

## Legal Analysis of Legal Personality Organization of South East Asian Countries (ASEAN) as the Subject of International Law

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### Abstract

ASEAN stands on August 8, 1967, under the agreement of five foreign ministers of Southeast Asian Countries namely Adam Malik (Indonesia), Tun Abdul Razak (Malaysia), Thanat Khoman (Thailand), Rajaratnam (Singapore), and Narcisco Ramos (Philippines). The ASEAN Charter is the legal and institutional framework that binds all ASEAN member countries and makes ASEAN an organization of legal status. ASEAN has immunities and privileges in the territory of the Member States as necessary to achieve its objectives. ASEAN with the ASEAN Charter being a full

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international organization, there are clear rules on ASEAN. Among them are the privileges and immunities for Permanent Representatives and diplomatic agents in the ASEAN Secretariat.

**Keywords:** ASEAN Charter, Legal Personality, Privileges

## A. Introduction

The current international law has a very effective role in regulating the lives and interactions of the international community. One of the subjects of international law is the international organization. Just as societal life, then the state can not stand alone, so the country needs to get along with other countries. The gathering of nations in one association with the interest to meet certain needs is clothed in a group of so-called international organizations.<sup>1</sup>

ASEAN stands on August 8, 1967 under the agreement of five foreign ministers of Southeast Asian Countries namely Adam Malik (Indonesia), Tun Abdul Razak (Malaysia), Thanat Khoman (Thailand), Rajaratnam (Singapore), and Narcisco Ramos (Philippines) . This agreement was generated through a meeting held in Bangkok on 5-8 August 1967. The agreement reached in this meeting was made a statement called the Bangkok Declaration. The Bangkok Declaration became the foundation for a Southeast Asian Association of Southeast Asian Nations (Association of Southeast Asian Nations).<sup>2</sup>

A social organization established through an international agreement or agreement which is then incorporated into its instrument of incorporation will have an international legal personality.<sup>3</sup> The idea of the legal personality has

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<sup>1</sup> Sumaryo Suryokusumo. 1990. *Hukum Organisasi Internasional*, Jakarta: Penerbit Universitas Indonesia, hlm.4

<sup>2</sup> Bambang Cipto. 2007. *Hubungan Internasional di Asia Tenggara, Teropong terhadap Dinamika, Realitas, dan Masa Depan*, Yogyakarta: Pustaka Pelajar, hlm.23

<sup>3</sup> Setyo Widagdo. "Masalah-Masalah Hukum Internasional Publik." (Malang : Bayumedia, 2008), hlm. 178.

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been well described in the International Court's statement on international organizations, especially the United Nations. Legal personality concerns the quality of an organization as the subject of international law while the legal capacity is related to the ability of international organizations to take legal action. Therefore, affirmation of the status of legal personality is very important related to the implementation of the function and the achievement of its objectives. In addition, international organizations can be differentiated on the basis of membership. Some are said to be universal where membership is not limited to certain criteria, eg the UN. While the so-called closed is an organization whose membership is based on the region, eg ASEAN. So that in ASEAN membership bersifat exclusively only for countries in the region of Southeast Asia.<sup>4</sup>

## B. Research Mehtod

The method of writing used in this paper is using the method of libraries where the method is to study, read and collect from libraries related to the problems discussed, whether in the form of books, journals, or other information in the form and summarize it in a language that is easy to understand.

## C. Result & Discussion

### 1. The Role of ASEAN Charter (ASEAN Charter) in making ASEAN a legal subject (*Legal Personality*)

The ASEAN Charter is the legal and institutional framework that binds all ASEAN member countries, and makes ASEAN an organization of legal status. Indonesia adopted the ASEAN Charter through Act No. 38 of 2008. The ASEAN Charter can be reviewed after five years since the official ASEAN Charter comes

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<sup>4</sup> Iskandar, Pranoto." *Hukum HAM Internasional: Sebuah Pengantar Kontekstual*".(Cianjur : IMR Press, 2012), hlm. 299-300.

