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Koesrianti Koesrianti
Faculty of Law Universitas Airlangga

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INTERNATIONAL COOPERATION AMONG STATES IN GLOBALIZED ERA: THE DECLINE OF STATE SOVEREIGNTY

Koesrianti¹

Abstract

This article discusses the national sovereignty and regionalism in the context of the membership of a state into regional economic organisations. It concludes that in nowadays-shrinking world the traditional concept of sovereignty is less relevant since states have suffered a loss in their sovereignty. It found that member states of regional economic organisations have to cede a degree of sovereignty, such as in the EU. This phenomenon however is not the case for NAFTA and AFTA.

Keywords: *sovereignty, regional economic organisation, EU, NAFTA, AFTA*

I. Introduction

The problem of sovereignty is an extremely vast subject since sovereignty constitutes a counterpart of international law. Whereas the precise meaning of sovereignty has not determined yet, it has been a matter of cardinal importance for those conducting international relations since sovereignty is 'a ticket' of general admission to the international arena.² By gaining sovereignty status a state is able to receive the fundamental international rights, such as, expropriation, diplomatic and sovereign immunity, and national jurisdictions.³ Simultaneously, such state attains state responsibility for governing, defending and promoting the welfare of a human community.

In order to achieve their goals, states held a growing range of activities. These policies involve states in the exigencies of interdependence such as; join international organizations, engaging in the international networks and markets. They might join in one or more international or regional organizations. When joining international institutions often states are sacrificing some degree of their national sovereignty. In the contemporary world, as states has acquired more power as an institution, there has been a tension between nations to assert their state sovereignty powers while using international law and states may scarify some part of sovereignty in the hope of the better standard living of their communities. Furthermore, it is inevitable phenomenon that states have involved in many international agreements. It is arguable; however, that international legal system lacks of effective dispute settlement and enforcement mechanisms.

The advanced of technology, transportation and the Internet has resulted that in the nowadays-shrinking world, the quality of state sovereignty has

¹ Koesrianti, a senior lecturer Law Faculty, Universitas Airlangga, Surabaya, Indonesia, email address at koesrianti@fh.unair.ac.id

² Michael Ross Fowler and Julie Marie Bunck, *Law, Power and the Sovereign State: The Evolution an Application of the Concept of Sovereignty*, Pennsylvania: the Pennsylvania State Univ. Press, 1995, p.12

³ *ibid.*

fundamentally changed. National sovereignty is not absolute anymore. States have to adjust their legal and economic structures to keep pace with the rapid changes of the world economy challenges.

This paper discusses the decline of the traditional concept of state sovereignty in relation with international cooperation among states to form international institutions. It argues that the choice of maximising traditional state sovereign power in such current world of interconnected market and rapid capital mobility is misplaced. The forces of market integration and economic globalisation are beyond the control of national government therefore, some argue that state sovereignty has already lost its significance in world politics⁴. However, since sovereignty is a key factor in the international relations, it necessary to give a comprehend understanding of the concept of state sovereignty and its corollaries in the current world. International society has changed considerably within the last century, and it accelerated by the end of the cold war by which one has to see international law from different perspective. This article will explore answers whether nation states within their territories remain 'exclusive and absolute' or there have been diminished as a result of economic globalisation, transportation and communications advances. Moreover, international law nowadays is not merely law that regulate sovereign states, but it also put order over individuals. Human right law and the Internet and so forth could be mentioned here as best examples of this phenomenon.

Given the increasing tendency that states are member of one or more international or regional organizations, this article will analyse the motivations of states in joining regional organizations. In this respect, it will review the European Union since many regional organizations have followed its success as a regional organization. As comparison this article will discuss the North American Free Trade Area (NAFTA) and the Association of Southeast Asian Nations (ASEAN). Limitations and transfer of sovereignty will also be assessed as these issues are correlated with state's insertion to international organizations. Finally, this article draws a conclusion as an ended part of this article.

II. The Concept and the Development of Sovereignty

The concept of sovereignty is not a unitary concept.⁵ As state sovereignty is a class category, its social and political content has not remained unchanged at different stages of historical development. It has been differed from time to time, which reflected the various circumstances of particular times that have characterized it accordingly.⁶ The concept of sovereignty indeed has evolved. Therefore, it should be redefined and reinterpret as the situations change. An international law scholar even has said, 'it is time...to examine, analyse,

⁴ Territorial sovereignty of the state is now more rather than less an essential part of the structure of modern international law, see Robert Jennings, *Sovereignty and International Law*, in *State, Sovereignty, and International Governance*, Gerard Kreijen, et.al., Oxford University Press, 2002, p. 41

⁵ Jack Goldsmith, *Sovereignty, International Relations Theory, and International Law*, Book Review, 52 *Stanford Law Review* 959, p. 974; Sovereignty is not a static concept as it has been in a constant process of evolution in response to external challenges and integration process, see also, *State Sovereignty in the 21st century concept, relevance and limits*, July 23, 2001, at <http://meadev.nic.in/speeches/fs-jul23.htm> (last visited on 15/04/2003)

⁶ Jennings, *supra* n.4, p.29

reconceived the concept, cut it down to size, break out its normative content, repackage it, perhaps even rename it.⁷

The concept of sovereignty⁸ first developed in constitutional law as an attribute of the highest authority and power holder within a state. This concept was elaborated as the legitimacy of a single hierarchy of domestic authority. The modern theory of sovereignty arose from the reaction of the European States to the doctrine of the German-Roman Empire, according to which the emperor was superior to all governments, monarchies or republics, of the Christian countries. Thus, the concept of sovereignty initially developed as a European concept to guide relations between European powers.

