

ASEAN Charter: A New Beginning for Southeast Asian Nations

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The ASEAN leaders have signed ASEAN Charter in December 2007. A year later, this Charter was ratified by all ASEAN member states thus it became to be entry into force on 15 December 2008. ASEAN Charter reflects the internal momentum and the development of relations between ASEAN and the world. In addition, it also characterizes the common ideals shared by the ASEAN member states. This article will emphasize three subjects. Firstly, it will examine the factors that push ASEAN member states to move toward ASEAN Charter. Secondly, it will underline the process of drafting the ASEAN Charter. Thirdly, it will briefly discuss relevant issues which are arisen by the ASEAN Charter.

Keywords: ASEAN Charter, ASEAN Community

Introduction

The twenty-first century has brought new fundamental changes, and they will continue to take place, both regionally and internationally. These changes have thrust new challenges to ASEAN: globalization with all its ramifications in various fields; interdependence among nations and interconnection of global problems; heightened international economic competition, and the urgent need to bridge the development gap between the older and the newer members of ASEAN; the emergence of non traditional security threats such as terrorism, various transnational crimes, natural disasters, pandemics, climate change etc. In Asia, the rise of China and India, the adverse impacts of global financial crisis and ASEAN's widening links with the rest of the world are realities that impel ASEAN to strategically rethink and reposition itself in the new world.

The Association of Southeast Asian Nations (ASEAN) when established on 8 August 1967 was already envisioned to build closer regional cooperation

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in the economic, political, security, as well as technical spheres. More importantly, ASEAN was founded to dispel suspicions among countries in South East Asia that was still the predominant nature of regional relations at the time. The Cold War geopolitical game was also another reality that nations of Southeast Asia tried to address by reaffirming the principles freedom of States, sovereignty and non-interference. They are aimed at excluding foreign powers in the region² while at the same time continue to build mutually beneficial relations with countries outside the region.

Now, ASEAN cooperation has developed into many specific fields of cooperation that keep on evolving, such as security, politics, trade, agriculture, labor, law, energy, and youth. Its external relations are firmly established through dialogue partnerships with countries such as the United States of America, Japan, South Korea, China, India, Australia and international institutions such as United Nations, European Union and Mercosur. ASEAN membership itself has been expanded from the five founding members (Indonesia, Malaysia, Philippines, Singapore, Thailand) to include Brunei Darussalam (1984), Vietnam (1995), Lao PDR (1997), Myanmar (1997), and Cambodia (1999), thereby fulfilling the dream of its Founding Fathers of a regional organization that encompasses all the countries in the region.

After forty years of existence, in December 2007, ASEAN Leaders signed a document that some claim as the crowning achievement of ASEAN, the ASEAN Charter. One year later, the Charter was ratified by all ten Member States and entered into force on 15 December 2008. Indeed, the Charter was not created in vacuum. In many ways, it reflects the internal momentum and the development of relations between ASEAN and the world. It also epitomizes the common ideals shared by ASEAN Member States, as well as the current state of regional cooperation.

With that understanding, first, this article will try to examine factors that impel ASEAN to move toward an ASEAN Charter. Second, it will highlight the process of drafting of the ASEAN Charter. Third, the article will briefly discuss some of the pertinent issues raised by the ASEAN Charter.

The Impetus for ASEAN Charter

ASEAN emerged as one of the most successful regional groupings in the world without any formal constitutional basis. Before the ASEAN Charter entered

² See preamble paragraphs of Bangkok Declaration.

into force in December 2008, ASEAN functioned only on the basis of a “founding document”, that is, the Bangkok or ASEAN Declaration of 1967 and other agreed declarations, concords, and communiqués. These documents did not require any formal ratifications or to be of a legal-binding nature with the exceptions of the Treaty of Amity and Cooperation in Southeast Asia (1976) and the Treaty on the Southeast Asia Nuclear Weapon-Free Zone (1995). For this reason, ASEAN cooperation has often been characterized as a loose and informal one, relying on political persuasion rather than legal enforcement.

