

FRAMING THE  
ASEAN  
CHARTER

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# FRAMING THE ASEAN CHARTER

*AN ISEAS PERSPECTIVE*

Compiled by  
Rodolfo C. Severino



Institute of Southeast Asian Studies

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# FOREWORD

Southeast Asia in the 1960s was a turbulent region as regional countries were faced with managing the effects of de-colonization, confrontation with the forces of communism, and separatism. These newly independent countries were also pre-occupied with building their economies and national identities. ASEAN provided a regional framework of peace, stability and security. From its tentative beginnings in 1967, ASEAN has in the last four decades evolved into one of the most successful experiments in regionalism. It has served the region well in meeting and managing the numerous challenges that have confronted Southeast Asia and in the process has contributed to global peace and harmony.

However, member countries recognize that the world today is far different from the one that confronted the ASEAN founding fathers in 1967. They realize that ASEAN as an organization is at a crossroad. With the rise of China and India and the recovery of Japan, and the challenges of enhanced trade liberalization and the need to build a socio-political regional architecture, ASEAN would have to make itself more cohesive and integrated. ASEAN also has to address unprecedented non-traditional security challenges like SARS, avian flu and environmental hazards that demand expedient cross-border solutions.

In recognition of the difficult challenges facing the region, ASEAN governments have invited an Eminent Persons Group (EPG) to dwell on the issues and to advise on the policies to be taken into account in the framing of an ASEAN Charter. Such a charter would not only give ASEAN a much-needed legal

personality but also serve to make it a more responsive, dynamic and integrated regional organisation.

Against this background, ISEAS would like to offer to the EPG and the wider community the ideas contained in this publication.

**K. Kesavapany**  
**Director**  
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**PART**  
**I**



# FRAMING THE ASEAN CHARTER

## An ISEAS Perspective

*Rodolfo Severino*

### **The ASEAN Way**

The Association of Southeast Asian Nations is almost 40 years old. Over its 38 years, ASEAN has operated without a formal charter. By preference, it has managed its affairs with a minimum of formality, with few legally binding arrangements, and with relatively weak regional institutions. ASEAN's founding document was a two-page "Declaration". It had no criteria for membership other than location in Southeast Asia and adherence to some general principles of international behaviour. Most ASEAN agreements, even those that are technically binding, have been dependent on the voluntary compliance of member-states. There are no mechanisms for calling member-states to account in case of non-compliance with binding agreements. The ASEAN Secretariat, the closest thing that the association has to an executive, remains weak in terms of formal powers despite its strengthening in 1992.

The great diversity of the countries of Southeast Asia, their widely different historical legacies, their divergent strategic outlooks, the diverse compositions of their populations, the uneasy nature of their recent relations, and the lack of a regional identity

among their peoples have led their governments to prefer informal processes, weak regional institutions, and decisions by consensus. This has reassured the ASEAN members, even as they build confidence among themselves, that their national sovereignty, won so recently and with such difficulty, and that, in the case of some, the survival of the ruling regime, would not be threatened by their neighbours. They have gained the confidence that decisions would not be imposed on them by a combination of neighbours or through a strong supranational institution.

Over most of ASEAN's existence, this loose, informal arrangement has served the association and its members well. The "ASEAN Way" and the association's very existence have enabled ASEAN to keep the peace among its members, promote regional stability and play a constructive role in the world out of proportion to its military might or economic heft. The inevitable bilateral disputes have been managed and contained, some settled by legal or diplomatic means, certainly in non-violent ways. Certain norms of inter-state behaviour have evolved over the years. Common economic purposes have been pursued through closer cooperation and moves towards regional economic integration. Relationships formed and cooperative practices developed have helped ASEAN countries, working together, deal with common regional problems like trans-boundary pollution, transnational crime and communicable diseases. On the basis of the ASEAN idea, links have been developed among non-governmental organizations, industry groups, professional associations, and cultural and educational institutions across the region. At the same time, ASEAN has remained open to the rest of the world and is closely engaged with the world's leading powers.

ASEAN has the symbols and some institutions of a regional entity. It has a flag and a logo. It has a headquarters, a Secretariat,

a Secretary-General, and a staff sworn to loyalty to the region rather than the countries of their nationality. The Secretariat enters into commercial and personnel contracts. Headquarters agreements have been concluded between the Secretary-General and the Indonesian Government. ASEAN has a budget. The Secretariat issues cheques against bank accounts in its name.

Over the years, ASEAN has entered into agreements that are technically binding on its members. The Treaty of Amity and Cooperation in Southeast Asia lays down certain precepts governing the behaviour of states-parties with respect to other states and establishes procedures for facilitating the peaceful settlement of disputes. The Southeast Asia Nuclear Weapons-Free Zone treaty commits the parties not to “develop, manufacture or otherwise acquire, possess or have control over nuclear weapons; ... station or transport nuclear weapons by any means; or ... test or use nuclear weapons” in the treaty’s area of coverage or allow others to do any of these things (except for transport). It embodies other commitments related to nuclear weapons and nuclear waste.

The agreement on the ASEAN Free Trade Area obligates ASEAN members to bring down and remove tariff and non-tariff barriers to trade. ASEAN has separate agreements committing its members to the sector-by-sector liberalization of trade in services, the harmonization of product standards, mutual recognition arrangements, and the free flow of intra-ASEAN investments. ASEAN has concluded agreements on air cargo and on the facilitation of goods in transit, and it has one on multimodal transport ready to be signed. ASEAN’s heads of government themselves signed an agreement on tourism, pledging their countries to take certain specific cooperative measures for developing and promoting tourism in the region. The agreement

on trans-boundary haze pollution is already in force, although not all ASEAN members have ratified it.

Thus, by these means, ASEAN has gained recognition as a regional entity and has, to a rising degree, acted as one.

However, although some of its agreements are technically binding, ASEAN has no central institutions to uphold compliance with them. It has nobody to call a member-state to account for non-compliance with the agreements. ASEAN has no credible mechanisms for settling disputes in an objective and binding manner. A mechanism approved by ASEAN's leaders in 2003 would cover only economic agreements. For lack of explicit legally binding provisions in most of its agreements, with no effective compliance mechanisms or credible dispute-settlement systems, ASEAN often does not carry out measures already agreed on to integrate the regional economy or deal with transnational problems. Although the ASEAN Secretary-General has been given, in 1992, the mandate to take initiatives, his power in practice is too circumscribed for him to fulfil this mandate with any effectiveness. Because it does not have the mandate to do so, the ASEAN Secretariat cannot authoritatively call for compliance with ASEAN agreements, or initiate arrangements or other actions to advance ASEAN's purposes. Externally, ASEAN lacks a central authority to speak on the association's behalf and conclude agreements and otherwise conduct relations with other organizations and states. ASEAN does not have juridical personality or legal standing under international law. The lack of all this is a principal reason why ASEAN is slow not only in arriving at agreements but also in carrying them out.

And yet, the inexorable trends towards globalization and towards regionalism in many parts of the world, as well as the rise of continent-sized developing economies like China and India,

require of ASEAN much closer cohesion and more rapid responses to these trends. So does the emergence, in increasing magnitude, of trans-boundary challenges in the form of threats to the environment, transnational crime, international terrorism, communicable diseases, and so on.

As shall be seen below, ASEAN has, on scattered occasions, expressed its members' adherence to certain common values and principles. However, these have not been embodied in a single authoritative document. Without a comprehensive set of values and principles explicitly adopted, ASEAN cannot on the basis of objective and agreed-upon criteria call its members to account for acts that have adverse impacts on fellow-members or on the region as a whole. Without it, ASEAN cannot credibly set the direction in which it is headed.

