

Eastphalia and Asian Regionalism

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INTRODUCTION

In a recent doctoral thesis, Sungwon Kim coins the phrase “Eastphalia” to explore how the rise of Asia might affect international law.¹ The assumption is that an Eastphalian order will be different from the Westphalian one that signifies the foundational principles of the modern state-centered international system.² The inquiry is a timely one given widespread belief that we are living in an “Asian Century” in which the rise of China will have profound implications for virtually every field of endeavor.

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¹ Sungwon Kim, *Eastphalia Rising: An Enquiry into the Emergence of Asian Perspective on International Law and Global Governance* (2009) (unpublished J.S.D. thesis, Indiana University) (on file with author); see David P. Fidler, *Eastphalia Emerging*, 17 *IND. J. GLOBAL LEGAL STUD.* 1, 2 (2010).

² See STEPHEN KRASNER, *SOVEREIGNTY* 223-38 (2000) (discussing alternatives to Westphalian sovereignty structure); James A. Caporaso, *Changes in the Westphalian Order: Territory, Public Authority, and Sovereignty*, 2 *INT'L STUD. REV.*, no. 2, Summer 2000, at 1, 24 (discussing Westphalian order declining vis-à-vis Europe).

The Eastphalia inquiry is in some tension with another popular view among international lawyers, namely that the European Union is a harbinger of the future of international order.³ Westphalia, under this view, will be replaced not by an Asia-centered set of norms, but by supranational regional organizations and an end to sovereignty.⁴ Professors Slaughter and Burke-White, for example, have argued that “[t]he Treaty of Westphalia . . . has given way to the Treaty of Rome.”⁵ As European nations have given up significant components of national sovereignty in favor of a supranational quasi-federalism, other regions of the world have also developed regional institutions and increased levels of economic integration.⁶ The growing number of free-trade agreements, customs unions, and other regional arrangements are cited as evidence in support for the “Europeanization” thesis.⁷

Is it Europe or Asia that is the future? One way to resolve the tension between these two positions is to expect that there will be increasing integration in East Asia, perhaps the formation of an East Asian Common Market, in which law will play a substantial role in fostering integration. This has been the European pattern, so one would assume that the European model would spread to East Asia. Yet developments in this regard have been relatively slow. Asia remains the only major region of the world without a region-wide human rights court.⁸ The only body that might be so characterized, the

³ See MARK LEONARD, WHY EUROPE WILL RUN THE 21ST CENTURY 43-46 (2005). See generally Anne Marie Slaughter & William Burke-White, *The Future of International Law Is Domestic (or, the European Way of Law)*, 47 HARV. INT'L L.J. 327, 349-51 (2006) (discussing EU model for future).

⁴ James N. Rosenau, *Sovereignty in a Turbulent World*, in BEYOND WESTPHALIA?: STATE SOVEREIGNTY AND INTERNATIONAL INTERVENTION, 191, 194, 223-27 (Gene M. Lyons & Michael Mastanduno eds., 1995); see Andreas Osiander, *Sovereignty, International Relations, and the Westphalian Myth*, 55 INT'L ORG. 25, 281-84 (2001); Darel E. Paul, *Sovereignty, Survival and the Westphalian Blind Alley in International Relations*, 25 REV. INT'L STUD. 217, 228-31 (1999).

⁵ Slaughter & Burke-White, *supra* note 3, at 331.

⁶ Andrew Hurrell, *Regionalism in Theoretical Perspective*, in REGIONALISM IN WORLD POLITICS: REGIONAL ORGANIZATION AND INTERNATIONAL ORDER, 37, 58-66 (Louise Fawcett & Andrew Hurrell eds., 1995).

⁷ Slaughter & Burke-White, *supra* note 3, at 329-36.

⁸ See, e.g., AFRICA UNION, PROTOCOL ON THE STATUTE OF THE AFRICAN COURT OF JUSTICE AND HUMAN RIGHTS, <http://www.africa-union.org/root/au/Documents/Treaties/text/Protocol%20on%20the%20Merged%20Court%20-%20EN.pdf> (discussing African Court of Justice and Human Rights); European Convention on Human Rights, Nov. 4, 1950, available at <http://www.hri.org/docs/ECHR50.html#C.Sec1> (discussing European Court of Human Rights); see also Organization of American States, American Convention on Human Rights arts. 52-69, Nov. 22, 1969, O.A.S.T.S. No. 36, 1144 U.N.T.S. 123 (discussing Inter-American Court of Human Rights).

recently created Human Rights Commission of the Association of Southeast Asian Nations (“ASEAN”), is very much an instrument of governments. Nor is there any region-wide common market outside ASEAN, notwithstanding recent proposals.⁹ Overall, East Asian regionalism is a topic on which there has been a good deal of scholarly attention, but relatively little concrete development, and there is little sign that Asia will develop a regional architecture of comparable ambition and scope to that in Europe.¹⁰

In this Article, I argue that the underlying conditions for European integration are absent in Asia and will remain so for the foreseeable future. To date, Asian economic and even cultural integration have far outpaced political or legal integration, and the current state of affairs is likely to continue.¹¹ Political integration is clearly a long way away, and it is unlikely that law will play a major role in the future development of Asian regionalism. Thus, the current pattern of incremental integration is likely to continue for some time. Part I briefly examines the European experience, explaining how law came to play such a central role in integration.¹² Part II considers Asian economic integration to date. It then elaborates on three reasons why law is unlikely to play a similar role to that in Europe.¹³ These reasons include a positivist conception of law as an instrument of the nation state, a fierce defense of sovereignty as a basis for international law, and a very different international environment than that faced by post-war European nations.¹⁴ Part III focuses on one recent proposal for an East Asian Charter to promote legal integration, arguing that it continues a tradition of “sovereignty-reinforcing” regionalism that reinforces rather than undermines the nation state.¹⁵

⁹ See Kuala Lumpur Declaration of the ASEAN Plus Three Summit, Dec. 12, 2005, <http://www.aseansec.org/18036.htm> (proposing East Asian community).

