

SETTLEMENT OF INTERNATIONAL DISPUTES IN THE BODY OF ASEAN: Treaty of Amity and Cooperation in Southeast Asia

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ABSTRACT

Founded in 1967, the Association of South East Asian Nation or ASEAN was formed as an attempt to create cooperation and solidarity between fellow ASEAN members. Through the years of its existence, relations between ASEAN members in various aspects have developed and have been carried out through agreements and cooperation. However, in implementing agreements and through the cooperation of one or more members within the ASEAN region, countries with different backgrounds and interests are very likely to disagree at some point which would then create a dispute between them. Although formed in order to create peace within its region, disputes within ASEAN region are seldom settled as ASEAN members strongly hold the principles of sovereignty of each member states and the use of non-intervention. Through this background, the Authors of this paper will then study the settlement of international disputes in the body of ASEAN and as to why the principles and objectives of ASEAN and the concept of regional organizations have not been able to work well in ASEAN.

Keywords: *International Dispute Settlement, ASEAN, Treaty of Amity and Cooperation in Southeast Asia*

ABSTRAK

Ditemukan pada tahun 1967, Association of South East Asian Nation atau ASEAN dibentuk sebagai upaya untuk menciptakan kerjasama dan sebagai bentuk solidaritas dari setiap negara anggota ASEAN. Selama perjalanannya, hubungan antara negara anggota ASEAN di berbagai aspek telah berkembang dan dilaksanakan melalui berbagai macam bentuk perjanjian dan kerjasama. Namun dalam pelaksanaannya, sangat dimungkinkan untuk terciptanya suatu sengketa diantara negara-negara anggota yang memiliki latar belakang serta kepentingan yang berbeda-beda. Meskipun ASEAN dibentuk dalam rangka menciptakan perdamaian di dalam wilayahnya, sengketa dalam lingkup ASEAN sering tidak dapat terselesaikan. Hal tersebut dikarenakan negara anggota ASEAN yang berpegang teguh pada prinsip kedaulatan setiap negara dan non-intervensi. Berdasarkan latar belakang tersebut, Penulis penelitian ini akan meneliti mengenai penyelesaian sengketa internasional di dalam tubuh ASEAN dan mengapa prinsip dan tujuan dari ASEAN serta konsep organisasi regional belum dapat bekerja sebagaimana mestinya di wilayah ASEAN.

***Keywords:** Penyelesaian Sengketa Internasional, ASEAN, Perjanjian Persahabatan dan Kerja Sama di Asia Tenggara*

A. BACKGROUND

Regional international bodies or organizations have long been recognized as having a role in resolving international disputes. The role of this regional organization has continued to develop in the twentieth century, in line with the tendency of the international community to form bodies within its region. One of the initiatives to form a regional organization came from the Asian continent, especially for Southeast Asia, namely by forming the ASEAN (Association of South East Asian Nation).

ASEAN is an organization formed through the awareness of countries in the Southeast Asia region because of the need for cooperation and solidarity between them through common goals, namely the realization of peace, progress and prosperity.¹ The various similarities that have been experienced by countries in the Southeast Asian region, including geographic location, shared fate and history, equality of economic interests, and cultural equality have led to the formation of a regional organization, which is ultimately referred to as ASEAN.²

After the establishment of ASEAN, various kinds of cooperation have been made and carried out, including in the economic sector which focuses on the export-import trade, the establishment of factories and labor. In the political and security sector, the 1971 Kuala Lumpur Declaration was a sign of the agreement of Southeast Asia as a peaceful, free and neutral region which is commonly referred to as ZOPFAN (Zone of Peace, Freedom and Neutrality).³ Especially in the field of human rights, ASEAN through the ASEAN Political-Security Community focuses on enhancing the human rights values of ASEAN members.

With ASEAN countries often having international relations with other countries, many positive impacts are generated. However, there is no doubt that besides the positive impacts, negative impacts also exist. For example, countries may involve in international disputes or disputes between two countries, which then causes tension between warring countries, such as the case between Indonesia and Malaysia, namely Sipadan and Ligitan, and Thailand and Cambodia, namely the Preah Vihear Temple Dispute, which is still in dispute to defend the arguments of each country.

