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ASEAN

Life After the Charter



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ASEAN

Life After the Charter

Edited by **S. Tiwari**



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FOREWORD

ASEAN is at an exciting phase of its development. It has started to grapple with the meaning, implications and the implementation issues pertaining to the newly adopted ASEAN Charter. Concurrently, ASEAN is working intensively on integration-related economic issues for the creation of the ASEAN Economic Community by 2015. This is the first book which contains an in-depth analysis of aspects of the new ASEAN Charter and the trade in goods and the comprehensive investment agreements ASEAN has recently completed. The book deals with the key areas of legal personality conferred on ASEAN by the Charter; the legislation and other measures required by ASEAN member states to comply with the Charter; and the plan, progress and related issues relating to ASEAN's new trade in goods and comprehensive investment agreements. The book also highlights policy issues for consideration by ASEAN policy-makers. The book is edited by S. Tiwari, the former Head of the International Law Division in Singapore's Attorney-General's Chambers and currently a Visiting Senior Research Fellow at ISEAS. He was extensively involved in many aspects of ASEAN-related work, including negotiating and drafting of its key trade, investment and dispute settlement-related instruments.

Dr Surin Pitsuwan
Secretary-General of ASEAN

PREFACE

This is the first book which contains an in-depth analysis of aspects of the ASEAN Charter and its implementation, and the new goods and investment instruments that ASEAN has recently adopted. It is intended to start the process of creating a better understanding of the Charter and its implementation issues and the instruments underpinning the push towards economic integration and the ASEAN Economic Community.

A special feature of the book is the “Summary of Key Points” at the end of each chapter. I have prepared the summaries to enable readers to obtain an overview and a quick appreciation of each chapter.

I am indebted to Ambassador K. Kesavapany, Director of the Institute of Southeast Asian Studies (ISEAS) for his advice, guidance and encouragement in this book project. I am also grateful to the Head of the ASEAN Studies Centre at ISEAS, Mr Rodolfo Severino, who kindly read through the draft manuscript and offered useful suggestions.

I would like to thank all paper presenters and my colleagues, Mrs Y.L. Lee, Head of Administration, Ms Moe Thuzar, Ms Karthiani Nair, Mr Deepak Nair, Ms Emillia Amin and Mr Alex Tham Keng Sum. The workshop would not have been possible without support from them.

My special thanks to Mrs Triena Ong, Managing Editor of the ISEAS Publications Unit, who was always generous with her time in guiding me through the intricacies of preparing a book for publication. I also appreciate greatly the unstinting assistance of Ms Rahilah Yusof and Ms Sheryl Sin.

S. Tiwari
Editor
March 2010

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Simon Chesterman is Global Professor and Director of the New York University (NYU) School of Law Singapore Programme, and a Professor of Law at the National University of Singapore. Prior to joining NYU, he was a Senior Associate at the International Peace Academy and Director of UN Relations at Crisis Group in New York. He has previously worked for the UN Office for the Coordination of Humanitarian Affairs in Yugoslavia and interned at the International Criminal Tribunal for Rwanda.

He has authored a number of books on the United Nations and on humanitarian intervention under international law.

Termsak Chalermpanupap is currently Director of the Political and Security Directorate at the ASEAN Secretariat. He studied political science and has served at the Secretariat in various capacities since 1993, including as Special Assistant to the Secretary-General.

He has represented the ASEAN Secretariat in each of the groups working on the ASEAN Charter: the Eminent Persons Group, the High Level Task Force, the High Level Panel (drafting the Terms of Reference for the human rights body) and the High Level Legal Expert Group.

Michael Ewing-Chow is an Associate Professor at the National University of Singapore (NUS) where he teaches world trade law and corporate law. He received an LL.B. (First Class) from NUS and an LL.M. from Harvard.

Along with some colleagues, he started the first World Trade Law course at NUS. He has been a consultant to the Singapore Government as well as the World Bank and the WTO. He has written and published articles on trade law and investment law.