¹⁰ See EDWARD J. LINCOLN, EAST ASIAN ECONOMIC REGIONALISM 5 (2004). See generally MICHIO MORISHIMA, COLLABORATIVE DEVELOPMENT IN NORTHEAST ASIA 129-64 (2000) (stating that Asian regionalism is not at level of European integration, but suggesting NE Asia community may deepen integration).

¹¹ See Kazushi Shimizu, *East Asian Regional Economic Cooperation and FTA: Deepening of Intra-ASEAN Economic Cooperation and Expansion Throughout East Asia*, in EAST ASIAN REGIONALISM FROM A LEGAL PERSPECTIVE 3, 3-5 (Tamio Nakamura ed., 2009).

¹² See *infra* Part I.

¹³ See *infra* Part II.

¹⁴ See *infra* Part II.

¹⁵ See *infra* Part III.

I. EUROPE: INTEGRATION THROUGH LAW

The implicit model for integration through law is the European Community, in which early cooperation in coal and steel production led to a series of sequentially more ambitious agreements producing an “ever-closer union.”¹⁶ These agreements were originally of an international legal character, taking the form of treaties under which states undertook mutual obligations.¹⁷ Treaties, of course, are sovereign commitments through which states agree to be bound, and states generally are not obligated when they have not so agreed. As the European treaties developed, they contained the possibility that a qualified supermajority vote would be sufficient to undertake certain governance decisions, rather than the unanimous vote typical of international treaties. Still, the arrangements were generally understood to be of international legal character.

In the 1960s, President de Gaulle of France pushed for the so-called Luxembourg compromise, in which the states agreed, as an informal matter, not to undertake policies if any state opposed them. This was a reassertion of sovereignty in the form of a mutual veto. The unanimity condition, of course, slowed down the movement toward an ever-closer union, as national governments took control of the process.¹⁸

However, something unusual happened. The European Court of Justice (“ECJ”), one of the international organs established by the treaties, issued a series of crucial decisions that changed the incentives of the states involved.¹⁹ These decisions included finding that European law had a direct effect in the national sphere; that member states had to allow the sale of products lawfully produced in other markets; that member states could be liable for damages for failure to implement European law; and many others.²⁰ Although there has been a debate in European studies as to whether the ECJ was acting as an independent agent in deepening integration, the contemporary consensus position is that it was a crucial factor and not simply reflecting the position of the Member States.²¹

¹⁶ See, e.g., Treaty Establishing the European Coal and Steel Community (ECSC), Apr. 18, 1951, 261 U.N.T.S. 140 (establishing common market for coal and steel production among several European states).

¹⁷ See ALEC STONE SWEET, *THE JUDICIAL CONSTRUCTION OF EUROPE* 64 (2004).

¹⁸ Joseph Weiler, *The Transformation of Europe*, 100 *YALE L.J.* 2403, 2423 (1991).

¹⁹ STONE SWEET, *supra* note 17, at 68-70; Weiler, *supra* note 19, at 2413-16; see, e.g., Case 120/78, *Cassis de Dijon*, 1979 E.C.R. 649 (discussing mutual recognition of product standards).

²⁰ See Weiler, *supra* note 19, at 2413-19.

²¹ See Alec Stone Sweet & Thomas Brunnell, *How the European Court Works and*

In the course of these developments, Europe moved from an international organization toward a constitutional federalism, under which courts could hear cases brought by individuals against their own governments on the basis of regional law.²² Further, qualified majority voting had replaced the unanimity rule of interstate cooperation as the default mode of decision-making for vast portions of governance.²³ The ECJ was at the very center of this transformation, prodding states toward greater integration through a series of landmark decisions, especially during periods when the governments were unable to agree on further steps.²⁴ The ECJ, in cooperation with national judiciaries, helped institutionalize European law into each legal system and, thus, constructed a supranational polity.²⁵ It is not surprising, then, that scholars have characterized the European experience as “integration through law.”²⁶

With the development of the World Trade Organization and the emergence of regional organizations in other parts of the world, it is only natural that scholars would speculate that similar dynamics might take place elsewhere. The Europeanization thesis is also somewhat normatively attractive, given that Europe had just prior to the development of the EC been through the bloodiest war in human history. The narrative of beating swords into plowshares provided hope that the experience could be replicated. The next section considers the likelihood that such a development might occur in East Asia.

II. ASIA: INTEGRATION THROUGH ECONOMICS

A. *Economic, Not Legal Cooperation*

The experience of East Asia has not been one of extensive regional organization, even as the region has become more integrated in other

Does Not Work: A Response to Carruba, Gabel, and Hankla, 105 AM. POL. SCI. REV. (forthcoming 2010), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1569594.

²² STONE SWEET, *supra* note 17, at 65-68.

²³ *See id.* at 204-05.

²⁴ *See id.* at 65-68.

²⁵ KAREN J. ALTER, ESTABLISHING THE SUPREMACY OF EUROPEAN LAW: THE MAKING OF AN INTERNATIONAL RULE OF LAW IN EUROPE 230-31 (2001); KAREN J. ALTER, *The European Court and Legal Integration: An Exceptional Story or Harbinger of the Future?* (2008), in *THE EUROPEAN COURT'S POLITICAL POWER* 34 (2009); STONE SWEET, *supra* note 18, at 64.

²⁶ *See generally* INTEGRATION THROUGH LAW: EUROPE AND THE AMERICAN FEDERAL EXPERIENCE (Mauro Cappelletti et al. eds., 1985) (providing comparative study of integration).

ways. For example, economic integration is such that most trade and investment is now intraregional, not simply involving exports to the industrialized West.²⁷ China and Japan now trade with each other as much as either trades with the United States, and integration is continuing to increase.²⁸ For Southeast Asia, too, China and Japan are the most important markets and an increasingly important source of capital.²⁹

Culturally, too, Asia is integrating. Korean soap operas, J-pop music, and Indian films are consumed throughout the region.³⁰ Exchange programs are expanding, and Asian universities are investing in the future.³¹ Cultural integration can play an important role in underpinning further economic integration, not only through transborder trade and investment in cultural products, but through shaping a common mindset that can reduce nationalistic barriers to more formal integration.

