

Does ASEAN Exist?

The Association of Southeast Asian Nations as an International Legal Person*

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The ASEAN Charter, adopted in Singapore in November 2007, asserts in Article 3 that ASEAN “as an inter-governmental organisation, is hereby conferred legal personality”. This paper examines the legal status of the association, as well as the political question of whether the whole is greater than (or perhaps less than) the sum of its parts. The argument presented is that legal personality at the international level is less a status than it is a capacity: the fact that ASEAN now claims international legal personality in the Charter does not mean it lacked it previously, nor that it will possess it after the Charter is ratified. Rather, the key question is what specific powers have been granted to ASEAN and how those powers are used. On these questions, the Charter is largely silent.

In January 1991, less than two weeks before the commencement of hostilities to drive Iraq from occupied Kuwait, the French poststructuralist philosopher Jean Baudrillard published an article in *Libération* entitled “The Gulf War Will Not Take Place”. He argued that this war would never happen in a meaningful sense of the word, because technology had transformed perceptions of conflict to the point where all that was left was the simulacrum of war. As the bombs were falling and troops were moving, he produced a follow-up piece: “The Gulf War Is Not Taking Place”. After Iraq had been driven from Kuwait and tens of thousands had died, he returned to the opinion pages with “The Gulf War Did Not Take Place”. The three essays are now conveniently published together in a volume by Polity Press entitled *The Gulf War Never Happened*.¹

Is it not a similar conceit to question the existence of ASEAN? Without doubt the Association of Southeast Asian Nations represents an important slice of the world. It encompasses a population of around half a billion, with a combined GDP in the order of a trillion U.S. dollars. From the five countries that signed the Bangkok Declaration in 1967,² it has added Brunei in 1984, and Vietnam, Laos, Myanmar, and Cambodia between 1995 and 1999.

But the key questions I would like to raise today are, first, what exactly *is* ASEAN in international legal terms? Secondly, I hope to consider whether in political

¹ Jean Baudrillard, *The Gulf War Never Happened* (Oxford: Polity Press, 1995).

² The ASEAN Declaration (Bangkok Declaration), Indonesia--Malaysia-Philippines-Singapore-Thailand, done at Bangkok, 8 August 1967, available at <<http://www.aseansec.org/1212.htm>>.

terms ASEAN is greater than the sum of its parts: in other words, whether ASEAN as an entity offers something more than the ten separate nation-states that constitute it. We can think of these questions as, first, does ASEAN exist? And, secondly, does ASEAN matter?

I. Does ASEAN Exist?

What *is* ASEAN? In particular, what is its legal status? Clearly it is more than just a “group of friends”, ten states that share some limited set of interests and goals;³ but clearly it is also less than the United Nations, an international organization that asserts the power to impose binding obligations on all states.⁴ It is more than an annual meeting of foreign ministers hoping to promote economic growth, but less than the World Trade Organization. Of the world’s significant regional organizations, the powers ceded by members to the centre are less than within the European Union (EU), the African Union (AU), or the Organization of American States (OAS). Yet within Asia, it is perhaps the most important regional organization, with a wider mandate than the Asia-Pacific Economic Cooperation forum (APEC) and deeper commitments than the Shanghai Cooperation Organization (SCO).

Speaking in 1998, in the wake of an economic crisis that shocked the region’s “tigers” and “dragons”, the Secretary-General of ASEAN, Rodolfo Severino, gave a speech in which he emphasized that ASEAN “is not and was not meant to be a supranational entity acting independently of its members. It has no regional parliament or council of ministers with law-making powers, no power of enforcement, no judicial system.”⁵ He later reaffirmed more bluntly that ASEAN lacks “juridical personality or legal standing under international law.”⁶ This was consistent with the view

³ Teresa Whitfield, *Friends Indeed? The United Nations, Groups of Friends, and the Resolution of Conflict* (Washington, DC: United States Institute of Peace Press, 2007).

⁴ UN Charter, esp. chapter VII.

⁵ Rodolfo Severino, “Asia Policy Lecture : What ASEAN Is and What It Stands For” (The Research Institute for Asia and the Pacific, University of Sydney, Australia, 22 October 1998), available at <<http://www.aseansec.org/3399.htm>>.

⁶ Rodolfo Severino, “Introduction”, in Rodolfo Severino (ed.), *Framing the ASEAN Charter: An ISEAS Perspective* (Singapore: ISEAS Publications, 2005), p. 6. In the same volume, Locknie Hsu adopted a more nuanced position that ASEAN’s legal personality needed “clarification”: Locknie Hsu, “Towards

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that ASEAN was intended to be a kind of social community, rather than a legal community.⁷

A decade later ASEAN has a Charter stating that “ASEAN, as an inter-governmental organisation, is hereby conferred legal personality.”⁸ As of March 2008, six of the ten members had ratified the Charter, which will come into effect thirty days after the tenth instrument of ratification has been deposited with the ASEAN Secretary-General.⁹

