

How to Apply Protocol to the ASEAN Charter on Dispute Settlement Mechanisms 2010 in Case of ASEAN Charter Interpretation

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Abstract

ASEAN Charter is the fundamental ASEAN instrument and it sometimes needs to be interpreted in case of matters of law. This article is written to answer the question of how the Protocol to the ASEAN Charter on Dispute Settlement Mechanisms (PDSM) 2010 will be applied in case of ASEAN Charter interpretation. It starts with an introduction of relations between ASEAN Charter, the Rules of Procedure for the Interpretation of the ASEAN Charter 2012 (ROP 2012), and PDSM 2010. It also shows how ASEAN interprets ASEAN Charter in section of ASEAN Charter interpretation and presents the map of how to apply PDSM 2010 in case of ASEAN Charter interpretation. Finally it shows an outcome of non-legal binding on result of interpretation which makes a direct affecting to PDSM 2010 and ASEAN Charter.

Keywords: PDSM 2010, ASEAN Charter, Charter Interpretation, ROP 2012, ASEAN Summit

Introduction

ASEAN Charter is officially launched since 2008 as the constituent instrument of ASEAN. As normal as other constituent instruments such as UN Charter or EU Charter of Fundamental Rights, it is clearly unavoidable to be challenged by an issue of law interpretation. In order to deal with this challenging, ASEAN later declared ROP 2012 to handle it. Nevertheless it seems to us that ROP 2012 which is expected to be effective and reliable law to interpret ASEAN Charter, is useless in a sense of reality because there is no legal-binding effect for result of interpretation. Moreover it also puts all burdens of law interpretation to PDSM 2010 instead. Therefore this article will show the reader how to apply PDSM 2010 in case of ASEAN Charter interpretation and also comes up with the legal problem of Charter interpretation and solution.

ASEAN CHARTER Interpretation

Definition of Law Interpretation: According to Black Law dictionary, Law interpretation is the process of discovering and expounding the intended signification of the language used in a statute, will, contract, or any other written document. Whenever the meaning of a legal document must be determined, Law interpretation shall takes place. (Black's Law, 1910)

ASEAN Charter interpretation: ASEAN Charter interpretation is very significant to ASEAN because ASEAN Charter is the constituent instrument and officially legalized ASEAN from an international organization "de facto" to be the rule-based international organization "de jure". (Beckman, Bernard, Phan, Hsien-Li & Yusran, 2016) According to Article 51(1) of ASEAN Charter, it stated 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". This would means that in case of the interpretation of ASEAN Charter is requested, the duty to interpret the rule of law is

up to ASEAN Secretariat and ASEAN Secretariat must interpret in good faith in accordance with an ordinary meaning to be given to the terms of ASEAN Charter in their context and in the light of its object and purpose due to Rule 2(2) of ROP 2012.

ASEAN Laws related to ASEAN Charter interpretation

ASEAN Charter: ASEAN Charter essentially serves as a constitution as same as a real evolution for ASEAN in achieving ASEAN Community by providing legal and institutional framework for ASEAN. It also codifies ASEAN norms, rules and values, sets clear targets for ASEAN, and presents accountability and compliance. (Wong, 2012; Hung, 2010)

An idea of drafting ASEAN Charter was popped up at 11th ASEAN Summit in 2005 because ASEAN realized that the present institutional base of ASEAN, which was mainly designed in the period of Cold war concerning on anti-communist and external threat, was out of date and unfitted to ASEAN community building in future. So in order to reform its organization, the foreign ministers then agreed to a draft of a “Declaration on the Establishment of an ASEAN Charter” which looked forward to a rule-based organization framework of democracy, transparency, and good governance as well as protected ASEAN way of consensus decision-making, respect for sovereignty, and non-interference. Finally in order to draft ASEAN Charter, ASEAN set up two working groups such as (1) the ASEAN Eminent Persons Group (EPG), which comprised of one each from each member state, and (2) the High Level Task Force (HLTF), which commissioned by the ASEAN Foreign ministers, to produce an effective and efficient institutional framework for ASEAN charter. As a result of the EPG and HLTP’s work, ASEAN Charter was adopted at the 13th ASEAN Summit in November 2007 then entered into force on 15 December 2008. (Koh, Manalo & Woon, 2009; Weatherbee, 2009)