Bodin in his *De la republique* made the influential contribution to the development of the concept of sovereignty in 1576. In Bodin theory, sovereignty is 'the absolute and perpetual power of state', i.e., the supreme power of the state within a specific territory.⁹ Divine and natural law however, limited this power. It also was limited by obligations to, and agreements with other states.¹⁰ Concerning the hierarchy of legal norms, as in the field of the general theory of law, Bodin had placed the laws of God and of nature which are binding on all human beings and on all nations on the highest ladder-step of this hierarchy. He concluded that very few rulers absolutely sovereign.¹¹ In these feudal times, therefore, the sovereignty rested in God. Bodin's theory of sovereignty reflected the situation of state in Europe in his day and to what he saw to be a means for the restoration of some sort of internal order: the desire to create one final source of legal power, the supremacy of monarchy on the papacy and the empire, and the external front.¹² These ideas were essentially an attempt to tidy up Europe, which, with its mosaic more or less petty territorial regimes, was in danger of disintegration into disorder.¹³

Grotius of Holland had defined the concept of sovereignty differently to Bodin's theory as he noticed a weaker notion of sovereignty. Grotius recognized the right of independent states to war against other states. He said that states are the only actors possessing a monopoly power in international arena.¹⁴ In this case, the idea of sovereignty has been moved from domestic authority to international relations.

Then at the end of the eighteenth century when the liberal and democratic revolutions took place, and inspired by the English constitutional system, the new doctrine of sovereignty coincided with the doctrine of the rights of men, that promoted together with the theory of division of powers, the political and legal limitation of power with the purpose of moderating its exercise to protect people's freedom.¹⁵ Thus, the sovereignty was transferred to the

⁷ Louis Henkin, *The Mythology of sovereignty*, ASIL Newsletter March-May 1993

⁸ The English word sovereignty originally derived from the French term *souverain*: a supreme ruler not accountable to anyone, except perhaps to God, see Ivo D. Duchacek, *Nations and Men: International Politics Today*, New York: Holt, Rinehart and Winston, 1966, p. 47

⁹ Marek St Korowicz, *Introduction to International Law*, The Hague: Martinus Nijhoff, 1964, p.28

¹⁰ Korowicz, *supra* n.9, Id.

¹¹ Korowicz, *supra* n.9, p.29

¹² Jean Bodin, *Six Books of the Commonwealth* 25 (M. Tooley trans. 1967), quoted in Ivan Simonic, *Relative Sovereignty of the Twenty First Century*, 25 *Hastings Int'l & Comp. L Rev* 371 (2002); see also, Jennings, n.4 *supra*, id.

¹³ Jennings, *supra* n.4, p 27

¹⁴ Jennings, *supra* n.4, Id.

¹⁵ Chris Patten, *Sovereignty and Democracy in the European Union*, CH the Chatham Lecture Trin-

people. Parliament sovereignty was on the rise, as stated in the Bill of Rights in 1689 that it was illegal for the king to pretend the '*power of suspending of law, or the execution of laws.... without consent of Parliament*'¹⁶. Then parliament was sovereign. State sovereignty became an authority, which is stemmed from the people who voluntarily formed civil society. And that sovereignty was no longer an expression of the will of God, but the will of the people.¹⁷

Later in the early 1930s, in the League Nations period, the idea of sovereignty was determined as an obstacle to the development of international law.¹⁸ Within this period the right of war was recognized as a legal right of sovereign states to gain their political aims by which they became absolute and uncontrolled sovereign states. Therefore, it was needed for states to 'surrender' of their sovereignty in order to develop international law and community.¹⁹

Next, in the United Nations era, the right of war of states was abolished but the principle of the equality of nations is affirmed in the United Nations Charter article 2 (1), which declares that 'the Organization is based on the principle of the sovereign equality of all its Members'. Thus, it is recognized that state sovereignty is the principle of international law without which there can be no free cooperation between states and there is no international law. Indeed, if the sovereign states do not exist, the rules of international law cannot grow up as states formed the international community on the basis of mutual respect for their sovereignty.

Surveys of genealogy of sovereignty principle, however, have exposed the vagueness and inconsistency with which the term has been used. In international politics practice no concept is less understood and more misused than that of sovereignty.²⁰ The fact that sovereignty is a laudatory political word as well as a legal concept has doubtless contributed greatly to this confusion. Nevertheless, it may still be possible to identify a common core of meaning of sovereignty.

Over the centuries, as international communities expanded, diversity and complexity eventually merged into a single international society. Likewise the system of states was developed in various ways. People then used sovereignty to focus not just on domestic authority within a state but on the relative independence of individual states. Later, people interpreted sovereignty in two meanings, namely, sovereignty within that state's boundaries and beyond state's borders, in foreign affairs, as a power to secure independence from other states. Thus, sovereignty has two central elements: the notion of supremacy within a territory (the internal aspect) and independence in the international arena (the external aspect).

The internal aspect of sovereignty means supremacy, or exclusive competence or domestic jurisdiction. Meanwhile, the external aspect means political and juridical independence, or autonomy from any other authority. It has also been referred to as the notion of 'relative sovereignty', meaning that sovereignty in the international arena is not unlimited since the state is subject

ity College, Oct 2000

¹⁶ Bill of Rights 1689, see Law Museum at http://www.duhaime.org/Law_museum/uk-billr.htm

¹⁷ Patten, *supra* n.15, id

¹⁸ Jennings, *supra* n.4, p 29

¹⁹ Jennings, *supra* n.4, Id

²⁰ Josef Joffe, Rethinking the nation-state: The many meanings of Sovereignty, 78 Foreign Affairs 122 (1999)

to international law and is expected to respect the sovereignties of other states. Therefore, no sovereign state has 'absolute sovereignty' as no state is free to do as it pleases. Thus sovereignty is the ability of a state to determine its domestic and foreign policies, includes the right to choose its form of government, free from subordination to any other authority. Therefore, respect for sovereignty means that a state accepts the obligation not to interfere in the internal affairs of other states and respects their independence.

