

**CHINA'S RISE AND INTERNATIONAL LAW:
STRENGTHENING OR WEAKENING A FUNDAMENTAL INSTITUTION?**

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Over the last two decades, the rise of the People's Republic of China and East Asia has given rise to an intense debate on its consequences for United States' hegemony, the distribution of global power and the dynamics of an international system leaning towards multipolarity.¹ Some authors have gone farther, pointing out that this 'global power shift'² also represents an unprecedented challenge to the role of international law as the key institution of the current international order. According to these analysts, this transformation will eventually relegate international law to a secondary position, similar to that which it held during the balance of power system of the nineteenth century or the bipolar system of the Cold War.³ This chapter argues against such interpretations, positing that the rise of Beijing and other East Asian capitals over the twenty-first century will not necessarily lead to the marginalisation of international law. Indeed, since the early 1950s, international law has been one of the fundamental institutions of East Asia's regional order.⁴

Leading on from these initial reflections, the following section provides a brief review of the process of constructing the regional order over the last seventy years. This brief coverage of how the regional order was established will help to interpret the second section, which analyzes the structure and content of the constitutional base of this order, which international law rests on. In general terms, Christian Reus-Smit has defined this base as a coherent set of 'beliefs, principles and intersubjective norms' which help identify the legitimate actors

¹ For further reading on this debate see RK Betts, 'Wealth, Power, and Instability: East Asia and the United States after the Cold War' (1993/94) 18(3) *International Security* 34-77; AL Friedberg, 'Ripe for Rivalry' (1993/94) 18(3) *International Security* 5-33; G Segal, 'East Asia and the Constraint of China' (1996) 20(4) *International Security* 107-35; R Bernstein and RH Munro, *The Coming Conflict with China* (Knopf, New York 1997); TJ Christensen, 'Posing Problems without Catching Up: China's Rise and Challenges for U.S. Security Policy' (2001) 25(4) *International Security* 5-40; IJ Alastair, 'Is China a Status Quo Power' (2003) 27(4) *International Security* 5-56; B Zheng, 'China's Peaceful Rise to Great-Power Status' (2005) 84(5) *Foreign Affairs* 18-24; S Shirk, *China: Fragile Superpower* (OUP, New York 2007); GJ Ikenberry, 'The Rise of China and the Future of the West. Can the liberal system survive?' (2008) 87(1) *Foreign Affairs* 23-37; CF Bergsten and others, *China's Rise: Challenges and Opportunities* (Peterson Institute for International Economics, Washington, DC 2008).

² J Hoge, 'A global power shift in the making' (2004) 83(4) *Foreign Affairs* 2-7.

³ E Posner and J Yoo, 'International Law and the Rise of China' (2006) 7 *Chicago JIL* 1-15.

⁴ Using the work of Hedley Bull and the recent work by Joseph M Parent and Emily Erikson as a base, in this chapter regional order is interpreted as a *pattern of activity which limits the frequency and magnitude of violent interactions between the members of a particular region*. This definition contains three constitutive parts: (1) the prior existence of a system, that is, a set of two or more politically organized units which are relatively independent from each other but which interact with a certain degree of frequency and which influence each other and act as parts of a whole; (2) the regular repetition of a certain pattern of international activity which reduces unpredictability amongst members of the system; and (3) a quantitative and qualitative limitation of violence in relations. H Bull, *The Anarchical Society: A Study of Order in World Politics* (3rd edn Palgrave, Basingstoke 2002) 8, 16; JM Parent and E Erikson, 'Anarchy, hierarchy and order' (2009) 22 *Cambridge Review of International Affairs* 129-45.

interacting within the order and the parameters limiting their actions.⁵ In analyzing the main components of this group we contextualise the third and final section, which centres on the study of international law as a key institution within the regional order.

I. THE PROCESS OF CONSTRUCTING EAST ASIA'S REGIONAL ORDER

The process leading to the construction of East Asia's current regional order and the anchoring of international law as a fundamental institution can be split into three different periods that, in spite of some overlap, can be viewed as following a chronological sequence. The formation period of this order started in December 1941 with the United States' entry into World War II after the Japanese attack on Pearl Harbor, and terminated in March 1955 with the ratification of its mutual defence agreement with Taiwan. This period witnessed the definition of the basic features of the new order, as well as the design of its most basic structure. The two main actors were the United States and, to a lesser extent, the Soviet Union, both fuelled by their ideological rivalry and their desire to expand the geographical areas under their influence. In parallel to the decolonization process, the confrontation between these two superpowers, their role in the First Indochina War, the occupation of Japan, the Korean War and the Chinese Civil War led to the configuration of the region's geopolitical organization. In addition, the United States' security strategy of hubs and spokes with its East Asian allies promoted bilateralism and international law as the two fundamental institutions of the emerging order. The consolidation period comprises the years between March 1955 and February 1972, when Washington and Beijing agreed on the first Shanghai Communiqué and embarked on the normalization of their bilateral relationship. Throughout this period the United States remained the most influential actor in shaping the regional order, whereas the Soviet Union's room for manoeuvre decreased. By renewing previous agreements and signing new ones with their respective allies, both superpowers reinforced bilateralism and international law as the order's fundamental institutions. In addition, the creation of ASEAN saw the birth of the order's norm of procedural justice, the so-called 'ASEAN way'.⁶ Finally, the current adaptation period began with Nixon's visit to China in 1972. During this period the constitutional structure and fundamental institutions of East Asia's regional order finally took root. The traditional dominance of bilateralism, however, has been partially challenged by the advance of multilateralism⁷. In parallel, the United States has lost its absolute control over the process and other state and non-state actors have gained prominence. Moreover, economic issues have made significant inroads into the regional agenda, thus contributing to the creation of new organizations and to the transformation of the former hegemonic order into a contractual one.

This contractual order is built on a regional system in which states share at least some minimal values based around the ideals of justice and equality, and within which there are some links of association between the component members. Each state maintains its own identity which differentiates it from other members of the order, but the links between the member states may give rise to a feeling of collective identity, even though this may be weak.

⁵ CH Reus-Smit, 'The Constitutional Structure of International Society and the Nature of Fundamental Institutions' (1997) 51 *Int'l Org.* 555, 566.

⁶ A Acharya, 'Ideas, Identity, and Institution Building: From the "ASEAN Way" to the "Asia-Pacific Way"?' (1997) 10(3) *Pacific Review* 3-46.

⁷ J Ravenhill, 'The new bilateralism in the Asia-Pacific' (2003) 24 *Third World Quarterly* 299-317.

