



THE ASEAN CHARTER: AN OPPORTUNITY NOT TO BE MISSED

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Abstract:

In November 2004, the leaders of the Association of Southeast Asian Nations decided “to work towards the development of an ASEAN Charter.” The formulation of a charter presents ASEAN with a priceless opportunity, not only to confer, for certain practical objectives, legal standing on the Association of Southeast Asian Nations. It is, above all, an opportunity to give substance to ASEAN’s highest and most fundamental purposes, as they were laid down at the association’s founding on 8 August 1967, and as they have developed over the years. It is an opportunity for enabling ASEAN as an association more effectively to advance and achieve those purposes.

Keywords: ASEAN, Charter, Southeast Asia.

Resumen:

En noviembre de 2004, los líderes de la Asociación de Naciones del Sudeste Asiático decidieron “trabajar hacia el desarrollo de una Carta de ASEAN”. La formulación de una Carta proporciona una oportunidad de incalculable valor, no sólo para otorgar con fines prácticos personalidad jurídica a ASEAN. Es, sobre todo, una oportunidad para dar sustancia a los propósitos más elevados y fundamentales de ASEAN, como fueron establecidos en la fundación de la asociación en 1967 y se han desarrollado a lo largo de los años. Es una oportunidad para dar a ASEAN la capacidad de trabajar por y conseguir más eficazmente estos propósitos.

Palabras clave: ASEAN, Carta, sudeste asiático.

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Introduction

In November 2004, the leaders of the Association of Southeast Asian Nations decided “to work towards the development of an ASEAN Charter.” In December 2005, they agreed to establish an Eminent Persons Group to “provide practical recommendations on the directions and nature of the ASEAN Charter.” Chaired by Tan Sri Musa Hitam, former Deputy Prime Minister of Malaysia, and made up of members from the other nine ASEAN countries, the Eminent Persons Group has been undertaking private and public consultations with a view to presenting some recommendations to the leaders at the ASEAN Summit in Cebu, the Philippines, in December 2006.

Although almost 40 years old now, ASEAN does not yet have a formal charter to define its nature and objectives, codify its norms, establish the relationship between the association and its members, and consolidate its institutions. The formulation of a charter presents ASEAN with a priceless opportunity.

It is an opportunity not only to confer, for certain practical objectives, legal standing on the Association of Southeast Asian Nations. It is, above all, an opportunity to give substance to ASEAN’s highest and most fundamental purposes, as they were laid down at the association’s founding on 8 August 1967, and as they have developed over the years. It is an opportunity for enabling ASEAN as an association more effectively to advance and achieve those purposes.

Essentially, the opportunity lies in six areas, which the proposed ASEAN Charter should, therefore, encompass:

1. ASEAN’s juridical personality and legal standing;
2. Common values and norms to which all ASEAN members adhere:
 - 2.1. Relations between member-states;
 - 2.2. Relations with non-member states and the international community;
 - 2.3. Norms of behavior within states;
3. Integrating the regional economy;
4. Cooperating for the common good on transnational issues and problems;
5. Strengthening the ASEAN Secretariat and the decision-making processes of the association; and
6. Promoting a sense of regional identity.

For 39 years, ASEAN 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.” Since then, the association has formally adopted certain norms for the conduct of inter-state relations but none for the domestic



arrangements within member-states. It had no criteria for membership other than location in Southeast Asia and adherence to some general principles of international behavior.

It was not until nine years after its founding that ASEAN concluded its first binding treaty, the Treaty of Amity and Cooperation in Southeast Asia, and established a central Secretariat. It was not until after another 16 years that ASEAN strengthened the Secretariat and concluded another binding agreement, the one on the Common Effective Preferential Tariff scheme for the ASEAN Free Trade Area. Most ASEAN agreements, even those that are technically binding, have been dependent on the voluntary compliance of member-states.

Over most of those 39 years, this loose, informal arrangement served ASEAN and its members well, taking into account the great diversity among the countries of Southeast Asia, their widely different historical legacies, their divergent strategic outlooks, the diverse compositions of their populations, and the uneasy nature of their recent relations. As they build confidence among themselves, the ASEAN members have felt reassured that their national sovereignty, won so recently and with such difficulty, or the survival of the ruling regime would not be threatened by their neighbors. They have gained the assurance that decisions would not be imposed on them by a combination of neighbors or through a strong supranational institution.

By these means, as well as by the association's very existence, the ASEAN system has enabled ASEAN to keep the peace in the region, promote regional stability and play a constructive role in the world out of proportion to its military might or economic heft. In other ways, however, as practiced thus far, the "ASEAN way" has deterred ASEAN's ability to live up to its potential, weakened its capacity to carry out its purposes, eroded its credibility, and retarded its progress.

Without a formal charter, ASEAN has, technically speaking, no legal personality. Although so far no one has raised questions about ASEAN or its Secretariat acting as a legal entity or entering into contracts, neither can be assured of the legal basis for its actions. For one thing, neither can receive tax-exempt donations to augment its resources. Without common norms, 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. For lack of legally binding provisions, compliance mechanisms and dispute-settlement systems, ASEAN often does not carry out measures already agreed on to integrate the regional economy or deal with transnational problems. 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. Because of an inadequate sense of regional identity, ASEAN member-countries do not sufficiently trust one another or regional institutions to take more effective actions on a regional scale.

