Asian State Practice of Domestic Implementation of International Law (ASP-DIIL)

A Preliminary Report

Seokwoo Lee
Inha University Law School, Korea
leeseokwoo@inha.ac.kr

Hee Eun Lee
Handong International Law School, Korea
hlee@handong.edu

Kevin YL Tan
Faculty of Law, National University of Singapore, Singapore
lawtylk@nus.edu.sg

Mission Statement

The common narrative of contemporary Asia has often been in the context of the political economy of rapid industrialization, or from the point of view of international relations, in light of the global balance of power and Cold War fault lines. The dramatic economic growth of Asia – in particular Japan and Korea during the latter half of the 20th century, and of China and India this century – has been well documented and researched. Asia has also been the focus of much study in relation to the geopolitical climate of the Cold War. While economists and political scientists have contributed greatly to the study of the region and its modern history, a frequently overlooked area of study is the function and impact of international law on the relations of the countries in the region. Indeed, we argue that international law has had an important if somewhat muted role since it was introduced to the region by the West in the 19th century. It has since taken on a more significant role in the post-Cold War era reflecting the dynamism of the region and the prospects for establishing an order based upon international legal principles.

The growing importance of international law in Asia can largely be attributed to the forces of globalization that has animated the region in economic, political, and cultural terms. It was not until the end of the Cold War and the
flourishing of globalization that countries in the region engaged each other on common issues of interest, but also interacted with each other on the basis of modern principles of international law. As a result, regional problems that lay dormant during the Cold War, such as human rights concerns and law of the sea issues of maritime delimitation and access to ocean resources like fisheries and other non-security matters, have raised the profile and significance of international law. While geopolitical factors continue to be relevant in understanding interstate relations in the region, international law and its attendant principles have become the basis upon which Asian states engage each other. The increasingly important role of international law in Asia can no longer be ignored.

Though a great variety of cultures exists among Asian countries, all of which espouse different outlooks and interests, a strong, albeit rather undefined, feeling of familiarity, mutual understanding, and even coherence and solidarity exists among them because of a shared historical, religious, cultural and social past. Today, this commonality is further buttressed by a shared experience of domination and dominance through colonization and semi-colonization. This latter experience remains significant today. Admittedly, it is shared by other regions of the world, such as Africa, but its manifestation and consequences in Asia are quite different because of the divergent cultural substrata, making a separate Asian approach justified. However, an examination of Asian practical – as opposed to theoretical – approaches to international law has thus far been very limited.

The present report is motivated by the relative lack of scholarship on this important, yet underrepresented area in international legal studies. The introduction of Western international law into Asia, the shift from Asian international law and the development of international law in the region, and their impact on Asian states have not been explored in depth. While there are individual studies on how Asian states deal with international law, the survey is patchy and does not offer a sufficient overview of their attitudes and philosophies towards the domestic implementation of international law.

This report focuses on the development of international law through its domestic implementation in Asian states. This report will add significantly to the literature and our understanding of individual states’ role in the application of international law, both nationally and regionally. For the purposes of this report, Asia will include the countries in most of sub-regional level of Asia: Northeast Asia, Southeast Asia, South Asia and Central Asia.

Given that the form and substance of international law as it is known today derives from Western states, it may be argued that Western philosophy and culture continue to influence the character of international law. The important
questions raised are: Whether international law can appreciate the cultural difference between Western and Asian countries? What approach to international law do Asian states adopt when they implement it domestically? Assuming that a distinct Asian approach to international law exists, what is its contribution, if any, to the development of international law in Asia and generally?

The mandate and scope of this report will be to study the *Asian State Practice of Domestic Implementation of International Law*. This study will focus on the activities undertaken by Asian states that have a direct bearing on international law. The members will report on state practice in their respective countries and provide a comprehensive snapshot of what these states do in relation to international law during a specific period. The intention is not to provide a commentary on Asian state practice of international law, but to describe how these states apply international law in their domestic legal systems and in their foreign relations. This task is all the more challenging given the increasing relevance of international law throughout the region and the abundance of state practice that is seen year after year. The research will analyze judicial decisions, international agreements, legislation and administrative regulations, and resolutions and statements of each government. This may well reveal a distinctly Asian approach to international law. If that be the case, then what is the content and substance of that approach and how has that affected the development of international law in the region and beyond?

2 Analysis of Asian State Practice

2.1 Ocean and Territory

Warwick GULLETT (School of Law, University of Wollongong, Australia) and Dustin Kuan-Hsiung WANG (National Taiwan Normal University, Taiwan)

2.1.1 Background

All states with marine and maritime interests need to ensure their domestic laws enable them to meet their obligations, and to take advantage of the rights afforded to them, under the international law of the sea. Among various achievements, this body of international law supports the unhindered transport of goods at sea and is the basis for states to assert their territorial entitlements to sea areas. This area of international law is of critical interest to Asian states due to their reliance on seaborne trade and marine resources, and the preponderance of particularly complex marine areas leading to geographically overlapping assertions on jurisdiction claims and disputed territorial claims to islands and island groups.
2.1.2 The Law of the Sea

The Law of the Sea is structured around one of the most extensive and widely-ratified international treaties: the United Nations Convention on the Law of the Sea (LOS Convention). The treaty boasts 168 states parties. It enjoys an enormous number of ratifications in Asia, with only a few non-parties (Cambodia, North Korea, Chinese Taipei (Taiwan), and the Central Asian landlocked states of Kazakhstan, Kyrgyzstan, Tajikistan, Turkmenistan and Uzbekistan). Landlocked states, such as Laos, Mongolia and Nepal, have also recognized the benefits of treaty membership by becoming parties to the LOSC.

The LOSC is one of the most ambitious international treaties because it sets out the legal framework for all maritime activities throughout the world. Its main contribution is that it provides for various zones of jurisdiction adjacent to coastal states and sets out the prescriptive and enforcement jurisdiction of coastal states therein. The nine maritime zones the LOSC has confirmed or created are critical to the activities of all states at sea because there is a careful balancing of the rights of coastal states with those of other states in the different zones. A coastal state has greater rights in maritime zones in which it has full sovereignty (that is, internal waters, archipelagic waters, territorial sea, and to a lesser degree, the contiguous zone) than in zones in which it merely has ‘sovereign rights’ (that is, the exclusive economic zone (EEZ), and the continental shelf). There are also zones beyond national jurisdiction (that is, the high seas and ‘the Area’ – the seabed, ocean floor and subsoil beyond coastal states’ continental shelf or extended continental shelf) and a special regime is established for straits used for international navigation. There is a need for cooperation in several critical straits due to differing views on jurisdiction, such as Tsushima Strait, Taiwan Strait, Bashi Channel, and Malacca Strait. Asia is responsible for the international acceptance with the LOSC of the archipelagic state concept, which was advocated principally by Indonesia and the Philippines and which also benefits Papua New Guinea.

