

SECRETARY-GENERAL OF ASEAN: LAW REVIEW APPLICATION OF FUNCTIONAL NECESSITY PRINCIPLE

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Abstract

Since entry into force of the ASEAN Charter in 2008, ASEAN has moved from a loose organization to a rule-based one. The ASEAN Secretary General has the important position in related to conduct the role of ASEAN. The ASEAN Secretary General has the privileges and immunity rights. These rights are based on the functional necessity principle and ruled in the ASEAN Charter and ASEAN Treaty on the privileges and immunity right.

Keywords: *Functional Necessity Principle, the Privileges and Immunity Rights,*

Abstrak

Sejak Piagam ASEAN dinyatakan berlaku pada tahun 2008, ASEAN berubah dari sebuah organisasi yang “longgar” menjadi sebuah organisasi yang berdasarkan aturan. Dalam menjalankan peranannya, ASEAN membutuhkan sekretariat jenderal. Sekretariat jenderal ini dikepalai oleh seorang Sekretaris Jenderal. Untuk menunjang kelancaran pelaksanaan tugas dan kewenangannya, Sekretaris Jenderal ASEAN diberikan hak istimewa dan kekebalan diplomatik. Hak ini didasarkan pada prinsip *functional necessity* yang diatur dalam Piagam ASEAN dan *ASEAN Treaty on the privileges and immunity right*.

Kata kunci: *functional necessity principle*, hak istimewa dan kekebalan diplomatik,

Preface

ASEAN (Association of Southeast Asian Nations) is a regional international organization located in Southeast Asia.¹ ASEAN was established on August 8, 1967 with the Bangkok Declaration (Declaration of ASEAN) as the legal basis of its formation.² Since 2008, ASEAN has been transformed into an intergovernmental organization with the enactment of the Charter as the basic statute replaces ASEAN Declaration on December 15, 2008 in Thailand during the 14th meeting of the ASEAN Heads of State.³ ASEAN Charter, signed on 20 November 2007 and ratified by all member countries of ASEAN has been the de jure transform ASEAN from a loose regio-

nal organization into an organization that is based on the rules.⁴ The declaration changing of ASEAN being ASEAN Charter would certainly bring logical meaning and affect the law against ASEAN's view and its member countries regarding legal personality and the legal position of capacity/owned by ASEAN.

ASEAN established a Secretariat-General in order to demonstrate its existence as an international organization (intergovernmental) and also to support the implementation of its activities. ASEAN General Secretariat headed by a Secretary General, which is a civilian officials of

¹ Benny Teh Cheng Guan, “ASEAN's Regional Challenge: the ASEAN Process”, *The Copenhagen Journal of Asian Studies*, Vol. 20, 2004, Denmark: Asia Research Center-Copenhagen Business School, page 71.

² Djauhari Oratmangun, “ASEAN Charter: A new Beginning for Southeast Asian Nations”, *Jurnal Hukum Internasional*, Vol. 6 No. 2, January 2009, Depok: Lembaga Pengkajian Hukum Internasional Fakultas Hukum Universitas Indonesia, page 187-189.

³ Termsak Chalernpalanupap, “The ASEAN Secretariat and Legal Issues Arising from ASEAN Charter”, *Jurnal Hukum Internasional*, Vol. 6 No. 2, January 2009, Depok: Lembaga Pengkajian Hukum Internasional - FH UI, page 178.

