

## **LIFE AFTER THE CHARTER**



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## **LIFE AFTER THE CHARTER**

### **Introduction**

#### *Emerging Issues*

1. The Association of Southeast Asian Nations (ASEAN) is currently experiencing a critical and exciting period. After more than forty years of existence, ASEAN now has a constitutional instrument – the ASEAN Charter – and has started to grapple with the meaning and implications of the Charter provisions and the issues pertaining to its implementation.
2. ASEAN is at the same time working intensively on economic issues. ASEAN has a strong economic potential with a combined market of almost 600 million people. To benefit from this potential ASEAN needs to integrate and do so rapidly. To this end, ASEAN has accelerated the achievement of economic integration from 2020 to 2015. Two legal instruments in relation to the goods and investment areas have been reviewed and revised with the objective of creating the necessary environment for the free movement of goods and a freer and more open investment regime. These instruments are the ASEAN Trade in Goods Agreement 2009 (ATIGA 2009) and the ASEAN Comprehensive Investment Agreement 2009 (ACIA 2009). The follow-up work on these two instruments will have an important bearing on how ASEAN's economic integration objectives are accomplished.

#### *Complementing the ASEAN Process: Workshop and Issues Taken Up*

3. The ASEAN Studies Centre at the Institute of Southeast Asian Studies (ISEAS) organised a workshop on “Life After the Charter” on 27-28 July 2009 at ISEAS in Singapore. The workshop dealt with the following issues:
  - a. the nature, meaning and implications of the legal personality conferred by the Charter on ASEAN;
  - b. the legislation and other measures required by member countries to implement the Charter; and

- c. the plan, progress and connected issues in relation to the recently completed agreements on trade in goods and investment.
4. The workshop aimed to complement the ASEAN process by pooling together the insights of the practitioners and the business sector with the experience and knowledge of government and ASEAN officials closely involved in the legal personality and implementation issues and the work on the two agreements. Views and perspectives from the business sector and those in academia knowledgeable on ASEAN issues/treaties enriched the discussions.
5. The policy recommendations from the workshop are highlighted in the concluding section of this report.
6. The workshop sessions involved representatives from the government, the ASEAN Secretariat, the private sector and academia. The speakers and commentators at this Workshop were(in alphabetical order): Jeffrey Chan Wah Teck, SC, of the Attorney-General's Chambers of Singapore; Simon Chesterman, Global Professor and Director of the NYU School of Law, currently attached to the National University of Singapore's Faculty of Law; Termsak Chalermpanupap, Director for Political and Security Cooperation, ASEAN Secretariat; Michael Ewing-Chow, Associate Professor, Faculty of Law, National University of Singapore; Martin Hutagalung, Regional Director, US-ASEAN Business Council, Singapore; David Parsons, Executive Director, Committee on Trade and Investment, Indonesian Chamber of Commerce and Industry (KADIN); Eduardo Pedrosa, Secretary-General, Pacific Economic Cooperation Council; Razeen Sally, Director, European Centre for International Political Economy (ECIPE), Belgium; Kanya Satyani Sasradipoera, Senior Officer, Trade in Goods Unit, Trade and Facilitation Division, ASEAN Secretariat; and Yap Lai Peng, Assistant Director, Services and Investment Division, Market Integration Directorate, ASEAN Secretariat. The full list of participants and the workshop programme are provided at the end of this report.

**Session I**  
**ASEAN's Legal Personality Under its New Charter:**  
**Its Nature, Meaning and Implications**

**Status of Work and Issues Involved**

*Status of Work*

7. ASEAN Foreign Ministers issued a “Statement on the ASEAN Charter” on 21 July 2008, at the 41<sup>st</sup> ASEAN Ministerial Meeting. The statement announced, among other things, the establishment of a “High Level Legal Experts' Group on Follow-up to the ASEAN Charter (HLEG)”, tasking it to “consider the recommendations on dispute settlement mechanisms and on the legal personality of ASEAN”. The HLEG submitted a first set of recommendations on ASEAN’s legal personality, the establishment of dispute settlement mechanisms and other legal issues to the ASEAN Foreign Ministers at the 14<sup>th</sup> ASEAN Summit in February 2009. Discussions of the HLEG continued on these topics, and the status of work was recently reported to the 42<sup>nd</sup> ASEAN Ministerial Meeting held on 20 July 2009 in Phuket, Thailand. The ASEAN Foreign Ministers endorsed the HLEG’s recommendation on ASEAN’s legal personality. They also approved (ad referendum) the ASEAN Privileges and Immunity Agreement. The HLEG’s mandate was extended to finalise dispute settlement mechanisms and other legal issues under the Charter. HLEG’s recommendations on the latter issues would be submitted to the Foreign Ministers in October 2009 at the 15th ASEAN Summit
  