Coastal states face considerable challenges in harmonizing their domestic laws with LOSC. This is due to a range of factors, including the spatial extent and scope of maritime jurisdictional zones, the number of marine industries and activities affected, and the ambiguities riddled throughout the LOSC text. These difficulties are apparent in Asia with there being a number of different types of national legal systems, states exhibiting differing degrees of economic development, and a range of marine environments and complexities in coastal territory.

Although the LOSC is a binding legal agreement, it can be misleading to view it simply as a legal document. It is a complex legal and political instrument based on many hard-fought compromises between the interests of various types of states (such as states with or without large coastlines, states with large commercial, military or fishing fleets, and developing states). There are overlapping rights and concurrent jurisdiction between coastal states and flag states in the different maritime zones and there are differences between coastal state and flag state rights depending on the type of vessel or activity. Perhaps the best example is that the EEZ is a zone in which the coastal state has almost complete power with respect to fishing yet for navigational purposes it is only marginally different from the high seas. There are also competing principles for ocean use enshrined in the LOSC, such as between preservation and protection of the marine environment and optimum utilization of marine resources, and between freedom of navigation and protection of sovereignty and sovereign rights.

The various balances of interests that have been crafted into the LOSC text provide much scope for international dispute if states in their activities and enforcement conduct do not respect the balances achieved. Coastal states and flag states therefore face complex policy, regulation and enforcement options. This is especially the case because the LOSC text is deliberately vague or ambiguous in many places, yet state parties need to ascribe further meaning into its provisions when they incorporate them into domestic law, in a manner that is workable for the government officers who have the responsibility to implement the convention. In Asia, variation in interpretation of rights in LOSC is apparent. This includes questions of enforcement jurisdiction (such as prior notice or authorization for the conduct of innocent passage, and the ability of coastal states to preclude foreign military exercises in their EEZ).

The LOSC covers many topic areas, ranging from defining the various maritime jurisdictional zones to setting up marine environment protection principles and rules and providing for the conduct of marine scientific research, the development and transfer of marine technology, and procedures for settling disputes between state parties. Its provisions affect activities within all marine sectors (such as fishing, maritime transport, defence and security, seabed resource exploitation, marine scientific research, tourism, and environmental protection). A complication is that other international agreements (both binding and non-binding) have been developed since the conclusion of the LOSC which have developed standards in various law of the sea topic areas.

All state parties to the LOSC have the responsibility to ensure that their domestic laws allow them to fulfil their obligations under the convention. This includes ensuring that the actions of the executive (that is, the various
government departments and agencies) to implement the LOSC are authorized within the domestic legal framework, typically under legislation, judicial decisions, and also potentially under executive authority contained in constitutions. A complication regarding the LOSC is that many of its provisions have the status of law outside the convention itself. This is because much of the LOSC codifies rules of customary international law that had emerged prior to the conclusion of the treaty in 1982. There are differences in the way domestic law embraces convention law and customary international law and the body of customary international law of the sea has relevance to the interpretation and development of the LOSC.

The process by which domestic law is revised to incorporate new international law differs among states, especially as between states that have different legal traditions. In some states, there is automatic incorporation of international law into domestic law. In other states, there needs to be separate legislative action. Practical and legal problems can arise where there are disjunctions between a state’s domestic laws and its international obligations. Problems can arise such as where coastal state enforcement officers undertake a boarding of a foreign ship pursuant to authority provided in domestic law which goes beyond what is permitted under international law. In such a case, an international legal dispute could arise between the coastal state and the flag state about the correct interpretation of LOSC while enforcement officers remain in doubt about the extent of their authority.

International law does not set any requirements about the manner in which individual states need to ensure that their domestic laws implement international obligations. Nevertheless, the general approach to the incorporation of international law into domestic law is framed by two competing theories. The first is dualism. The dualism theory holds that international law and domestic law operate in two separate, independent spheres because of the different sources of the two fields of law (domestic law is sourced in the will of the sovereign state whereas international law is sourced in the collective will of individual states). This means that developments in international law do not automatically effect change to a state’s domestic laws. Rather, international law needs to be ‘transformed’ or ‘incorporated’ into domestic law by a specific action of the state, typically by the enactment of implementing legislation. The second theory is monism. This theory, which is based on natural law theory, holds that domestic and international law are essentially part of one and the same universal normative order. A consequence of this view is that there is no need for any specific

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act to incorporate international law into domestic law. Rather, developments in international law automatically become part of a state’s domestic law. As a general rule, common law states reflect dualism theory and civil law states reflect monism theory. Some states have more intricate arrangements, including some of those based on other legal traditions (such as Islamic law) and those states that embrace a mixture of legal traditions. Asian states span these traditions including civil law (eg South Korea), common law (Singapore), Islam (Iran) and mixtures (eg Macau in China and its inherited Portuguese law).

State reports in this project reveal a number of areas in which domestic laws do not align exactly with provisions in the LOSC. This owes to the nature of the process for domestic legislative incorporation of international law (including the need to ‘flesh out’ the content of purposefully vague or ambiguous provisions in LOSC) and the desire by states to contribute to the development of the international law of the sea in areas where LOSC provisions are open to a range of interpretations. Indeed, in many respects LOSC can be viewed as a classic international treaty where the ‘lowest common denominator’ standards are set, due to the consensual nature of international law and the desire for this Convention to be a framework for the further development of the Law of the Sea necessitating a high rate of ratifications globally. Compromises were made during UNCLOS III in order to ensure the support of more states and thereby extend the application of the treaty to more issues and to all areas of the world’s seas. While this may be inelegant or indeed unhelpful as a matter of legal development, it is a feature of international law that reveals it as much a political and diplomatic process as it is a legal process.