Country	Ratification	Deposited ¹⁰
Singapore	Tuesday, 2007 December 18	Monday, 2008 January 07
Brunei Darussalam	Thursday, 2008 January 31	Friday, 2008 February 15
Malaysia	Thursday, 2008 February 14	Wednesday, 2008 February 20
Lao PDR	Thursday, 2008 February 14	Wednesday, 2008 February 20
Cambodia	Tuesday, 2008 February 25	?
VietNam	Tuesday, 2008 March 06	Friday, 2008 March 14

Does this mean that ASEAN presently has no international legal personality? And that after the entry into force of the Charter will miraculously pop into existence? The answer to both questions is a qualified “no”: the lack of such a provision doesn’t mean that ASEAN lacks international legal personality; the presence of one doesn’t mean that it possesses it in a meaningful sense. This section will briefly outline the basis of a test for international legal personality before applying it to ASEAN.

an ASEAN Charter: Some Thoughts from the Legal Perspective”, in Rodolfo Severino (ed.), *Framing the ASEAN Charter: An ISEAS Perspective* (Singapore: ISEAS Publications, 2005). Cf. Seiji Naya, et al., *ASEAN Economic Cooperation for the 1990s: A Report Prepared for the ASEAN Standing Committee* (Manila: Philippine Institute for Development Studies, 1992), p. 112 (concluding that ASEAN has a “nascent international legal personality”); JiangYu Wang, “International Legal Personality of ASEAN and the Legal Nature of the China-ASEAN Free Trade Agreement”, in John Wong, ZOU Keyuan, and ZENG Huaqun (eds.), *China-ASEAN Relations: Economic and Legal Dimensions* (Singapore: World Scientific, 2006), p. 126 (ASEAN has “selective personality”).

⁷ Paul Davidson, *ASEAN: The Evolving Legal Framework for Economic Cooperation* (Singapore: Times Academic Press, 2002), p. 29.

⁸ Charter of the Association of Southeast Asian Nations (ASEAN Charter), done at Singapore, 20 November 2007, in force [not yet in force], available at <<http://www.aseansec.org/AC.htm>>, art. 3.

⁹ *Ibid.*, art. 47(4).

¹⁰ <http://www.aseansec.org/AC-update.pdf>

A. International Legal Personality

In every legal system, certain entities are regarded as possessing rights and duties enforceable at law. The recognition of those entities as “legal persons” is itself determined by law, a tautology that is reinforced in international law by the centrality of states not merely to the form but also to the substance of its norms.¹¹ The practice and consent of states remains axiomatic to the concept of international law, and through the protection of territorial integrity and sovereign immunity states are its primary beneficiaries.¹² This is replicated in the institutions of international order: Only states are recognized as members of the United Nations; only states may bring contentious claims before the International Court of Justice.¹³ (This is distinct from the question of whether an entity’s legal personality is recognized in the *domestic* law of a given state,¹⁴ a point frequently confused in the literature¹⁵ and, occasionally, in treaties.¹⁶)

Nevertheless international organizations, most prominently the United Nations itself, and some other entities¹⁷ have been recognized as having international legal personality. The issue came before the International Court of Justice soon after the

¹¹ Ian Brownlie, *Principles of Public International Law*, 5th ed. (Oxford: Clarendon Press, 1998), p. 57. See generally Janne Elisabeth Nijman, *The Concept of International Legal Personality: An Inquiry into the History and Theory of International Law* (The Hague: T.M.C. Asser Press, 2004).

¹² See, e.g., U.N. Charter art. 2, paras. 4, 7.

¹³ Statute of the International Court of Justice, art. 34(1). Cf. *Mavrommatis Palestine Concessions* (Greece v. United Kingdom), 1924 P.C.I.J. (ser. A) No. 2, at 10, 12 (Aug. 30) (allowing the Greek government to sue on behalf of a Greek national).

¹⁴ Thus the UN Charter, art. 104 provides that “The Organization shall enjoy in the territory of each of its Members such legal capacity as may be necessary for the exercise of its functions and the fulfilment of its purposes.” This does not answer the question of the *international* legal personality of the United Nations.

¹⁵ See, eg, Konstantinos D. Magliverasa and Gino J. Naldia, “The African Union — A New Dawn for Africa?” *International and Comparative Law Quarterly*, vol. 51 (2002) (suggesting that the OAU’s *international* legal personality could be inferred from a provision comparable to UN Charter, art. 104).

¹⁶ See, eg, International Agreement on Olive Oil and Table Olives, done at Geneva, 29 April 2005, available at <<http://www.internationaloliveoil.org/downloads/Convenio03eng.pdf>>, art. 5(1) (“The International Olive Council shall have international legal personality. It shall, in particular, have the capacity to contract, to acquire and dispose of movable and immovable property and to institute legal proceedings. It shall not have the power to borrow money.”)

