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## THE ASEAN CHARTER: Towards its Ratification and Implementation

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In August last year ASEAN reached the venerable age of 40, an important stage in the life of any organization. It has indeed been an eventful 40 years.

One unique aspect of ASEAN's existence and growth has been that during the past four decades ASEAN cooperation has proceeded without any formal, constitutional basis. Up until this moment, ASEAN has functioned only on the basis of a "founding document", i.e. the Bangkok or ASEAN Declaration of 1967 and other agreed declarations, concords and communiques. Apart from the specific Treaties ASEAN has also initiated, these documents did not require any formal ratification or be of binding legal nature. Thus, ASEAN cooperation has been loose and informal, relying on political persuasion rather than legal enforcement and basing itself on *musyawarah* and *mufakat*, consultation and consensus. This style of cooperation has often been dubbed as "the ASEAN way".

However, this way of functioning has not resulted in ASEAN being ineffective. On the contrary! ASEAN's most notable achievement is that during these decades it has been able to create and maintain peace and stability in Southeast Asia. In turn, this condition of peace has made it possible to promote and strengthen economic cooperation and integration among ASEAN member-states. And this undoubtedly has contributed significantly to their respective national development as well as to national and regional progress.

Since its formation, ASEAN has expanded into a regional association of ten countries and, with the future entry of Timor Leste, will embrace all of Southeast Asia. It has widened its scope to cover not only economic, but also political, security and socio-cultural cooperation. ASEAN has also succeeded in developing a number of important concepts as well as additional forms of regional cooperation, such as the Zone of Peace, Freedom and Neutrality (ZOPFAN), the ASEAN Regional Forum (ARF), the ASEAN Dialogue Partnerships with a number of key countries, the ASEAN + 3 cooperative scheme with China, Japan and the Republic of Korea, and most recently, the East Asian

Summit. It has also initiated two international treaties, i.e. the Treaty of Amity and Cooperation in Southeast Asia (TAC) and the Treaty on the Southeast Asia Nuclear Weapons-Free Zone (SEANWFZ).

Hence, based on these realities, the international community has come to recognize ASEAN as one of the most successful regional groupings in the world.

However, it is now being realized that in entering the 21<sup>st</sup> century, fundamental changes have taken place, and 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 inter-connection of global problems; heightened international economic competition and the urgent need to bridge the development gap between the older and newer members of ASEAN; the emergence of non-traditional security threats such as terrorism, various trans-national crimes, natural disasters, pandemics, etc. On the East Asian landscape, major strategic realignments are occurring, brought about by the rise of China and India, the resurgence of Japan and ASEAN's widening links with the rest of the world. Moreover, ASEAN itself has decided, at the Bali Concord II, to strengthen its cooperation and intensify its process of integration by moving towards the establishment of an ASEAN Community and not anymore be a loose and informal Association.

Due to these factors and the need for ASEAN to adapt and reposition itself to be better able to meet these fundamental challenges, the conviction has grown that the way ASEAN has been functioning over the years would no longer suffice.

Thus, at the XI<sup>th</sup> ASEAN Summit in Kuala Lumpur in December 2005, the ASEAN Leaders agreed to devise an ASEAN Charter. Towards this end an Eminent Persons Group (EPG), comprising ten members each representing the respective ASEAN member countries, was established (I had the honour and privilege to represent Indonesia in this group).

In its terms of reference or mandate, the EPG was asked to come up with "bold and visionary" ideas and recommendations for the projected Charter and to make ASEAN into a legally-based or rules-based organization, endowed with a legal personality, an organizational framework that is more effective, and an operational system that is more efficient. Above all, the EPG was asked to ensure the transformation of ASEAN into a political, economic and socio-cultural Community so as to enable it to meet the challenges and seize the opportunities of a rapidly changing world. Thus,

from the outset, the EPG was entrusted with a much wider task than simply devising a legal, basic document.

On *Objectives and Principles*, for example, apart from reaffirming and codifying all pertinent norms, principles and goals of ASEAN as contained in earlier agreed Concords, Agreements and Declarations, the EPG, with an eye to the future, consciously recommended for inclusion in the Charter such additions as:

“The promotion of democracy and the strengthening of democratic institutions, respect for human rights and fundamental freedoms, the rule of law, including international humanitarian law, transparency and good governance .....”;

“Adherence to a set of common political and socio-cultural community values and norms; promotion of the interests of the community for the benefit of all”;

“Strengthen ASEAN’s competitiveness, deepen and broaden integration”;

“Develop ASEAN as a Single Market and Production Base in which there is a free flow of goods, services, investments, skilled labour and a freer flow of capital”;

“Narrow the development gap among Member countries”.

The EPG also discussed and put forward recommendations on such strategic issues as: the decision-making process; effectiveness in implementing the principles/goals/agreed decisions and commitments of Members; a monitoring process and measures in case of non-compliance; strengthening of the organizational structure, including the ASEAN Secretariat, and its modes of financing; dispute settlement mechanisms; ASEAN’s legal status; last but not least, how to make ASEAN a more people-oriented organization.