Legally, the primary vehicle for regional integration is ASEAN, founded in 1967.³² The five original members — Indonesia, Malaysia, the Philippines, Singapore and Thailand — have been joined by Brunei, Cambodia, Vietnam, Myanmar, and Laos. ASEAN established a free trade association, effective as of 2003, and since 2005 has pursued a broader East Asian community.³³ The major regional powers of China, Korea, and Japan interact with ASEAN bilaterally, as well as multilaterally through the so-called ASEAN +3 meetings.³⁴ These meetings take place on an annual basis, along with broader groupings such as the ASEAN +6 and +8.³⁵

²⁷ LINCOLN, *supra* note 10, at 8, 42-47.

²⁸ See *Sino-Japanese Trade Hits New Record*, CHINA DAILY, Aug. 29, 2006, http://www.chinadaily.com.cn/china/2006-08/29/content_676285.htm.

²⁹ See LINCOLN, *supra* note 10, at 28.

³⁰ See Joshua Kurlatznick, *Pax Asia-Pacific? East Asian Integration and Its Implications for the United States*, 30 WASH. Q. 67, 72 (2007).

³¹ See generally Richard C. Levin, *Top of the Class: The Rise of Asian Universities*, 89 FOREIGN AFF., no. 3, May-June 2010 (discussing Asian educational systems of Asian Universities).

³² Lawan Thanadsillapakul, *Legal and Institutional Frameworks for Open Regionalism in Asia: A Case Study of ASEAN*, in EAST ASIAN REGIONALISM FROM A LEGAL PERSPECTIVE, *supra* note 11, at 125, 126-27.

³³ See Shimizu, *supra* note 11, at 3-5.

³⁴ Markus Hund, *ASEAN Plus Three: Towards a New Age of Pan-East Asian Regionalism? A Skeptic's Appraisal*, 16 PAC. REV. 383, 384-96 (2003); see Richard Stubbs, *ASEAN Plus Three: Emerging East Asian Regionalism?*, 42 ASIAN SURV. 440, 440 (2002). We will be abbreviating these as "+3" throughout this Article.

³⁵ Stubbs, *supra* note 34, at 443 (discussing annual meetings). ASEAN +6 includes Australia, New Zealand, and India. Masahiro Kawai & Ganeshan Wignaraja, ASEAN +3 or

The ASEAN Free Trade Association (“FTA”) has been successful as a formal matter, but observers also criticize its effort for failing to accomplish all that it could. The level of economic integration in the region remains relatively low, in part because the economic structures of the member states are similar.³⁶ Notwithstanding the relatively high levels of economic integration with Northeast Asia, the economies of the Southeast Asian region are all export oriented and relatively competitive with each other. The ASEAN effort has also been underinstitutionalized, lacking an effective dispute resolution mechanism. ASEAN’s FTA has no regional court, notwithstanding proposals to set one up, and has made its most significant achievements in tariff reduction.³⁷ Tariff reductions, however, are hardly sufficient for deep integration and reflect a natural interest of states in cross-border coordination rather than an erosion of sovereignty. Accordingly, since 2003, ASEAN has pursued the goal of an ASEAN Economic Community.

Perhaps the greatest achievement of Asian regionalism has been the ASEAN+3 system of financial cooperation known as the Chiang Mai Initiative. The Chiang Mai Initiative is a series of bilateral swap arrangements through which countries promise to provide each other currency to address short-term liquidity problems.³⁸ It is now being multilateralized and might one day form a regional monetary fund.³⁹ However, countries have not always utilized it, even when opportunities existed, and it remains unclear if it will foreshadow further integration.⁴⁰

The ASEAN Regional Forum is the most developed security structure in the region and provides an important place to air issues and hold discussions.⁴¹ But it is hardly institutionalized in the sense of its institutional structure having any *independent* effect on outcomes.

ASEAN +6: Which Way Forward? 9-11 (Sept. 2007), available at http://www.wto.org/english/tratop_e/region_e/con_sep07_e/kawai_wignaraja_e.pdf. ASEAN + 8 adds the United States and Russia. See K. Kesavapany, *ASEAN +8 — A Recipe for a New Regional Architecture*, EAST ASIA FORUM (May 8, 2010), <http://www.eastasiaforum.org/2010/05/08/asean8-a-recipe-for-a-new-regional-architecture/>.

³⁶ Shimizu, *supra* note 11, at 6 (noting that market interdependence remains low).

³⁷ See *id.*

³⁸ Hyoung-kyu Chey, *The Changing Political Dynamics of East Asian Financial Cooperation: The Chiang Mai Initiative*, 49 ASIAN SURV. 450, 451 (2009).

³⁹ *Id.* at 452.

⁴⁰ Hal Hill, *Political Realignment in Southeast Asia*, FAR E. ECON. REV., Apr. 2009, at 8, 13.

⁴¹ See Stubbs, *supra* note 34, at 454-55; ASEAN REGIONAL FORUM, <http://www.aseanregionalforum.org/Home/tabid/36/Default.aspx> (last visited Aug. 4, 2010).

And in any case, a forum for discussion by national leaders is emblematic of Westphalian, not constitutionalist, thinking. That is, it emphasizes state sovereignty, non-interference in internal affairs of other states, and a kind of shallow form of mutual support.