¹ Rodolfo C. Severino, *ASEAN*, Southeast Asia Background Series No. 10, Singapore: Institute of Southeast Asian Studies, 2008, hlm. 1-2.

² Setiawan Wicaksono, *Kajian Prinsip Non-Intervensi ASEAN Dalam Kerangka Organisasi Ekonomi Internasional*, Jurnal Law Riview Vol XVII, No 1, 2018, hlm. 24.

³ Amitav Acharya, *Constructing a Security Community in Southeast Asia: ASEAN and the problem of regional order*, London: Routledge, 2001, hlm. 54.

In fact, so far ASEAN has not been able to resolve problems or disputes that exist within ASEAN members. Most member countries prefer to solve problems that occur within their own countries due to the reason that ASEAN has the principle of respecting the normality, sovereignty of each country, and the use of non-intervention.⁴ This can be a weakness for ASEAN that rarely allows dispute resolution to its members.

Therefore, it is necessary to further study conceptually and theoretically as to why the principles and objectives of ASEAN and the concept of regional organizations have not been able to work well in ASEAN. In this paper, the Authors would like to convey some general studies on the general division of international dispute resolution in general and ASEAN dispute resolution.

B. RESEARCH METHOD

Materials from this paper were obtained through various sources, such as international treaty, books, and journals which are all related to the current issue. The method used in this research is qualitative study to ensure that the point of this research is explored through different perspectives and sources for the sole purpose of the readers' complete understanding of the issue at hand.

C. DISCUSSION

1. Dispute Resolution Within ASEAN

At the Meeting held in Bangkok, the objectives of ASEAN were discussed, namely laying the foundation aimed at advancing regional cooperation in Southeast Asia, strengthening economic and social stability, and maintaining peace and security

⁴ Rodolfo C. Severino, *ASEAN*, Southeast Asia Background Series No. 10, Singapore: Institute of Southeast Asian Studies, 2008, hlm. 7; Ralf Emmers, *Cooperative Security and the Balance of Power in ASEAN and the ARF*, London: Routledge, 2003, hlm. 3.

in the Southeast Asian region.⁵ Included in the objectives is the desire to resolve disputes among its members peacefully without violence or by use of war.⁶

The important thing that ASEAN did in an effort to create and achieve political stability and security in the Southeast Asian region was the Treaty of Amity and Cooperation in Southeast Asia 1976 (TAC). In cases of disputes that does not concern the interpretation or application of any ASEAN instrument, Article 24(2) of the ASEAN Charter provides that the dispute settlement prescribed in the TAC and its rules of procedure will be used.⁷ Basically, principles such as the principle of non-interference (non-intervention) and the use of peaceful methods in resolving disputes by not using violence that are contained in the TAC are similar to what is stipulated in the UN Charter.

Meanwhile, the Second protocol amending the Treaty of Amity and Cooperation in Southeast Asia 1998 (2nd Protocol Amendment of the TAC) signed by the Ministers of Foreign Affairs of ASEAN and Papua New Guinea in Manila on 25 July 1998, became the starting point for the expansion of the TAC outward. This action was taken by ASEAN to maintain regional peace and stability which was experiencing rapid progress in October 2003 with the accession made by the Governments of China and India to the TAC at the 9th ASEAN Summit in Bali in 2003.

On 2 July 2004 in the 37th AMM which was held in Jakarta, the Japanese and Pakistani governments acceded to the TAC. Meanwhile, the Russian and South Korean governments acceded to the TAC at the ASEAN-Russia Ministerial Meeting and ASEAN-South Korean Ministerial Meeting in November 2004 in Laos. On July 2005 in the 38th AMM which was held in Vientiane, New Zealand and Mongolia

⁵ Andrea, Faustinus, *Perimbangan Kekuatan di Myanmar Faktor ASEAN dan Kepentingan Indonesia*, Volume. 35 No. 2 Juni 2006, Analisis Centre for Strategic and International Studies (CSIS), Jakarta, hlm. 83.