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into force.<sup>5</sup> ASEAN Charter as a constitutional document contains some very important elements, among others:

1. The explicit statement that ASEAN is an international organization that has an international legal personality, thus ASEAN is able to exercise rights and obligations at the international level;
2. The explicit statement that ASEAN has objectives, functions and powers such as other international organizations. In other words, the Charter will transform ASEAN into a rulesbased Organization;
3. The establishment of legislative mechanisms, the rule-making mechanisms / organs and procedures within ASEAN;
4. Establishment of an executive or organ mechanism in charge of implementing and monitoring the implementation of organizational rules and decisions;
5. Establishment of judicial and quasi judicial mechanisms that serve to interpret and implement any rules and decisions issued by ASEAN;
6. Directly the ASEAN Charter will help to encourage and strengthen the structuring of ASEAN agreements by its member states and indirectly increase the sense of region among ASEAN governments.<sup>6</sup>

The fundamental transformation undertaken by the ASEAN Charter has provided legal personality to ASEAN. As a legal personality, ASEAN moves and makes agreements on its behalf and may also prosecute and be prosecuted legally. In line with this transformation, institutional improvements are being made so that ASEAN is expected to respond better to the increasingly complex regional and global issues in the future.<sup>7</sup>

The enactment of the ASEAN Charter is intended to encourage ASEAN's transformation of a loose organization into an organization with a legally binding foundation. This will have implications for Member States, that Member States shall take the necessary measures including the establishment

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<sup>5</sup> <http://setnas-asean.id/tentang-asean> diakses pada Minggu, 08 Oktober 2017, pukul 16.20 WIB

<sup>6</sup> Liona Nanang Supriatna, Piagam ASEAN : Menuju Pemajuan Dan Perlindungan HAM di Asia Tenggara, "Jurnal Hukum Internasional (Indonesian Journal of International Law)", Vo. 5, 3 April 2008, hlm. 557-558

<sup>7</sup> R. Winantyo dkk. "Masyarakat Ekonomi ASEAN (MEA) 2015 : Memperkuat Sinergi ASEAN di Tengah Kompetisi Global". (Jakarta : PT. Elex Media Komputindo, 2008), hlm. 14.

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of appropriate domestic legislation to effectively implement the provisions of this Charter and to comply with membership obligations (Article 5 paragraph 2) ASEAN Charter). A peaceful dispute resolution mechanism is also adopted in the agreement. With the establishment of the agreement, it is expected that any disputes between ASEAN member states can be resolved within the framework of the TAC. To complete the TAC, a Rules and Procedure of High Council of the Treaty of Amity and Cooperation in South East Asia was adopted on 23 July 2001 in Hanoi, Vietnam. Dynamics both internally and externally in ASEAN ultimately has made the ASEAN leaders work to strengthen the organization to face the challenges that will be faced in the future.<sup>8</sup>

Some of the immediate implications of the implementation of the ASEAN Charter are:

1. The relationship between ASEAN countries is thoroughly strengthened legally
2. ASEAN shows the world that ASEAN's solidarity for 41 years with its added value of security stability can be said to be the safest in the world, it is also supported by the cohesiveness to enact the ASEAN Charter which will also have global implications
3. ASEAN Charter in principle is expected to encourage economic integration, strengthen the principles of democracy, protection of human rights and environmental conservation of the environment. ASEAN's objectives are stated in Article 1 of the ASEAN Charter, namely: 1. Maintain and promote peace, security and stability and further strengthen the peace-oriented values in the region; 2. Increasing regional resilience by promoting broader political, security, economic and socio-cultural cooperation; 3. Maintaining Southeast Asia as a Nuclear Weapon Free Area and free of all other types of weapons of mass destruction;
4. Ensure that the people and ASEAN Member States are at peace with the world as a whole in a fair, democratic and harmonious environment;

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<sup>8</sup>Dewa Gede Sudika Mangku, " Peluang dan Tantangan ASEAN Dalam Penyelesaian Sengketa Kuil Preah Vihear di Perbatasan Kamboja dan Thailand". *Pandecta* Volume 6. Nomor 2. Juli 2011, 107-108.

