

“POWER OF ASEAN SECRETARIAT TO INTERPRET THE ASEAN CHARTER”

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ABSTRACT:

This article shows the overview of Article 51 of the ASEAN Charter and Rule of Procedure for the Interpretation of the ASEAN Charter (ROP 2012) to explain the power of the ASEAN Secretariat to interpret the ASEAN Charter. The analysis focuses on the main research question of why Article 51 of the ASEAN Charter and Rule 2(1) of ROP 2012 would not fit into the ASEAN principle as ASEAN declared itself as a rule-based intergovernmental organization. By applying a descriptive method, this article shall be considered with three factors such as (1) Interpreter, (2) Legal binding decision, and (3) Result of application of the decision. It has found that the interpretation power of the ASEAN Secretariat under Article 51 of the ASEAN Charter and Rule 2(1) of ROP 2012 is impossibly used into the current practice of ASEAN because (1) the ASEAN Secretariat is designed for an administrative body, not a decision-making body, (2) there is no legal binding for ASEAN Secretariat's decision, and (3) application of ASEAN Secretariat's decision would lead to the unresolved dispute. Therefore the author suggests ASEAN to revise Article 51 of the ASEAN Charter and Rule 2(1) of ROP 2012 by adding the Charter interpretation supporting unit for the ASEAN Secretariat, the legal binding status of interpretation, and the majority based dispute settlement mechanism with the penalty action in case of decision obeying.

Keyword:

ASEAN Charter Interpretation, ASEAN Secretariat, ASEAN Charter, Rule of Procedure for the Interpretation of the ASEAN Charter 2012.

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INTRODUCTION

After ratification of the ASEAN Charter in 2007, ASEAN is the most well-known and successful inter-governmental organization which consisted of Member States from the differences of culture, language, religion, economic, and politic in South East Asia region (ASEAN, 2019; Ciorciari, 2017: 252-254; Koh, Manalo & Woon, 2009). These differences could be found from all perspectives. In terms of economic, there are a group of nations with a higher level of development including Brunei, Indonesia, Malaysia, the Philippines, Singapore and Thailand, and a group of countries with a lower level of development which is composed of Cambodia, Laos, Myanmar and Viet Nam. In terms of politics, it basically contains socialist-oriented regimes such as Viet Nam, Cambodia and Laos, a military government such as Myanmar, and a capitalist group such as

Indonesia, Malaysia, the Philippines, Singapore and Thailand, a monarchy such as Brunei. In terms of religion, Indonesia is Muslim nation while Cambodia, Laos and Thailand are Buddhism, and the Philippines are mainly Christian (Tan, 2008: 173-174; Severino, 2006: 80-84). Moreover ASEAN also claimed itself as the most present successful rule-based regional intergovernmental organization in the Southeast Asia region with 642.1 million peoples and GDP at 2,765.8 US\$ billion in 2017 (ASEAN, 2018; ASEAN, 2016a). The ASEAN Charter has well served ASEAN as a constitutional instrument to joint these mentioned differences of each ASEAN Member States since 2008 till present is now challenged to be officially reviewed by the scholar (Limsiritong, Springall, & Rojanawanichkij, 2019: 38-39; Woon, 2017: 245-248; Star, 2017; Today, 2017; Tiwari, 2010: xvi). Even Article 50 of the

ASEAN Charter states to review its ASEAN Charter five years after into force in 2008 which is 2014, and it has no progressive processes of the ASEAN Charter reviewing (Singapore Institute of International Affairs, 2014). Without any review and revision of its ASEAN Charter, in case of doubt of law, Article 51 of ASEAN Charter under the Rule of Procedure for the Interpretation of the ASEAN Charter (ROP 2012) put a strict burden of duty to interpret its ASEAN Charter to the ASEAN Secretariat, which has the Secretariat-General of ASEAN as the head of ASEAN's administrative office. This situation provides prominence to critical questions for ASEAN as a rule-based intergovernmental organization: (1) What is the ASEAN Secretariat's Power to interpret ASEAN Charter?, (2) Why Article 51 of the ASEAN Charter and Rule 2(1) of ROP 2012 would not fit into the ASEAN principle?, and (3) How Article 51 of the ASEAN Charter and Rule 2(1) of ROP 2012 would fit into the ASEAN principle?

1. Objectives

This article objectives are (1) to study Article 51 of the ASEAN Charter and ROP 2012 to explain the power of the ASEAN Secretariat to interpret the ASEAN Charter, (2) to analysis why Article 51 of the ASEAN Charter and Rule 2(1) of ROP 2012 would not fit into the ASEAN principle, (3) to suggest how Article 51 of the ASEAN Charter and Rule 2(1) of ROP 2012 would fit into the ASEAN principle.

