

Conference Paper

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# Security and Prosperity in Asia The Role of International Law

With an essay by Professor Ben Saul



**CHATHAM  
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## About the Conference

At a time of geopolitical uncertainty and with multilateralism under pressure, this conference brought together diverse actors to explore the evolving role of international law on critical security and economic issues in the Asia-Pacific. From trade agreements to deep-sea mining, cyberwarfare to territorial disputes, the breadth of the discussion illustrated the growing reach of international law in the region.

Hosted by the International Law Programme and the Asia-Pacific Programme at Chatham House on 27 March 2019, the conference focused on three themes: trade and investment, maritime security and governance, and emerging security challenges. What trends are emerging in terms of engagement with international law in the region, and how can international standards play a greater role in encouraging collaboration and reducing tensions? And, with the eastward shift in geopolitical power, how will Asia-Pacific states shape the future of international law?

# International Law in the Asia-Pacific: A Marriage of Convenience

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The Asia-Pacific region<sup>1</sup> is home to around 60 per cent of the world's population (4.5 billion people), possesses the largest regional share of the global economy (one-third of GDP), covers almost a third of the world's land area, and encompasses the vast resources of the Pacific and Indian oceans. It includes the world's most populous states, China and India, as well as four of the world's eight declared nuclear-weapons states (China, India, Pakistan and North Korea). About half of the world's maritime trade passes through Asia,<sup>2</sup> while a third of global shipping transits through the South China Sea alone.<sup>3</sup>

Asian and Pacific states played a very limited role in the early development of international law and the institutions of global governance, including the economic and security dimensions. Historically, many were 'rule-takers', initially due to colonial coercion (including conquest by force, as well as the imposition of unequal treaties) and later because of their weakness as developing states after 1945. Post-war, existing and newly independent Asian states broadly accepted the largely statist framework and institutions of international law. They embraced those elements of international law that suited their interests at a time of state consolidation – including aspects covering decolonization, statehood, sovereignty, non-interference, development, the law of the sea (and associated resource rights), and the right not to consent to treaties or submit to compulsory international dispute settlement.

Many Asian states were, however, reluctant to embrace other areas of international law that were perceived to impinge upon their sovereignty, including those associated with labour standards, human rights, environmental protection, free and fair elections, the rule of law and international criminal law – if not normatively, then at least in its application in national and international courts. There were, of course, powerful exceptions, as under the constitution of a democratic India. There was also resistance in the region to the injustices of the post-war international economic order. The failure of so-called 'third world' efforts to reform that settlement in the 1970s resulted in many Asian states pivoting to embrace the neoliberal economic order from the 1980s onwards, a shift that subsequently has generated challenges and inequalities of its own. Chronic inequality *within* Asian states has become as pressing as inequality *between* Asian states and the West, with associated corruption, rights violations and risks of social and political instability.

Still today, compared with other regions, Asia has lower levels of treaty ratification, participation in international organizations and acceptance of compulsory adjudication. Many Asian states remain hesitant to support collective interventions in the domestic affairs of other states, such

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<sup>1</sup> The United Nation's 'Asia-Pacific Group' comprises 55 states (including 13 in the Pacific), although this includes 14 Middle Eastern states which are often regarded as part of their own region. Australia and New Zealand are also often treated as part of the Asia-Pacific, although they are technically part of the UN's 'Western European and Others Group'.

<sup>2</sup> UNCTAD (2016), *Review of Maritime Transport 2016*, p. 13, [https://unctad.org/en/PublicationsLibrary/rmt2016\\_en.pdf](https://unctad.org/en/PublicationsLibrary/rmt2016_en.pdf).

<sup>3</sup> Centre for Strategic and International Studies (undated), 'How much trade transits the South China Sea?', <https://chinapower.csis.org/much-trade-transits-south-china-sea>.

as pursuant to the ‘responsibility to protect’ doctrine, or by enabling accountability through the International Criminal Court. The absence of any regional security architecture, or deeply institutionalized regional organizations, has also left numerous ‘hard’ interstate security threats more difficult to resolve, including those stemming from the unfinished business of decolonization. Notable threats include conflict in Kashmir between India and Pakistan, the conventional and nuclear threats posed by North Korea, and tensions in the South China Sea. In addition, states have often resisted subjecting serious domestic unrest to international norms or supervision – with their reluctance evident both in respect of insurgencies (in Afghanistan, India, Myanmar, Pakistan and the Philippines) and in respect of minority rights struggles (in Myanmar, Sri Lanka, Tibet, West Papua and Xinjiang, among other countries or regions). Resistance to international law has also characterized domestic defensiveness towards historical sources of continuing ‘human’ insecurity: colonial violence against indigenous peoples in Australia and New Zealand; unremedied wartime atrocities, as between Japan, China and South Korea; the war crimes of the Sri Lankan civil war or the Bangladeshi war of independence; mass anti-communist purges in Indonesia in the 1960s; atrocities during the Cultural Revolution in China; the list goes on.

**Despite the absence of any pan-Asian regional identity or institutions, sub-regional organizations such as the Association of Southeast Asian Nations are driving incremental integration and generating ‘soft’ regional norms.**

This context for international law is, however, changing in important respects. States in the region are increasingly developed, economically interconnected, technologically capable, diplomatically confident and conscious of the tectonic eastward shift in the global balance of power. Despite the absence of any pan-Asian regional identity or institutions, sub-regional organizations such as the Association of Southeast Asian Nations (ASEAN) are driving incremental integration and generating ‘soft’ regional norms. Individual states have also shown regional leadership on particular issues, such as Japan on trade liberalization and disarmament. Economic opportunities are sparking greater engagement on international laws and procedures for investment, trade and finance. Cross-border threats are stimulating enhanced cooperation on transnational crimes (such as terrorism, piracy and drug-trafficking), environmental harm (including climate change), resource conservation (such as biodiversity and shared fisheries) and human displacement.

Even on human rights, traditionally hostile attitudes are changing, with ASEAN slowly embracing regional norms and processes. In part, the changing international dynamics reflect domestic political changes. The number of democracies has slowly increased, and now encompasses most of South Asia (including the stalwart, India), the economic powerhouses of East Asia (Japan and South Korea), the huge state of Indonesia, and most of Oceania (Australia, New Zealand and the Pacific island states). Some Asia-Pacific democracies are more troubled, however, with autocratic tendencies and/or disruptions of democracy evident in countries that include Afghanistan, Cambodia, Fiji, Malaysia, Pakistan, the Philippines, Singapore and Thailand.

There remain, of course, various authoritarian regimes in the region that continue to limit the uptake of certain progressive dimensions of international law. These include, notably, Brunei, China, Laos, Myanmar, North Korea and Vietnam, as well as Central Asian states such as Kazakhstan, Kyrgyzstan, Tajikistan, Turkmenistan and Uzbekistan. Asia’s disparate political systems, dispersed geographical nature and cultural diversity are major factors inhibiting the development of a pan-regional organization or of pan-Asian approaches to international

law. Instead, approaches to international law will remain a mixture of bilateralism, creeping soft sub-regionalism, and alliance-building and/or unilateralism by emerging powers such as China and India.

Great powers rarely rise peacefully within international orders that they did not create. This is all the more so when existing, exceptionalist powers refuse to proportionally give ground; there is, after all, nothing natural or inevitable about the US's geopolitical dominance in Asia, nor indeed about the country's self-proclaimed normative status as 'leader of the free world' and 'global policeman'. Paradoxically, US President Donald Trump's shift towards ad hoc, bilateral, transactional relationships, in place of permanent alliances enmeshed in international norms, creates space for other powers to fill the normative void, potentially empowering them and diminishing one of the US's historical comparative advantages.<sup>4</sup> Further, if the US comes to be seen as an erratic and unreliable partner, its traditional allies may turn elsewhere.

Despite occasional alarmist rhetoric about the threat of a rising China, there are as yet few signs of an 'Eastphalian' legal revolution being imminent. Until China emerges as a true superpower – which may not happen until after 2050, and even then, the country may not necessarily become the distinct hegemon – it may be too early to determine the eventual impact of China's rise on the international legal order. China itself has accepted much of the international legal order on the grounds that this facilitates its economic growth, ensures its security from external threats and entitles it to opt out of binding international adjudication. China's prosperity depends on remaining economically enmeshed with others; rupture would be economically catastrophic, and could consequently undermine the Chinese political leadership's domestic authority.

Thus far, since entering the mainstream of the international legal order in 1971 (when it assumed its seat on the UN Security Council), China has largely played by the rules and been committed to UN multilateralism (wielding the veto fewer times than the US, and recently becoming a heavy supporter of both the UN budget and peacekeeping).<sup>5</sup> It has not invaded other states, violently interfered in their internal affairs, or recognized the illegal acquisition of foreign territory by its allies (unlike, for instance, the US on various occasions since 1945). Its focus on domestic stability and economic development for much of the post-war era has limited its desire to exert normative leadership on the international stage. It duly accepted existing norms – such as through membership of the World Trade Organization (WTO) and compliance with the WTO's compulsory dispute settlement system – to aid its progress.<sup>6</sup> China is, for instance, currently defending both the WTO system and global climate change agreements against US efforts to undermine them.