Beyond ASEAN, there have been numerous proposals for broader integration. Many of these have originated outside the formal government sphere, with Japan taking a leadership role.⁴² In 1967, a group of businessmen formed the Pacific Basin Economic Council, while Prime Minister Takeo Miki proposed a Pacific Area Free Trade Area (“PAFTA”).⁴³ In 1980, Prime Minister Masayoshi Ohira spurred the formation of the Pacific Economic Cooperation Conference, a tripartite organization of government, business, and academics that included other pacific nations like the United States and Canada.⁴⁴ The formation of the Asia Pacific Economic Cooperation (“APEC”) organization institutionalized formal government cooperation in 1989, creating a kind of institutionalized talk-shop of broad membership. The next year, Prime Minister Mahathir Mohamed of Malaysia proposed a Japan-centered East Asian Economic Group (“EAEG”).⁴⁵ But all of these organizations did little in concrete terms, even in the face of the Asian Economic Crisis of 1997-98.⁴⁶ APEC’s most visible achievements are cross-border coordination on terrorism and shipping security, issues that serve important state interests, but are hardly a harbinger of deep integration.⁴⁷

In short, multilateral efforts at regional organization remain relatively underdeveloped in East Asia. This is particularly true when compared with other regions. Latin America has Mercosur, the Organization of American States, the Caribbean Community, and Andean Community.⁴⁸ The African Union itself has half a dozen regional economic communities within it.⁴⁹ North America has the

⁴² Sunhyuk Kim & Philippe C. Schmitter, *The Experience of European Integration and the Potential for Northeast Asian Integration*, 29 *ASIAN PERSP.* 5, 17 (2005).

⁴³ *Id.*

⁴⁴ *Id.* at 18-19.

⁴⁵ *Id.* at 20.

⁴⁶ *Id.* at 21.

⁴⁷ See generally Stubbs, *supra* note 34, at 447-48 (discussing limits of APEC).

⁴⁸ Barbara Stallings, *Regional Integration in Latin America: Lessons for East Asia*, in *EAST ASIAN REGIONALISM FROM A LEGAL PERSPECTIVE*, *supra* note 11, at 63, 63-67.

⁴⁹ See African Union, *Decision on the Protocol on Relations Between the African Union and the Regional Economic Communities (RECs)*, AU Doc. EX.CL/348 (IX) (July 2007), available at http://www.africa-union.org/root/au/Conferences/2007/june/summit/doc/accra/Draft_Assembly_Decisions.pdf.

North American Free Trade Association (“NAFTA”).⁵⁰ And Europe has integrated to the point that regional organization has transcended the nation state.⁵¹ Every major region of the world has a more developed regional architecture than East Asia, leading to the question of why Asia has been exceptional.

B. Sources of Limitation

There are three major reasons Asia is “behind” in regional organization and legal integration. First, there is no historical precedent in the region’s international relations that augurs for such an expansive role for regional integration through law. Second, the countries of the region have focused on sovereignty as a fundamental principle of international law, a kind of hyper-Westphalian approach. Third, there are ongoing political tensions that will prevent an integrated structure from emerging.

1. Conceptions of Law

Consider first the concept of law and its role. European law comes from the Roman tradition, a unified continent-wide empire with a unified legal system. Centuries later, Europe was politically disaggregated, but the legacy of Roman law endured in the *jus commune*, a regional common law grounded in principles that were applied all over medieval Europe.⁵² This tradition emerged with the rediscovery of the *Corpus Juris Civilis*, the Code of Justinian compiled by one of the last Roman emperors.⁵³ The text was lost for many centuries, but rediscovered in eleventh century Bologna and then taught to jurists all over Europe. It was applied as a kind of common law, even without formal enactment by a legislator.⁵⁴ Law bound Europe together even before the modern nation state emerged. Europe also enjoyed a Judeo-Christian tradition of a universal natural law that represented higher principles than the state.⁵⁵

⁵⁰ See NAFTA SECRETARIAT, <http://www.nafta-sec-alena.org/en/view.aspx> (last visited Aug. 4, 2010).

⁵¹ See STONE SWEET, *supra* note 18, at 14, 236.

⁵² JOHN HENRY MERRYMAN & ROGELIO PÉREZ-PERDOMO, *THE CIVIL LAW TRADITION* 3-4 (3d ed. 2007); REINHARD ZIMMERMAN, *ROMAN LAW, CONTEMPORARY LAW, EUROPEAN LAW* 2-3 (2001).

⁵³ MERRYMAN & PÉREZ-PERDOMO, *supra* note 53, at 3-4.

⁵⁴ NILS JANSEN, *THE MAKING OF LEGAL AUTHORITY: NON-LEGISLATIVE CODIFICATIONS IN HISTORICAL AND COMPARATIVE PERSPECTIVE* 5 (2009).

⁵⁵ MERRYMAN & PÉREZ-PERDOMO, *supra* note 52, at 8-11.

In contrast, there is no region-wide notion of law as a superior regulatory device in East Asia. Instead, East Asian thought has for millennia conceived of law as fundamentally an instrument of national state power, rather than as a set of universal constraints on the state.⁵⁶ Law is what the state says it is, not a set of universal constraints applicable to all people and government entities. This conception has remained true even as East Asian countries have adopted modern constitutional form.⁵⁷

The region we know today as East Asia has also never been politically integrated. The Chinese empire has expanded and contracted at different periods, but has never considered the offshore islands of Japan or the Philippines to be part of the core. Instead, the imperial Chinese mode of international relations was the tribute system, in which neighboring states — including at various times Japan, Korea, Vietnam, the island Kingdom of the Ryukyus, and various states in Southeast and Central Asia — sent tribute to acknowledge the suzerainty of China.⁵⁸ In exchange, the countries received trade privileges and some promises of protection and mediation, as well as the status of civilized peoples.⁵⁹ Interestingly, the tributary system was bilateral in nature, meaning that it emphasized interactions between pairs of states rather than groups. It was not a regional council of states, with China at the head, but rather a hub and spokes system with China at the center.⁶⁰ It emphasized non-intervention in the affairs of the barbarians, as well as non-exploitation of them.⁶¹

Notably, the tributary system was not based in some universal ideology to be imposed on other states. Rather, it drew on notions of Chinese cultural and civilizational superiority.⁶² Other states might be barbaric, or might demonstrate civilizational qualities by acknowledging the superiority of China, but there was no universalist tradition or belief system to which all had to convert. This contrasts

⁵⁶ Compare DERK BODDE & CLARENCE MORRIS, *LAW IN IMPERIAL CHINA* 2-4 (1967) (characterizing tradition of law as tool of state), with MERRYMAN & PÉREZ-PERDOMO, *supra* note 52 (arguing that law empowers private citizens).