One often cited example of this characteristic is the decision making procedure in ASEAN. Decisions are made based on *musyawarah* (consultation) and *mufakat* (consensus), the so-called “the ASEAN way”. Many analysts and students of regionalism have criticized this approach to decision making. Despite the many critics of this approach, this unique way has not hampered the progress of ASEAN. It has been able to create and maintain peace and stability in Southeast Asia for the past four decades, which has enabled its Member Countries to strengthen economic cooperation and integration, and concentrate on their own nation-building agenda.

Perhaps what is interesting from legal point of view, ASEAN looked like a proper international organization with all of its machineries and procedures but at the same time, ASEAN was not an international organization in the formal legal sense until the ASEAN Charter entered into force. Several scholars have debated whether ASEAN had become an international organization with a legal personality even without the need of concluding a constituting document such as ASEAN Charter. As several scholars have discussed, ASEAN might be an international organization but it was not an organization with international legal personality.³ What is very clear about ASEAN, however, is that it is a form of cooperation between states as its members and thus it fits into the definition of an Intergovernmental Organization.⁴

ASEAN also closely follows the development in other region, particular the integration process of Europe. The regionalism set by European Union can be regarded as a positive trend for advancing ASEAN’s cooperation, even

³ DR. Jiang Yu Wang, “ International Legal Personality of ASEAN and the Legal Nature of the China-ASEAN Free Trade Agreement “ . CHINA-ASEAN RELATIONS: ECONOMIC AND LEGAL DIMENSIONS, John Wong, Zou Keyuan, Zeng Huaquan, eds., Singapore: World Scientific, 2006. Full document is downloadable from the link provided by SSRN: <http://ssrn.com/abstract=893764>.

⁴ See the definition of “international organization” in the article 2 of the Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations (1986).

though it is necessary to re-emphasize that ASEAN integration is conceptually different from European integration. In order to become more competitive and relevant as a regional organization, ASEAN must transform into an organization with clear decision making mechanism, clear rules in ensuring compliance, as well as a legal personality that endows ASEAN with rights and duties under international law.

Academic discussions aside, one event can be considered as the turning point that increased the call for a more binding constituting document of ASEAN: the Ninth ASEAN Summit in Bali, 2003 which produced the Bali Concord II. At the Summit, ASEAN Leaders further articulated the concept of a community of Southeast Asian nations as expressed in the ASEAN Vision 2020, as the outcome document of the Second Informal Summit in Kuala Lumpur, in 1997.⁵ They agreed to elevate the concept from an ASEAN community into an ASEAN Community, with capital "C" by 2020. The Leaders later decided to accelerate the establishment of an ASEAN Community from 2020 to 2015 during the 12th ASEAN Summit in Cebu, Philippines, in 2007. Anticipating that, ASEAN decided to strengthen the foundation of ASEAN through a binding Charter that will support the establishment of an ASEAN Community and ensures the implementation of its Member States commitments, while preserving internal sovereignty and integrity of its Member States.

As the biggest Southeast Asian country in almost every aspects, the socio-political developments in Indonesia, to a certain extent, are reflected in the development of ASEAN. For Indonesia, the call for ASEAN transformation mirrored the change in socio-political landscape that has taken place in Indonesia since 1998. The *Reformasi* (reform) movement in Indonesia has made human rights issues, democracy, rule of law, good governance important features of Indonesia's politics, and they are rightly reflected in its foreign policy. Indonesia has been a strong supporter for an ASEAN Charter believing that such a constituting document can greatly help in advancing these noble ideals.

