

The Problems of Law Interpretation under ASEAN Instruments and ASEAN Legal Instruments

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Abstract

The objective of this work is to answer the questions that “*What are the problems of law interpretation under ASEAN Instruments and ASEAN Legal Instruments?*,” “*Why doesn't the law interpretation of ASEAN Instruments and ASEAN Legal Instruments now work?*” and “*How to solve its problem and improve the law interpretation of ASEAN Instruments and ASEAN Legal Instruments?*” by comparative and qualitative study of the interpretation of legal instruments between ASEAN and European Union (EU). A result of this work found that there are three problems of the law interpretation under ASEAN Instruments and ASEAN Legal Instruments to consider as; (1) Confusion of definition between ASEAN Instruments and ASEAN Legal Instruments, (2) No one is in-charge to interpret ASEAN Instruments and ASEAN Legal Instruments, and (3) Lacking of Rule of interpretation for ASEAN Instruments and ASEAN Legal Instruments. All of these problems also makes the law interpretation under ASEAN Instruments and ASEAN Legal Instrument are non-effective and non-reliable enough to serve ASEAN. Finally in order to solve this problem, ASEAN urgently needs

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to (1) enact the Rules of Interpretation of ASEAN Instrument and ASEAN Legal Instruments and, (2) establish a legally supported institution to in-charge on law interpretation for ASEAN Instruments and ASEAN Legal Instruments.

Keywords: ASEAN Instruments / ASEAN Legal Instruments / ASEAN Charter / ASEAN Law Interpretation

บทคัดย่อ

วัตถุประสงค์ของงานชิ้นนี้มีขึ้นเพื่อตอบคำถามว่า “ปัญหาในการตีความกฎหมายของตราสารอาเซียนและตราสารกฎหมายอาเซียนคืออะไร” และ “ทำไมหลักการตีความกฎหมายของตราสารอาเซียนและตราสารกฎหมายอาเซียนในปัจจุบันถึงไม่สามารถบังคับใช้ได้” และ “ควรจะทำอย่างไรเพื่อแก้ไขปัญหานี้และปรับปรุงหลักการตีความกฎหมายในส่วนตราสารอาเซียนและตราสารกฎหมายอาเซียน” โดยผ่านการศึกษาวิจัยเชิงคุณภาพโดยการเปรียบเทียบระหว่างการตีความกฎหมายของอาเซียนกับสหภาพยุโรป ผลของการศึกษาพบว่า ปัญหาในการตีความกฎหมายของตราสารอาเซียนและตราสารกฎหมายอาเซียนมีทั้งหมด 3 ข้อ ได้แก่ (1) คำนิยามที่สัมพันธ์ระหว่างตราสารอาเซียนและตราสารกฎหมายอาเซียน (2) ไม่มีผู้รับผิดชอบในการตีความตราสารอาเซียนและตราสารกฎหมายอาเซียน และ (3) ขาดหลักเกณฑ์ในการตีความกฎหมายตามตราสารอาเซียนและตราสารกฎหมายอาเซียน ดังนั้น ปัญหาทั้งสามข้อนี้ จึงเป็นสาเหตุทำให้หลักการตีความกฎหมายของตราสารอาเซียนและตราสารกฎหมายอาเซียนในปัจจุบันไม่มีประสิทธิภาพและขาดความน่าเชื่อถือเพียงพอที่จะบังคับใช้กับอาเซียน สุดท้ายในการแก้ปัญหาดังกล่าวนี้ อาเซียนมีความจำเป็นอย่างเร่งด่วนที่จะต้องดำเนินการ (1) ออกกฎข้อบังคับว่าด้วย การตีความตราสารอาเซียน

และตราสารกฎหมายอาเซียน และ (2) จัดตั้งหน่วยงานทางกฎหมายเพื่อทำหน้าที่
ตีความกฎหมายในกรณีตราสารอาเซียนและตราสารกฎหมายอาเซียน

คำสำคัญ: ตราสารอาเซียน / ตราสารกฎหมายอาเซียน / กฎบัตรอาเซียน /
การตีความกฎหมายอาเซียน

Introduction

Since ASEAN was officially established in 1976 till 2016, ASEAN launched ASEAN Charter in 2008 as a firm foundation in achieving ASEAN Community by upgrading ASEAN to be the rule-based regional inter-governmental organization and providing institutional framework for ASEAN as well as a lot of ASEAN Instruments and ASEAN Legal Instruments to build ASEAN Community (AC) as its will.²

