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14th ANNUAL ANZSIL CONFERENCE:  
PACIFIC PERSPECTIVES ON INTERNATIONAL LAW

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THIS ISSUE INCLUDES CONTRIBUTIONS BY:

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Rt Hon Helen Clark

José E Alvarez

Transform Aqorau

Andrew T F Lang

Shirley V Scott

Andrew Townend

Stephen Tully

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VICTORIA UNIVERSITY OF WELLINGTON

*Te Whare Wānanga o te Ūpoko o te Ika a Māui*



FACULTY OF LAW  
*Te Kauhanganui Tatai Ture*

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# INSTITUTIONALISED LEGALISATION AND THE ASIA–PACIFIC "REGION"

*José E Alvarez\**

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*Widely held assumptions that the "Asia–Pacific region" is relatively "under-legalised" as compared to other parts of the world are contestable. It is true that the region relies less on formal inter-governmental organisations with delegated law-making powers and more on trans-governmental networks of regulators; inter-state institutions with no formal legal capabilities; public/private consortia; and standard-setting by private actors. On the other hand, the construct of a monolithic "Asia–Pacific" region is artificial and loses sight of the many sub-regions, with differing approaches to legalisation, within the vaster whole. The under-legalisation thesis is also under-theorised, as the leading explanations for why the countries of the alleged region "do not do law" lose their cogency when more closely examined. The thesis also focuses attention on the alleged lack of Asian regional institutions at the expense of considering the level of participation by countries in the region with global institutions such as those of the United Nations system or the World Trade Organization. Most critically, the under-legalisation thesis reflects an overly rigid view of what international legalisation is and how it occurs.*

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Six years ago, the leading political science journal *International Organization* devoted its entire issue to the "legalization" of world politics (the Legalization Issue).<sup>1</sup> International lawyers were pleased by the attention since their prior attempts at bridging the inter-disciplinary divides between law and politics had been unrequited. We had read the work of political scientists and were interested in incorporating their insights into our analysis of the law, but they did not seem terribly interested in reciprocating. Indeed, the one-sided nature of inter-disciplinary work of this kind — despite valiant efforts by Anne–Marie Slaughter, among others, to promote it<sup>2</sup> — is suggested by

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\* Hamilton Fish Professor of Law & Diplomacy, Columbia Law School. Revised version of a presentation given at the Annual Meeting of the Australian–New Zealand Society of International Law, June 2006.

1 Judith Goldstein and others (eds) *Legalization and World Politics: A Special Issue of International Organization* (2000) 54 *International Organization* 385.

2 See, for example, Anne-Marie Slaughter "International Law and International Relations" (2000) 285 *Recueil des Cours* 9.

the fact that my own law school stopped carrying *International Organization* as a Journal shortly before this issue appeared since it never seemed to live up to its title, at least insofar as international lawyers understood the term to be actual bricks and mortar international organisations such as those of the United Nations (UN) system and not inchoate "regimes".

The editors of that Legalization Issue — Judith Goldstein, Miles Kahler, Robert Keohane and Anne-Marie Slaughter — could not assume much legal knowledge from their political science readers so they explained the "concept of legalisation" that was driving the entire symposium in its leading article.<sup>3</sup> Legalisation, they explained, consists of three elements: obligation, precision, and delegation, which they proceeded to explain in the following terms:

*Obligation.* Law, they explained, was governed by H L Hart's "secondary rules".<sup>4</sup> Unlike mere pledges to cooperate or other forms of social courtesy, law *obligates* and can be *breached*. It needs to be distinguished from mere political rules of the road or other forms of politesse that lack a compulsory quality.

*Precision.* They explained that laws are rules that at their best unambiguously define the conduct that they require, authorise or proscribe.

*Delegation.* Real law, they suggested, usually means that third parties (especially national or international judges) have been granted authority to implement, interpret, apply, and even sometimes to make, the rules. Delegation also implies methods of enforcement. Having law usually means that saying "sorry" upon breach may not be enough. Expressing regret without threat of sanction is certainly not enough when an impartial third party, like a judge, has been given the ability to determine that this is so.

The authors argued that these three attributes were more essential characteristics than others that had been suggested in the past to distinguish law from non-law, such as differences in substantive content. The pedigree of a purported rule, such as whether it was issued by an authoritative law-maker, was more important than the kind of conduct it purported to affect. The authors noted — like good positivists — that while a "conference declaration or other international document that is explicitly not legally binding could have exactly the same substantive content as a binding treaty, or even a domestic statute, ... they would be very different instruments in terms of legalization, the subject of this volume."<sup>5</sup>

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3 Kenneth W Abbott and others "The Concept of Legalization" (2000) 54 *International Organization* 401 ["The Concept of Legalization"].

4 H L Hart *The Concept of Law* (Oxford University Press, New York, 1961).

5 "The Concept of Legalization", above n 3, 402.

These editors — who included two prominent international lawyers — were sophisticated about all of this. They did not suggest that their three characteristics of law led to rigid dichotomies, subject to an on/off switch, leading to uncontested determinations that something either was or was not "law". They said all the right things about the three dimensions of law existing along a multidimensional continuum. At the same time, like much good political science, their article contained helpful charts illustrating both "ideal types" and concrete examples of "hard legalization".<sup>6</sup>

These charts, reproduced below, suggest the authors' assumptions of what international legalisation entails.<sup>7</sup> Thus, Figure 1 suggests that legalisation varies along three dimensions: extent of obligation (from something that is expressly binding to norms that are expressly not), level of precision, and degree to which national law-makers have delegated authority for law-making to others. Under Figure 1, international legalisation has not taken place when there is no delegation to an international court or other organisation and matters are left to diplomats to resolve, where the norms that exist are only vague principles or where these norms are expressly made non-legally binding. Table 1 allocates particular institutions or regimes within the three categories of obligation, precision, and delegation, and ranks these institutions or regimes as to whether they are high, moderate or low along these three dimensions. The Group of 7, for example, comes out at the low end of this metric of legalisation while the WTO-TRIPs Agreement and a number of European regimes, on the other hand, come out on top. At the bottom of Table 1 is the "ideal type" designated by the authors as "anarchy". Tables 2, 3 and 4, further delineate the authors' indicators of obligation, precision, and delegation. Table 4 indicates that delegation can take place either by according discretion to international dispute settlers or by granting law-making authority to designated rule-makers or other interpreters.