2.1.3 Specific Law of the Sea Issues in Asia
2.1.3.1 Inconsistent Interpretation and Implementation of the LOSC
Asian states can vary in their interpretation of provisions of LOSC, especially those concerning the extent of coastal state enforcement powers. Differences also exist in the zones claimed, such as the declaration of questionable territorial sea baselines and a large number of states not claiming a contiguous zone. Domestic laws that implement rights and responsibilities for the various maritime zones under LOSC are an important area for analysis to minimise the risk of international disputation. Potential flashpoints exist for disputed activities at sea, such as the full extent of the right of innocent passage of foreign ships in the territorial sea, the scope of transit passage through straits used for international navigation, and preservation of traditional fishing rights in archipelagic waters. There also a need to examine Asian ocean governance frameworks, such as policies, institutional mechanisms, contribution to the LOSC, and overarching oceans legislation.
2.1.3.2 Overlap of Maritime Claims and the Need for Peace and Cooperation

Asia has a large proportion of the world’s overlapping maritime zones, including those drawn from insular features where territorial sovereignty is disputed. This is apparent in the South China Sea, as well as the East China Sea and the Sea of Japan/East Sea between Japan and Republic of Korea. Although some claims have been settled by international adjudication (e.g. Singapore and Malaysia), there remain many areas in the region where boundary lines are disputed or yet to be delimited. Maintaining peace and cooperation in areas of special regional tension is a critical issue. New international disputes can be envisaged across various issues including fishing, seabed resource extraction, freedom of navigation and protection of submarine cables. Measures for regional cooperation in fishing and fisheries enforcement stand out as a priority for Asian states.

2.1.3.3 Recognition of Rights of Landlocked States

A major achievement of the LOSC is that it affords special protection to landlocked states for rights to access the sea. However, there is a lack of specificity in the LOSC provisions on how this will be achieved. There are a significant number of landlocked states in Asia. Access for these states to marine resources, or the benefits of their exploitation, is critical. This includes Mongolia, which also boasts a significant shipping registry.

2.1.3.4 Continuing Disputes on the Legal Status of Maritime Features

The 2016 award of the South China Sea arbitration (Philippines/China) provided the first quasi-judicial interpretation of the troublesome Article 121 (Regime of Islands) of the LOSC. Yet, the disputes and different interpretations remain in state practice in Asia. For example, land reclamations continue to occur (such as in the South China Sea), and official claims to jurisdiction remain despite widespread non-recognition by other states (such as the full island status claimed by Japan for Okinotorishima).
2.1.4 Concluding Remarks

For Asian states, the LOSC is an important gateway for them to be integrated into the global order. The LOSC is seen as a critical bridge to achieve regional cooperation. Nevertheless, there is need for considerable further study of the regional implementation of the LOSC due to the array of differing interpretations and state practice in Asia.

2.2 Environment

David ONG (Nottingham Trent University, UK)

2.2.1 Background

This section examines the prospects for the construction of a legal perspective on Asia’s ‘environment’. This contribution attempts a preliminary consolidation of initial forays on the question of whether it is possible to discern an identifiably Asian legal approach to the ‘environment’.

Within this context, a dialectical and reflexive approach or methodology is proposed, consisting of: First, an elaboration of Asian state participation in environmental treaties and institutions, followed by the (topdown) implementation of these environmental treaty principles and obligations within national legal systems; and second, the cumulative Asian (domestic) state practice when implementing these principles and obligations within their national laws and policies, thereby contributing (upwards) to the possible development of ‘customary’ international environmental law within the Asian context. Throughout this exercise, a dialectical perspective is employed, whereby the interaction between international law and national law, as well as national law and international law, both of these interactions occurring concurrently, are highlighted.

At this juncture, however, it is important to emphasize that the sheer size of the subject matter of this project – the whole Asian continent itself, and the relatively recent start date for this study, both combine to ensure that the perspective adopted for this essay is necessarily prospective, rather than definitive, and its tone speculative, rather than affirmatory. We are dealing here with the possibility of an emerging, de lege ferenda, rather than a settled, de lege lata regime for the largest and arguably most environmentally diverse continent on earth.

Asia’s place as the most significant continent on earth is manifest in two key facts: its geography and its history. Asia’s huge presence in world affairs is physically manifested first in its sheer geographical size and second in its temporally long history of human civilization. It is these physical and historical factors that loom large and weigh heavily on any attempt to address this immense landmass,
along with its associated island chains, as a single entity for our purposes here. Topographically too, Asia ranges from the deepest oceanic trench (Mariana) in all the world's seas, to the tallest peak (Everest) of the highest mountain range on earth (the Himalayas). Asia also has several of the world's greatest rivers, notably the Ganges-Brahmaputra, Indus, Yangtze, Mekong, Irrawaddy, and the Tigris-Euphrates confluence. All of these watercourses were also significant human civilizational starting points. Offshore Asia is equally impressive, especially from an environmental perspective, with the island chains lying off its eastern and southern flanks being home to some of the most biologically-diverse flora and fauna to be found anywhere on this earth.

Along with this geographical heft, as noted above – Asia is also home to several of the oldest civilizations known to history, while currently hosting some of the most economically dynamic (human) populations in the world. Indeed, the sheer historical longevity of human interactions with their environmental surroundings in the Asian context is arguably a major factor in at least two aspects of an emerging Asian environmental legal framework: The evolving recognition of legal rights for certain endangered animal species, and the award of legal personality to natural entities, such as rivers. Moreover, many of the (recent and currently) fastest-growing national economies are Asian. It is this set of geographical, historical and socio-economic facts, and their environmental implications in particular, that form the parameters of this study. This study will therefore be organised along these geographical, historical, and socio-economic themes in terms of their environmental implications for the continent as a whole.