The thorough definition of sovereignty has been defined by Gelber, which means, 'the exclusiveness of that sovereign's authority within his own territory, a right to non-intervention in the affairs of one's state and the equality of states in terms of status and law. It involves the unique right of every independent state entity to control its own destiny without acknowledging any superior secular authority and without undue external pressure'.²¹

Meanwhile, Stephen D Krasner, a political scientist has conceptualised sovereignty²². He divides the concept of sovereignty into four dimensions. Firstly 'domestic sovereignty', the organization of public authority within the state, or it refers to final source of authority of states. It is the supreme power to enforce the law and adjudicate conflicts. Secondly, 'interdependence sovereignty', the ability to control those that crosses at state's borders. It means freedom from external influences. However, this interdependence sovereignty has been eroded because of globalization. States are losing their control over the flow of people, goods, pollutants, and currencies across their borders. Thirdly, 'international legal sovereignty', referring to the legal capacities to act, as well as other benefits that, derived from mutual recognition between states or other independent entities. It is a fundamental concept for the exclusivity of territorial border, the state recognition and diplomatic immunity. Lastly, 'Westphalian sovereignty', referring to political organization based on the exclusion of external actors from authority structures within the territory. It corresponds to the international law principle of territorial sovereignty. Prohibition on the use of force in the UN Charter, customary international law limits on extraterritorial jurisdiction and international law governing territorial borders are based on this principle.

III.Sovereignty in Globalized Era

Under international law, a sovereign state is an entity that has defined territory and permanent population, under the control of its own government, and has the capacity to engage in, formal relations with other such entities.²³ This definition derives from the historical development of states and the concept of sovereignty as it has developed from the middle ages. Traditional international law is the law among sovereign states that fulfil those attributes, which characterise a state as a political institution of the ruling class. Most scholars called it as nation-state sovereignty which synonymous with

²¹ Harry G Gelber, *Sovereignty through Interdependence*, London: Kluwer Law International, 1997, p.74

²² Stephen D Krasner, *Sovereignty: Organized Hypocrisy*, Princeton: Princeton University Press, 1999

²³ Rights and Duties of States [Inter-American] signed at Montevideo on December 26, 1933 entered into force December 26, 1934 (hereinafter Montevideo Convention)

'Westphalian' sovereignty.²⁴

Meanwhile, in the field of international relations, states are treated as persons and interact with one another accordingly.²⁵ An individual state has the right to defend its integrity and independence, to provide for its conservation and prosperity, and consequently to organize itself as it sees fit, to legislate upon its interests, administer its services, and to define the jurisdiction and competence of its courts.²⁶ These rights, however, are limited by the exercise of the other states rights according to international law. In other words, the scope of a state's sovereignty is ended when another state's sovereignty begins.

Dramatic changes in the nature and intensity of global interactions in the more than past two decades have some implications on the sovereignty. States have suffered a loss in their sovereignties in an increasingly complex and interdependent world. As Roslyn Higgins has said:²⁷

Globalization represents the reality that we live in a time when the walls of sovereignty are no protection against the movement of capital, labor, information and ideas, nor can they provide effective protection against harm and damage.

Internationalisation of society, which gave effect to internationalisation of politic resulting states, are no longer the sole, or even the most important source of order in the world today. Indeed, international legal system has recognised other non-state participants such as international organization and non-governmental organizations.²⁸ International community has been developed formally (for example the European Union), and informal (such as, environmental issues), combined with the contemporary globalization, namely the existed of intergovernmental organization (eg. the World Bank) and transnational corporations, has meant that absolute sovereignty is no longer practical or even legitimate (such as in relation to human rights matters).²⁹ Therefore, state sovereignty is becoming less relevant to the needs of what is now commonly referred to as a global international community. The structure of the international legal arena has been changed. The present understanding of sovereignty, therefore, must be expanded. It means the exclusively state-centric approach is no longer sufficient.

Moreover, the challenge of the national governments to cope with a new range of threats that respect no political boundaries: environmental degradation, narcotics, international crimes, terrorism, AIDS, human rights

²⁴ Julian Ku and John Yoo, *Taming Globalization: International Law, the U.S. Constitution, and the New World Order*, Oxford University Press, 2012, p. 40

²⁵ Montevideo Convention, art.2, supra n. 23, id.

²⁶ Montevideo Convention, art.3, supra n. 23, id

²⁷ Roslyn Higgins was the former International Court of Justice President, see Roslyn Higgins, *International Law in a Changing International System*, (1999) 58 Cambridge Law Journal, 78, see also, Julian Ku and John Yoo, supra n.24, p. 22

²⁸ See UN Charter art.71 ("The Economic and Social Council may make suitable arrangements for consultation with non-governmental organizations"); Convention on the Representation of States in their relations with International Organizations of a Universal Character, Mar.14, 1975, 69 Am.J Int'l L 730 (1975); Convention on the Law of Treaties between States and International Organizations or Between International Organizations, Mar.21, 1986, 25 I.L.M. 543 (formally acknowledging the authority of agreements involving international organizations).

²⁹ Robert McCorquodale, *The Creation and Recognition of States*, in Sam Blay, Ryszard Piotrowicz, and Martin Tsamenyi (eds), *Public International Law: An Australian Perspective*, Second Ed, Oxford University Press, 2005, p. 185

violations, and poverty to name but a few, has made some fuzzy of what is foreign and what is domestic policy. In other words, states have lost their direct control over activities that affect or take place within their formal jurisdiction. It should be borne in mind; however, the ability of states to influence its domestic affairs is not diminished. States will continue to be major source of sovereign authority in their territory. States will remain the primary subject of international law which is without them international law has not growing to play. Indeed, the existence and reality of the government's internal sovereignty are significant factors for international capacity itself.³⁰ For example, a state that carry obligation under international treaty that usually occurs after treaty ratification, by which such state requires to change its local law in order this international obligation to be applied in the local law and local courts.