China's growing power and confidence in more recent years have been disruptive but not necessarily destructive (with the exception of its unlawful and provocative position in the South China Sea, although even this is geared more towards what it perceives as its defensive interests, rather than expansionism). It has pursued reforms within existing frameworks, including on world trade, climate change, disarmament, international development, and the distribution of power at the World Bank and International Monetary Fund. In tandem, China has increasingly constructed

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<sup>4</sup> See, for example, Sceats, S. (2017), 'Trumpian Isolationism Could Help China Become a Leader in International Law', Chatham House Expert Comment, 19 January 2017, <https://www.chathamhouse.org/expert/comment/trumpian-isolationism-could-help-china-becomeleader-international-law>.

<sup>5</sup> Moynihan, H. and Muller, W. (2019), 'China's Growing Military Presence Abroad Brings New Challenges', Chatham House Expert Comment, 18 February 2019, <https://www.chathamhouse.org/expert/comment/china-s-growing-military-presence-abroad-bringsnew-challenges>.

<sup>6</sup> See further Moynihan, H. (2017), *China's Evolving Approach to International Dispute Settlement*, Briefing, London: Royal Institute of International Affairs, <https://www.chathamhouse.org/publication/chinas-evolving-approach-international-dispute-settlement>.

parallel – yet legally conventional – regimes within which it is able to exercise greater influence, such as the Asian Infrastructure Investment Bank, the New Development Bank (often referred to as the ‘BRICS Bank’), the ‘Belt and Road Initiative’ and the regional Shanghai Cooperation Organisation (to address terrorism and other security threats). This is little different to how other great powers seek to exercise influence. More of the same can be expected from China in the short to medium term.

Like other great powers, China also violates international law when it calculates that doing so suits its interests. Its performance on civil and political rights, and minority rights, is particularly dire. As with the US, the UK, Russia and France, its veto as a permanent member of the UN Security Council effectively gives it impunity. So, too, does its right to opt out of compulsory adjudication before the International Court of Justice (as all other permanent members of the UN Security Council, except the UK, have also done). But Chinese law-breaking is largely a matter of degree, not kind; its occasional violation of particular rules is (thus far) not directed at breaking down, or rebuilding, the entire edifice of international law.

The great unknown is what may happen as China’s power increases, as it grows in political confidence and military capability, and if its authoritarian political system persists. Some elements of international law may then come under more serious systemic strain, most notably the already weakly enforced areas of human rights, refugees, humanitarian protection in war, and international criminal justice – towards all of which some Western states have also shown ambivalence or hostility. These areas of international law are also ailing due to the retreat of US leadership and, in many countries (from President Trump’s America to Brexit Britain to Xi Jinping’s China), the unpredictable and inflammatory currents of nationalism, xenophobia and isolationism. Again, outright rejection of existing norms is less likely than efforts to selectively adapt them, for instance by insisting on an ‘Asian values’ approach to human rights,<sup>7</sup> whereby the community is prioritized over the individual and socio-economic rights prevail over civil and political ones.

There is further volatility around the future of the WTO regime, because of protectionism by many states (including over agriculture, adversely affecting developing states), the displacement of multilateralism by discriminatory bilateral and regional agreements, disagreements over non-market economy status, the provocative instigation of trade ‘wars’, and the unhelpful blocking of appointments of WTO adjudicators. Outright abandonment of multilateralism by China is highly unlikely, but continuing fragmentation and contestation may erode or reduce gains. In a global economy, no state can unilaterally define the rules of engagement, but a tussle between superpowers can certainly inflict a lot of unnecessary collateral damage while the competing parties work out a compromise that everyone can live with.

Hubris, nationalism and exceptionalism are common adversaries of prosperity and security for all.

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<sup>7</sup> Moynihan, H. (2018), ‘Exploring Public International Law Issues with Chinese Scholars – Part Four’, Roundtable Series, 3 June 2018, <https://www.chathamhouse.org/publication/exploring-public-international-law-issues-chinese-scholars-part-four>.

# Conference Summary

## International law in the Asia-Pacific: an overview

The conference opened with some reflections on the historical context. There is no pan-Asian approach to international law, because the region is too diverse, too geographically dispersed and too riven by geopolitical rivalries (particularly involving China, India and Japan). It was suggested that, historically, most Asia-Pacific states were ‘rule-takers’ not ‘rule-makers’ and that they perceived international law negatively as a humiliating instrument of Western colonialism (including through conquest, ‘unequal treaties’ and racist standards of ‘civilization’). At the same time, international law was sometimes appropriated by regional powers to advance their own interests, as with the Chinese occupation of Manchuria (and later of Tibet and Xinjiang) or the territorial expansion of imperial Japan.

The Atlantic Charter of 1941, agreed between the leaders of the UK and the US, was raised as an illustration of who was leading the development of modern public international law, and as a phenomenon driven largely by European and American interests. This shaped the way the Asia-Pacific region approached and received international law. Post-war ‘victors’ justice’ at the Tokyo international war crimes trials reinforced perceptions that international law was selectively used by powerful states which had themselves violated the law.

**It was suggested that, historically, most Asia-Pacific states were ‘rule-takers’ not ‘rule-makers’ and that they perceived international law negatively as a humiliating instrument of Western colonialism.**

There was limited Asian input into the drafting of the UN Charter of 1945 and the creation of the Bretton Woods financial institutions (the World Bank and the International Monetary Fund). Pacific states are also not proportionately represented in the distribution of voting power in the post-war institutions, including the UN Security Council. There was also Asian scepticism with regard to the UN’s failures in the region – including in Kashmir, Tibet and Bangladesh, as well as in Indochina during the Cold War. Many Asian states reacted with a reluctance to embrace international law, on the grounds that it did not reflect or serve their interests.

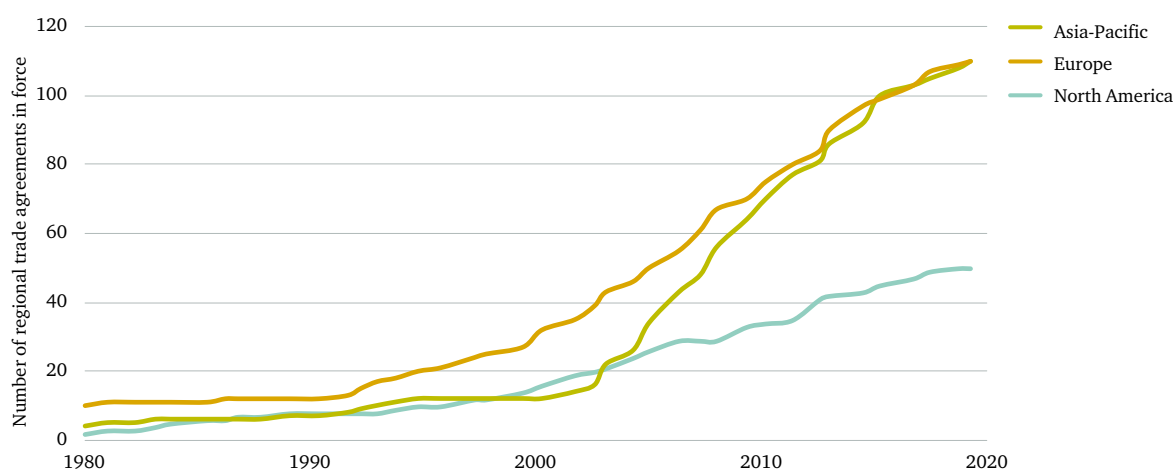
At the same time, Asian states selectively embraced those elements of international law that were beneficial for them, such as self-determination, decolonization, sovereignty and non-interference, as they consolidated their newly won political independence and territorial integrity. Many states in the region were focused on internal stability and/or external threats, while low levels of development also impaired their capacity to influence the global development of international law.

One speaker noted that a reformist tendency nonetheless emerged through initiatives such as the Bandung Conference in Indonesia in 1955, in which a coalition of Asian and African states attempted to reform parts of international law that were seen as imperialistic and Western-oriented. Further, by the 1970s, many Asian states supported efforts to create a New International Economic Order (NIEO) that would promote fairer economic development. Met with failure, many Asian states gradually changed tack to embrace the liberal economic order as a path to



development, with even socialist countries such as China and Vietnam eventually adopting this approach. China's accession to the World Trade Organization (WTO) in 2001, albeit on unequal terms, was a watershed moment, in which the country accepted intrusive changes to its domestic economy and trade relations. Asian states are now also parties to around 1,000 bilateral investment treaties (BITs).