The identification of common values and principles serves to define a region's image of itself. It helps to cultivate a deeper sense of regional identity among its people. At the same time, practical steps have to be taken to promote such an identity, particularly in order for the common values and principles to take stronger hold.

### **Why Have an ASEAN Charter?**

For all this, what ASEAN needs is a charter, an ASEAN Charter.

A charter would establish the association as a juridical personality and a legal entity. It would make clear the association's objectives. The charter would enshrine the values and principles to which the association's members adhere and which, in a real sense, define its very nature. The charter would envision the arrangements for the further integration of the regional economy and define the institutions, mechanisms and processes for dealing with transnational problems. It would establish the organs of

the association and delineate their respective functions, responsibilities, rights and limitations, the relationships among the organs, and their decision-making processes. Among these organs would be an objective and credible dispute-settlement mechanism. The charter would mark out the relationship between the association and the member-states. It would specify the ways for the charter to take effect and when. It would lay down rules for amendments to be made.

Indicative recommendations for the contents of the proposed ASEAN Charter are as follows.

### **Preamble**

The charter's preamble should briefly recall ASEAN's beginnings, development and achievements and lay down the reasons for having a charter.

### **Establishment**

The charter should embody the member-states' agreement to establish ASEAN as a juridical personality and legal entity.

### **Flag, Logo and ASEAN Day**

It should describe ASEAN's flag and logo, with detailed specifications. It might designate 8 August as ASEAN Day, to be observed as a public holiday in all ASEAN member-countries.

### **Objectives**

Essential to any charter or constitutive act of an association is a statement of its objectives. In ASEAN's case, the association's objectives are stated in scattered ASEAN documents. They should include the following:



1. The well-being of the member-countries' peoples and the protection of their rights;
2. The maintenance of regional peace and stability;
3. The integration of the regional economy for its growth and competitiveness;
4. The narrowing of the development gap among ASEAN countries;
5. The reduction of poverty within ASEAN countries;
6. The conservation and protection of the region's environment for sustainable development;
7. Cooperation in dealing as a region with transnational regional problems;
8. The advancement of the common values that the region's peoples hold in common;
9. The cultivation of a sense of regional identity among the region's peoples;
10. The promotion of Southeast Asian and ASEAN studies;
11. The development or establishment of effective regional institutions for advancing the above objectives; and
12. Such other objectives as the heads of state or government may set down for the association.

The objectives indicated above might be merged with those set forth in the Bangkok Declaration of August 1967, the Declaration of ASEAN Concord of 1976, the Treaty of Amity and Cooperation in Southeast Asia of 1976, ASEAN Vision 2020 of 1997, the Declaration of ASEAN Concord of 2003, and the Vientiane Action Programme of 2004.

The 1967 Bangkok Declaration set these objectives for the new association:

- “1. To accelerate the economic growth, social progress and cultural development in the region through joint endeavours in the spirit of equality and partnership in order to strengthen the foundation for a prosperous and peaceful community of South-East Asian Nations;
2. To promote regional peace and stability through abiding respect for justice and the rule of law in the relationship among countries of the region and adherence to the principles of the United Nations Charter;
3. To promote active collaboration and mutual assistance on matters of common interest in the economic, social, cultural, technical, scientific and administrative fields;
4. To provide assistance to each other in the form of training and research facilities in the educational, professional, technical and administrative spheres;
5. To collaborate more effectively for the greater utilization of their agriculture and industries, the expansion of their trade, including the study of the problems of international commodity trade, the improvement of their transportation and communications facilities and the raising of the living standards of their peoples;
6. To promote South-East Asian studies;
7. To maintain close and beneficial cooperation with existing international and regional organizations with similar aims and purposes, and explore all avenues for even closer cooperation among themselves.”

The Declaration of ASEAN Concord issued in Bali in February 1976 elaborated on these objectives by proclaiming certain “objectives and principles”:

- “1. The stability of each member state and of the ASEAN region is an essential contribution to international peace and security. Each member state resolves to eliminate threats posed by subversion to its stability, thus strengthening national and ASEAN resilience.
2. Member states, individually and collectively, shall take active steps for the early establishment of the Zone of Peace, Freedom and Neutrality.
3. The elimination of poverty, hunger, disease and illiteracy is a primary concern of member states. They shall therefore intensify cooperation in economic and social development, with particular emphasis on the promotion of social justice and on the improvement of the living standards of their peoples.
4. Natural disasters and other major calamities can retard the pace of development of member states. They shall extend, within their capabilities, assistance for relief of member states in distress.
5. Member states shall take cooperative action in their national and regional development programmes, utilizing as far as possible the resources available in the ASEAN region to broaden the complementarity of their respective economies.
6. Member states, in the spirit of ASEAN solidarity, shall rely exclusively on peaceful processes in the settlement of intra-regional differences.
7. Member states shall strive, individually and collectively, to create conditions conducive to the promotion of peaceful cooperation among the nations of Southeast Asia on the basis of mutual respect and mutual benefit.
8. Member states shall vigorously develop an awareness of

regional identity and exert all efforts to create a strong ASEAN community, respected by all and respecting all nations on the basis of mutually advantageous relationships, and in accordance with the principles of selfdetermination, sovereign equality and non-interference in the internal affairs of nations.”

The Treaty of Amity and Cooperation in Southeast Asia of 1976 defines its purpose as being “to promote perpetual peace, everlasting amity and cooperation among their peoples which would contribute to their strength, solidarity and closer relationship”.

The 1997 statement on ASEAN Vision 2020 gives a more detailed depiction of ASEAN’s objectives for the first two decades of the 21st century. The Ha Noi Plan of Action, 1998, reaffirms these objectives while prescribing measures for attaining them.

The first operative part of the Declaration of ASEAN Concord of 2003 reaffirms and builds upon the previous statements of ASEAN’s objectives. The Vientiane Action Programme of 2004 spells out separate objectives for the political and security, economic, and socio-cultural areas.

The proposed ASEAN Charter should codify the more fundamental of these objectives in a comprehensive way. In no case should they be less than those already agreed upon in previous ASEAN documents.

## **Principles**

Almost all regional associations have common standards of conduct for member-countries to live by, common principles to adhere to. Such standards and principles are often criteria for membership in the association. The common standards and principles are, in turn, based on and reflect common values and

norms. Common values and norms give credibility to the association and provide a basis for a regional identity and for the region's people to develop a sense of that identity. Without common values and norms, ASEAN cannot become a true community. It would be difficult to engender enough mutual trust for ASEAN to move quickly on regional economic integration, on effective regional cooperation, on strengthening regional institutions, and on ensuring regional stability.

The Charter of the Organization of American States embodies such common principles, values and norms. Among them are:

- Non-intervention in “matters that are within the internal jurisdiction of the Member States”;
- The promotion and consolidation of “representative democracy, with due respect for the principle of nonintervention”;
- The pacific settlement of disputes among the Member States;
- The “effective limitation of conventional weapons”;
- The “effective exercise of representative democracy”;
- “The elimination of extreme poverty” as “an essential part of the promotion and consolidation of representative democracy” and as “the common and shared responsibility of the American States”;
- The condemnation of wars of aggression;
- “Social justice and social security” as “bases of lasting peace”;
- The “fundamental rights of the individual without distinction as to race, nationality, creed, or sex”; and
- Justice, freedom and peace.

