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DOES ASEAN EXIST? THE ASSOCIATION OF SOUTHEAST ASIAN NATIONS AS AN INTERNATIONAL LEGAL PERSON

by SIMON CHESTERMAN*

The ASEAN Charter, which entered into force on 15 December 2008, asserts in Article 3 that ASEAN "as an inter-governmental organisation, is hereby conferred legal personality". This essay 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 now possesses it in any meaningful way. 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 (ASEAN) 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 in this article are, first, what exactly *is* ASEAN in international legal terms? Secondly, I hope to consider whether in political terms ASEAN is greater than the sum of its parts: in other words, whether ASEAN as an entity offers

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

2 *The ASEAN Declaration,* Indonesia, Malaysia, Philippines, Singapore and Thailand, Bangkok, 8 August 1967, online: Association of Southeast Asian Nations <http://www.aseansec.org/1212.htm> [*Bangkok Declaration*].

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 (UN), 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 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] On 15 December 2008, that Charter came into effect thirty days after the tenth instrument of ratification had been deposited with the ASEAN Secretary-General.[9]

Does this mean that ASEAN before that moment had no international legal personality? And that after the entry into force of the Charter such personality miraculously popped into existence? The answer to both questions is a qualified "no": the lack of such a provision did not mean that ASEAN lacked international legal personality; the presence of one does not mean that it possesses personality in a meaningful sense. This section will briefly outline the basis of a test for international legal personality before applying it to ASEAN.

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 *Charter of the United Nations*, 26 June 1945, 892 U.N.T.S. 993 (entered into force 24 October 1945),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), online: <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) 3 at 6. In the same volume, Locknie Hsu adopted a more nuanced position that ASEAN's legal personality needed "clarification": Locknie Hsu, "Towards an ASEAN Charter: Some Thoughts from the Legal Perspective", at 45. *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) at 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) 111 at 126 (ASEAN has "selective personality").

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

8 *Charter of the Association of Southeast Asian Nations*, 20 November 2007, (entered into force 15 December 2008), art. 3, online: <http://www.aseansec.org/AC.htm> [*ASEAN Charter*].

9 *Ibid.*, art. 47(4).

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.[10] The practice and consent of states remain axiomatic to the concept of international law, and through the protection of territorial integrity and sovereign immunity, states are its primary beneficiaries.[11] This is replicated in the institutions of international order: only states are recognized as members of the UN; only states may bring contentious claims before the International Court of Justice.[12] (This is distinct from the question of whether an entity's legal personality is recognized in the *domestic* law of a given state,[13] a point frequently confused in literature[14] and, occasionally, in treaties.[15])

Nevertheless, international organizations, most prominently the UN itself, and some other entities (the Knights of Malta, for example) have been recognized as having international legal personality. The issue came before the International Court of Justice soon after the creation of the UN when Count Bernadotte, a Swedish national and chief UN truce negotiator in the Middle East, was killed in Jerusalem. The question concerned whether the UN had the capacity to bring an action in its own right against Israel with respect to his death. The Court issued an advisory opinion that the UN 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.[16]

A complication, however, was that Israel was not yet among those members.[17] 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

[10] Ian Brownlie, *Principles of Public International Law*, 5th ed. (Oxford: Clarendon Press, 1998) at 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).

[11] See e.g. *Charter of the United Nations*, *Supra* note 4, art. 2, paras. 4 and 7.

[12] *Statute of the International Court of Justice*, 26 June 1945, U.N.T.S. 993 (entered into force 24 October 1945), 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).

[13] Thus the *Charter of the United Nations*, 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.

[14] See e.g. Konstantinos D. Magliverasa and Gino J. Naldia, "The African Union—A New Dawn for Africa?" (2002) 51 Int'l & Comp. L.Q. 415 (suggesting that the OAU's *international* legal personality could be inferred from a provision comparable to UN Charter, art. 104).

[15] See e.g. *International Agreement on Olive Oil and Table Olives*, 29 April 2005, TD.OLIVE OIL.10/6 (entered into force 25 May 2007), art. 5(1), online: <http://www.internationaloliveoil.org/downloads/Convenio03eng.pdf>. ("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.").