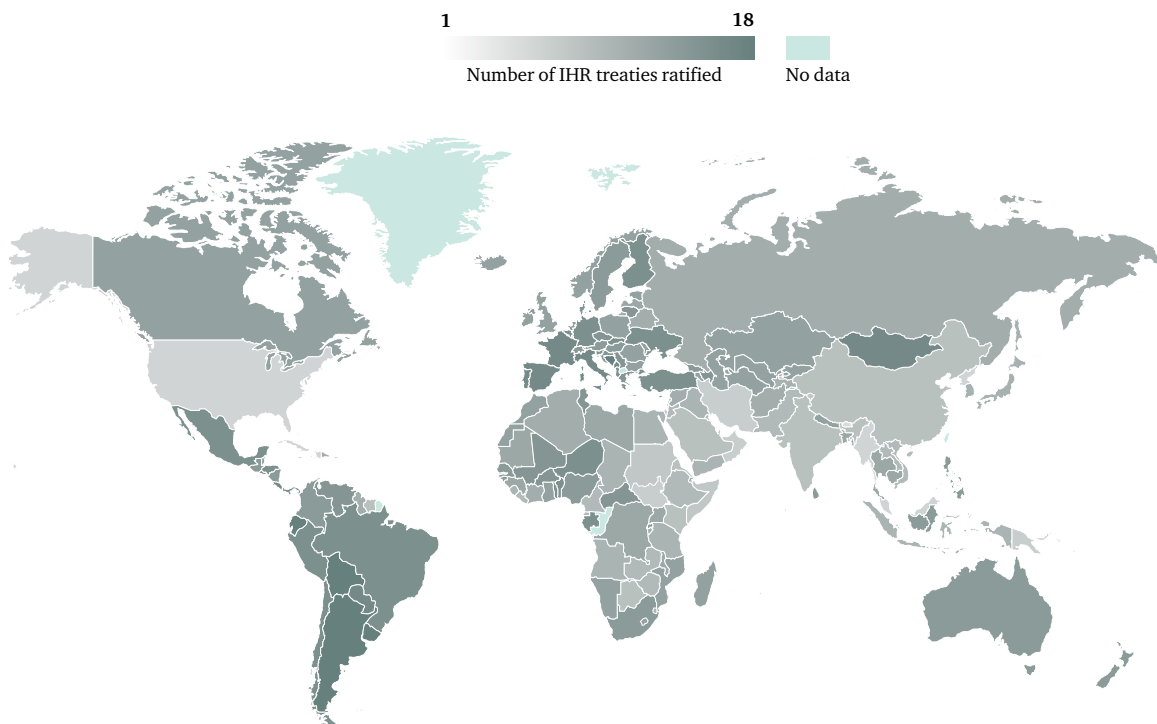
**Figure 1: Growth in trade agreements – Asia-Pacific, Europe and North America**



Note: Covers all bilateral, intra-regional and cross-regional treaties in force as of 6 September 2019, including those only partially in force. North America and Europe are as defined by the database; Asia-Pacific consolidates datasets for West Asia, East Asia and Oceania. Source: World Trade Organization (2019), Regional Trade Agreements Database, <http://rtais.wto.org/UI/PublicMaintainRTAHome.aspx> (accessed 6 Sep. 2019).

It was suggested, however, that the Asian economic model has been less 'liberal' in other respects. The state often still plays a strong role in leading development and regulating the market. Labour, human rights and environmental controls have been less stringent, as has accountability for their violations. It was argued that Asian states have wielded sovereignty as a shield against external criticism, including in the highly controversial assertion since the 1990s of 'Asian values' – wherein community welfare is prioritized over individual rights, and socio-economic rights are privileged over civil and political ones. It was noted that only 19 Asian states are party to the Rome Statute of the International Criminal Court (the ICC Statute).

Figure 2: Ratification of core global human rights treaties by region



Note: The dashboard covers the core nine human rights treaties and their optional protocols. See UN OHCHR (undated), 'The Core International Human Rights Instruments and their monitoring bodies', <https://www.ohchr.org/EN/ProfessionalInterest/Pages/CoreInstruments.aspx>. Data relate to treaty ratification (i.e. the state has consented to be bound by the treaty) and not to entry into force for that state. Regions are as defined by the OHCHR Dashboard.

Source: UN OHCHR (2019), 'Status of Ratification Interactive Dashboard', <https://indicators.ohchr.org/> (accessed 10 Sep. 2019).

Speakers noted a number of specific areas in which states in the Asia-Pacific have provided significant contributions to the development of international law. These areas have included: the UN Convention on the Law of the Sea 1982 (UNCLOS) – particularly in respect of the rules on archipelagos, international straits, the deep seabed as common heritage, and the rights of landlocked countries; development; disarmament (with both Japan and Australia playing substantial roles); nuclear weapons-free zones (efforts around which have notably involved ASEAN and Pacific states); terrorism (Sri Lanka and India); and Antarctica (Australia, New Zealand, Japan and India). States in the Asia-Pacific have also been active in the UN system – Bangladesh, for instance, has been heavily engaged in UN peacekeeping.

One speaker highlighted Japan's engagement with international law. Following Japan's reopening to the world in the late 1860s – a period known as the Meiji Restoration – its leadership prioritized learning public international law as a means of assisting the country's reintegration into the international community. It was also observed that over the past decade or so, as China's engagement with the international community has evolved, Japan has been heavily investing in international law education and diplomacy.

There was discussion of the increasing acceptance of compulsory dispute settlement mechanisms in the region, an aspect of international law that many states (including in the West) have been wary of. It was suggested that arbitration has been used effectively, and that this has helped to prevent

disputes from escalating. Since 2009, China's involvement in WTO dispute settlement procedures has increased rapidly. About one-third of all cases before the International Tribunal for the Law of the Sea (ITLOS) have involved an Asian state.

As for the International Court of Justice (ICJ), while only 17 per cent of Asia-Pacific states accept compulsory jurisdiction (compared to around 40 per cent in both Africa and Latin America), no fewer than 21 contentious cases have involved an Asian state, and over half of all Asian states have made submissions in advisory opinion proceedings.

Overall, it was suggested that while many Asia-Pacific states harbour a lingering scepticism that international law is imperialist, some such states are trying to reform those elements of international law which they do not like. Asian states acknowledge a desire to promote the rule of law and the importance of democracy. However, many states are driven by national self-interest, and prioritize certain rules in favour of others. It was suggested that we are therefore seeing the emergence of a selective rules-based order, and that there is still a preference in the region for bilateralism over multilateralism.

### Sub-regionalism

It was suggested that many Asian states see existing international law – particularly notions of sovereignty and non-interference – as working well for them from a security perspective, and that this removes any compelling reasons to build an alternative regional architecture. Similarly, the US still underwrites security, albeit more unpredictably, for many of its Asian and Pacific allies, further deterring any recourse to regionalism.

There are, though, certain shared interests that drive sub-regionalism. These include economic development and the avoidance or mitigation of transboundary harms (from environmental damage to organized crime). Sub-regional arrangements include the Association of Southeast Asian Nations (ASEAN), the South Asian Association for Regional Cooperation (SAARC), the Asia Pacific Economic Cooperation (APEC), the Shanghai Cooperation Organisation (SCO) and the Pacific Islands Forum (PIF). These generally take 'soft' diplomatic and political forms rather than creating 'hard' legal, political, economic or security communities. Sub-regional arrangements also tend to be weakly institutionalized, certainly compared to the supranational integration of the European Union. One speaker suggested that the only exception is in Central Asia, where the Eurasian Economic Union includes an integrated single market, free movement (of goods, capital, services and people), common economic policies, and binding legal and judicial organs.

A contrast was drawn between SAARC, a relatively toothless organization that does not enact international law at the regional level, and ASEAN, a body that is progressively proliferating regional norms (including through the ASEAN Charter of 2007, and through a commission and declaration on human rights in 2009 and 2012 respectively). In seeking to establish a common sub-region conducive to prosperity, ASEAN has relied on diplomacy-based 'soft' law and cooperation (the 'ASEAN way') rather than on 'hard' law and strong integration, which do not suit the consensual working modalities of member states. It was suggested that these soft-law endeavours help to initiate the consensus-building that is a prerequisite for the effectiveness of international law.

In this respect, ASEAN has been successful in formulating a more cohesive regional collective will to support the international order. It has boosted regional confidence, shared information and expertise, and helped discourage the build-up of military tensions. It has also drawn in external partners through initiatives such as the 'ASEAN+3' (which has since expanded to become the ASEAN+6).<sup>8</sup>

ASEAN has, however, struggled in the face of traditional security challenges, such as civil conflict (for instance, repression of the Rohingya minority in Myanmar). It lacks the institutions to enforce norms and hold states accountable. Its consensus model of operation is poorly suited for difficult issues that have an internal political or human rights aspect; or for those that have a challenging extraterritorial dimension, such as irregular migration.

### Current opportunities and future trends

A number of speakers highlighted the environment, climate change, economic cooperation and dispute settlement as areas which provide an opportunity for Asia-Pacific states to both influence the progressive development of international law and strengthen the UN system.

In particular, the Trans-Pacific Partnership (TPP) was highlighted as an example of successful rule-making in Asia. In order to account for divergent stages of development and to increase participation, the TPP provides for stepped implementation. It was hoped that the TPP's ambitious approach would provide a template for economic integration in the Asia-Pacific. After the withdrawal of the US, 11 countries with diverse political systems became party to a revised version of the TPP, known as the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP). Another promising example is the Regional Comprehensive Economic Partnership (RCEP), a proposed free-trade agreement (FTA) between ASEAN and six other Asia-Pacific states (Australia, China, India, Japan, New Zealand and South Korea).