⁴ Eddy Pratomo, “Prospek dan Tantangan Hukum Internasional di ASEAN dan Indonesia Pasca Piagam ASEAN dari Sisi Perjanjian Internasional”, *Jurnal Hukum UII*, Vol. 16 No. 1 January 2009, Yogyakarta: Fakultas Hukum Universitas Islam Indonesia, page 63.

international organizations granted diplomatic privileges and immunities.⁵

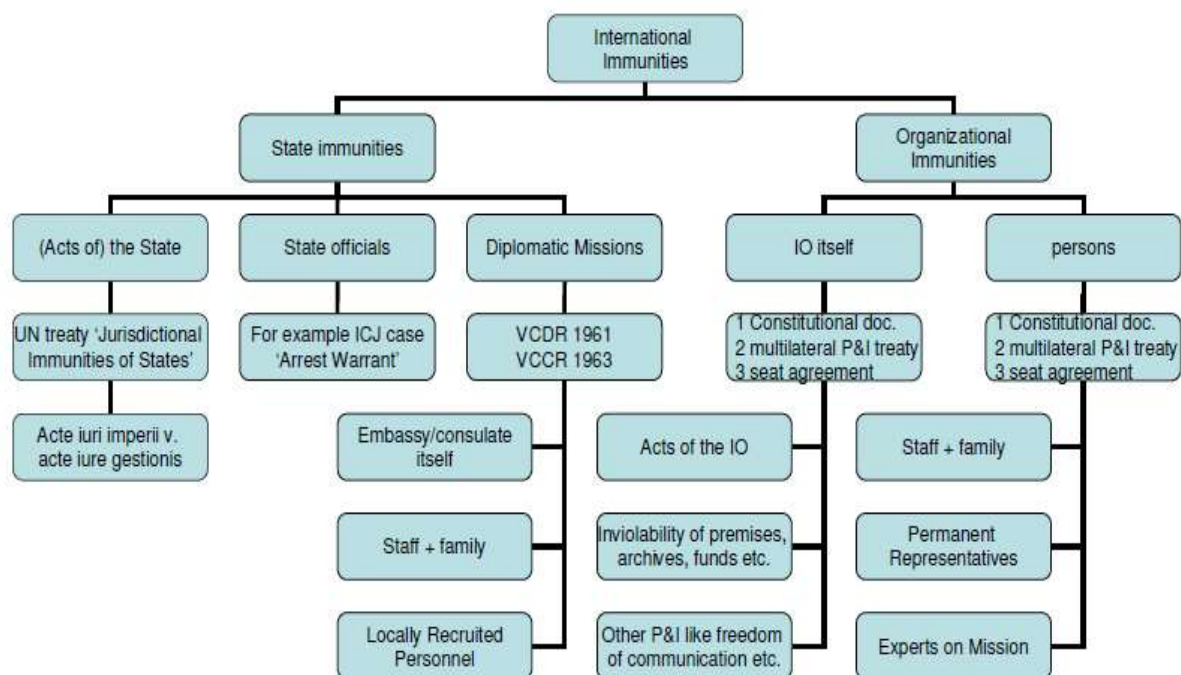
ASEAN will enter the era of the ASEAN Economic Community by 2015. The role of the ASEAN Secretary General is needed for the success of the agenda. An important role will be smooth if offset by granting diplomatic privileges and immunities equivalent to him. With the existence of this right allows the ASEAN Secretary General to carry out the functions and duties independently, freely, impartially and efficiently.

Based on this, the author in this article will explain more about the application of diplomatic privileges and immunities of the Secretary-General of ASEAN in their official duty by Functional Necessity Principle.

Functional Necessity Principle as the Basic Granting Privileges and Immunities of the International Organization of Civil Officials

There are two categories of immunity under international law.⁶ As shown in the following diagram. The term immunity derived from the Inviolability and Immunity. Inviolability means immune to power tools of the recipient country and immune from harmful interference. While Immunity means immune to the legal jurisdiction of either the criminal, civil and administrative recipient country. The privileges are the rights enjoyed by diplomatic representatives of countries and international organizations, especially the servants including his family that they are different from the citizens of the recipient (host state), such as tax exemption rights, customs and excise.

Diagram I
International Immunity⁷



⁵ Laurence Henry, "The ASEAN WAY and Community Integration: Two Different Model of Regionalism", *European Law Journal*, Vol. 3 Issue 6, November 2007: Wiley-Blackwell Press, page 863.