8. The ASEAN Privileges and Immunities Agreement gives effect to ASEAN’s legal personality, as it declares that ASEAN is a legal person internationally. It also harmonises the legal capacities of ASEAN in all the ASEAN member states and the privileges and immunities to be accorded under the ASEAN Charter in the member states. The Agreement’s Article 2 provides for the exercise of legal personality in domestic transactions (supplemented by two Authorisations –on signature of international agreements and on entering into transactions under

domestic law, on behalf of ASEAN), represented by the ASEAN Secretary-General, a Deputy Secretary-General, or another officer of the ASEAN Secretariat authorised by the Secretary-General. With regard to the exercise of international legal personality, the Agreement states that “under Article 41(7) of the ASEAN Charter, ASEAN shall act through its representatives authorised by the Member States”. The Agreement will be signed by the ASEAN Leaders in October 2009. It will enter into force upon ratification by all ASEAN member states. Even so, the Agreement will be effective only if the rules (i.e. the authorisations) have force and are made known to persons dealing with ASEAN on who are authorised to bind ASEAN. Additionally, since, not being a sovereign entity, ASEAN does not have immunity, there is a need to prescribe immunities and their limits, as well as the privileges and immunities of persons carrying out ASEAN duties. There is a need to promote wide international acceptance of the Agreement.

9. The Rules to be annexed to the ASEAN Privileges and Immunities Agreement, i.e. the two Authorisations mentioned above, are almost complete. Discussions are still in progress, however, on the ASEAN Dispute Settlement Mechanism Protocol, and other subsidiary instruments, including rules for arbitration/conciliation/mediation, and rules for the reference of “unresolved disputes” to the ASEAN Summit. ASEAN’s consensual and consultative approach to decision-making has made progress which is “slow but educational”.

#### *Legal Personality*

10. The ASEAN Charter assumes that ASEAN had no legal personality prior to the Charter. Prior to the Charter, binding international agreements between ASEAN and other entities were signed by all the ASEAN member states, and not by ASEAN as a single legal person/entity. ASEAN was conferred legal personality by Article 3 of the ASEAN Charter, which states, “ASEAN as an inter-governmental organisation is hereby conferred legal personality”. ASEAN’s legal personality – as an intergovernmental organisation – would thus be determined by the rules of public international law, and ASEAN would be considered an

international legal person, with certain attributes under international law, including enjoying rights under public international law; entering into treaties with like entities; and initiating and defending proceedings in international tribunals. As an international legal person, ASEAN can also enjoy the same capacities as domestic legal persons, but only if recognised by domestic law. Interestingly, the ASEAN Secretariat has had legal personality since 1979 under Indonesian domestic law, when it established its seat in Jakarta, and can enter into legal transactions, such as purchasing of goods and services and entering into employment contracts. The ASEAN Secretariat is currently engaged in negotiations with its host country, Indonesia on the extent of privileges and immunities for ASEAN Secretariat officers in the discharge of their duties.

11. The ASEAN Charter has changed ASEAN's character, which, prior to 2007 (and the Charter's adoption), was known for its informal and consensual *modus operandi*. With the ASEAN Charter's ratification, ASEAN member states have undertaken to uphold the purposes of the Charter, which include establishing ASEAN as a rules-based organisation. This has a bearing on how the legal personality of ASEAN is determined, as one of the critical factors for a rules-based organisation is a legal personality. Without this, rules cannot be applied or enforced. The other critical factors include strong dispute resolution mechanisms and an enforcement mechanism, without which applicable rules could be ignored. The characteristics of an enforcement mechanism are, however, difficult to interpret at both international and domestic levels. At the international level, an enforcement mechanism should be linked to a clear and transparent determination of right and wrong, and involve peer pressure – as well as moral pressure on the offending state – for compliance with rules. ASEAN already has elements of this in the Enhanced Dispute Settlement Mechanism (EDSM) for its economic agreements. The EDSM borrows from the WTO rules of procedure, with shorter timelines.

12. It should be clarified, however, that the HLEG discussions did not deal with the economic dispute settlement mechanisms. With regard to enforcement and compliance issues, it would be useful for ASEAN to regard this as a matter of political will, in the sense of “pooling” sovereignty rather than “surrendering” it. This is a misperception that is often applied to the EU, whose member states do not surrender their sovereignty in complying with EU decisions; rather, they transfer sovereignty so that it can be exercised for the common good. In the case of dispute settlement under the WTO, the main factor in compliance is still largely peer pressure. The next frontier for ASEAN in dealing with dispute settlement issues would be to “test the credibility” of the agreements and their provisions. Although Article 52 (2) of the ASEAN Charter states that “in case of inconsistency between the rights and obligations of ASEAN Member States under such instruments and this Charter, the Charter shall prevail”, it does not clarify whether ASEAN agreements shall prevail over domestic laws. ASEAN will need to address how to deal with people’s expectations of the Charter, particularly from the business community.

### **Other Perspectives**

13. Considering the issue from one aspect of legal analysis, the fact that ASEAN now claims international legal personality under the Charter does not mean that the Association lacked it previously or that it now possesses this in any meaningful way. International legal personality is less a status than a capacity, and thus the question of international legal personality is in many ways theoretical. The process ASEAN has gone through shows that the contours of this personality still largely remain to be defined in the practical sense, most importantly in the political environment within which ASEAN operates. The key question now is what specific powers have been granted to ASEAN and how these powers are to be or will be used.