RESEARCH QUESTIONS

1. What is the ASEAN Secretariat's Power to interpret ASEAN Charter? (**RQ 1**)
2. Why Article 51 of the ASEAN Charter and Rule 2(1) of ROP 2012 would not fit into the ASEAN principle? (**RQ 2**)
3. How Article 51 of the ASEAN Charter and Rule 2(1) of ROP 2012 would fit into the ASEAN principle? (**RQ 3**)

RESEARCH METHODOLOGY AND LIMITATION OF WORK

This article is qualitative research with documentary data and descriptive approach. Primary data consisted of ASEAN Charter, Rule of Procedure for the Interpretation of the ASEAN Charter (ROP 2012), and the Vienna Convention on the law of treaties (VCLT). Secondary data consisted of pieces of information from the textbook, journals, reports, newspaper, and ASEAN website related to Research questions. By descriptive approach, the author analysis and apply secondary data into primary data to answer the mentioned Research questions. Due to the lack of case studies, the author needs to design mapping of due process of ASEAN Charter interpretation based on primary data.

FINDINGS AND DISCUSSION

According to the research objectives, the research result is fulfilled as follows;

Research objective 1, which is "to study Article 51 of the ASEAN Charter and ROP 2012 to explain the power of the ASEAN Secretariat to interpret the ASEAN Charter", is fulfilled by reviewing the power of the ASEAN Secretariat to interpret the ASEAN Charter under Article 51 of the ASEAN Charter and ROP 2012 to answer the RQ1 on what is the ASEAN Secretariat's power to interpret ASEAN Charter.

It found that there are three factors to be discussed such as (1) what the ASEAN Charter interpretation is, (2) who is in charge to interpret the ASEAN Charter, and (3) how to interpret the ASEAN Charter.

The first factor is what the ASEAN Charter interpretation is. Bryan A. Garner, the editor of Black Law dictionary, describes the law interpretation as the process of discovering and expounding the intended signification of the language used in a statute, will, contract, or any other written document (Garner, 2009: 894). So the ASEAN Charter interpretation is the process of discovering and expounding the intended

signification of the language used in the ASEAN Charter whenever the contents of the ASEAN Charter must be determined. According to Rule 3(2) of ROP 2012, the contents of ASEAN Charter interpretation consisted of (1) the provisions of the ASEAN Charter, and (2) the specific questions on which the interpretation is sought (ASEAN, 2016b).

The second factor is who is in charge to interpret the ASEAN Charter, the answer is stated under Article 51(1) of the ASEAN Charter which states that *“Upon the request of any Member State, the interpretation of the Charter shall be undertaken by the ASEAN Secretariat in accordance with the rules of procedure determined by the ASEAN Coordinating Council.”* (ASEAN, 2016a). This article directly empowers the ASEAN Secretariat by the request of ASEAN Member State to interpret the ASEAN Charter when the matter of law is placed such as in case of a south china sea dispute or Rohingya crisis. (Limsiritong, Springall & Rojanawanichkij, 2019: 29-30; Limsiritong, 2018: 31).

The last factor is how to interpret the ASEAN Charter, Rule 2(2) of ROP 2012 stated that *“the ASEAN Secretariat shall interpret the ASEAN Charter in good faith in accordance with the ordinary meaning to be given to the terms of the ASEAN Charter in their context and in the light of its object and purpose.”* (ASEAN, 2016b). It would mean that the principle of good faith from Article 31(1) of Vienna Convention on the law of treaties (VCLT 1969) shall be directly applied into the ASEAN Charter interpretation.

Research objective 2, which is *“to analysis why Article 51 of the ASEAN Charter and Rule 2(1) of ROP 2012 would not fit into the ASEAN principle as a rule based intergovernmental organization”*, is fulfilled by descriptive analyzing Article 51 of the ASEAN Charter and Rule 2(1) of ROP 2012 to answer the RQ2 on why Article 51 of the ASEAN Charter and Rule 2(1) of ROP 2012 would not fit into the ASEAN principle.

It found that there are three factors to be discussed such as (1) Interpreter, (2) Legal binding decision, and (3) Result of application of the decision.