[16] *Reparation for Injuries Suffered in the Service of the United Nations*, Advisory Opinion, (1949) I.C.J. Rep. 174 [*Reparations case*], at 179.

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

bring into being an entity possessing *objective* international personality, and not merely personality recognized by them alone."[18]

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

In the case of the UN 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,[19] the International Criminal Court,[20] and the International Olive Oil Council.[21] The Shanghai Cooperation Organization provides in its Charter that:

> As a subject of international law, SCO shall have international legal capacity… SCO shall 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.[22]

When its Charter entered into force, ASEAN joined such bodies.

[18] *Reparations case*, *supra* note 16 at 185 [emphasis added].

[19] *United Nations Convention on the Law of the Sea*, 10 December 1982, 1833 U.N.T.S. 3 (entered into force 16 November 1994), art. 176, online: <http://www.un.org/Depts/los> [*UNCLOS*]. ("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.").

[20] *Rome Statute of the International Criminal Court*, 17 July 1998, 2187 U.N.T.S. 90, UN Doc A/Conf.183/9 (entered into force 1 July 2002), art. 4, online: <http://www.icc-cpi.int/library/about/officialjournal/Rome_Statute_120704-EN.pdf> [*Rome Statute*]. ("The Court shall have international legal personality.").

[21] *International Agreement on Olive Oil and Table Olives*, *supra* note 15, 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."). Other examples include:

— the Western Indian Ocean Tuna Organisation: *Convention on the Western Indian Ocean Tuna Organisation*, 19 June 1991, art. 8(1), online: <http://www.fao.org/fi/body/rfb/WIOTO/wioto_convention_text.doc>. ("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, art. 26(1), online: <http://www.cdera.org/about_cdera_agreement.php>. ("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*, 20 March 1992, [1992] O.J. L379/16. art. 6(1), online: <http://www.isosugar.org/home/agreements/agreementenglish.htm>. ("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*, 5 September 2000, [2005] O.J. L32/3 (entered into force 19 June 2004), art. 9(6), online: <http://www.wcpfc.int>. ("The Commission shall have international legal personality and such legal capacity as may be necessary to perform its functions and achieve its objectives.")

[22] *Charter of Shanghai Cooperation Organisation*, China, Kazakhstan, Kyrgyzstan, Russian Federation, Tajikistan and Uzbekistan, 7 June 2002, art. 15, online: <http://www.sectsco.org/news_detail.asp?id=96&LanguageID=2>.

Interestingly, some of the major regional organizations are not among this group. Until recently, for example, the EU lacked legal personality. The European Community certainly did have legal personality, but the EU itself was more ambiguous, having limited powers to enter into treaties only.[23] This changed only when the Treaty of Lisbon entered into force on 1 December 2009, adding to the Treaty on European Union a provision that, "The Union shall have legal personality."[24] 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.[25] The Organization of American States does not provide for its own legal personality.[26]

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

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.[27] This is closer to the manner in which states come into being, with recognition of, say, Kosovo, regarded as being consequent to rather than constitutive of its existence.[28] This makes sense in the context of states coming into being—there is, in fact, a treaty definition of what a state is[29]—but it is less clear when an international organization reaches "organizationhood".[30]

The International Law Commission has not dealt directly with the question of which 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

[23] Philippe Gautier, "The Reparation for Injuries Case Revisited: The Personality of the European Union" (2000) Max Planck Y.B. United Nations L. 331; Rafael Leal-Arcas, "EU Legal Personality in Foreign Policy?" (2006) 24 B.U. Int'l L.J. 165.

[24] *Treaty of Lisbon Amending the Treaty on European Union and the Treaty Establishing the European Community*, 13 December 2007, (entered into force 1 December 2009), art. 1(55), online: <http://europa.eu/lisbon_treaty> (inserting new art. 46A into the Treaty on European Union).

[25] Magliverasa and Naldia, *supra* note 14.