⁵⁷ See ANDREW J. NATHAN, *CHINESE DEMOCRACY*, at ix-x (1988) (arguing that all twentieth century Chinese constitutions reflect positivist notions of law).

⁵⁸ Zhaojie Li, *Traditional Chinese World Order*, 1 *CHINESE J. INT'L L.* 20, 50-51 (2002).

⁵⁹ See *id.* at 49.

⁶⁰ See *id.* at 25-26, 49.

⁶¹ *Id.* at 31.

⁶² John K. Fairbank, *Tributary Trade and China's Relations with the West*, 1 *FAR E. Q.* 129, 129-30 (1942); Li, *supra* note 59, at 30-31.

with the international orders promoted by Islamic and Western civilizations, which both contained strong universalist overtones born of religious motives.⁶³

To be sure, there are elements of the Confucian tradition that might support a more robust regional organization.⁶⁴ The Confucian concept of *ping* represents harmony and order and is a goal not just for a nation, but for the world.⁶⁵ But the concept that *law* could play a role in facilitating such harmony seems to be antithetical to the conception of law in Chinese thought.⁶⁶

Nor are courts particularly prominent in the historical tradition of the region. To be sure, there have been a number of new constitutional courts that are exercising important powers, and courts are also playing an important role in both constitutional and administrative law.⁶⁷ At times, the courts are willing to cite decisions in other jurisdictions, in accordance with a kind of global trend.⁶⁸

However, supranational adjudication is relatively underdeveloped to this date. Asian countries rarely utilize the International Court of Justice ("ICJ"). Southeast Asian countries have turned to the ICJ to resolve disputes only three times in its history of over seventy years: Cambodia and Thailand sent a territorial dispute about the Preah Vihear Temple in 1959; Indonesia and Malaysia filed a case in 1998 to resolve an ongoing dispute over sovereignty over Pulau Ligitan and Pulau Sipadan, two islands in the Celebes Sea; and Malaysia and Singapore turned to the court in 2003 to resolve another territorial dispute.⁶⁹ China, Korea, and Japan have never filed cases with ICJ, notwithstanding significant territorial disputes among them. And, as stated before, there are no regional courts to speak of. One can only conclude that there is relatively little demand in the region for supranational courts to resolve intra-regional disputes.

⁶³ Li, *supra* note 59, at 44-45, 48.

⁶⁴ See Frederick Tse-Shyang Chen, *The Confucian View of World Order*, in RELIGION AND INTERNATIONAL LAW 27, 27-49 (Mark W. Janis & Carolyn Evans eds., 1999).

⁶⁵ *Id.* at 28.

⁶⁶ See, e.g., BODDE & MORRIS, *supra* note 56, at 43, 49-50 (Confucianists and legalists had different conceptions of law as instrument of state).

⁶⁷ ADMINISTRATIVE LAW AND JUDICIALIZED GOVERNANCE IN ASIA, at ix-x (Tom Ginsburg & Albert Chen eds., 2008); ASIAN CONSTITUTIONALISM IN TRANSITION (Tania Groppi et al. eds., 2008); Andrew Harding & Penelope Nicholson, *New Courts in Asia: Law, Development and Judicialization*, in NEW COURTS IN ASIA 1, 10-11, 14-15 (Andrew Harding & Penelope Nicholson eds., 2010).

⁶⁸ See, e.g., TOM GINSBURG, JUDICIAL REVIEW IN NEW DEMOCRACIES 139, 232 (2003).

⁶⁹ Cases, INT'L CT. OF JUST. (last visited Nov. 3, 2010), <http://www.icj-cij.org/docket/index.php?p1=3&p2=2>.

2. Jealously Guarded Sovereignty

East Asia is the home of the paradigmatic nation states: Japan, Korea, China, and Vietnam. These nations have histories far older than European nation states. At the same time, the region has been victimized by colonialism, leading to some suspicion of a Western-centered international law that was used to justify colonial interference.⁷⁰ Accordingly, there is an apparent reluctance in the region to cede authority to international organization. In international relations, East Asian countries emphasize sovereignty and non-interference as the basic principles of interaction. It is in East Asia, rather than Western Europe, that Westphalian notions of national sovereignty receive their most vocal defense.⁷¹ The obvious consequence is that East Asians have little instinctive trust in any form of transnational law that reaches down into the national sphere. These are formidable barriers for integration through law.

Consider ASEAN, whose ethos is captured in the idea of the “ASEAN Way”: a set of norms that focus on consultation and consensus.⁷² The ASEAN Charter emphasizes the traditional principles of non-interference, sovereignty, and independence.⁷³ To be sure, the Charter also calls for an expansion of ASEAN’s purposes of strengthening democracy and protecting human rights.⁷⁴ But there is little appetite for serious reductions in sovereignty.

This distinctive “sovereignty-reinforcing regionalism” is one of ASEAN’s successes. Elsewhere in the world, regional organizations are seen as eroding national sovereignty.⁷⁵ But ASEAN has played a role in *reinforcing* sovereignty in the classic sense of the UN Charter. ASEAN’s sovereignty-reinforcing regionalism has strengthened rather than weakened national state capacity and, thus, has underpinned much of the economic dynamism and political stability in the region. The demand for this form of regionalism arose because each of the countries in Southeast Asia is a colonial creation, designed around the

⁷⁰ ANTONY ANGHIE, *IMPERIALISM, SOVEREIGNTY, AND THE MAKING OF INTERNATIONAL LAW* 108 (2004).

