

## **Rules-Based and International Law Approaches: Prospects and Challenges for ASEAN-Japan Cooperation**

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RECENT SHIFTS IN power are of concern to the world and especially to Asia Pacific. Inescapably, there are concerns about the rise of China, the sustainability of American power into the future, and the pecking order among other states. But beyond that, the discourse concerns the very character of international society. Some respond to shifts in power by seeking to gain or sustain their own power, but another response is to rely on other ways to discipline and limit power, which include approaches based on rules and international law.

Calculations of power will no doubt still be relevant and, probably, primary. But international law can influence, discipline, and indeed civilize international society. Institutions and norms can have a role in shaping how states behave and what other states may reasonably expect. This is the present situation across a wide range of state practices. Looking forward, international law and rules-based approaches have the potential to be relevant and even essential to even the most sensitive issues concerning sovereignty and the use of force.

For this to happen, much depends on the great powers and whether they will accept or even actively develop the role of international law. This is not impossible. The United States played this role in the post-World War II period as it encouraged the creation of the United Nations and international financial institutions. Strong states may find it in their best interests to be engaged in the making and effective functioning of international law and institutions.<sup>1</sup>

There are also efforts that the smaller states and medium-sized powers can undertake. There have been a number of efforts that demonstrate their role, such as the creation of the International Criminal Court.

Japan and ASEAN in particular can play roles—both separately and together—in the development of international law in the region and in global governance. Such efforts would be in their own interests as well as in the interest of the community of nations.

This brief chapter begins with a discussion of the role of international law, especially in Asia. It next reviews the past and ongoing experiences of Japan and ASEAN in international law. And finally, specific recommendations are outlined on how Japan and ASEAN can move forward—separately and together—to enhance the roles of international law and its influence on interstate relations.

## THE ROLE OF INTERNATIONAL LAW IN ASIA

The role of international law and institutions in governing the interaction between states is at once both long accepted and often ignored. Since the end of World War II, efforts led by the United States have created international institutions that influence what states do across almost all fields of activity in the lives of states: from the most sensitive issues of military strategy and economic development, to the everyday mundane conduct of air flights, telecommunications, and exchange of weather information.<sup>2</sup>

International law has seen progress in a number of areas, and an increasing number of states today say they respect international law and subscribe to and regularly utilize legal norms, instruments, and institutions in the conduct and management of their relations and the settlement of their disputes. Yet power—political, military, and economic—remains the prevalent coin, especially as regards sovereignty and the use of force. International law is therefore often ignored in practice, or left on the sidelines on such issues, despite the rhetoric that laws and rules should matter more.

The emphasis on power is likely to continue and indeed grow in the coming years. Optimism about the constitutionalization of the international order—particularly through the World Trade Organization dispute settlement system and international criminal tribunals—surged and then ebbed as limits and problems in various institutions grew more apparent. The international policy focus of the United States under former President Bush changed from promoting international law and institutions to one of exceptionalism that led, in Philippe Sand's estimate, to a "lawless world."<sup>3</sup> The European Union has positioned itself as a normative power supporting

international law and is often discussed as the model of global governance in the future.<sup>4</sup> But given the difficulties that a common Asian security and foreign policy entails, the European imprint on the development of regional governance structures has never been strong, and it appears to be even less influential in the wake of the global financial crisis and Eurozone problems.

Attention has shifted instead to questions of power, especially to hard power in the security and political realms. A mega shift in global power is anticipated and indeed is already partially visible in the rise of Asia and especially the rise of China. Given the dominant role of the United States globally and in Asia Pacific, much attention has been given to the US-China relationship and the potential impact that the changing balance between them will have on their bilateral relationship as well as on others in the region and the world.

Connected to this, issues of power—especially military power—have resurfaced about the current and future roles of other Asian powers such as Japan and India, and of the alliances that the United States has with other countries in the region—Korea, the Philippines, Thailand, and Australia. The US-China issue has particularly been emphasized because of the so-called US pivot, as it rebalances its global assets toward Asia. Concerns have also risen about conflicting claims to islets and seas in the South China Sea and the East China Sea—raising questions about sovereignty that could potentially invoke a military response among Asian neighbors.