**One speaker argued that it was up to those countries that had benefited from the US's previous engagement to deploy their resources to ensure that international peace and security are enhanced more collectively in the region.**

It was noted that global institutions need to be reformed as they do not reflect the current balance of power. Speakers emphasized that the West would be required to make room for rising Asian states. Indeed, it was suggested that the US, under its current political leadership, has retreated from its role as a guarantor of security in the region and as an enforcer of the international legal order. This change and the ensuing unpredictability in the region, combined with populist or nationalist trends in certain Asian countries, has left members of the region unclear about where they stand in terms of trade and security. One speaker argued that it was up to those countries that had benefited from the US's previous engagement to deploy their resources to ensure that international peace and security are enhanced more collectively in the region. This could be an opportunity for Asia to play a greater role in shaping the reform and development of public international law. However, others suggested that this may be a difficult task for the region because of its diversity, given the consequent potential lack of consensus on legal norms.

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<sup>8</sup> ASEAN+3 consisted of the 10 ASEAN states plus China, Japan and South Korea. ASEAN+6 adds Australia, India and New Zealand.

It was also suggested that a mismatch in objectives between the US and Asian states is leading to an age of competition. On the one hand, President Donald Trump is inward-focused, prioritizing trade deficit issues and the protection of his working-class voter base. In terms of foreign policy in Asia, his priority is homeland security and defence. Under previous administrations, freedom of navigation, the safety of allies and the rules-based international order were major factors motivating US policy, but this is less the case now. On the other hand, the Communist Party of China (CPC) has a more strategic focus on the protection of stability at home and the development of investment associated with the Belt and Road Initiative (BRI). The CPC also has a largely defensive, rather than expansionist, security posture. China is seeking to preserve the current period of strategic opportunity to facilitate economic growth.

A number of participants remarked that although Western states often speak about the ‘rules-based international legal order’, this has not been without hypocrisy and selectivity. Attention was drawn to situations in which Western states could be seen as having undermined international rules, including the US-led invasion of Iraq in 2003, the US bombing campaign of Laos and Cambodia during the Vietnam War, and contrasting attitudes towards Tibet and Taiwan. The apparently limited consequences for powerful law-breakers were raised as a problem in terms of expecting a rising China to adhere to international law.

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Discussion also touched on the idea of a quasi-revolutionary ‘Eastphalian’ system. China’s insistence on ‘historic rights’ in the South China Sea – in apparent violation of the UN Convention on the Law of the Sea (to which it is a party) – was given as an example of what this revolution is considered to involve. However, it was suggested that the development of an Eastphalian system is actually unlikely for normative and political reasons, including that much existing international law works well for all states, including powerful ones. In addition, China is unlikely to gain hegemonic ‘hard power’ status for many decades. Even if it eventually overtakes the US, the latter’s status may still be magnified by its extensive alliances with other powers (including Europe, Japan and India) – alliances which China lacks. China’s ‘soft power’ (including language and culture) is far less influential than that of the US. China is also likely in time to be beset by internal economic and political challenges, limiting its capacity and willingness to project power externally.

It was noted that China itself claims to be rising peacefully, and that there are positive signs of its engagement in the existing global order (including the legal framework), for example over action to tackle climate change. It is perhaps more likely that China’s rise will be marked by a combination of the creation of parallel regimes alongside the reform of existing institutions. Certain parallel but complementary regimes may emerge, as has already been seen in the establishment of the Asian Infrastructure Investment Bank (AIIB). China has led this initiative, in competition with the West, to achieve more control over economic developments.

It was suggested that the emergence of parallel initiatives, alongside reform of existing norms and institutions, is likely to result in a convergence of Eastern and Western interests: i.e. a peaceful adjustment or process of ‘selective adaptation’, rather than an ‘Eastphalian’ take-over. The West

must, however, be prepared to give ground on certain issues in proportion to gradual shifts in global power – and will need to make concessions not only to China but also to India and growing powers such as Indonesia.

### Strengthening economic relations

In the Asia-Pacific, there is evidence of cooperation, integration and innovation in the economic sphere. However, there are also negative indicators, partly driven by the current US approach which has moved away from traditional support of international institutions. This has implications for trade policy in bilateral negotiations between the US and key allies, and in the China–US trade ‘war’. The re-emergence of historical disputes has also translated into economic tensions. Examples include a recent decision in South Korea to impound the material assets of Mitsubishi Material Industries, a move driven by lingering tensions with Japan over wartime reparations.

### The world trade system

A number of challenges for the WTO system were discussed, including China’s objection to continuing to be treated as a non-market economy for anti-dumping purposes; the US veto of appointments to the Appellate Body; and the US–China trade war. More generally, the US has a preference towards bilateralism at present. Against this backdrop, a number of divergent potential outcomes were raised, including: reform of the WTO along terms set out by the US, which would involve incorporating a series of provisions on the ‘non-market economy’ issue; removal of the Appellate Body, which would render the WTO toothless; and rejection of the US reforms by China, which could involve US or Chinese withdrawal from the WTO. It was suggested that the future direction of the WTO will depend on how the trade tensions between the US and China are addressed.

Given the possible decline in the importance of the WTO within the world trade order (including due to the proliferation of bilateral and regional FTAs), there has been some speculation as to whether China will pursue a new trade order, based on either the BRI or the CPTPP/TPP-11. The point was raised that China is not currently in a position to create a new order, and that in any case China’s focus at the moment remains on maintaining the current world trade system.

In relation to the US’s inclination towards bilateralism in trade matters, the US–Japanese trading relationship was explored. The US is seeking a bilateral deal with Japan that is similar to the US–Mexico–Canada agreement of November 2018. This type of deal could imply balancing trade accounts via political interventions on the part of governments, leading to a revival of what can be termed ‘procedural protectionism’.

During joint summit talks between Japan and the US in September 2018, different approaches emerged. Japan emphasized the importance of free, fair and rule-based trade, while the US underlined the importance of reciprocal trade and reducing the trade deficit.<sup>9</sup> The resulting joint statement covered issues relating to certain sensitivities (in the agricultural and automotive sectors), cooperation on non-market-oriented policies and practices, and engagement of the EU to promote discussion on WTO reform. It was noted that in negotiations Japan would seek to push back on US bilateralism and protectionism.

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<sup>9</sup> Ministry of Foreign Affairs of Japan (2018), ‘Joint Statement of the United States and Japan’, 26 September 2018, <https://www.mofa.go.jp/files/000405449.pdf>.

Japan was also part of the negotiations over the TPP, from which the US withdrew in January 2017 and which has been superseded by the CPTPP. Discussion noted that Japan still hopes that this type of rules-based platform might encourage the US to eventually join, along with China. Japan has multiple bilateral economic partnership agreements (EPAs) and FTAs with other countries. It also belongs to the RCEP, the membership of which includes countries that are lagging behind in developmental levels. The CPTPP, in contrast, enjoys more high-level market access and rule-making. It was suggested that the RCEP and TPP could be complementary and be brought under one umbrella in the form of an APEC-wide FTA, the Free Trade Area of the Asia-Pacific (FTAAP), by 2025.

It was observed that increasing connectivity is enhancing production networks beyond the Asia-Pacific. A multi-layered structure for free trade and investment has also developed, including non-binding forums (APEC and the Asia–Europe Meeting (ASEM)), legally binding agreements (the RCEP and ASEAN+1), and legally binding agreements with high-level commitments (the CPTPP and the Japan–EU EPA). It was suggested that these FTAs, mega-FTAs and EPAs could be considered as pathways to bring FTA/EPA rules back into the sphere of the WTO once there are enough like-minded states. This would ‘multilateralize’ preferential agreements beyond existing WTO measures in areas such as investment, intellectual property rights, government procurement, competition policy, disciplines on state-owned enterprises and corporate governance.

### International arbitration and investment treaties

It was noted that globally there are more than 3,000 BITs (of which 1,000 involve Asian states), and that investors have so far commenced more than 800 arbitration cases. Arbitration is therefore an important form of dispute resolution. It receives a lot of coverage due to its public nature (unlike, for example, mediation or conciliation) and the fact that it often deals with issues of public interest, including health and the environment. For example, tobacco company Philip Morris opposed Australia’s public health-related laws requiring plain-paper packaging of tobacco products, which drew civil society interest in the government’s right to regulate on such matters.

A number of trends are visible in this sphere. Investment treaties are becoming more detailed as states react to decisions by arbitrators. States are qualifying in more detail the limits to the substantive rights that investors acquire. In response to prior criticism, new provisions are now included to respect governments’ right to regulate. And there has been growing recognition that the advantages of arbitration include that it provides ‘teeth’ to international law and an extra level of control over states to deal with investors according to international law. On the other hand, the process has faced criticism for being detailed, expensive and lengthy.

