be sued before the Indonesian judicial court or does a international regional organization might own property in Indonesia is basic question that has not been provided sufficient answer by Indonesian Law at this time.

Other issue concerning the legal implication is about immunity right and privilege of ASEAN in Indonesia. Indonesia has no legislation that governs specifically the status of international organization. Indonesian Law that correlates with immunity right and privilege of International organization is still disperse in general legislation such as Undang-undang No. 24 year 200 regarding International treaty, Undang-Undang No. 37 year 1999 regarding International Relations and Host Country Agreements, and other legislation that contradict each other is tax and immigration legislation.

The urgency to govern International Organization has become extremely relevant in the context of ASEAN as Indonesia has been vested mandate to become the Host of ASEAN. Indonesia should act in conformity as United States as the host of United Nation, Swiss and Austria as host for several international organization. The intensity of ASEAN meeting held in Jakarta will be extremely high accordingly; it will not be redundant to prevent conflicts with Indonesian Legal System especially when the Indonesian legal System has not yet regulated such issues clearly. Furthermore, each member states of ASEAN will deploy additional mission which level the status of Ambassador in conformity with representative of states to the United Nation in New York United States and this relation has not

include other states that have special relation with ASEAN such as dialogue partner. Australia for instance has sent its special envoy for ASEAN to Jakarta.

For Indonesia the implication of being host pose its own prospects and challenges either to Indonesian Law and to the relation of Indonesian Law with International law considering the character of International Treaty of ASEAN Charter. For Indonesia, the International Law prospect and challenges aftermath ASEAN Charter may be seen in two aspects, which is in internal aspect and external aspect. In the internal aspect, Indonesian Law will be influenced by international law especially law of international organization. Indonesian Law must bridge the interest of international law and the interest of its national law.

In the external aspect, the international community especially ASEAN Community and it is not impossible that such practice will be regarded as standard and lead to become international custom that is recognized and reflected by the international community will see the practice of Indonesia as the host of ASEAN. If such occurrence ever happens, it might be said that Indonesia has been directly involved in shaping the international law thru international customary law.

Conclusion

With the fact that ASEAN Charter has comes into effect it would start a new chapter not only for ASEAN as a regional organization but also for Indonesia as a member states. ASEAN posses a legal and institutional framework that is binding to reach common goals that has been agreed upon. With ASEAN Charter, ASEAN has evolved from a loose organization and become a rules-based organization. This fact automatically implicate to the development of international law especially in the ASEAN region referring to the status of ASEAN Charter as an international treaty that is one of the sources of international law.

In the context of ASEAN, the existence of ASEAN Charter is expected speed up the process of forming vision of ASEAN Community 2020. The international law prospect and challenges for ASEAN aftermath ASEAN Charter concerning the aspect of international treaty us that the implementation of ASEAN Charter that needs communal follow-ups with strong political will and precondition of a good system in implementation.

For Indonesia herself, international law prospect and challenges ASEAN Charter aftermath concerning the international treaty aspect is divided into two aspects; internal and external. In the internal aspect, Indonesia needs to carry out legal rectification governing international organization. Indonesia in this case is influenced by the international law. While in the external aspect, Indonesian position as the host of ASEAN might influenced the development of international law especially concerning international organization law.

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