⁶ Hiro Katsumata, *ASEAN's Cooperative Security Enterprise: Norms and Interests in the ASEAN Regional Forum*, London: Palgrave Macmillan, 2009, hlm. 52.

⁷ Tommy Koh, *The Making of the ASEAN Charter*, Singapore: World Scientific Publishing, 2009, hlm. 73-74.

acceded to the TAC. In Kuala Lumpur, before the 11th ASEAN Summit in December 2005, Australia acceded to the TAC.⁸ At the 12th ASEAN Summit (XII), France and Timor Leste acceded to the TAC.

The accession of the French State, which is one of the European Union (EU) countries, is an important recognition to the TAC of the existence of ASEAN and the importance of developing cooperation with ASEAN. The EU's desire to accede to the TAC signifies the progress of ASEAN as a significant regional organization, particularly for the development of cooperation between the two regions. The process of further activities regarding this accession is still ongoing. The accession of permanent member states of the UN Security Council, such as the Governments of China, Russia and France, indicates significant support to the TAC as a code of conduct in carrying out relations between countries inside and outside the ASEAN region. The ASEAN organization continues to encourage other countries outside the Central Asia region to accede to the TAC.

The results of the TAC meeting stated that any disputes arise between ASEAN countries must avoid using means that can cause war and may endanger and hinder cooperation in the Southeast Asian region. The TAC also contains the objectives and principles adopted in friendly relations and cooperation between ASEAN member countries. The objectives of the TAC are as stated in Chapter I Article 1 which states that to be able to promote peace continuously, build good cooperation among ASEAN member countries.⁹

The TAC, which was signed at the first ASEAN Summit in Bali on 24 February 1976, is often cited as a manifestation of global values that underlie the formation of regional organizations.¹⁰ At the meeting in Bali, ASEAN member countries agreed to: Respect each other for the independence, sovereignty and

⁸ Dewa Gede Sudika Mangku, *Suatu Kajian Umum Tentanb Penyelesaian Sengketa Internasional Termasuk Di Dalam Tubuh ASEAN*, Jurnal Perspektif Vol XVII No. 3, 2012, hlm. 156.

⁹ *Ibid*, hlm. 157.

¹⁰ Bambang Cipto, *Hubungan Internasional di Asia Tenggara, Teropong terhadap Dinamika, Realitas, dan Masa Depan*, Yogyakarta: Pustaka Pelajar, 2007, hlm 23.

territorial integrity of all countries; Every country has the right to defend its existence from interference, subversion, violence from outside forces; To not interfere in the affairs of other countries; Resolving disagreements and disputes in a peaceful manner; Resisting threats of use of force.

When viewed between the preamble and the provisions regarding the objectives and basic principles that was adopted, one of the issues prioritized in the TAC agreement is regarding the resolution of disputes or disputes that occur between ASEAN member countries to be carried out in a peaceful manner without using violence or war to maintain the friendship and cooperation that has been established. Chapter IV of the TAC regulates the settlement of disputes which consists of 5 (five) articles, namely Articles 13-17. Based on Chapter IV of the TAC, there are 3 (three) mechanisms or procedures for dispute resolution known to ASEAN member countries, which may include: avoiding disputes and resolution through direct negotiations, dispute resolution through the High Council, and ways of dispute resolution, according to Article 33 paragraph 1 of the UN Charter.