This attention given to power will likely persist and grow in the coming years. China's economic growth is likely to continue, albeit at a slower pace, with the prediction being that its economy will surpass that of the United States in terms of total GDP within the next decade. While it is considerably behind the United States in military prowess and current spending, Beijing has also embarked on ambitious plans to develop its capabilities, and especially those of its navy.

The emphasis across Asia Pacific is shifting toward a focus on power, especially economic and security-political power. The temptation is for the medium-sized states in Asia to try to match their neighbors power for power. Consequently, as China's military develops, there are parallel efforts in Japan, India, and elsewhere.

While this has a certain logic, medium-sized and especially smaller states, like those within ASEAN, should have a vested interest in the creation of a more rules-based system in the region and wider world that relies more on norms and principles than on raw equations of power.

The need for international law and rules-based governance is particularly important given the shifts in globalization and its far-reaching consequences for economics, society, politics, and the environment. The international

system has still not transformed into a post-Westphalian system—the state remains the essential unit. However, the past formality and clarity of state sovereignty have become softened and blurred so that what a state does within its own borders can be delegitimized in some still-not-fully-defined situations. As Andrew Hurrell notes, “The density of international and world society has undoubtedly increased along both solidarist and transnational dimensions, reflecting the increasing complexity of world society, the involvement of a wider range of actors and processes and far-ranging changes...”<sup>5</sup> In this context, the significant role of international law rise in parallel and also in tension with questions of power.

To appreciate the ongoing and potential role of international law, we have to look beyond the formal treaty-making and judicial application of such law. When we look at international law through the lenses of institutions—global and regional—and of norms and principles, we may understand the much broader application and relevance of international law in the life of states and in their dealings *inter se*.

### THE RELEVANCE OF INTERNATIONAL LAW TO JAPAN AND ASEAN

Take, for example, Asian attitudes toward sovereignty and non-interference. These attitudes are sometimes seen as an essential characteristic of the ASEAN way, in juxtaposition to the prescription from Western states that advocate a liberal, post-Westphalian order. The ASEAN and Asian emphasis on sovereignty has sometimes been derided by scholars who have dubbed it “Eastphalia,” a latter-day ossification of the Westphalian system.<sup>6</sup>

Yet the reality is that the practices of non-interference are giving way to norms and practices of cooperation and to institutions that regulate the same. In this way, norms and institutions—international law—are in a sense moving on a separate plane from the old, strict concept of state sovereignty and are redefining that concept in the process.

Whether in human rights and humanitarian intervention, in addressing environmental issues such as climate change, or even in efforts to foster closer economic cooperation across the region, Asians have been actively participating in and thinking about the purposes of and limits to sovereignty. They have neither blindly adopted Western models nor simply been passive and defensive. After all, given the roots of modern international law, what is claimed to be a “universal norm” may instead be a particularity of Western culture and history that has been disguised over time.<sup>7</sup>

ASEAN has instead sought to increase interstate cooperation by fostering new institutions (or new emphases in existing institutions) and to apply norms and principles in ways that are more predictable and rules based. ASEAN continues to use a more flexible and often quieter diplomacy (as opposed to stricter, legal measures), as well as the continuing relevance of the norms of sovereignty as a shield against unwarranted external interference. This can be seen in the economic sphere with the free trade agreements that the group has signed with major trade partners—especially China and Japan—and among its members *inter se* in the context of the ASEAN Economic Community (AEC). While nationalistic sentiments and sovereignty concerns countervail, the trend has been to enhance and deepen economic cooperation and integration. The AEC is especially notable for its clearly defined deadlines and targets, and for the creation of systems to resolve economic and commercial disputes based on agreed rules.