For example in a pillar of ASEAN Economic Community (AEC), there are ASEAN Framework Agreement on Services (AFAS 1995) for services, Framework Agreement on the ASEAN Investment Area (AIA 1998), ASEAN Comprehensive Investment Agreement (ACIA 2009) for investment, ASEAN Trade in Goods Agreement (ATIGA 2009) for goods, ASEAN Agreement on Medical Device Directive (AGMDD 2014), and so on. As well as a pillar of

² ASEAN. (2016) ASEAN Charter, [Online] Available: <http://www.asean.org/asean/asean-charter/> [23 March 2016]. Tang, S.C. & Xivivadh, W. (2014) Human Rights and ASEAN, Chulalongkorn University Law Journal, vol.32 (2), pp. 102-103. Koh, Tommy & Manalo, Rosario G & Woon, Walter (2009) The Making of the ASEAN Charter. Singapore: World Scientific Publishing Co.Pte.Ltd, pp. 11-27. Wahlers, Gerhard. (2006) ASEAN and European Union. Singapore: Konrad-Adenauer-Stiftung, pp. 40-42.

ASEAN Politic-Security Community (APSC), there are Treaty on the Southeast Asia Nuclear-Weapon-Free Zone (SEANWFZ 1995), Treaty on Mutual Legal Assistance in Criminal Matters (TMLACM 2004), ASEAN Convention on Counter Terrorism (ACCT 2007), and so on. In a pillar of ASEAN Socio-Cultural Community (ASCC), there are ASEAN Agreement on Trans-boundary Haze Pollution (AATHP 2002), ASEAN Agreement on Disaster Management and Emergency Response (AADMER 2005), and so on.³

There are now 80 main ASEAN Instruments and ASEAN Legal Instruments which consisted of 62 in force and 18 not in force.⁴ As same as other laws, these ASEAN Instruments and ASEAN Legal Instruments are sometimes unclear and need the law interpretation as other laws. Because the law interpretation of its ASEAN Instruments and ASEAN Legal Instruments can lead to the future disputes between the ASEAN Member States for sure if the law interpretation itself is not clear.

Thus in order to avoid the dispute in future and guarantee the justice of law, it is unavoidable and compulsory to have an operative and reliable interpretation of law for these ASEAN Instruments and ASEAN Legal Instruments. Therefore this leads the researcher to question that "*What are the problems of law interpretation under ASEAN Instruments and ASEAN Legal Instruments?*", "*Why doesn't the law interpretation of ASEAN Instruments and ASEAN Legal Instruments now work?*", and "*How to solve its problem and*

³ ASEAN. (2016) ASEAN Instruments, [Online] Available: <http://agreement.asean.org/> [5 May 2016].

⁴ Ibid.

improve the law interpretation of ASEAN Instruments and ASEAN Legal Instruments?”.

Objectives

1. To find out the present problems of law interpretation under ASEAN Instruments and ASEAN Legal Instruments.

2. To offer a possible way to solve the problems of law interpretation under ASEAN Instruments and ASEAN Legal Instruments.

Research Questions

1. What are the problems of law interpretation under ASEAN Instruments and ASEAN Legal Instruments? **(RQ1)**

2. Why doesn't the law interpretation of ASEAN Instruments and ASEAN Legal Instruments now work? **(RQ2)**

3. How to solve its problems and improve the law interpretation of ASEAN Instruments and ASEAN Legal Instruments? **(RQ3)**

Research Methods and Scope of Work

The methodology of this work is the qualitative study under a scope of ASEAN law. In order to shape down this scope, the researcher decided to select ASEAN Charter (2007) to analysis because the Charter is customarily recognized as a firm foundation treaty in achieving ASEAN Community⁵ as well as Rules of Procedure for the Interpretation of the ASEAN Charter (RoP 2012),

⁵ See Koh, Tommy & Manalo, Rosario G & Woon, Walter (2009), *supra* note 2, pp. 11-27.

ASEAN Comprehensive Investment Agreement (ACIA 2009), ASEAN Trade in Goods Agreement (ATIGA 2009), Protocol to the ASEAN Charter on Dispute Settlement Mechanisms (PDSM 2010), and ASEAN Framework Agreement on Services (AFAS 1995) which officially legislated to fulfil ASEAN Charter.