14. In this regard, it may not be correct to assume that ASEAN did not have a legal personality before its Charter. As the emphasis of international legal personality



seems to be more on what can be claimed (as a privilege) rather than what could be undertaken by the organisation, the question remains what additional powers the Charter has brought to ASEAN beyond providing a structure for ASEAN processes, which even under present circumstances does not grant more discretion to the ASEAN Secretary-General or officers of the ASEAN Secretariat in carrying out their duties.

15. Interpreting ASEAN's legal personality from the perspective of the Will Theory, ASEAN certainly could be said to have a legal personality as "willed" or endowed by the members when the Charter entered into force. Interestingly, the European Union (EU), the African Union (AU) and the Organisation of American States (OAS) do not explicitly provide for their own legal personality. According to the Objective Theory, which provides a circular reasoning that personality is based on the powers given to the organisation but the extent of those powers is based on the fact of personality, it can be reasoned that ASEAN enjoys such legal personality as the member states have endowed it with. Whether this is recognised by ASEAN's external partners is another concern. A more objective set of standards could be applied, such as Brownlie's three-part test for whether an organisation could enjoy a personality, which requires:

- A permanent association of states, with lawful objects, equipped with organs;
- A distinction, in terms of legal powers and purposes, between the organisation and the states; and
- The existence of legal powers exercisable on the international plane and not solely within the national systems of one or more states.

16. In the case of ASEAN, it is evident that even before the Charter, ASEAN was a permanent association of states with rudimentary organs that grew over time from the outset. It can also be said that in the economic sphere ASEAN already possesses a legal personality. This is also evident in how ASEAN adopted and ratified the SEANFWZ Treaty and the ASEAN Agreement on Transboundary

Haze Pollution. Since personality at the international level is not so much a status as capacity, ASEAN would appear to have a limited form of international legal personality already, but it is not clear at this stage whether this exists in a meaningful sense. This bears consideration, as ASEAN moves towards a rules-based organisation. In the past, ASEAN entered into numerous agreements without considering whether they would be implemented. While this can be seen as positive in terms of consensus and regional confidence-building, the low rate of implementation of ASEAN agreements may lead to ASEAN not being taken seriously as a rules-based organisation.

17. An important consideration related to implementation is that implementation of important Summit or ministerial decisions and agreements often takes place with or without ratification. The figure indicating a low rate of implementation pertains to the rate of ratification of ASEAN economic agreements which had specific deadlines for ratification (the rate of ratification has since increased). Some hold the view that “drafting of agreements is technocratic but implementation is political”. Adding to the complexity of the issue is the fact that some ASEAN agreements are carried out in parts but not in their entirety (e.g. the CEPT Agreement, the ASEAN Tourism Agreement, and the ASEAN Agreement on Transboundary Haze Pollution). Even when ASEAN agreements are revised and/or updated (as in the case of the agreements on trade in goods and on investment), the un-implemented parts remain unchanged. This has implications for compliance.

18. While it is still unclear how much impact or significance the Charter will have on ASEAN’s future actions, there is nonetheless scope for optimism if ASEAN focuses on three areas where real change can come about, partly as a result of the Charter and partly as a result of the institutional momentum that ASEAN has been building up. These three areas are: opening the multi-track “ASEAN minus X” formula for economic cooperation; strengthening the role of the ASEAN Secretary-General in dispute mediation or conciliation; and continuing the

dialogue on the ASEAN human rights body, with possible empowerment of the ASEAN Secretary-General as its voice. ASEAN would need to be viewed also as a “state of mind” and not just as an entity or a process. ASEAN community-building and the notion of an ASEAN regional identity illustrated this. ASEAN can be said to be currently in a “new community-building mode”.

## **Session II**

### **ASEAN Charter: Implementation and Compliance**

#### **Implications and Follow-ups to the Entry into Force of the ASEAN Charter**

19. The workshop was updated on certain implementation issues arising from follow-up actions undertaken by ASEAN bodies, including the ASEAN Secretariat. ASEAN’s diversity apart, member states have all committed to the regional economic integration agenda. A question to be further examined would be how ASEAN economic integration will affect domestic political issues and concerns. However, ASEAN community-building is not merely in the economic sphere. Several ASEAN member states have made it clear that ASEAN integration should advance the three spheres of cooperation together. The goal of achieving the ASEAN Community by 2015 is meant to be the first phase of community-building, as there are many long-term endeavours to be undertaken.
20. The recent 42<sup>nd</sup> AMM adopted the Terms of Reference (TOR) of the ASEAN human rights body, which is now named “ASEAN Intergovernmental Commission on Human Rights”. The name of the human rights body was a compromise to accommodate differing views of member countries on the use of “Body” or “Commission”. It had also been agreed that the national representatives to the commission would not be called “commissioners”. The Commission would be launched at the 15<sup>th</sup> ASEAN Summit in October 2009. The High Level Panel (HLP) is scheduled to meet in Manila in August to draft the “Political Declaration”, which will convey a message on the future of ASEAN human rights

cooperation, as well as substantive commitments, such as **“to enhance the mandate and functions of the Commission”** at the first review to be undertaken in five years. The HLP also plans to meet representatives of civil society to explain the TOR and how the Commission will work. The HLP is scheduled to meet in Singapore in September 2009 to finalise the draft document and decide on funding for the commission’s operations.