⁷¹ See generally Tom Ginsburg, *Eastphalia as a Return to Westphalia*, 17 *IND. J. GLOBAL LEGAL STUD.* 27, 34-35 (2010) (describing Asian emphasis on non-interference and national sovereignty).

⁷² See MARY SOMERS HEIDHUES, *SOUTHEAST ASIA: A CONCISE HISTORY* 182-84 (2000) (discussing ASEAN Way norms).

⁷³ A.S.E.A.N. Charter, Nov. 20, 2007, ch.1, art. 2(2)(a), <http://www.aseansec.org/21069.pdf> (entered into force Dec. 15, 2008).

⁷⁴ *Id.* art. 2(2)(i).

⁷⁵ See, e.g., Eric Brahm, *Sovereignty*, *BEYOND INTRACTABILITY* (Sept. 2004), <http://www.beyondintractability.org/essay/sovereignty>.

needs of the metropole.⁷⁶ Even Siam, which retained independence from the colonial powers, consolidated itself as a state in response to European colonialism.⁷⁷ Like the colonial creations, Siam expanded to absorb a hinterland populated by different peoples than those at the core.⁷⁸ This created a diverse state similar in structure to the colonial states of the region. Thus, each of the states in the Southeast Asian region is multiethnic, with peripheral areas that extend well beyond easy central control.

In the aftermath of independence, each of the Southeast Asian nation-builders faced the challenge of establishing and reinforcing central control.⁷⁹ This challenge was easier in some places than others, and many of the security issues in the region today are the legacies of efforts to consolidate artificial entities along colonial boundaries. The border regions — Mindanao, Aceh, the Burma-Thailand border — have been continuous sources of internal separatism.⁸⁰ As a result, state concerns about security were primarily internal, rather than external. Accordingly, from the outset, ASEAN was an organization of relatively insecure states that focused on consolidating the internal aspects of sovereignty rather than external independence *per se*.

In response to this insecurity, ASEAN developed the ASEAN Way, to which many attribute much of the organization's success. The touchstone of the ASEAN Way is non-interference in the internal affairs of the other members.⁸¹ Non-interference includes refraining from public criticism of other members, refusing to provide support or sanctuary to insurgencies against other members, and a commitment to peaceful dispute resolution in inter-state conflict.⁸² These norms, though grounded in the cultures of the region, also can be traced to the UN Charter, with its demands for non-interference and peaceful resolution of disputes.⁸³ In the Southeast Asian milieu, with the potential for destabilizing internal conflicts, ASEAN's reinforcement of these general norms on a regional basis has led to the collective legitimization of the states as states and left them free to focus on

⁷⁶ HEIDHUES, *supra* note 73, at 21-25.

⁷⁷ THONGCHAI WINICHAKUL, *SIAM MAPPED: A HISTORY OF THE GEO-BODY OF A NATION* 13 (1994).

⁷⁸ *Id.* at 101-02.

⁷⁹ HEIDHUES, *supra* note 73, at 163-84.

⁸⁰ *Id.*

⁸¹ Gillian Goh, *The ASEAN Way*, 3 *STAN. J. INT'L AFF.* 113, 114 (2003), available at <http://www.stanford.edu/group/sjeaa/journal3/geasia1.pdf>.

⁸² *Id.*

⁸³ U.N. Charter art. 2, para. 3 (discussing peaceful resolution of disputes); *id.* at para. 7 (discussing non-interference in domestic jurisdiction).

internal challenges of state-building. By discouraging states from supporting cross-border insurgencies against their neighbors, ASEAN has contributed to a stable political environment in the region. This, in turn, has been one of the key factors facilitating the region's spectacular economic growth, which in turn has further strengthened state capacity.

The ASEAN Way is also a style of informality, which may explain why formal institutionalization has been slow. In sum, the concept of sovereignty is alive and well in Southeast Asia. The concept is a defensive one, rooted in non-interference, in accord with a view of power that places less emphasis on "getting others to do what you want them to," so much as avoiding being forced to do something you do not want to.

Sovereignty-reinforcing regionalism served the interests of state-building in an era when every Southeast Asian nation faced internal challenges to their sovereignty, in places such as Mindanao, Karen State, Aceh, and Songkhla. Each of the Southeast Asian states was multiethnic in theory, while having a dominant majority in practice. The legacy of colonial borders meant that there were some internal populations who were affected and sought some degree of autonomy or secession. The ASEAN doctrine of non-interference meant that states refrained from funding national liberation movements in their neighbors, and this was helpful during the phase of state-building.⁸⁴

Northeast Asia has been more reluctant to give up sovereignty. The Chinese mantra of non-interference may also reflect its concern about internal threats. Similarly, Japan has been relatively unwilling to allow international law to interfere with domestic policies.⁸⁵ In domestic governance, Asian countries are hardly in the lead with regard to making blanket constitutional commitments to international treaties or the operation of customary international law. Japanese courts, for example, will apply rules of customary international law directly, but only if they are sufficiently clear.⁸⁶ In this sense, they have been no more international than the allegedly "provincial" United States Supreme Court.⁸⁷ Chinese scholars have asserted that customary

⁸⁴ See Sheldon Simon, *ASEAN and Multilateralism: The Long, Bumpy Road to Community*, 30 CONTEMP. S.E. ASIA 264, 287 (2008).

⁸⁵ YUJI IWASAWA, INTERNATIONAL LAW, HUMAN RIGHTS AND JAPANESE LAW 3 (1998).

⁸⁶ Tōkyō Kōtō Saibansho [Tokyo High Ct.] Mar. 5, 1993, 811 HANREI TAIMUZO 76 (Japan) (as cited in IWASAWA, *supra* note 86, at 78); see Thomas Franck & Arun Thiruvengadam, *International Law and Constitution-Making*, 2 CHINESE J. INT'L L. 467, 495-96 (2003).