Furthermore, the researcher decided to choose the EU to compare with ASEAN. Even it obviously shows that ASEAN will not follow the path of EU but as by now EU still be the suitable model of regional organization in the World that ASEAN can still learn some more or less from EU.⁶ Hence Treaty on the European Union (TEU 1993), Treaty on the Functioning of the European Union (TFEU 2007), the Rules of Procedure of the General Court (RoP of General Court 1991), the Rules of Procedure of the Court of Justice (RoP of Court of Justice 2012), and the Rules of Procedure of the European Union Civil Service Tribunal (RoP of Civil Service Tribunal 2014) are also considered to compare with ASEAN.

Due to lack of case studies, there is no data of related studies on Law Interpretation under ASEAN Instruments and ASEAN Legal Instruments. Hence this research will be limited only a scope of ASEAN law.

Findings and Discussion

According to the RQ 1 that *“What are the problems of law interpretation under ASEAN Instruments and ASEAN Legal Instruments?”*, the researcher found that there are three problems to consider; (1) Confusion of

⁶ See Wharton University of Pennsylvania, Public Policy: Is ASEAN Ready to Become a Single Market? [Online] Available: <http://knowledge.wharton.upenn.edu/article/is-asean-ready-to-become-a-single-market/> [11 August 2016].

definition between ASEAN Instruments and ASEAN Legal Instruments, (2) No one is in-charge to interpret ASEAN Instruments and ASEAN Legal Instruments, and (3) Lacking of Rule of interpretation for ASEAN Instruments and ASEAN Legal Instruments.

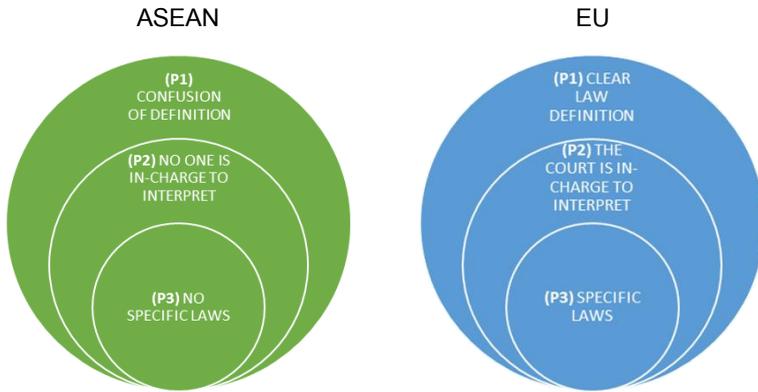


Figure 1 Comparative Interpretation Structure between ASEAN and EU

As shown on figure 1, the problem 1 (P1) is the confusion of definition between ASEAN Instruments and ASEAN Legal Instruments. A first question under P1 to consider is that the ASEAN Instruments and ASEAN Legal Instruments are the same nature in sense of ASEAN Law or not.

The similar words “*ASEAN Instruments*” are obviously mentioned many times in many articles under ASEAN Charter. For example, Article 2(1) stipulated that “*in pursuit of the Purposes stated in Article 1, ASEAN and its Member States reaffirm and adhere to the fundamental principles contained in the declarations, agreements, conventions, concords, treaties and other instruments of ASEAN*”,⁷ Article 11(2) (a) stipulated that “*The Secretary-General*

⁷ See ASEAN Charter, *supra* note 2, Art. 2(1).

shall...(a)carry out the duties and responsibilities of this high office in accordance with the provisions of this Charter and relevant ASEAN instruments,...”,⁸ Article 24(1) stipulated that “Disputes relating to specific ASEAN instruments shall be settled through the mechanisms and procedures provided for in such instruments”,⁹ and Article 25 stipulated that “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”¹⁰ as well as Article 52 stipulated that “All treaties, conventions, agreements, concords, declarations, protocols and other ASEAN instruments which have been in effect before the entry into force of this Charter shall continue to be valid”.¹¹

As seen on above, ASEAN Charter itself does not give any definition of ASEAN Instruments or ASEAN Legal Instruments. In contrast, the definition of ASEAN Instruments was found in Article 1(a) of Protocol to the ASEAN Charter on Dispute Settlement Mechanisms (PDSM 2010) instead of ASEAN Charter. It stipulated that “ASEAN instrument means any instrument which is concluded by Member States, as ASEAN Member States, in written form, which gives rise to their respective rights and obligations In accordance with international

⁸ Ibid., Art.11(2).

⁹ Ibid., Art.24(1).

¹⁰ Ibid., Art.25.