2.2.2 Overarching Themes and Cross-Cutting Environmental Issues
The first overarching theme to note about a land mass as large and environmentally diverse as Asia, which is also surrounded on its northern, eastern and southern flanks by equally biologically-rich seas, is that it requires international co-ordination for the conservation and management of a number of (Asian) continental-wide ‘commons’ spaces. To be sure, most of the terrestrially-based ‘commons’ areas identified here are spread across the territorial jurisdictions of several continental Asian states, whereas the ‘common’ marine spaces in turn traverse multiple maritime jurisdiction zones of both coastal and insular Asian states. However, it is argued here that despite the national territorial and maritime jurisdictional divisions ostensibly separating Asian countries, both the transboundary and shared natures of these identified ‘commons’ areas lying across the Asian continent and within its waters merit special consideration in and of themselves as to whether they are (or should be) the subject of international co-operation between their respective states.
2.2.2.1  *Asian ’commons’ Areas: Land and Sea*

At least five types of Asia-specific regional ‘commons’ areas have been identified for introduction here, followed by specific attention within the final ILA Study Group report, namely, as follows:

1. the major international watercourses and rivers;
2. the vast mountain ranges and their immediately surrounding areas;
3. the geopolitically-strategic and biodiversity-rich regional seas;
4. the sub-tropical forests and tropical rainforest/jungle areas that (still) cover parts of East and South Asia, especially the Southeast Asian mainland and its adjoining islands; and last but not least,
5. the significant areas of continental grasslands – in particular, the ‘temperate’ grasslands which are prevalent in the so-called Palearctic ‘realm’, encompassing *inter alia* (from west to east) Europe, Russia, the Middle East, Northern China, and Mongolia.

Here an initial finding is that, at least as compared to smaller, and arguably less diverse region like Europe, such Asian ‘commons’ areas have not been the subject of intensive co-ordination as found in European environmental laws, notably within the European Union, and across European-wide rivers, as well as regional and sub-regional marine spaces such as the Mediterranean and Black Seas. On the other hand, Marsden has recently highlighted both the transnational governance, as well as sub-regional, application of international environmental regimes within Asia, suggesting that the continent is gearing-up on these fronts.

2.2.2.2  *Asian Mega-Cities*

A further cross-cutting phenomenon to account for relates to the rise of Asian mega-cities and the attendant social and environmental impacts of these concentrated population masses. Amidst the global rise of these so-called ‘mega-cities’, defined as metropolitan areas that host ten million or more inhabitants, Asian mega-cities such as Beijing, Bangkok, Delhi, Jakarta, Manila, Mumbai, Seoul, Shanghai, Tokyo and Tehran, constitute a disproportionately large majority of these, possibly leading to a unique set of environmental challenges for Asia as a whole, with implications for this growing phenomenon across the world.

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8 Simon Marsden and Elizabeth Brandon, *Transboundary Environmental Governance in Asia: Practice and Prospects with the UNECE Agreements* (Edward Elgar, 2015).
2.2.3 Asia’s Normative Role in International Law: Geographically Significant but Historically Blunted?

A second overarching theme is Asia’s long history, which denotes both informal and formal interactions between civilizations, societies, and communities, over an extended time period. When Asia’s geographical size is coupled with the length of its history, both these factors also combine to ensure Asia’s significant role at the heart of public international law. As the continent with the second largest number of states in the world, as well as its two (and four out of five) most populous countries, the successful (or otherwise) implementation of any particular international law rule within Asia alone is arguably indicative of the possible success (or otherwise) of that international law rule across the whole world. In other words, a large number of Asian state(s) practice accepting and applying an emerging international legal obligation arguably contributes significantly to the crystallization of such an obligation as a customary rule of international law, albeit initially as a regional custom. Such state practice is all the more influential given the highly populous nature of several major Asian countries – just over a handful of these, namely, China, India, Indonesia, Pakistan, Bangladesh, Japan, and the Philippines, together amounting to more than half of the world’s human population today.

On the other hand, it is possible to suggest that until recently, and perhaps even presently, as far as international affairs is concerned, Asia conspicuously punches below its immense geographical and population size, not to mention the sheer weight of its long history. Even taking into account Asia’s rapid and growing economic strength, it is debatable whether Asia has truly re-emerged to take its rightful place at the centre of global affairs in the 21st century.10 Mishra and others have referred to the European colonial dominance of Asia across five centuries (amounting to half a millennium) as one reason for this (initial) Asian reticence.11 However, it may also need to be acknowledged and accepted that this slow Asian (re-)nascence is at least in part due to the inherent parochialism of Asian affairs, occasioned by the great distances and obstacles in geographical space and time that have historically conspired to constrain human endeavour within the land mass of this huge

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11 See Pankaj Mishra, From the Ruins of Empire: The Revolt Against the West and the Remaking of Asia (Allen Lane, 2012). References to this title in the present study are to the Penguin Books paperback edition (2013).
continent. While this is less the case in the maritime sphere, it is notable that Western colonialism of the East occurred following historically dominant periods of Indian, Mongolian, Chinese, and various Indochinese and Southeast Asian empires.

2.2.4 Constructing an Analytical Framework for the ‘Dialectical Interaction’ between International and National Environmental Law in Asia

Based on the introductory geographical and historical settings for the consideration of the role of international law within Asia generally, and international environmental law specifically, this section addresses the need to establish a suitable analytical framework for the not inconsiderable task of assessing Asian State Practice on Domestic Implementation of International Law in the Field of the ‘Environment’. Here, the present study arguably takes a different perspective on the relationship between these international regimes and their continental focus. Rather than simply examining the application of global and regional environmental treaty regimes to the Asian continent, and thus embodying the traditional ‘top-down’ approach to the relationship between international environmental law and its national subjects, this study instead proposes the application of a dialectic approach to the interaction between international law and the domestic Asian state practice of this branch of international law in the ‘environmental’ field.

This ‘dialectical interaction’ approach postulates that general international environmental law advances through the domestic developments of significant environmental law concepts, principles, rules and standards at least as much as developments within its international law counterparts. Moreover, this approach propounds that such national (state) practice of environmental law is at least as important to the overall progress of international environmental law as a whole. In other words, general international environmental law properly develops not just through the adoption of environmental treaties and associated international instruments, but also through the continuing ‘dialectical interaction’ between these international legal and institutional regimes, and their equivalent regimes at municipal levels across the world.

What holds true for the globe, may well also be the case for Asia as a continent. The hypothesis explored here then is as to whether a sufficiently unique Asian approach to the implementation of international environmental law concepts, principles, rules and standards to put ‘meat on the bones’ of the notion of the development of an ‘Asian Environmental Law’, that is reflective of a truly Asian-wide perspective. To be sure, similar exercises have been
undertaken previously, with a notable contribution by Mushkat in particular. But it is argued here that the present study, drawing as it will do from the seventeen (17) national reports commissioned by the Chair of the relevant ILA Study Group on Asian State Practice in the Domestic Implementation of International Law generally, including the ‘environment’, allows for unprecedented access to inputs from specialist national legal experts in their fields – in this case, ‘environmental law’, as a branch/field of (public) international environmental law as a whole.