[26] *Charter of the Organization of American States*, 30 April 1948, 119 U.N.T.S. 3 (entered into force 13 December 1951), online: <http://www.oas.org/juridico/english/charter.html>.

[27] See, e.g., Rosalyn Higgins, *Problems and Process: International Law and How We Use It* (Oxford: Clarendon Press, 1994) at 48.

[28] Christopher J. Borgen, "Kosovo's Declaration of Independence: Self-Determination, Secession and Recognition", online: (2008) 12(2) ASIL Insight, <http://www.asil.org/insights080229.cfm>.

[29] *Montevideo Convention on the Rights and Duties of States*, 26 December 1933, O.A.S.T.S. 37 (entered into force 26 December 1934), online: <http://en.wikisource.org/wiki/Montevideo_Convention>.

[30] See generally Jan Klabbers, *An Introduction to International Institutional Law* (Cambridge: Cambridge University Press, 2002) at 42-59; Philippe Sands and Pierre Klein, *Bowett's Law of International Institutions*, 5th ed. (London: Sweet & Maxwell, 2001) at 469-531; José Alvarez, *International Organizations as Law-makers* (Oxford: Oxford University Press, 2005) at 129-139. *Cf.* Giorgio Gaja, *First Report on Responsibility of International Organizations*, UN Doc A/CN.4/532 (2003), para. 19, online: <http://www.un.org/law/ilc>:

> Even if a treaty provision were intended to confer international personality on a particular organization, the acquisition of legal personality would depend on the actual establishment of the organization. It is clear that an organization merely existing on paper cannot be considered a subject of international law. The entity further needs to have acquired a sufficient independence from its members so that it cannot be regarded as acting as an organ common to the members. When such an independent entity comes into being, one could speak of an "objective international personality", as the Court did in its advisory opinion on *Reparation for injuries suffered in the service of the United Nations*. The characterization of an organization as a subject of international law thus appears as a question of fact. Although the view has been expressed that an organization's personality exists with regard to non-member States only if they have recognized it, this assumption cannot be regarded as a logical necessity [footnotes omitted].

international law and possessing its own international legal personality".[31] 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".[32] Both reproduce the essentially circular logic from the *Reparations* case: personality can be deduced from the powers given to an international 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 *Reparations* 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.[33]

B. *ASEAN's Personality*

In the case of ASEAN, the reasoning from the *Reparations* case is easily extended to ASEAN with respect to the members themselves: ASEAN enjoys such legal personality as those members have endowed it.[34] But the question of whether states and other actors outside ASEAN must recognize it depends on the application of a more objective set of standards. Though there is no consensus in the literature and little authority from courts (primarily focused on the status of the EU and the OSCE),[35] Ian Brownlie has developed a three-part test summarizing the majority views on international legal personality. To enjoy personality, he argues, 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 or legal powers and purposes, between the organization and its member states;

[31] 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) at 38-45, online: <http://www.un.org/law/ilc>. International organizations, as understood by the ILC, "may include as members, in addition to States, other entities." As to the theoretical foundation of such organizations international legal personality, the ILC has observed that the ICJ "appeared to favour the view that when legal personality of an organization exists, it is an "objective" personality. Thus, it would not be necessary to enquire whether the legal personality of an organization has been recognized by an injured State before considering whether the organization may be held internationally responsible according to the present draft articles. On the other hand, an organization merely existing on paper could not be considered as having an "objective" legal personality under international law." at 42.

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

[33] *Reparations case*, *supra* note 16.

[34] See Henry G. Schermers and Niels M. Blokker, *International Institutional Law: Unity Within Diversity*, 4th ed. (Leiden: Martinus Nijhoff, 2003) at 989-993.

[35] *Ibid.* at 991-993.

3. the existence of legal powers exercisable on the international plane and not solely within the national systems of one or more states.[36]

Applying Brownlie's test, does ASEAN have personality?