¹¹ Ibid., Art.52.

law".¹² With this contexts, it would mean that a key legal condition to define ASEAN Instruments is to oblige the State party as ASEAN Member States. So in order to define the legal term of ASEAN Instruments, all of Bilateral Treaties which ASEAN Member States signed on behalf of a state, not as an ASEAN Member States, are not considered as ASEAN Instruments under Article 1(a) of PDSM.

Whereas the word "*ASEAN Legal Instruments*" also mentioned on Article 20(3) of ASEAN Charter stipulated that "*Nothing in paragraphs 1 and 2 of this Article shall affect the modes of decision-making as contained in the relevant ASEAN legal instruments*".¹³

As same as in case of ASEAN Instrument, ASEAN Charter itself also mentions to ASEAN Legal Instruments, but it does not give any definition of its ASEAN Legal Instruments at all. Instead the definition of ASEAN Legal Instrument is defined and found on the official website of ASEAN, not as a part of treaty. It describes that "*legal instruments, which, within this context, is ASEAN legal instruments concluded among and between ASEAN Member States. There are various understandings and interpretations of what is considered international legal instruments. As such, the Matrix only focuses on legal instruments by which the consent to be bound is expressed through either signature of the authorized representatives of Member States or the signature is subject to ratification and/or acceptance in accordance with the internal procedures of respective Member States...[not] include Statements*

¹² PDSM, Art.1(a). (not in force) [Online] Available: <http://agreement.asean.org/media/download/20131229165853.pdf> [23 March 2016]

¹³ See ASEAN Charter, *supra* note 6, Art.20(3).

and Declarations, which are issued or adopted by ASEAN Member States that appear to reflect their aspirations and/or political will".¹⁴ This would summarize that a key legal condition to define ASEAN Legal Instruments is to oblige into the instruments as ASEAN Member States as same as a condition of ASEAN Instruments.

In conclusion, when we consider from the different source of its definition for ASEAN Instruments and ASEAN Legal Instrument, it has been found that the mentioned definition of ASEAN Instruments and ASEAN Legal Instruments is similar and broadly considered as an open view included specific ASEAN Instrument, or any agreements which ASEAN Member States done as ASEAN Member States in different names of law instruments such as ASEAN Instrument, ASEAN Legal Instrument, specific ASEAN Instrument, and so on.

Unlike European Union (EU), the EU Laws are clearly divided into two categories such as primary legislation and secondary legislation. The primary legislation comes from the founding Treaties and secondary legislation comes from the provisions of EU legal instruments enacted by the European institutions.¹⁵ Hence, the definition of EU legal instruments as secondary legislation obviously refers to the instruments available to the European institutions to carry out their tasks.¹⁶ According to Article 288 of TFEU, these

¹⁴ ASEAN. (2016) ASEAN Legal Instruments, [Online] Available <http://agreement.asean.org/explanatory/show.html> [5 May 2016].

¹⁵ EU. (2016) EU Law, [Online] Available http://europa.eu/eu-law/index_en.htm [5 May 2016].

¹⁶ Ibid.

mentioned instruments are; (1) regulations, which are binding in their entirety and directly applicable in the EU countries, (2) directives, which are binding the EU countries as to the results to be achieved, (3) decisions, which are fully on those to whom they are addressed, and (4) recommendations and opinions, which are non-binding.¹⁷

Next problem (P2) is no one is in-charge to interpret ASEAN Instruments and ASEAN Legal Instruments. The duty to interpretation ASEAN Instrument and ASEAN Legal Instrument is normally supposed to belong to the ASEAN Secretariat as stated under Article 51(1) of ASEAN Charter 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*".¹⁸ However due to the context of Article 51(1), this would mean that Article 51(1) shall only apply in case of the interpretation of the Charter, not in case of other ASEAN Instruments and ASEAN Legal Instruments. Therefore there is no law to determine who has a power to interpret its ASEAN Instruments and ASEAN Legal Instruments in practice.

¹⁷ TFEU, Art. 288. [Online] Available: <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:12012E/TXT> [2016, April 8]. BORCHARDT, K. D. (2010). The ABC of European Union Law. Luxemburg: Luxembourg Publications. pp.80-86. SCHUTZE, ROBERT. (2012). An Introduction to European Law. UK: Cambridge University Press. pp. 180-182.

¹⁸ See ASEAN Charter, *Supra* note 2, Art.51(1).