Article 4 of the Constitutive Act of the African Union lays down the following principles:

- a) Sovereign equality and interdependence among Member States of the Union;
- b) Respect of borders existing on achievement of independence;
- c) Participation of the African peoples in the activities of the Union;
- d) Establishment of a common defence policy for the African Continent;
- e) Peaceful resolution of conflicts among Member States of the Union through such appropriate means as may be decided upon by the Assembly;
- f) Prohibition of the use of force or threat to use force among Member States of the Union;
- g) Non-interference by any Member State in the internal affairs of another;
- h) The right of the Union to intervene in a Member State pursuant to a decision of the Assembly in respect of grave circumstances, namely war crimes, genocide and crimes against humanity;
- i) Peaceful co-existence of Member States and their right to live in peace and security;
- j) The right of Member States to request intervention from the Union in order to restore peace and security;
- k) Promotion of self-reliance within the framework of the Union;
- l) Promotion of gender equality;
- m) Respect for democratic principles, human rights, the rule of law and good governance;
- n) Promotion of social justice to ensure balanced economic development;
- o) Respect for the sanctity of human life, condemnation and rejection of impunity and political assassination, acts of terrorism and subversive activities;

- p) Condemnation and rejection of unconstitutional changes of governments.”

In the light of the great political, cultural and historical diversity among the ASEAN members — greater than in the Americas or in Africa — one might think that it would be difficult, if not impossible, for ASEAN to adopt similar principles, values and norms in common. Yet, over the years, ASEAN has adopted, whether explicitly or implicitly, some such common principles, values and norms. Indeed, the Vientiane Action Programme envisions the proposed ASEAN charter as among “the strategies for shaping and sharing ... norms of good conduct in a democratic, tolerant, participatory and open community”. Examples of norms that ASEAN has already adopted in scattered documents, like those enshrined in the OAS Charter or in the AU’s Constitutive Act, may be classified into three categories:

A. Inter-state relations among ASEAN members:

- Respect for “justice and the rule of law in the relationship among countries of the region” (The ASEAN Declaration, 8 August 1967);
- Exclusive reliance on “peaceful processes in the settlement of intra-regional differences” (Declaration of ASEAN Concord, 24 February 1976, and subsequent documents);
- Mutual assistance in case of natural disasters and “other major calamities” (Declaration of ASEAN Concord, 24 February 1976);
- The development of an “awareness of regional identity” (Declaration of ASEAN Concord, 24 February 1976) and the promotion of “a common regional identity” (Declaration of ASEAN Concord II, 7 October 2003);

- The “fundamental principles” of the Treaty of Amity and Cooperation in Southeast Asia, 24 February 1976 (also embodied in other documents):
    - a. Mutual respect for the independence, sovereignty, equality, territorial integrity and national identity of all nations;
    - b. The right of every State to lead its national existence free from external interference, subversion or coercion;
    - c. Non-interference in the internal affairs of one another;
    - d. Settlement of differences or disputes by peaceful means;
    - e. Renunciation of the threat or use of force;
    - f. Effective cooperation among themselves.
  - The undertakings in the Treaty on the Southeast Asia Nuclear Weapon-Free Zone, 15 December 1995;
  - Freedom from “all other weapons of mass destruction” (ASEAN Vision 2020, 15 December 1997);
  - The “principle of comprehensive security” (Declaration of ASEAN Concord II, 7 October 2003).
- B. Relations with states outside the region:
- Adherence to “the principles of the United Nations Charter” (The ASEAN Declaration, 8 August 1967);
  - “close and beneficial cooperation with existing international and regional organizations with similar aims and purposes” (The ASEAN Declaration, 8 August 1967);
  - The “recognition of, and respect for, South East Asia as a Zone of Peace, Freedom and Neutrality, free from any form or manner of interference by outside Powers” (Zone of Peace, Freedom and Neutrality Declaration, 27 November 1971);
  - “a strong ASEAN community, respected by all and respecting all nations on the basis of mutually advantageous



relationships, and in accordance with the principles of self-determination, sovereign equality and non-interference in the internal affairs of nations” (Declaration of ASEAN Concord, 24 February 1976);

- Accession by non-regional states to the Treaty of Amity and Cooperation in Southeast Asia, 24 February 1976;
- “ASEAN as an effective force for peace, justice and moderation in the Asia-Pacific and in the world” (ASEAN Vision 2020, 15 December 1997);
- The ASEAN Regional Forum as “the main forum for regional security dialogue” (Declaration of ASEAN Concord II, 7 October 2003).

C. Standards of behaviour within states:

- The “promotion of social justice” and “the improvement of the living standards of their peoples” (Declaration of ASEAN Concord, 24 February 1976);
- “A Community of Caring Societies” (ASEAN Vision 2020, 15 December 1997):
  - “open ASEAN societies ... where all people enjoy equitable access to opportunities for total human development regardless of gender, race, religion, language, or social and cultural background;
  - where strong families as the basic units of society tend to their members particularly the children, youth, women and elderly; and where the civil society is empowered and gives special attention to the disadvantaged, disabled and marginalized and where social justice and the rule of law reign;
  - our nations being governed with the consent and greater participation of the people with its focus on the welfare

and dignity of the human person and the good of the community.”

- A “set of socio-political values and principles” (Declaration of ASEAN Concord II, 7 October 2003);
- The peaceful resolution of domestic political disputes (ASEAN Joint Statement on the Situation in the Philippines, 23 February 1986);
- “national reconciliation and dialogue among all parties concerned leading to a peaceful transition to democracy” (Joint Communiqué of the 36th ASEAN Ministerial Meeting, 17 June 2003, paragraph on Myanmar);
- “free and peaceful elections” as contributing to “the attainment of a just, democratic and harmonious Southeast Asia” (Joint Communiqué of the 37th ASEAN Ministerial Meeting, 30 June 2004, commenting on elections in Malaysia, Indonesia and the Philippines).

These could be the basis of the ASEAN principles, values and norms to be enshrined in the proposed charter. In addition, the charter could manifest ASEAN’s collective rejection of acts that all would find abhorrent, such as genocide, ethnic cleansing, torture, the use of rape as an instrument of state power or as a weapon of war, the worst forms of child labour, the use of child soldiers, and discrimination on the basis of gender, race, religion or ethnicity. Condemnations of such acts are embodied in international conventions that all ASEAN countries have signed, but placing them in the proposed ASEAN Charter would strengthen the region’s commitment to them, help promote a sense of community among ASEAN’s states and peoples, and project ASEAN as an association with standards.

Member-states in egregious violation of the more fundamental of these norms, which the charter would define, ought to be subject to suspension from the decision-making processes of the association.

## **Economic Integration**

Regional economic integration is one of the vital objectives of ASEAN. The proposed charter should, therefore, make quite clear the ultimate goal of ASEAN in this regard and the stages on the way towards it. The ultimate goal should be a common market — in the words of ASEAN Vision 2020, “a stable, prosperous and highly competitive ASEAN Economic Region in which there is a free flow of goods, services and investments, a freer flow of capital, equitable economic development and reduced poverty and socio-economic disparities”. The charter should define the principal stages towards the establishment of the common market. The first would be the full implementation of AFTA and the other ASEAN economic agreements already arrived at. The second would be not only the removal of all barriers to trade among ASEAN’s members but also the establishment of a common set of external tariffs on imports into ASEAN from outside ASEAN, that is, a customs union. This would require the negotiation of trade agreements, in multilateral settings or with individual countries and groups of countries, by an ASEAN official on behalf of the association as a whole. The final stage, that of an ASEAN Economic Region or common market, would entail the tight coordination of policies that affect trade, investments and the macro-economy, which would, in turn, require a strong central authority to administer and monitor the process of coordination.

