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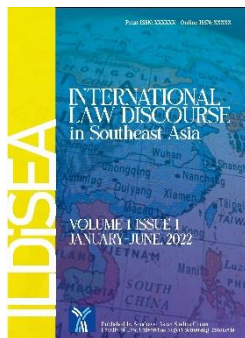
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# Legal Personality ASEAN as the Subject of International Law: Contemporary Developments

**Dhezya Pandu Satesna\***

*Research Fellow at Southeast Asian Studies Center*

*Universitas Negeri Semarang, Indonesia*



**ABSTRACT:** The Organization of Southeast Asian Nations (ASEAN) has unique characteristics, apart from the legal systems in Southeast Asian countries that are different from one another, but also have different historical aspects. If ASEAN is compared to the European Union, which has the same legal vision, characteristics of society, and even a uniform financial system, ASEAN does not yet have this uniformity. This study aims to identify the legal personality for ASEAN as a subject of international law. This study looks at various theories and concepts regarding international organizations as subjects of international law. This study confirms that the basis for ASEAN legal personality as a subject of international law can be seen in the ASEAN Charter, however, this form of legal personality is still limited.

**KEYWORDS:** ASEAN, Legal Personality, International Law, Subject of International Law

\* Corresponding author's email: [dhezypandusatresba@gmail.com](mailto:dhezypandusatresba@gmail.com)

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## I. 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>

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<sup>1</sup> Sumaryo Suryokusumo, *Hukum Organisasi Internasional*. (Jakarta: Penerbit Universitas Indonesia, 1990), p. 4. In the further context, international organization recognized as an organization created by members of the international community voluntarily or on the basis of equality which aims to create world peace in the international relations system. In essence, international organizations have broad and narrow meanings. Broadly speaking, international organizations include public international organizations, private international organizations, regional organizations, subregional organizations, and organizations of universal character. Narrowly includes only public international organizations. According to Clive Archer, an international organization is a formal structure established based on the mutual consent of every member of government and non-government from various sovereign countries, which has the vision of reaching a mutual agreement, and creating peace and security in a prosperous world. International organizations to achieve their vision need to implement their functions correctly and also neatly so that they do not conflict with what has been mutually agreed upon. *Please also see Clive Archer, International Organizations*. (London: Routledge, 2014); Robert S. Jordan, et al. *International*

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

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*Organizations: A Comparative Approach to the Management of Cooperation.* (Connecticut: Greenwood Publishing Group, 2001); Mark Copelovitch, and Jon CW Pevehouse. "International organizations in a new era of populist nationalism." *The Review of International Organizations* 14, No. 2 (2019): 169-186; Julia Gray, "Life, death, or zombie? The vitality of international organizations." *International Studies Quarterly* 62, No. 1 (2018): 1-13.

<sup>2</sup> Bambang Cipto, *Hubungan Internasional di Asia Tenggara, Teropong terhadap Dinamika, Realitas, dan Masa Depan.* (Yogyakarta: Pustaka Pelajar, 2007), pp. 23-24. See also Shaun Narine, "Forty Years of ASEAN: A Historical Review." *The Pacific Review* 21, No. 4 (2008): 411-429; Filomeno Aguilar Jr., "Towards Community Formation in Southeast Asia?: History Education, ASEAN and the Nation-State." *Sojourn: Journal of Social Issues in Southeast Asia* 32, No. 1 (2017): 137-169; Mohamad Faisol Keling, et al. "The Development of ASEAN from Historical Approach." *Asian Social Science* 7, No. 7 (2011): 169-189.

<sup>3</sup> Setyo Widagdo, *Masalah-Masalah Hukum Internasional Publik.* (Malang: Bayumedia, 2008), pp. 178-179; Roland Portmann, *Legal Personality in International Law.* (Cambridge: Cambridge University Press, 2010); Clarence Wilfred Jenks, "The Legal Personality of International Organizations" in *International Legal Personality.* (London: Routledge, 2017), pp. 229-238; N. I. Nicolae Purdă, "Aspects of International Legal Personality of International Organizations." *Challenges of the Knowledge Society. Legal Sciences* 2 (2012): 891-900.

of the legal personality has 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, e.g., the UN. While the so-called closed is an organization whose membership is based on the region, e.g., ASEAN. So that in ASEAN membership is exclusively only for countries in the region of Southeast Asia.<sup>4</sup>