IV. Sovereignty and Regionalism

National sovereignty as formally articulated in the Treaty of Westphalia is an important legal principle of international law. It defines nationhood. States are the sovereign actors in international arena. Nations define themselves by their territoriality and fight to protect their sovereign interests. Indeed, the traditional prerogatives of governments are, as guardians of national interests generally will decide vigilance every policy when the national interests are at stake. However, it should not be forgotten that when a state came into an international organization or concluded a treaty, it is decided by each state as its own discretion, means, a state did it voluntarily without external pressures. However, entry into an international organization or conclude a treaty also involves certain obligations which are to a certain extent a restriction on its sovereignty.

Regional organizations of the economic or of the political (security) type exist in most part of the world- Europe, Africa, Asia, and Latin America during the last few decades. These regional integrations have different level and pace. Some of the most notable of these regional integrations are the European Union (EU), the North American Free Trade Area (NAFTA), and the Association of Southeast Asian Nations (ASEAN). There is no single motivation for establishing a formal regional integration agreement. There is generally a combination of two or more of the following motivations: economic development and efficiency, emulation, historical links, security and political stability, negotiating and counterweight power, safe haven or security of market access.³¹ In the previous time, political or military factors might have been the main reasons for integration. Economic aspect, however, is likely the major considerations for states to form regional integration in 1990s. Motivation of state in joining regional integration are manifold³²: it could be for the sake of growth; or opening a bigger market or market access; in NAFTA case, it can be said that less unemployment in Mexico through investment from outside and thus less incentives for illegal immigration from Mexico into

³⁰ Jennings, *supra*.n.4, p.32

³¹ OECD, *Regional Integration and the Multilateral Trading System: Synergy and Divergence*, OECD, 1995, p.32

³² Winfred Lang, *New Regionalism in a Changing World Order*, in *International Law, Theory and Practice*, K. Wellens (ed), Netherlands: Kluwer International Law, 1998, pp.54-55

the United States; and lastly, in order not being isolated (in case Canada joined NAFTA).

Furthermore, economic integration can be divided in two different levels³³; firstly, *shallow integration* means the agreement is mainly concerned with reducing tariffs and ending quotas. Rules are determined at the level of each country, with the foreign country being accorded non-discriminating treatment; and secondly, *deep integration* where the agreement has a broader scope than simply lifting tariff barrier and quotas. There are common policies for the members of this region. As far as states' contribution in the international organizations (universal or regional one) is concern, it has raised the question of national sovereignty. The most interesting case institutional and integration can make today is that of the EU. Indeed, the EU is a Mecca of regional integration around the world.

In 1950s a sovereignty debate was occurred in the Britain concerning its memberships in the European Community (or now the European Union). The desire to preserve its national sovereignty is one important factor that causes the British reluctance to join the Union.³⁴ Nevertheless, the Britain became the member of the EU fifteen years after the establishment of the Union.³⁵ Many people were worried that Britain will be vanished, as the word of the Treaty Rome³⁶ represent an encroachment of the supremacy of the national Member States. Unlike the ordinary international treaty, the Treaty of Rome is very special, as it takes away the major part of the decision-making power of the contracting states³⁷ by exercising the power that usually belongs to the national authority, such as, the four freedoms in the community,³⁸ and eliminates trade barriers.

In the European Union (EU) practice, which is reflected in the European Court of Justice (ECJ) decisions, there was a transfer of sovereignty from state members to the EU. It can be seen in *Costa v ENEL*³⁹ and *van Gend v Loos*⁴⁰ decisions. However, it is assumed that member states have not transferred sovereignty to the EU, they merely exercising sovereign powers through it and, to that end, have delegated power to it.⁴¹ Furthermore, according to Krasner⁴², unlike conventional treaty, the EU member states have created supranational

³³ OECD, Regional Integration and Internal Reforms in the Mediterranean Area, Sebastian Dessu and Ahko Siva (eds), 1995, p.102

³⁴ British did not accept the supranational body of the Union, ties with the Commonwealth, membership of EFTA (European Free Trade Association) and a system of farm prices, which allowed much higher prices in the Union than in Britain, see Miroslav N Jovanovic, European Economic Integration; Limits and Prospects, London: Routledge, 1997, p.11

³⁵ British economy, at that time, did not develop at a satisfactory pace compared with the other Union member countries; A boost to the economy could come from access to a larger market, see, Jovanovic n.31, supra, id.

³⁶ Treaty establishing the European Economic Community, U.N.T.S.140 (entered into force Jan.1, 1958) hereinafter Treaty of Rome

³⁷ Guy Pevtchin, Sovereignty revisited: the EC – an Example of Breaking Down the Barriers of Sovereignty- Implications for Canada and the United States, 24 Can.-U.S. L.J. 89 (1998) p. 91

³⁸ Freedom of movement of persons, services, goods and capital which provided in article 3 (c) Treaty of Rome

³⁹ *Costa v ENEL*, 1964 E.C.R. 585, C.M.L.R. 425 (1964)

⁴⁰ *Case 26/62 Van Gend en Loos v Nederlandse Administratie der Belastingen* (1963) E.C.R. 1

⁴¹ John Bell, The Birth of European Constitutional Order-Book Reviews, *International And Comparative Law Quarterly*, 51.2 (475), (2002)

⁴² Stephen D Krasner, Sovereignty, Foreign Policy, 20, (2001), p.28

institutions (the European Court of Justice, the European Commission, and the Council of Ministers) that can make decisions opposed by some member countries. In this respect, he argues that the member states have 'delegated' their sovereign power to an external authority. The rulings of the Court have direct effect and supremacy within national judicial systems, even though these doctrines were never explicitly endorsed in any treaty. The exercise of these doctrines is a proof of the demise of national sovereignty.