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6 Ibid.

7 Ibid, 404 (Figure 1), 406 (Table 1), 410 (Table 2), 415 (Table 3) and 416 (Table 4). Reproduced with the permission of MIT Press Journals.

**Figure 1.** *The dimensions of legalization*

<b>Obligation</b>	Expressly nonlegal norm	←→	Binding rule ( <i>jus cogens</i> )
<b>Precision</b>	Vague principle	←→	Precise, highly elaborated rule
<b>Delegation</b>	Diplomacy	←→	International court, organization; domestic application

**Table 1.** *Forms of international legalization*

<i>Type</i>	<i>Obligation</i>	<i>Precision</i>	<i>Delegation</i>	<i>Examples</i>
<b>Ideal type:</b>				
<b>Hard law</b>				
I	High	High	High	EC; WTO-TRIPS, European human rights convention; International Criminal Court
II	High	Low	High	EEC Antitrust, Art. 85-6; WTO-national treatment
III	High	High		U.S.-Soviet arms control treaties; Montreal Protocol
IV	Low	High	High (moderate)	UN Committee on Sustainable Development (Agenda 21)
V	High	Low	Low	Vienna Ozone Convention; European Framework Convention on National Minorities
VI	Low	Low	High (moderate)	UN specialized agencies; World Bank; OSCE High Commissioner on National Minorities
VII	Low	High	Low	Helsinki Final Act; Nonbinding Forest Principles; technical standards
VIII	Low	Low	Low	Group of 7; spheres of influence; balance of power
<b>Ideal type:</b>				
<b>Anarchy</b>				

**Table 2.** *Indicators of obligation*

<b>High</b>	Unconditional obligation; language and other indicia of intent to be legally bound
	Political treaty: implicit conditions on obligation
	National reservations on specific obligations; contingent obligations and escape clauses
	Hortatory obligations
	Norms adopted without law-making authority; recommendations and guidelines
	Explicit negation of intent to be legally bound
<b>Low</b>	



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**Table 3. Indicators of precision**

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**High**

- Determinate rules: only narrow issues of interpretation
- Substantial but limited issues of interpretation
- Broad areas of discretion
- "Standards": only meaningful with reference to specific situations
- Impossible to determine whether conduct complies

**Low**

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**Table 4. Indicators of delegation**

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a. Dispute resolution

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**High**

- Courts: binding third third-party decisions; general jurisdiction; direct private access; can interpret and supplement rules; domestic courts have jurisdiction
- Courts: jurisdiction, access or normative authority limited or consensual
- Binding arbitration
- Nonbinding arbitration
- Conciliation; mediation
- Institutionalized bargaining
- Pure political bargaining

**Low**

b. Rule making and implementation

**High**

- Binding regulations; centralized enforcement
- Binding regulations with consent or opt-out
- Binding internal policies; legitimation of decentralized enforcement
- Coordination standards
- Draft conventions; monitoring and publicity
- Recommendations; confidential monitoring
- Normative statements
- Forum for negotiations

**Low**

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Other articles in that Legalization Issue filled out what leading scholars in both law and political science meant by the concept of "legalisation". Thus, Keohane, Moravcsik, and Slaughter described the mechanisms behind "legalised" dispute resolution, indicating that international courts also varied along multiple dimensions, with the key characteristic driving their capacity for expansive legal effect being whether private parties (and not just states) were given direct or indirect access as

complainants.<sup>8</sup> This widely cited article globalised Joseph Weiler's famous piece explaining "The Transformation of Europe".<sup>9</sup> The authors put Weiler on steroids. They applied Weiler's insights about how the European Court of Justice (ECJ) "legalised" Europe onto a more ambitious framework for explaining how the increasing numbers of international courts and other multinational dispute settlers may be "legalising" the world. They suggested that the International Court of Justice, because it was limited to States Parties, was the classic case of "interstate dispute settlement" while international tribunals, open to private parties, were more accurately described as "transnational". They argued that the ICJ was less "legalised" (and therefore less important) than the World Trade Organization (WTO) (where private parties heavily influenced the disputes states bring) or the European Court of Justice (where private parties have indirect access through the Commission and national courts) or, the pinnacle of "transnational", and therefore "transformational", international adjudication, the European Court of Human Rights (ECHR).<sup>10</sup>

Despite the sophistication of the scholarship in this Legalization Issue, the "take-away" point of its lead article was simple and well-illustrated by the charts reproduced above. Keohane, Moravcsik and Slaughter argued that international law was most effective or real, in the sense of real-world impact on the conduct of significant actors including governments, when it was accompanied by third party institutions delegated with the power to impose top-down binding rules on sovereigns enforceable by binding third party judicial resolution — preferably at the option of private party claimants acting as non-governmental attorneys general, as in the case of the ECJ and ECHR. The authors' implicit metric for legalisation was suggested by the regimes accorded pride of place atop their Table 1 above. To the authors, the "ideal types" that would most advance the "legalisation" of politics were the institutions and rules associated with the European Union (EU) and the European system of human rights. A distant second at the global level were the national treatment obligations imposed under the WTO and, at the regional level, developments such as the North American Free Trade Agreement (NAFTA), with its five distinct forms of dispute settlement, and the Inter-American Court of Human Rights.