As noted above, in proposing and applying this ‘dialectical interaction’ approach, this study eschews the traditional ‘top-down’ view of the international/national law relationship that Marsden arguably applies to the nine Asian sub-regions he identified in his consolidated study. Instead, this analysis cleaves towards the more nuanced approach taken to the relationship between international and domestic law by Tzanakopoulos in both his individual, and co-written, contributions to this debate. In particular, the reflexivity between


international and national legal systems highlighted by Tzanakopoulos arguably better explains their legal relationship and will be utilized in the present exercise as the basis for the ‘dialectical interaction’ between international and domestic environmental law within the Asian continent. Indeed, it is postulated here that this ‘dialectical interaction’ between international and national environmental law is especially pronounced in the Asian context due to the sheer longevity of the nature-human-civilization nexus within this continent.

In my view, the ‘dialectical interaction’ hypothesis outlined here builds on this reflexive international-national-international legal relationship within environmental law generally to highlight the growing significance of the role of domestic institutions, especially municipal courts, in developing important environmental law concepts, principles and standards, which in turn both inform and animate international courts and tribunals accordingly. Yet another recent contribution on Asian environmental law by Boer observes that: ‘(D)espite the inadequacy of the environmental legal frameworks and the lack of government implementation in some countries, particularly in South Asia and Southeast Asia, the courts have nevertheless been able to achieve significant environmental outcomes by using national constitutional provisions focused on basic human rights, especially the right to life.’

Indeed, Asia’s deep historical connections with nature specifically, and the environment generally, especially from the pre-colonial era, have arguably formed the basis for certain modern legal developments in Asian environmental law. For instance, these ancient, spiritual antecedents may form the background for an apparently greater willingness among certain Asian domestic courts and other authoritative bodies to assign legal protection, personality, standing, and even rights to non-human species and other national entities. A number of examples can be adduced in this regard, as follows:

(1) Both the Asiatic species of buffalo and lion, along with the Ganga (Ganges) and Yamuna Rivers, have been granted legal rights and personality, respectively, by proactive Indian courts, led by its Supreme Court;

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18 Ibid., at 227–229.
This latter legal protection for rivers coincidentally arriving just one day after a similar grant of legal personality to the Wanganui River by New Zealand legislation;¹⁹

The use of *fatwas* or edicts under the Islamic faith against illegal wildlife trafficking in Indonesia, where the leading Muslim clerical body, namely, the Indonesian Council of Ulama has declared the illegal hunting and trading of endangered species to be *haram* (forbidden).²⁰

2.2.5 Can an Intrinsically ‘Asian’ Approach to the Interaction Between International and National Environmental Law be Discerned?

The preliminary discussion above allows us to consider whether there is an intrinsically Asian approach to the relationship between international and national environmental law that can be discerned from Asian state practice implementing, interpreting, and applying the main environmental treaties and their associated international environmental instruments, as well as the environmental principles that all these legal authorities embody, within their national environmental laws.

While most Asian states have become parties to the main environmental treaties, in particular those relating to the main pollution sources, climate change mitigation and biodiversity protection, as well as having legislated on the main environmental issues of the day, the overall coverage and level of depth of these domestic environmental laws is uneven. This is reflected in the list of headings for reporting developed so far by the seventeen (17) national rapporteurs convened for this ILA Study Group. Nevertheless, certain trends that may be considered to be intrinsically (albeit not solely) Asian in their approach to international law generally, and international environmental law specifically, are summarised here below. Possible indications of an intrinsically ‘Asian’ approach to international environmental law in this regard consist of the following attributes:

First, Asian-specific jurisprudence from Asian domestic courts such as in India on rights for endangered wildlife species and natural entities (as already alluded above) and innovative legislation, for example, from Singapore on the Southeast Asian transboundary haze issue;

Second, where possible, eschewing legal, and specifically judicial, resolution of territorial, and especially, sovereignty disputes, in favour of international co-operation on the exercise of jurisdiction to manage shared natural resource and

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¹⁹ *Ibid.*, 136–143. While New Zealand is not technically an Asian country, its relative proximity to the Asian continent allows for favourable comparison of similar legal trends.

environmental obligations. Reverting to dispute settlement of environmental issues at the international level, it is possible to discern at least an implied preference by Asian states parties to the 1982 UNCLOS for forms of arbitration over judicial settlement of disputes under Part XV of this Convention. This option allows arbitrators to be chosen by states, rather than from a pre-ordained sitting panel of judges. For example, in the Land Reclamation Case, employing an Annex VII arbitration panel to settle a dispute between Malaysia and Singapore over land reclamation activities conducted by the latter state (Singapore) that the former state (Malaysia) objected to on the basis of alleged inadequate bilateral consultation and unaccounted for negative impacts to Malaysian fishing interests.

Third, also, in line with this implied preference against judicial forms of dispute settlement, there is an expressed in favour of informal ‘second-track’ institutional arrangements to address environmental and natural resource issues within Asian regions and sub-regions. This preference for ‘soft’, rather than ‘hard’ law approaches to bilateral co-operation can also be seen from the comparative dearth of regional environmental treaties, such as the UNEP-sponsored regional seas treaties, as compared to continental regions elsewhere in the globe. Instead, Asian regional and sub-regional organizations manifest themselves for example focusing on scientific co-operation over shared natural resources, such as fisheries and marine habitat and ecosystem protection. Examples are Partnerships in Environmental Management for the Seas of East Asia (PEMSEA) in Northeast Asia, and the Southeast Asian Fisheries Development Centre (SEAFDEC).

Finally, Asian countries are arguably beginning to incorporate the principle of integration of environmental protection through international trade and investment law instruments, and especially within major infrastructure development projects, international development finance institutions, such as the

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21 Partnerships in Environmental Management for the Seas of East Asia (PEMSEA) is an intergovernmental organization operating in East Asia to foster and sustain healthy and resilient oceans, coasts, communities and economies across the region. PEMSEA is supported by the UNDP and funded through the GEF. More information on PEMSEA is available at: http://www.pemsea.org/.

