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The ASEAN Secretariat and Legal Issues Arising from the ASEAN Charter

Mr Termsak Chalermpanupap¹

There are three major issues embodied in the new ASEAN Charter. They are; legal personality of ASEAN, privileges and immunities and dispute settlement mechanism. This article elaborates recent developments of those three legal issues, as new legal tasks that ASEAN Secretariat has to carry out as the ASEAN Charter start to be entry into force.

Nonetheless, ASEAN Secretariat faces many obstacles ahead particularly in building its human resources and seeking of the legal experts to carry the tasks which must be undertaken by the ASEAN Secretariat

Keywords: ASEAN Charter, ASEAN Secretariat

The ASEAN Charter which entered into force on 15 December 2008 embodies three major legal issues: legal personality of ASEAN; privileges and immunities (P & I); and dispute settlement mechanisms (DSM). The first part of this paper recounts recent developments in each of the three issues. The second part discusses new legal tasks that the ASEAN Secretariat has to undertake in light of the entry into force of the ASEAN Charter.

At the outset, it should be pointed out that discussion on these three legal issues is ongoing in the High Level Legal Experts Group (HLEG)². HLEG was established by the ASEAN Foreign Ministers in Singapore last July. It has periodically reported its progress to the ASEAN Foreign Ministers. Its final report and recommendations are expected to be presented to the Ministers at the 42nd ASEAN Foreign Ministers Meeting in Thailand in July 2009. Nothing in this paper, therefore, can be construed to contradict whatever HLEG has recommended or will eventually recommend to the Ministers.

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² Indonesia's member on HLEG is Mr. Eddy Pratomo, Director-General, Directorate for Legal Affairs and International Treaties, Department of Foreign Affairs; his alternates are Mr. Arif Havas Oegroseno, and Mr. Rachmat Budiman from the same Directorate.

Legal Personality

Article 3 of the ASEAN Charter simply states: '*ASEAN, as an inter-governmental organisation, is hereby conferred legal personality.*'³ The drafters of the ASEAN Charter crafted the simple article with the intention of leaving it to further elaboration by legal experts. And that task is being undertaken by HLEG now.

Legal personality of every international organization can be seen in two major dimensions: domestic (within each of its Member States), and international. In the domestic dimension, ASEAN's legal capacities may include: to hold and dispose of properties, movable as well as immovable; to sign contracts; and to engage in legal proceedings in court, both to sue or to defend itself. The key question is who to represent ASEAN and how to authorize the representation. Most probably the Secretary-General of ASEAN and his authorized representatives will be tasked to exercise the above capacities, especially in activities that are administrative or commercial in nature.

In the international dimension, exercising the legal personality of ASEAN is more complex. On the one hand, ASEAN has similar capacities as in the domestic dimension; for example, to own properties outside of the ASEAN region, or to sign a commercial contract with a firm outside of the ASEAN region, etc. On the other hand, ASEAN has additional capacities, including to enter into international agreements (Article 41 [7]); to join or participate in regional, international or inter-regional organizations; and to exercise other capacities as are customary in international law governing international organizations.⁴

Again, a similar question here is about who can represent ASEAN in the international dimension and how to authorize the representation. The Minister of Foreign Affairs of the ASEAN Chair country⁵ is customarily the most appropriate representative of ASEAN. At the same time, the Secretary-General of ASEAN could also be authorized to represent ASEAN, where there is consensus among ASEAN Member States to do so.

³ For the full text of the ASEAN Charter, go to the official website of ASEAN at www.asean.org and find the document at www.asean.org/ASEAN-Charter.pdf

⁴ Including the 1969 Vienna Convention on the Law of Treaties, and the 1986 Vienna Convention on the Law of Treaties Between States and International Organisations or Between International Organisations.

⁵ Article 32 about the Role of the Chairman of ASEAN does not specify who "the Chairman of ASEAN" is, but customarily, the Foreign Minister has played this role. With the entry into force of the ASEAN Charter, the Head of State or Government is also sometimes considered as the Chairman of ASEAN.

Privileges and Immunities (P & I)

Chapter VI of the ASEAN Charter contains three articles concerning P & I of ASEAN in Article 17; of the Secretary-General of ASEAN and staff of the ASEAN Secretariat in Article 18; and of the Permanent Representatives and officials of Member States on ASEAN duties in Article 19. Details are being discussed in HLEG meetings.