At this point it is perhaps important to note that the Indonesian Constitution and Law Number 24 year 2000 on International Treaties stipulate that negotiations on international treaties lie under the purview of the Government of Indonesia. Nevertheless, contrary to some opinions that the Charter was negotiated in secrecy and without sufficient consultations with the public, it has been a habit on the part of Indonesia to regularly hold meetings aiming at gathering

⁵ ASEAN Vision 2020

inputs from the Parliamentarians and civil society in general. During the drafting process, Indonesian Foreign Minister Hassan Wirajuda regularly gathered members of civil society through “Foreign Policy Breakfast” initiative. The Directorate General for ASEAN Cooperation regularly convened constituent gatherings attended by representatives from Indonesian universities, non-governmental organizations, youths and other public organizations including religious organizations. These were done in order to learn their views and concerns, to ensure the interests of the Indonesian people are justly reflected in the new ASEAN Charter. It is later proven that these interactions help in smoothing the process of ratification.

The Road to ASEAN Charter

According to the decision taken at the 11th Summit in Kuala Lumpur in December 2005, ASEAN Leaders foresaw the Charter to be the legal and institutional framework to support the vision of ASEAN (Create Legal Personality), and as the legal instrument of ASEAN, the Charter might have a more binding effects in incorporating all the shared-value and common interest and cooperation of ASEAN.

The idea for an ASEAN Charter is actually can be traced back to Declaration of ASEAN Concord in 1976 as the outcome of the First ASEAN Summit. The 1976 Declaration, popularly known as Bali Concord I, mandated “a study of desirability of a new constitutional framework for ASEAN”⁶ as part of improvement measures of ASEAN machinery. But the idea has never really taken off since then. For many years, there was not enough interest for the members to transform ASEAN into an international organization with international legal personality and rigid organizational rules. ASEAN cooperation gradually developed for decades with its “ASEAN Way” at “a pace comfortable to all”.

In 2003 the idea of having an ASEAN Charter found its momentum. During Indonesia’s chairmanship of ASEAN, the Declaration of ASEAN Concord II (Bali Concord II) was concluded. The Declaration mentions about the need for ASEAN integration and establishes “the framework to achieve a dynamic, cohesive, resilient and integrated ASEAN Community” with ASEAN Political Security Community, ASEAN Economic Community, and ASEAN Socio-Cultural Community as the three pillars of ASEAN cooperation⁷.

⁶ See Bali Concord II under section F. Improvement Measures of ASEAN Machinery.

⁷ See Declaration of ASEAN Concord II, <http://www.aseansec.org/15159.htm>

As a follow up to the *Bali Concord II*, the Indonesian delegation contributed toward the adoption of an *ASEAN Security Community Plan of Action (ASC PoA)* which underlined among other things the shaping and sharing of norms. The concept of shaping and sharing of norms that was the brainchild of the Indonesian Foreign Minister, Dr. N. Hassan Wirajuda, became the basis for the development of the Charter. The idea is quite simple. Without a single set of rules that represent ASEAN norms/values and principles within a legal framework acceptable to all, it would be hard to build an ASEAN community, noting the differing situation of Member States and complexities of issues facing the region.

After long and difficult negotiations, a paragraph was finally agreed in the ASC PoA, under the rubric of *norm shaping and norm sharing* that clearly mandated for the development of an ASEAN Charter, which many, particularly in Indonesia, expected would be completed in a short span of time. This was not the case. Although the Indonesian delegation presented a full draft of the ASEAN Charter in the ASEAN SOM meetings in 2004 to expedite discussions, some ASEAN members were still reluctant for different reasons.

When the Vientiane Action Programme (VAP) was concluded in 2004 to further develop the modalities for an ASEAN Community, Indonesia seized the opportunity to pursue the initiation of drafting activities of an ASEAN Charter. The VAP indeed mandated the initiation of preparatory activities to develop an ASEAN Charter as part of shaping and sharing of norms in ASEAN⁸. It took another 3 years, with the establishment of an Eminent Persons Group (EPG), followed by a High Level Task Force on the Drafting of ASEAN Charter (HLTF) before the ASEAN Charter was able to be signed by ASEAN Leaders in November 2007.