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5. Creating a stable, prosperous, highly competitive, and economically integrated, stable and economically viable market through effective facilitation of trade and investment, in which there is freight flow of goods, services and free investments; facilitated movement of business actors, professional workers, talented workers and workers; and more free capital flows;
  6. Reducing poverty and narrowing development gaps in ASEAN through mutual assistance and cooperation;
  7. Strengthen democracy, improve good governance and rule of law, and promote and protect human rights and fundamental freedoms, taking into account the rights and obligations of ASEAN Member Countries;
  8. Respond effectively, in accordance with the principle of overall security, all forms of threats, transnational crime and cross-border challenges;
  9. Promote sustainable development to ensure environmental protection in the region, sustainable natural resources, the preservation of cultural heritage, and the life of the people of high quality;
  10. Develop human resources through closer cooperation in education and lifelong learning, as well as in science and technology, for the empowerment of the people of ASEAN and the strengthening of the ASEAN Community;
  11. Improving the welfare and decent living of the people of ASEAN through the provision of equal access to opportunities for human resource development, social welfare and justice;
  12. Strengthening cooperation in building a safe and secure environment free of narcotics and drugs for the people of ASEAN;
  13. Promote a people-oriented ASEAN in which all walks of life are encouraged to participate in, and benefit from, the integration and building process of the ASEAN community;
  14. Promote ASEAN's identity by promoting greater awareness of cultural diversity and regional heritage; and

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15. Maintain the centrality and proactive role of ASEAN as a key driving force in relations and cooperation with external partners in open, transparent and inclusive regional architecture.<sup>9</sup>

Based on the above description we can know that ASEAN exercises its legal authority under international law. This can be seen from the authority of ASEAN in making international agreements with other parties. ASEAN on various occasions has signed a Memorandum of Understanding with other parties.<sup>10</sup>

## **2. The Personality of ASEAN Laws against the ASEAN Position in treaties made with the State or International Organization**

The Rules of Procedure for Conclusion of International Agreements by ASEAN (hereinafter referred to as ROP) is one of the instruments of the implementation of Article 41 paragraph (7) of the ASEAN Charter explaining the ability of ASEAN to enter into agreements with the state or international organization.<sup>11</sup>

ROP adopted in the ASEAN Coordinating Council Meeting IX, November 16, 2011 in Bali, Indonesia. The "international treaties" subject to the ROP are agreements that meet the following conditions:<sup>12</sup>

- 1) Written agreement;
- 2) For any purpose;
- 3) Regulated under international law; and
- 4) Generate rights and obligations for ASEAN as an entity different from its member countries.

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<sup>9</sup> Zainuddin Djafar, Piagam ASEAN, Legalitas Tonggak Baru Menuju Integrasi Regional?, "Jurnal Hukum Internasional (Indonesian Journal of International Law), Vol. 6, No. 2, Januari 2009, hlm.197-198

<sup>10</sup> Yustisia. KEWENANGAN HUKUM ASEAN DALAM MEMBUAT PERJANJIAN INTERNASIONAL DENGAN PIHAK EKSTERNAL BERDASARKAN PIAGAM ASEAN Vol. 4 No. 3 September – Desember 2015, hlm. 726.

<sup>11</sup> National University of Singapore Centre for International Law, "Document Database: 2007 Charter of the Association of Southeast Asian Nations signed on 20 November 2007 in Singapore by the Heads of State/Government, hlm 67

<sup>12</sup> Association of Southeast Asian Nations, Rules of Procedure for Conclusion of International Agreement by ASEAN, (Bali, 16 November 2011), Rule 2.