Dead last in terms of "legalisation" and perilously close to their "ideal type" of "anarchy" in Table 1, was the Asia-Pacific region. Indeed, the Legalization Issue concluded with a piece by Miles Kahler who argued that while Europe and North America provide a benchmark for "high legalization", the Asia-Pacific region was the opposite. Kahler contended that the region had

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8 Robert O Keohane, Andrew Moravcsik and Anne-Marie Slaughter "Legalized Dispute Resolution: Interstate and Transnational" (2000) 54 *International Organization* 457.

9 Joseph Weiler "The Transformation of Europe" (1991) 100 *Yale LJ* 2403.

10 Abbott and others, above n 3. See also Laurence R Helfer and Anne-Marie Slaughter "Toward a Theory of Effective Supranational Adjudication" (1997) 107 *Yale L Rev* 273.

"produced few formal multilateral institutions" and had participated in regional institutions that remained "highly informal" and intentionally non-legal; he noted that the region had produced a limited number of formal rules or obligations and appeared to prefer codes of conduct or vague, unenforceable principles over precisely defined binding treaties. To Kahler it appeared that the region at best *managed* their disputes but did not *litigate* them before delegated dispute settlers.<sup>11</sup>

Kahler and others have generated reams of scholarship explaining the Asia–Pacific region's alleged allergy to legalisation.<sup>12</sup> As is discussed further below, Kahler did not spend much time delineating what the Asia–Pacific region actually was; instead his article devoted considerable attention to three organisations — the Association of Southeast Asian Nations (ASEAN), the Asia–Pacific Economic Cooperation (APEC), and the ASEAN Regional Forum (ARF) — whose members were presumably intended to constitute the requisite "region". These institutions, and their qualities, were the focus for Kahler's description of "institutions without legalization".<sup>13</sup> Kahler's article provides a useful survey of the favoured scholarly explanations for why Asians just do not do law, at least of the international kind:<sup>14</sup>

*Lower functionalist needs.* Given the distance between the countries in the region, even from one another, much less the rest of the world, the region has faced lower demands for international law and institutions. Lower needs for economic and security integration yield less law.

*Culture.* The "ASEAN way" — collaboration without legalisation is culturally derived. Asians (such as rural Malay villagers) avoid adversarial or litigious conflict, and prefer to *manage* conflict.<sup>15</sup> Asians prefer, both as people and as governments, informal non-agreements not subject to binding third party dispute settlement. Asians like to talk through their disputes. They prefer non-adversary modes of discourse to resolve their inter-state difficulties. Asian decision-making involves much consultation, group harmony, consensus — without vote taking or formal modes of delegation to impartial third parties such as judges that are given the power to brand clear winners

11 Miles Kahler "Legalization as Strategy: The Asia–Pacific Case" (2000) 54 *International Organization* 549, 549 ["Legalization as Strategy"]. See also Miles Kahler "Institution-building in the Pacific" in Andrew Mack and John Ravenhill (eds) *Pacific Cooperation: Building Economic and Security Regimes in the Asia–Pacific Region* (Allen and Unwin, Sydney, 1994) 16.

12 *Ibid.*

13 "Legalization as Strategy", above n 11, 551-559.

14 *Ibid.*, 559-563.

15 For a constructivist take on the "ASEAN way" (defined to include six core norms: sovereign equality, non-interference, the non-resort to the threat or use of force, quiet diplomacy, the non-involvement of the Association in the resolution of bilateral disputes and mutual respect) see Jürgen Haacke "ASEAN's Diplomatic and Security Culture: A Constructivist Assessment" (2003) 3 *International Relations of the Asia–Pacific* 57.

and losers (as in compulsory forms of dispute settlement). They do not want to give independent parties the power to make embarrassing pronouncements that someone has breached the law.

*Domestic politics.* This is especially popular among liberal theorists who believe liberal democracies do law (and peace) better — at least with each other.<sup>16</sup> Liberals argue that you cannot seriously expect effective or deep legalisation in regions such as the Asia-Pacific region, characterised by stark differences between authoritarian regimes (from the Asian tigers to China and North Korea) and those that are classically liberal (such as Australia and New Zealand).

*International politics.* Lack of legalisation reflects a strategic choice by government elites to accomplish other ends. Asian governments encourage strong nationalist bonds to keep political order, to paper over ethnic or other internal divides, to protect officials' discretion for as long as possible, or to keep regional or global hegemons (such as Japan, China, or the United States) and their hegemonic forms of international law at bay. Asia-Pacific governments associate international law and institutions with high sovereignty costs. Strategic reasons — such as a need to retain their own power — therefore help to explain their avoidance of both law and its institutions.<sup>17</sup> And the many Asian societies that are post-colonial are able to play on the historical memory of Western abuse to achieve these strategic ends. This helps to explain why certain Asian governments find it useful, for example, to blame the Asian economic crisis on "Western legalism" as characterised by the dictatorial demands of the International Monetary Fund (IMF).<sup>18</sup>

Now I would be the first to acknowledge that the Asia-Pacific "region", as defined by the regional institutions that Kahler chooses to address, has shown a penchant for establishing relatively non-institutionalised forums for dialogue. Beneath the welter of impressive names/acronyms — ASEAN, ARF and APEC, the Shanghai Five and its Shanghai Cooperation Organisation, ASEAN plus Three (APT), the Pacific Forum, the ASEAN Troika, the ASEAN Security Community (ASC), the ASEAN Economic Community (AEC) — and the seemingly impressive agreements produced under these organisational auspices (such as the ASEAN Single Window, ASEAN Retreats, ASEAN Human Rights Mechanism and numerous free trade agreements) are arrangements that are

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16 For suggestions along these lines see Anne-Marie Slaughter "International Law in a World of Liberal States" (1995) 6 EJIL 503.