Application of Article 18 is more complicated, because of the existing 1979 host country agreement between Indonesia and ASEAN. A new host country agreement is being drafted to adjust and update the P & I that Indonesia will accord to the Secretary-General of ASEAN, his four deputies⁶ and other staff of the ASEAN Secretariat. The new draft host country agreement will include provisions concerning P & I for experts on mission in ASEAN. At present there are experts (some are ASEAN nationals, others are not) working in the ASEAN Secretariat for ASEAN's cooperation programmes with Dialogue Partners, such as Australia, the European Union, Japan, and the United States of America. These experts also need some P & I.

HLEG is expected to propose a comprehensive ASEAN agreement on P & I, which will address issues concerning P & I of all the three categories of officials in Articles 17, 18, and 19. The ASEAN Secretariat believes that P & I of experts on ASEAN mission could also be included in such an agreement.

Dispute Settlement Mechanisms (DSM)

ASEAN aspires to become more rules-based. In this regard, ASEAN needs to put in place an efficient DSM to handle disputes on ASEAN matters that will arise, sooner or later.

Chapter VIII of the ASEAN Charter deals with settlement of disputes. Article 22 [1] stipulates that "*Member States shall endeavour to resolve peacefully all disputes in a timely manner through dialogue, consultation and negotiation*" Most of the functional cooperation agreements in the ASEAN Socio-Cultural Community pillar do not specify any DSM, except calling for friendly dialogue and amicable negotiations to settle disputes.

⁶ Under Article 11 [6], two Deputy Secretaries-General who will serve a non-renewable term of three years, shall be nominated by Member States based on alphabetical rotation; two other Deputy Secretaries-General, who will serve a term of three years, which may be renewed for another three years, shall be openly recruited based on merit.

It should be emphasised here that Chapter VIII of the ASEAN Charter concerns more about disputes on ASEAN matters between or among ASEAN Member States. Bilateral border disputes and other bilateral disputes on non-ASEAN matters will still be dealt with bilaterally, or be referred to the High Council under the 1976 Treaty of Amity and Cooperation in Southeast Asia, if they could disrupt regional peace and harmony.

In dealing with disputes on ASEAN matters, Article 22 [2] calls for the establishment of dispute settlement mechanisms “*in all fields of ASEAN cooperation.*”

Article 23 provides for the use of “*good office*”, “*conciliation*” and “*mediation*” as possible DSM along side any other DSM, at any time if there is mutual consent of the disputing parties to do so. These are new DSM modes that can supplement the usual dialogue and negotiation between disputing parties.

Article 24 [1] endorses the use of existing mechanisms and procedures for settlement of disputes in specific ASEAN instruments. Article 24 [2] refers to the 1976 Treaty of Amity and Cooperation in Southeast Asia when there are disputes which do not concern the interpretation or application of any ASEAN instrument. However, it is well-known that the 1976 Treaty’s Chapter IV: Pacific Settlement of Disputes, which includes the establishment of a High Council, has never been tested.

Moreover, the presence of 15 non-regional States⁷ that have acceded to the Treaty has created new complications. Under the 2001 Rule 14 of the Rules of Procedure of the Treaty, “*High Contracting Parties which are States outside Southeast Asia and which are not directly involved in the dispute may, upon written request to the Chairperson be represented by observers at a meeting of the High Council, subject to the High Council deciding otherwise*”⁸. It would be rather embarrassing for any two disputing parties in ASEAN to argue in a dispute in the High Council while these 15 non-regional States observe.

Article 25 calls for the establishment of appropriate mechanisms \$ including arbitration — to settle disputes concerning the interpretation or application of the ASEAN Charter and other ASEAN instruments which do not provide any

⁷ These non-regional States are: Papua New Guinea, China, India, Japan, Pakistan, the Republic of Korea, the Russian Federation, Mongolia, New Zealand, Australia, France, Timor-Leste, Sri Lanka, Bangladesh, and the Democratic People’s Republic of Korea.

⁸ For text of the Rules of Procedure of the High Council of the Treaty of Amity and Cooperation in Southeast Asia (2001), please go to www.asean.org/3639.htm

specific DSM. The crucial question here is whether or not mutual consent of disputing parties is needed to refer a dispute to arbitration.

Such mutual consent is required under the 1976 Treaty of Amity and Cooperation in Southeast Asia for a political dispute to be referred to the High Council. The High Council also lacks the authority to make legally-binding judgment; hence it is not suitable for settling bilateral border disputes. This partly explains why no dispute has ever been referred to the High Council because no two disputing parties have ever agreed to bring their dispute to the High Council; and most of the disputes concern overlapping territorial claims. Some Member States have, however, agreed to bring some of their bilateral border disputes to the International Court of Justice (ICJ), like in the case between Indonesia and Malaysia over Sipadan and Litigan islands; and the case between Malaysia and Singapore over Pedra Branca island and lighthouse.