21. The compromise decisions reflect the member states’ realisation when they are “aiming too high” and highlight the value of resolving important issues from the beginning rather than leaving it to the eleventh hour. The Commission’s TOR also provide a window for initiating activities that are not expressly proscribed. The Charter’s Article 14 calls for both “promotion and protection of human rights and fundamental freedoms”, which covers a wide range of human rights and security issues. While follow-up actions would progress gradually and step-by-step, it should not be seen as “evolutionary”, which connote an end-result that might be different from what was originally intended.

22. With regard to the conditions for a rules-based organisation, Article 5 (2) of the ASEAN Charter highlights requirements “to comply with all obligations of membership”, which might include domestic legislation. Implementation and compliance would have cost implications for ASEAN, as it would involve setting up new mechanisms and bodies, and the cost issue has not been considered or clarified. This also bears relevance for ASEAN’s institutional set-up. The ASEAN Coordinating Council (ACC) convened its inaugural meeting on 15 December 2008, and the ASEAN Ministerial Meeting would be renamed the ASEAN Political and Security Council, retaining the acronym of AMM. There would also be community councils for the other two pillars.

23. As for the day-to-day functions of ASEAN, the Committee of Permanent Representatives (CPR) was launched on 21 May 2009. The CPR would gradually assume the responsibilities that the ASEAN Standing Committee (ASC) formerly

held, starting with the supervision of the ASEAN Secretariat – including scrutinising the operational budget, auditing, tender, controlling trust funds and approving projects. Eventually, the CPR would replace the ASC, which comprises the ASEAN Directors-General, who would then focus on domestic coordination functions. Discussions are ongoing on delineating the external relations functions of the CPR, ASC and the ASEAN SOM (which has a strategic advisory authority over CPR and ASC operations). The ASEAN Secretariat will equip each of the Permanent Representatives with full information on ASEAN, so that they will be the most-informed persons on ASEAN from each member state. The ASEAN Secretariat has also undergone restructuring to align the work undertaken by its bureaus with the three communities, ultimately to serve as the “nerve centre” for ASEAN cooperation. A legal services and agreements division is being set up. The ASEAN Secretary-General’s role and responsibilities are also undergoing some changes. Whilst Session I discussions gave a different impression, the Secretary-General finds that external partners are more interested and motivated about ASEAN’s development than its own members.

### **Domestic Legislation and Other Measures Necessary to Implement the Charter**

24. A perspective was also provided on the Charter’s domestic implementation and some of the pitfalls and concerns that might arise from implementation. Implementation problems could arise from three main areas: lack of political will at the state level to implement the Charter; lack of conformity of domestic laws with the Charter and consequent lack of enforcement by the domestic courts; and the more complex realm of administrative structural problems that prevent Charter obligations from being applied at the ground level. Session discussions addressed the first two areas, drawing examples from strategies to strengthen state compliance with environmental law. Where the intention and (legal) capacity of states to comply were strong, “sunshine” or highlighting the problem was most appropriate. Where capacity was weaker, incentives were necessary to increase capacity. Where the state’s intention was weaker, sanctions and sunshine (through international dispute settlement mechanisms) were necessary to encourage

compliance. Many cases under international dispute settlement mechanisms were resolved without having resort to sanctions. What was important was the existence of mechanisms to negotiate and reach a solution.

25. Whether ASEAN needs to develop a new political dispute settlement mechanism is an issue that requires careful consideration. There is a potential case for improving upon the existing provisions (on the High Council) under the Treaty of Amity and Cooperation (TAC) to manage political disputes. However, it is important for ASEAN to develop this DSM for the right reasons; it will need to clarify the objective and assess whether a new political DSM is really necessary. The DSM process would lessen the spirit of cooperation in negotiating resolution to conflicts, although a good (strong) DSM process might encourage promotional compliance even if members may not use it. It might be difficult for several ASEAN countries to subject themselves to judicial processes on sensitive issues.

26. While enforcement could be looked at as one of the elements of the rule of law, it is not a sufficient one. However, absent an enforcement mechanism or sanction, the negotiation of a solution becomes more problematic. The Charter provides dispute settlement mechanisms (DSMs) for the economic agreements, but these are less clear for non-economic situations such as the agreement on Tamiflu sharing and distribution and the ASEAN open-skies policy. The ASEAN Summit is identified as the deciding authority should disputes remain unresolved, but this may prove difficult in cases of contentious disputes. Nonetheless, the ASEAN Charter is a treaty and, as such, follows international law. Implementation of all Charter provisions should thus be undertaken in good faith.