17 For an argument that government elites' "obsession" with sustaining their regime(s) and preserving state sovereignty helps to explain Southeast Asia's resistance to the International Criminal Court (ICC), see Valeriane Toon "International Criminal Court: Reservations of Non-State Parties in Southeast Asia" (2004) 26 Contemporary Southeast Asia 218. For discussion of China's impact on Asian regionalism, see Joseph Yu-shek Cheng "The ASEAN-China Free Trade Area: Genesis and Implications" (2004) 58 Australian Journal of International Affairs 257.

18 For a critical view of the International Monetary Fund's role in the Asian economic crisis, see S Stanley Katz "The Asian Crisis, the IMF and its Critics" (1999) 25 Eastern Economic Journal 421.

at the low "non-legal" end of the obligation, precision, and delegation tables as defined by the authors of the Legalization Issue. Most of these are easy to dismiss as: mere mechanisms for diplomacy, playgrounds for spheres of influence or the exercise of balance of power, venues for dispute resolution through power politics, or vehicles for the venting of hot air. They are anything but centralised, hierarchical institutions capable of rule-making by majority vote or binding judicial decision.<sup>19</sup> Indeed, in a leading article synthesising democratic critiques of international organisations and relating these critiques to the level of integration achieved by such organisations, Eric Stein described ASEAN as an International Organisation (IO) that was "long on ambitious design but short on accomplishment" which ranked low on the scale of "normative-institutional" and "empirical-social" factors that contribute to level of integration.<sup>20</sup>

It is true that unlike Europe, the Americas, and Africa, Asia lacks a regional human rights court; or an organisation charged with legal harmonisation as compared to even the relatively weak Organisation for Economic Co-operation and Development (which after all is authorised to adopt legally binding instruments and has, on occasion done so, such as the Code of Capital Movements); or a collective security arm as legalistic as the North Atlantic Treaty Organization or any other entity clearly eligible to act on behalf of the collective security of the region under Chapter VIII of the UN Charter; or a regional charter for economic integration as legalised as that of the EU or even the NAFTA.<sup>21</sup> Indeed, the ASEAN Free Trade Area has been derided as standing for "agree first, talk after" for its lack of achievement and precision.<sup>22</sup> And the "region" as loosely defined by Kahler

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19 See Yoshi Kodama *Asia Pacific Economic Integration and the GATT-WTO Regime* (Kluwer Law International, The Hague, 2000) 95-97, 118-119, describing the Asia-Pacific Economic Cooperation's (APEC) preferences for informal processes, modest institutionalisation, and relations with, and dependence upon, non-state actors such as the private sector and contrasting these with the structures and arrangements in the European Economic Community.

20 Eric Stein "International Integration and Democracy: No Love at First Sight" (2001) 95 AJIL 489, 495.

21 For an explanation of why the ASEAN should not be seen as a dispute settler, an arm of collective security, or a political community intended to supersede sovereignty like the European Union (EU), see Michael Leifer "The ASEAN process: A Category Mistake" (1999) 12 *The Pacific Review* 25. See also Hilaire McCorbrey and Justin Morris *Regional Peacekeeping in the Post-Cold War Era* (Kluwer Law International, The Hague, 2000) 154-183.

22 For an unfavourable assessment of the achievements of the ASEAN Free Trade Area, see Zakir Hafez *The Dimensions of Regional Trade Integration in Southeast Asia* (Transational, Ardsley (NY), 2004) 205-266. For an unfavourable assessment of the achievements of APEC over the past decade, see John Ravenhill, *Asia Pacific Economic Cooperation (APEC): The Construction of Pacific Rim Regionalism* (Cambridge University Press, Cambridge (UK), 2001).

and others — with notable exceptions such as Australia and New Zealand — has lagged behind the rest of the world in ratifying the International Criminal Court.<sup>23</sup>

It is also true that quite apart from their less than institutionalised regional institutions, the countries of the region have taken an active part in purposely non-institutionalised, non-legalised activities. Like many countries and perhaps more than some, the countries of Asia and the Pacific have participated in all presumptive alternatives to traditional IOs on the model of those of the UN system.<sup>24</sup> These decidedly non-Grotian activities include:

(1) Trans-governmental networks of regulators, involving sub-state actors like the central bankers of the Basle Committee or informal networks of law enforcers engaged in counter-terrorism.

(2) Non-binding inter-state institutions (especially on security issues) such as the Financial Action Task Force (FATA) — which includes as members Australia, Hong Kong, Japan, New Zealand, and Singapore — and the United States's Proliferation Security Initiative (PSI). Singapore and Japan each have hosted PSI interdiction exercises. Other "active PSI participants" in that regime include Thailand, Australia, Russia, Japan, and New Zealand, while PSI observers include Cambodia, China, India, Indonesia, Malaysia, Pakistan, South Korea, Philippines, and Vietnam.<sup>25</sup>

(3) Public/private consortia. There has been considerable scholarship on, for example, the prevalence of transnational ethnic social networks in the Asia-Pacific region based on ancestral and kinship ties.<sup>26</sup> It appears that networks of private entrepreneurs working with local authorities have encouraged trans-border sub-regional economic integration — especially in the Western Pacific rim embracing parts of China, Hong Kong, and Taiwan. These bottom-up public/private developments — which do not fit the model or the form of inter-state compacts — may have made more formal legalised customs unions at the national level less necessary.<sup>27</sup>

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23 For a list of States Parties to the ICC, see Multilateral Treaties Deposited With The Secretary-General <[untreaty.un.org/english/bible/englishinternetbible/partI/chapterXVIII/treaty11.asp](http://untreaty.un.org/english/bible/englishinternetbible/partI/chapterXVIII/treaty11.asp)> (accessed 7 May 2007).

24 For a survey of ostensible alternatives to formal IOs and international law, see Eyal Benvenisti "Substituting International Law" in American Society of International Law, Proceedings of the 100th Annual Meeting, 289 (2006).