22 The Southeast Asian Fisheries Development Center (SEAFDEC) is an autonomous intergovernmental body established in 1967. SEAFDEC comprises 11 Member Countries: Brunei Darussalam, Cambodia, Indonesia, Japan, Lao PDR, Malaysia, Myanmar, Philippines, Singapore, Thailand, and Vietnam. The mission of SEAFDEC considered and adopted by the Special Meeting of the SEAFDEC Council, 2017 is ‘to promote and facilitate concerted actions among the Member Countries to ensure the sustainability of fisheries and aquaculture in Southeast Asia’. More information on SEAFDEC is available at: http://www.seafdec.org/.
Asian Infrastructure Investment Bank (AIIB) and New Development Bank, or BRICS Bank (BRICS – Brazil, Russia, India, China and South Africa). For example, the AIIB’s Environmental and Social Risk Assessment Framework is being applied to infrastructure projects financed by this new multilateral development bank (MDB).

2.3 Human Rights

Seryon LEE (Chonbuk National University Law School, Korea) and Kevin YL TAN (Faculty of Law, National University of Singapore, Singapore)

2.3.1 Background

While the values underlying human rights are universal in nature, such values have been interpreted differently across the continents because different states understand these values against the backdrop of their different historical, political, cultural, and social experiences and traditions. Some key challenges distinct to Asia include, but are not limited to geography, the lack of shared regional identity and tendency to emphasize cultural values over the universality of human rights. However, despite these obstacles, many Asian countries have been actively participating in the promotion of human rights in the international arena.

The overall purpose of this section is to examine national practices relating to human rights and identify challenges faced by Asian states in human rights protection.

Some key issues to be identified include the following:

(i) The Asian-Values Discourse:
Does a distinctive Asian concept of human rights exist? How has it been used at both international and domestic levels? Is there a trend of growing recognition of the universality of human rights in Asia?

(ii) General Assessment of Human Rights Implementation:
How has the international human rights protection system been implemented in Asia? (i.e., status of major international human rights treaties signed by Asian countries); How does the existing international system influence Asia? To what extent have Asian states contributed to the international system on human rights? How have they been implemented at national level through legislations, court cases related to human rights issues; observations and comments from international treaty bodies

(iii) Specific Human Rights Issues:
Gender discrimination, child rights, women’s rights; Regarding these issues, what are the common/different factors found among Asian countries? What are the challenges?
(iv) Assessment of Obstacles to the Full Realisation of Human Rights in Asia

2.3.2 The Asian Values Discourse

Since the end of World War II, the debate on the universalism of human rights and the importance of culture was a central theme in the conceptualization and realization of human rights around the world. The concept of Asian values, which eschews universalism in favour of cultural particularism and regional specificities, emerged in the early 1990s as a response to what was regarded as the hegemony of western conceptions about human rights. The Asian states, through the Bangkok Declaration of 1993 and various other pronouncements at the World Conference on Human Rights in Vienna in 1993, argued that individual freedom and democracy enshrined in international human rights law were the creation of post-war European political philosophy. Proponents of Asian values viewed culture as the supreme ethical value and were concerned that the European-oriented concept of human rights could undermine the unique Asian cultures. Though diversity exists among Asian countries, they often share common values such as an emphasis for an individual’s duties to society and respect for hierarchy, social harmony and the primacy of community or family over the individual. In fact, human rights in the context of Asian Values are often manifested by the relationship between the state and individual.

However, a series of geopolitical, economic and social factors at the end of the 20th century led to the demise of the Asian values discourse. Although the relation between Asia and human rights has been generally portrayed rather pessimistically due to the absence of a regional mechanism on the protection of human rights, the Asian region has seen the rise of openness to democratization and democratic practice. In this context, the adoption of the Association of Southeast Asian Nations (ASEAN) Charter in 2007 and the subsequent creation of the ASEAN Intergovernmental Commission on Human Rights.

23 The Bangkok Declaration was signed by 34 states and opened up the discussion on how Asian value should be applied to the human rights discourse.
24 This is reflected by Amartya Sen’s views that what need to be explored thorough the course of discussion on Asian value is whether Asian countries share the common feature of prioritizing order and discipline over individual freedom and liberty. Amartya Sen, Human Rights and Asian Values, presented on the 16th Morgenthau Memorial Lecture on Ethics and Foreign Policy, 1997.
25 While the economic crisis of 1997, in particular, is often cited as the major reason for the demise of academic debate on Asian values, the cultural differences, which lie at the heart of the debate of Asian values, were often used to explain that human rights were still considered as Western concept. Leena Avonius and Damien Kingsbury, Human Rights in Asia: A Reassessment of the Asian Values Debate (New York, Palgrave Macmillan, 2008), 11–13.
Rights (AICHRR) raise interesting questions regarding the theoretical and political future of the Asian values discourse. The Asian Human Rights Declaration (AHRD), which was unanimously adopted by the ASEAN countries in 2012, became a starting point to reignite the old debate of the dichotomy between universalism and cultural relativism in Asia.26

2.3.3 General Assessment of Human Rights Implementation

2.3.3.1 International Level

Some key issues to be identified in this sub-section are as follows: (a) To what extent do international mechanisms impact the human rights situation in Asian states; (b) Are there similarities in commitment or behaviors among Asian states at international forums notwithstanding the region’s heterogeneity? To answer these questions, we need to closely examine not only domestic legal orders, but also states’ behavior before various international bodies within the UN.

Implementation of human rights standards – especially where it concerns social and economic rights – can be difficult for developing countries where the scarcity of resources may impose challenging obstacles to achieving compliance with international human rights standards.

The international human rights protection system provides forums for not only discussing human rights issues, but also for the codification of norms. Asia was involved in the creation and development of the international human rights system. At the United Nations, Asian states participated actively in ‘upgrading’ the Commission on Human Rights to the Human Rights Council as 13 of the 47 seats were occupied by states from the Asia-Pacific region. To understand Asia’s level of commitment to the international human rights system, we need to observe and understand the behavior of Asian states through the Human Rights Council mechanism, especially the Universal Periodic Review (UPR) process. These reports and the follow-up queries and responses offer us useful insights into state attitudes to human rights protection and issues.

Although the level of human rights protection is not always necessarily linked to the acceptance of international treaties, the records with the OHCHR and status of ratification of key international human rights treaties reveal the level of commitment by Asian states as well as some common characteristics. While most Asian states have ratified major international human rights standards,

26 The AHRD makes references to the regional and national in paragraph 7 as follows: [...] All human rights and fundamental freedoms in this Declaration must be treated in a fair and equal manner, on the same footing and with the same emphasis. At the same time, the realization of human rights must be considered in the regional and national context bearing in mind different political, economic, legal, social, cultural, historical and religious background.
treaties, they show a low rate of ratification of optional protocols to such treaties.\(^27\) Also, the number of instruments pertaining to specific protection such as for migrant workers signed by Asian states is relatively low compared to other regions of the world.