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creation of the United Nations, after Count Bernadotte, a Swedish national and chief UN truce negotiator in the Middle East, had been killed in Jerusalem. The question was whether the United Nations had the capacity to bring an action in its own right against Israel with respect to his death.¹⁸ The Court held that the United Nations did indeed have a measure of legal personality, derived from the consent of the states that established it:

the Organization was intended to exercise and enjoy, and is in fact exercising and enjoying, functions and rights which can only be explained on the basis of the possession of a large measure of international personality and the capacity to operate upon an international plane. It is at present the supreme type of international organization, and it could not carry out the intentions of its founders if it was devoid of international personality. It must be acknowledged that its Members, by entrusting certain functions to it, with the attendant duties and responsibilities, have clothed it with the competence required to enable those functions to be effectively discharged.¹⁹

A complication, however, was that Israel was not yet among those members.²⁰ The Court went on to hold, nonetheless, that “fifty States, representing the vast majority of the members of the international community, had the power, in conformity with international law, to bring into being an entity possessing *objective* international personality, and not merely personality recognized by them alone.”²¹

Six decades later international legal scholars are still arguing about the two theories that can be derived from this advisory opinion.

1. Will Theory

The “will theory” is probably more popular and corresponds to the first leg of the Court’s opinion. If the founders of an international organization intend to endow their creation with personality then that is what it will receive. This theory is supported by

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¹⁹ *Reparation for Injuries Suffered in the Service of the United Nations (Advisory Opinion)* (1949) ICJ Rep 174, 179.

²⁰ Israel joined the United Nations in May 1949, a month after the Court issued its advisory opinion.

²¹ *Reparation case*, 185 (emphasis added).

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the understanding of international law as being based on the freely expressed consent of states.

In the case of the United Nations legal personality was not explicitly asserted, but today it frequently is. Many international organizations assert international legal personality in their constitutive documents, for example the International Seabed Authority,²² the International Criminal Court,²³ and the International Olive Oil Council.²⁴ The Shanghai Cooperation Organization provides in its Charter that, “[a]s a subject of international law, SCO shall have international legal capacity. ... SCO shall

²² United Nations Convention on the Law of the Sea (UNCLOS), done at Montego Bay, 10 December 1982, in force 16 November 1994, available at <<http://www.un.org/Depts/los>>, art. 176 (“The Authority shall have international legal personality and such legal capacity as may be necessary for the exercise of its functions and the fulfilment of its purposes.”).

²³ Statute of the International Criminal Court (Rome Statute), UN Doc A/Conf.183/9 (17 July 1998), available at <http://www.icc-cpi.int/library/about/officialjournal/Rome_Statute_120704-EN.pdf>, art. 4 (“The Court shall have international legal personality.”).

²⁴ International Agreement on Olive Oil and Table Olives, art. 5(1), quoted above n 16. (“The International Olive Council shall have international legal personality. It shall, in particular, have the capacity to contract, to acquire and dispose of movable and immovable property and to institute legal proceedings. It shall not have the power to borrow money.”) Other examples include:

- the Western Indian Ocean Tuna Organisation: Convention on the Western Indian Ocean Tuna Organisation, done at Mahe, Seychelles, 19 June 1991, available at <http://www.fao.org/fi/body/rfb/WIOTO/wioto_convention_text.doc>, art. 8(1) (“The Organisation shall have international legal personality and such legal capacity as may be necessary for the exercise of its functions and the fulfilment of its purposes, in particular the capacity to conclude agreements at the international level to contract, to acquire and dispose of moveable and immoveable property and to sue and to be sued in accordance with its legal and diplomatic status.”);
- the Caribbean Disaster Emergency Response Agency: Agreement Establishing the Caribbean Disaster Emergency Response Agency, September 1991, available at <http://www.cdera.org/about_cdera_agreement.php>, art. 26(1) (“The Agency shall have international legal personality and such legal capacity as may be necessary for the exercise of its functions and the fulfilment of its objectives.”);
- the International Sugar Organization: International Sugar Agreement, done at Geneva, 20 March 1992, available at <<http://www.isosugar.org/home/agreements/agreementenglish.htm>>, art. 6(1) (“The Organization shall have international legal personality.”);
- the Commission for the Conservation and Management of Highly Migratory Fish Stocks in the Western and Central Pacific Ocean: Convention on the Conservation and Management of Highly Migratory Fish Stocks in the Western and Central Pacific Ocean, done at Honolulu, 5 September 2000, in force 19 June 2004, available at <<http://www.wcpfc.int>>, art. 9(6) (“The Commission shall have international legal personality and such legal capacity as may be necessary to perform its functions and achieve its objectives.”).

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enjoy the rights of a legal person and may in particular: conclude treaties; acquire movable and immovable property and dispose of it; appear in court as litigant; open accounts and have monetary transactions made.”²⁵ When its Charter enters in to force, ASEAN will join such bodies.

Interestingly, some of the major regional organizations are not among this group. The European Union’s failed constitution would have provided clearly that it enjoys legal personality. In its absence, the European Community certainly does have legal personality, but the EU itself is more ambiguous, having limited powers to enter into treaties only.²⁶ This will change if the Treaty of Lisbon is ratified, which will add to the Treaty on European Union a provision that “The Union shall have legal personality.”²⁷ The Constitutive Act of the African Union does not provide explicitly for its legal personality, possibly on the assumption that it would inherit that of the Organization of African Unity.²⁸ The Organization of American States does not provide for its own legal personality.²⁹

As indicated in the *Reparation* case, however, the failure specifically to outline the intention to create legal personality can be remedied if such an intention can be inferred.