⁸⁷ Patrick McFadden, *Provincialism in United States Courts*, 81 CORNELL L. REV. 4, 5 (1995).

international law does not apply in the domestic legal order in China.⁸⁸ And domestic application of treaties has hardly been robust in either China or Japan.⁸⁹

3. International Relations

Another barrier to East Asian integration is the difficult political relations among countries in the region.⁹⁰ Countries must have an incentive to promote integration and adjust their world view to realize their interests are advanced when they give up sovereignty.

After World War II, Europe was such a context. Professor Kenji Hirashima, in a thoughtful analysis, reviews the history of European integration and suggests that an Asian integration project lacks the same foundations.⁹¹ Hirashima recognizes the role of domestic preferences in the key decisions setting up the European Union, and emphasizes the geopolitical.⁹² Domestic preferences in East Asia do not seem to be pushing toward full-fledged integration, and geopolitical concerns are not a source of pressure in this regard. In particular, Cold War Europe enjoyed a profound external threat that led politicians to put sovereignty to the side. Asia lacks even the prospect of such an external threat that would force, for example, China and Japan to unite under common cause.

The major security threats in Asia are intra-regional rather than extra-regional. The region includes two of the world's potential hotspots: the Taiwan Strait and the Demilitarized Zone between South and North Korea. China and Japan are both superpowers, and many consider India to be becoming one as well.⁹³ Relations among these states are complicated, and tensions have emerged in late 2010 between China and Japan regarding control of the seas.⁹⁴

⁸⁸ Franck & Thiruvengadam, *supra* note 86, at 500.

⁸⁹ See IWASAWA, *supra* note 85, at 27; Hanqin Xue & Qian Jin, *International Treaties in the Chinese Domestic Legal System*, 8 CHINESE J. INT'L L. 299, 304 (2009) (stating that "it cannot be concluded in sweeping terms that international law prevails over domestic law").

⁹⁰ Stallings, *supra* note 49, at 78 ("[P]olitical relations among East Asian countries are even more problematic than those found in Latin America.").

⁹¹ Kenji Hirashima, *European Integration in a Historical Perspective: How Did It Begin and What Are the Lessons for Asia?*, in EAST ASIAN REGIONALISM FROM A LEGAL PERSPECTIVE, *supra* note 11, at 107.

⁹² *Id.*

⁹³ Apurva Joshi, *Can India Become a Superpower?*, THE VIEWSPAPER, July 8, 2008, <http://theviewpaper.net/can-india-become-a-superpower>.

⁹⁴ Edward Wong, *Chinese Civilian Boats Roil Disputed Waters*, N.Y. TIMES, Oct. 5, 2010, <http://www.nytimes.com/2010/10/06/world/asia/06beijing.html>.

ASEAN has taken the lead in East Asian regionalism largely because the two big powers that would be natural leaders of Asian regional integration are unable or unwilling to play the role. China's grand strategy has been to let other powers take the lead. China is growing more assertive in international and regional fora, but is still not ready to create an alternative Beijing-centered dialogue for Asia because its internal transition to a market economy is incomplete and will remain so for some time.⁹⁵

Similarly, Japan has been unable to play the role of host and leader for a variety of reasons, including the power of its domestic interest groups, its relationship with the United States, and its lingering tensions over World War II.⁹⁶ Of course, Germany faced similar historical constraints in Europe, and it effectively formed a partnership with France to drive European integration.⁹⁷ What are the prospects for Japan and China jointly leading regional integration? Japan and China have been unable to cooperate closely to date, and few believe that such a project is likely in the near future. Most observers view Japan and China as rivals rather than partners.⁹⁸

The European Union's formation grew from a grand bargain of France and Germany.⁹⁹ In the 1950s, Germany was seen to be the rising economic engine of Europe, but unable to take the political lead for obvious reasons. France desired political leadership and sought to bind Germany into a common economic project to avoid a repeat of World War II. These two pillars formed the European Coal and Steel Community along with Italy and the smaller Benelux countries. From these early seeds, the European Union developed into the quasi-federalist super-state that it is today, largely spurred on by the ECJ.¹⁰⁰

Asia's development of a similar super-state is unthinkable. In Asia, the rising power is China and the status quo power Japan. The two powers have utterly different political and social systems, and neither needs a regional organization to promote economic integration, which

⁹⁵ See Wu Xinbo, *Chinese Perspectives on Building an East Asia Community in the Twenty-First Century*, in *ASIA'S NEW MULTILATERALISM* 55 (Michael Green & Bates Gill eds., 2009).

⁹⁶ Oguma Eiji, *The Postwar Intellectuals' View of "Asia"*, in *PAN-ASIANISM IN MODERN JAPANESE HISTORY: COLONIALISM, REGIONALISM AND BORDERS* 200, 202-08 (Sven Saaler & J. Victor Koschman eds., 2007); Chey, *supra* note 39, at 453-54.

⁹⁷ Wolfram Kaiser, *Transitional Networks in European Governance*, in *THE HISTORY OF THE EUROPEAN UNION* 12, 21 (Wolfram Kaiser, Brigitte Leucht & Morten Rasmussen eds., 2009).

⁹⁸ ELLEN FROST, *ASIA'S NEW REGIONALISM* 135 (2008).

⁹⁹ Kaiser, *supra* note 97, at 21.

¹⁰⁰ STONE SWEET, *supra* note 17, at 1, 46-50.

is already well along.¹⁰¹ China might one day show German-style inclination to hide its leadership behind a regional façade, but at this point the political merits of an intrusive, true federation are not obvious from either China or Japan's point of view.¹⁰²

It is important to remember that European integration had a security motive as well as an economic one. Having fought numerous wars, and facing an existential threat from the Soviet Union, the EU complemented NATO. Asia faces no common threat from outside the region that might serve to incentivize integration. The largest offshore power is the United States, which is hardly a security threat that might mobilize a common bond between China and Japan.