The first factor is related to the official interpreter of ASEAN Charter, which is the ASEAN Secretariat under Article 51(1) of the ASEAN Charter. It means that in case of Charter interpretation is requested by any ASEAN Member State, and the ASEAN Secretariat shall be fully in charge of making the decision. However this article is not reliable and practical due to the relation of the ASEAN Summit and ASEAN Secretariat-General under the ASEAN Charter.

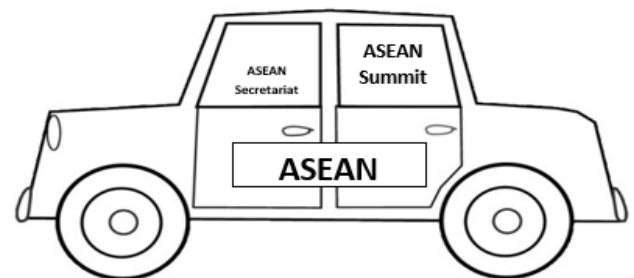


Figure 1 Relation of the ASEAN Summit and ASEAN Secretariat-General under the ASEAN Charter

As shown in Figure 1, it explains the relation of the ASEAN Summit and ASEAN Secretariat-General under the ASEAN Charter. Assuming that ASEAN is a car, the ASEAN Summit, as the supreme policymaking body, is a car owner, as well as the ASEAN Secretariat, as the administrative body, is a car driver. It would mean that a car owner has rights typically to set his direction and can order a car driver to drive his car to his destination. However if a car owner is in doubts of his order, Article 51(1) of the ASEAN Charter automatically empowers a car driver to make a decision instead of a car owner. Hence it makes the strange situation against the ASEAN organizational structure which is a top-down style organization (Limsiritong, 2018: 33). Especially for the ASEAN Secretariat as a car driver, which is not a right man in this situation to

make the decision instead of the ASEAN Summit as a car owner.

Moreover Article 51(1) of the ASEAN Charter requires that the duty to interpret the ASEAN Charter is up to ASEAN Secretariat. In fact, the ASEAN Secretariat is mainly and wholly in charge of administrative works, not a legal specialist (Limsiritong, 2017: 10; ASEAN; 2016c; Phan, 2013: 276). The ASEAN Secretariat is also short of staff and fund (The Strategist, 2017; Singapore Institute of International Affairs, 2014: 9-10). Therefore the given decision of interpretation could be in doubt on justice and equality by the ASEAN Member States whose is directly or indirectly affected by this decision.

The second factor is related to the legal binding decision. According to Article 2(1) of ROP 2012 stipulated that “the interpretation of the ASEAN Charter by the ASEAN Secretariat shall be non-binding and non-authoritative in nature and shall not be considered as representing the view of any Member State or of ASEAN as an intergovernmental organization.” (ASEAN, 2016b). It means that any interpretations of the ASEAN Charter by the ASEAN Secretariat are not considered as the legal binding decision. So Without the legal binding result, any decision of ASEAN Secretariat’s interpretation could be claimed as just a guideline, and the Parties has no any obligations to respond and follow it (Sookhakich, 2019: 38-39; Limsiritong; 2017: 9-11). Moreover with consideration of Article 51(2) of the ASEAN Charter and Article 2(1) of ROP 2012, it has found very nonsense and misperception that the interpretation of the ASEAN Charter under Article 51(1) shall not be considered as representing ASEAN while the ASEAN Charter itself is served ASEAN as a constitutional instrument of ASEAN (Tiwari, 2010: xvi).

The third factor is a result of application of the decision. The effective due process of law shall usually give a good output. Without the legal binding order, it allows the parties to reject its

decision without any enforcement and punishment. Article 51(2) of the ASEAN Charter specified that “Any dispute arising from the interpretation of the Charter shall be settled in accordance with the relevant provisions in Chapter VIII (Dispute Settlement).” (ASEAN, 2016a). When Article 51(1) of ASEAN Charter is rejected by the parties, Article 51(2) shall legally be taken and creates a new dispute between the ASEAN Secretariat and any ASEAN Member States when the Parties does not agree with the interpretation of ASEAN Secretariat. So instead of solving an issue of interpretation, Article 51 brings the parties into a new dispute with a more difficult situation because the ASEAN Dispute Settlement Mechanisms (ASEAN DSMs) has never been applied in practice even once since ASEAN was established in 1969. All the disputes among the ASEAN Member States are resolved through the non-ASEAN DSM such as WTO panel, ICJ, and back door diplomacy (Limsiritong, 2016: 23-24). Consequently how the Parties can rely on the unproved ASEAN DSMs when there is a dispute between the ASEAN Secretariat and any ASEAN Member States.