⁶ Davinia Aziz, "Global Public-Privat Partnership in International Law", *Asian Journal of International Law*,

Vol. 2 Issue 2, July 2012, United Kingdom: Cambridge University Press, page 341.

⁷ Sander D. Dikker Hupkes, 2009, *Protection and Effective Functioning International Organizations, Secure Haven*, Final Report of WP 1110 International Intitutional Law, Netherlands: Leiden University, page 24.

Legal Basis of Granting Privileges and Immunities of the International Organization of Civil Officials

Privileges and immunities are not only enjoyed by the international organization itself, but also for the officials of international organizations.⁸ Granting immunity and privileges to the Secretary general of international organization set up in several international agreements, namely (1) Article 104 and 105 of the UN Charter, (2) the General Convention on the Privileges and immunities of the United Nations, 1946, (3) Convention on the privileges and immunities of the Specialized Agencies, 1947, (4) Vienna Convention on the Representation of States in Their Relations with International Organizations of a universal Character of 1975, (5) the 1986 Vienna Convention on Treaties between States and International Organizations, and also (6) Seat-specific agreements between Organizations and Reviews their host state.

Privileges and immunities granted to international organizations and to its officials is limited only within the scope of the territory of its member states. This is in accordance with Article 105 of the UN Charter.⁹

Legal Theory of Granting Privileges and Immunities of the International Organization Officials

The thought about granting privileges and immunities of international organizations and officials began to develop in the 15th century, and it is based on three theory that are representative characters, extritoriality and functional necessity.¹⁰ The most developed and used theory at that time was the theory Representative Character and Ex-territoriality. According to Grotius, an ambassador is defined as "...*The character, which they sustain, is not that of*

ordinary individuals, but they represent the Majesty of the Sovereigns, by whom they are sent, whose power is limited to no local jurisdiction".¹¹ Grotius's opinion has given rise to a theory that the privileges and immunities granted to an ambassador or a diplomat because diplomat is representative of the sending country which is famous for the theory of "Representative Character".

Ex-territoriality theory on the other hand states that a real ambassador though he/she was in the territory of the recipient but actually its territory (which he/she occupied) is still under the jurisdiction of the sending countries, so that in this case there is the expansion of the jurisdiction of the sending State in the receiving country.¹²

Functional Necessity theory developed from Grotius' thought that, "an ambassador ought to be free from all compulsion - in order that he/she may have the full security". Based on that thought, it could be revealed that a diplomat or ambassador should be free from all forms of pressure/force. Therefore, he/she must be fully protected. This thought has been growing rapidly, and in early 1735 this thinking has been used as a judge's ruling in *Barbuit's Case*.¹³ The thought gave birth to the theory of functional necessity, namely that the privileges and immunities granted to diplomats on the basis of considerations that diplomats can carry out their duties smoothly.

Granting privileges and immunities to the diplomatic mission of his life based on the principle of the sovereign equality of states, known as the principle of "par in parem non habet imperium". However, this principle can not be applied to international organizations and officials, because the relationship states and international organizations are not the same on the

⁸ August Reinisch, "The Immunity of International Organizations and the Jurisdiction of their Administrative Tribunals", *The Chinese Journal of International Law*, Vol. 7 No. 2, 2008, United Kingdom: Oxford University Press, page 286.

⁹ Article 105 of the UN charter and also see J.Craig Baker, 2006, *The Protection of Diplomatic Personel*, E-book, United Kingdom: ASHGATE University of Sussex, page 27.

¹⁰ Ebenezer Olugbenga, "The Significance of the Immunity Clause for Democratic Consolidation in Nigeria", *African*

Journal of Criminology and Justice Studies (AJCJS), Vol. 6, #s1 & 2, November 2012: Africa Resource Center, Inc., page 91.

¹¹ J.Craig Baker, *op.cit.*, page 42-43.