Likewise this mentioned above problem shall make PDSM 2010 which is essentially designed to deal with the ASEAN dispute,¹⁹ to be blocked in practice because in order to apply PDSM 2010, only the dispute can be legally applied by itself. When there is no one in-charge to interpret the law, the issue cannot be considered as the dispute. For example, Article VII of AFAS 1995 stipulated that *“The Protocol on Dispute Settlement Mechanism for ASEAN shall generally be referred to and applied with respect to any disputes arising from, or any differences between Member States concerning the interpretation or application of, this Framework Agreement or any arrangements arising therefrom”*²⁰ or Article 27 under ACIA 2009 stated that *“The ASEAN Protocol on Enhanced Dispute Settlement Mechanism signed in Vientiane, Lao PDR on 29 November 2004, as amended, shall apply to the settlement of disputes concerning the interpretation or application of this Agreement”*,²¹ or Article 89

¹⁹ Gino J Naldi. The ASEAN Protocol on Dispute Settlement Mechanisms: An Appraisal, *Journal of International Dispute Settlement*, (2014), pp.1-34. Limsiritong, Nattapat. (2014). The ASEAN Dispute Settlement Mechanisms, The 2nd CAS National and International Conference, Thailand, pp.3458-3465. Phan, Hao Duy. (2013). Towards a Rules-Based ASEAN: The Protocol to the ASEAN Charter on Dispute Settlements Mechanisms, *Yearbook on Arbitration and Mediation*. Vol 5. pp.275-276. Woon, Walter. (2012). The ASEAN Charter Dispute Settlement mechanisms in the Making of the ASEAN Charter at ASEAN Law Association 10th General Assembly, [Online], Available: <http://www.aseanlawassociation.org/workshop-tenthGA.html> [11 August 2016].

²⁰ AFAS, Art.7 [Online] Available: <http://agreement.asean.org/search/index/3.html?q=ASEAN%20Framework%20Agreement%20on%20Services> [23 March 2016].

²¹ ACIA, Art.27 [Online] Available: http://www.asean.org/?static_post=asean-comprehensive-investment-agreement [23 March 2016].

under ATIGA 2009 stipulated that *“The ASEAN Protocol on Enhanced Dispute Settlement Mechanism, signed on 29 November 2004 in Vientiane, Lao PDR and amendments thereto, shall apply in relation to any dispute arising from, or any difference between Member States concerning the interpretation or application of this Agreement”*.²² All of these ASEAN Instruments first require the dispute to apply PDSM 2010. So when there is no one in-charge to interpret it, the interpretation cannot yet be considered as the dispute and can't apply by PDSM 2010 due to absence of requirement.

Next interesting question to concern is in case of triggering of law interpretation, the result of interpretation will be considered as a binding or just a guideline. Lastly in case that the party doesn't agree with a result of interpretation, it will be considered as a dispute or not. All of these matters still be in doubt and never been mentioned before due to lack of law and cases between ASEAN Member States.

For EU, the Court of Justice of European Union (CJEU) is the highest sole judicial authority in matters of Union laws and has sole duty to interpret the EU treaties and Union laws.²³ According to TEU 1993, TFEU 2007 and Statute, it also gives clearly defined jurisdiction of CJEU which referred to preliminary

²² ATIGA, Art.89 [Online] Available: <http://agreement.asean.org/media/download/20140119034633.pdf> [23 March 2016].

²³ EU. (2016) Court of Justice of the European Union (CJEU), [Online] Available: http://europa.eu/about-eu/institutions-bodies/court-justice/index_en.htm [5 May 2016].

rulings and in various categories of proceedings.²⁴ So in case of EU, P2 will never happen due to the strong and clear laws.

Last problem (P3) is lacking of Rule of interpretation for ASEAN Instruments and ASEAN Legal Instruments. ASEAN Charter itself never even once mentioned on how ASEAN Instruments and ASEAN Legal Instruments will be interpreted. But it can search from Article 1(a) of PDSM instead of ASEAN Charter. It stipulated that “*ASEAN instrument... [which] gives rise to their respective rights and obligations In accordance with international law*”²⁵ as well as Article 3(1) stipulated that “*1. This Protocol shall be interpreted in accordance with the customary rules of treaty interpretation of public international law*”.²⁶ Under this contexts, this would mean that ASEAN doesn't have its own rule of law for interpretation but applying the customary rules of treaty interpretation of public international law instead. The customary rules of treaty interpretation of public international law in this sense would mean Vienna Convention on the Law of Treaties (VCLT 1986).²⁷

Unlike EU, in order to handle with the problem of law interpretation, they particularly enacted the Rules of Procedure of the CJEU and many amendments such as the Rules of Procedure of the General Court (RoP of

²⁴ See BORCHARDT, K. D. (2010). *Supra* note 16, pp.80-86. See SCHUTZE, ROBERT. (2012). *supra* note 16, pp. 180-182.