The distribution of power within the system, on the other hand, is variable in nature; although states continue to maximize their own interests, at the same time they also seek out common interests through various principles, norms and institutions. The principles in question refer to 'beliefs of facts, causation and rectitude', whilst norms consist of 'standards of behaviour defined in terms of rights and obligations'.⁸ The principles and norms are expressed through specific rules whose content and formulation have been precisely defined and which, when brought together, determine the framework and normative foundation of the system. The institutions are built on this foundation and can be defined as 'constant sets of formal and informal norms which prescribe patterns of behaviour, constrain actions and create expectations'.⁹ The set of principles, norms and institutions determine the legitimacy or otherwise of possible courses of action and work as a limiting factor against the concentration of power. In the short term, any concentration of power is made difficult as obligations are established for all states within the system and cooperation is fostered. In the medium and long term, a concentration of power is unattractive for actors within the system because there are costs for non-compliance with the laid-down obligations, thus reducing the incentives for states within the system to maximize their power. These principles, norms and institutions affect the interests and identities of all states within the system; furthermore, the fact that these states adhere to and observe the aforementioned principles, norms and institutions creates stability within the order. Finally, the regional order within East Asia differs from the broader international order, but both forms of order are compatible and they tend mutually to reinforce each other.

II. THE CONSTITUTIONAL BASE OF EAST ASIA'S REGIONAL ORDER

The base – or constitutional structure – of East Asia's regional order comprises three interconnected elements: a hegemonic belief with regard to the moral objective of a centralized and autonomous political organization, the organizational principle of sovereignty, and the norm of procedural justice.

a) The 'developmental' hegemonic belief with regard to the moral objective of the State

Since the beginning of the 1940s, it has been an accepted fact in East Asia that the autonomous and centralized state is the key and legitimate form of political organization within the regional system. Additionally, during the intervening period a hegemonic belief has taken hold that the moral role of the state is to promote and sustain economic development, so we can thus consider the state as being developmentalist. The main explanation behind the

⁸ SD Krasner, 'Structural Causes and Regime Consequences: Regimes as Intervening Variables' in SD Krasner (ed.), *International Regimes* (Cornell University Press, Ithaca 1983) 2. In accordance with the ideas of M Alagappa, the set of norms that guide the relations between states can be classified according to their nature (constitutive or regulative norms) or the purpose they serve in relation to the international order (norms of coexistence, coordination or collaboration). M Alagappa (ed.), *Asian Security Order: Institutional and Normative Features* (Stanford University Press, Stanford 2003) 40.

⁹ RO Keohane, *International Institutions and State Power* (Westview Press, Boulder, Colorado 1989) 3. Christian Reus-Smit posits that these institutions work to deal with two key problems which, according to Arthur Stein, hinder the construction and maintenance of the international order: the problems related to collaboration are associated with States seeking out common interests, and the coordination problems surround those situations in which collective action is essential in order to avoid certain consequences. CH Reus-Smit (n 5) 557; A Stein, *Why Nations Cooperate: Circumstance and Choice in International Relations* (Cornell University Press, Ithaca 1990) 39-44.

establishment of this belief among the countries which have led the gradual economic growth in the region lies in the central role played by governmental administrations in this process. This central role has traditionally rested on four complementary factors. The first factor relates to the existence of societies which were poorly organized and relatively weak, thus meaning there was no societal element to hold back the concentration of power in the hands of small government elites during the decades following the end of the Second World War. The armed conflicts of the 1940s and 1950s broke up the political and economic communities that had previously existed in East Asia. Furthermore, these conflicts gave rise to a more generalized worry regarding security that favoured the establishment of government administrations that were able coercively to maintain domestic stability and territorial integrity in the face of possible external attacks.¹⁰ The second factor stems from the economic interests of certain groups within the elites; these groups had sufficient resources and influence so as to be able to push forward governmental policy and their own economic ideologies. Initially these groups were found around the Ministry of International Trade and Industry (MITI) in Japan in the early 1960s, but similar groups began appearing in the 1970s in Hong Kong, Taiwan, South Korea and Singapore, with others emerging later in Malaysia, the Philippines, Thailand and Indonesia.¹¹ The third factor is the centralizing impact of the Communist threat on the United States' allies in East Asia. In most of these countries the population either did not oppose the concentration of power as a means of holding back the advance of Communism or, in cases such as Singapore and Malaysia, was relatively supportive of this policy.¹² In all cases, the demands that came with the military alliances with Washington worked to strengthen state structures.¹³ The fourth factor is the United States' aid and trade policy in the region. Between the end of the 1940s and the mid-1970s the United States' administration invested large sums of capital in East Asia, as well as opening up its own market to products from the region and purchasing numerous products and raw materials there in order to sustain its troops in the Korean and Vietnam Wars.¹⁴

The content of these factors, and their impact on the establishment of the developmental hegemonic belief as regards the moral objective of the state, have been altered by the end of the Cold War and the consequent transformation of the regional security scene. At the domestic level, democratization processes have been activated in the majority of East Asian

¹⁰ R Stubbs, 'What ever happened to the East Asian Developmental State? The Unfolding Debate' (2009) 22 *The Pacific Review* 1, 6.

¹¹ J Fallows, *Looking for the Sun: The Rise of the New East Asian Economies and Political System* (Pantheon, New York 1994). See also C Johnson, *MITI and the Japanese Miracle: The Growth of Industrial Policy, 1925-1975* (Stanford University Press, Stanford 1982); KE Calder, 'Japanese Foreign Economic Policy Formation: Explaining the Reactive State' (1988) 40 *World Politics* 517-48; World Bank, *The East Asian Miracle: Economic Growth and Public Policy* (OUP, New York 1993) esp. Ch. 2; P Krugman, 'The Myth of Asia's Miracle' (1994) 73(6) *Foreign Affairs* 62-78; R Wade, *Governing the Market: Economic Theory and the Role of Government in East Asian Industrialization* (Princeton University Press, Princeton 2003); H-J Chang, *Globalisation, Economic Development & the Role of the State* (Zed Books, London 2003).

¹² MJ-E Woo-Cumings, 'National security and the rise of the DS in South Korea and Taiwan' in HS Rowen (ed.), *Behind East Asian Growth: The Political and Social Foundations of Prosperity* (Routledge, London 1998) 319-37; T Zhu, 'DSs and Threat Perception in Northeast Asia' (2002) 2(1) *Conflict, Security and Development* 5-29.