Protocol to the ASEAN Charter on Dispute Settlement Mechanisms (PDSM 2010): After launching ASEAN Charter in 2008, ASEAN was obligated to maintain and establish the Dispute Settlement Mechanisms (DSMs) in all fields of ASEAN due to Art.22. In doing this, ASEAN established a High Level Experts Group (HLEG) to draft PDSM 2010 in order to fill the gaps where Treaty of Amity and Cooperation in Southeast Asia (TAC) 1976 and ASEAN Protocol on Enhanced Dispute Settlement Mechanism (EDSM) 1996 could not cover up. The PDSM 2010 was signed by the foreign minister of ASEAN on 8 April 2010 in Hanoi. Nevertheless it is surprisingly that it did not yet enforce because of waiting for the ratification from ASEAN Member States with the Secretary-General of ASEAN. Additionally in order to solve the interpretation problem on “an unresolved dispute” under Art.26 and on “non-compliance” under Art.27 of ASEAN Charter. ASEAN launched two instruments to deal with these problems. The first instrument is the Instrument of Incorporation of the Rules for Reference of Unresolved Disputed to the ASEAN Summit to the Protocol to the ASEAN Charter on Dispute Settlement Mechanisms (ANNEX 5) adopted in 2010 as Annex 5 of ASEAN Charter as well as the Rules for Reference of Non-Compliance to the ASEAN Summit (ANNEX 6) adopted in 2012 as Annex 6 of ASEAN Charter. Besides due to non-requirement of ratification, these two protocols were automatically enforced.

Rules of Procedure for the Interpretation of the ASEAN Charter 2012 (ROP 2012): The ROP 2012 was adopted on 2 April 2012 in Phnom Penh, Cambodia at the 10th Meeting of the ASEAN Coordinating Council to produce ASEAN procedure on ASEAN Charter interpretation in accordance with Art.51(1) of ASEAN Charter. It consisted of only six rules as Rule 1 is the scope of ROP, Rule 2 is general provisions, Rule 3 is content of request, Rule 4 is procedure, Rule 5 is contents of interpretation as well as Rule 6 is delivery of the interpretation.

Applying PDSM 2010 in case of ASEAN Charter interpretation

An overview of PDSM 2010 in general: In context PDSM 2010 covers other disputes that do not rely on TAC 1976 and EDSM 1996. It confines with six more annexes of rule of procedure into PDSM itself. Annex 1 is rule of procedure on good office. Annex 2 is rule of procedure on conciliation. Annex 3 is rule of procedure on mediation. Annex 4 is rule of procedure on arbitration. Annex 5 is rule of procedure on rules for reference in case of unresolved disputes as well as Annex 6 is rule of procedure on Non-compliance to ASEAN Summit. The PDSM begins with the Consultation in Art. 5. A complaining party has to request for consultation. If a request for consultation is made, the Responding Party shall reply to the request within 30 days from the date of its receipt and shall enter into consultation within 60 days from the date of receipt of the request for consultation, with a view to reaching a mutually agreed solution. Therefore the consultation normally must be completed within 90 days unless the parties otherwise agreed. In case of the consultation fails, the complaining party can request for the establishment of an arbitral tribunal to resolve the dispute when there are: (1) the Responding Party does not reply within 30 days from the date of receipt of the request for consultation; or (2) the Responding Party does not enter into consultation within 60 days from the date of receipt of the request for consultation; or (3) the consultation fails to settle the dispute within 90 days, or any other period mutually agreed by the Parties to the dispute, from the date of receipt of the request for consultation.

According to the procedure of arbitral tribunal provided in Articles 10-17 plus Annex 4 of PDSM, the arbitral tribunal shall consist of three arbitrators which are chosen from the list of arbitrators maintained by the Secretary-General of ASEAN. Each Party shall appoint one arbitrator. The third arbitrator will be chosen by the Parties. However in case the Parties could not agree on the appointment of the third arbitrator, the appointment will be made by the Chair of the ASEAN Coordinating Council (ACC) under the recommendation of the Secretary-General of ASEAN. The third arbitrator which can be chosen from outside ASEAN, will hold the Chair of the arbitral tribunal. In case the arbitral tribunal fails, the complaining party can refer the dispute to the ACC and the ACC can direct the parties to settle their dispute by good offices, mediation, conciliation or again arbitration. The ACC has to make decision within 45 days from the date the dispute was referred to it or plus 30 days in case of extending. If the ACC cannot find a decision, the dispute will be considered as “an unresolved dispute” and referred to the ASEAN Summit. (Limsiritong, 2014)

How to apply PDSM 2010 in case of ASEAN Charter interpretation

As shown on Figure 1, there are 3 steps of law procedure getting involved into ASEAN Charter interpretation issues which are (1) ASEAN Charter, (2) PDSM 2010, and again with (3) ASEAN Charter.