¹² Lucia Ch.Tahamata, "Suaka Diplomatik dalam Kajian Hukum Internasional", *Jurnal Sasi*, Vol. 17 No. 2 April - June 2011, Maluku: Universitas Patimura, page 3.

¹³ J.Craig Baker, *op.cit.*, page 49.

sovereignty and jurisdiction. It also affects the existence of the theory and the theory of representative character ex-territoriality, both theories can not be applied to underpin the provision of privileges and immunities of the organization and its employees. The theory can still be used and eventually became "legal basis" granting privileges and immunities of international organizations and officials is the theory of functional necessity.

Existence Functional Necessity Principle for Civil Officials International Organizations

Functional Necessity theory has been considered as a principle in international law, since this theory became the fundamental instrument of granting privileges and immunities of international organizations and officials.¹⁴ Based on the principle of functional necessity, an international organization including its officials enjoys the privileges and immunities in order to carry out its functions effectively. Effective function is usually contained within each of the organization. Become an important record that must be understood that this principle is given in the framework carried out by international organizations and employees should be proportional.¹⁵ Each existing international organization is unique and different from one another of nature, power and authority, purpose, and so forth, and then the application of the principle of functional necessity in order granting privileges and immunities are also different in every organization.

The principle of functional necessity has been widely accepted and recognized as one of the principles of international law. One indication of the use of this principle can be found in Article 105 of the UN Charter.¹⁶ In items 1 and 2 of the article clearly indicated on the use of functional necessity as the basic principle of granting privileges and immunities for United Nations. The interest in the use of functional ne-

cessity principle contained in the 2nd item among others lies in the emphasis on the word "similarly" which means there should be no distinction kinds of privileges and immunities were obtained between state representatives and officials of international organizations, and the second is that the privileges and immunities granted only to enable them to carry out their duties independently associated with the organization. This implies that if the state representatives in the organization and its officials acted outside the organization, the task will not be granted privileges and immunities. In connection with Article 105 of the UN Charter, in Section 27, the Seat Agreement between the USA and the UN also implies the use of the principle of functional necessity, which lies in the phrase "fully and efficiently, to discharge its responsibilities and fulfill its purposes".¹⁷

Functional Necessity Principle existence is also indicated by the International Court of Justice in its Advisory Opinion on the "Reparations for Injuries Suffered in the Service of the UN".¹⁸ Furthermore, the use of the principle of Functional Necessity can be seen by the International Court of Justice in Mazilu and Cumaraswamy Case.¹⁹ Basically Functional Necessity Principle applied in an international organization for three objectives, namely: *first*, in order to show the legal personality, capacity and competence of an international organization; *second*, as the basis for granting privileges and immunities of international organizations and employees including officials of international organizations; and *third*, as the basis for determining the level of privileges and immunities required by international organizations and officials.²⁰

ASEAN Secretary General of the International Organization For Civil Officials Establishment of the ASEAN Secretariat

ASEAN is still questioned about its status as an international organization in the period

¹⁴ Sander D. Dikker Hupkes, *op.cit.*, page 30.

¹⁵ *Ibid.*, page 31.

¹⁶ *Ibid.*

¹⁷ *Ibid.*, page 31.

¹⁸ Ian Hurd, "Choice and Methods in the Study of International Organizations", *Journal of International*

Organizations Studies, Vol. 2 Issue 2, 2011, United States of America: Brigham Young University-Kennedy Center, page 9.

¹⁹ Sander D. Dikker Hupkes, *loc.cit.*

²⁰ *Ibid.*, page 32-33.