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ROP only applies to treaties made by ASEAN as entities and not treaties made by ASEAN member countries collectively. Agreements made by ASEAN member countries collectively are not bound by this ROP, but the procedures are determined by the agreement of ASEAN member countries in a casuistic manner. The agreements that are bound to the ROP are agreements made by ASEAN as an intergovernmental organization after the adoption of this agreement in November 2011.

### **3. Treaties of Privileges and Immunities of ASEAN**

The Treaty on the Privileges and Immunities of ASEAN applies to the personality of ASEAN law as stated in the ASEAN Charter Chapter VI Article 17 paragraph 1 stating "ASEAN has immunity - the privileges and privileges in the territory of the Member States as necessary to achieve the objectives of ASEAN. the goal. In paragraph 2 it is stated that; "Immunities and privileges shall be governed by separate agreements between ASEAN and the host Member State".<sup>13</sup> The agreement establishes the exercise of the legal personality in domestic transactions represented by the Secretary-General, Deputy Secretary-General or other ASEAN Secretariat officials authorized by the Secretary-General. Moreover, since it is not a sovereign entity, so that ASEAN has no immunity, there is a need to determine its immunities and boundaries, such as the privileges and immunities of those who carry out the duties of ASEAN.

In this respect it has long been granted certain rights that are applied fairly well on their diplomatic privileges and immunities. Generally, the rights granted include such rights as the inviolability of missions from the entry of representatives or persons of the recipient country except with the approval of the head of the mission, the exemption from certain taxes of the recipient country, obtaining immunity from prosecution and immunity to enjoy full diplomatic status including diplomatic families as well as more limited immunity for members of administrative and technical mission staff. Privileged

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<sup>13</sup> Eddy Pratomo. 2009. "Prospek dan Tantangan Hukum Internasional di ASEAN dan Indonesia Pasca Piagam ASEAN dari Sisi Perjanjian Internasional", Yogyakarta: Fakultas Hukum Universitas Islam Indonesia, Jurnal Hukum UII, Volume 16 Nomor 1 Edisi Januari 2009, hlm 28



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rights are governed by the Vienna Convention of 1961 on Diplomatic Relations.<sup>14</sup>

The presence of international organizations as an international person and attribution to their functions is often analogous to the sovereignty of states which for their effective implementation require the concessions of the privileges and immunities of states. Has led to the efforts of forming a series of laws pertaining to the privileges and immunities of international organizations, places of domicile of such international organizations.<sup>15</sup>

ASEAN with the ASEAN Charter being a full international organization, there are clear rules on ASEAN. Among them are the privileges and immunities for Permanent Representatives and diplomatic agents in the ASEAN Secretariat. Privileges and immunities for secretariat and building or residence officials have been arranged through the host country's agreement between ASEAN and the Indonesian government.<sup>16</sup>

## D. Conclusions

The ASEAN Charter is the legal and institutional framework that binds all ASEAN member countries, and makes ASEAN an organization of legal status. As a legal personality, ASEAN moves and makes agreements on its behalf and may also prosecute and be prosecuted legally. The entry into force of the ASEAN Charter is intended to encourage ASEAN's transformation of a loose organization into an organization with a strong legal foundation. Simon Chestermen argues that ASEAN as an international organization obtains its legal personality based on "Will Theory. Will theory is a theory that states that the legal personality of an international organization is based on the will of its founders.

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<sup>14</sup> Frederic L Kigris, Jr, *International Organizations and Their Documents*, Comments and question, (Minnesota : West Publishing Company, 1977), hlm. 49.

<sup>15</sup> Bowett, D. W, *The Law of International Institution*, (London : Steven & Sons, 1982)

<sup>16</sup> Sumaryo Suryokusumo, *Studi Kasus Hukum Organisasi Internasional*, (Bandung: PT. Alumni, 1997)

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The Treaty on the Privileges and Immunities of ASEAN applies to the personality of ASEAN law as stated in the ASEAN Charter Chapter VI Article 17 paragraph 1 stating "ASEAN has immunity - the privileges and privileges in the territory of the Member States as necessary to achieve the objectives of ASEAN goal

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