According to Trachtman, however, national sovereignty is never lost. He suggests that what the EU member states do is 'reallocate' their national sovereignty to the EU.⁴³ He viewed sovereignty as an allocation of power and responsibility. Also, he argued that sovereignty as a qualitative one, not quantitative, like many contemporary observers suggest so far. By this view he argued that the EU as the recipient of enhanced power and responsibility will exercise power and recognize its responsibility more effectively.⁴⁴

Moreover, almost similar with Trachtman, Jackson argued that sovereignty in practical used today refers to questions about the 'allocation of decision-making power' among various levels of institutions.⁴⁵ However, quite different with Trachtman, Jackson divided those power in two levels; vertical and horizontal levels. In the vertical level, means, the allocation decision making power between national and international body. Meanwhile, in the horizontal level, is the allocation power among legislative, executive and judicative institution.

By joining international or regional organization, states may sacrifice their sovereignty as part of a deal.⁴⁶ In the economic history it was common thing that states were bargaining away their sovereign economic rights in order to get concessions as a reward. For example: the US gave away fishing rights to Canada, Nova Scotia, in return for other English concessions.⁴⁷ By this view, states can involve in economic deals with other states without bothering too much about state sovereignty. What has happened in the process of economic integration agreements is that the parties negotiate their sovereign rights in both directions freely. They can compromise their bargaining proposition, means, if a party wants to bargain for something, and then there is a price of that.⁴⁸

Furthermore, in dealing with the issue of sovereignty and regionalization it is more appropriate to distinguish between economic sovereignty and political autonomy. Generally, supra-nationality of regional institutions is far better established in the economic field than in the political realm.⁴⁹ In

⁴³ Joel P Trachtman, Reflections on the Nature of the State: Sovereignty, Power and Responsibility, 20 Can-U.S. L.J. 399 (1994)

⁴⁴ Trachtman, *supra* n.43, Id

⁴⁵ Although this article discussed on the WTO topic which is not a regional organization, some views of the writer are relevant with issue on regionalism, see John H. Jackson, The Great 1994 Sovereignty Debate: United States Acceptance and Implementation of the Uruguay Round Results, in Politics, Values and Functions: International Law in the 21st Century. Essays in Honour of Professor Louis Henkin, J.I. Charney, D.K. Anton, M.E. O'Connell (eds), Netherlands: Kluwer Law International, 1997, p. 149-176

⁴⁶ Gary N Horlick, Sovereignty and International Trade Regulation, 20 Can-US L.J. 57 (1994)

⁴⁷ Horlick, *supra* n.46, Id

⁴⁸ Horlick, *supra* n.46, Id

⁴⁹ Wolf Grabendorff, The Price of Integration: Reducing or Redefining State Sovereignty?, in The Challenge of Integration: Europe and the Americas, Peter H Smith, ed, Florida: North-South Centre University of Miami, 1993, p.352

other word, states tend to scarify their economic sovereignty easily than their political autonomy to supranational body. The following are regional organizations as practical examples of the sovereignty and regionalism issues.

A. The European Union (EU)

Europe has experienced two major world wars in less than forty years, and was the horrific magnitude trauma of which is almost impossible to imagine. Within European countries in that time, France has been invaded by Germany a seventy-year period. Germany, on the other hand, has being aggressive in the World War II as a result of political process. With this European historical background the architects of the EU have been to put an end of these bloody conflicts forever.⁵⁰ The purpose of the creation of the European Coal and Steel Community in the 1951 was to pooled European coal and steel production under a common authority, and therefore immobilises, and controls the raw materials of war.⁵¹ In addition, if one reads European history it is revealed that European's wars have emerged as they connected with the existence of the notion of nation state. The founding father of modern Europe concluded that by moving this notion into a wider structure would prevent future conflicts among European's states⁵² and this will build a new prosperous Europe.

The process of the establishment of EU began with three separate treaties: the European Coal and Steel Community (ECSC), the European Atomic Energy Community (EURATOM), and the European Economic Community (EEC). In 1967, they collectively became known as the European Communities (EC). Later, the Treaty of Maastricht in 1992⁵³ and the Treaty of Amsterdam in 1998⁵⁴ amended the Treaty of Rome of 1958; the total of these three treaties is called as the Treaty on European Union (TEU).

Under these treaties, the EU, instead of being a community of nation states, became a 'legal personality' of its own right, capable of acting as a single entity in international affairs; able to sign treaties binding on all its constituent member states. Also, they expanded the competence of ECJ and gave the European Council of Minister to impose penalties to any member state that 'in persistent breach of the Treaty'. It also provided a blueprint to achieve Economic and Monetary (EMU), further developed the Union's inherent political dimension through the new Common Foreign and Security Policy (CFSP), and expanded cooperation in judicial and policing matters. The 2000 Treaty of Nice⁵⁵ took further steps forwards the creation of a centralized European State.

The EU is governed by five institutions: European Parliament, Council

⁵⁰ It was a vision that cooperation between former adversaries could defuse potential conflicts in the future, see Jovanovic, supra n. 35, p.1

⁵¹ Richard Portes & David Vines, *European Integration: Retrospect and Prospect*, in *Europe, East Asia & APEC: A Shared Global Agenda*, Peter Drysdale & D Vines (eds), Cambridge University Press, 1998, p.78

⁵² Portes and Vines, supra n.51, Id

⁵³ Maastricht Treaty established the concept of European citizenship, laid down the blueprint to achieve Economic and Monetary Union (EMU), and the creation of the Single European currency (the euro)

⁵⁴ Amsterdam Treaty, which took effect in 1999, strengthened the ability of the Union to undertake joint foreign policy actions

⁵⁵ The Treaty of Nice, signed in Nice, France, in December 2000

of the EU, European Commission, European Court of Justice, and European Court of Auditors. Moreover, head of state and government and the Commission president meet at least twice a year in European Council summits to provide overall strategy and political direction. Meanwhile, the European Central Bank is responsible for monetary policy and managing the euro in the Economic and Monetary Union (EMU).