The shifting discourse in ASEAN about sovereignty can also be seen in the political-security realm. A notable example is the group's evolving stance on Myanmar, following that country's past record of political and human rights controversies. This began with the norm of non-intervention, whereby one ASEAN member refrains from criticism of another, but shifted to the compromise of "constructive engagement," whereby Myanmar, as a new member of the group, was to be engaged on certain conditions so that its economic opening could foster internal social change. (While it may not be clear that the policy worked, it is clear that the concept of "constructive engagement" was a step away from non-interference.) But in 2007, when the military junta in charge at the time put down the "Saffron Revolution"—a series of protests led by Buddhist monks—ASEAN issued a clear and strong condemnation of the use of excessive force and the consequent fatalities.<sup>8</sup>

ASEAN has also emphasized international law and rules-based approaches to managing and resolving the conflicts in the South China Sea. This is notwithstanding the prevalent view, held by many in the region, that power and the use of force—rather than international law—may be used to settle the issues.<sup>9</sup> As a group, ASEAN has negotiated a Declaration on the Conduct of Parties in the South China Sea, and has agreed to further this initial effort with a more specific code of conduct. While details are yet to be discussed, the overall attempt is clearly to apply the principles of international law—often encapsulated in the Treaty of Amity and Cooperation in Southeast Asia—to the situation. The ASEAN foreign ministers re-emphasized their reliance on international law principles during their first 2014 meeting under the chairmanship of ASEAN. Their statement with respect to the South China Sea reaffirmed ASEAN's Six-Point Principles on the South China Sea—particularly the importance of maintaining peace and

stability, maritime security, and the freedom of navigation in and overflight of the South China Sea—and called on all parties concerned to resolve their disputes by peaceful means in accordance with universally recognized principles of international law, including the 1982 United Nations Convention on the Law of the Sea (UNCLOS).<sup>10</sup>

One of the four ASEAN claimants in the South China Sea dispute, the Philippines, has also taken the step of bringing aspects of its conflicting claims with China before the International Tribunal for the Law of the Sea, the dispute settlement body established under UNCLOS. While some view this move as political provocation of China, it again demonstrates the resort to international law even where there are sensitive issues of sovereignty and territory at stake.

ASEAN member states have also resorted to the International Court of Justice (ICJ) to address sovereignty and territorial disputes amongst themselves. Indonesia and Malaysia brought their dispute over islands in the Sulawesi (Celebes) Sea—Pulau Ligitan and Pulau Sipadan—to the ICJ, resulting in a 2002 decision in favor of Malaysia. Malaysia and Singapore then brought their dispute over Pedra Branca/Pulau Batu Puteh in the Straits of Singapore to the ICJ, with the 2008 decision giving the largest of three islets in dispute to Singapore.

Cambodia and Thailand have also had a long-running dispute over the Preah Vihear Temple and some adjoining lands along their border. Despite an early judgment in 1962 that granted sovereignty over the temple itself to Cambodia, disputes about the adjoining land continued and led to violent conflict and fatalities in 2008. A subsequent 2013 decision gave much of the disputed land on the border to Cambodia, and led both governments to seek a negotiated solution.

What of Japan and international law? From the middle of the 19th century, even as almost all of ASEAN and many others in the region were under colonial rule, Japan modernized and joined the international community of “civilized nations.” Japan emerged as one of the victorious “Principal Allied and Associated Powers” in World War I, and started asserting its place in the international order. The Japanese initially called international law “*bankoku koho*,” or literally “the public law of all the nations.”<sup>11</sup>

However, in the aftermath of the Great Depression, Japan failed to reach agreement with the international community on Japan’s place in the international order, invaded the Asian continent, and then met with military defeat in World War II. In 1933, early in this sequence of events, Japan left the League of Nations—a precursor to the United Nations—when the group sought to criticize its activities in Manchuria. This decision may be seen as an indication that calculations of power prevailed in Japan at the

time. However, Japan's choice to leave the League of Nations rather than to stay and face admonition for its actions was considered by others to be a violation of international law.