Chapter IV of the TAC recognizes that there are 3 (three) dispute resolution mechanisms in ASEAN, namely:

a) Dispute avoidance and settlement through negotiation

Article 13 of the TAC reads:

"The High Contracting Parties shall have determination and good faith to prevent disputes from arising. In case disputes on matters directly affecting them should arise, especially disputes likely to disturb regional peace and harmony, they shall refrain from the threat or use of force and shall at all times settle such disputes among themselves through friendly negotiations "

Article 13 recommends that ASEAN member countries, as far as possible in good faith and full efforts, to prevent disputes. If a dispute occurs, the parties are asked to resolve the problem through good negotiations.

b) Dispute resolution through the High Council

If dispute resolution through negotiations fails, TAC provides another way, namely by bringing it to the High Council which consists of representatives from each country through a peaceful manner such as good services, mediation, conciliation, investigation and so on (Article 14 TAC). If the dispute becomes worsens, the High Council has the power to provide recommendations or direction for the achievement of dispute resolution (Article 15 TAC).

Article 14 of the TAC reads:

"To settle disputes through regional processes, the High Contracting Parties shall constitute, as a continuing body, a High Council comprising a Representative at ministerial level from each of the High Contracting Parties to take cognizance of the existence of disputes or situations likely to disturb regional peace and harmony. "

Meanwhile, Article 15 of the TAC reads:

"In the event no solution is reached through direct negotiations, the High Council shall take cognizance of the dispute or the situation and shall recommend to the parties in dispute appropriate means of settlement such as good offices, mediation, inquiry or conciliation. The High Council may however offer its good offices, or upon agreement of the parties in dispute, constitute itself into a committee of mediation, inquiry or conciliation. When deemed necessary, the High Council shall recommend appropriate measures for the prevention of a deterioration of the dispute or the situation. "

c) Settlement of disputes in accordance with Article 33 of the UN Charter

Article 17 of the TAC provides an option for disputing parties to continue to use the dispute settlement method as stipulated in Article 33 of the UN Charter. As it is known that Article 33 of the Charter of the United Nations requires that the settlement of disputes that occur in a regional area must be resolved in accordance with the mechanisms applicable in that regional area.

Article 17 TAC gives disputing States the right to settle previous regional disputes but does not exclude the possibility of pursuing settlement through generally accepted international law.

Article 17 TAC reads:

“Nothing in this Treaty shall preclude recourse to the modes of peaceful settlement contained in Article 33(l) of the Charter of the United Nations. The High Contracting Parties which are parties to a dispute should be encouraged to take initiatives to solve it by friendly negotiations before resorting to the other procedures provided for in the Charter of the United Nations.”

If the dispute continues, then the possibility of dispute resolution is through an international court such as the International Court of Justice or other judicial institutions. However, this means that ASEAN's initial aspirations so that dispute resolution can be resolved regionally is not realized, on the contrary it raises dispute tensions to the international level in general.

2. Disputes between Thailand and Cambodia Using the ASEAN Mechanism

Disputes over national borders among ASEAN members still often cause conflicts. The dispute between Thailand and Cambodia was caused by upheaval around the Preah Vihear Temple which is located between Preah Vihear Province in Cambodia and near the Kantharalak district in Thailand. This dispute occurred after the United Nations Educational, Scientific and Cultural Organization (UNESCO) made Preah Vihear Temple a world historical heritage belonging to Cambodia on July 7, 2008. Since then, there has been a conflict between Thailand and Cambodia. The border dispute concerns an area of 4.6 square kilometers around the site of the Preah Vihear Temple.

Cambodia and Thailand have long fought over the Preah Vihear Temple. In 1962, the International Court of Justice (ICJ) ruled that Preah Vihear Temple belongs to Cambodia. However, the area around Preah Vihear temple covering an area of 4.6

square kilometers was not determined (left unfinished). Therefore, Thailand and Cambodia continue to claim the area around the Preah Vihear Temple within their respective territories. As a result, when the Preah Vihear Temple was designated by UNESCO as a World Heritage site, strong protests emerged from nationalist groups in Thailand.¹¹

Initially Thailand wanted to resolve this border dispute bilaterally without any interference from other parties. Meanwhile, Cambodia is seeking assistance from the United Nations to help resolve the dispute. The United Nations urged the two countries to resolve their dispute through the ASEAN organization. The UN Security Council has mandated ASEAN to resolve conflicts peacefully. Finally, Thailand agreed to settle its border dispute through ASEAN, which was also agreed to by Cambodia. The situation was getting better after the victory of Yingluck Shinawatra camp in the Thai election because as they are more friendly to the Government of Cambodia.¹²