In the Asia-Pacific, India has acted as a rule-maker in this sphere. In reaction to cases brought against it under its BITs, India terminated several treaties and drafted a new Indian Model Bilateral Investment Treaty in 2016. The Model BIT affords less protection to investors, including as a result of its rule on the exhaustion of domestic remedies, and is seen by some as going too far.

It was noted, though, that aside from India’s stance, Asian states generally comply with investment treaties and actively participate in arbitration, including cases under the International Centre for Settlement of Investment Disputes (ICSID). A major shift was highlighted in Chinese investment treaty drafting, which has gone from a general suspicion and limitation of arbitration rights to a very broad approach to arbitration rights. This reflects the change in China’s role from capital importer to capital exporter, catering for Chinese entities investing abroad.

In the future, there may be a trend towards more human rights-based claims in investment arbitrations. Attention was drawn to a number of recent examples, including Al Jazeera's claim against Egypt that Egypt was targeting its journalists,<sup>10</sup> and a claim by a Saudi Arabian national against Indonesia in which the tribunal held that Indonesia had not complied with its obligations under the International Covenant on Civil and Political Rights (ICCPR).<sup>11</sup>

It was recognized that multilateral investment agreements are missing from the investment treaty regime. Previous talks on such agreements have failed, including negotiations on the OECD Multilateral Agreement on Investment, which foundered in 1998. Mega-FTAs, such as the RCEP and the TPP, are striving for plurilateral agreement on investment, and in so doing are fostering discussion on a wider spectrum of issues among like-minded states. Mega-FTAs could therefore be making an important contribution to multilateral rules on investment.

### China's economic ambitions

As China's military and economic power has expanded, the proposition garnering attention in the media is that China aims to construct a parallel order and competing institutions. The suggestion was made that this misreads what China's leadership is trying to achieve. It was argued that China instead seeks to work within the existing UN framework to adjust the existing rules to its preferences and to expand its international clout. During the 2014 Fourth Plenum of the CPC, the government highlighted the importance of discursive power – the ability to shape the international agenda and engage with the debate from the very beginning. The economic strategy for China is to make sure that trade relations with economies on its periphery will facilitate domestic economic development. With regard to the BRI, it was noted that the government is responding to its own failures over the past five years by shifting the BRI from being government-led to enterprise-led, in order to reduce financial risks.<sup>12</sup>

#### China is aiming to internationalize the renminbi to mitigate exposure to microeconomic risks and reduce excessive reliance on the US dollar.

On the role of the currency, it was noted that the US dollar has so far been the dominant global currency. China intends its currency, the renminbi, to attain that status. In October 2016, the renminbi became one of the world's reserve currencies. China is aiming to internationalize the renminbi to mitigate exposure to microeconomic risks and reduce excessive reliance on the US dollar. It also hopes that internationalization will facilitate business for Chinese-owned companies, especially in Southeast Asia. In every trade agreement that China has signed, it has formulated a currency swap agreement to help facilitate trade and investment in the region. In short, it is using 'externality' to facilitate domestic change.

China also hopes to use renminbi internationalization to increase its geopolitical clout. However, currency movements depend largely on supply and demand; demand for the US dollar has outstripped that for the renminbi. China's attempts to challenge the existing financial architecture have also been hindered by doubts over its ability to implement the change it seeks. Part of this is because China

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<sup>10</sup> *Al Jazeera Media Network v. Arab Republic of Egypt* (ICSID Case No. ARB/16/1).

<sup>11</sup> *Hesham T. M. Al Warraq v. Republic of Indonesia*, UNCITRAL, Final Award of 15 December 2016, para 621.

<sup>12</sup> In April 2019, at the Second Belt and Road Forum for International Cooperation, it was proposed that Chinese companies should address how they are to deal with financial risk.



does not have a strong history of respecting the rule of law. It was proposed that if China wants to acquire partners, it must implement domestic and political reform, toning down elements of nationalism and revisionism.

The question was raised as to how much the current political authorities and ruling class in China are prepared to sacrifice to achieve this. The government has so far made few concessions, hoping instead that the sheer size of the Chinese economy will attract business partners. The most significant progress has been made under the new Foreign Investment Law, set to come into force from 2020, which provides for national treatment of foreign investors, subject to a 'negative list' under Article 4. The principle involved here is that every sector of the Chinese economy is as open to foreign investors as it is to domestic ones, apart from when a sector specifically appears on the 'negative' list (there are 48 such sectors). There are also exceptions on national security grounds and in cases where China wishes to retaliate in response to foreign discrimination against Chinese investors. It was suggested that the implementation of this law at both the central government level and the provincial level will be of considerable significance.

### Maritime security and governance

Over the past decade, maritime security and governance issues have become critical to regional geopolitics and national sovereignty, as countries in the Asia-Pacific have begun to reassert and, in some cases, redraw their maritime boundaries. These issues have come to the fore, in particular, as a consequence of the nature of power competition in the region.

### The South China Sea region

China's strategic position in the South China Sea is strong. China has completed construction of artificial islands on seven reefs of the Spratly Island group and occupies every feature of the Paracel Islands. It was highlighted that any use of military force, diplomatic pressure or economic coercion by China to force its neighbours to give up their claims would be destabilizing for the region, and China has not taken such an approach recently. Panellists disagreed on the best way forward for addressing the dispute and deadlock in the region. Some argued that properly developed confidence-building measures would foster international cooperation, others that the only option for stability would be for China to compromise on the underlying territorial disputes. Thus far it has not done so, and it is unlikely that any states in the region would voluntarily give up their claims.

It was suggested by one speaker that there are historical legal arguments in support of compromise. In 1943, in the *China Handbook*, the Chinese government claimed territory only as far south as the Paracel Islands.<sup>13</sup> China expanded its territorial claim to the Spratly Islands in 1947.<sup>14</sup> This claim is partial and incomplete. One speaker asserted that this claim was never backed up with occupation and did not at the time mention historic rights to the waters. Even if it is assumed that historic rights exist, the question was raised as to China's stance when it negotiated UNCLOS. It was argued that China's acceptance of UNCLOS is an express acceptance of UNCLOS rules, to the exclusion of inconsistent legal doctrines such as on historic rights. China's arguments on absolute freedom of the high seas

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<sup>13</sup> Chinese Ministry of Information (1943), *China Handbook*, 1937–1943, New York: Macmillan.

<sup>14</sup> Chinese Ministry of Information (1947), *China Handbook*, 1937–1945, New Edition with 1946 Supplement, New York: Macmillan.

during the UNCLOS negotiations directly contradict what it is now asserting, as Chinese interests have changed. Despite the presence of a legal, historical and evidential basis for compromise on the territorial dispute, it was noted that there does not appear to be any political will to do so.

### Implications of the South China Sea ruling

The 2016 South China Sea award by the tribunal set up under the Permanent Court of Arbitration does not touch upon land territory disputes or maritime boundary delimitation disputes.<sup>15</sup> Territorial disputes are outside the purview of UNCLOS, while maritime delimitation disputes were excluded by China's reservation under the dispute settlement procedures of Article 298(1) of UNCLOS. In any case, the Philippines only requested that the tribunal determine the character of the geographical features which were said to generate the so-called 'nine-dash line'. The tribunal therefore only considered the source of the rights, rather than the delimitation of maritime entitlements.

One speaker noted that in determining the nature of the geographical features, the tribunal rejected the historic rights argument and concluded that they could at best be considered as 'rocks' under Article 121(1) of UNCLOS, since they cannot sustain human habitation or economic life of their own. As such, they are capable of producing only a 12-nautical-mile territorial sea. They were not, however, considered islands under Article 121(1), as islands have the ability to generate an exclusive economic zone (EEZ) of 200 nautical miles and a continental shelf. The implication of the ruling is that the nine-dash line does not have a legal operation or function.

It was suggested that different types of rights are claimed by Vietnam, the Philippines and China. According to China, it has exclusive rights over the Paracel Islands, the Spratly Islands and Scarborough Shoal. The Philippines objected to the latter two claims. On both counts, the tribunal concluded that the disputed features are to be considered rocks. It is not clear whether this could have implications for the underlying territorial dispute.

Vietnam, meanwhile, was not involved in the dispute because its claim is territorial and is therefore beyond the remit of UNCLOS. The only option that remains for Vietnam is to make a maritime entitlement claim; however, such a claim would be excluded by China's reservation. Despite this, UNCLOS demands that if a state brings a claim, it must go to mandatory conciliation. Although non-binding, the outcome would have strong political influence. In practice, China has been unwilling to abide by the award. China remains keen to claim the nine-dash line as its EEZ, to the exclusion of the Philippines, as it wants to exploit natural resources found in the area.

The impact of the code of conduct for the South China Sea was also raised. ASEAN and China agreed a non-binding Declaration on the Conduct of Parties in the South China Sea in 2002, with further guidelines adopted in 2011. China attempted to argue that, because there was a code of conduct, the dispute could not be decided through UNCLOS. The tribunal was clear that a code of conduct is a soft-law instrument; it is not a treaty.