¹³ B Cumings, 'The Origins and Development of the Northeast Asian Political Economy: Industrial Sectors, Product Cycles and Political Consequences' (1984) 38 *Int'l Org.* 1-40;

¹⁴ B Harland, 'Whither East Asia?' (1993) 6 *The Pacific Review* 9-16; R Stubbs, *Rethinking Asia's Economic Miracle: The Political Economy of War, Prosperity and Crisis* (Palgrave Macmillan, Basingstoke 2005).

economies and the Communist threat no longer exists as a unifying element for government policies, which has resulted in a loss of support for the concentration of power in the hands of elites. At the regional level, the partial withdrawal of the United States from South-East Asia at the beginning of the 1990s, the gradual closing-off of the US market to Asian products and the reduction in US economic aid have led to the erosion of government elites and the traditional development model. At the global level, changes in the nature of capital flows and the growing power of actors and authorities other than states have further accentuated this trend.¹⁵ However, far from disappearing, the developmental hegemonic belief has continued to be relevant in all cases. On the one hand, the adherence to traditional economic and trading practices on the part of regional economic agents, who benefited from the economic growth model between the mid-1960s and the end of the 1980s, has guaranteed the survival of this belief beyond any formal regulatory changes. On the other hand, the generally positive opinion held by East Asian societies with respect to their states as guarantors of security and providers of welfare over the same period has contributed to states maintaining their central role, albeit in a slightly weakened form. Finally, the survival of a complex network of regional interconnections built on multiple trading agreements and organizations has reinforced the influence of the government and economic elites, favouring the continuation of the status quo.¹⁶

In parallel to this, the last twenty years have seen the developmental hegemonic belief spread to countries which either did not participate, or only partially participated, in the gradual economic growth model of the Cold War. Vietnam and the People's Republic of China took on this belief in the mid-1980s, but it really started to take hold after the end of the Cold War, as the ideological conflicts that had previously dominated were greatly relaxed and Communism was no longer a legitimising force.¹⁷ The societies of Brunei, Laos and Cambodia, with much weaker state structures, have started to go down this route more recently.¹⁸ In contrast, the societies of North Korea and Myanmar have not formed a similar link between the legitimacy of their governments and their capacity to promote and sustain economic development. In fact, the majority consider that the moral objective of the state is still connected to cultural and ideological factors.¹⁹ The impact of these two exceptions on the

¹⁵ Stubbs (n 10) 9-12.

¹⁶ Ibid, 12-13.

¹⁷ F Chen, 'The dilemma of Eudaemonic Legitimacy in Post-Mao China' (1997) 29 *Polity* 421-39; D Phong and M Beresford, *Authority Relations and Economic Decision-Making in Vietnam: An Historical Perspective* (Nordic Institute for Asian Studies Publications, Copenhagen 1998); Y Zheng, *Discovering Chinese Nationalism in China: Modernization, Identity and International Relations* (CUP, Cambridge 1999) esp. Ch. 2; S Zhao, 'China's Pragmatic Nationalism: Is It Manageable?' (2005) 29(1) *The Washington Quarterly* 131-44; CA Thayer, 'Challenges to the Legitimacy of the Vietnamese One-Party State', presented at the conference 'The Search for Legitimacy: Managing the Consequences of Asian Development', Singapore, 27-8 July 2009.

¹⁸ M Alagappa (ed.), *Political Legitimacy in Southeast Asia: The Quest for Moral Authority* (Stanford University Press, Stanford 1995); S Narine, 'State Sovereignty, Political Legitimacy and Regional Institutionalism in the Asia-Pacific' (2005) 17 *The Pacific Review* 423-50.

¹⁹ DI Steinberg, 'On Patterns of Political Legitimacy in North Korea' in SS Kim (ed.), *The North Korean System in the Post-Cold War Era* (Palgrave Macmillan, New York 2001) 87-113; A Cheng, 'Political Legitimacy in Myanmar: The Ethnic Minority Dimension' (1997) 3 *Asian Security* 121-40; T Maung Maung Than, *State Dominance in Myanmar: The Political Economy of Industrialization* (Institute of Southeast Asian Studies, Singapore 2007) esp. Ch. 9; DI Steinberg, "'Legitimacy" in Burma/Myanmar: Concepts and Implications' in N Ganesan and K Yin Hlaing (eds), *Myanmar: State, Society and Ethnicity* (Institute of Southeast Asian Studies, Singapore 2007) 109-42.

establishment of the developmental hegemonic belief in the regional order should not, however, be overestimated. In order to be legitimate, this belief must be accepted by the majority and must not be significantly questioned by the most powerful actors within the order, but it does not necessarily have to be shared by each and every one of the actors within the system.²⁰ In other words, for the belief in the moral objective of the state to be hegemonic does not imply that it must be universally and wholly accepted, nor that it be exclusive, as there is room for a certain degree of dissent.

b) The organisational principle of Westphalian-style sovereignty

Underlying the developmental hegemonic belief, the constitutional structure of East Asia's regional order includes the organizational principle of sovereignty, which is strongly influenced by Westphalian ideals. This sovereignty, as in all forms of contractual order, serves to 'differentiate political units on the basis of particularity and exclusivity, creating a system of territorially demarcated, autonomous centres of political authority'.²¹ Compared with liberal and anti-utopian concepts,²² the Westphalian idea of sovereignty is based around state authority and autonomy. The concept of authority refers to the right of the state to govern the population within a demarcated territorial area, and the state provides a guarantee to defend both its people and its land.²³ Autonomy, on the other hand, claims independence and equality for this state within the system.²⁴ In East Asia, both concepts are viewed as inseparable to such an extent that, as Christopher Clapham and Shaun Narine have pointed out, for most countries in the region 'authority without autonomy is an empty sovereignty'.²⁵ Both concepts are also fiercely defended by government elites in the region, which has traditionally been evidenced in a strong belief in non-interference in the domestic affairs of other states.²⁶

²⁰ Reus-Smit (n 5) 566-7.

²¹ Ibid 567.

²² Following the classification set out by Takashi Inoguchi, the liberal or 'Philadelphian' concept of sovereignty is constructed around the popular nature of sovereignty and the dilemma surrounding whether or not this should be promoted and exported to all the states within the system, whilst the anti-utopian concept is based on the idea of incomplete sovereignty or of loss of sovereignty and is expressed in the resistance of some states and cultures to yield to Western attempts to impose liberal values and the logic of globalization on them. T Inoguchi, 'Peering into the Future by Looping Back: The Westphalian, Philadelphian and Anti-utopian Paradigms' (1999) 1 *International Studies Review* 173-91; T Inoguchi and P Bacon, 'Sovereignties: Westphalian, Liberal and Anti-utopian' (2001) 1 *International Relations of the Asia-Pacific* 285-304.