Interestingly, disputes concerning economic agreements in ASEAN can be tackled without any mutual consent under the 2004 ASEAN Protocol on Enhanced Dispute Settlement Mechanism. This is in line with the practice in the World Trade Organization. Still, the 2004 Enhanced DSM has never been tested, as ASEAN Member States prefer political dialogue and negotiation rather than litigation. Nevertheless, efforts are underway to further improve the 2004 Enhanced DSM; and a DSM Fund has been established to support the operations of the Enhanced DSM.

Now HLEG is addressing this mutual consent question. The concern is that it would be difficult to secure such mutual consent in serious disputes concerning political or functional agreements in ASEAN. Too many disputes will then remain “unresolved” and can be referred to the ASEAN Summit, in accordance with Article 26. Two more related questions deserve attention: When can a dispute be considered as “unresolved” under Article 26? Strictly speaking, a dispute can be considered as “unresolved” only after the disputing parties have applied DSM provisions in Articles 22-25.

Mere disagreement on what mode of DSM to be used will not qualify the dispute as “unresolved”. Such procedural question should be settled either by the disputing parties or with the help from all others in ASEAN.

Another line of thinking leads to a suggestion for the ASEAN Foreign Ministers, acting as the ASEAN Coordinating Council (the ACC, as in Article 8), to step in when there is no mutual consent of disputing parties to go for arbitration. The ACC may determine the appropriate means of resolution of the dispute, including arbitration. One question here is how the ACC is going to

decide on this matter - by positive consensus or negative consensus? Another question is whether the disputing parties can take part in making the decision. If the disputing parties are to take part, then it will be more sensible to use negative consensus. In other words, every Member State must all agree not to do certain things.

If all else fails and “unresolved disputes” are referred to the ASEAN Summit for its decision, yet another question arises: Will the ASEAN Leaders be able to handle many “unresolved disputes” effectively? Heads of State or Government are mostly politicians who may not have deep knowledge of law or good understanding of complex technical legal issues. And their ASEAN Summit is a political decision making body, which is not intended to function as an “ASEAN supreme court”

One emerging idea is to establish a group of eminent persons or lawyers to advise the ASEAN Summit on how to settle “unresolved disputes” Such a group may be able to come up with proposed solutions for the ASEAN Leaders to consider. However, ideally, ASEAN’s DSM should be able to handle all disputes systematically, based on the rule of law and due process. This is better and more sustainable than trying to settle “unresolved dispute” through political means.

New Legal Tasks of the ASEAN Secretariat

Another important requisite of becoming more rules-based is having an efficient central body to keep the rules, facilitate fulfillment of commitments and ensure compliance. That role will be undertaken by the Secretary-General of ASEAN with effective support of the ASEAN Secretariat. In this regard, new legal tasks to be undertaken by the ASEAN Secretariat include the following:

1. Interpret the ASEAN Charter

One of the most important new legal tasks to be undertaken by the ASEAN Secretariat is to interpret the ASEAN Charter. Article 51 [1] states: *‘Upon the request of any Member State, the interpretation of the Charter shall be undertaken by the ASEAN Secretariat in accordance with the rules of procedure determined by the ASEAN Coordinating Council’*

The drafters of the ASEAN Charter entrusted this function to the ASEAN Secretariat under the belief that the ASEAN Secretariat is most neutral and objective. Moreover, the Secretariat staff has the institutional memories of what

had happened during the drafting of the Charter and other ASEAN instruments, know the deep background of sensitive issues and understand the delicate understanding among Member States on certain controversial questions.

2. Support the Chairman of ASEAN or the Secretary-General of ASEAN

Article 23 [2] states: “*Parties to the dispute may request the Chairman of ASEAN or the Secretary-General of ASEAN, acting in an ex-officio capacity, to provide good offices, conciliation or mediation*”. This is new in ASEAN. Probably the ASEAN Secretariat might be called upon to provide necessary support to the Chairman of ASEAN when Article 23 [2] is invoked, and the Chairman is requested to provide good offices, conciliation or mediation. And certainly the Secretariat will have to assist the Secretary-General of ASEAN when he is chosen to provide either one of these DSM services.