Since the award was issued, China has tried to push for a fresh code of conduct. A Framework for a Code of Conduct was agreed in 2017, and a draft negotiating text in mid-2018. Discussions are yet to reach agreement, as China will not voluntarily allow its behaviour to be constrained and ASEAN is reluctant to be seen constraining China's behaviour.

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<sup>15</sup> *Philippines v. China* (PCA Case No 2013-19) Award, 12 July 2016 (South China Sea Arbitration).

### Emerging maritime security challenges

Transnational crimes such as piracy, armed robbery at sea, smuggling by sea and maritime terrorism are major concerns for the Asia-Pacific. Moreover, there are other non-traditional concerns, including marine pollution and illegal, unreported and unregulated (IUU) fishing. The existence of maritime disputes and territorial borders has hindered cooperation on the management of these issues, which have thereby been exacerbated.

It was noted that deficiencies in maritime governance hamper responses to these concerns. Northeast Asian countries suffer from a lack of regional diplomatic instruments; Southeast Asia relies upon ASEAN and the Southeast Asian Fisheries Development Centre (SEAFDEC). These bodies have made references to international law to resolve maritime issues, but the underlying disputes have hindered progress. Major fishing states such as China, Malaysia and Vietnam are not parties to the Fish Stocks Agreement 1995, which provides the basis for regional fisheries management organizations. There are a number of regional fisheries bodies in the region,<sup>16</sup> including for the Indian and Pacific oceans, but national enforcement is often impeded by a lack of resources (especially in the Pacific). It was acknowledged that there is further room for confidence-building measures, although China has refused to engage in these as yet. One speaker suggested that coordinated unilateralism may be the only way forward.

Certain ‘emerging disruptors’ were identified that at present have not yet had a significant security impact but are likely to do so in the future because of maritime disputes. A growing number of fishing militias and military-backed civilian vessels, equipped with communications technology and trained personnel and allegedly controlled by state naval forces, operate in some parts of the Asia-Pacific. What started as harmless competition for resources has developed into the potential for conflict. There have been clashes between these fishing vessels. In 2016, the first clash occurred between an Indonesian patrol ship and a large Chinese fishing vessel.

Another ‘emerging disruptor’ could come from developments in the digital sphere. There are significant concerns about the vulnerability of shipping technology to cyberattacks. This puts at risk the safety and security of cargo contents and routes. It was also suggested that sizeable terrorist attacks could not be ruled out.

### Exploitation of deep-seabed resources

It was suggested that natural resources are at the heart of maritime and territorial disputes in the region. The existing political situation is preventing realization of the multiple benefits that could otherwise be obtained from the deep seabed. Many of the countries in the East China Sea and South China Sea have tried to block one another from entering into contracts with oil and gas companies, hindering states’ abilities even to explore and estimate the quantity of resources available.

One speaker noted that providing for joint development of disputed maritime areas has nevertheless enabled natural resources to be exploited in a peaceful and coordinated manner, by temporarily removing issues of disputed sovereignty from the claimant states’ political agendas. In 2008, for example, China and Japan announced that they would jointly develop natural resources in a defined disputed area in the East China Sea, prior to delimitation and without prejudice to

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<sup>16</sup> Indian Ocean Tuna Commission; Western and Central Pacific Fisheries Commission; Commission for the Conservation of Southern Bluefin Tuna; South Pacific Regional Fisheries Management Organisation; Asia-Pacific Fishery Commission.

their legal positions on delimitation.<sup>17</sup> However, this agreement has not been implemented to date. In November 2018, China and the Philippines signed a memorandum of understanding (MoU) agreeing to carry out joint oil and gas exploration in areas of the South China Sea.<sup>18</sup> The MoU invokes the UN Charter, UNCLOS and the 2002 Declaration on the Conduct of Parties in the South China Sea. Legally speaking, the MoU does not invalidate the South China Sea award and cannot be used to support China's claims in the South China Sea. Some commentators argue, however, that the MoU may actually do just this in reality because facilitating joint exploitation in an area no longer considered disputed is a step back from the tribunal's dismissal of China's claims in the area.

The past two decades have seen rapid expansion in the development of alternative unconventional fossil fuel resources, such as methane hydrates found in deep-seabed locations. In March 2013, Japan became the first country to announce successful continuous-flow production of methane hydrate. In May 2017, China also successfully completed a methane hydrate production test in the South China Sea. According to estimates, the amount of natural gas located in methane hydrate greatly exceeds the amount of conventional natural gas globally.

**Many technical challenges exist because the ultra-deep seabed is a very hostile environment and research thus far indicates significant environmental risks around methane hydrate extraction.**

However, many technical challenges exist because the ultra-deep seabed is a very hostile environment and research thus far indicates significant environmental risks around methane hydrate extraction. The question was raised whether the lack of knowledge as to the degree of risk should require application of the precautionary principle, whereby measures to prevent potential serious environmental harm should be taken even if there is a lack of scientific certainty as to the probability and extent of such harm. This could mean, for instance, that development should be prevented at this stage, or that China and Japan should come together to set minimum global standards for methane hydrate extraction and commercial exploitation. The issue of liability for environmental harm was also raised. It was noted that liability cannot be limited to national jurisdictions as such harms do not recognize human-made zones at sea.

In addition, regulatory challenges arise because of the location of the resources. In many cases, as these resources lie beyond the limits of national jurisdiction, the mandate of the International Seabed Authority (ISA) kicks in. The ISA has the exclusive mandate to manage mineral-related activities in the international seabed area on behalf of humanity as a whole, and provides a minimum standard for countries wishing to mine there. So far, no permits have been issued. However, many consultations are taking place between private actors, international actors and the ISA to allow for the resources to be exploited.

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<sup>17</sup> Ministry of Foreign Affairs of Japan (2008), 'Japan-China Joint Press Statement: Cooperation between Japan and China in the East China Sea', <https://www.mofa.go.jp/files/000091726.pdf>.

<sup>18</sup> Ministry of Foreign Affairs of the People's Republic of China (2018), 'Memorandum of Understanding on Cooperation on Oil and Gas Development between the Government of the People's Republic of China and the Government of the Republic of the Philippines', 27 November 2018, [https://www.fmprc.gov.cn/mfa\\_eng/wjdt\\_665385/2649\\_665393/t1616644.shtml](https://www.fmprc.gov.cn/mfa_eng/wjdt_665385/2649_665393/t1616644.shtml).

### Asia-Pacific approaches to the polar regions

In the Arctic, there are several interests at stake that are of increasing importance due to climate change. These include the potential availability of shorter and cheaper shipping routes, the exploitation of seabed resources, military activities and scientific research. There are relatively few territorial disputes in the region (examples being those between Canada and the US in the Beaufort Sea, and between Denmark and Greenland in the Lincoln Sea). There is, however, more controversy regarding maritime claims. For example, it was noted that there has been a ‘flip’ in terms of international relations in this region, as Canada has aggressively asserted its right to the North-western Sea Route. Canada claims that the route is within its internal waters – a controversial stance, as under international law the route would traditionally be seen as an international strait.

Many Arctic states have made claims to the Commission on the Limits of the Continental Shelf (CLCS) under Article 76 of UNCLOS, thereby accepting that the Arctic region is regulated by UNCLOS. Under UNCLOS, maritime claims cover areas extending for up to 12 nautical miles of territorial sea, 200 nautical miles of EEZ, plus a continental shelf or extended continental shelf based on geographic features and formulas under UNCLOS, provided the CLCS approves the submissions. The entire area (water column and seabed) beyond 200 nautical miles constitutes the ‘common heritage of mankind’, open to use by other states, including Asian states. In terms of governance, the Arctic Council, established in 1996, is made up of eight ‘member’ Arctic states (all of which have claims in the area), plus six indigenous organizations designated as ‘participants’. There are also 13 observer states, as well as NGO and intergovernmental observers. For non-Arctic states to become observers at the Arctic Council, they need to accept that the Arctic states have sovereignty. Since 2013, five Asian states have joined the Arctic Council as observers: China, India, Japan, Singapore and South Korea. As observers, these states are seeking to have a stake in developments in the Arctic, although this potential stake is limited. The focus of each Asian state is different. India, for example, is concerned with scientific research, while South Korea – which is home to one of the largest manufacturers of ice-breakers – is interested in navigation.<sup>19</sup>

### Emerging security challenges

#### The assertion of Chinese authority in ASEAN

##### *The South China Sea*

In relation to the South China Sea, it was noted that China has managed to shape the negotiation process of the code of conduct to suit its own interests. One speaker also referred to Singapore’s response to the South China Sea award to illustrate China’s attitude towards unfavourable legal rulings. When the award was issued in 2016, Singapore reaffirmed that all claimant states had to abide by the UNCLOS ruling and urged all parties to respect the legal and diplomatic processes. This led to significant displeasure on the part of China and to the seizure by China of nine armoured vehicles en route from Taiwan to Singapore. The Singaporean prime minister was consequently not invited to the inaugural BRI summit. Another example of the assertion of Chinese authority was the failure of ASEAN to issue a joint statement in 2012 on the South China Sea, because Cambodia, as chair of ASEAN, opposed this. China thus succeeded in influencing ASEAN processes.