From the very beginning of the process of drafting the ASEAN Charter, Indonesia believed that the future of ASEAN would be greatly shaped by its Charter. That was why the wisdom from H.E. Ali Alatas, former Minister of Foreign Affairs as well as the advice from a senior diplomat, Ambassador Wiryono Sastrohandoyo were sought. H.E. Ali Alatas, the former Minister of Foreign Affairs was later appointed as Indonesia's EPG member. The late Pak Alatas was greatly respected and admired in the region for his contribution and deep understanding on ASEAN.

Recommendations of EPG were laid down in its Final Report. It was submitted to the 12th ASEAN Summit in Cebu, January 2007. The EPG work

⁸ See Vientiane Action Programme on the website, <http://www.aseansec.org/VAP10th%20ASEAN%20Summit.pdf>.

was continued by the High Level Task Force on the Drafting of ASEAN Charter. It is comprised of government representatives of ten ASEAN countries. They were tasked to further study, discussion, and its drafting into the legal, official language of the Charter. Indonesia's representative in HLTF was Mr. Dian Triansyah Djani, then the Director General for ASEAN Cooperation of Indonesia. The Task Force submitted the final draft text of the Charter to the ASEAN Leaders at the Thirteenth Summit in Singapore in November 2007. Eventually, this was the text of the ASEAN Charter that was ratified by all Member States and entered into force on 15 December 2008.

When Indonesia presented the instrument of ratification to the ASEAN Secretariat on 13 November 2008, two days before the agreed deadline, cynics commented that it aptly exhibited the pessimism the Indonesian people have on ASEAN. I beg to differ. On the contrary, Indonesian people put high hopes on ASEAN and as the third largest democracy in the world, the internal democratic process must be honored and allowed to take its due course.

After a long process and such in-depth deliberations and discussions at the national level, Indonesia finally come up with one voice on how to move forward with our regional cooperation.

Finding the Middle Ground for the ASEAN Charter

As a document negotiated by all member states of ASEAN, it is not always easy to find a consensus in drafting an ASEAN Charter. Compromises as the consequences of negotiation among sovereign states were made. At a glance, the resulting text of ASEAN Charter may look different from the recommendations of the EPG. However, under closer scrutiny the final Charter text reveal that a few important EPG recommendations were not completely rejected, but their essence was retained. On the other hand, most the EPG recommendations have been accepted by the Task Force and its wording in some instances have actually been strengthened and made more explicit. Furthermore, the Task Force has successfully introduced a few "new" aspects in the final text which earlier failed to pass in the EPG, such as success of securing Member States' commitment on the establishment of a regional Human Rights body.

At this point, it is of interest to highlight some of the debates on ASEAN Charter that was frequently raised in the course of negotiations and during the ratification process, particularly in Indonesia. This will give better understanding and appreciation of the important document, which is a culmination of a long

and sometimes difficult negotiation among Member Countries.

To address the issue of non-compliance that some scholars identified as the source of ASEAN's slow progress, some scholars expected the Charter to include provisions for expulsion and suspension of membership. However, it should be noted that expulsion rarely existed in a regional treaty/charter and suspension only covers the suspension of facilities (documents or voting rights) in a particular organization/regional grouping and unrelated to membership status.

Another issue that has drawn a lot of attention in the ASEAN Charter is the ASEAN decision making process, particularly the reaffirmation of consultation and consensus as the preferred decision making procedure, and absence of voting as one of the possible options. It should be understood that voting could also be a double-edged sword, whereby a member as large as Indonesia could be outvoted by a simple majority. It is also important to note, that although the "ASEAN Way" has been rightly or wrongly accused of rendering ASEAN less effective so far, the concept of "consultation" and "consensus" originated from Indonesia from the very beginning of ASEAN and came from the Indonesian language namely "*musyawarah*" and "*mufakat*".

However, despite the final text of the Charter reads that "*as a basic principle, decision making in ASEAN shall be based on consultation and consensus,*"⁹ the possibility of voting is not ruled out. Paragraph 2 of the same Article mentions that if consensus cannot be reached, then the matter is referred to the ASEAN Summit. Here consensus is not made explicit, thus providing the opportunity to take a decision in another way.