²⁵ Charter of Shanghai Cooperation Organisation, China-Kazakhstan-Kyrgyzstan-Russian Federation-Tajikistan-Uzbekistan done at St. Petersburg, 7 June 2002, available at <http://www.sectesco.org/news_detail.asp?id=96&LanguageID=2>, art. 15.

²⁶ Philippe Gautier, “The Reparation for Injuries Case Revisited: The Personality of the European Union”, *Max Planck Yearbook of United Nations Law*, vol. 2000 (2000); Rafael Leal-Arcas, “EU Legal Personality in Foreign Policy?” *Boston University International Law Journal*, vol. 24 (2006).

Cf. UK House of Commons Library Research Paper (p. 72): “This means that only the Community, represented by the Commission, currently has rights and obligations under international law. The Commission negotiates international agreements, such as trade and commercial agreements, on behalf of the Community with the authorisation of the Council. Member States decide the negotiating mandate by unanimity or QMV, depending on the policy area in question, and approve any final agreement on the same basis. The EU has no express legal personality at present, but Articles 24 and 38 TEU provide a treaty negotiation procedure on the basis of which treaties have been signed in the name of the EU.”

²⁷ Treaty of Lisbon Amending the Treaty on European Union and the Treaty Establishing the European Community, done at Lisbon, 13 December 2007, in force [not yet in force], available at <http://europa.eu/lisbon_treaty>, art. 1(55) (inserting new art. 46A into the Treaty on European Union).

²⁸ Magliverasa and Naldia, “The African Union — A New Dawn for Africa?”.

²⁹ Charter of the Organization of American States, done at Bogotá, 30 April 1948, in force 13 December 1951, available at <<http://www.oas.org/juridico/english/charter.html>>.

2. *Objective theory*

An alternative theory about international legal personality of international organizations goes one step further and suggests that legal personality can be deduced not from the will of the founders but from the possession of certain attributes by the body itself.³⁰ This is closer to the manner in which states come into being, with recognition of, say, Kosovo, being regarded as being consequent to rather than constitutive of its existence.³¹ This makes sense in the context of states coming into being — there is, in fact, a treaty definition of what a state is³² — but it is less clear when an international organization reaches “organizationhood”.³³

The ILC has not dealt directly with the question of what international organizations enjoy international legal personality; instead its draft articles on the responsibility of international organizations simply assume that international responsibility only applies to organizations “established by a treaty or other instrument governed by international law and possessing its own international legal personality”.³⁴ Similarly, the Vienna Convention on the Law of Treaties Between States and International Organizations or Between International Organizations notes in the preamble “that international organizations possess the capacity to conclude treaties, which is necessary for the exercise of their functions and the fulfilment of their purposes”.³⁵ Both reproduce the essentially circular logic from the *Reparation* case: personality can be deduced from the powers given to an international

³⁰ See, eg, Rosalyn Higgins, *Problems and Process: International Law and How We Use It* (Oxford: Clarendon Press, 1994), p. 48.

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³³ See generally Jan Klabbers, *An Introduction to International Institutional Law* (Cambridge: Cambridge University Press, 2002), pp. 42-59; Philippe Sands and Pierre Klein, *Bowett's Law of International Institutions*, 5th ed. (London: Sweet & Maxwell, 2001), pp. 469-531.

³⁴ International Law Commission, Draft Articles on Responsibility of International Organizations provisionally adopted by the International Law Commission at its fifty-eighth session, UN Doc A/58/10 (2003), available at <<http://www.un.org/law/ilc>>, 38-45. International organizations, as understood by the ILC, “may include as members, in addition to States, other entities.”

³⁵ Vienna Convention on the Law of Treaties Between States and International Organizations or Between International Organizations (VCLTIO), done at Vienna, 21 March 1986, in force [not yet in force], available at <http://untreaty.un.org/ilc/texts/instruments/english/conventions/1_2_1986.pdf>, preamble. Cf. art. 6: “The capacity of an international organization to conclude treaties is governed by the rules of that organization.”

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organization, with the extent of certain powers being deduced in turn from the fact of personality.

A final consideration in this abstract consideration of international legal personality is that it is not plenary — in other words even if international legal personality is found to exist that does not conclude the inquiry of what powers such an entity may in fact exercise. In the *Reparation* case, the ICJ noted that

the Court has come to the conclusion that the Organization is an international person. That is not the same thing as saying that it is a State, which it certainly is not, or that its legal personality and rights and duties are the same as those of a State. Still less is it the same thing as saying that it is “a super-State,” whatever that expression may mean. ... Whereas a State possesses the totality of international rights and duties recognized by international law, the rights and duties of an entity such as the Organization must depend upon its purposes and functions as specified or implied in its constituent documents and developed in practice.³⁶

B. ASEAN's Personality

Summarizing the majority views on international legal personality, Ian Brownlie has developed a three-part test. To enjoy personality an organization must possess the following three attributes:

1. a permanent association of states, with lawful objects, equipped with organs;
2. a distinction, in terms of legal powers and purposes, between the organization and its member states;
3. the existence of legal powers exercisable on the international plane and not solely within the national systems of one or more states.³⁷

Applying Brownlie's test, does ASEAN have personality?