The EU law is developed through treaties, legislations⁵⁶ and the creation body of law by ECJ. Treaty Art 189 confirms the precedence of Community law by stating that EC regulations and Directives shall be binding upon all member states. In addition, under Treaty Art 5, member states agree, “to ensure fulfilment of the obligations arising out of this Treaty or resulting from action taken by the institutions of the Community.” The ECJ is the Community’s ‘Supreme Court’. It ensures that the treaties are interpreted and applied correctly by other EU institutions and by the member states. Judgments of the ECJ in the field of EU law are binding on EU institutions, member states, national courts, companies, and private citizens. These judgments overrule those of national courts. As an example of creation of body of law by ECJ is ‘direct effect’ principle that has been developed by ECJ in the *Costa v ENEL*⁵⁷:

By contrast with ordinary international treaties, the EEC Treaty has created its own legal system which, on the entry into force of the Treaty, became an integral part of the legal systems of the Member States and which their courts are bound to apply....

This principle determines that both the EU law and national laws are equivalent, and must be applied as such by the local courts. This principle needs further provisions by which it could be applicable in national laws, in next wording of the decision; therefore, it affirmed the *transfer* of sovereignty as well⁵⁸:

By creating a community of unlimited duration, having its own institution, its own personality, its own legal capacity, and capacity of representation on the international plane and, more particularly, real powers stemming from a limitation of sovereignty or a transfer of powers from the Member States have limited the sovereign rights and have thus created a body of law which binds both the national and themselves.

The EU, moreover, has a unique governing system, which is differed from all previous national and international models. Its model is supranational organization. The opposite of supranational is intergovernmental a word implying that the activity is carried out by a coalition of states without any supranational element.⁵⁹ ‘Three pillars’ has been introduced in the EU system, which evolve adapting to changing political and economic circumstances.⁶⁰

⁵⁶ Legislation takes different forms, depend on the objectives to be achieved: Regulations are binding in their entirety, self-executing, directly applicable, and obligatory throughout the EU territory; Directives are binding in terms of the results to be achieved and are addressed to the member states, which are free to choose the best forms and method of implementation; Decision are binding in their entirety upon those to whom they are addressed –member states and natural and/or legal persons; Recommendations and Opinions are not binding.

⁵⁷ *Costa v ENEL*, supra n. 39

⁵⁸ *Costa v ENEL*, supra n. 39

⁵⁹ Trevor C. Hartley, *European Union Law in A Global Context: Text, Cases and Materials*, Cambridge University Press, 2004, p 2

⁶⁰ Hartley, supra n. 59, p 14

1. Pillar One, incorporates the three founding treaties now forming the 'European Union' and sets out the institutional requirements for EMU. It also provides for expanded Community action in certain area, such as, the environment, research, education and training.
2. Pillar Two, established the CFSP, which makes it possible for the Union to take joint action in common foreign and security affairs.
3. Pillar Three, created the Justice and Home Affairs (JHA) policy, dealing with asylum, immigration, judicial cooperation in civil and criminal matters, and customs and police cooperation against terrorism, drug trafficking and fraud.

In area falling under Pillar One of the EU, member states have surrendered part of their national sovereignty to the EU institutions. This has led to descriptions of the Union as a supranational entity, with many decisions made and final authority residing at the EU level. In these areas, member states work together, in their collective interest, through the EU institutions to administer their sovereign powers jointly. Shortly, nation states should transfer certain sovereign rights in the common interest of all Europeans.

Under Pillar Two and Three, member states have agreed to cooperate but retain much more discretion over their participation, including the right to veto certain measures. Here the EU has been described as an intergovernmental entity, with EU policies administered largely by the member states themselves, rather than through the EU institutions. The Union also operates according to the principle of 'subsidiarity' means, the Union is granted jurisdiction only over those policies that cannot be handled effectively at the national or lower level of government.

B. The North American Free Trade Area (NAFTA)

The NAFTA member countries, namely, the United States of America (the US), the Government of Canada (Canada) and the United Mexican States (Mexico) had agreed to accept the provision of NAFTA⁶¹ as an international multilateral agreement as a binding agreement. It seems clear that all of the members enhance the effectiveness of this free trade regime. It also, however, raised concerns for nation sovereignty, especially related to dispute settlement provisions in the NAFTA.

The principle dispute resolution mechanisms of NAFTA are found in Chapters 11, 14, 19 and 20 of the agreement.⁶² Chapter 11 applies to disputes between signatory states and investors from another signatory state (foreign investors) that allows for binding arbitration of investment disputes.⁶³ Its guiding principles are equal treatment, international reciprocity and due process before impartial tribunal, i.e., any NAFTA party's domestic tribunals or courts (art.1115 and art. 1121 of NAFTA). A NAFTA investor who alleges that a host government has breached its investment obligations under Chapter 11 may, at its option, have recourse to one of the following arbitral mechanism: the World Bank's International Centre for the Investment Disputes (ICSID); ICSID's

⁶¹ North American Free Trade Agreement, done Dec.17, 1992, U.S-Can-Mex, 32 I.L.M, 296-397, 605-779 (entered into force Jan. 1, 1994) [hereinafter NAFTA]

⁶² See NAFTA Secretariat, <http://www.nafta-sec-alena.org/english/home.htm>

⁶³ Jeffrey A Kaplan, ASEAN's Rubicon: A Dispute Settlement Mechanism for AFTA, 14 Pacific Basin Law Journal 147 (1996), p. 162

Additional Facility Rules; and the rules of the United Nations Commission for International trade Law (UNCITRAL rules) or alternatively, the investors may choose the remedies available in the host country's domestic courts.⁶⁴ The final awards of the arbitration tribunals can be enforced in domestic courts of member countries.⁶⁵

Chapter 14 established a mechanism for the settlement of financial services disputes. It said that Section B of Chapter 20 should apply, with modification, to the settlement of disputes arising under this chapter.⁶⁶ A financial services roster is to be established whose members shall have expertise or experience in financial services law or practice.