3. Support other DSM

The ASEAN Secretariat will also have to provide necessary support to other DSM, especially the 2004 Enhanced DSM for settling economic disputes. In this connection, readers interested in details of specific roles of the Secretary-General of ASEAN and the ASEAN Secretariat can look up the 2004 ASEAN Protocol on Enhanced Dispute Settlement Mechanism.⁹

4. Exercise legal capacities

The ASEAN Secretariat will have to support the Secretary-General of ASEAN and his authorized representatives in exercising ASEAN’s legal capacities, both in domestic and international dimensions. One important related task is to negotiate and conclude bilateral agreements with each of ASEAN’s Dialogue Partners¹⁰ on the recognition of ASEAN’s legal personality and on P & I for the Secretary-General of ASEAN, his deputies and other ASEAN Secretariat staff as well as officials of Member States and experts on ASEAN duty in the territory of each of the Dialogue Partners.

⁹ Text of the ASEAN Protocol on Enhanced Dispute Settlement Mechanism (2004) is available at www.asean.org/16754.htm

¹⁰ Australia, Canada, China, the European Union, India, Japan, the Republic of Korea, New Zealand, the Russian Federation, the United States of America, and the United Nations. Pakistan is ASEAN’s Sectoral Dialogue Partner. And Papua New Guinea is a Special Observer in ASEAN.

5. Monitor compliance and report to the ASEAN Summit

Article 27 specifies: *“The Secretary-General of ASEAN, assisted by the ASEAN Secretariat or any other designated ASEAN body, shall monitor the compliance with the findings, recommendations or decisions resulting from an ASEAN dispute settlement mechanism, and submit a report to the ASEAN Summit”*

This obviously is a thankless task, but necessary, for compliance is the essence of being rules-based. Moreover, Article 27 [2] gives right to any Member State *“affected by noncompliance [to] refer the matter to the ASEAN Summit for a decision”*

6. Safeguard ASEAN’s intellectual property rights

The Secretary-General of ASEAN will most probably be entrusted to hold and safeguard ASEAN’s intellectual property rights. And he will require support from the ASEAN Secretariat in this regard. ASEAN’s intellectual property includes, for example, the ASEAN Motto: *“One Vision, One Identity, One Community”* (Article 36); the ASEAN Flag (Article 37); the ASEAN Emblem (Article 38); and the ASEAN Anthem¹¹ (Article 40); and publications of the ASEAN Secretariat.

7. Monitor ratification of ASEAN agreements

The ASEAN Secretariat has to step up its efforts in persuading Member States to speed up their respective internal processes in, where required, ratifying ASEAN agreements. In the ASEAN Economic Community, the latest count shows that about 66% of the economic agreements that require ratification have been fully ratified by all Member States.

One possible solution to the slow ratification problem is to make new agreements go into effect upon signing. Another solution, which has been in use in some functional agreements (including the 2002 ASEAN Agreement on Transboundary Haze Pollution), is to require ratification of only a majority of Member States for an agreement to enter into force in the Member States that have ratified it.

¹¹ “The ASEAN Way” music by Kittikhun Sodprasert and Sampao Triudom, lyric by Payom Valaiphatchra, and arrangement by Kittikhun Sodprasert, all from Thailand, has been chosen in a recent region-wide contest as the ASEAN Anthem.

8. Ensure uniformity and consistency in ASEAN instruments

Lastly, the ASEAN Secretariat needs to step in to ensure uniformity, clarity and consistency in the use of proper format and terminology in drafting all ASEAN instruments. One inconsistency that still crops up every now and then is the use of 'Member Countries... instead of 'Member States... \$ Member States are correct and used in the ASEAN Charter.

Strengthening the ASEAN Secretariat

In order to provide all of the legal tasks mentioned above, the ASEAN Secretariat needs to build up its human resources. Its existing Agreements and Compliance Unit in the Bureau of Economic Integration and Finance will have to be upgraded into a new Legal Services Office. Ideally, the new Office should be located under the Community Affairs Development Directorate of the restructured ASEAN Secretariat, because the legal services this Office will provide will go to supporting the building of ASEAN Community as a whole. However, the ASEAN Secretariat sees many obstacles ahead. It faces an uphill battle in recruiting legal experts, let alone experienced practicing lawyers. Those who specialize in international trade laws may not want to work at the ASEAN Secretariat, because they can find better jobs with higher pay in the United Nations, World Trade Organization, World Bank, Asian Development Bank, and in the international business sector.

Nevertheless, the new legal tasks must still be undertaken by the ASEAN Secretariat somehow. And one possible solution is to request Member States to send their seconded legal officials to assist the Secretariat. The Secretariat needs all the help it can get in turning into reality our collective aspiration of making ASEAN a more rules-based organization.