The conflict case between Thailand and Cambodia is one example of a challenge for Indonesia, which at the time (in 2011) was the Chair of ASEAN, to play an active role in resolving conflicts in the region. Indonesia has tried to encourage the two countries to resolve conflicts through peaceful means and does not need to be brought to the international level such as the UN Security Council. Indonesia has also won the trust of the UN Security Council to resolve conflicts. Indonesia's role in promoting conflict resolution between the two countries has not only received the spotlight from fellow ASEAN countries, but has also received the spotlight from the United Nations.¹³

¹¹ Elfia Farida, *Peyelesaian Sengketa Perbatasan Antara Thailand dan Kamboja Melalui ASEAN*, Jurnal MMH, Jilid 43, No. 1, 2014, hlm, 58.

¹² *Ibid*, hlm. 58.

¹³ ASEAN dan Penyelesaian Konflik Thailand-Kamboja, 22 Februari 2011, "Menteri Luar Negeri RI, R.M. Marty M Natalegawa, melakukan pembicaraan dengan Menteri LuarNegeri Thailand Kasit Piromya di Jakarta, (Kemlu.go.id).

Indonesian then Foreign Minister, Marty Natalegawa, conducted a "shuttle diplomacy" to meet with Cambodian Foreign Minister, Hor Nam Hong, in Phnom Penh and Thai Foreign Minister, Kasit Piromya, in Bangkok to get first-party information. After that, Foreign Minister Marty left for New York to provide considerations and input on ASEAN's role in resolving internal conflicts in the region. This measure has been proven effective by stabilizing the conflict area on the border of Thailand and Cambodia. Although the contested area of 4.6 km² is still tense. The two countries then agreed to a ceasefire in August 2010. However, on 4 to 6 February 2011 there was another gun battle between the two countries.

On 22 February 2011 in Jakarta, an informal meeting of the ASEAN Foreign Ministers (Informal Foreign Ministers Meeting) was held with a single agenda to discuss the resolution of the conflict between Thailand and Cambodia. The two warring countries have agreed on three corridors, namely peaceful dialogue through the TAC mechanism, a permanent ceasefire and ASEAN involvement in mediating conflict. The informal meeting of ASEAN foreign ministers initiated by Indonesia as the Chair of ASEAN was a follow-up to the results of the UNSC meeting which called on Thailand and Cambodia to cooperate with ASEAN as mediators to resolve border problems through peaceful means.

D. CLOSING

Conclusion

a. In ASEAN, the mechanism for resolving border disputes between countries is clearly written in the Treaty of Amity and Cooperation (TAC) and the ASEAN Charter. The articles contained in the TAC and ASEAN Charter, in practice, prefer to use instruments to defuse disputes so that they do not escalate into war conflicts. Settlement of disputes through the ASEAN mechanism is in a peaceful manner, namely through dialogue, consultation and negotiation, using good services, conciliation and mediation based on the agreement of the disputing parties in

accordance with the TAC (Chapter VIII Articles 22 to Article 28 of the ASEAN Charter and Chapter IV Articles 13 to Article 17 TAC).

b. The border dispute that arises between Thailand and Cambodia is resolved using the good services of Indonesia. The effort made by ASEAN to resolve the border dispute between Thailand and Cambodia is a diplomatic effort. Diplomatic efforts are prioritized to avoid violence and military means.

Suggestion

- a. a way to resolve disputes, mainly among the ASEAN member countries, The Treaty of Amity and Cooperation in Southeast Asia or TAC should be utilized to its fullest extent by ASEAN member countries.
- b. In resolving disputes, it is important for ASEAN member countries to exhaust all the dispute remedies available within the ASEAN region.
- c. As In accordance with the TAC, it needs to be stressed that disputing countries should use no violence as it would not resolve the dispute between them.

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