A statement of goals and intentions would by itself lack meaning and credibility. It should be accompanied by sanctions for non-compliance. Sanctions would be decided on by the Council of Economic Ministers minus the minister of the state in non-compliance, with the possibility of appeal to the ASEAN Summit, which, again, would not include the state concerned in the appeal process.

### **Collective Responsibility**

The charter should establish the fundamental principle that ASEAN has the collective responsibility to ensure, if necessary through the creation of special bodies, that:

- the objectives and principles enshrined in the charter are upheld and respected;
- the integration of the regional economy is maintained, safeguarded and advanced;
- the people of ASEAN are protected from illicit drugs, transnational crime and international terrorism;
- they are safeguarded from communicable diseases that cross international borders;
- ASEAN member-countries help one another when afflicted by natural or other disasters;
- the rights of the individual citizen, as well as of the community, are protected; and
- the natural environment of the region is preserved and development is sustainable.

### **The ASEAN Summit**

The ASEAN Summit could be affirmed as the supreme decision-making body of the association, with its functions defined in general terms. The minimum frequency of its meetings could be

specified. It should be provided that the Summit could meet, regularly or on single occasions, with leaders of other countries or international organizations whom it might decide to invite to such meetings.

### **Council of Foreign Ministers**

This would take the place of the ASEAN Ministerial Meeting. In keeping with its institutional character, this body should be called a council rather than a meeting. It would convene formally at least once a year. Its functions would include:

- advancing and conducting political and security cooperation in ASEAN;
- conducting ASEAN relations with other countries and international organizations on political and security matters;
- coordinating ASEAN positions in international forums;
- providing direction to the Secretary-General and the Secretariat on political, security, administrative and budgetary, and broad cooperative matters and on general issues pertaining to ASEAN;
- shaping ASEAN administrative and budgetary policies;
- approving the ASEAN Secretariat's budget; and
- recommending to the ASEAN Summit the appointment of the Secretary-General.

### **Council of Economic Ministers**

Similarly, this would take the place of the ASEAN Economic Ministers Meeting. It would meet at least once a year. Its functions would include:

- advancing and conducting economic cooperation in ASEAN;
- forging agreements and taking other measures for the integration of the regional economy;

- conducting ASEAN relations with other countries and international organizations on economic matters;
- coordinating ASEAN positions in international economic forums; and
- taking measures to ensure compliance with ASEAN economic agreements.

### **Council of Finance Ministers**

Also similarly, this would take the place of the ASEAN Finance Ministers Meeting. It would meet at least once a year. Its functions would include:

- advancing and conducting financial cooperation in ASEAN;
- undertaking macroeconomic surveillance of the member-countries' economies;
- taking steps towards the possible harmonization of the member-countries' macroeconomic policies;
- taking steps towards the freer flow of capital in the ASEAN region;
- taking measures for the liberalization of financial services within ASEAN;
- conducting ASEAN relations with other countries and international organizations on financial matters;
- coordinating ASEAN positions in international financial forums; and
- taking measures to ensure compliance with ASEAN financial agreements.

### **Other Ministerial Bodies**

The ASEAN Summit should sanction the continued operation of other ASEAN ministerial forums and, if necessary, establish new ones, setting down their respective functions.

## **Senior Officials and Technical Committees**

The charter could provide that the ministerial bodies may maintain the senior officials' forums, working groups and technical bodies currently operating under their respective jurisdictions and set up new ones if necessary. Again, in keeping with their institutional nature, the senior officials' forums would be called committees rather than meetings. Question: should the forum of customs directors-general be, in the ASEAN context, under the Economic Ministers or the Finance Ministers?

## **ASEAN Standing Committee (ASC)**

The charter would preserve the current functions and responsibilities of the ASC but make them explicit. The principal ones would be to oversee the administrative and budgetary components of the Secretariat's operations, ASEAN's development cooperation with other countries and organizations, and assistance for the newer ASEAN members and the less advanced areas in the older members.

## **Secretary-General**

The 1992 ASEAN Summit, for the first time since the Secretariat's creation in 1976, decided to streamline and strengthen the "ASEAN organizational structure, especially the ASEAN Secretariat, ... with more resources". The Summit gave the ASEAN Secretary-General, who would "be appointed on merit", ... "an enlarged mandate to initiate, advise, coordinate and implement ASEAN activities". The ASEAN leaders also agreed that the Secretariat's professional staff would "be appointed on the principle of open recruitment" and that "representation of all ASEAN countries in the Secretariat" should be ensured.

Despite his “enlarged mandate”, the Secretary-General’s functions and authority in practice fall far short of what seems necessary to carry forward the purposes of an association that would have expanded objectives, embody the common values of its members, substantially integrate the regional economy, deal effectively with growing transnational challenges, ensure compliance by member-states with legally binding commitments, and support the increased functions of ministerial and subsidiary ASEAN bodies. The Secretary-General should also be the personification of a more cohesive association and a clearer regional identity.

Hence, in addition to his current functions and responsibilities, the charter ought to mandate the Secretary-General to:

- speak for the association on all matters except only on those that ministers reserve for themselves;
- negotiate agreements on behalf of ASEAN with other organizations and countries, as authorized by the ministerial bodies concerned;
- take initiatives to advance the association’s purposes;
- draw up a set of benchmarks to measure ASEAN’s progress towards the objectives that it has set for itself; and
- formally invite ministers’ attention to non-compliance by member-states with ASEAN agreements, recommend steps for dealing with it, and otherwise induce, if not ensure, compliance with those agreements.

The Secretary-General is to be appointed by the ASEAN Summit upon recommendation of the Council of Foreign Ministers, which should be aided by a search committee of eminent persons from ASEAN (and from outside ASEAN?). The selection would be



based entirely on merit and without regard for the nationality of the appointee. However, persons of the same nationality are not to serve in immediate succession.

## **Secretariat**

In addition to its current functions and responsibilities, the Secretariat should be geared towards being capable of supporting the Secretary-General in his expanded tasks and duties, as well as the member-states in their larger commitments to the association and the region. The charter should explicitly mandate the Secretariat to engage in research and analysis in support of ASEAN's objectives and provide for the strengthening of its capacity to do so.

In order to assure the member-states of the Secretariat's impartiality, its officers and staff must be shielded from undue influence by the member-states, pledging their loyalty only to the region and the association and devoted only to their interests. The Secretary-General ought to recruit and appoint the Deputy Secretary-General (one or two?) and the professional staff of the Secretariat strictly on merit, professional competence and personal integrity, through a process of maximum transparency and with no intervention or clearance by any of the member-states. However, to the extent possible, all members of the association should have nationals on the Secretariat staff. The charter might direct that the compensation scheme for Secretariat personnel, openly recruited or locally hired, be reviewed and adjusted to correspond to their expanded responsibilities.

The charter or a subsequent protocol should specify the privileges and immunities granted the Secretariat's staff not only by the government hosting its headquarters but also by the other member-states.

The budget of the Secretariat and major decisions on its organization should, as currently, be processed by the ASEAN Standing Committee (ASC) for approval by the Council of Foreign Ministers. The charter should also have provisions on special funds held in trust by the Secretariat and the periodic audit of all books and funds.

### **Funding**

The charter should spell out the manner of financing the operations of the Secretariat and other expenses of the association on the basis of the most equitable way possible of distributing the burden among the member-states. Weighted voting may be a condition for a decision to establish different levels of contribution to the ASEAN budget. Other possible sources of funding might be mentioned. The charter could provide for donations to ASEAN by private persons, natural or corporate, to confer privileges in terms of taxation by member-states.