At first step, ASEAN Charter empowers ASEAN Secretariat to interpret its Charter according to Art. 51(1) which stated 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.”. To interpret ASEAN Charter, it requires ASEAN Secretariat to follow ROP 2012. Due to Rule 2(2) of ROP 2012, ASEAN Secretariat shall interpret ASEAN Charter in good faith in accordance with the ordinary meaning to be given to the terms of ASEAN Charter in their context and in the light of its object and purpose. However due to Rule 2(1), the interpretation of ASEAN Charter by 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. When the Charter interpretation of ASEAN Secretariat is no legal-binding, the Parties can legally rejected its interpretation and it will automatically create

a dispute arising from the interpretation of ASEAN Charter. Lastly this dispute arising from the interpretation of the Charter shall be settled in accordance with the relevant provisions in Chapter VIII (ASEAN Dispute Settlement Mechanisms) under Art. 51(2) which is PDSM 2010 in this case.

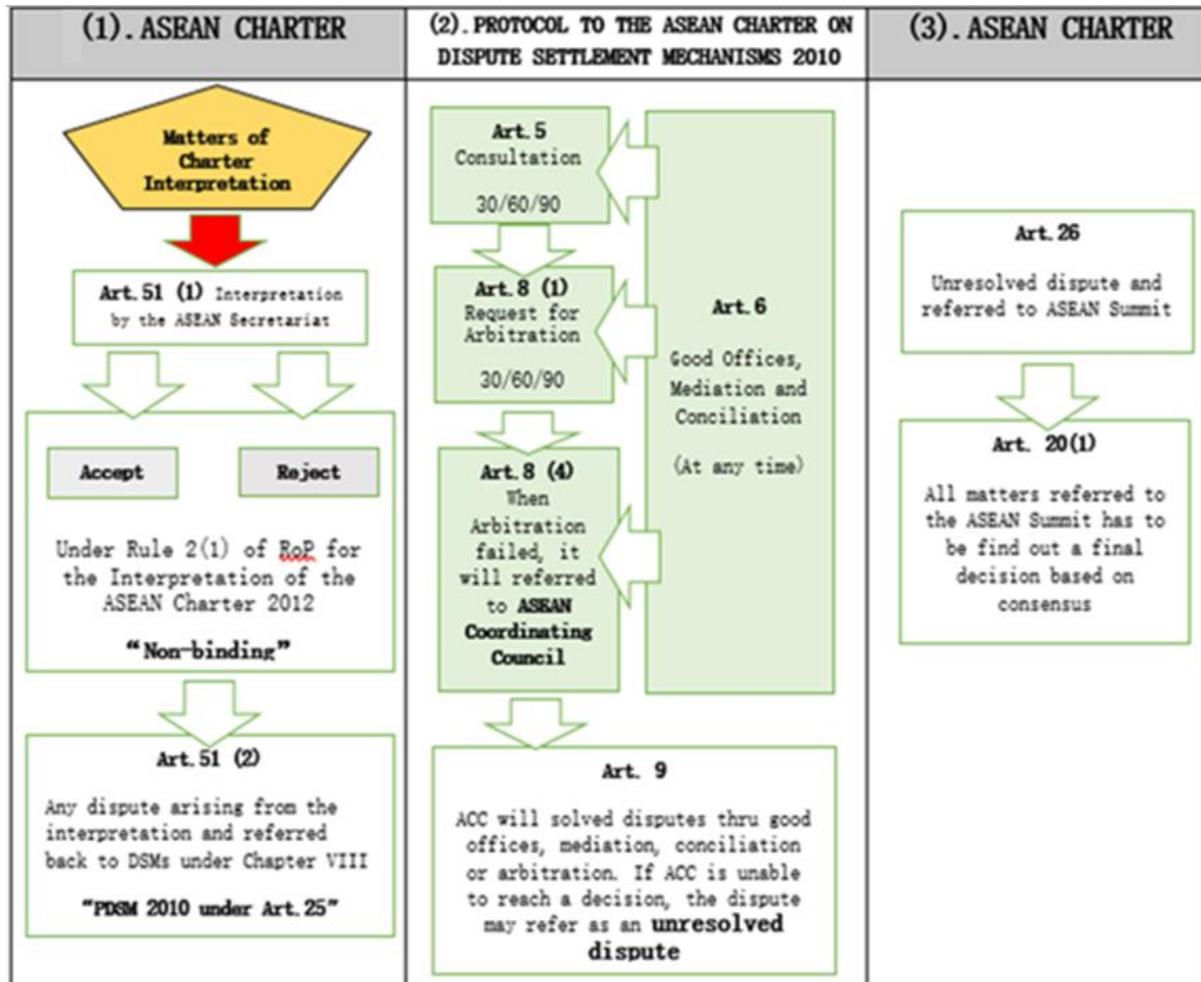


Figure 1 Applying PDSM 2010 in case of ASEAN Charter Interpretation

At second step due to PDSM 2010, the Parties to the Dispute can choose many alternative dispute settlement mechanism such as consultation under Art. 5, Good offices, mediation or conciliation under Art. 6, and Arbitration under Art. 10. A dispute will be referred to the ASEAN Coordinating Council (ACC) under Art. 9. Nevertheless if (1) the Parties to the dispute fail to carry out the direction of the ACC within 150 days in the case of arbitration, and 45 days in the case of good offices, mediation or conciliation, from the date of receipt of notification from the ACC, or any extended timeline agreed to by the Parties, or (2) the Parties to the dispute have carried out the direction of the ACC but the dispute remains unresolved, or (3) the ACC is unable to reach a decision on how the dispute is to be resolved, or (4) the Parties to the dispute mutually decide that they are unable to resolve the dispute through the application of dispute settlement mechanisms as provided under PDSM 2010, the dispute will be finally referred as an unresolved dispute under Art. 26 of ASEAN Charter within 90 days of the receipt of the notification.

At third step when the disputes are considered as an unresolved dispute, Art.26 of ASEAN Charter will automatically take place of PDSM 2010 by transferring its dispute from ACC to ASEAN Summit for making decision. Nevertheless when an unresolved dispute submits to

ASEAN Summit which is the supreme power of body consisted of the leader of ASEAN Member States, they have to find their final decision based on the consultation and consensus under Art.20 which is influenced by politic interests, not legal ground. However in reality since ASEAN Charter was entered into force, ASEAN Summit never even once reached a consensus decision to settle a dispute between ASEAN Member States. (Limsiritong, 2016; Edmund, 2008)