Chapter 19 is to resolve disputes involving antidumping and countervailing duties laws. Contracting member parties affected by such amendments may request a binational panel, to review the proposed amendments and issue declaratory opinions as to whether the changes are consistent with the GATT and the NAFTA (art.1903 and art.1904 Chapter 19). This binational review process is designed to give an alternative to the ordinary domestic judicial review of antidumping and countervailing duty decisions of each NAFTA party.⁶⁷

Chapter 20 provides a mechanism for resolving disputes concerning the interpretation and application of NAFTA and alleged violations of NAFTA by signatory states.⁶⁸ It creates 'an intergovernmental dispute resolution mechanism' to address these disputes. It governs general disputes exclude disputes relating to investment (chapter 11), financial services (chapter 14), and antidumping and countervailing duty final determinations (chapter 19).

A Free Trade Commission' (the NAFTA Commission) handles general disputes under Chapter 20 NAFTA Agreement. This new commission comprised of cabinet-level representatives of the three NAFTA countries,⁶⁹ administratively assisted by a Secretariat.⁷⁰ It is as institutional safeguards to ensure that NAFTA operates in accordance with each member's expectations. This Commission is charged with resolving disputes; supervising NAFTA implementation; and monitoring the work of the various NAFTA committees and working groups. It also has an authority to resolve other matters relevant to NAFTA's functioning. However, this later authority is a broad and ambiguous authority of the commission.

Decisions issued by chapter 20 panels are not binding upon the parties, nor are they subject to any form of appellate review. Disputing parties, however, are directed to agree upon a final resolution of the disputed issues, which 'normally shall conform' to the final report's findings and recommendations.

In certain degree the provisions of NAFTA limit state sovereignty,

⁶⁴ NAFTA Secretariat, General Information, at <http://www.nafta-sec-alena.org/english/home.htm>

⁶⁵ NAFTA Secretariat, supra n.64, id

⁶⁶ NAFTA Secretariat, supra n. 64, id

⁶⁷ Prior to the NAFTA's establishment, for antidumping and countervailing duties of either member states could be appealed, in the case of a U.S. final determination, to the Court of International Trade, to the Tribunal Fiscal de la Federacion (for Mexico), and to the Federal Court of Appeal, or for some Revenue Canada decisions, to the Canadian International Trade Tribunal/CITT (for Canada), see NAFTA Secretariat, supra n.65, id

⁶⁸ NAFTA, supra n. 64, arts.2001-22

⁶⁹ NAFTA, supra n. 62, annex 1911

⁷⁰ NAFTA, supra n. 62, art.2002 para.3

especially, the two of NAFTA's dispute resolution mechanisms, one dealing with general disputes and the other with specific disputes over dumping and subsidies. While these mechanisms, which include appellate review and enforcement, in one hand are more effective, but in other hand they potentially more threatening to state sovereignty.

C. ASEAN Free Trade Area (AFTA)

From the very beginning, the ASEAN founding fathers have intended to establish ASEAN as a loose organization without strong power over the member states.⁷¹ The powers are remained in the hand of national sovereignty of ASEAN members. The Association as reflected in the ASEAN Declaration of 1967 was simply asked to facilitate cooperation on social, cultural, economic matters, and to promote peace.⁷² Indeed, ASEAN has solved some political conflicts in the region successfully, such as, the Vietnam and Cambodian conflicts. Later, the association became sort of collective bargaining body with its external dialogue partners, such as, OECD, EU, Japan and Australia. However, each ASEAN member country has undertaken a process of unilateral trade liberalization at some point during the past three decades⁷³.

Treaty of Amity and Cooperation (TAC) signed at the first ASEAN Summit on 24 February 1976, declared that in their relations with one another, the High Contracting Parties should be guided by the following fundamental principle:

1. Mutual respect for the independence, sovereignty, equality, territorial integrity, and national identity of all nations;
2. The right of every state to lead its national existence free from external interference, subversion or coercion;
3. Non-interference in the internal affairs of one another;
4. Settlement of differences or disputes by peaceful manner;
5. Renunciation of the threat or use of force; and
6. Effective cooperation among themselves

The most controversial principle from those principles, and yet most defended policy of ASEAN, is the principle of non-interference.⁷⁴ This principle has been criticised by scholars as ASEAN development being slow but ASEAN governments have strongly defended it. ASEAN members maintain that it is important to keep this principle in ASEAN practice to promote confidence building and preserve state sovereignty.