27. How domestic courts implement international treaties depends on whether the domestic law recognises international treaties are part of domestic legislation or whether the international treaty requires domestic legislation to take effect in a particular country. The legal regimes of ASEAN members vary. Some follow the dualist system, which requires domestic legislation for an international treaty,

while others consider whether the international treaty is self-executing. Some ASEAN members are still developing legal systems. As all ASEAN members are state parties to the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), this was used as a gauge for the domestic legislation requirements of international treaties in ASEAN member states. In general, most of the member states require domestic legislation. The implementation of this for ASEAN Charter implementation would need to be the subject of a separate investigation. As the exact process for the implementation of a treaty in some ASEAN member states is still uncertain, members may, if necessary, consider enacting legislation for the following provisions:

- Conferment of legal personality;
- Appointment of Permanent Representatives to ASEAN and establishment of ASEAN National Secretariats;
- Immunities and privileges;
- Annual fiscal contributions to the ASEAN Secretariat operating budget;
- Dispute settlement; and
- Commemoration/celebration of ASEAN Day in each country.

28. Other enforcement issues include how ASEAN protects the use of its name and logo as intellectual property. Many non-governmental organisations and/or businesses are using the ASEAN brand freely, thus diluting its value. This can be regulated with changes in domestic legislation. However, beyond ASEAN's shores, protection of the ASEAN brand will have to rely on the World Intellectual Property Organisation (WIPO), with which the ASEAN emblem and the name "asean" are registered. ASEAN could also learn from the EU experience in how it protects the EU emblem and name. Similarly, the ASEAN Secretariat can seek to learn from the experience of secretariats of other regional/international organisations on the role of secretariats in ensuring compliance, implementation and enforcement. Issues of domestic legislation and enforcement are not unique to the ASEAN process.

### **Session III**

#### **ASEAN Economic Agreements: Implications for Implementation**

29. This session heard an update from ASEAN Secretariat officers closely involved in the drafting and implementing of the ASEAN Trade in Goods Agreement (ATIGA) and the ASEAN Comprehensive Investment Agreement (ACIA). Commentaries were provided by representatives from academia and the business sector.

#### *What's New in the ATIGA?*

30. The ATIGA consolidates and streamlines all existing instruments and provisions on trade in goods and incorporates Ministerial decisions to provide them with legal standing. The principle is to make the ATIGA user-friendly to both government officials as the enforcers and the private sector as the beneficiaries by serving as a single reference document. The ATIGA annex provides the full tariff reduction schedule of each Member State and spells out the tariff rates to be applied for each year on each product up to 2015. A new initiative aimed at enhancing transparency is the ASEAN Trade Repository, an online database of trade and customs legislation and procedures. The provisions on non-tariff measures (NTMs) in the ATIGA codify relevant provisions and establish a mechanism to monitor the application of NTMs with a view to eliminating the non-tariff barriers (NTBs) component of the NTMs. To put emphasis on trade facilitation initiatives, the ATIGA includes a dedicated chapter on trade facilitations. A comprehensive work programme, a framework and a guidebook on ASEAN trade facilitation will also be developed as integral parts of the ATIGA. An ASEAN Trade Facilitation Joint Consultative Committee will be established, with an open session for the private sector. The ATIGA also aims to extend privilege in bilateral free trade agreements (FTAs) to all ASEAN member states on a most-favoured-nation (MFN) basis.
31. The ATIGA was signed in February 2009 by the ASEAN Economic Ministers (AEM). It will come into force upon ratification of all Member States, which is



expected to be completed by the end of August 2009. Upon its entry into force, ATIGA would supersede a number of ASEAN economic agreements related to goods, such as the CEPT agreement. In the case of inconsistency between the ATIGA and an ASEAN economic agreement that is not superseded, the ATIGA shall prevail. There would also be no further flexibility accorded to member states beyond the pre-agreed flexibility already captured in the ATIGA provisions. The ATIGA implementation would be reviewed after its first year, and thereafter every two years.

*What's New in the ACIA?*

32. Like the ATIGA, the ACIA resulted from a decision of the AEM in 2007 to review the 1998 Framework Agreement on the ASEAN Investment Area (AIA) and the 1987 ASEAN Agreement for the Promotion and Protection of Investments (ASEAN IGA), and develop a comprehensive ASEAN investment agreement. The main objectives of ACIA are to create a free and open investment regime to attract investments; and to achieve ASEAN economic integration (i.e. the ASEAN Economic Community or AEC). The ACIA was signed in February 2009. Follow-up to the ACIA's adoption involves: drafting the Reservation Lists of ASEAN member states, to be finalised by August 2009; ratification by the ASEAN member states; and phasing out reservations based on the AEC Strategic Schedule.
33. The benefits of the ACIA for the ASEAN investment environment are that it would facilitate a free and open investment regime by 2015 when Member States have reduced or eliminated investment impediments (reservation lists) according to the three Strategic Schedules of the AEC; improve the investment climate and investors' confidence to invest in ASEAN; and encourage further development of intra-ASEAN investments, especially among multinational corporations (MNCs) based in ASEAN, through regional production networks, industrial complementation or specialisation. For the business sector, the ACIA would allow ASEAN-based investors to enjoy the benefits of non-discriminatory treatment when they invest in other ASEAN countries. They would also be granted the same

treatment as domestic (host country) investors. In case of investment disputes with host governments, investors have the choice of bringing a claim to domestic courts (where applicable) or to international arbitration. Investors could expect a minimum standard of treatment for their investments, including fair and equitable treatment and full protection and security.