On the issue of ASEAN Human Rights body, some have criticized that the Article 14 of the Charter only vaguely agrees on principle of its establishment. Indeed, when it will be established and what its terms of reference will be are still to be decided upon by the ASEAN Foreign Ministers. Nevertheless, it is difficult to understate the fact that through the Charter all ten Member States have reiterated their common commitments for the establishment of a regional body to promote and to protect the fundamental rights. In order to follow-up on the commitment ASEAN Foreign Ministers have established a High Level Panel on An ASEAN Human Rights body that is tasked to draft the body's Term of Reference. In discharging its task, the Panel holds consultations with members of civil society and other stakeholders.

This brings us the role of civil society in the new ASEAN. In a democratic

⁹ The ASEAN Charter, Article 20.

system, civil society is an integral actor in policy making. Likewise, in ASEAN the civil society also wants to be included in the ASEAN process, not only as a beneficiary and participant but also actively involved in the decision making.

The Charter expresses the goal of promoting a people-oriented ASEAN, but currently there was a differing opinion as to how to involve civil society in ASEAN's decision making process. Some argue that signatories to any legal document between countries are undertaken by governments which have clear accountability and responsibility under the law, unlike NGOs that are free agents. Nevertheless, the current thinking is that ASEAN should be a people oriented organization and therefore the Charter should ensure that there is an interaction between all stakeholders by having a particular chapter in the Charter on "*Entities Associated with ASEAN*". The "rules of procedures and criteria for engagement" with those entities are still to be discussed and determined by the ASEAN Committee of Permanent Representatives based on the recommendation of the ASEAN Secretary General.¹⁰

The ASEAN Charter also mandates the restructuring of ASEAN organization. The Charter is transforming the ASEAN organs and enforcing them with clear responsibilities. The Charter introduces Community Councils as representing each pillars of ASEAN Community. ASEAN Coordinating Council was formed to ensure coherency of work among various organs of ASEAN Charter. The Committee of Permanent Representatives was established with a goal to streamline ASEAN's decision making process. Secretary-General of ASEAN was given more power that can enable him to play more prominent roles such as in monitoring implementation and dispute settlement mechanism. Two additional Deputy Secretaries-General were added to ensure a more effective ASEAN's Secretariat. Emphasis is also made in the Charter on strengthening the conduct of ASEAN's external relations.

One important issue as the consequence of the ASEAN Charter is the issue of legal personality in accordance with Article 3, and dispute settlement mechanisms (Chapter 8). ASEAN has established the High Level Legal Experts Group on the Follow-up of ASEAN Charter to provide recommendations which are aimed at operationalizing dispute settlement mechanisms and ASEAN's legal personality.

¹⁰ The ASEAN Charter, Article 16.

Closing

The new Charter has given ASEAN the necessary boost of confidence for a stronger regional integration and a bigger role in the world stage. ASEAN has entered a new phase of maturity.

In recognition of this, and in accordance with the ASEAN Charter, ASEAN Member States have appointed their Permanent Representatives to the regional organization. ASEAN Dialogue Partners have also joined them in appointing their own ambassadors to ASEAN. Up to date, 14 Dialogue Partner Countries (U.S., Australia, New Zealand, Japan, South Korea, China, India, Great Britain, France, German, Czech Republic, European Commission, Finland and Canada) already have ambassadors to ASEAN.

Much still needs to be done to ensure that the Charter is duly implemented, in spirit as well as in letters. At least, more than 28 activities have been identified as the follow up actions to the Charter, including many rules of procedure, terms of reference, protocols/agreements, the host country agreement, including an agreement on immunities and privileges of ASEAN and the staff of the ASEAN Secretariat, the rules of procedure of the Committee of Permanent Representatives, etc.

These follow up actions of the ASEAN Charter are challenge for academics and Indonesian scholars of international law to further develop studies of regional integration. By making the ASEAN Charter a living document, Indonesia will support the establishment of the ASEAN Community for the benefit of the Indonesian people.