Moreover, the analysis of national integration of international human rights norms among Asian countries will be essential to assess the level of human rights implementation. The overall status of ratification will be assessed not only by the number of states signed or ratified, but also the content of the reservations or declarations to major international human rights treaties.

2.3.3.2 National Level

The implementation of international human rights at the national level can be assessed in various ways by looking at domestic legislation, judicial decisions, state reports submitted to international monitoring bodies and concluding observations by relevant treaty bodies. Addressing human rights issues in any part of the region is challenging as the implementation of human rights usually depends, to a large extent, on the political will of states to comply with international standards. Implementation entails an array of activities such as the enacting of local legislation and the creation of policing and enforcement mechanisms.

As with other continents, international treaties are not directly enforceable in most Asian states unless they are incorporated into the domestic law. Moreover, at the regional level, a lack of regional bodies, except in ASEAN, makes it more difficult to address human rights in the context of what might be regarded as ‘Asia’. However, the purpose of this section is not to discuss the establishment of a single unified Asian system of human rights protection, but to focus on the relationship between Asian states and the international system and the impact each has on each other.

2.3.4 Specific Human Rights Issues in Asia

In this part of the analysis, the focus will be on so-called first and second generation rights: civil and political rights, and economic, social and cultural rights. With respect to civil and political rights, we need to ascertain how human rights are dealt in the public sphere. Domestic situations vary greatly among the Asian states and for some of them, civil and political rights may not be part of the public sphere at all; otherwise, divergent views may exist or such rights may form an integral part in the public discussions.

Many Asian states have laws permitting derogations or exceptions to freedoms of expression, association and peaceful assembly. These are often made

in the interests of state or national security or to maintain public order. In most cases, such laws may conflict with international human rights law as terms such as ‘national security’ or ‘public welfare,’ ‘public order’ may be too vague and broad so much so they can be used to mask social and political repression.

The promotion of economic and social rights exact a cost on the part of states. As such, much discussion has centered on how poverty remains the main obstacle to the full and effective enjoyment of such rights. Not all Asian states systematically enshrine these rights in their national laws. It is also generally known that some Asian states are inclined to prioritize economic and social rights over civil and political rights. This is made all the easier as these two categories of rights are enshrined in two separate international covenants (the ICCPR and ICESCR). As the Vienna Declaration and Program of Action pointed out, all human rights are ‘universal, indivisible and interdependent and interrelated’ and should thus be accorded equal importance.

There have been a number of important internal changes among the Asian states to create effective legal mechanisms to guarantee individual rights, thus resulting in an improvement of the protection of human rights. Although situations differ across Asia, countries that have improved their human rights situations have usually undergone some degree of democratization. The documents published by relevant international organizations will be particularly helpful to identify the key human rights issues in the Asian region.28

Keeping in mind that the discussion on human rights in the Asian region should be specific, the following topics will be thoroughly studied: Gender Discrimination/Women’s Rights;29 Rights of the Child;30 Rights of Migration Workers and Refugees.31


29 As gender discrimination has been quite pervasive in Asia, the overall status will be provided by the recent release of the Global Gender Gap Report by the World Economic Forum, which revealed the relative gaps between Asian women and men on measures of health, educational attainment, political empowerment, economic participation and opportunity.

30 Along with the relevant national legislation and policies, this topic will include the annual global index such as “The KidsRights Index,” which comprises a ranking of all UN member states to provide the overall performances with respect to children’s rights in the areas of right to life, health, education, protection, and enabling environment for child rights among Asian countries.

31 In order to ascertain the overall situation of labour migration and refugee issues in the Asian region, the reports and data provided by the International Organization for Migration, the International Labour Organization and the UNHCR will be examined.
2.3.5 Assessing Obstacles to the Full Realisation of Human Rights in Asia

It is often pointed out that the lack of a shared identity in Asia as a single regional entity offers a considerable obstacle to formation of consensus and attainment of cooperation on any issue. Particularly, establishing an effective mechanism to ensure accountability for past human rights violations is an important step to realize human rights. Such accountability will involve punishing the perpetrators of human rights violations as well as providing victims with appropriate remedies. As the starting point for individual victims to seek remedy for human rights violations is the national legal order, it is necessary to know what remedies are available within domestic systems. This may require an analysis of the judicial, prosecution, or law enforcement systems of Asian countries.

Another impediment might be the unique political and social culture in the Asian states insofar as how state power is exercised and how important social hierarchy is. Proper assessment of social and political factors in the region may be important as respect for rights depends on such factors.

2.3.6 Conclusion

In conclusion, this section will cover the current status of implementation of human rights in the Asian region, identify challenges and seek to find viable solution to increase the region's engagement in the protection and realization of human rights.

2.4 Trade and Investment

Christine SIM (Executive Editor, Asian Yearbook of International Law) and RAVIDRAN Rajesh Babu (Indian Institute of Management Calcutta, India)

2.4.1 Introduction

In the following years, Asian states implementing international law within their domestic regimes may face the following challenges:

(1) Maintaining consistency of interpretation and implementation of multinational trade and investment agreements;

(2) Negotiations with and creation of international legal norms by other regional blocs such as Europe and the United States;

(3) Withdrawal of Asian states from the system of international economic law through treaty denunciations;
(4) Failure to participate in the WTO regime and the effects of a potential “trade war” on the implementation of international law in Asian states; and
(5) Resolving conflicts between international and domestic environmental obligations, and international trade and investment obligations.

It is critical that Asian states focus on the drafting of their international trade and investment treaties. As international economic law is largely comprised of a global network of binding international trade and investment treaties, if the trend of multi-national and comprehensive economic agreements continues over the next five years, Asian states would face the challenge of implementing similar trade and investment commitments within their domestic legal systems.

2.4.2 Consistency in the Interpretation and Implementation of Multi-National Trade and Investment Agreements

The World Trade Organisation (WTO) system is responsible for harmonization of international trade obligations between most Asian states. The WTO Dispute Settlement Understanding provides a common dispute settlement forum for all international trade disputes arising under the GATT and related agreements.