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<sup>19</sup> Moynihan (2018), ‘Exploring Public International Law Issues with Chinese Scholars – Part Four’.

### *The Belt and Road Initiative*

The Belt and Road Initiative (BRI) is an attractive proposition for ASEAN because it meets ASEAN's huge appetite for infrastructure development. There are, however, concerns regarding challenges to national sovereignty, debt diplomacy and financial viability. Eighty-nine per cent of Chinese-funded BRI transport projects globally are developed by Chinese contractors. China's leadership has tried to address this by emphasizing that BRI projects are not exclusive, and that China is open to cooperation with other countries.

Concerns nonetheless remain regarding social and economic risks. Attention was drawn to a recent incident in which Malaysia put on hold a \$20 billion railway project, citing concerns over its ability to pay for it and whether the project will benefit the local community. In Myanmar, the Myitsone Dam project was put on hold in 2011 due to environmental concerns. Myanmar has also downsized the first phase of the Kyaukphyu Port project, from \$1.6 billion to \$1.3 billion, fearing that it would be indebted to China as a result of funding the port. In relation to the BRI, a recent poll in ASEAN countries found that 70 per cent of respondents felt that their government should be 'cautious to avoid getting into unsustainable financial debts with China'.<sup>20</sup> However, only 6.6 per cent of respondents felt compelled to avoid the BRI altogether.<sup>21</sup>

### *Digital space*

China is also asserting influence and shaping norms in ASEAN in the digital space. For many Chinese firms, ASEAN is an accessible and promising market. It is estimated that by 2025 the digital economy in ASEAN will be worth \$240 billion.<sup>22</sup> Chinese brands Huawei, Oppo and Vivo account for about 30 per cent of ASEAN's smartphone market, and have increasingly edged out South Korea's Samsung, which used to be the dominant player.

There has also been a lot of investment in ASEAN 'unicorns' (tech companies with a market value of over \$1 billion). China's Alibaba has bought into Lazada, a Singapore-based e-commerce company, as well as Tokopedia, an Indonesia-based e-commerce company. Alibaba has also established data centres in Indonesia, Malaysia and Singapore, and has invested in Thailand's eastern economic corridor and smart digital hub. The founder of Alibaba, Jack Ma, is personally advising the governments of these countries and providing technical assistance in training people on digital literacy. China is also marketing its satellite system, BeiDou, as an alternative to GPS – over 40 satellites have been launched in total so far, and another 11 are expected by 2020. So far, such satellites have been launched for three ASEAN states: Cambodia, Indonesia and Laos.

### *ASEAN's response*

One speaker noted ASEAN's pragmatism given that it is China's close neighbour. It wishes to cooperate on the upside and manage the downside. It was proposed that by engaging with China on equal terms, ASEAN can help temper some of China's policies and bring them closer to regional norms.

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<sup>20</sup> Institute of Southeast Asian Studies (2019), *The State of Southeast Asia: 2019 Survey Report*, ASEAN Studies Centre at ISEAS Yusof Ishak Institute, 29 January 2019, p. 20.

<sup>21</sup> *Ibid.*

<sup>22</sup> Anandan, R., Sipahimalani, R., Saini, S., Aryasomayajula, S. and Smittinet, W. (2018), 'e-Conomy SEA 2018: Southeast Asia's internet economy hits an inflection point', Google/Temasek, November 2018, <https://www.thinkwithgoogle.com/intl/en-apac/tools-resources/research-studies/e-conomy-sea-2018-southeast-asias-internet-economy-hits-inflection-point/>.

It was suggested that ASEAN should step up engagement with the US and other partners to create an ASEAN-centric 'Indo-Pacific'. However, such a proposal would be viewed as a security-centric effort to contain China; ASEAN would not want to be part of an approach viewed in this light.

It was noted that ASEAN must also pay more attention to 'middle powers', such as the UK, the EU, Japan and Australia, as several of these have adopted a more Asia-focused foreign policy. India has an 'Act East' policy; Japan has developed a \$113 billion infrastructure partnership with the US and Australia to counteract the BRI; and the EU has a connectivity strategy seeking to improve physical and digital connectivity.

### Emerging security challenges in the Asia-Pacific

#### *Hybrid warfare*

It was noted that the UN security regime, in the form of the UN Security Council, tends to be deadlocked nowadays. There is therefore a greater tendency for states to invoke the right to self-defence, sometimes under controversial circumstances. Many states believe that they can only exercise self-defence when there is an armed attack. Other states, such as the US, consider that any lesser use of force is sufficient justification. Through technological developments, such as cyberwarfare, it is now not just states that can use destructive force, but also non-state actors (NSAs) and individuals. In hybrid warfare, it may not be clear what amounts to an armed attack against which the state can exercise its right to self-defence. The application of international humanitarian law (IHL) may also become uncertain. These ambiguities have created a space where hostile states and NSAs may have an incentive to engage in hybrid warfare and create 'grey-zone situations', in which a defending state cannot readily decide how to respond lawfully.

**If the technological gap between states continues to increase, victim states may not even understand what is happening when they are under attack.**

If this trend continues, certain methods of cyberwarfare may become more sophisticated, and a victim state may find it more difficult to attribute the conduct of a given attack to a particular actor or state. If the technological gap between states continues to increase, victim states may not even understand what is happening when they are under attack. For example, only after extensive investigation in 2010 did Iran realize that the malfunctioning of multiple nuclear centrifuges had been caused by a state-launched cyberattack (Stuxnet). This may become a significant security threat for many Asian states, particularly when they do not have the technological means to defend themselves. In this context, identifying the principles and rules that may be breached by cyber operations becomes very important. Asian states may want to invoke the notion of sovereignty (including non-intervention and prohibition of the use of force) as a rule of international law in cyberspace because, if there is a breach, they can invoke countermeasures against the hostile state or actor.

#### *The role of ASEAN in the global security system*

It was suggested that the UN Security Council's system of collective security has been failing in some situations, and that international law does not seem to provide effective mechanisms for regulating new threats in the region. The UN also suffers from a lack of accountability. The role of ASEAN as a regional organization using international law was therefore highlighted as having potential in terms of its ability to protect the region from external and internal interference. In relation to ASEAN's reaction to the

humanitarian situation in Myanmar, panellists noted that ASEAN had provided a communication channel with Myanmar, and that in 2017 it had negotiated with Myanmar to secure humanitarian assistance. Panellists disagreed, however, on ASEAN's effectiveness in terms of enforcement and collective security both in that situation and more generally.

With regard to the uptake of international law by ASEAN states, it was noted that many are not ready for more extensive engagement, as implementation requires domestic political and legislative changes (although this is not a problem unique to Asian states). For example, even Japan, which negotiated the ICC Statute, did not ratify it for some time because its domestic law was not ready. It was pointed out that many Asian nations do not have the same legal resources and expertise as European states. ASEAN has, however, helped to implement and internalize international and regional norms. There is potential for this model of cooperative compliance to be developed further, to become an alternative way of achieving some level of security without relying on traditional methods of enforcement and deterrence.

### *The North Korean nuclear question*

Responses to the North Korean nuclear programme have vacillated between the bilateral approaches of the US and China and broader multilateral efforts through the six-party talks and the UN Security Council. The responses have raised questions about the balance between collective security and the roles of individual states in addressing threats to international peace and security.

It was suggested that when the US and China act bilaterally on North Korea, there is a more transactional 'flavour' to these actions. It was questioned whether this undermines the UN Security Council's more systemic engagement with any threat to international peace and security, particularly as the UN Charter attempts to strike a balance between collective security and unilateral measures only when collective security is not available. Bilateral engagement raises doubts about the continued relevance of the UN Security Council in respect of these threats. It was considered that bilateralism might in fact be the only option available, particularly when the region is moving away from reliance on US security guarantees.

The threats of force exchanged between the US president and the North Korean leader also raise questions about approaches to the prohibition on the unlawful threat or use of force under Article 2(4) of the UN Charter, and about the related right to self-defence under Article 51. The threat of force might hasten participation in negotiation, but may also result in escalation. Threats are explicitly prohibited under Article 2(4), but Article 51 only permits states to respond to actual armed attacks, not mere threats thereof. Article 51 is also broadly understood to allow for responses to imminent armed attacks, which may, however, be based on threats of force. When there are threats such as those between the US and North Korea, there is rarely an initial statement that can be identified as a 'ground zero' in terms of threat. The reactive nature of Article 51 thus does not obviously apply, and the temporal elements of imminence, along with the condition of proportionality in self-defence, become almost impossible to apply. It is not clear whether Article 51 precludes the wrongfulness of a defensive threat in the same way that it precludes the wrongfulness of the use of force in self-defence. The application of proportionality is particularly ambiguous, as the threats between the US and North Korea tend to be hyperbolic.