### **Decision-making**

The charter might make distinctions among five types of decisions:

1. Those that involve matters fundamental to the association, including amendments to the ASEAN Charter, the admission of members and the appointment of the Secretary-General;
2. Those that involve the suspension of members or the imposition of other sanctions;
3. Those that involve economic arrangements and agreements dealing with transnational problems;
4. Those that deal with administrative and budgetary issues;  
and
5. Those that are procedural in nature.

Decisions on issues under No. 1 would be made at the Summit and require unanimity. Recommendations by the Council of Foreign Ministers on such issues would likewise need unanimity. No. 2 would also require unanimity but without the participation of the member-state that is the subject of the proposed suspension or other sanction. No. 3, to be decided upon by the ministerial bodies concerned, would entail a simple majority in the case of weighted voting or, in the absence of such a system, a four-fifths majority of all member-states. So would No. 4, which would be the subject of decisions by the Council of Foreign Ministers and the ASC. The same voting requirement would apply to No. 5 and to all ASEAN bodies. In the last three categories, decisions by consensus would be preferable and should be striven for; voting would be resorted to only in case of failure to arrive at a consensus. Where appropriate and possible, implementing measures could be carried out by those members that are ready, with others joining when they can.

### **Settlement of Disputes**

The charter should set up a dispute-settlement mechanism, perhaps similar to the one provided for in the ASEAN Economic Community or the ASEAN-China Agreement on Dispute Settlement Mechanism of November 2004, to cover all ASEAN agreements rather than just the economic ones.

### **Entry into Force**

The charter ought to enter into force upon deposit of all instruments of ratification, with effect upon deposit of the last one. It would be of indefinite duration.

## **Amendment**

Any amendment to the charter would require unanimous approval.

## **Language**

The charter should be in English, ASEAN's working language.

## **Conclusion**

The ASEAN Charter would establish ASEAN as a juridical and legal entity. By clearly defining the association's objectives, it would make it easier for ASEAN to advance towards those objectives. By embodying the values that ought to bind ASEAN together, the charter would make clear to the international community and to its own peoples what ASEAN stands for and the member-states' expectations of one another. By setting the association's direction in the integration of the regional economy, that is, towards a customs union and a common market, the charter would be guiding ministers and officials in taking measures in this regard and the ASEAN and international business sectors in making their investment and other business decisions. The charter would mandate ASEAN cooperation in dealing with the challenges posed by transnational problems.

The charter would help ensure that ASEAN agreements are complied with and implemented. It would make ASEAN institutions more effective by making clearer their functions and responsibilities. It would substantially strengthen the Secretary-General and the Secretariat by enhancing their status, enlarging their independence, and expanding their authority. The Secretariat's capacity for research and analysis would be strengthened. ASEAN's resources would be augmented with the modification of the system of contributions to its budget and the opening of additional methods for raising funds.

Decision-making would be streamlined and expedited by the application of different requirements to different types of decisions — unanimity and weighted voting or simple majority — while consensus would remain the preferred mode. A credible mechanism would be set up to settle disputes not only on the economic agreements but on all.

These proposed elements in the charter would be effective only if they are backed by the strong political will of ASEAN's leaders and supported by a developing sense of regional identity among ASEAN's peoples.

But ASEAN must have a charter to begin with.



**PART**  
**II**





# **TOWARDS AN ASEAN CHARTER**

## **Regional Economic Integration**

*Denis Hew*

### **The ASEAN Economic Community Project**

The proposed ASEAN Charter is expected to set out the longer-term direction for ASEAN. In terms of regional economic integration, that long-term direction and end-goal have already been articulated to some extent in the ASEAN Concord II (better known as the Bali Concord II). At the Ninth ASEAN Summit in Bali in October 2003, ASEAN leaders agreed to integrate their economies and establish an ASEAN Economic Community (AEC) by 2020. The AEC is one of three pillars (the other two being the ASEAN Security Community and the ASEAN Socio-cultural Community) that make up the ASEAN Community.

In line with the ASEAN Vision 2020, it is envisaged that the AEC will be a single market and production base with free flow of goods, services, investments, capital and skilled labour. This bold project would require a higher degree of regional economic integration than what exists today in ASEAN.

The ASEAN Economic Ministers' High Level Task Force (HLTF) on Economic Integration has unveiled a slew of economic initiatives with clear deadlines to expedite the economic integration process to realize the AEC. These initiatives, which are annexed to the Bali Concord II, include:

- Fast-track integration of 11 priority sectors<sup>1</sup>
- Faster customs clearance and simplified customs procedures
- Elimination of barriers to trade
- Accelerated implementation of the mutual recognition arrangements (MRAs) for key sectors (e.g., electrical and electronic equipment and telecommunications equipment)
- Harmonization of standards and technical regulations

One of the most important recommendations by the HLTF was the creation of a more effective dispute-settlement mechanism (DSM) with powers to make legally binding decisions in resolving trade disputes among member states. The number of trade disputes will likely rise significantly as the region moves towards a higher level of economic integration. Hence, a credible DSM would be absolutely critical for the AEC to succeed. The following measures will be undertaken to enhance the DSM:<sup>2</sup>

- Establish a legal unit within the ASEAN Secretariat to provide legal advice on trade disputes
- Establish the ASEAN Consultation to Solve Trade and Investment Issues in order to provide quick resolution of operations problems (this would be similar to the EU mechanism)
- Establish the ASEAN Compliance Body

Why should ASEAN economically integrate? Economic integration within ASEAN has always been motivated by the need to make the region an attractive production base for domestic and foreign companies. By maximizing the complementarities among member countries to achieve economies of scale, and becoming an efficient manufacturer of products, ASEAN aims to

become a single production base that would be a magnet for attracting FDI inflows.

An integrated ASEAN would also be an alternative to China as a regional production base for multinational corporations (MNCs). Some have referred to this as the “China+1” formula, as MNCs would prefer to diversify their risk by investing in an alternative regional site rather than “putting all their eggs” in one basket and investing solely in China.

Achieving a higher level of economic integration may seem daunting at first glance but ASEAN is not starting from scratch. This is because ASEAN has already put in place potential building blocks towards achieving the AEC. These potential building blocks would include economic integration initiatives, such as AFTA, the ASEAN Framework Agreement on Services (AFAS) and the ASEAN Investment Area (AIA). Looked at holistically, the formation of an AEC could be seen as a logical step up the economic integration ladder.

### **Key Measures to Facilitate Economic Integration**

When considering economic inputs for the Charter, there is no need to “reinvent the wheel”. This is because key economic measures to ensure that ASEAN can effectively function as a single market and production base are elaborated in the HLTF’s recommendations as well as in the Vientiane Action Programme 2004–2010 (VAP). This six-year strategic action plan for ASEAN was launched at last year’s ASEAN Summit in Laos. The VAP aims to intensify the economic integration process by developing and implementing measures that would put in place the essential elements for ASEAN to function as a single market and production base. These measures will also continue to be relevant beyond the deadline of the VAP (i.e., in 2010). These measures include:

- Enhancing the attractiveness of ASEAN as an investment destination
- Accelerating the liberalization of trade in goods
- Improving trade and business facilitation
- Reducing trade transaction costs
- Promoting regional trade in services
- Upgrading competitiveness of ASEAN small and medium-sized enterprises (SMEs)
- Strengthening the ASEAN Dispute Settlement System

To avoid a “two-tiered” or “multi-tiered” ASEAN, it would be absolutely critical for the Charter to address the development gaps among its member countries. This would ensure that the economic integration can be implemented smoothly and that every member country will benefit from the process. Appropriate resources should be allocated to ensure the full participation of less developed ASEAN countries in the integration process. This would include financial and technical assistance, transfer of technology, education and training facilities to reduce the economic divide between the more developed ASEAN-6 countries and the CLMV (Cambodia, Laos, Myanmar and Vietnam).