Problem of Applying PDSM 2010 in case of ASEAN Interpretation

In order to protect the legal order of ASEAN Charter itself, the result of interpretation by ASEAN Secretariat supposed to be clear, authoritative and most importantly legal-binding. But in reality it was not designed to do their job well and also passes thru an issue of interpretation to Dispute settlement process under PDSM 2010 instead.



Figure 2 Problem of Applying PDSM 2010 in case of ASEAN Interpretation

As shown on Figure 2, due to Rule 2(2) of ROP 2012, the result of Charter interpretation is non legal binding. When the result of interpretation is not legal binding, it also turned to be a dispute and referred to PDSM 2010 under Art.51 (2) and Art.25 of ASEAN Charter. The dispute settlement mechanisms under PDSM 2010 is mostly legal binding. But in order to apply it, it formally required the consent of the Parties to dispute for the whole procedure. So whenever the party decided not to go on, the dispute will turned to be an unresolved dispute and PDSM 2010 will return this unresolved dispute to ASEAN Summit for making decision. At the end the matter of Charter interpretation will not be touched by ASEAN Summit because the decision making mode of ASEAN Summit is consultation and consensus under Art.20. Then the consensus will make a deadlock for this situation and shut the door for the matter of Charter interpretation. (Limsiritong, 2014, 2016)

New challenging in future

As now ASEAN claimed itself as a rule-based international organization. Henceforth as far as ASEAN can go, there still are a lot of problems of ASEAN Charter interpretation to test ASEAN. Even ASEAN now can avoid to talk and sweep its problems under the carpet but following question is how long ASEAN can keep doing this. Most importantly ASEAN Charter is the most important fundamental instrument of ASEAN. So if even ASEAN Charter itself is in doubt of interpretation and cannot be finalized, then this would lead a big question to us that why ASEAN Member States need to rely on ASEAN Charter. Then this would make a domino effect to the trustworthy of other ASEAN instruments. Finally if no one cares about ASEAN legal order anymore, this will affect to ASEAN security and integration in the future.

Suggestions

In order to solve this problem in a view of law, ASEAN needs to (1) put the legal-binding effect in case of Charter interpretation into the ROP 2012, or (2) applying a negative consensus (reverse consensus), which Dispute Settlement Body (DSB) used to apply in

WTO, for ASEAN Summit in case of Charter interpretation only. (Limsiritong, 2014; van Damme, 2010)

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