In the years following the war, Japan toiled to rebuild its economy and to rejoin the world community, but despite its strong economic recovery and expansion, Japan's postwar pacifist constitution continued to restrain its role in international security. Nevertheless, the country has sought to emphasize its adherence to international law and its contributions to the joint efforts of the international community. This is evidenced, for example, in Japan's participation and leadership role in the UN Transitional Authority in Cambodia. This massive, multinational effort was headed by a Japanese UN official, and was in large part funded by Japan.

Japan has also been actively engaged with the ICJ. Japan has had the privilege and responsibility of having a number of its nationals serve as judges of the ICJ, most notably former Vice-Minister for Foreign Affairs Hisashi Owada, who served as president of the ICJ. In an interview with the Japanese media, Owada expressed his views about Japan's attitude toward the changing norms of international law:

The ICJ has come to be tasked with not only classic political disputes between nations such as territorial issues, but also problems involving human rights and the environment . . . . Environmental issues such as Minamata disease and Yokkaichi asthma in Japan's past have been principally addressed as problems for domestic law. However, the situation today increasingly requires us to regard them as matters that also affect neighboring countries.<sup>12</sup>

Yet despite these progressive views on international law, Japan has not been anxious to apply international law to issues that it regards as being sensitive to its interests or particular practices. Take, for example, the recent and ongoing controversy surrounding Japan's continued practice of whaling (alleged to be for scientific purposes), a challenge to which has been brought to the ICJ by Australia.

Another example is the Senkaku-Diaoyu Islands, which are subject to overlapping claims from Japan and China. Notwithstanding Chinese claims, Japan has treated the islands—which are within its physical control at present—as being under its undisputed sovereignty. Consequently when there was an incident between Japanese patrol boats and a Chinese fishing trawler, the matter was “handled strictly in accordance” with Japanese domestic law and not international law, despite Japan's awareness that the incident would clearly have repercussions for Sino-Japanese relations.<sup>13</sup> Given such policies, most experts remain pessimistic that the dispute between China and Japan can be resolved with reference to international law and the ICJ.

## PROSPECTS FOR ASEAN-JAPAN COOPERATION

What then are the prospects for ASEAN-Japan cooperation on international law? In what ways might the two work to increase the relevance and weight of international principles in the practice of states—both separately and, even more importantly, together? How might institutions evolve to better utilize international law and appropriately bind the behavior of states through the reliance on rules?

To begin, we must question whether the perspectives held by the two sides are compatible when one looks at international law in the context of power. ASEAN is, to a considerable degree, quite consistent in seeking to uphold principles of international law in key areas. Thus, whether in discussions over the South China Sea or more generally in the ASEAN Regional Forum, ASEAN has invoked the peaceful settlement of disputes, and enshrined this and other international law principles in the Treaty of Amity and Cooperation.

While ASEAN ministerial statements are political declarations, they increasingly refer to international law as a basis for the conduct of states. We see this explicitly in the recent ministerial statement on the South China Sea noted above, and it can be implied from the ASEAN statements of recent past that criticized the former ruling junta in Myanmar. While legal treaties *per se* remain relatively rare among ASEAN member states, there is a move toward rules-based systems in the AEC. The ASEAN Charter also anchors the legal personality of ASEAN and sets out its key institutions and processes in a treaty, whereas in the past these were based on practice.

While on balance the ASEAN way still retains informality as a key precept, the trend in the group is toward “legalization.” Such “legalization” describes efforts to allow and encourage interactions to be based on rules and principles, and to institutionalize the interactions between member states accordingly. International law principles are also of emerging importance in the exchanges between ASEAN states and non-ASEAN states. In sum, ASEAN seems to be responding to the changing balance of power in the world and the region by increasing its reliance on international law and rules.

Japan, however, may hold quite a different perspective with respect to the balance between international law and power. While Japan was one of the earliest entrants from Asia into the international community and therefore absorbed modern international law early in its development, its contributions and participation may be adjudged as stable rather than increasing in dynamism.