Although most of the essential elements have been identified for the Charter, the main problem lies in its effective implementation and compliance by member countries. For example, we observed some member-countries back-tracking on their AFTA commitments. It is therefore essential that the Charter be designed to ensure that economic commitments are legally binding and that non-compliance would result in punitive measures such as trade sanctions. The Charter should therefore seek to give the existing ASEAN dispute settlement mechanism some much needed “bite”.

## Greater Institutional Development

It is also important to note that deeper economic integration in ASEAN cannot be successfully achieved without the establishment of a stronger institutional structure with a better enforcement mechanism. There is thus a need to streamline, strengthen and enhance coordination among the existing institutions, as well as design better enforcement mechanisms in order to facilitate and expedite economic integration. In this regard, the European experience is worth noting; in Europe, institutional development started at an early stage of economic integration. In ASEAN's case, building relevant institutions — some of them could be supranational in nature, viz. ASEAN Trade Commission — to expedite regional economic integration is long overdue.

ASEAN still maintains a very loose institutional structure although there has been a strengthening of its institutions in recent years. ASEAN does not operate on the overriding principle of using a formal, detailed, and binding institutional structure to prepare, enact, coordinate, and execute policies for economic integration. The “ASEAN Way” of dialogue is still very much entrenched: i.e., *musyawarah* (discussion and consultation), and *mufakat* (consensus).

The recent and more structured, detailed, and binding procedures adopted in the 1996 ASEAN “Protocol on Dispute Settlement Mechanism” also augurs well for the formation of a formal institutional infrastructure and the integration of ASEAN although this Protocol is yet to be invoked by any member country. The enhanced DSM that is proposed in the Bali Concord II seeks to address the existing problems in the Protocol. Hence, the development of an ASEAN Charter could lay the foundation for a more rule-based institutional structure for ASEAN.

## **Is the Charter ASEAN's Treaty of Rome?**

The end-goal of the AEC is not clearly defined conceptually — is it a common market? A single market connotes a European-style common market — it is the ultimate form of economic integration. A common market is understood to be an arrangement in which there are completely free flows of trade, including internal trade (as in a Customs Union), as well as free mobility of labour and capital. Full mobility of labour involves the right to reside and accept employment in all member countries, and mutual recognition of professional and technical qualifications. Full capital mobility requires the absence of exchange controls and full rights of establishment for firms in all countries. In a common market, credible removal of tariffs may require policy harmonization or common policies on taxes, wages, prices, etc. It may even require common rules governing competition and monopoly, as well as environmental regulations.

Given the conceptual ambiguity of the final goal of regional economic integration, the AEC project is, not surprisingly, losing momentum. If ASEAN countries are unable to integrate deep and fast enough, then they will undoubtedly lose out to more dynamic emerging markets, such as China and India.

Hence, a change of mindset is required if ASEAN wishes to remain economically competitive and relevant. This may include rethinking the “ASEAN Way” of making decisions which is based on consensus. Clearly this form of decision-making process will slow down economic integration. The “2+X” principle which allows two member countries to integrate specific sectors first could be a possible alternative. (This principle was suggested at the Bali Summit two years ago.)

Like the Treaty of Rome in 1957 which laid the foundation for the creation of today's European Union, the ASEAN Charter

provides a golden opportunity to achieve the very same thing. Given that ASEAN is made up of countries of very different levels of economic development, a common market is unlikely to be achieved by 2020. Nevertheless it is a long-term goal that ASEAN should strive to achieve. Even without the Charter, ASEAN is already moving towards realising a fully functioning free trade area (i.e., AFTA) by the year 2010. Hence, regional economic integration towards establishing a common market could be done in 3 stages with the following timelines:

Stage I: By 2020, ASEAN will easily realize an AFTA-Plus arrangement where there is an FTA and freer movement of goods, services, investments, capital and labour.

Stage II: By 2030, a customs union within ASEAN to be established where trade barriers among member countries will be removed and a common external tariff vis-à-vis non-member countries will be set up.

Stage III: By 2050, the establishment of an ASEAN common market where there is complete free flow of trade and investments as well as free mobility of labour and capital.

## **Concluding Remarks**

The ASEAN Charter has to be bold if it's going to make a real impact. However, given the fact that it will take at least two years to come out with an ASEAN Charter leaves plenty of time for the document to be watered down so as to avoid political sensitivities. If this happen, it would sadly be yet another missed opportunity for ASEAN.

**Notes**

- 1 The 11 priority sectors are: electronics, e-ASEAN, healthcare, wood-based products, automotives, rubber-based products, textiles and apparels, agro-based products, fisheries, air travel and tourism.
- 2 For more details regarding the enhance DSM, please see Recommendations of the High Level Task Force on ASEAN Economic Integration (Annex 1: Mechanism of the Dispute Settlement Mechanism).



# **TOWARDS AN ASEAN CHARTER**

## **Promoting an ASEAN Regional Identity**

*Leo Suryadinata*

### **Introduction**

The ASEAN regional identity is still weak.

This may be partly due to the fact that, although ASEAN was established on 8 August 1967 by five Southeast Asian states, Brunei joined later in 1981 and only in the later half of the 1990s did three Indochinese states (Vietnam, Laos and Cambodia) and Myanmar become members. It is therefore understandable that “national identity” is stronger than “regional identity” in ASEAN.

Southeast Asia was only a geographical region rather than a socio-political, economic and cultural region. Unlike European states which are predominantly Christian and economically developed, ASEAN is one of the most diverse areas in the world; it is multi-ethnic, multi-lingual and multi-religious. Economically, with the exception of Singapore, ASEAN countries are still “underdeveloped”. Violent conflicts between Southeast Asian states also occurred in recent history. However, after World War II, the leaders of Southeast Asian states became aware that they share a lot of things in common; with the exception of Thailand, they were all Western colonies, economically underdeveloped, and longing for rapid development. To achieve this, there was a need for them to foster close cooperation not only in the field of

politics but also in economics. Nevertheless, due to different ideologies and historical experiences, ASEAN countries were unable to establish close ties until in the 1990s.

### **Why an ASEAN Regional Identity?**

The leaders of the Southeast Asian states have been aware that their peoples do not know much about each other. Therefore in the Bangkok Declaration in 1967, when ASEAN was first established, a clause was inserted that one of the purposes and aims of ASEAN was “to promote Southeast Asian Studies”. In other words, through the promotion of Southeast Asian Studies (which should now be called “ASEAN Studies”), member-states would be able to understand each other and promote closer cooperation.

After several decades, due to the change in the external environment and within the ASEAN countries themselves, there was a common desire to foster an ASEAN community rather than just promoting “closer cooperation”. “Integration”, not “cooperation”, has become the final goal of the ASEAN states. ASEAN would like to become an economic community, a security community and a socio-cultural community. In short, a regional community rather than national communities! Nevertheless, national identity in ASEAN is still strong.

As a realist, I am fully aware that when there is a conflict of “national identity” and “regional identity”, national identity (national interest) often, if not always, prevails. When this happens, it jeopardizes the cooperation and integration of ASEAN states into a regional entity. There is a danger of hindering the integration process.

It should be noted that ASEAN was an élite organization rather than a people’s organization. In other words, ASEAN was

popular among the élites of Southeast Asian countries, but has not been widely understood by the man in the street. Élite-mass integration in the ASEAN context is therefore needed; one way of creating this integration is to promote an ASEAN regional identity.