²³ R Jackson, 'Sovereignty in World Politics: A Glance at the Conceptual and Historical Landscape' in R Jackson (ed.), *Sovereignty at the Millennium* (Blackwell, Malden 1999) 9-34.

²⁴ SD Krasner, 'Problematic Sovereignty' in SD Krasner (ed.), *Problematic Sovereignty* (Columbia University Press, New York 2001) 1-23.

²⁵ CH Clapham, 'Sovereignty in the Third World State' in R Jackson (ed.), *Sovereignty at the Millennium* (Blackwell, Malden 1999) 100-15; S Narine (n 18) 429.

²⁶ Having borne witness to the deeply-rooted nature of this phenomenon throughout East Asia, D Dickens and G Wilson-Roberts have shown that it is more strongly emphasized in the countries of South-East Asia than in those of North-East Asia and they have suggested that this divergence could be explained by the distinct colonial traditions of these countries, the differing degree of consolidation of the state structures in each sub-region and the variable geopolitical weight of each of these within contemporary international society. D Dickens and G Wilson-Roberts (eds), *Non-Intervention and State Sovereignty in the Asia-Pacific* (Centre for Strategic Studies/China Centre for International Studies/Institute of Strategic and International Studies, New Zealand 2000); J Funston, 'ASEAN and the Principle of Non-intervention: Practice and Prospects' in D Dickens and G Wilson-Roberts (eds), *Non-Intervention and State Sovereignty in the Asia-Pacific* (Centre for Strategic

This concept began to take hold in the region in the mid-nineteenth century, because of intervention by Western powers in North-East Asia and because Japan, China and Korea became sovereign states.²⁷ These three countries took the principle of sovereignty on board more for reasons of pragmatism than conviction, though the process took on its own characteristics in each case. In Japan, the government elites clung on to the Westphalian concept of sovereignty because of their fear of a confrontation with Western powers, as well as seeing sovereignty as a way of guaranteeing their hold over any future territorial expansions. In China, the widely-held conception of the governing elite as a political and moral entity that was hierarchically superior to all others, coupled with certain deeply rooted principles and institutions from the previous order, meant that the elites were less predisposed to the idea. However, the elites were able to meet their needs through the formal acceptance of sovereignty alongside the informal continuance of some more traditional practices, mostly based in Confucianism. In Korea, it was impossible to abandon these practices, either formally or informally, because of their strong links to government legitimacy; this heavily limited the elites' scope of action. In the medium term, this limitation led to absorption into the Japanese Empire and, conversely, to a gradual acceptance of the Westphalian concept of sovereignty.²⁸

The spread of the principle of sovereignty to South-East Asia came about later, during the first half of the twentieth century. The dependence on colonial hierarchies and the development of state structures by colonial metropolises during this period incited the rise of nationalist feeling.²⁹ Meanwhile, the experience of their neighbours to the north further encouraged the development of nationalism, as well as fostering a growing regional hostility towards the West. This brought about a growing belief in sovereignty as a means for achieving independence through a process that Hendrik Spruyt has labelled as 'ironic'.³⁰ The irony comes from the fact that it was the refusal on the part of the European metropolises to grant their colonies sovereignty that led the latter to rebel, which saw them adopting the principle of sovereignty within their discourse in order to demand independence. The concept of sovereignty thus became universalized, as did the European organizational basis of Westphalian sovereignty.

Once it had spread throughout East Asia, the establishment of Westphalian sovereignty as part of the constitutional structure of the regional order took place during the second half of the twentieth century. Three factors contributed to this process. Firstly, memories of the Second World War and the wars of independence lived on within societies of the region. In a context shaped by instability and ideological rivalry between Communism and capitalism, these memories led to an attachment to sovereignty as a means of guaranteeing security. The second factor was the deeply-rooted belief in nationalism and anti-colonialism within these societies, which was occasionally instrumentalized by leaders of the newly-independent states

Studies/China Centre for International Studies/Institute of Strategic and International Studies, New Zealand 2000) 9-22.

²⁷ SD Krasner, 'Organized Hypocrisy in 19th Century East Asia' (2001) 1 *International Relations of Asia Pacific* 173-97.

²⁸ *Ibid.*

²⁹ Alagappa (n 18).

³⁰ H Spruyt, 'The End of Empire and the Extension of the Westphalian System: The Normative Basis of the Modern State Order' (2000) 2(2) *International Studies Review* 65-92.

in order to consolidate their authority.³¹ The third factor relates to the impact of the cultural, ethnic and religious diversity of the majority of East Asian states on the political legitimacy of their governments: right from the start, this political legitimacy was conditional on governments' capacity to maintain national unity. Looking to guarantee their permanence in power, the governments of the region resorted to the strengthening of state structures and, just as in other regions of the Third World, made the concept of Westphalian sovereignty the central theme of their discourse.³²

In the post-Cold War period, the arrival of growing communal and transnational pressures, driven forward by globalization, has weakened the hegemonic position of the concept of sovereignty in East Asia. The communal pressures are linked to the claims of groups which operate within states. As has been witnessed in the cases of the province of Aceh in Indonesia and the regions of Tibet and Xinjiang in China, these question the capacity and legitimacy of central governments to exercise their authority over the entirety of their territory. The transnational pressures derive from the emergence of actors and authorities other than the state and the rise of regional challenges of a transnational nature, such as terrorism, organized crime or pollution, with the implications for governments being the same as in the case of communal pressures.³³ However, the continued presence of the previously mentioned factors, which have strengthened the concept of Westphalian sovereignty over the last two decades, has acted as a counterpoint to these pressures.³⁴ This is not to say that the principle of Westphalian sovereignty has always been respected or that all the actors within the region defend it with the same passion.³⁵ However, even authors who question its primacy accept

³¹ C-I Moon and CH Chun, 'Sovereignty: Dominance of the Westphalian Concept and Implications for Regional Security' in M Alagappa (ed.), *Asian Security Order: Institutional and Normative Features* (Stanford University Press, Stanford 2003) 106-37.