1967 to 1976, as the ASEAN did not have the organization secretariat.²¹ The absence of the Secretariat and also on the status of the Declaration of ASEAN that did not bind its members, made ASEAN lost its legitimacy as an international organization.²²

The ASEAN Foreign Ministers On the 1st ASEAN Summit in Bali, in 1976, signed the Agreement on the Establishment of the ASEAN Secretariat. ASEAN Secretariat worked since June 7, 1976, headed by a Secretary General.²³ Tasks and role of the ASEAN Secretariat is, "to provide for greater efficiency in the coordination of ASEAN organs and for more effective implementation of ASEAN projects and activities".²⁴

Secretary General is included on the list of the organizational structure of ASEAN and Secretary General is the ASEAN official administrative head. According to Article 11 paragraph (1) of the ASEAN Charter, ASEAN Secretary General appointed by the ASEAN Summit (ASEAN Summit) for a term of five years and thereafter can not be reappointed. Secretary General is elected from the citizens of ASEAN member countries based on alphabetical rotation, with due consideration to integrity, capability and professional experience, and gender equality. The position and status of the Secretary General is a level with the minister. ASEAN Secretary General is charged by the trust and approval of the Head of State or government of the ASEAN member countries and the recommendation of the meeting of Foreign Ministers.

Duties and Authority of the Secretary-General of ASEAN

Duties and authority of the Secretary General of ASEAN in carrying out its duties based on Article 11 paragraph (2) of the ASEAN Charter.²⁵ Whereas in Article 11 paragraph (3) of the ASEAN Charter, ASEAN Secretary General stated as "the Chief Administrative Officer of ASEAN" ²⁶ as UN Secretary General who is regarded as the chief administrative officer of the Organization" (Article 97 of the UN Charter). However, the Charter does not specifically set forth on the role as the Chief Administrative Officer of ASEAN, which is known as the Secretary General is not the administrative head of each agency or organ that is in ASEAN because every agency or organ in the head or CEO ASEAN has its own.²⁷

ASEAN Secretary-General as the Chief Administrative Officer of ASEAN under Article 2 paragraph (1) the 2009 Agreement authorized by ASEAN to implement the legal personality, namely: to enter into contracts; to acquire and dispose of movable and Immovable property; and to institute and defend itself in legal proceedings. This is consistent with the mandate of the provisions of Article 3 of the Charter which means the Secretary-General to implement the function of reps.

Privileges and Immunities of ASEAN Secretary-General

Privileges and immunities to the ASEAN Secretary General are under the Article 18 of the ASEAN Charter. Referring to the contents of the article, the Secretary General of ASEAN granted privileges and immunities under the principle of functional necessity, not based on the principle of representative character and principles exterritoriality. Moreover, it is stated further in Article 18 paragraph (2) that the provisions on the

²¹ Elfia Farida, "Efektivitas Piagam ASEAN (ASEAN Charter) bagi ASEAN sebagai Organisasi Internasional", *Jurnal QJSTIE*, Vol. 3 No. 3, 2009, Semarang: Fakultas Hukum Universitas Wahid Hasyim, page 1.

²² Damos Dumoli Agusman, "Treaty Making Power in ASEAN: Legal Analysis on ASEAN Practices", *Jurnal Opinio Juris*, Vol. 14, September - December 2013, Jakarta: Direktorat Jenderal Hukum dan Perjanjian Internasional, Kementerian Luar Negeri Republik Indonesia, page 13.

²³ Kementerian Luar Negeri Republik Indonesia, 2008, *ASEAN Selayang Pandang*, Jakarta, page 17.

²⁴ *Ibid.*

²⁵ Look Article 11 paragraph (2) ASEAN charter and Ioan Vociu, "ASEAN between Aspirations and Realities", *ABAC Journal* Vol. 29 No. 3, September-December 2009, Thailand: Assumption University of Thailand, page 8.

²⁶ Elena Ascitti, "The ASEAN Charter: An Analysis", *Perspectives on Federalism Journal*, Vol. 2 Issue 1, 2010: Centro Studi Sul Federalismo, page 58.