In short, ASEAN's regionalism is a harbinger of Asian regionalism to come. Above all, it is *sovereignty-reinforcing*. There is not and will not be a supranational court designed to adjudicate disputes among neighbors. In other words, it is a Westphalian style of regionalism, in which the princes gather to discuss mutual concerns but refrain from criticizing each other, least of all regarding "internal" affairs.¹⁰³ To be sure, there is plenty of cooperation among ASEAN bureaucrats. But this is perfectly compatible with classical international law and a Westphalian view.

III. THE PROSPECTIVE EASTPHALIAN ORDER

In light of this analysis, it is worth considering recent proposals for greater economic and legal integration. One such effort is a Draft Charter for an East Asian Community, proposed by a group of Japanese academics as a possible basis for further integration.¹⁰⁴ The idea emerged out of a study group at the University of Tokyo and presents a creative example of academic innovation that might lead to further development by governments. Ideas surely matter, and there are several examples in international relations when academic efforts laid the groundwork for governments to follow when conditions were ripe.

The proposed East Asian Charter would create an international organization, in which the primary decision-making criteria are unanimity and consensus.¹⁰⁵ This structure, which looks in some sense

¹⁰¹ Xinbo, *supra* note 95, at 70-71.

¹⁰² Injoo Sohn, *Learning to Co-Operate: China's Multilateral Approach to Asian Financial Co-Operation*, 194 CHINA Q. 309, 324-25 (2008).

¹⁰³ See KRASNER, *supra* note 2, at 20-23.

¹⁰⁴ Tamio Nakamura et al., *Draft Charter of the East Asian Community*, in EAST ASIAN REGIONALISM FROM A LEGAL PERSPECTIVE, *supra* note 11, at 256.

¹⁰⁵ *Id.* at 264 (noting that East Asian Council shall act by consensus); *id.* at 265 (noting that Council of Ministers shall act by consensus).

like the regionalization of ASEAN, obviously respects national sovereignty, in that each state can choose the rules that will apply to it. The institutional architecture includes an East Asian Council, a Council of Ministers, a Secretariat, and committees of National Parliamentarians and former senior officials known as “Eminent Persons.”¹⁰⁶ The Eminent Persons group is an interesting feature that one might characterize as particularly Asian, as it is one of the structures within ASEAN.¹⁰⁷

The Council of Ministers structure is a perfect parallel with the “EU structure,” in which the heads of governments form the Council, the highest decision-making body, and the Council of Ministers consists of topically relevant ministers from national governments. The European Union has a European Parliament, directly elected at the national level, which is acquiring an increasingly powerful role in legislation over time.¹⁰⁸ The proposed Asian structure has a National Parliamentarians Committee, appointed by national parliaments, and so with a much more indirect relationship to national publics. This no doubt reflects a less ambitious goal: whereas the European regional discussion centers on the ideal of a transnational polity, such a suggestion would be anathema to the governments of the Asian region. Notably, the proposal does not include an analogue to the European Court of Justice, though Article 35(5) provides that the Member states will study the establishment of such an institution. Disputes are to be resolved peacefully and through conciliation.¹⁰⁹ Penalties for serious breaches of the Charter may result in suspension from the organization.¹¹⁰ The overall flavor is one of consultation and negotiation, which represents an extension of the ASEAN Way.

This institutional structure is sensible given the conditions as they currently exist. But it suggests that law will play a secondary role in moving things forward. A supranational regional court that can spur states to move forward on integration seems unlikely. To be sure, transnational dispute resolution in the trade and investment spheres is growing in Asia. These schemes of trade and investment arbitration at the heart of the legal integration project are typically ad hoc and not permanent. This means they are unlikely to develop into permanent

¹⁰⁶ *Id.* at 265-66.

¹⁰⁷ See ASEAN SECRETARIAT, REPORT OF THE EMINENT PERSONS GROUP 2 (2006), available at <http://www.aseansec.org/19247.pdf>.

¹⁰⁸ Richard Corbett, Francis Jacobs & Michael Shackleton, THE EUROPEAN PARLIAMENT 2 (7th ed. 2007).

¹⁰⁹ Nakamura et al., *supra* note 105, at 270.

¹¹⁰ *Id.* at 271.

power centers that states need to consider in ordering their affairs. Law will play a role, but not a prominent one in the sense of transforming state preferences or ruling against the interests of the states qua states.

CONCLUSION

Scholars who argue that the European experiment is the future of international law focus on the increasing development of regional organizations.¹¹¹ Yet Asia has been relatively slow in this regard, taking only tentative steps to date. On the one hand, East Asian integration is already proceeding at the level of the private sector, and governments are playing somewhat of a facilitative role.¹¹² On the other hand, political integration and legal integration remain quite tentative.

There are formidable barriers to further political and legal integration in Asia. First, there is little in the concept of law in East Asia that would provide the basis for regional norms. Instead, countries in the region rely on a positivist conception of law as an instrument of the nation state.¹¹³ Second, countries in the region have emphasized sovereignty in their international relations, the classic Westphalian basis for international law.¹¹⁴ Third, the countries in the region face a very different international environment than the post-war European nations did.¹¹⁵

At the end of this thought experiment, one must conclude that regional integration in Asia will proceed in its own way, with the European model only vaguely a touchstone, particularly with regard to the role of law. Law will be present, as it must be in a world of increasing transborder interaction, but its role is likely to remain a secondary one, subject ultimately to constraints imposed by national political leaders.

¹¹¹ Slaughter & Burke-White, *supra* note 3, at 333.

¹¹² Shimizu, *supra* note 11, at 3-5.

¹¹³ *See supra* Part II.B.1.

¹¹⁴ *See supra* Part II.B.2.

¹¹⁵ *See supra* Part II.B.3.