1. *Permanent association*

The first leg is easily satisfied: even before adopting the Charter, ASEAN was certainly a permanent association of states, with lawful objects, equipped with at least rudimentary organs from the outset, growing into a Secretariat over time.[37]

2. *Distinction between organization and members*

Is there, secondly, a distinction, in terms or 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.[38]

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."[39] This point was emphasized also in the Report of the Eminent Persons Group, which explicitly linked rule-adherence to legal personality.[40] Whether the ASEAN Way, epitomized by *musjawarah* (consultation) and *mufukat* (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 that ASEAN has a competence distinct from its members. The Framework Agreement for Enhancing ASEAN Economic Cooperation, for example, has provided the basis for agreements 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, but was superseded in 2004 by another protocol that went further in providing for a "negative consensus" model under which the

36 Brownlie, *supra* note 10 at 679-680. Other tests are, of course, possible.

37 ASEAN has developed an extensive network of national actors, but the reference here is to the limited independent organs that exist. It is indicative that ASEAN officials travel on their own national passports.

38 *Bangkok Declaration*, *supra* note 2.

39 Tommy Koh, Walter Woon, and Chan Sze-Wei, "Charter Makes ASEAN Stronger, More United and Effective" *The Straits Times [of Singapore]*, (8 August 2007).

40 The Eminent Persons Group on the ASEAN Charter, *Report of the Eminent Persons Group on the ASEAN Charter* (Jakarta, December 2006), para. 43: "By embarking on building the ASEAN Community, ASEAN has clearly signalled its commitment to move from an Association towards a more structured Intergovernmental Organisation, in the context of legally binding rules and agreements. In this regard, ASEAN should have legal personality." Online: <http://www.aseansec.org/19247.pdf> [Eminent Persons Group, *Report*].

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

42 *Cf*. Koh Kheng-Lian and Nicholas Robinson, "Strengthening Sustainable Development in Regional Inter-Governmental Governance: Lessons from the ASEAN Way" (2002) 6 Singapore J. Int'l Comp. L. 640; Koh Kheng-Lian, "ASEAN Environmental Protection in Natural Resources and Sustainable Development: Convergence Versus Divergence?" (2007) 4 Macquarie J. Int'l Comp. Envt'l. L. 43 at 45.

43 See Paul Davidson, "The ASEAN Way and Role of Law in ASEAN Economic Cooperation" (2004) 8 Singapore Y.B. Int'l L. 165 at 158-161.

44 *ASEAN Protocol on Dispute Settlement Mechanism*, 20 November 1996, (entered into force 26 May 1998), online: <http://www.aseansec.org/16654.htm>.

Senior Economic Officials Meeting (SEOM) would have to decide by consensus *not* to set up a panel, adopt a panel report, adopt an appeal report, or authorize retaliation.[45]

A second area in which there have 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 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.

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 UN in December 2006,[53] though it was beaten to this milestone by the Asian-African Legal Consultative Organization in 1980,[54] the Asian Development Bank in 2002,[55] and the Shanghai Cooperation Organization and the South Asian Association for Regional Cooperation in 2004.[56]

45 *ASEAN Protocol on Enhanced Dispute Settlement Mechanism*, 29 November 2004, (entered into force 29 November 2004), arts. 5(1), 9(1), 12(13), 16(6), 16(8), online: <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) at 35 [Severino, *Southeast Asia*]; Joel Vander Kooi, "The ASEAN Enhanced Dispute Settlement Mechanism" (2007) 20 N.Y. Int'l L. Rev. 1. I am grateful to Lim Chin Leng for his thoughtful comments on this aspect of ASEAN's legal personality.

46 *Southeast Asia Nuclear-Weapon-Free Zone Treaty*, 15 December 1995, (entered into force 28 March 1997), online: <http://www.aseansec.org/2082.htm> [*Bangkok Treaty*].

47 Johnna Villaviray-Giolagon, "SEANWFZ", *Manila Times* (28 February 2007).

48 Severino, *Southeast Asia*, *supra* note 45 at 16.

49 *Bangkok Treaty*, *supra* note 46, art. 16(1). At the time of signing Myanmar, Laos, and Cambodia had not yet joined ASEAN.