²⁵ See PDSM, *supra* note 11, Art.1(a)

²⁶ *Ibid.*, Art. 3(1)

²⁷ UN. (2016) Vienna Convention on the Law of Treaties, [Online] Available: legal.un.org/avl/pdf/ha/vclt/vclt-e.pdf [5 May 2016].

General Court 1991),²⁸ the Rules of Procedure of the Court of Justice (RoP of Court of Justice 2012),²⁹ and the Rules of Procedure of the European Union Civil Service Tribunal (RoP of Civil Service Tribunal 2014),³⁰ and so on. Therefore in case of EU, there is a very clear law to interpret the Union law unlike ASEAN which doesn't has specific law at all.

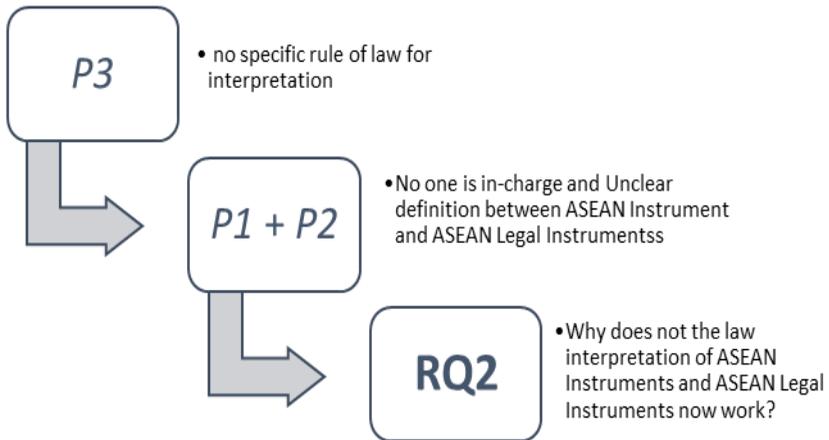


Figure 2 The Connection between RQ1 and RQ2

²⁸ CVRIA. (2016) Rules of Procedure of the General Court, [Online] Available: http://curia.europa.eu/jcms/upload/docs/application/pdf/2008-09/txt7_2008-09-25_14-08-6_431.pdf [5 May 2016]

²⁹ CVRIA. (2016) Rules of Procedure of the Court of Justice, [Online] Available: http://curia.europa.eu/jcms/upload/docs/application/pdf/2012-10/rp_en.pdf [5 May 2016]

³⁰ CVRIA. (2016) Rules of Procedure of the European Union Civil Service Tribunal, [Online]. Available: [http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32014Q0714\(01\)&from=EN](http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32014Q0714(01)&from=EN) [5 May 2016]

As shown on figure 2, due to the RQ2 that *“Why doesn't the law interpretation of ASEAN Instruments and ASEAN Legal Instruments now work?”*, it has been found that there is no specific rule of law for interpretation in case of ASEAN Instruments and ASEAN Legal Instruments. Then when there is no specific law, there is no official authority in-charge to deal with the law interpretation of ASEAN Instruments and ASEAN Legal Instruments and also makes unclear of law definition. At the end this obviously makes the law interpretation of ASEAN Instruments and ASEAN Legal Instruments in present failed and non-effective enough to serve ASEAN.

Conclusion and Suggestions

In conclusion, the P1, P2 and P3 obviously shows the problem of law interpretation under ASEAN Instruments and ASEAN Legal Instruments. It also affects to the law interpretation of ASEAN Instrument and ASEAN Legal Instruments as a whole. Then when the law is unclear and in doubt, no ASEAN Member States want to try it if they can have a choice. Furthermore the problems shows the weak of law and lack of specific law interpret unit. So in order to answer RQ3 that *“How to solve its problem and improve the law interpretation of ASEAN Instruments and ASEAN Legal Instruments?”*, it urgently needs to (1) enact the specific Rules of Interpretation for ASEAN Instruments and ASEAN Legal Instruments by concerning more on the qualification of law interpreter, clear jurisdiction of interpreting power, legal binding status of interpretation, and so on, and (2) establish a legally supported institution to in-charge in law interpretation for ASEAN. Lastly in order to apply

this suggestions in reality, it obviously needs to consider other factors especially politic interest between ASEAN Member States as a first priority.

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