#### *Commentaries*

34. A skeptical outsider's view of the two ASEAN agreements in the context of the ASEAN Charter held that it would be utopian for ASEAN to push for liberalisation with a weak Charter. ASEAN should instead attempt to build more transparency in its processes, thus building the foundation for regional economic integration. Current gaps in the ASEAN Charter (e.g., the non-binding dispute settlement) and the emphasis on the "ASEAN Way" had led many to view ASEAN as a paper tiger. ASEAN was cautioned against too much "window-dressing". ASEAN's usefulness was at the margins: as a "chat forum", locking-in national reforms, providing surveillance and promoting transparency. Extra value could be created from the ASEAN process if modest, realistic goals were set, with less rhetoric that would be difficult to reconcile with reality.
35. ASEAN's economic record showed modest gains on tariff liberalisation (the CEPT), but hardly any progress on NTBs (goods, services, investment, regulatory barriers), which was where the obstacles to economic liberalisation lay. The WTO-plus advantages of economic agreements were, in one view, a "fiction". The benchmark was already very weak WTO disciplines that are distant from reality. Member states' track records also showed that since the 1997-98 crisis, trade and FDI liberalisation and structural reforms had stalled in ASEAN, with the backsliders being Malaysia, Thailand, Indonesia and the Philippines; and Singapore and Vietnam as the exceptions. Protectionism was emerging in the wake of the global economic crisis. In this view, AEC would not be achieved in the true sense by 2015. Rules of origin and other discriminatory complications limit intra-ASEAN integration. If ASEAN integration did occur, it would not be top-down

ASEAN-driven; rather it would depend on bottom-up unilateral measures carried out by the member states. The EU model of economic integration was irrelevant for ASEAN.

36. The ATIGA was seen as a “paper exercise” with no real changes. The key issue was to tackle the NTBs, but this was not evident. The ASEAN Secretariat had sought feedback from the business sector on NTB removal, but this request had met with silence, largely out of fear that corrupt officials would “retaliate”. A hopeful development was the ASEAN Trade Repository, which was viewed as good for transparency. The ACIA was more interesting but seemed to be less advertised than the ATIGA. The potential advantages of the ACIA lay in: non-discrimination for ASEAN-based multinational enterprises; the scope of the agreement; the single-reservations list; the link to services through mode 3; and the investor-state dispute settlement mechanism. However, there were some questions to be addressed concerning the reservations list; how ACIA links to the ASEAN Framework Agreement on Services (AFAS); how it will deal with post-establishment regulatory barriers; and comparisons with the NAFTA and EU models.

37. The ATIGA and ACIA are both useful agreements, but need to address issues such as:

- updates on implementation through the scorecard system, and how much of it would be made available to the public;
- promoting greater awareness of the ASEAN processes (e.g. seeking input from business, legislatures and regional governments);
- domestic legislation down to local levels, as provided in Article 18 of the ATIGA and Article 4(f) of the ACIA.; and
- the implications of the single platform concept, and the connections with non-ASEAN economic entities, such as the Asia Pacific Economic Cooperation (APEC) and the ASEAN Plus arrangements.

38. The scorecard system and the ASEAN Trade Repository are seen as the key processes to ensure and enhance transparency in ASEAN economic integration. It should be noted, however, that the scorecard itself would not provide a complete picture of developments and progress. Even so, individual governments would have the discretion to release their scorecard information. Member states would be motivated to share less than positive scorecard results. The business sector should encourage governments to share relevant parts of the information provided in the scorecards. This in turn would assist internal coordination among government agencies involved in implementation.

39. There are three main challenges to achieving the AEC, according to a business person from an ASEAN member country. These are:

- Information: There is as yet not enough knowledge in the business sector to act on initiatives for economic integration. Issues pertain to access, understanding and socialisation. The ASEAN Secretariat is requested to provide a user-friendly, up-to-date and navigable website. A business portal on the website, with language and format useful for businesses, is also recommended. Studies undertaken by the ASEAN Secretariat on various topics of regional economic integration should also be provided on the website.
- Implementation: This is linked to the information challenges, as businesses cannot make decisions without the necessary and sufficient information to act upon. Additionally, businesses need to have a stronger role in the process, so as to prevent slippages in implementation. Making the scorecard available (even in partial form) to business stakeholders would be useful. To assist businesses assess implementation issues, an ASEAN Business Policy Implementation Centre – independent of governmental processes – should be established.
- Competition: Currently the ASEAN member states are in competition with one another for a share of the global market. This has implications for how ASEAN sequences its investment and trade liberalisation

schedules. ASEAN will need to clarify how integration of the 12 priority sectors is being undertaken.