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She first joined the ASEAN Secretariat in 1996 as Assistant Programme Officer, then worked with the ASEAN-UNDP Sub-Regional Programme and rejoined the ASEAN Secretariat in 2004 as Special Officer. She commenced work with the Bureau for Economic Integration from 2005 as Senior Officer for Trade in Goods.

Yap Lai Peng holds a Bachelor of Economics and Masters of Public Administration from the University of Malaya. She also attended the Advanced Certificate on International Economics at the Kiel Institute of Economics in 1993/94. She started with the ASEAN Secretariat as a Trade Economist in October 2007 and then moved to her current position as Assistant Director, Head of Services and

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Razeen Sally is Co-Director of the European Centre for International Political Economy (ECIPE), an international economic policy think-tank based in Brussels. He received his Ph.D. from the London School of Economics in 1992. He is a Senior Research Associate at the South African Institute of International Affairs in Johannesburg. He has been a Visiting Professor at the Institut D'Etudes Politiques (Sciences Po) in Paris, Visiting Senior Research Fellow at the Institute of Southeast Asian Studies in Singapore, a Visiting Fellow at the University of Hong Kong, and Director, Trade Policy, at the Commonwealth Business Council in London.

Eduardo Pedrosa is the Secretary-General of the Pacific Economic Cooperation Council (PECC), a position he has held since March 2006. He has worked on regional economic issues for fourteen years in various capacities. Before joining PECC in 2000 as Director of Policy, he was the Coordinator of the Regional Programme for Southeast Asia of the Konrad-Adenauer-Stiftung and was Co-Editor of its journal *Panorama*. He has also worked for the Economist Intelligence Unit. He is a graduate of the London School of Economics.

David Parsons is Executive Director of the Committee on Investment and International Trade Development in the Indonesian Chamber of Commerce and Industry – Kadin Indonesia. He joined the Chamber in 2005 to help develop more systematic policy contributions from the Indonesian business sector for the government's reform process.

Following earlier careers as a journalist, farmer and researcher at the Australian Bureau of Agricultural and Resource Economics, he joined PECC in 1988 and worked there till 2005 in various capacities.

Martin Hutagalung is the U.S.-ASEAN Business Council's Regional Director based in Singapore. Martin is the primary liaison point with Council members in the region and oversees the Council's programmes and services in Singapore. Before moving to Singapore, Martin was based in the Council's Washington D.C. office as Manager for ASEAN and APEC Affairs.

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Sivakant Tiwari is currently a Visiting Senior Research Fellow at the Institute of Southeast Asian Studies (ISEAS), Singapore, dealing with ASEAN-related Legal Affairs. Prior to joining ISEAS, he served in senior positions in the Singapore Legal Service.

During his stint in the Legal Service, Tiwari played a significant role in preparing the legislation for the newly formed Singapore Armed Forces. He led the evidence in landmark Commissions of Inquiry, represented Singapore in high profile internal security cases in the Singapore High Court and has led numerous bilateral and multilateral trade, investment, intellectual property, maritime boundary, law of the sea and other negotiations on behalf of Singapore. He has also been extensively involved in many aspects of ASEAN-related legal work, including negotiating, advising and drafting of its key trade, investment and dispute-related instruments. Tiwari was involved in handling Singapore's Pedra Branca case from the commencement of the dispute in 1979 till the hearing of the case at the International Court of Justice in November 2007. He served as a Panel Member (2007-08) in a major WTO intellectual property case involving the U.S. and China and is currently a Panel Member in the Tuna-II dispute at the WTO involving the U.S. and Mexico. He has contributed articles, *inter alia*, on trade and intellectual property issues.

INTRODUCTION

BACKGROUND

The Association of Southeast Asian Nations (ASEAN) was established on 8 August 1967 in Bangkok by the ASEAN Declaration. ASEAN had only five members at the time of its establishment: Indonesia, Malaysia, Philippines, Singapore and Thailand. The ASEAN Declaration spelt out the aspirations of the five nations and indicated a simple informal structure to carry them out.