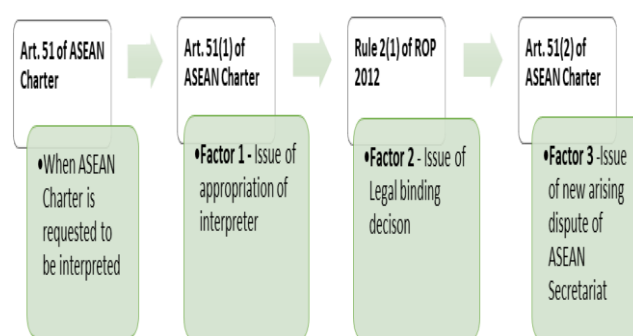


Figure 2 Interpretation Process of the ASEAN Charter

As shown in Figure 2, it explains the interpretation processes of ASEAN Charter under Article 51 of the ASEAN Charter and Rule 2(1) of ROP 2012 which is not applicable in reality because Article 51 of the ASEAN Charter puts a wrong man to a wrong job and also creates makes the odd situation against the ASEAN organizational structure which is a top-down style

organization. Then according to Rule 2(1) of ROP 2012, without the legal binding decision, any decision of ASEAN Secretariat's interpretation is worthless because any given decision could not be enforced to the parties. Last of all with the mentioned issues of factor 1 and 2 on the inappropriate interpreter and no-legal binding decision, Article 51(2) of the ASEAN Charter will make a new dispute between the ASEAN Secretariat and any ASEAN Member States at the end.

Research objective 3, which is “to suggest how Article 51 of the ASEAN Charter and Rule 2(1) of ROP 2012 would fit into the ASEAN principle”, is fulfilled by suggesting some recommendations to answer the RQ3 on how Article 51 of the ASEAN Charter and Rule 2(1) of ROP 2012 would fit into the ASEAN principle.

It found that in order to suggest how Article 51 of the ASEAN Charter and Rule 2(1) of ROP 2012 would fit into the ASEAN principle, there are three suggestions related to factors 1, 2, and 3 as follows;

Factor 1 - *the issue of appropriation of the interpreter* - ASEAN needs to add the Charter interpretation supporting unit for the ASEAN Secretariat to have any meaningful role interpreting the ASEAN Charter.

Factor 2 - the issue of legal binding decision - ASEAN should amend Rule 2(1) of ROP 2012 as “the interpretation of the ASEAN Charter by the ASEAN Secretariat shall be binding and authoritative in nature and shall be considered as representing the view of any Member State or of ASEAN as an intergovernmental organization.” to declare a legal binding status of interpretation and empowers the ASEAN Secretariat to interpret the ASEAN Charter when the matter of law is issued without the request of ASEAN Member State.

Factor 3 - the issue of a new arising dispute of ASEAN Secretariat – ASEAN should amend Article 51(2) of the ASEAN Charter as “Any dispute arising from the interpretation of the

Charter shall be settled in accordance with the relevant provisions in Chapter VIII (Dispute Settlement) on the basis of majority. When a Member State fails to comply with the decisions resulting from the dispute settlement mechanisms, it will refer the issue to the ASEAN Council for action under Chapter III: Membership.” to add the basis of the majority instead of consensus in the dispute settlement mechanism and the penalty action in case of decision obeying.

CONCLUSION

To summarize, ASEAN officially reconfirmed itself as a rule-based intergovernmental organization with the ASEAN Charter (ASEAN, 2016a; Piris & Woon, 2015; Singapore Institute of International Affairs, 2014: 11). In order to respect the value of the ASEAN Charter, the interpretation of the ASEAN Charter is needed. However this article shows (1) the overview of the ASEAN Secretariat's Power to interpret ASEAN Charter, (2) why Article 51 of the ASEAN Charter and Rule 2(1) of ROP 2012 would not fit into the ASEAN principle, and (3) the suggestions to fit in Article 51 of the ASEAN Charter and Rule 2(1) of ROP 2012 into the ASEAN principle. The ASEAN Charter need not be reviewed in total but on a limited point of Article 51 of the ASEAN Charter reliability with Rule 2(1) of ROP 2012. So if the ASEAN Charter is really mattered as ASEAN mentioned itself as a rule-based intergovernmental organization, the ASEAN Charter is supposed to be respected its values by all ASEAN Member States as well as the ASEAN Charter interpretation should be actually recognized by the rule of law in practice, not just in theory. These proofs show the weakness of the rule of law in the ASEAN Charter.

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