40. ACIA and ATIGA are not solutions in themselves, as their implementation also requires many behind-the-border measures. The business sector is encouraged to take a proactive role in engaging more closely with government agencies on liberalisation schedules. Existing inter-governmental forums can be utilised better for dialogue with the business sector.

41. For US businesses in ASEAN, implementation, communication and transparency are important. Most US businessmen in the region do not yet see ASEAN as a single market. Therefore, ASEAN's main challenge is to convince the private sector that it is serious about regional economic integration. For example, the deadline of 2008 for implementing the national single windows (for customs) has not yet been met. It was recommended that ASEAN should be more proactive in informing the business sector of the decisions and developments on economic integration. The information currently provided on the ASEAN website should be updated regularly and the website made more navigable. Additionally, inputs from the business sector should be treated as inputs for, rather than mere feedback on, ASEAN documents and agreements.

### **Conclusions and Policy Recommendations**

42. The conclusions and recommendations below follow from the presentations and discussions on the topics of the workshop's three sessions. They explain the issues arising from the topics and provide recommendations for ASEAN policy makers to consider, so as to improve the implementation of the Charter provisions, the ATIGA 2009 and the ACIA 2009.

#### *Legal Personality and Charter Implementation*

- The Charter establishes ASEAN as a rules-based organisation. The conferment of legal personality is important in this context, as rules are best enforced with

such a capacity. The more important question is what ASEAN can or cannot do with its legal personality. ASEAN needs to work on this question and take a position on it so as to enable the conferment of legal personality to be used in a meaningful way.

- The domestic implementation of the ASEAN Charter will continue to occupy ASEAN for some time. Article 5(2) of the Charter requires that ASEAN countries “take all necessary measures, including the enactment of appropriate domestic legislation, to effectively implement the provisions of the Charter and to comply with all obligations of membership.” Domestic implementing legislation would, for example, be needed to confer legal personality on ASEAN and provide for immunities and privileges of the nature envisaged by the Charter. The workshop highlighted three problem areas that may arise in implementation, which ASEAN countries would need to tackle. These are:
  - A lack of political will at the government level to implement the Charter due to internal disagreements or other reasons;
  - Domestic courts purportedly applying laws implementing the Charter may not enforce the obligations of the Charter if the domestic laws being applied by the courts are not in conformity with it or are silent with regard to treaty norms or obligations; and
  - Administrative structural problems preventing the obligations of the Charter from being applied at the ground level.

#### *The Issue of Perception*

- ASEAN also needs to address a serious perception problem. With the public impression that only 30 percent of ASEAN agreements have been implemented, the business community and observers remain sceptical about ASEAN’s will to abide by its agreements. The figure of 30 percent continues to be regularly quoted in media reports and academic discussions even though ASEAN Secretariat officers have tried to explain that it was inaccurate. Workshop participants from the business sector asked if the implementation of

the ASEAN Charter would bring about a change in this regard, as the Charter was intended to change ASEAN into a rules-based organisation. The business sector was also concerned as to:

- what would be the mechanisms for areas for which there are no existing dispute settlement mechanisms; and
- how the ASEAN Summit would resolve unresolved disputes.

#### *The Trade Instruments: ASEAN Needs to Do More*

- The workshop felt that ASEAN had moved forward through its review, rationalisation, enhancement and consolidation exercises, which had produced ATIGA 2009 and ACIA 2009. It was of the view, however, that ASEAN had to do more, including:
  - Working on the real obstacles to integration, which are tackling non-tariff barriers at and behind the borders, ASEAN having made little progress on such barriers and on trade facilitation;
  - Tackling the regulation barriers behind the borders so as to make real progress on market access; and
  - Handling the listing of reservations under ACIA 2009 in a manner which would ensure that ASEAN would be an attractive investor destination..

#### *ASEAN Trade Repository*

- The workshop was of the view that the ASEAN Trade Repository envisaged in ATIGA 2009 was a good idea, containing trade and customs laws and procedures and a variety of trade-related information. The mechanism would increase transparency. ASEAN may find it useful to study the model of the Australian Tariff Board (now called the Productivity Commission). It could be useful as a tool to create in-country independent transparency boards, leading towards an ASEAN Economic Transparency Board.

*Other Issues:*

- One of the main challenges for integration (perhaps relevant across all spheres of cooperation) is information, access to it, understanding the panoply of ASEAN arrangements. For example, the business sector can benefit from the information contained in the scorecards on AEC implementation submitted to the ASEAN Summit. The workshop suggested that these scorecards be shared with the public, in modified or partial form. The ASEAN Secretariat, as an information depository, should also make available all necessary information on its website in a user-friendly and usable format. It is encouraging that the ASEAN Secretariat will undertake a review and revamp of its current website. The new website should also provide a business portal.
- Issues on implementation, compliance and domestic legislation are not unique to ASEAN as a regional organisation; other regional or international organisations have gone through similar experiences. If the ASEAN Secretariat feels that it is necessary, it may wish to contact the secretariats of other regional or international organisations to learn from their experience.