³⁶ *Reparation case.*

³⁷ Brownlie, *Principles*, pp. 679-680.

1. *Permanent Association*

The first leg is easily satisfied: ASEAN is certainly a permanent association of states, with lawful objects, equipped with at least rudimentary organs from the outset, growing into a Secretariat over time.³⁸

2. *Distinction Between Organization and Members*

Is there, secondly, a distinction, in terms of legal powers and purposes, between the organization and its member states? Traditionally within ASEAN the answer would have been no. ASEAN's foundational document, the Bangkok Declaration, essentially stated some shared goals and announced an annual meeting of foreign ministers.³⁹

As Tommy Koh and others have argued, the purpose of the Charter is to make ASEAN a more rules-based organization: "The 'ASEAN Way' of relying on networking, consultation, mutual accommodation and consensus will not be done away with. It will be supplemented by a new culture of adherence to rules."⁴⁰ This question of whether the ASEAN Way, epitomized by *musjawarah* (consultation) and *mufakat* (consensus),⁴¹ is compatible with a rules-based organization will be a key challenge to the organization in years to come.⁴² In specific areas, however, there has already been some movement.

In the economic sphere, for example, one might argue ASEAN has a competence distinct from its members. The Framework Agreement for Enhancing ASEAN Economic Cooperation, for example, has provided the basis for agreements

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³⁹ Bangkok Declaration.

⁴⁰ Tommy Koh, Walter Woon, and CHAN Sze-Wei, "Charter Makes ASEAN Stronger, More United and Effective", *Straits Times* (Singapore), 8 August 2007.

⁴¹ See Zakirul Hafez, *The Dimensions of Regional Trade Integration in Southeast Asia* (Ardsey, NY: Transnational Publishers, 2004), pp. 119-123.

⁴² Cf. KOH Kheng-Lian and Nicholas Robinson, "Strengthening Sustainable Development in Regional Inter-Governmental Governance: Lessons from the ASEAN Way", *Singapore Journal of International & Comparative Law*, vol. 6 (2002).

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on trade liberalization, industrial cooperation, and foreign direct investment.⁴³ The possibility of majority voting was considered in the 1996 Protocol on Dispute Settlement Mechanism for ASEAN economic agreements.⁴⁴ This was never implemented, and was superseded in 2004 by another protocol that reaffirmed decision-making by consensus.⁴⁵

A second area in which there has been interesting developments is on nuclear weapons. This is marginal to the day-to-day operations of ASEAN, but the adoption of the Southeast Asia Nuclear-Weapon-Free Zone Treaty in 1995 was unusual for two reasons.⁴⁶ This is the treaty that established SEANWFZ (pronounced “see-yan-fez”⁴⁷ or “shaun-fizz”⁴⁸). First, the treaty required only seven ratifications from the ten states parties to enter into force.⁴⁹ The treaty would not bind states who had not ratified, but this led to the Philippines sitting in on SEANWFZ meetings as an observer from 1997 until it became a party in June 2001.⁵⁰ Secondly, the Commission that was established by the treaty provided for decisions to be made by two-thirds majority in cases where consensus could not be reached.⁵¹ The provision has never been implemented and it is unlikely that any matter will be put to a vote.

Other agreements, such as the ASEAN Agreement on Transboundary Haze Pollution, have repeated the limited ratification requirement (in that case lowering it

⁴³ See Paul Davidson, “The ASEAN Way and Role of Law in ASEAN Economic Cooperation”, *Singapore Year Book of International Law*, vol. 8 (2004), pp. 158-161.

⁴⁴ ASEAN Protocol on Dispute Settlement Mechanism, done at Manila, 20 November 1996, in force 26 May 1998, available at <<http://www.aseansec.org/16654.htm>>.

⁴⁵ ASEAN Protocol on Enhanced Dispute Settlement Mechanism, done at Vientiane, 29 November 2004, in force 29 November 2004, available at <<http://www.aseansec.org/16754.htm>>; Rodolfo Severino, *Southeast Asia in Search of an ASEAN Community: Insights from the Former ASEAN Secretary-General* (Singapore: ISEAS Publications, 2006), p. 35; Joel Vander Kooi, “The ASEAN Enhanced Dispute Settlement Mechanism”, *New York International Law Review*, vol. 20 (2007).

⁴⁶ Southeast Asia Nuclear-Weapon-Free Zone Treaty (Bangkok Treaty), done at Bangkok, 15 December 1995, in force 28 March 1997, available at <<http://www.aseansec.org/2082.htm>>.