50 Severino, *Southeast Asia*, *supra* note 45 at 17.

51 *Bangkok Treaty*, *supra* note 46, art. 8(8).

52 *ASEAN Agreement on Transboundary Haze Pollution*, 10 June 2002, (entered into force 11 November 2003), art. 29(1), online: <http://www.aseansec.org/6086.htm>. (Indonesia has yet to ratify the agreement.) See also *Agreement on the Establishment of the ASEAN Centre for Biodiversity,* 12 September 2005, online: <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*, 8 February 2007, online: <http://www.aseansec.org/19734.htm> (six ratifications required).

53 GA Res 61/44 (2006).

54 GA Res 35/2 (1980).

55 GA Res 57/30 (2002).

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

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 the Secretary-General of ASEAN, but related only to its status within Indonesia.[57] When outside Indonesia, ASEAN officials travel as nationals of their respective member states.[58] ASEAN has signed various Memoranda of Understanding (MOUs) such as the 2000 MOU with Australia on Haze,[59] a 2002 MOU with China on Agricultural Cooperation,[60] and a 2003 MOU with China on Information Communications Technology,[61] but on matters regarded as important or that bind the member states, the various members have signed and ratified in their individual capacities.[62]

This appears likely to continue under the Charter. Though the Eminent Persons Group recommended that the Secretary-General be "delegated the authority to sign non-sensitive agreements on behalf of ASEAN Member States",[63] the Charter as adopted merely provides that "ASEAN may conclude agreements with countries" and other entities, with the procedures for concluding such agreements to be prescribed by the ASEAN Coordinating Council in consultation with the Community Councils.[64]

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 does not 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.

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."[65] 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.

[57] *Agreement Between the Government of Indonesia and ASEAN Relating to the Privileges and Immunities of the ASEAN Secretariat*, 20 January 1979 (entered into force 22 March 1979), online: <http://www.aseansec.org/1268.htm>.

[58] Naya, *supra* note 6 at 112.

[59] *Memorandum of Understanding (MOU) between the Association of South East Asian Nations (ASEAN) and the Commonwealth of Australia (on Haze)*, 28 January 2000, online: <http://www.aseansec.org/670.htm>.

[60] *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*, 2 November 2002, online: <http://www.aseansec.org/13214.htm>.

[61] *Memorandum of Understanding Between the Association of Southeast Asian Nations and the People's Republic of China on Cooperation in Information and Communications Technology*, 8 October 2003, online: <http://www.aseansec.org/15147.htm>.

[62] See e.g. *Framework Agreement on Comprehensive Economic Co-Operation Between ASEAN and the People's Republic of China*, 5 November 2002, online: <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') ..."

[63] Eminent Persons Group, *Report*, *supra* note 40, para. 37.

[64] *ASEAN Charter*, *supra* note 8, art. 41(7).

[65] ASEAN Secretariat, Media Release, "ASEAN Leaders Sign ASEAN Charter" (20 November 2007), online: <http://www.aseansec.org/21085.htm>.

II. Does ASEAN Matter?

The question of international legal personality is, in many ways, a theoretical one. As indicated, the contours of that personality remain to be defined. An important factor will be the political environment within which ASEAN operates—in the sense of the willingness of members to cede powers to the centre, and of non-members to deal with that centre. 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 was created 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 political, economic and socio-cultural relations. Secondly, its embryonic institutions have grown into more regular contacts and a framework for more formal discussion of multilateral issues.

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.[66]

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".[67]

At the same time, however, the Charter reaffirms consultation and consensus as a "basic principle".[68] Where consensus cannot be achieved, the ASEAN Summit may decide on how a specific decision can be made.[69] If there is a serious breach of the Charter or non-compliance, the matter will be referred to the ASEAN Summit for decision.[70]

It remains unclear how much significance the Charter will have on what ASEAN does and how, but three points 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"

[66] *ASEAN Charter*, *supra* note 8, art. 1(5).
[67] *Ibid*.
[68] *Ibid*., art. 20(1).
[69] *Ibid*., art. 20(2).
[70] *Ibid*., art. 20(4).

formula for economic cooperation.[71] This could strengthen ASEAN by allowing deeper ties between some members, or it could destroy ASEAN by fragmentation.