An ASEAN Charter would be an opportunity to deal with these shortcomings. In order to do so, it should contain the following elements:

1. Juridical personality and legal standing

By concluding a formal Charter ratified by all member-states, ASEAN would become a juridical personality and achieve legal standing. Like all such documents, the Charter would



declare the association's objectives. In this case, the objectives should embody those proclaimed or indicated in the 1967 Bangkok Declaration, the Declaration of ASEAN Concord of 1976, the Treaty of Amity and Cooperation in Southeast Asia, ASEAN Vision 2020 (1997), the 2003 Bali Concord II encompassing the ASEAN Security Community, the ASEAN Economic Community and the ASEAN Socio-Cultural Community, and the 2004 Vientiane Action Programme. Beyond these, the Charter should set out as objectives the adoption of common values and norms, cooperation on specified transnational issues and problems, the strengthening of regional institutions, and the promotion of a regional identity. In no case should the objectives be less than those already set in previous documents, as enumerated above. The Charter should also make it clear that ASEAN would be open to financial contributions not only from member-states, other governments and inter-governmental institutions, but also from corporations, foundations, non-governmental organizations, and individuals.

2. Common values and norms

Almost all regional associations have common standards of conduct for member-countries to live by. Such standards are often criteria for membership in the association. The common standards are, in turn, based on 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 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 defense 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 would think that it would be difficult, if not impossible, for ASEAN to adopt similar values and norms in common. Yet, over the years, ASEAN has adopted, whether explicitly or implicitly, some such common values and norms. Indeed, the Vientiane Action Programme envisions the 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 behavior within States:

- The “promotion of social justice” and “the improvement of the living standards of their peoples” (Declaration of ASEAN Concord, 24 February 1976);
- ASEAN Vision 2020, 15 December 1997, on “A Community of Caring Societies”:
 - “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 values and norms to be enshrined in the 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 labor, 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 ASEAN Charter would strengthen the region's commitment to them and project ASEAN as an association with standards.

3. Integrating the regional economy

Without, of course, going into specific detail, the Charter should definitively set the direction for regional economic integration. It would specify the attainment of the ASEAN Economic Community as the goal, defining it on the basis of ASEAN Vision 2020: "We will create 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." It would spell out the elements of the ASEAN Economic Community in terms of the commitments that have already been made and others that may be agreed upon, including the removal of tariffs, the dismantling of non-tariff barriers, the harmonization of product standards, the facilitation of trade by customs authorities, the easing of transportation linkages, the use of information and communications technology, and the liberalization of trade in services, and give them legally binding effect. The Charter could also encompass compliance systems and dispute-settlement mechanisms for ASEAN economic agreements.

4. Cooperating on transnational issues and problems

So as not to lose focus and coherence, the Charter should single out only a few areas for regional cooperation on transnational issues and problems. Those areas that most call for such cooperation and are most susceptible to it are the environment, atmospheric, including transboundary haze pollution, and marine; communicable diseases; and transnational crime, including piracy, drug-trafficking, trafficking in persons, and terrorism.

5. Strengthening regional institutions

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.

The Charter could codify all of this but also go beyond it by further strengthening ASEAN's institutions through a number of measures:

- Expanding further the Secretary-General's mandate by authorizing him (or her) to speak for the association on important international issues, to promote compliance by member-states with ASEAN agreements, and to take initiatives for deeper regional economic integration and closer and more active regional cooperation on the basis of studies undertaken or commissioned by the Secretariat;



- Promoting confidence in the Secretary-General's and the Secretariat's impartiality by:
 - The appointment of the Secretary-General on the basis of merit, without regard for the alphabetical rotation by country and with the help of a credible search committee;
 - The appointment of the Deputy Secretary-General on the basis of merit;
 - The elimination of the system of seconding officers from certain member-countries to the Secretariat but continuing and expanding the system of attachment of officers from those countries;
- Devising a suitable formula for determining the contributions of member-states to the operations of the Secretariat on the basis of their ability of pay;
- Strengthening the dispute-settlement mechanism envisioned in the ASEAN Economic Community and either expanding it or creating another to cover most ASEAN agreements and not only those on economic matters.

6. Promoting a sense of regional identity

One of the seven "aims and purposes" of ASEAN listed in the Bangkok Declaration of 1967 is "To promote South-East Asian studies." The evident intention was to get the peoples of Southeast Asia to know one another better and thereby develop a sense of regional identity. Without that mutual understanding and that sense of regional identity, it is not possible to do what is necessary to integrate the regional economy, cooperate effectively on regional problems, maintain regional stability on an enduring basis, or adopt norms and values in common.

After 39 years, little has been done to develop mutual understanding or to promote a sense of regional identity. The ASEAN Charter would be an opportunity to reaffirm ASEAN's commitment to this purpose.