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<sup>4</sup> Pranoto Iskandar, *Hukum HAM Internasional: Sebuah Pengantar Kontekstual*. (Cianjur: IMR Press, 2012), pp. 299-300. The current situation of ASEAN is growing and is considered in the international arena as one of the influential international organizations. ASEAN as a regional organization actually has the authority to resolve disputes in its own way (local dispute settlement) as stated in Article 52 of the United Nations Charter. This authority can be seen in the Agreement on Friendship and Cooperation in Southeast Asia (Treaty Amity and Cooperation Asia – TAC 1976) which was ratified in the Bali Concord I. The essence of TAC is the use of peaceful means in resolving intraregional disputes (peaceful settlement of disputes), which are the basic principles to guide regional peacekeeping arrangements. *Please also see* Wang Jiangyu, "The International Legal Personality of ASEAN and the Legal Nature of the China-ASEAN FTA", in *China-ASEAN Relations: Economic and Legal Dimensions*. (Singapore: World Scientific Publishing Co. Pte. Ltd., 2006), pp. 111-131; Simon Chesterman, "Does ASEAN Exist? The Association of Southeast Asian Nations as an International Legal Person." *Singapore Yearbook of International Law* 12 (2008): 199-211; Rosario G. Manalo, and Walter CM Woon. *The Making of the ASEAN Charter*. (Singapore: World Scientific, 2009).

## II. METHODS

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.

## III. THE ROLE OF 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 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

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<sup>5</sup> Daniel Seah, "The Asean Charter." *International & Comparative Law Quarterly* 58, No. 1 (2009): 197-212; Walter Woon, *The ASEAN Charter: A Commentary*. (Singapore: NUS Press, 2015); Rodolfo Severino, *Framing the ASEAN Charter*. (Singapore: ISEAS Publishing, 2005).

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>

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<sup>6</sup> Liona Nanang Supriatna, "Piagam ASEAN: Menuju Pemajuan dan Perlindungan HAM di Asia Tenggara", *Indonesian Journal of International Law* 5, No. 3 (2008): 557-558; John Arendshorst, "The Dilemma of Non-Interference: Myanmar, Human Rights, and the ASEAN Charter." *Northwestern Journal of Human Rights* 8, No. 1 (2009): 102-121; David Martin Jones, "Security and Democracy: The ASEAN Charter and The Dilemmas of Regionalism in South-East Asia." *International Affairs* 84, No. 4 (2008): 735-756.

<sup>7</sup> R. Winantyo et.al., *Masyarakat Ekonomi ASEAN (MEA) 2015: Memperkuat Sinergi ASEAN di Tengah Kompetisi Global*. (Jakarta: PT. Elex Media Komputindo, 2008), pp. 14-15.

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 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 Southeast 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

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<sup>8</sup> Dewa Gede Sudika Mangku, "Peluang dan Tantangan ASEAN dalam Penyelesaian Sengketa Kul Preah Vihear di Perbatasan Kamboja dan Thailand". *Pandecta Research Law Journal* 6, No. 2 (2011): 107-108.

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: *first*, Maintain and promote peace, security and stability and further strengthen the peace-oriented values in the region; *second*, Increasing regional resilience by promoting broader political, security, economic and socio-cultural cooperation; and *third* 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.
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.
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

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

parties. ASEAN on various occasions has signed a Memorandum of Understanding with other parties.<sup>10</sup>

#### **IV. 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>10</sup> Natalia Yeti Puspita, "Kewenangan Hukum ASEAN dalam Membuat Perjanjian Internasional dengan Pihak Eksternal Berdasarkan Piagam ASEAN." *Yustisia Jurnal Hukum* 4, No. 3 (2015): 719-745.

<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*.

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

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.

Furtermore, concerning treaties made by ASEAN, it is also emphasized that 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 stated that ASEAN has immunity - the privileges and privileges in the territory of the Member States as necessary to achieve the objectives of ASEAN. 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

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<sup>13</sup> Eddy Pratomo, "Prospek dan Tantangan Hukum Internasional di ASEAN dan Indonesia Pasca Piagam ASEAN dari Sisi Perjanjian Internasional." *Jurnal Hukum Ius Quia Iustum* 16, No. 1 (2009): 60-72.

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 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>

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<sup>14</sup> Frederic L Kigris Jr., *International Organizations and Their Documents, Comments and Questions* (Minnesota: West Publishing Company, 1977), pp. 49-50.

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

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

## V. CONCLUSION

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. 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. 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. . ROP regulates the process of making international agreements by ASEAN comprehensively, even to the full powers of the letter.

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None.

## COMPETING INTERESTS

The Authors declared that they have no competing interests.

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