### **What is an ASEAN Regional Identity?**

A regional identity refers to a collective identity, or supra-national identity. Usually it can be divided into symbolic/institutional and value identities. The former is concrete while the latter is abstract. It is not easy to define the ASEAN (regional) identity, as the countries in the region are so diverse. Three major world religions — Islam, Christianity and Buddhism — are found in the ASEAN states. Major and minor languages as well as various races are present. Countries are at different stages of economic development. Even political ideologies are not always in conformity. Therefore extreme diversity is the major characteristic of ASEAN, but if diversity is overstressed, there will not be a “common” identity but a “diverse” identity. Therefore, to promote an ASEAN regional identity means to promote “unity in diversity”. This is to guarantee regional integration and prevent regional disintegration.

### **Common Symbols/Institutions**

At the moment, there exists an ASEAN regional symbol and an institution: these are the ASEAN Logo and ASEAN Secretariat. These two concrete properties of ASEAN should be popularized in all ASEAN countries through educational institutions at all levels.

There are four other “symbols” of ASEAN regionalism which should be promoted:

- First is the establishment of an ASEAN Studies Centre,
- Second is an ASEAN College/University,
- And the third is to celebrate ASEAN's birthday — to be called the ASEAN Day — as a common holiday for all ASEAN states.
- Furthermore, the Southeast Asian Games (SEA Games) should be called the “ASEAN Games” in order to enhance people's awareness of the presence of ASEAN.

### **Common Values/Norms**

Common ASEAN values or ASEAN Shared Values are present in the ASEAN states. Some of these values are weak and hence should be promoted. These values/norms include consensus, mutual respect, non-interference, peaceful settlement of disputes, renunciation of the use of force, protection of human rights, and promotion of social justice.

### **Concluding Remarks**

The ASEAN Charter should be concerned with how to promote the ASEAN identity, as the promotion of such identity is relevant for the further development of ASEAN as a regional organization. The Charter should include a statement like: “To continue promoting ASEAN regional identity in order to realize an ASEAN regional community.” Only through successful promotion of such regional identity can ASEAN solidarity be achieved. Concrete steps for the promotion of such ASEAN Regional Identity should be inserted as an appendix to the ASEAN Charter.

# TOWARDS AN ASEAN CHARTER

## Some Thoughts from the Legal Perspective

*Locknie Hsu*

### **Introduction**

This is a brief paper outlining the value that an ASEAN Charter may present to ASEAN members. This paper adopts a relatively neutral stance on the desirability of a Charter. On one hand, it will not be a quick cure to differences in political perspectives and to lack of movement where political will is not strong. However, a Charter can create the right negotiating and decision-making mechanisms to facilitate movement.

Discussion of an ASEAN Charter is taking place against a backdrop of increasingly legalized international relationships. This trend can be seen in the current web of legal agreements:

- between WTO members;
- between bilateral and regional trade partners, through numerous free trade agreements and investment agreements;
- within ASEAN itself, in the area of economic integration, and with the advent of the highly legalized 2004 dispute settlement mechanism; and
- between ASEAN and its dialogue partners, being negotiated.

Against this background, should ASEAN adopt a Charter? Can ASEAN achieve its current and future objectives using existing arrangements (i.e., no Charter but a series of inter-governmental agreements, memoranda of understanding and other informal arrangements)? A large number of ASEAN objectives and cooperation activities can probably continue through the existing means. What legal value might a Charter bring?

### **An ASEAN Charter as a Constitutional Document**

A constitutional document may contain norms, statements on sovereignty, rights and obligations, and powers in legislative, executive, judicial processes. An ASEAN Charter may thus serve as a constitutional document for ASEAN. It may contain some or all of the following elements:

1. Establishing expressly legal personality for ASEAN as an international organization (and therefore making ASEAN a subject of international law in its own right). This is elaborated on below.
2. Establishing the objectives, functions and competence of ASEAN as an international organization. This will spell out the organization's specific goals and define its powers to attain those goals.
3. Establishing the rule-making mechanisms/organs and procedures within ASEAN (legislative mechanism).
4. Establishing a mechanism or organ for implementation and monitoring of implementation of rules and decisions made by the organization (executive mechanism).
5. Establishing a mechanism for interpreting and enforcing ASEAN rules and decisions (judicial or quasi-judicial mechanism).

The following part elaborates on the opportunities that may be achieved through an ASEAN Charter.

**1. (a) Clarification of ASEAN's international legal status**

- (i) ASEAN currently does not appear to have legal personality as it is not explicitly established as an international organization with such personality. Legal personality will confer on the international organization several rights, privileges and immunities recognized in international law, e.g., the ability to participate in proceedings as an entity, bring matters before UN organs (by registering its Charter and treaties under Art. 102 of the UN Charter), and have application of international law to relationships between the organization and other subjects of international law.
- (ii) Such legal status will enable ASEAN to enter treaties (e.g., with non-ASEAN countries) as an entity. At the moment, ASEAN's ten separate members act as separate treaty parties vis-à-vis non-ASEAN members.
- (iii) Such legal status will enable the ASEAN entity to enforce treaties entered into with its members.

**(b) Clarification of ASEAN's legal personality in domestic law**

- (i) ASEAN as an international organization with legal personality may enjoy certain rights in domestic systems, e.g., sue in national courts, purchase property, enjoy tax benefits, enter into a headquarters agreement with a host country (see, for example, agreements between Switzerland and several international organizations for hosting headquarters: [http://www.eda.admin.ch/geneva\\_miss/e/home/instit/oigen.html](http://www.eda.admin.ch/geneva_miss/e/home/instit/oigen.html)).

- (ii) It can allow the organization to enjoy specific privileges under domestic law (for instance, in Singapore, the International Organizations [Immunities and Privileges] Act, Cap. 145, confers privileges on international organizations such as the APEC Secretariat, IBRD, MIGA, UN and ICJ, UNESCO, WHO, WIPO).

**2. Establish objectives, functions and competence of ASEAN as an international organization.**

- a. Consolidation of norms common to members, currently scattered throughout the many existing agreements and documents of ASEAN.
- b. Consolidate past commitments and perhaps include new commitments (e.g., in further integration).
- c. Set out future directions and tasks for the organization.
- d. Establish the competence of the organization, i.e., the functions and the powers with which to fulfil them.
- e. Establish a decision-making structure: this represents an opportunity to review the current decision-making processes, by considering the following:
  - (i) What body/bodies should be competent to make decisions (e.g., which decisions are only for Leaders, which decisions by senior officials, whether there are any issues on which there may be joint competence between ASEAN and members, etc.);
  - (ii) Whether to retain consensus decision-making as the default method in all areas, or whether to introduce voting of any kind for a limited number of issues.
- f. Establish membership, suspension and termination criteria.



3. Establish a mechanism or organ for implementation and monitoring of implementation of rules and decisions made by the organization. This is an opportunity to decide whether to place responsibility in a particular ASEAN organ for promoting and implementing integration initiatives, and promotion of an “ASEAN-wide” perspective (like that placed in the EU Commission).
4. Establish a mechanism for interpreting and enforcing ASEAN rules and decisions (judicial or quasi-judicial mechanism). The 2004 Protocol on Enhanced Dispute Settlement Mechanism focuses on disputes arising from ASEAN *economic* agreements. Members may wish to consider whether there should be an overall ASEAN judicial mechanism that handles non-economic disputes, or to look to other existing international tribunals for such disputes.
5. Increase international standing and recognition of ASEAN and its members. The capacity to speak as one in international forums can be important. For instance, the European Communities stand as a single entity in the WTO, both in negotiations and dispute settlement. The combined voice within the organization can lend strength to an individual member’s arguments.
6. Strengthen the ASEAN integration process. The Charter may allow the following in respect of economic integration:
  - a. Consolidation of existing integration commitments, e.g., Vision 2020, roadmaps, priority sectors, schemes of cooperation, framework agreements;

- b. Create a mechanism to take the integration process forward systematically.
7. Establish general norms and directions in external relations, e.g., with dialogue partners and other countries, beyond those in documents such as the TAC and SEANWFZ.
8. Reinforce an ASEAN identity — especially if the organization’s objectives and benefits are brought home to member populations clearly.