⁴⁷ Johnna Villaviray-Giolagon, “SEANWFZ”, *Manila Times*, 28 February 2007.

⁴⁸ Severino, *Southeast Asia*, p. 16.

⁴⁹ Bangkok Treaty, art. 16(1). At the time of signing Myanmar, Laos, and Cambodia had not yet joined ASEAN.

⁵⁰ Severino, *Southeast Asia*, p. 17.

⁵¹ Bangkok Treaty, art. 8(8).

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to six),⁵² but majority voting in other areas was rejected in the discussions on the ASEAN Charter. In so far as ASEAN continues to rely on consensus, where every member effectively has a veto, it begs the question of whether the collectivity genuinely has a separate personality from its members. Outside these two areas of economic cooperation and nuclear weapons there has been little indication of a willingness to grant any form of independence to the organization *qua* organization, with active resistance to such a development in the area of human rights.⁵³

3. *Powers*

Thirdly, does ASEAN possess legal powers exercisable on the international plane and not solely within the national systems of one or more of its states? ASEAN was finally granted observer status at the United Nations in December 2006,⁵⁴ though it was beaten to this milestone by the Asian-African Legal Consultative Organization in 1980,⁵⁵ the Asian Development Bank in 2002,⁵⁶ and the Shanghai Cooperation Organization and the South Asian Association for Regional Cooperation in 2004.⁵⁷

This means little. A more important test is whether the organization can create and accept legal obligations. The clearest example would be if the organization can enter into treaties in its own right.

The 1979 Agreement Between the Government of Indonesia and ASEAN Relating to the Privileges and Immunities of the ASEAN Secretariat was signed by

⁵² ASEAN Agreement on Transboundary Haze Pollution, done at Kuala Lumpur, 10 June 2002, in force 11 November 2003, available at <<http://www.aseansec.org/6086.htm>>, art 29(1). (Indonesia has yet to ratify the agreement.) See also Agreement on the Establishment of the ASEAN Centre for Biodiversity, done at Bangkok, 12 September 2005, available at <http://www.aseansec.org/acb_copy.pdf> (six ratifications required); Protocol 1 - Designation of Transit Transport Routes and Facilities and its Annex of List of Transit Transport Routes, done at Bangkok, 8 February 2007, available at <<http://www.aseansec.org/19734.htm>> (six ratifications required).

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⁵⁴ GA Res 61/44 (2006).

⁵⁵ GA Res 35/2 (1980).

⁵⁶ GA Res 57/30 (2002).

⁵⁷ GA Res 59/48 (2004); GA Res 59/53 (2004).

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the Secretary-General of ASEAN but related only to its status within Indonesia.⁵⁸ When outside Indonesia, ASEAN officials travel as nationals of their respective member states.⁵⁹ ASEAN has signed various memoranda of understanding such as the 2000 MOU with Australia on Haze,⁶⁰ a 2002 MOU with China on Agricultural Cooperation,⁶¹ and a 2003 MOU with China on Information Communications Technology,⁶² but on matters regarded as important or that bind the member states, the various members have signed and ratified in their individual capacities.⁶³

So what does this mean in terms of ASEAN's international legal personality? The first thing to note is that personality at the international level is not so much a status as a capacity. It matters less what you *claim* than what you *do*. And, importantly, at the international level there are degrees of legal personality. The UN Charter doesn't assert personality but there is no doubt today that the Organization possesses it. The ASEAN Charter asserts personality but ASEAN would appear to have a very limited form of international legal personality already. From the watered down provisions of the Charter, it is not clear that its ratification will radically alter that analysis of substance as opposed to form.

⁵⁸ Agreement Between the Government of Indonesia and ASEAN Relating to the Privileges and Immunities of the ASEAN Secretariat, done at Jakarta, 20 January 1979, in force 22 March 1979, available at <<http://www.aseansec.org/1268.htm>>.

⁵⁹ Naya, *ASEAN Economic Cooperation*, p. 112.

⁶⁰ Memorandum of Understanding (MOU) between the Association of South East Asian Nations (ASEAN) and the Commonwealth of Australia (on Haze), done at Jakarta, 28 January 2000, available at <<http://www.aseansec.org/670.htm>>.

⁶¹ Memorandum of Understanding Between the Association of Southeast Asian Nations (ASEAN) Secretariat and the Ministry of Agriculture of the People's Republic of China on Agricultural Cooperation, done at Phnom Penh, 2 November 2002, available at <<http://www.aseansec.org/13214.htm>>.

⁶² Memorandum of Understanding Between the Association of Southeast Asian Nations and the People's Republic of China on Cooperation in Information and Communications Technology, done at Bali, 8 October 2003, available at <<http://www.aseansec.org/15147.htm>>.

⁶³ See, eg, Framework Agreement on Comprehensive Economic Co-Operation Between ASEAN and the People's Republic of China, done at Phnom Penh, 5 November 2002, available at <<http://www.aseansec.org/13196.htm>>, referring to "the Heads of Government/State of Brunei Darussalam, the Kingdom of Cambodia, the Republic of Indonesia, [etc] ..., Member States of the Association of South East Asian Nations (collectively, 'ASEAN' or 'ASEAN Member States', or individually, 'ASEAN Member State')..."