³² M Alagappa (n 18); M Ayoob, *The Third World Security Predicament* (Lynne Rienner, Boulder, Colorado 1995), 'Subaltern Realism: International Relations Theory Meets the Third World' in SG Neuman (ed.), *International Relations Theory and the Third World* (MacMillan Press, Houndsmills 1998) 31-54; M Ayoob, 'Inequality and theorizing in international relations: the case for subaltern realism' (2002) 4(3) *International Studies Review* 27-48; H Kraft, 'The Principle of Non-Intervention: Evolution and Challenges for the Asia-Pacific Region' in D Dickens and G Wilson-Roberts (eds), *Non-Intervention and State Sovereignty in the Asia-Pacific* (Centre for Strategic Studies/China Centre for International Studies/Institute of Strategic and International Studies, New Zealand 2000) 23-41; Narine (n 18).

³³ M Beeson, 'Sovereignty Under Siege: Globalization and the State in Southeast Asia' (1993) 24 *Third World Quarterly* 357-74; Moon and Chun (n 31) 126-9.

³⁴ M Oksenberg, 'The Issue of Sovereignty in the Asian historical context', in SD Krasner (ed.), *Problematic Sovereignty* (Columbia University Press, New York 2001) 84, 87; S Narine (n 18) 433.

³⁵ Aihwa Ong notes that the region currently embraces a concept of 'graduated' sovereignty which seeks to reconcile Westphalian elements of sovereignty with the pressures of globalization faced by states, though she recognizes the predominant nature of the former. A Ong, 'Graduated Sovereignty in South-East Asia' (2000) 17(4) *Theory, Culture and Society* 55-75. Going a step further, Chung-In Moon and Chaesung Chun have noted that in recent years 'empirical sovereignty' – more rhetorical than real and with varying content depending on the circumstances – has prevailed over 'Westphalian sovereignty' in East Asia. This notwithstanding, they recognize the almost exclusive use of the latter in official discourses and accept that on most occasions the content of Westphalian sovereignty has predominated over other concepts of sovereignty. Moon and Chun (n 31) 111-113. For a more detailed investigative study on the evolution of non-interference in South-East Asia: Funston (n 26) 13-15. Finally, discussions on non-interference in the context of ASEAN, which have been echoed by various authors, stress the existence of differing degrees of adherence to the Westphalian concept of sovereignty within the region: Funston (n 26) 14-15; M Alagappa, 'Gestión de la seguridad asiática. Competitividad, cooperación y evolución' in S Golden (ed.), *Multilateralismo versus unilateralismo en Asia: el peso internacional de los "valores asiáticos"* (Fundació CIDOB, Barcelona 2004) 23, 26; Kraft (n 32) 34.

that ‘Westphalian sovereignty...is still deeply entrenched’ and it has assured itself a prominent position in the bases of East Asia’s regional order.³⁶

c) The ‘consensual’ norm of procedural justice

The final component of the constitutional structure of this order is the norm of procedural justice for the adoption of decisions; this stresses the value of consensus and its main function consists of specifying ‘the correct procedures that “legitimate” or “good” States employ collectively to formulate basic rules of inter-State conduct’.³⁷ This norm has three main features. The first and most significant is, as noted above, a preference for consensus. In keeping with the Westphalian concept of sovereignty, this is based on the inclusion of all participating actors on equal terms,³⁸ though consensus should not be confused with unanimity. As far as is possible, the decisions adopted reflect the positions of all actors involved, but in general there is a commitment to those points on which there is majority agreement and which do not raise significant opposition from any of the participants. In this sense, the preference for consensus can be interpreted as a mechanism via which all involved can ‘agree on the existence of disagreements without discord’.³⁹ The second feature of this norm is conflict avoidance, which is expressed as a marked predilection for discretion and a pragmatic and flexible approach to negotiations. The majority of discussions are held in private, far from the media spotlight and public opinion, and generally the only matters dealt with are those on which it is assumed that there will be a minimum level of agreement, with more controversial issues thus avoided.⁴⁰ Finally, the third feature of the norm is the informality of the cooperative framework, which highlights the importance of personal relationships within debates and which allows for more flexibility in the organization of meetings, the structuring of the agenda and the creation of an atmosphere which allows all to

³⁶ Moon and Chun (n 31) 129.

³⁷ Reus-Smit (n 5) 567.

³⁸ A Acharya, ‘Culture, Security, Multilateralism: The “ASEAN Way” and Regional Order’ (1998) 19 *Contemporary Security Policy* 55, 62-3; W Christopher, *In the Stream of History: Shaping Foreign Policy for a New Era* (Stanford University Press, Stanford 1998) 28. On the general features of this norm also see H Soestasto (ed.), *ASEAN in a Changed Regional and International Political Economy* (Centre for Strategic and International Studies, Jakarta 1995); Acharya (n 6); D Capie and P Evans, ‘The “ASEAN Way”’ in S Siddique and S Kumar (eds), *The 2nd ASEAN Reader* (Institute of Southeast Asian Studies, Singapore 2003) 45-51.

³⁹ S Nordin, ‘ASEAN Towards 2020: Strategic Goals and Critical Pathways’, presented at the ‘Second ASEAN Congress’, 20-3 July 1997, 9. An illustrative example of consensus that is not necessarily unanimous is the ‘five-minus-one formula’ set out by the Prime Minister of Singapore, Lee Kuan Yew, at the beginning of the 1970s in relation to ASEAN policy on tariff reductions and joint ventures. In accordance with this formula, ‘when four agree and one does not, this can still be considered consensus and the five-minus-one scheme can benefit the participating four without damaging the remaining one’. Cited in R Irvine, ‘The Formative Years of ASEAN: 1967-1975’ in A Broinowski (ed.), *Understanding ASEAN* (MacMillan, London 1982) 8-36.