### **Addressing Domestic Sovereignty Concerns**

A concern frequently encountered in ASEAN is that of a fear of diminution of domestic sovereignty. The Charter may deal with this concern in several ways, and the following are some examples:

1. Clear delineation of the competence (and limits) of ASEAN as an organization, and that which is retained by domestic governments. The strength of legal language (e.g., firm commitment versus endeavour) can also be adjusted to reflect whatever is agreed upon by member governments.
2. Providing a *temporary* “escape” mechanism from commitments for members in specific, special circumstances (resembling the notion of an emergency safeguard system frequently seen in the area of trade). However, these circumstances should probably be narrowly defined in order for members not to invoke the mechanism lightly.
3. Inclusion of provisions reflecting recognition of the differences in levels of development of newer ASEAN members (CLMV), to assure them of mindfulness of their interests. These can take the form of special consideration

for less developed members during decision-making processes, and special timelines in requiring performance of commitments.

4. Provision of a method to review the Charter when serious circumstances call for it.

Thus, while it may not provide a quick fix for all current issues, the Charter represents an opportunity to address certain questions and to provide facilitative structures for the way forward.



# TOWARDS AN ASEAN CHARTER

## Lessons from the European Union

*Joergen Oerstroem Moeller*

Some key points with regard to the European Union (EU) that ASEAN could make use of are as follows:

### **1. Main Principle of Economic Integration**

- a. Integration had to be a positive sum game for all so much so that it would always be better for a member state to be in rather than out of the union. Politically: stronger influence and better possibilities to shape and implement domestic political preferences. Economically: higher and sustainable growth rate leading to a higher living standard.

Two defining instances can be listed such as in the 1965 incident concerning France (boycott of institutions for six months) and when Margaret Thatcher in 1979 demanded “money back” given the sentiments that Britain was financing the EU at too high costs without hopes of returns. In both cases the “recalcitrant” member state was accommodated by a special political and/or economic arrangement.

This underlines that the objective(s) for the integration applies for all, but special arrangements, i.e.,

of transitional nature can be agreed for one or more member-states. They all get there but not necessarily by the same road and at the same time. Looking at the state of the EU today, this is still the case. UK stood outside the Social Charter in the Treaty of Maastricht, several member states are outside the EURO and the Schengen arrangement regarding free passage at borders.

It is thus pertinent for the Charter to be drafted in such a way that such difficult situations do not occur.

- b. It was important for the organization to be a problem grinder. There must be common acceptance that integration is for the good of the member-states and for the population and that no problems are irrelevant. All member-states must come to the EU confident that their problem will be dealt with. And the population must feel that this is the case — the EU being relevant for them in their daily life and not only a political exercise at a high level or even worse an irritant.
- c. A visible political objective should exist. In the EU case, this includes the 1950s free trade to boost economic growth and to counter the threat posed by the Soviet Union. Later came the Single European Act, Single Currency and Enlargement. It should target a clear political problem that the people understand and feel is relevant. And it is advisable to highlight why these problems cannot be solved without the integration.

The failure of the proposed Constitution in two member states was precisely because politicians did not manage to get across to the population and explain why the constitution

was needed — they failed to communicate which political project demanded a constitution, what the existing treaties could not do.

## **2. Impact of Globalization**

On the one hand, there is a need to ensure that the organization's own goals as well as those of the nation-states would be non-contradictory to rules set by multilateral organizations such as the WTO. At the same time, it is necessary to be aware that actions of one country have important impacts on its neighbours, i.e., economic policies and environmental rules such as building a nuclear power station close to an adjacent member state.

Economic integration makes it possible for a nation-state to punch above its weight by letting the regional integration (EU as a case) put its position forward. On the other hand the integration imposes certain obligations that may work as constraints on the nation-state.

For the nation-state it is of vital importance to adopt an offensive approach taking an active role in international institutions to be sure that rules and decisions adopted by them are in conformity with its own interest. It thus pushes the burden of adjusting to international rules/decisions on other nation-states. At the same time it creates room for manoeuvre for itself, knowing that no domestic policies will run counter to the international set of rules.

The defence of the nation-state's room of manoeuvre to shape its domestic policies starts at the international negotiating table and not by national legislation being more and more eroded as a bulwark by globalization.

### **3. Clearly Defined Roadmap**

On how to proceed, the suggestion would be to proceed a step at a time. A roadmap would have to be clearly defined, starting from the basics before adding on in an incremental process. This would allow for changes and reversals.

The EU started with a customs union, a common agricultural policy and a common external trade policy. They were all visible and easily understood as steps to promote growth.

When tangible results are achieved the next steps can be taken.

The EU experience shows that of the so-called four freedoms — goods, services, capital, persons — goods do not pose much difficulties, services and capital are more difficult to handle, but it can be done, while freedom for movement of persons is a very sensitive issue.

In addition, so as to alleviate negative impacts, special instruments also had to be in place on several fronts such as provision of social funds, etc. Otherwise the disadvantaged member states and/or regions feel that they are left outside and deprived of benefits.

### **4. Decision-making Process and Institutions**

A choice between intergovernmental and supranational decision making had to be made — the latter would require the pooling of sovereignty and be a legally binding act.

The question of sovereignty was often misrepresented in the debate. Economic integration does not imply that member states abandon or lose sovereignty. They transfer sovereignty to exercise it in common with adjacent nation-states pursuing analogous political goals. By doing so they



adopt an offensive approach creating space for domestic policies and policies pursued by the group of nation-states forming the integration.

Again, this would be done in an incremental manner and while some parts remained intergovernmental, there are parts that go under a supranational decision-making process.

A well-defined, specific platform as well as a pilot project in a specific area should be taken up.

The most difficult step for the EU has been to engage the population and convince people that the EU institutions are not distant and far fetched institutions but institutions “for them”, where they are represented. EU institutions are still not regarded as part of the political life in the same way as the national political institutions. The result is a gap of confidence and lack of trust between the institutions and the European population.

The population still does not see or agree that the ultimate objective for the economic integration is to move the decision-making process to the same level as the economy. Goods, capital etc, have jumped out of the national context to operate internationally. Economic integration is basically an attempt to catapult the political decision making to the same level. That is why the key words are the same for the national decision-making: legitimacy, accountability and transparency.

The members of the Commission (in principle one for each member state) are nominated by the member states but pledge not to pursue national interest (the President of the European Commission has to be approved by the European Parliament after a debate about his programme — this is no formality). The officials of the European Commission are

recruited and promoted on merit. Every year exams rather like the Chinese mandarin system take place for candidates wishing to start a career as “eurocrats”.

## **5. Building Trust**

It is of the utmost importance to build trust among the members. Feedback and proper representation of the population are also most necessary. In the 1970s and 1980s the Europeans created the foundation for what later became EUROland by classifying national economic and monetary policy as a policy of common interest. Countless meetings were organized to map out a common approach and member-states looked to the EU for support when in difficulties.

Finally the 3 Cs, namely Coherence, Consistency and Continuity, are of paramount importance to ensure the smooth running of the daily work. The member-states must know the policies pursued by each other to prevent surprises undermining confidence and trust.

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