43. Awareness about ASEAN in its member states is not wide-spread. One of the aims of the ASEAN Charter is to promote a common ASEAN identity and a sense of belonging among its peoples. With the ASEAN Charter now in place, it is now for ASEAN to ensure that knowledge about the Charter is spread among its peoples. Hence, there should be more concerted efforts at promoting awareness of what it means for the general public and the different stakeholders. This would help bridge the information gap and overcome the current disconnect between central policymaking and reality on the ground, paving the way towards greater transparency and accountability under the aegis of a strong and dynamic ASEAN Charter.





**WORKSHOP ON  
LIFE AFTER THE CHARTER  
27 - 28 July 2009  
Seminar Room II  
Institute of Southeast Asian Studies**

**Programme**

**Monday, 27 July 2009**

9.00 am – 9.15 am      Registration

9.15 am – 9.30 am      **Welcome Remarks**

*Dr CHIN Kin Wah*  
Deputy Director, Institute of Southeast Asian Studies,  
Singapore

9.30 am - 10. 45 am      **SESSION I: ASEAN’S LEGAL PERSONALITY UNDER ITS  
NEW CHARTER - ITS NATURE, MEANING AND  
IMPLICATIONS**

Chair:      *Mr S TIWARI*  
Visiting Senior Research Fellow, Institute of  
Southeast Asian Studies, Singapore

**(a) Status of the Work and Issues Involved**

*Mr Jeffrey CHAN Wah Teck*  
Deputy Solicitor-General, Attorney-General’s Chambers,  
Singapore

10.45 am - 11.00 am      Coffee

11.00 am - 12.45 pm      **SESSION I contd.**

**(b) Other Perspectives**

*Professor Simon CHESTERMAN*  
Global Professor and Director, NYU School of Law,  
National University of Singapore

## **Discussion**

12.45 pm - 2.15 pm

Lunch

2.15 pm - 3.00 pm

### **SESSION II: ASEAN CHARTER - IMPLEMENTATION AND COMPLIANCE**

Chair: *Dr CHIN Kin Wah*  
Deputy Director, Institute of Southeast Asian Studies, Singapore

#### **(a) Implications and Follow-ups to the Entry into Force of the ASEAN Charter**

*Dr Termsak CHALERMPALANUPAP*  
Director, Political and Security Cooperation, ASEAN Secretariat, Indonesia

3.00 pm - 3.15 pm

Tea

3.15 pm - 4.45 pm

### **SESSION II contd.**

#### **(b) The Domestic Legislation and other Measures Necessary to Implement the Charter**

*Assoc Professor Michael Ewing-CHOW*  
Faculty of Law, National University of Singapore

## **Discussion**

5.00 pm

End of Day One

7.30 pm

Dinner

## **Tuesday, 28 July 2009**

9.00 am - 9.45 am

### **SESSION III: ASEAN Economic Agreements: Implications for Implementation**

Chair: *Mr Rodolfo C SEVERINO*  
Head, ASEAN Studies Centre, Institute of Southeast Asian Studies, Singapore

#### **(a) The ASEAN Trade in Goods Agreement - its Objectives, Plan and Progress**

*Ms Kanya Satyani SASRADIPPOERA*  
Senior Officer, Trade in Goods Unit, Trade & Facilitation Division, ASEAN Secretariat, Indonesia

9.45 am - 10.30 am	<p><b>(b) The ASEAN Comprehensive Investment Agreement - its Objectives, Plan and Progress</b></p> <p><i>Ms YAP Lai Peng</i> Assistant Director, Services and Investment Division, Market Integration Directorate, ASEAN Secretariat, Indonesia</p>
10.30 am - 10.45 am	Coffee
10.45 am - 12.45 pm	<p><b>Session III contd.</b></p> <p>Commentators for both presentations:</p> <p><i>Dr Razeen SALLY</i> Director, European Centre for International Political Economy (ECIPE), Belgium</p> <p><i>Mr Eduardo PEDROSA</i> Secretary General, Pacific Economic Cooperation Council, Singapore</p> <p><i>Mr David PARSONS</i> Executive Director, Committee on Trade and Investment, Indonesian Chamber of Commerce and Industry (KADIN), Indonesia</p> <p><i>Mr Martin HUTAGALUNG</i> Regional Director, US-ASEAN Business Council, Singapore</p> <p>Discussion</p>
12.45 pm - 1.00 pm	<p><b>Closing Remarks</b></p> <p><i>Mr Rodolfo C SEVERINO</i> Head, ASEAN Studies Centre, Institute of Southeast Asian Studies, Singapore</p>
1.00 pm	Lunch and Farewell

## **ANNEX II**

### **WORKSHOP ON LIFE AFTER THE CHARTER**

**27-28 July 2009  
Seminar Room II  
Institute of Southeast Asian Studies  
Singapore**

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