25 See Robert Joseph, Under-Secretary for Arms Control and International Security "Transforming our Counterproliferation Efforts in the Asia Region" (Remarks to the Institute of Defense and Strategic Studies, Singapore, 15 August 2005) <[www.state.gov/t/us/rm/51129.htm](http://www.state.gov/t/us/rm/51129.htm)> (accessed 20 March 2007).

26 See, for example, Xiangming Chen "Both Glue and Lubricant: Transnational Ethnic Social Capital as a Source of Asia-Pacific Subregionalism" [2000] Policy Sciences 269.

27 Ibid.

(4) Standard-setting by private actors. The Asia-Pacific region is also not averse to such things as participating in the International Organization for Standardization.<sup>28</sup>

There is clearly some truth in the lack of legalisation thesis. But much of the scholarship on the Asia-Pacific region's alleged aversion to legalisation, particularly of the institutionalised sort, over simplifies. Here are my four objections:

(1) There is no such thing as an "Asia-Pacific region". The hyphen between "Asia" and "Pacific" does not begin to bridge the distance between these two groupings and use of the hyphen should not blind us to the arbitrary nature of grouping countries together only because many of them have sometimes found it useful to associate themselves in certain associations or organisations. That many or most countries that border the Pacific Ocean belong to a single "regional" grouping within UN system organisations does not mean that they (whether their leaders, their governments, or their peoples) share a single "ASEAN way",<sup>29</sup> or that the alleged characteristics of their IOs tell us something about their cultural preferences for inter-state forms of cooperation outside those organisations. The welter of acronyms for other regional groupings within Asia-Pacific — and the alleged identity crisis within the ASEAN organisation itself — should give us pause. The diversity of states and peoples lumped together in this alleged "region"<sup>30</sup> blurs sharp differences, for example, between common law and civil law countries; economic superpowers with close ties to the West and developing states such as Papua New Guinea and Nauru; states that are avowedly secular, anti-religious, or Christian, Muslim or Buddhist (or all of the above simultaneously); and those in Japan's orbit from those who are not.

Moreover, it is not even clear whether those who find alleged "Asian" cultural or political preferences based on what occurs within Asian-Pacific regional organisations have closely examined everything that is occurring within those organisations. The "Pacific Way" that may

28 For other examples of standard-setting by mixed groups of private and public actors, see Benvenisti, above n 24.

29 Compare David Capie and Paul Evans "The 'ASEAN way'" in Sharon Siddique and Sree Kumar (eds) *The 2nd ASEAN Reader* (ISEAS, Singapore, 2003) 45.

30 For a discussion of some of the cleavages among members of ASEAN, see Michael Richardson "Australia-Southeast Asia Relations and the East Asian Summit" (2005) 59 *Australian Journal of International Affairs* 351. Of course, any regional grouping is, to a considerable extent, a social and not merely geographic construction. See Takashi Terada "Constructing an 'East Asian' Concept and Growing Regional Identity: from EAEC to ASEAN+3" (2003) 16 *The Pacific Review* 251; Roman Grynberg and others "Asian Development Bank-Commonwealth Secretariat Joint Report to the Pacific Islands Forum Secretariat: Toward a New Pacific Regionalism" (Asian Development Bank, Manila, 2005). For discussion of the competing notions of "regionalism" among ASEAN countries, see Benedicte Bull and Morten Bøås "Multilateral Development Banks as Regionalising Actors: The Asian Development Bank and the Inter-American Development Bank" (2003) 8 *New Political Economy* 245.

emerge from the Pacific Forum's Pacific Plan of October 2005 may end up at some distance from the "ASEAN way" for example. The artificial construct "Asia-Pacific" loses sight of many exceptions to the non-legalisation thesis, such as Australia and New Zealand, the United States–Singapore Free Trade Agreement (which is comparable in many respects to the NAFTA) and the ASEAN–China Free Trade Agreement, whose framework anticipates binding dispute settlement.

And if the alleged "region" is bogus, so are most of the alleged reasons for its lack of legalisation. The functional needs of globalisation that have spurred international legalisation elsewhere have not entirely spared Asian or Pacific-rim countries. Ask those in East Asia who suffered from the Asian flu and had to turn to IMF-dictated remedies in its wake or the Pacific Island nations that might disappear altogether with the consequences of global warming and are vitally interested in stemming those adverse effects through international agreement.

Nor does the alleged aversion to adversarial modes of dispute settlement in organisations like APEC tell us much about whether the countries in Asia or along the Pacific rim are actually averse to lawyerly dispute settlement for issues involving international law in other venues, national or international. If there is a unified Asian cultural aversion to litigation or formal precise rule, will someone tell the sophisticated judges and lawyers of Singapore, Malaysia, or the Philippines, all of whom regularly hear disputes involving international law, especially international commercial disputes? My suspicion is that the myth of a monolithic culture may be limited to those remote Malay rural villages that may be intentionally kept out of the reach of globalisation. While all of us would rather be engaged in less adversarial activities rather than sit in a courtroom, I suspect that when important rights are at stake, all of us — including Asians — will opt, when necessary, for a judge to protect our interests — as is suggested by the number of countries from the region that have submitted their disputes to the WTO or the International Court of Justice.