²⁷ Termsak Chalermpananupap, "Challenges Facing the New ASEAN Secretary-General", *ISEAS Perspektif Journal*, Vol. 7, 28 January 2013, Singapore: ISEAS, available on the website http://www.iseas.edu.sg/documents/publication/ISEAS%20Perspective%202013_7.pdf, retrieved 23rd November 2013, page 4.

privileges and immunities of the Secretary General will be set in a separate ASEAN agreement. Therefore, ASEAN issued a regulation such as the 2009 Agreement on the Privileges and Immunities of the Association of Southeast Asian Nations Agreement and the 2012 Agreement Between The Government of The Republic of Indonesia and the Association of Southeast Asian Nations (Asean) on Hosting and Granting Privileges and Immunities to the Asean. According the provisions of the ASEAN Secretary-General granted immunity and privileges,²⁸ such as a Secretary General of ASEAN have immunity from legal process for his actions both spoken orally and in writing with regard to the implementation of the ASEAN organizational tasks.

The content of the 2009 agreement equal to the contents of the provisions of Article 14 of the 2012 Agreement. In Article 14 of this Agreement stated that, "the Secretary General ... while in the performance of and for the independent exercises of Reviews their respective duties, functions and responsibilities, privileges and immunities be granted as stipulated in the Vienna convention on diplomatic relations 1961. If you see such provisions can be seen that the principle of functional necessity based on the Vienna Convention 1961. It is very contradictory and ill-fitting if applied as the legal basis for ASEAN, given the 1961 Vienna Convention is intended for interstate relations, not for international organizations.

The 2009 Agreement until now only been ratified by three countries, namely Singapore, Thailand and Vietnam, that needs attention. Without ratification of all member countries of ASEAN, the agreement is only a document and has no legal force. Secretary General must act more carefully again in carrying out its duties and powers. While the 2012 Agreement has been ratified by the Government of Indonesia in the form of Presidential Decree No. 99 of 2012 on the Ratification of the Agreement between the Government of the Republic of Indonesia and the Association of Southeast Asian Nations (ASEAN)

on Hosting and Granting Privileges and Immunities to the ASEAN Secretariat. The Presidential Decree merely endorse it and until now in the Indonesian national law there are no rules governing the specific international organizations, so that in practice if there will be disputes between international organizations (ASEAN) with the host country (Indonesia) would be a problem its own.

Granting privileges and immunities are not the same as the prevailing practice for the UN Secretary General. The UN Secretary General has the privileges and immunities wherever he/she is and as long as carry out its duties and functions. While the rules of granting privileges and immunities applicable in ASEAN is not granted to citizens of the host country.

Suspension of Privileges and Immunities of ASEAN Secretary

Suspension of privileges and immunity (waiver immunity) ASEAN Secretary General is set in Article 16 paragraph (1) the 2012 Agreement. Based on the article can be seen that the Secretary General of ASEAN are not granted privileges and immunities if he/she acted outside their official capacity or otherwise act for personal gain. Waiver immunity ASEAN Secretary General is done by the ASEAN Summit or someone who has the authority on behalf of the ASEAN Summit. In practice it is difficult to distinguish which is the act of ASEAN Secretary General in an official capacity of ASEAN and which are not, and this makes the ASEAN Secretary General can be stuck to ultravires.

Closing Conclusion

There are still inconsistencies in the application of granting privileges and immunities to the Secretary General of ASEAN on the principle of functional necessity. The existence of the principle of functional necessity for the legality of granting privileges and immunities is only applicable in the case of ASEAN Secretary carry out

²⁸ LIN Chun Hung, "ASEAN Charter: Deeper Regional Integration Under International Law?" *Chinese Journal of*

International Law, Vol. 9 Issue 4, 2010, United Kingdom: Oxford University Press, page 832.

their duties and functions as instructed by the ASEAN and not for personal gain.

Suggestion

First, ASEAN should not be based on the 1961 Vienna Convention for the creation of an international treaty governing of granting privileges and immunities to the ASEAN Secretary General and his staff. *Second*, amend the provisions of Article 4 of the 2009 Agreement and Article 14 of the 2012 Agreement. *Third*, ASEAN Secretary General should not be given a ministerial level position and status, but the level of heads of state.

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