In addition, ASEAN is a pure intergovernmental organization where there are no supra-national institutions that can impose ASEAN decisions over the member states.⁷⁵ Indeed, ASEAN members have not ceded powers of regulations or enforcement to any supra-national regional authority. ASEAN

⁷¹ Paul J. Davidson, ASEAN: The Legal Framework for Its Trade Relations, *International Journal* 588 (1995), p.590

⁷² ASEAN Declaration of 1967, at <http://www.aseansec.org>

⁷³ Sherry M. Stephenson, ASEAN and the Multilateral Trading System, (1994) 25 *Law and Policy in International Business* 439, p.440

⁷⁴ International Council on Social Welfare (ICSW), *Civil Society & the ASEAN*, ICSW, 2001, p.7

⁷⁵ Art.3 ASEAN Charter said that ASEAN is an intergovernmental organization is hereby conferred legal personality see ASEAN Charter at PDF version <http://www.asean.org/archive/publications/ASEAN-Charter.pdf>

still maintain this organizational structure under ASEAN Charter that puts ASEAN Summit as a supreme policy-making body without any supra-national authority.⁷⁶ Also, ASEAN has no supra-national dispute settlement body empowered to adjudicate international economic cooperation issues with binding effects on member countries.⁷⁷ Despite of those facts in 1992, ASEAN moved into closer trade cooperation among member countries by signing the ASEAN Free Trade Area (AFTA) Agreement.⁷⁸ This agreement, however, is still without sacrificing the individual exercise of sovereign powers by its member countries in any significant way. Its main objective is to create a free trade area in ASEAN region in which tariffs on intra-regional trade is between zero and five per cent. In order to achieve this objective the member states committed to reduce tariff in this region within fifteen years, it was then accelerated to ten years.

The Member States of ASEAN also signed the framework agreement on enhancing ASEAN Economic Cooperation (Framework agreement). This framework agreement consist some measurements to achieve AFTA objectives. They also signed the Agreement on the Common Effective Preferential Tariff (CEPT) Scheme for the AFTA (Agreement on CEPT for AFTA) which is the main mechanism of AFTA. This agreement in its general exception provision stated that,

Nothing in this Agreement shall prevent any Member State from taking action and adopting measures, which it considers necessary for the protection of its national security, the protection of public morals, the protection of human, animal or plant life and health, and the protection of articles of artistic, historic and archaeological value.⁷⁹

From its wording it is assumed that each member state can maintain its national sovereignty based on national interests. This provision is broad and ambiguous in essence. In greater or lesser degree it can constrain the institutional development of ASEAN. In addition, concerning the participation of member states in this economic arrangement, the Framework Agreement provides as follows:

All Member States shall participate in intra-ASEAN economic arrangements. However, in the implementation of these economic arrangements two or more Member States may proceed first if other Member States are not ready to implement these arrangements.⁸⁰

This provision can also hinder the improvement of the association since it allows member states to stay out of the arrangements in reasons of its domestic pressures or national interests.

In the Singapore Declaration of 1992, the Heads of Government agreed that a ministerial-level Council (AFTA Council) be established to supervise, coordinate and review the implementation of the Agreement on CEPT for

⁷⁶ ASEAN Charter Chapter IV Art.7: the ASEAN Summit comprises of the Heads of State and Governments of the member states, id

⁷⁷ ASEAN Charter Art.22 stated that member states shall endeavour to resolve peacefully all disputes in a timely manner through dialogue, consultations and negotiation. It further stated that member states which are parties to a dispute may at any time agree to resort to good offices, conciliation, or mediation in order to resolve the dispute within an agreed time limit, id

⁷⁸ Singapore Declaration of 1992, Jan 28, 1992, 31 I.L.M. 498 (hereinafter Singapore Declaration)

⁷⁹ Article 9 of Agreement on CEPT for AFTA

⁸⁰ Article 1, para 3, Framework Agreement

AFTA. AFTA Council would report its results to the ASEAN Economic Ministers (AEM). It is likely that AFTA Council has no an adequate settlement process for the disputes among the member states. Indeed, AFTA Council is not a supra national body that can impose AFTA agreement over the member states. ASEAN brought this model into the ASEAN Charter. Under ASEAN Charter, the Member States have not agreed yet to established a supra national body within ASEAN organization structure. The Member States of ASEAN have agreed to establish ASEAN Community in 2015 comprises of three pillars, namely ASEAN Political-Security Community, ASEAN Economic Community and ASEAN Socio-Cultural Community. In order to realize the objective of the three pillars, there is ASEAN Community Council, which has coordinating tasks to:

1. Ensure the implementation of the relevant decision of the ASEAN Summit;
2. Coordinate the work of the different sectors under its purviews, and on issues which cut across the other Community Councils; and
3. Submit reports and recommendation to the ASEAN Summit on matters under its purview

V. Conclusion

The traditional interpretation of nation sovereignty is not fulfilling adequately in coping today rapid changing economic world. Sovereignty has been defined broadly as exclusive, sacrosanct and absolute control over a given territory and its domestic affairs. It also, however, meant different things to different people in the different context. Indeed, the concept of sovereignty has evolved over certain period and the needs of the society.

The world is moving away from the traditional concept of nation sovereignty, as it has been globalize as the result of the advance technology and transportation as well as the existence of the Internet. In the second half of the last century, there was a tendency that states over the world were moving into the wave of regionalism. Economic integration has been the feasible option for states in achieving the better standard of living of their communities. However, the collaboration of nation states into economic integration has raised the fear of loss of nation sovereignty. When states join in economic integration agreements, they have to observe some obligations by which to some extent it has eliminated their sovereign power to govern their domestic affairs. Besides, states have to adjust some legal and economic structures and to remove the protective barriers in order to accelerate trade liberalisation within the region. This in turn will provide economic benefit to each state and the world. Indeed, the economic motive is a powerful motive for states to participate fully in certain regional economic integrations. However, in exchange for economic benefits, states that insert into economic integration agreements have to cede or compromise a degree their state sovereignties. This is true in the EU context, but not in NAFTA or AFTA and ASEAN contexts, since in both of these organizations, the member states still have not surrender their sovereignties over the regional organizations. Shortly, NAFTA and ASEAN have maintained their institutional status as intergovernmental bodies. To sum up, the degree of integration is proportional with the amount of state sovereignty given up to the organization. The more the states give to the institution the more they get the benefits.

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