As for the canard that only democracies "do law and only with each other", I have long been of the view that this proposition, once touted by liberal theorists, is as dubious as the suggestion that the United States has been its leading exemplar.<sup>31</sup> While it may be the case that with respect to some issues, states with comparable forms of government are more likely to cooperate with each other

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31 See José E Alvarez "Do Liberal States Behave Better?" (2001) 12 EJIL 183. See also Ann Kent "Influences on National Participation in International Institutions: Liberal v Non-Liberal States" in Hilary Charlesworth and others (eds) *The Fluid State: International Law and National Legal Systems* (Federation Press, Sydney, 2005) 251; Ann Kent *Beyond Compliance: China, International Organizations, and Global Security* (Stanford University Press, Stanford, 2007).



internationally, this may occur among both authoritarian regimes and democratic ones.<sup>32</sup> After the terrorist attacks of 11 September 2001, amidst United States efforts to wage war on terrorists in ways that strike many as singularly disrespectful of democratic values, the proposition that that leading democracy is especially good at playing well with others would appear to have as much credibility as Fukuyama's "end of history" thesis.<sup>33</sup> Of course, if the liberal thesis has some validity, it would suggest yet another reason to be skeptical about overly broad generalisations concerning the dim prospects for international legalisation premised on the "ASEAN way". Such generalisations render invisible the forms of cooperation that may exist among some member states of APEC, including those that are functioning democracies, even if fragile. They also tell us little about those countries' treaty or other legal relationships with other democracies, such as the United States, outside the region, and whether these relationships are "legalised". The liberal theory of international law is itself a reason to be skeptical of any legalisation thesis that attempts to say anything coherent about a "region" consisting of both democracies and more authoritarian regimes.

The contention that legalisation is a strategic choice is not as easily dismissed, however. There is considerable truth to the proposition that states cooperate (or not) depending on whether they perceive that it is in their interests to do so, and this must surely apply to some extent when it comes to choosing whether or not to engage in formal treaty-making or legalised dispute settlement.<sup>34</sup> But seeing the choice to legalise from the standpoint of rational choice theory does not lead to the conclusion that "Asian" legalisation does not occur. On the contrary it suggests that some Asian/Pacific governments may sometimes, on some issues, find it in their interests to legalise. And this turns out to be the case upon closer inspection, as is further suggested below.

(2) My second objection is that the existence or prevalence of Asia-Pacific regional groupings — from APEC to ASEAN plus 3 — does not necessarily say anything about a lack of commitment to global legal institutions like the UN or the WTO. Regionalism is not always the Janus face of

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32 If, as Ralf Dahrendorf has noted discussing the EU, a serious commitment to internationalisation "almost invariably means a loss of democracy" in some cases more authoritarian regimes may find it easier to cooperate internationally and with each other (Ralf Dahrendorf "The Third Way and Liberty: An Authoritarian Streak in Europe's New Center" (1999) 18 *Foreign Affairs* 13, 16). As Eric Stein indicates, it is true that "in the operational sense, the looser the parliamentary control over the executive in foreign affairs, the easier it is for the state to participate in IGOs [inter-governmental organisations]" (Stein, above n 20, 490).

33 Francis Fukuyama *The End of History and the Last Man* (Penguin Books, London, 1992).

34 See, for example, Andrew T Guzman "The Cost of Credibility: Explaining Resistance to Interstate Dispute Settlement Mechanisms" (2002) 31 *J Leg Stud* 303.

legalisation.<sup>35</sup> While some presidents cannot walk and chew gum at the same time, states can and do engage in regional forms of cooperation and global ones simultaneously — and either or both types of forums can engage law, albeit to different degrees. Ask the United States — which has managed to pursue both NAFTA and WTO liberalisation while avoiding both regional and global regimes for human rights or criminal accountability like the plague.

As students of EU harmonisation efforts have noticed, there is a complex interplay between regional and global legal efforts. While in some cases European supra-nationalism has made Europeans more amenable to global law; sometimes, as with respect to respecting international rules for the treatment of refugees, the reverse appears to have been the case. The fascination with Europe displayed by some legalisation theorists vastly oversimplifies a complex reality. That Europeans have entered into hard dispute settlement mechanisms with respect to European agreements should not be conflated with the proposition that Europeans are always better compliers with interstate legal obligations that arise outside of Europe. I am aware of no empirical evidence that the countries of Asia or the Pacific-rim are any less likely to comply with, for example, their WTO commitments than the countries of the EU. Indeed, some of the most difficult attempts to secure compliance with WTO commitments, notwithstanding repeated WTO rulings requiring compliance, have involved the EU, as students of the WTO Bananas litigation<sup>36</sup> well know. Nor am I aware of solid empirical comparisons with respect to the effective rate of compliance on environmental agreements, for example, as between pairs of states belonging to rival regional groupings, such as Australia versus New Zealand.

Further, even if it is true that some APEC members have been averse to some forms of "hard" dispute settlement produced by global institutions like the UN, such as the International Criminal Court (ICC), this aversion may be specific to certain subjects (like criminal justice or human rights) and not to others. It also may not accurately reflect current cross-cutting developments. Further, it would be hazardous to ascribe one country's reasons for aversion to the ICC to others, as is suggested by those who rely on cultural disinclinations to resort to courts, such as the "Asian

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35 See generally Heribert Dieter and Richard Higgott "Exploring Alternative Theories of Economic Regionalism: From Trade to Finance in Asian Co-operation?" (2003) 10 *Review of International Political Economy* 430. Even the often-studied relationship between regional trade agreements and multilateral liberalisation as characterised by the World Trade Organization (WTO) has yielded inconsistent conclusions, with some contending that regional agreements have undermined the WTO regime and others concluding the opposite. See Tran Van Hoa "Globalization, Crises and the Emergence of New Asian Regionalism: Genesis and Current Development" in Tran Van Hoa and Charles Harvie (eds) *New Asian Regionalism Responses to Globalization and Crisis* (Palgrave, Basingstoke, 2003) 9, 32-34.

36 For a concise survey of the elaborate multi-year efforts to secure the EU's effective implementation of WTO norms in connection with the EU's bananas regime, see Jeffrey L Dunoff, Steven R Ratner and David Wippman *International Law Norms, Actors, Process* (2ed, Aspen Publishers, New York, 2006) 828-846.