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This was evident in the media release that accompanied the signing of the Charter. Noting that the Charter conferred on ASEAN international legal personality distinct from the member states, the release went on to note that “Details of what ASEAN can or cannot do with its legal personality will be discussed and stated in a supplementary protocol after the signing of the Charter.”⁶⁴ Those details will answer the question of whether ASEAN exists in a meaningful sense as an international legal person. By all indications, we will be waiting some time.

II. Does ASEAN Matter?

The question of international legal personality is, in many ways, a theoretical one. What, then, is the *practical* significance of ASEAN?

A. Is ASEAN More than the Sum of Its Parts? Or Less?

Is ASEAN more than the sum of its parts? When ASEAN began the answer would probably have been no. The Bangkok Declaration merely laid the basis for a regular meeting with a skeletal institutional structure. Whether it has grown beyond that depends on whom one is asking, with a fairly clear distinction between the views of ASEAN’s members and aspiring members, and those with whom it has external dealings.

1. Among ASEAN Members

For its members and those who wish to join it, the significance of ASEAN has changed over time. First, ASEAN has seen the gradual emergence of an identity, justified in large part as a means of linking economies but incidentally establishing regular lines of communication for cultural, political, and defence relations. Secondly, its embryonic institutions have grown into more regular contacts and a framework for more formal discussion of multilateral issues.

⁶⁴ Media Release: ASEAN Leaders Sign ASEAN Charter (ASEAN Secretariat, Singapore, 20 November 2007), available at <<http://www.aseansec.org/21085.htm>>.

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The Charter formalizes both these trends, more clearly articulating a shared vision for the region and strengthening some of the institutions. On the “vision”, it outlines broad if vague support for peace, stability, justice, democracy, and prosperity, with far more concrete purposes articulated in the economic sphere:

To create a single market and production base which is stable, prosperous, highly competitive and economically integrated with effective facilitation for trade and investment in which there is free flow of goods, services and investment; facilitated movement of business persons, professionals, talents and labour; and freer flow of capital.⁶⁵

On institutions, the Charter makes the ASEAN Summit biannual rather than annual, establishes the meeting of foreign ministers as a Coordinating Council, provides single chairs for high-level ASEAN bodies, calls for the appointment of permanent representatives, and creates three “community councils” in the areas of political and security, economic, and socio-cultural affairs — as well as an undefined “human rights body”.⁶⁶

At the same time, however, the Charter reaffirms consultation and consensus as a “basic principle”.⁶⁷ Where consensus cannot be achieved, the ASEAN Summit may decide on how a specific decision can be made.⁶⁸ And if there is a serious breach of the Charter or non-compliance, the matter will be referred to the ASEAN Summit for decision.⁶⁹

It remains unclear how much significant the Charter will have on what ASEAN does and how, but three interest things are worth highlighting as possible drivers of real change. The first is the opening up of a possible two-track (or perhaps multi-track) “ASEAN Minus X” formula for economic cooperation.⁷⁰ This could strengthen ASEAN by allowing deeper ties between some members, or it could destroy ASEAN by fragmentation.

⁶⁵ ASEAN Charter, art. 1(5).

⁶⁶ Ibid.

⁶⁷ Ibid., art. 20(1).

⁶⁸ Ibid., art. 20(2).

⁶⁹ Ibid., art. 20(4).

⁷⁰ Ibid., art. 21(2).

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The second is that ASEAN's Chairman and its Secretary-General of ASEAN can be requested to provide good offices, conciliation or mediation in a dispute.⁷¹ A useful comparison may be made with the Secretary-General of the United Nations. Initially conceived as more "secretary" than "general", the position is described in the UN Charter as the Organization's "chief administrative officer". This has grown over time as various incumbents have expanded the role to become a major diplomatic and political actor in its own right.⁷²

The third is the discussion about a human rights body. Though it is unlikely that anything like the European Court of Human Rights is coming soon, the discussion itself has been interesting. As Singapore's Foreign Minister George Yeo observed, there has been disagreement among the members on what form the human rights entity should take, driven in part by fears that Western countries and NGOs will use it to interfere in domestic politics. The end result of having a "body" was an attempt to placate such concerns, though he gently suggested that though such a body may end up lacking teeth, it "will at least have a tongue and a tongue will have its uses."⁷³ With the formalization of the position of Secretary-General and the appointment of Surin Pitsuwan, it is possible that a strong Secretary-General could assume responsibility for that tongue.

2. *ASEAN's External Relations*

So within ASEAN there is some reason for cautious optimism. Outside ASEAN, however, there is an argument that the body is in fact *less* than the sum of its parts. Tommy Koh has cited two recent examples of policymakers in Washington and Brussels not appearing to take ASEAN particularly seriously:

At the Williamsburg Conference, held in Mongolia in June 2007, I was distressed to hear a senior US official say: "the ASEAN way is no way." At the ASEAN-US Symposium, held in October 2007 in Singapore, I was astonished to hear another

⁷¹ Ibid., art. 23(2).