The second is that ASEAN's Chairman and Secretary-General can be requested to provide good offices, conciliation or mediation in a dispute.[72] A useful comparison may be made with the Secretary-General of the UN. 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.[73]

The third is the discussion about a human rights body. Though it is unlikely that anything comparable to the European Court of Human Rights is likely to be established, 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 non-governmental organisations (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."[74] 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 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.[75]

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 does not reduce the need for bilateral diplomacy with the various states. All it does is to add another layer of diplomacy.

[71] *Ibid*., art. 21(2). The "X" denotes the possibility that one or more members might not opt in to a specific area of economic cooperation.

[72] *Ibid*., art. 23(2).

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

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

[75] Tommy Koh, "ASEAN at 40: Perception and Reality" *Pacific Forum CSIS*, (27 November 2007), online: Center for Strategic & International Studies <http://www.csis.org/media/csis/pubs/pac0748a.pdf> [Koh, "ASEAN at 40"]. *Cf.* Catharin E. Dalpino, *New Power Dynamics in Southeast Asia*, (September 2008), online: The Stanley Foundation, Muscatine, IA, <http://www.stanleyfoundation.org/resources.cfm?id=347>.

This is not helped by debacles such as the aborted briefing by UN special envoy Ibrahim Gambari on Myanmar at the ASEAN summit in 2007.[76]

There are some exceptions to the 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.[77]

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 they can also be seen as exemplars of the new phenomenon of transgovernmental networks that play an increasingly important role in global governance decisions.[78]

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 (CSCE), 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. Indeed, there is something of an irony that just as ASEAN may become Asia's first truly "legalized" international organization, the CSCE was originally decried as a deplorable departure from legalization with its unenforceable human rights provisions.[79] Despite the scorn of western international relations scholars, however, dissidents were later able to co-opt the language of such documents to call for union rights in Poland, *glasnost* in Russia, and, after 1989, multi-party elections.[80] These weak norms provided a language for the articulation of rights that later transformed societies. It would be overly optimistic to suggest that the ASEAN Charter will have comparable effects, but changing even the language of international affairs in Southeast Asia is a significant advance on the "Asian values" debates of the 1990s.

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 behavioural roles, constrain activity, and shape expectations".[81] 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,

[76] "UN Envoy Won't Address ASEAN Summit After Myanmar Objects" *International Herald Tribune* (19 November 2007).

[77] Mark Beeson, *Multilateralism, American Power and East Asian Regionalism* (2004) Southeast Asia Research Centre Working Papers Series, No. 64, 2004), online: <http://www.cityu.edu.hk/searc/WP64_04_Beeson.pdf>.

[78] Miles Kahler, "Legalization as Strategy: The Asia-Pacific Case" (2000) 54(3) Int'l Org. 549; Anne-Marie Slaughter, *A New World Order* (Princeton: Princeton University Press, 2004).

[79] Daniel C. Thomas, *The Helsinki Effect: International Norms, Human Rights, and the Demise of Communism* (Princeton, NJ: Princeton University Press, 2001) at 244-255.

[80] Michael Ignatieff, "Human Rights, Power, and the State" in Simon Chesterman, Michael Ignatieff & Ramesh Thakur, eds., *Making States Work: State Failure and the Crisis of Governance* (Tokyo: United Nations University Press, 2005) 59 at 62.

[81] Robert O. Keohane, "International Institutions: Two Approaches" (1988) 32 Int'l Stud. Q. 379 at 383.

encourages development, and promotes human rights in a part of the world that needs all three of these things.[82]

III. 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 and rhetoric in which he seeks to learn prose and is startled to discover that he has been speaking it all his life.[83]

To return to the question with which this article 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.

[82] *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", *supra* note 75 at 40.

[83] I am grateful to Anne-Marie Slaughter for first noting the similarity between Molière and Asian approaches to transgovernmental networks.