Over the years, ASEAN expanded into a ten-member body with the following additional members: Brunei, Vietnam, Laos, Myanmar and Cambodia. Forty years on, it also finds itself in a very different globalized world of intense economic competition.

In adapting ASEAN to the changed environment, ASEAN leaders decided that ASEAN needed a meaningful instrument to spell out the aims, aspirations, vision, powers and structure of ASEAN. Hence, the ASEAN Charter was signed by the ASEAN states on 20 November 2007 at the 13th ASEAN Summit in Singapore. It entered into force on 15 December 2008, this date being the thirtieth day after all ten ASEAN member states had deposited their instruments of ratification with the Secretary-General of ASEAN.

What does the Charter do for ASEAN? In the words of the current ASEAN Secretary-General, Dr Surin Pitsuwan, the Charter:

... has helped ASEAN articulate our values, purposes, visions and foundations on which we are built and our desire to build a regional identity... It is now up to the stakeholders of ASEAN to take up the challenge of regional integration to respond creatively to globalisation and the opportunity to improve our lives. Although many challenges lie ahead, the ASEAN Charter gives us hope, purpose and importantly a framework of action for all the peoples of ASEAN.

(Extracted from the Foreword by the
ASEAN Secretary-General to the book,
The Making of the ASEAN Charter, edited by Tommy Koh,
Rosario G. Manalo and Walter Woon)

The ASEAN Charter, also referred to as the “little green book”, is akin to a constitutional instrument for ASEAN. It will be studied, analysed, interpreted and written about for years to come. It will be applied on a daily basis. ASEAN political leaders, parliamentarians and government officials, ASEAN Secretariat officers, civil society members, and the public in general, all need to have at least a general understanding of what the Charter means.

EMERGING ISSUES

ASEAN is at the threshold of an exciting period. It has started to grapple with the meaning and implications of the Charter provisions and the issues pertaining to its implementation.

ASEAN is at the same time working intensively on economic issues. It 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. It has thus accelerated the achievement of economic integration from 2020 to 2015.

With the objective of creating the necessary environment for the free movement of goods and a freer and more open investment regime, two legal instruments consolidating ASEAN agreements on trade and investments were reviewed and revised in 2009. These

instruments are the ASEAN Trade in Goods Agreement 2009 (ATIGA) and the ASEAN Comprehensive Investment Agreement 2009 (ACIA). 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

(a) Issues ASEAN is Grappling with

To assist in the work relating to the Charter and economic issues, the ASEAN Studies Centre (ASC) at the Institute of Southeast Asian Studies (ISEAS) organized a workshop entitled, "Life After the Charter", on 27–28 July 2009, at ISEAS in Singapore. The workshop was intended to provide a forum to study, analyse and brainstorm the issues that ASEAN is grappling with currently. The workshop dealt with the following issues:

- (i) the nature, meaning and implications of the legal personality conferred by the Charter on ASEAN;
- (ii) the legislation and other measures required by ASEAN member countries to implement the Charter; and
- (iii) the plan, progress and connected issues in relation to the recently completed agreements on trade in goods and investment.

The workshop aimed to complement the ASEAN process by pooling together the insights of the practitioners, scholars, opinion-makers and business people 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 and treaties enriched the discussions.

The workshop took up the legal personality of ASEAN as the first area for study, as it is a key component of the Charter. The implications of the issue need to be settled so that ASEAN countries can legislate on it and implement it. This would allow, *inter alia*, actions taken by ASEAN as an entity to have a legal basis.

(b) Summary of Presentations and Discussions

The chapters which follow also contain summaries of the key points of the presentations and the discussions. These have been prepared to provide a quick appreciation of the issues and thus make the publication more useful.

(c) Conclusions and Policy Issues

The conclusions and policy issues arising from the workshop have been developed in a separate chapter for study and consideration by ASEAN countries.