⁷² See generally Simon Chesterman (ed.), *Secretary or General? The UN Secretary-General in World Politics* (Cambridge: Cambridge University Press, 2007).

⁷³ George Yeo, "Remarks by Minister for Foreign Affairs George Yeo and his reply to supplementary questions in Parliament during CoS debate (MFA)" (Ministry of Foreign Affairs, Singapore, 28 February 2008), available at <http://app.mfa.gov.sg/2006/press/view_press.asp?post_id=3768>, para. 11.

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senior U.S. official say that he had personally advised Secretary Rice, not once but twice, not to attend the annual ASEAN Regional Forum (ARF). I suspect the same attitude prevails in Brussels. This could explain why ministerial meetings between ASEAN and the EU are often attended by full ministers on the ASEAN side, but not on the EU side.⁷⁴

To many outside observers ASEAN as an international organization is useful if it binds together the ten members and promotes peace and development, but unless and until it offers something more, then liaising directly with ASEAN doesn't reduce the need for bilateral diplomacy with the various states. All it does is add another layer of diplomacy. This is not helped by debacles such as the aborted Gambari briefing on Myanmar at the ASEAN summit in 2007.⁷⁵

There are some exceptions to this general rule that ASEAN is not a good interlocutor with external actors, though this tends to be through separate institutions: such as the way in which ASEAN Plus-Three has come to be used as a forum to discuss financial coordination and territorial disputes in the South China Sea, or that the ARF is now used as an informal platform for security dialogue between twenty-three states.

So in essence the answer to the question of whether ASEAN matters is probably "yes" to the ten member states, but to everyone else the honest answer would be "not much".

B. To what should we compare ASEAN?

Underlying all of this is the question of what ASEAN is meant to be. In particular, is it fair or accurate or helpful to compare it to the UN or the EU? Is that the right test? One might argue, for example, that traditional conceptions of legal personality depend on a notion of sovereignty that is not shared in Asia (or at least Southeast Asia). Instead "non-legalized" informal institutions are the hallmark of this region, though

⁷⁴ Tommy Koh, ASEAN at 40: Perception and Reality (Pacific Forum CSIS, PacNet No. 48A, Honolulu, 27 November 2007), available at <<http://www.csis.org/media/csis/pubs/pac0748a.pdf>>.

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they can also be seen as exemplars of the new phenomenon of transgovernmental networks that play an increasingly important role in global governance decisions.⁷⁶

Even so, there are still useful comparisons to be drawn. But the UN and the EU are the wrong ones. Closer might be the origins of the OAS, or perhaps even more aptly the Conference on Security and Cooperation in Europe, which laid the foundations for today's OSCE. ASEAN may well be best understood as a kind of standing diplomatic conference, which is currently talking about becoming something more.

Theory also has useful contributions to make, provided we think broadly rather than narrowly. In particular, it may be helpful to understand "institution" not in the narrow sense of legal personality but in the larger sense of that word used by international relations scholars, denoting "persistent and connected sets of rules (formal or informal) that prescribe behavioral roles, constrain activity, and shape expectations".⁷⁷

In that larger sense ASEAN would certainly appear to be an "institution". ASEAN's achievements are not that it is the foundation of an Asian Union to rival the EU, but more modestly that it fosters peace, encourages development, and promotes human rights in a part of the world that needs all three of these things.⁷⁸

Conclusion

In Molière's *Le Bourgeois gentilhomme*, M. Jourdain is a foolish member of the middle-class who aspires to join the aristocracy. He orders splendid new clothes and aspires, unsuccessfully, to learning the gentlemanly arts of fencing, dancing, music, and philosophy. His philosophy lesson degenerates into a basic lesson on language

⁷⁶ Miles Kahler, "Legalization as Strategy: The Asia-Pacific Case", *International Organization*, vol. 54, no. 3 (2000); Anne-Marie Slaughter, *A New World Order* (Princeton: Princeton University Press, 2004).

⁷⁷ Robert O. Keohane, "International Institutions: Two Approaches", *International Studies Quarterly*, vol. 32 (1988), p. 383.

⁷⁸ Cf. Tommy Koh's list of ASEAN achievements: keeping the region peaceful, maintaining strategic sea lanes, laying the foundations of a single market, promoting multiculturalism, and providing a basic architecture for multilateralism: Koh, ASEAN at 40.

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and rhetoric in which he seeks to learn prose and is startled to discover that he has been speaking it all his life.⁷⁹

To return to the question with which this paper opened, and with the assistance of another French author, we might then conclude that ASEAN has always existed and that its problem is not legal personality but a shared vision of the purpose of that existence, of its place in the world. The Charter process, as important as it was, merely deferred most of these questions.

⁷⁹ Cf. Anne-Marie Slaughter, “Networking Government to Government: The Asian Way” (2008) written for Yang Jemian at the Shanghai Institute for International Studies.