As you are aware, the EPG Report was submitted to the ASEAN Heads of State/Government at the XII<sup>th</sup> ASEAN Summit in Cebu (the Philippines) in January 2007 and was well received by the ASEAN Leaders. Consequently, the Report was transmitted to the High Level Task Force, comprising Governmental representatives of the ten ASEAN countries for further study, discussion and its drafting into the legal, official language of the Charter. The Task Force, in turn, has submitted the final draft text of the Charter to the ASEAN Leaders at the XIII<sup>th</sup> Summit in Singapore in November 2007. And it is this text which eventually was agreed upon and adopted by the ASEAN

Heads of State and Government and is now awaiting ratification by all ASEAN Member-countries.

I cannot deny that as a former member of the EPG, I am disappointed that a number of ideas recommended by the EPG failed to obtain consensus support in the High Level Task Force and hence were not included in the final Charter text. However, a closer look at the final Charter text and comparing it with the text as proposed by the EPG will reveal that a few important EPG recommendations which were dropped in the final text were not completely rejected but its essence was retained, albeit in more general and vague words (terms). On the other hand, most of the EPG recommendations have been accepted by the Task Force, and its wordings in some instances have actually been strengthened and made more explicit. Furthermore, a few "new" aspects have been accepted in the final text which earlier failed to pass in the EPG (e.g. the establishment of a Regional Human Rights Body).

For example, on the *decision-making process*, voting is not anymore mentioned and decisions appear to be still fully based on consensus (Article 20, para 1). But in Article 20, para 2 it is stated that if consensus cannot be reached, then "the ASEAN Summit may decide how a specific decision can be made". Here consensus is not mentioned, thus providing the opportunity to take a decision in another way.

In the final text of the Charter, the question of monitoring and non-compliance appear to be kept consciously vague, as in the EPG too these issues turned out to be very sensitive. Thus, in Article 20, para 4, it is only stated that "In case of a serious breach of the Charter or non-compliance, the matter shall be referred to the ASEAN Summit for decision". Here too, consensus is not mentioned specifically.

Article 21, para 1 states that: "Each ASEAN Community Council shall prescribe its own rules of procedure.", which opens the interpretative possibility of the ASEAN Community Councils in certain cases; taking a decision other than one based on consensus. However, the ASEAN Coordinating Council, comprising the Foreign Ministers of ASEAN and possessing a coordinating role, is not mentioned in this context. This will in time require further clarification.

Meanwhile, regarding implementation of commitments in the economic field, the participation formula of ASEAN minus-X is maintained, but its procedure is made more rigid as it will require prior consensus before its application.

It is true that the establishment of an ASEAN Human Rights Body has been agreed (Article 14, para 1), but this is only an agreement in principle (“ASEAN shall establish .....”) whereas when it will be established and what its terms of reference will be are still to be decided upon by the ASEAN Foreign Ministers. It is, therefore, of vital importance for the ASEAN Foreign Ministers soon to agree on the particulars of this Body so that it can be launched as soon as possible. I understand that ASEAN, at the Senior Officials level, is still engaged in difficult negotiations on this score.

The routine/operational budget of the ASEAN Secretariat will still be based on the principle of equality, not equity (“..... shall be met by ASEAN Member States through equal, annual contributions .....” (Article 30, para 2). The question of voluntary contributions, inter alia to finance regional development projects and the creation of a Special Fund for the express purpose of bridging the development gap between Member-countries, as proposed by the EPG, are not mentioned anymore. This is indeed very regrettable and need to be further endeavoured. Failure to realize these types of funds will inevitably create difficulties in realizing the goal of speedily bridging the development gap between the member-countries.

The text of the Charter in one of its Articles on Purposes expresses the goal of “promoting a people-oriented ASEAN”. But nowhere in its subsequent Articles a concrete arrangement for the participation of the people in the further growth of ASEAN can be found. On the other hand, a new Chapter (Chapter V) is included in the text addressing the matter of ASEAN’s relationship with “..... entities which support the ASEAN Charter, in particular its Purposes and Principles.” (Article 16, para 1). The list of entities referred to in this Article is subsequently elaborated in *Annex 2*. However, the “rules of procedure and criteria for engagement” with those entities (Article 16, para 2) are still to be discussed and determined by the ASEAN Committee of Permanent Representatives, based on the recommendation of the ASEAN Secretary-General. I believe this question needs to be tackled as soon as possible, as uncertainty in this respect will no doubt cause deep disappointment among the AIPA (ASEAN Inter Parliamentary Association), the ASEAN Chambers of Commerce and representatives of ASEAN’s numerous civil society organizations.

Despite the deficiencies and weaknesses as earlier described, the fact that the present text of the Charter was unanimously accepted by the ASEAN Leaders is undoubtedly a very important step forward and a historic milestone in ASEAN’s development and growth.

For the first time since ASEAN's establishment 40 years ago, we will have a regional cooperation organization which is legally based, which officially constitutes a legal personality and which possess an organizational structure that is more effective and efficient, capable of meeting the challenges of a changed and changing world and overcoming the problems in its transition towards an ASEAN Community.

For the first time, we will have a regional cooperation organization where the commitment of its member-countries, on its purposes as well as its principles, in the political, economic as well as socio-cultural fields, will be legal commitments enforceable by law.

For the first time we will have a regional cooperation organization which hopefully can be more competitive, especially in the economic field, capable of facing the new economic forces like China and India and the established economic giants like the U.S., Europe and Japan on a more level playing field.

Hence, it is my considered view that, despite the shortcomings and weaknesses which surely can be redressed in future, the ASEAN Charter in its present form should be ratified by all ASEAN countries, so as to provide a stronger basis for ASEAN's prospective growth towards a Community and beyond.