There is also the perennial question of whether the development of certain weapon systems is, in itself, an unlawful threat of the use of force. It was noted that as North Korea has withdrawn from the nuclear Non-Proliferation Treaty (NPT) of 1968, there is no international law prohibiting North Korea



from developing nuclear weapons, particularly taking at face value the Advisory Opinion of the ICJ which declared that, in some instances, their use may be permissible under international law.<sup>23</sup> Much of the rhetoric around the North Korean case treats the development of nuclear weapons as a threat, which raises questions about the relationship between Article 2(4) and Article 51 of the UN Charter.

### *The Chinese approach to humanitarian intervention*

There are substantially divergent views as to whether humanitarian intervention is lawful. China is very reluctant to recognize any such right as a matter of international law for a number of reasons, including its broad and conservative approach to sovereignty and non-intervention. It was suggested that some of China's scepticism is also based on the efficacy of using force unilaterally outside the context of the UN Security Council without the consent of other states or broader regional support. For example, China voted in favour of Security Council Resolution 1264, which authorized the establishment of a multinational force to restore peace and security in East Timor, to protect the UN mission there and to facilitate humanitarian assistance operations. Contrary to expectations, China also did not veto the NATO-led Libyan mission to protect civilians in 2011, which was authorized by the UN Security Council pursuant to the 'responsibility to protect' doctrine. This was likely because there was strong Arab League support for the Libyan mission. It was suggested that the West seems to characterize China's approach to humanitarian intervention as a conservative and traditionalist approach to sovereignty. Yet it was pointed out that examples of humanitarian intervention that have been successful in stopping violations and developing a stable system, such as in Kosovo, have been the result of strong regional support in respect of intervention. It was underlined that China's approach may, therefore, provide lessons applicable to the approach of the wider international community.

### *Taiwan as a separate political entity*

Discussion also briefly touched on the security implications of Taiwan emerging as a separate political entity on a permanent basis. Panellists noted the potential role of a Japan-US alliance in this respect. It would boil down to what each state wanted to do and the extent to which each was prepared to get involved. It was recognized that, in order to be effective, such an alliance would need to use the defence assets based in and around Japan. It is not clear whether Japan's Self-Defense Forces (SDF) would be expected to assist, and what implications this would have under international law. Any action on behalf of Taiwan would also trigger questions about which IHL regimes would apply, as well as about the application of Article 2(4) and Article 51, given some interpretations of the Palestinian Wall case (concerning self-defence against attacks by non-state entities).<sup>24</sup> Further exploration of this issue would be beneficial.

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<sup>23</sup> *Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons*, ICJ Reports 1996, p. 226, International Court of Justice.

<sup>24</sup> *Advisory Opinion Concerning Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, ICJ Reports 2004, International Court of Justice.

## Concluding remarks

Despite some concerns about its origins, it was noted that there has been a high level of acceptance of international law across the Asia-Pacific, arguably because it reinforces sovereignty and is very flexible, allowing states to opt in or out of different treaty regimes. There have been significant levels of compliance in areas such as the world trade regime, investment and the environment. Sporadic law-breaking is also common to states in all regions. Occasionally more radical normative challenges have arisen, such as over historic rights claims in the South China Sea and the 'Asian values' debate on human rights. And the region has seen the development of parallel institutions, alternative approaches to development finance (with fewer conditionalities in the case of China, or more public regulation of foreign investment in the case of India), incremental reform of existing institutions, and the distinctive contribution of soft sub-regionalism (which nonetheless has limited effectiveness in respect of certain 'hard' issues).

It was suggested that diversity may be a significant impediment to future regional cohesion or cooperation of the kind seen in Europe, Latin America or even Africa. And, reflecting on the issues discussed, any future conference on international law in the Asia-Pacific region may wish to examine issues of human security (such as poverty, poor governance, terrorism, displacement and irregular migration), the shrinking of civil society space, and inequalities (economic, political or status-based).

*This conference summary was written by Victoria Barlow.*

# Conference Agenda

## Wednesday 27 March 2019

Geopolitical uncertainty, challenges to multilateralism, the growing influence of non-state actors and the implications of unprecedented technological advances raise questions about the role of international law in global and regional governance. In the Asia-Pacific, this is evident in numerous issues at the top of domestic and foreign policy agendas, including the future of the World Trade Organization (WTO), the need to resolve disputes in the East China and South China seas, and containment of North Korea's nuclear ambitions.

This conference will explore the impact of international law on security and prosperity in the Asia-Pacific. How can governments in the region and other actors contribute to international law playing a more effective role in strengthening cooperation and reducing regional tensions? And how influential are Asia-Pacific states in the development of international law generally?

*09:30–10:00*    *Registration*

*10:00–10:10*    *Welcome remarks*  
*Adam Ward*, Deputy Director, Chatham House

*10:10–10:45*    *Keynote discussion | The Role of International Law in the Asia-Pacific*

- What has been the impact of Asia-Pacific states in the development of international law? Is there such a thing as a pan-Asian approach?
- Where is international law helping to strengthen relationships in the region, and where might it be contributing to tensions?
- What are some of the broader challenges for the legitimacy and effectiveness of international law as a tool for global governance?

*Speakers:*        *Koji Tsuruoka*, Ambassador of Japan to the United Kingdom  
*Champa Patel*, Head, Asia-Pacific Programme, Chatham House

*Ben Saul*, Associate Fellow, International Law Programme, Chatham House;  
*Challis Chair of International Law*, University of Sydney

*Chair:*            *Adam Ward*, Deputy Director, Chatham House

*10:45–12:15*    *Session One | Strengthening Economic Relations*

This panel will look at opportunities and challenges for international trade and investment law in the Asia-Pacific, including regional arrangements – such as the Trans-Pacific Partnership and Regional Comprehensive Economic Partnership – as well as China's Belt and Road Initiative. The panel will also discuss the evolving regimes for dispute settlement on trade and investment matters.

- What trends do we see in regional and mega-regional trade agreements, including in relation to dispute settlement arrangements?
- What is China's approach to trade agreements in the region, and how does this compare with the positions taken by other key Asian and Pacific states?
- What are the implications of the increased use of international arbitration in the region to settle investment disputes, and what new approaches may be on the horizon?

*Speakers:* *Qingjiang Kong*, Dean, School of International Law, China University of Political Science and Law

*Yorizumi Watanabe*, Professor, Faculty of Policy Management, Graduate School of Media and Governance, Keio University

*Romesh Weeramantry*, Counsel, Clifford Chance Asia

*Yu Jie*, Research Fellow, Asia-Pacific Programme, Chatham House

*Chair:* *John Nilsson-Wright*, Senior Research Fellow, Asia-Pacific Programme, Chatham House

*12:15–13:30* *Lunch*

*13:30–15:00* *Session Two | Maritime Security and Governance*

This panel will examine the attitudes and behaviours of states in the Asia-Pacific towards the Law of the Sea, including freedom of navigation and maritime delimitation in the South China and East China seas; the evolving regulatory regime for mining of the international seabed; and disruptive actions by states aimed at tackling illicit economies, such as drugs- and human-trafficking.

- What are the key maritime and governance security challenges in the region?
- What has been the consequence of the Permanent Court of Arbitration ruling in the Philippines v. China case on the attitudes of states in the region towards the Law of the Sea?
- How are regulatory frameworks developing in relation to the polar regions and the deep seabed in response to competing economic and security interests? How are states in the region engaging on these issues?

*Speakers:* *Bill Hayton*, Associate Fellow, Asia-Pacific Programme, Chatham House

*Shafiah F. Muhibat*, Head, Department of International Relations, Centre for Strategic and International Studies (CSIS) Indonesia

*Aniruddha Rajput*, Member, UN International Law Commission; Consultant, Withersworldwide

*Constantinos Yiallourides*, Arthur Watts Research Fellow on the International Law of Territorial Disputes, British Institute of International and Comparative Law; Visiting Scholar in International Law and Public Policy, The University of Tokyo

*Chair:* *Vasuki Shastry*, Associate Fellow, Asia-Pacific Programme, Chatham House

15:00–15:20 *Tea/coffee break*

15:20–16:50 *Session Three | Emerging Security Challenges*

This panel will consider how international law regulates new threats, including cyberattacks, in the Asia-Pacific region and beyond. It will also review evolving defence strategies, and explore prospects for regional security cooperation.

- What are the emerging security issues that are most contested in the Asia-Pacific region?
- What role does international law have in response to the increasing use by state actors of cyber tools against other states? How are key Asian states such as China and Japan engaging in this space?
- What are the implications for security strategies in the region of developments and controversies relating to the law on the use of force?

*Speakers:* *Lee Chen Chen*, Director, Singapore Institute of International Affairs

*Hitoshi Nasu*, Professor of International Law, University of Exeter

*Kimberley Trapp*, Associate Professor, Faculty of Laws, University College London

*Chair:* *Harriet Moynihan*, Associate Fellow, International Law Programme, Chatham House

16:50–17:00 *Closing remarks*

*Ruma Mandal*, Head, International Law Programme, Chatham House

*Ben Saul*, Associate Fellow, International Law Programme, Chatham House;  
*Challis Chair of International Law, University of Sydney*

17:00–18:00 *Drinks reception*

Neill Malcolm Room, Chatham House

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