On the other hand, in relations with China as a potential rival, and with the United States as its ally, Japanese foreign policy is re-focusing on power. There are, moreover, signs that the current Abe administration is trying to rebuild Japan's standing and status in the world community not only by restarting its long stagnant economy but also by amending its pacifist constitution, increasing military expenditures, and revisiting World War II issues. These are largely attempts to seek and express status via power.

Another factor to consider is that over the last 20 years, there have been areas in which the relationship between Japan and ASEAN has become more of a partnership between equals. Whereas Japan stood far ahead of other Asians from the early postwar period into the 1990s, its recent stagnation has combined with the rise of many ASEAN countries to narrow the gap. A more horizontal and equal relationship in terms of influence and power must now be expected between ASEAN and Japan, compared with the more top-down hierarchy of past decades.

Yet there are still clear and considerable rationales for Japan and ASEAN to seek to work together on questions of international law as a balancer and civilizer in this period when global shifts in power are evident.

There is also an opportunity for them both—collectively and separately—to take their place in the rise of Asia and the concomitant increasing participation of Asian voices in shaping global governance. This can be in existing institutions, such as the international financial institutions, or in emerging ones such as the G20 and the climate change regime. Such institutions may not be formally centered on international law, but bringing normative, international law and rules-based approaches to these institutions can be a critical contribution that will prevent them from solely focusing on power.

By emphasizing principles of international law, Japan and ASEAN can act as shock absorbers in the US-China relationship. Conversely, if power alliances with one or the other giant are the key emphasis, ASEAN and Japan could instead create further divisions in the region. This is an important question to be considered, whether by allies of the United States, or by those countries that stand closer to China.

These principles should underpin the approach of ASEAN and Japan not only in terms of more routine diplomatic exchanges and practices, but also on the most sensitive of issues regarding sovereignty and security. Even if international law principles and rules-based approaches cannot be the main elements in such situations, incorporating them in the overall framework will be an important counterweight to pure power calculations.

In this context, the following measures are recommended for ASEAN and Japan to promote greater cooperation on international law and rules-based approaches:

- Employ international law more often in structuring, governing, and managing ASEAN-Japan relations, going beyond political statements and plans of action to promote monitoring, transparency, and the rules-based settlement of disputes and differences. Where disputes and differences arise between Japan and ASEAN, or between Japan and an ASEAN member, both sides should look for ways to resolve the issue in a rules-based and timely manner, relying on the norms of international law and, where appropriate, with reference to the relevant international institutions, including the ICJ.
- Gradually consider acceding to relevant international treaties and their institutions—in particular, the treaties on universally agreed human rights and the International Criminal Court. Consider accession to institutions that utilize and apply international law, including the ICJ.
- Commission a group of eminent jurists and experts to survey and report on whether the handling of emerging and on-going controversies in the region conforms with international law, with a view to promoting better understanding of and agreement upon how international law principles might be applied to resolve, manage, and frame these controversies. Further incorporate norms of international law into agreements and relevant statements and documents in East Asia and ASEAN.
- Consider establishing a mutual fund to assist less developed countries in ASEAN to refer and take up cases before relevant international institutions including the World Trade Organization and its Dispute Settlement Understanding.
- Develop a network of experts and institutions that specialize in international law, including government officials, academics, and practicing lawyers, and support the development of the Asian Society of International Law or other similar bodies.
- Establish a group of experts from ASEAN, Japan, and elsewhere to evaluate the decision-making processes in global institutions and recommend ways in which these can be reformed, especially in terms of ensuring respect for the sovereign equality of states—regardless of size or degree of power—and the principles of equity and inclusion. Review the evaluation and recommendations and, if thought suitable, align foreign policies to promote the principles of equality, equity, and participatory decision making. The global institutions to be reviewed would include, for example, the G20 and the emerging climate change regime.

## NOTES

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