Way.<sup>37</sup> Global developments — like some APEC members' aversion to the IMF after the Asian crisis — may be driving contemporary vehicles for more legalistic forms of regional cooperation (like some of the latest free trade agreements with "harder" forms of dispute settlement).<sup>38</sup>

We should also not forget that the establishment of regional institutions has occurred alongside continued Asian–Pacific involvement in the classic institutions of the post-World War II legal order, including international financial institutions and the WTO. Participation in UN peacekeeping, timely payment of UN dues, leading on significant UN initiatives (such as UN reform), and support for the UN secretariat when needed, all occur among members of APEC. Indeed, this is often done with considerably more (apparently genuine) dedication to multilateralism than has been the case with respect to the current Bush Administration (which, for example, only pressed for payment of UN arrears payments to the UN regular budget after the events of 11 September 2001 made it expedient to do so). Those who criticise the level of commitment to legalisation among "Asians" need to be more specific about their metric for comparison. While it is said that the countries of the "region" have participated in WTO dispute settlement less than their trade flows would warrant, surely one ought to be curious about whether the level of trade flows ought to be the basis for comparison, as opposed to, for example, prospects for a successful challenge in discrete cases or the likelihood of a WTO-authorized trade remedy that would prove effective as against an economic powerhouse like the EU or the United States. Moreover, even if level of trade flows is an accurate barometer for such purposes, the level of participation on WTO panels involving countries in the "region" appears to be growing; earlier levels may reflect a predictable learning curve with respect to WTO dispute settlement rather than a permanent aversion to this form of legalised dispute settlement. Of course, irrespective of the relative levels of Asian complaints in the WTO, it would be an error to suggest, based on the region's approach to IOs, that the countries of Asia or the Pacific-rim have not made major contributions to international law through participation in international dispute settlement — whether as complainants in the WTO's own *Shrimp–Turtle*<sup>39</sup> decision or the ICJ's *Nuclear Test*<sup>40</sup> cases. We should also acknowledge, as Rosemary Foot has, that even those disparaged Asian–Pacific regional institutions owe their ethos and many of their founding principles to the UN Charter and other products of the UN system, including the Agenda for Peace and the

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37 Compare J Lu and Z Wang "China's Attitude Towards the ICC" (2005) 3 J Int'l Crim J 608, providing particularised reasons for China's aversion to the ICC.

38 See, for example, Kevin G Cai "The ASEAN-China Free Trade Agreement and East Asian Regional Grouping" (2003) 25 Contemporary Southeast Asia 387.

39 *United States – Import Prohibition of Certain Shrimp and Shrimp Products* (6 November 1998) WT/DS58/AB/R (Appellate Body, WTO).

40 *Nuclear Tests (Australia v France)* (Judgment) [1974] ICJ Rep 253.

Nuclear Non-Proliferation and Comprehensive Test Ban Treaties (to which all major Asia-Pacific states have adhered).<sup>41</sup>

In any case, there are signs of increased legalisation among some "Asian-Pacific" regional institutions. We should not forecast the future of Asia-Pacific institutions based only on the past. We do not know what the future holds for the more formal ASEAN Charter of 2005; whether the ASEAN-China Free Trade Agreement will emerge, as anticipated, as the largest free trade area in the world and if so what this will do to ASEAN since it will need to implement its provisions; whether East Asia Summits or the Pacific Forum will adhere to the "ASEAN way"; whether peacekeeping efforts in East Timor bode more regional involvement in such efforts elsewhere; whether the Regional Assistance Mission to the Solomon Islands bodes a new kind of security mechanism involving the participation of police officers, military personnel, and civilians; or whether the 2004 ASEAN Enhanced Dispute Settlement Mechanism will actually be used or at least assert its shadow over disputes that are never submitted under it.

(3) Nor is it true that the region's participation in transnational networks, non-binding institutions, public/private consortia, or standardisation by private actors is necessarily inconsistent with international law. While some of these initiatives may have been initiated in order to avoid legal bureaucratic hurdles — such as submissions to legislatures for approval — many have not remained outside the orbit of international law or outside the province of traditional IOs. I disagree with those who describe these initiatives as signaling the demise of international law or of formal international organisations.<sup>42</sup> Even Slaughter, the foremost advocate of these alternatives to formal institutionalisation, now acknowledges that transnational networks of government regulators often work in tandem with or under the shadow of formal IOs, including the World Bank and the IMF.<sup>43</sup> There are signs that many of these less formal developments have now come to complement or enhance international law and more institutionalised forms of legalisation.<sup>44</sup> Indeed, both the FATA's effort to facilitate the adoption, implementation and enforcement of internationally accepted standards against money laundering and the financing of terrorism, as well as the PSI's interdiction exercises, complement on-going efforts by the UN Security Council on counter terrorism and

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41 Rosemary Foot "The UN System's Contribution to Asia-Pacific Security Architecture" (2003) 16 *The Pacific Review* 207. Interestingly, nearly all of the six core norms associated with the "ASEAN way" (see Haacke, above n 15) are reflected in the principles and purposes of the United Nations Charter, and especially Article 2 (Charter of the United Nations (26 June 1945) 59 Stat 1031).

42 See, for example, Benvenisti, above n 24.

43 Compare Anne-Marie Slaughter "The New Real World Order" 76 (1997) *Foreign Affairs* 183; with Anne-Marie Slaughter *A New World Order* (Princeton University Press, Princeton, 2004).

44 See, for example, Kal Raustiala "The Architecture of International Cooperation: Transgovernmental Networks and the Future of International Law" (2002) 43 *Virg JIL* 1.

weapons of mass destruction. In fact, these Security Council efforts rely on or anticipate such auxiliary efforts. This should not surprise anyone— given the common provenance of all of these efforts: namely the United States as hyper-power. If, as Kenneth Abbott and Duncan Snidal indicate, many formal IOs engage in "laundering" the needs of the powerful, why should "soft" methods of regulation such as the PSI be any less likely to do the same?<sup>45</sup> Moreover, the sheer informality of some of these efforts — especially the lack of possibility for legislative oversight — appear to generate in some cases eventual political pressures for bringing them back into the legal fold, especially for states that care about democratic accountability.