⁴⁰ This second feature has been criticized by authors that consider that rather than resolving conflicts, this norm is limited to avoiding them. M Leifer, *ASEAN and the Security of South-East Asia* (Routledge, London 1989); Narine (n 18); D Martin Jones and MLR Smith, ‘Making Process, Not Progress: ASEAN and the Evolving East Asian Regional Order’ (2007) 32 *International Security* 148-84; Y Nishikawa, ‘The “ASEAN Way” and Asian regional security’ (2007) 35 *Politics & Policy* 42-56; A Jetschke and J Rüländ, ‘Decoupling rhetoric and practice: the cultural limits of ASEAN cooperation’ (2009) 22 *The Pacific Review* 179-203. In this respect it should be noted, however, that the pragmatic approach contained within the norm has been useful in guaranteeing regional stability and that, furthermore, it does not imply permanently avoiding conflicts, rather it means postponing them until the appropriate conditions arise in order for them to be included within the negotiation agenda. Acharya (n 38) 61.

express opinions.⁴¹ Together, these three features define a norm of procedural justice which, unlike that which prevails in the wider international order of today, does not place a premium on legalistic and confrontational aspects.⁴² Furthermore, together with the developmental hegemonic belief on the moral objective of the state and the Westphalian concept of sovereignty, this norm defines a coherent and cohesive normative system.⁴³

This ‘consensual’ norm of procedural justice within the regional order has spread to both bilateral and multilateral relations among the various states of East Asia, though it is within the framework of the latter which it has become more established. In addition, it is not only limited to official initiatives, as it has spread to unofficial debate and negotiation forums. There are three main reasons for this widespread projection of the norm. Firstly, as Nikolas Busse has observed, the construction of the post-colonial states in the region was left in the hands of a small group of government elites who, via clientelist practices, promoted a political culture characterized by privacy and informality, especially in South-East Asia.⁴⁴ Secondly, the historically high levels of mistrust among the countries within the region led to the putting into place of a procedural norm that was able to encourage a minimum level of cooperation without requiring high levels of formality or bringing state sovereignty into question. Thirdly, the use of this norm by ASEAN during the Cold War and its positive effect on regional stability served to highlight the advantages of this type of practice, thus promoting its adoption by neighbouring countries in North-East Asia.⁴⁵ Additionally, in countries such as Indonesia, Malaysia, the People’s Republic of China and both Koreas, these three factors were facilitated by a deeply-rooted tradition of personal, informal and non-contractual political relations, shared by both Javanese and Confucian cultures.⁴⁶

From the perspective of the strengthening of East Asia’s regional order, on the other hand, this ‘consensual’ norm of procedural justice has three constituent functions which influence the content and workings of its main institutions. Firstly, this norm defines the cognitive horizons of the actors responsible for the design of these institutions. Secondly, it constitutes a metanorm which structures the communication process within which the production and reproduction of these institutions takes place. Finally, once it has become interiorised by the majority of states within the region, this ‘consensual’ norm limits the actions of those actors which do not feel deeply cognitively or morally connected to the institutions.⁴⁷

⁴¹ Acharya (n 38) 58-9; Capie and Evans (n 38).

⁴² Acharya (n 6) 329; Reus-Smit (n 5) 576-85.

⁴³ Reus-Smit (n 5) 568.

⁴⁴ N Busse, ‘Constructivism and Southeast Asian Security’ (1999) 12 *The Pacific Review* 39, 47.

⁴⁵ B Job, ‘ASEAN Stalled: Dilemmas and Tensions over Conflicting Norms’, presented at the annual meeting of the American Political Science Association, 2-5 September 1999.

⁴⁶ LW Pye, *Asian Power and Politics: The Cultural Dimension of Authority* (Harvard University Press, Cambridge, Massachusetts 1985) esp. Ch. 2. Acharya (n 38) 62.

⁴⁷ Reus-Smit (n 5) 569.

III. INTERNATIONAL LAW AS A FUNDAMENTAL INSTITUTION OF THE REGIONAL ORDER

At the beginning of this chapter institutions were defined as sets of norms which guide the behaviour of actors, limit the range of actions which they can carry out and introduce certainty into their relations. Far from being uniform and permanent, these sets of norms vary in different geographical spaces and evolve over time, either due to external factors such as changes in international power structures or as a result of the emergence of new challenges. What is more, in each specific order, these sets of norms maintain a certain hierarchical relationship, meaning that some may be more predominant and more highly developed than others, which can lead to certain tensions.⁴⁸ Over the last sixty years, East Asia's regional order has adopted various institutions, such as the balance of power, coordinated control of the great powers and even war,⁴⁹ but only international law has become fully consolidated. The idea of international law as an international institution is not new. Several authors from the English School and from within neoliberal institutionalism have recognized international law as a key institution within the contemporary international order,⁵⁰ with some even going as far as to claim that it represents *the* key institution of this order. Friedrich Kratochwil, for example, has indicated that the existence of legal international order defines the interplays within international relations, whilst James Mayall has argued that international law constitutes the cornerstone on which international society rests.⁵¹ In more resounding terms, Terry Nardin states that 'international society is not merely regulated by international law but constituted by it'.⁵² In the contemporary international order, the institution of international law has been expressed through various international treaties, agreements and commitments with varying levels of legalisation, that is to say, with differing levels of obligation, precision and delegation.⁵³

Since the beginning of the 1950s, international law within the East Asian regional order has taken the form of 'soft' law, referring to legal provisions with low legalisation. This

⁴⁸ M Wight, *Power Politics* (Penguin, London 1979) 111, 143-4; A Hurrell, 'Norms and Ethics in International Relations' in W Carlsnaes, T Risee and BA Simmons (eds), *Handbook of International Relations* (Sage Publications, London 2002) 146-7; B Buzan, *From International to World Society? English School Theory and the Social Structure of Globalisation* (Cambridge University Press, Cambridge 2004) 194-5.

⁴⁹ On the secondary nature of war or the use of force as an institution of the regional order see, for example, Alagappa (n 35) 35-7. On the secondary nature of balance of power see A Goldstein, 'Balance-of-Power Politics: Consequences for Asian Security Order' in M Alagappa (ed.), *Security Order: Instrumental and Normative Features* (Stanford University Press, Stanford 2003), 171-209.

⁵⁰ Bull (n 4); Buzan, (n 48); Keohane (n 9); Reus-Smit (n 5); Wight (n 48).

⁵¹ F Kratochwil, *Rules, Norms and Decisions: On the Conditions of Practical and Legal Reasoning in International Relations and Domestic Affairs* (CUP, Cambridge 1989) 251; J Mayall, *World Politics: Progress and its Limits* (Polity Press, Cambridge 2000) 94.

⁵² T Nardin, 'Legal Positivism as a Theory of International Society' in DR Mapel and T Nardin (eds), *International Society: Diverse Ethical Perspectives* (Princeton University Press, Princeton 1998) 17, 20.