(4) But my most fundamental objection<sup>46</sup> is to the metric by which "Asian-Pacific" developments purport to be measured. The tables from the *International Organization* journal that I have cited encourage an overly narrow, mechanistic concept of legalisation, or more accurately of international law. The tri-fold emphasis on obligation, precision, and delegation misleads and is outdated. International law and institutions, in all their increasing diversity, can no longer — if they ever were — be confined to top-down, precise, forms of obligation that either emerge from international law-makers with expressly delegated law-making authority or stem from judges authorised to interpret and enforce the law through binding judgments. International legal sources are no longer confined to treaty, custom, or general principles but include a welter of "soft law" whose content and legal effects very much involve the discourse of law. Relevant law-making actors are no longer just states but international civil servants, private parties, non-governmental organisations, business groups, and experts. These new actors influence the law in the absence of express delegated law-making power.<sup>47</sup> International law's interpreters are, most often, *not* judges, even in this age of proliferating international tribunals. International legal mechanisms now deploy many other interpreters, including private parties and municipal officials. Its enforcers include "the market" as well as a welter of bureaucrats, national and international.

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45 See Kenneth W Abbott and Duncan Snidal "Why States Act Through Formal International Organizations" (1999) 42 J Conflict Resolution 3, 18-19.

46 Indeed, Miles Kahler anticipated objections 1-3 above. See Kahler, above n 11, 559-571.

47 For multiple examples, see José E Alvarez *International Organizations as Law-makers* (Oxford University Press, New York, 2005).

The following table,<sup>48</sup> which illustrates some of the points made in my recent book, *International Organizations as Law-makers*,<sup>49</sup> suggests how even some formal IOs are now making, interpreting or enforcing law.

	<b>Traditional Regulation</b>	<b>IO Governance</b>
<i>Nature of Law</i>	<ul style="list-style-type: none"> <li>• Centralised</li> <li>• Command and control</li> <li>• Rigid and fixed</li> <li>• Uniform rules</li> <li>• Generalised</li> </ul>	<ul style="list-style-type: none"> <li>• Decentralised</li> <li>• Coordination/orchestration</li> <li>• Flexible and adaptable</li> <li>• Diversity</li> <li>• Contextualised variances</li> </ul>
<i>Organisation</i>	<ul style="list-style-type: none"> <li>• Top-down hierarchy</li> <li>• Formal</li> </ul>	<ul style="list-style-type: none"> <li>• Horizontal network</li> <li>• Informal</li> </ul>
<i>Central Actors</i>	<ul style="list-style-type: none"> <li>• State / public</li> </ul>	<ul style="list-style-type: none"> <li>• Multiple levels of government</li> <li>• Multiple public and private participation</li> <li>• Decentralisation and principle of subsidiarity</li> </ul>
<i>Law-making Process</i>	<ul style="list-style-type: none"> <li>• Static</li> <li>• One-shot</li> <li>• Rigid &amp; fixed</li> </ul>	<ul style="list-style-type: none"> <li>• Dynamic</li> <li>• Iterative / repeat learning</li> <li>• Experimental</li> <li>• Promotes innovation</li> </ul>
<i>Adjudicative Approach</i>	<ul style="list-style-type: none"> <li>• Reactive</li> <li>• After-the-fact judgment</li> </ul>	<ul style="list-style-type: none"> <li>• Ongoing benchmarking</li> </ul>

This table adapts one created by Orly Lobel, who synthesises the work of many who describe a new kind of administrative law in the United States and Europe.<sup>50</sup> The left side of her table, describing "traditional regulation" should be immediately recognisable since it tends to replicate the three dimensions of legalisation as described by Keohane, Moravcsik, and Slaughter. But the right side of this table, which I have recast as enumerating the characteristics of "IO Governance", describes many modern international law regimes and not just those associated with formal institutions like the UN. It includes legal products as diverse as the counter-terrorism efforts of UN Security Council committees to contemporary labour and environmental conventions and a great deal of "soft" law in-between.

As this table suggests, international and national legalisation can come from below and can involve, as participants or enforcers, private parties as well as the interplay of regional and global efforts. Its socialisation effects can emerge from, or be enforced by, consensus and informal vote taking (as indeed it does in WTO governance) and, as with respect to the vast majority of trade

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48 Based on Orly Lobel "The Renew Deal" (2005) 89 Minn L Rev 342.

49 Alvarez, above n 47.

50 Orly Lobel "The Renew Deal" (2005) 89 Minn. L Rev 342, 405-406.

disputes which are not submitted to dispute settlement even within the WTO, legalisation may not involve binding adjudication or even public assertions of "breach". And apart from the WTO, as Abram Chayes and Antonia Chayes showed a decade ago, many regimes, perhaps most, do not operate in the shadow of hard dispute settlement at all; they involve carrots in the form of continued managerial discourse, not sticks or the threat of litigation.<sup>51</sup>

We can suggest conflicting reasons for these developments. They may be reactions to hegemonic forms of traditional top-down law or manifestations of it. But whatever the underlying reasons, if these characteristics describe, as I believe that they do, both the future of much international legalisation and significant aspects of current developments around the world, it is possible that the Asia-Pacific "region" (even assuming that it is useful to address this region as if it exists) has been ahead of the curve and not behind it. Whatever else it is, the many legal developments occurring with the active participation of states from Asia and the Pacific-rim are not accurately described as Keohane, Moravcsik, and Slaughter's "ideal type" of anarchy.

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51 Abram Chayes and Antonia Chayes *The New Sovereignty: Compliance with International Regulatory Agreements* (Harvard University Press, Cambridge (Mass), 1995).