⁵³ KW Abbott and others, 'The Concept of Legalization' (2000) 54 *Int'l Org.* 401-19. These authors define legalisation as a particular set of characteristics that institutions may or may not possess in terms of three dimensions: obligation, which refers to the extent to which actors are legally bound by a norm, commitment or set of norms or commitments; precision, which alludes to the clarity with which norms define required, authorised or prohibited forms of conduct; and delegation, which refers to the cession of authority to a third party in order to implement, interpret and apply the agreed-upon norms, resolve disputes and, on occasions, elaborate new norms.

international law is characterized by three elements.⁵⁴ The first of these is that there is a strong tendency towards non-binding legal instruments, that is to say, with low levels of obligation. In East Asia the majority of bilateral or multilateral agreements which have been reached over the last half-century have adopted the form of declarations of principles, political commitments or guidelines. Leaving aside notable exceptions such as the Treaty of Amity and Cooperation in South-East Asia or the Treaty on the South-East Asia Nuclear Free Zone, there are few regional treaties or conventions of a binding nature. The second element is a notable degree of imprecision. The normative instruments developed in the region have a larger degree of variance in this respect, but the majority are characterized by high levels of vagueness, with required and prohibited forms of conduct remaining poorly defined. This results in states having considerable freedom in how they choose to interpret appropriate forms of behaviour. An example of this is the Declaration on the Conduct of Parties in the South China Sea, which includes the commitment on the part of signatory countries to 'exploring ways for building trust and confidence', but which barely alludes to the instruments, timeframes or actors which should participate in this exploration.⁵⁵ Another illustrative example is the agreement of 1992 which brought about the creation of AFTA, which John Ravenhill ironically dubbed *Agree First, Talk After* due to its brevity of merely fifteen pages and the lack of specific regulations on the products and sectors to be affected by it, the tariff reductions to be included and the deadlines to be met.⁵⁶ The third element refers to the reduced possibilities for delegating legal authority to supranational entities or third parties in order for these to implement, interpret and apply the agreements reached, and to develop new norms or resolve disputes. With respect to the adoption, implementation and interpretation of decisions, the experience of ASEAN – the most highly-developed regional integration initiative – is very revealing. All ASEAN decisions are still adopted at intergovernmental meetings or summits, these are then implemented at a national level and there is no supranational body with the power to discuss or amend these decisions. As regards dispute resolution, hardly any of the normative instruments developed in East Asia have considered adjudication mechanisms. Within the framework of bilateral agreements, the few exceptions to this rule are limited to the occasional memorandum on issues of little importance to the involved parties, two of which particularly stand out. The first of these occurred in 1997, when Malaysia and Indonesia signed a memorandum of understanding to take their dispute over the sovereignty of the Sipidan and Ligatan islands to the International Court of Justice (ICJ), which found in favour of Malaysia on 17 December 2002.⁵⁷ The second case took place in 2003 when, after several years of negotiations, Malaysia and Singapore signed a memorandum to refer their dispute over the sovereignty of various islets in the Malacca Straits to the ICJ; in this case the judges granted Pedra Branca to Singapore, Middle Rocks to Malaysia and South Ledge to whichever state in whose territorial waters it lies.⁵⁸ In the framework of multilateral agreements, exceptions are even harder to find and are

⁵⁴ On the general features of international law which is soft or of low legalisation, see KW Abbott and others (n 53), and KW Abbott and D Snidal, 'Hard and Soft Law in International Governance' (2000) 54 Int'l Org. 421-56. On the link between international law in East Asian regional order and this type of international law, see M Kahler, 'Legalization as Strategy: The Asia-Pacific Case' (2000) 54 Int'l Org. 549-71.

⁵⁵ ASEAN, *Declaration on the Conduct of Parties in the South China Sea* (4 November 2002) <<http://www.aseansec.org/13163.htm>> accessed 12 August 2009.

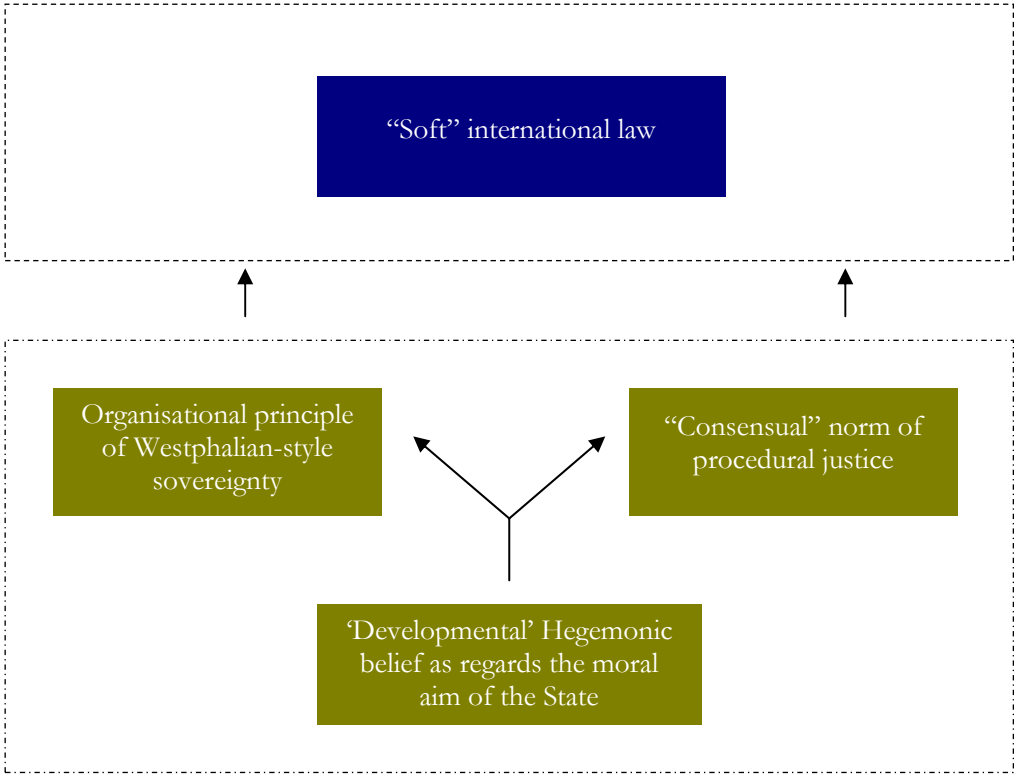
⁵⁶ J Ravenhill, 'Economic Cooperation in Southeast Asia' (1995) 35 Asian Survey 850-66.

⁵⁷ *Case Concerning Sovereignty of Pulau Ligitan and Pulau Sipidan (Indonesia v Malaysia)* (Report of Judgments, Advisory Opinions and Orders) [2002] ICJ Rep 139.

⁵⁸ *Case Concerning Sovereignty of Pedra Branca/Pulau Batu Puteh, Middle Rocks and South Ledge (Malaysia v Singapore)* (Report of Judgments, Advisory Opinions and Orders) [2008] ICJ Rep 168.

limited to cases such as the aforementioned Treaty of Amity and Cooperation in South-East Asia, which leaves it up to the states directly involved in a dispute to decide whether or not to resort to adjudication mechanisms.⁵⁹ Figure 1 illustrates the relationship between international law and the constitutional base of East Asia’s regional order.

Figure 1. International law and the constitutional base of East Asia’s regional order



Source: Own elaboration based on Reus-Smit, Ch., op. cit., 1997.

The penetration and establishment of international law as a fundamental institution of East Asia’s regional order is not surprising in light of the wider experience of international order. International law has been an established part of the European order since the beginning of the nineteenth century, and it was spread to the rest of the world via colonialism, the subsequent decolonization process and then through the construction of the current global order led by the United States; it has thus become one of the first truly universal institutions of contemporary international society.⁶⁰ In order to explain the fact that within the regional order of East Asia international law is ‘soft’, or of low legalisation, we need to focus on the concept of localization formulated by Amitav Acharya.⁶¹ The process of localization does not

⁵⁹ In accordance with Article 16 of the treaty ‘The provisions contained within this chapter (referring to adjudication to the High Council, as established in chapter IV of the treaty) will not be applicable except in the case that the parties to a dispute agree to their application’, *Treaty of Amity and Cooperation in Southeast Asia, Indonesia, 14 February 1976* <<http://www.aseansec.org/1217.htm>> accessed 10 December 2009.

⁶⁰ Kratochwil (n 51); Mayall (n 51); Nardin (n 52).

⁶¹ A Acharya, ‘How Ideas Spread: Whose Norms Matter? Norm Localization and Institutional Change in Asian Regionalism’ (2004) 58 Int’l Org. 239-75.

only refer to the diffusion, reinterpretation or contextualization of an institution or norm in order for it to be applied in a different geographical space; it also includes the norm's 'reconstitution to make an outside norm congruent with a pre-existing local normative order'.⁶² This pre-existing local normative order is identified with the constitutional base or structure of the regional order and, as has been previously noted, in the case of East Asia it consists of a developmental hegemonic belief regarding the moral objective of the state, the Westphalian principle of sovereignty and the 'consensual' norm of procedural justice.

Adopting a 'soft' form of international law contributes to its congruence in the regional sphere in at least four complementary ways. Firstly, low legalization reduces the contractual, economic and staffing costs involved in negotiating and supervising legal agreements. States are thus free to commit more resources to promoting economic development and social welfare. Secondly, the low level of legalization limits the 'sovereignty costs' entailed in any legal agreement between states and, as a result, consolidates the Westphalian concept of sovereignty and reinforces the preference for informality, consensus and conflict aversion in decision-making processes. There are three main sovereignty costs for states: the potential benefits they could obtain if they chose not to cooperate and instead acted as free riders; the loss of freedom to exercise their authority in certain areas as a result of the commitments they have taken on; and, where there is delegation to a third party or supranational authority, the possible loss of sovereignty arising from present or future decisions that this authority may take.⁶³ Thirdly, a low level of legalization reduces the homogenising pressures which generally weigh on participants in highly legalized agreements. These pressures tend to highlight a marked level of heterogeneity within the region and – in a context shaped by historic mistrust, power asymmetries and instability – they reinforce the need for consensual processes in decision-making. Finally, the low level of obligation, the imprecision and the non-delegation of the commitments taken on all work to reinforce the primacy of the state in regional relations, with the state maintaining its freedom to interpret commitments it has signed up to and also acting as the guarantor that they will be complied with.⁶⁴ From the perspective of private national companies, 'soft' international law increases their opportunities for influencing state actions and for maximizing their interests via the exploitation of the imprecisions within commitments and the greater room for states to act according to their own discretion within the framework of the commitments they take on.⁶⁵

It is important that 'soft' international law in East Asia is not understood as a transitional institution on a trajectory towards 'hard' international law, and nor should it be perceived as a reflection of the incapacity of the actors involved in constructing the regional order to

⁶² Ibid 244.

⁶³ The preoccupation with sovereignty costs would also explain why the states of the region have shown themselves to be resistant to the legalisation of security agreements, which generally entail higher costs of this type; however, they are somewhat more favourably disposed to the legalisation of economic agreements, which traditionally have fewer repercussions on State sovereignty. Abbott and Snidal (n 54) 440-1; Kahler (n 54) 567-71.

⁶⁴ Abbott and Snidal (n 54), 434-4.

⁶⁵ Ibid 450-2.

establish binding and precise agreements with delegation mechanisms.⁶⁶ In fact, this international law with a low level of legalization is the result of a conscious choice and, in terms of the interests of actors and the constitutional structure of the regional order, it provides 'superior institutional solutions'.⁶⁷ Two recent trends in the region provide evidence of this. The first is the acceptance by East Asian States of a higher degree of legalization of international law within the framework of international organisations such as the World Trade Organisation (WTO), which highlights their capacity to relinquish low levels of obligation, imprecision and non-delegation where their interests or the prevailing circumstances favour this outcome. The second trend refers to the development of different degrees of legalization in regional agreements, these being progressively higher within ASEAN and persistently low or non-existent in other cooperative frameworks, such as the ASEAN Regional Forum and the APEC Forum.⁶⁸ These two trends, together with the experience of the last two decades, show that the rise of East Asia should not necessarily be interpreted as a threat to current international law. Without doubt, the new position of the region in the sphere of twenty-first-century international relations will influence the form and content of this law, which may 'soften up', but there are no indications that it will be marginalized or displaced as one of the fundamental institutions of the present international order.

⁶⁶ For further reading on the concept of international law with a low level of legalization as a step on the path towards 'harder' international law and as a threat to the unity of this institution, see P Weil, 'Towards Relative Normativity in International Law?' (1983) 77 *AJIL* 413-42.

⁶⁷ Abbott and Snidal (n 54). In a similar vein, Richard Higgott and Shaun Narine have pointed out that the states of East Asia conceive the presence of institutions of order as a means via which to increase their sovereignty and not as a threat to it nor as an objective in itself. R Higgott, 'De facto and de jure regionalism: the double discourse of regionalism in the Asia-Pacific' (1997) 11 *Global Society* 165-83; Narine (n 18) 425-6.

⁶⁸ Kahler (n 54) 555-9.