In contrast, the investment protection system currently comprises a dispersed network of approximately 2,658 bilateral investment agreements (BITs) and 385 treaties with investment provisions (TIPS). As shown by UNCTAD, most bilateral investment treaties were signed in the 1990s and early 2000s.32

In recent years, Asian states have been leading the negotiation of multi-national and regional trade and investment agreements, such as the treaties between ASEAN and separate Asian economies China, India, Australia, New Zealand, Japan, Korea, Hong Kong; the Comprehensive and Progressive Agreement for a Trans-Pacific Partnership (CPTPP), and the Regional Comprehensive Economic Partnership (RCEP). The CPTPP involves 11 countries, 7 of which are Asian: Australia, Brunei, Japan, Malaysia, New Zealand, Singapore, and Vietnam. Similarly, RCEP, which concluded the negotiation and finalized the text on 4 November 2019 in the Bangkok summit, consists of 15 countries (Brunei, Cambodia, Indonesia, Laos, Malaysia, Myanmar, Philippines, Singapore, Thailand, Vietnam, Australia, China, Japan, New

Zealand and Republic of Korea) in the Asia Pacific region and will provide a common set of trade and investment rules consistent with WTO rules.

The difference between these new multi-national trade and investment agreements, and the older bilateral investment treaties, is three-fold:

1. Asian states are binding themselves to common standards of protection within the same treaty;
2. Asian states are combining trade and investment obligations within the same treaty, and at times referring to common exceptions for both trade and investment obligations;
3. Asian states are committing to a common dispute settlement forum or a common set of dispute settlement options.

The domestic implementation of the obligations and standards set out in these multi-national trade and investment agreements will be challenging. In this light, the Study Group should flag the complexities of older multi-national and comprehensive free trade agreements such as the North American Free Trade Agreement (NAFTA). It may also be relevant to consider the economic aspects of the Treaty on the Functioning of the European Union, COMESA, and the Organisation of Islamic Cooperation (OIC).

Such a study would consider the usefulness or implications on domestic law of a similar comprehensive Asian trade and investment agreement. This would bring Asian states a step closer to the level of regional integration similar to the European Union, the OIC, COMESA and the African Union.33

2.4.2.1 Notes of Interpretation

As Asian states express a preference for common binding standards in trade and investment law, there would be a greater expectation that these common standards apply equally to all Contracting Parties. One useful tool for multi-national economic treaties could be the use of a binding note of interpretation issued by all Contracting Parties, which would constitute a “subsequent agreement” under Article 31(3)(a) of the Vienna Convention on the Law of Treaties.

Many recent treaties involving Asian states provide an avenue for the Contracting Parties to issue a subsequent binding interpretation of a treaty

provision. Such subsequent agreement on interpretation may be issued indi-
rectly by a nominated committee established by the terms of the treaty. For
example, the EU-Singapore Investment Protection Agreement provides that
an interpretation adopted by its Committee shall be binding on tribunals
deciding disputes arising under the treaty.34

In the case of multi-national treaties, it may be practically impossible to
obtain the agreement of all the contracting states in time for a tribunal to con-
sider such a subsequent note on interpretation as binding. Further, the ques-
tion remains whether notes issued subsequent to the submission or decision
on a dispute can retroactively affect such decision.

2.4.2.2 Exceptions for Security, Health, the Environment and Labour
Protection
Recent investment agreements have included general exemptions modelled
on GATT provisions,35 and some model treaty texts used by states as a starting
point for negotiations include explicit references to WTO agreements.36 General
exemptions provisions modelled on GATT Article 20, sought to be included
in recently signed investment agreements, such as the draft EU-Vietnam FTA,
India's model BITs text 2015 and the draft EU–Singapore FTA.

Due to a ruling from the European Court of Justice, the trade section was
split up from the investment section in these previously comprehensive trea-
ties. The use of general exceptions have been amended to a general affirm-
a tion of the right to regulate. For example, Article 2.2.1 of the EU-Singapore
Investment Protection Agreement provides that “Parties reaffirm their right
to regulate within their territories to achieve legitimate policy objectives, such
as the protection of public health, safety, environment or public morals, social or
consumer protection, or promotion and protection of cultural diversity.”

34 EU–Singapore Investment Protection Agreement, Article 3.13.3, available at: https://eur-
lex.europa.eu/resource.html?uri=cellar:55d54e18-42e0-11e8-b5fe-01aa75ed71a1.0002.02/ DOC_2&format=PDF#page=29.
35 Andrew Newcombe, ‘General Exceptions in International Investment Agreements’, in
Marie-Claire Cordonier Segger, Markus W. Gehring, et al. (Eds.), Sustainable Development
36 For example, the United States’ current model BIT, released in 2012, directly cites and
draws from the WTO Agreement on Trade-Related Aspects of Intellectual Property Rights
(Articles 6, 8, and 14), the General Agreement on Trade in Services (Article 21), the
Agreement on Technical Barriers to Trade (See Article 11), the Agreement on the Application
of Sanitary and Phytosanitary Measures (See Article 11), and includes exceptions similar to
GATT Article XX (Articles 8 and 12).
2.4.2.3 Common Dispute Settlement Forums for Trade and Investment Disputes

For years after the entry into force of NAFTA, the collective decision of Canada, Mexico and USA to combine an investment protection chapter containing separate dispute settlement procedure, with a broader free trade agreement, has led to complexities in domestic implementation of international law. These complexities arise in particular, in the interpretation of standards, the scope of jurisdiction of the constituted dispute settlement tribunals; and lead to difficulties in domestic implementation of international economic law.37

For example, in *S.D. Myers v. Canada*, the investor was engaged in cross-border trade in waste management services, which the investor claimed were damaged as a result of regulations under the Canadian Environmental Protection Act. As the jurisdiction granted to the tribunal hearing investment disputes was limited, Canada, Mexico and the United States agreed that the tribunal's task was limited to assessing damages flowing from the breach of the NAFTA's provisions with respect only to investment protection obligations strictly found within Section A of Chapter Eleven. The three Contracting Parties agreed that the investment tribunal had no jurisdiction to assess damages with respect to cross-border trade in goods or services that fell outside Chapter Eleven.38 However, the investor had claims under Chapter Twelve of the same treaty, regarding Cross-Border Trade in Services, that were very closely related to the claims for breach of investment protection.

2.4.3 Negotiations and the Creation of International Legal Norms by Other Regional Blocs

Asian states may negotiate individually or in blocs. The EU trade agreement with Singapore for example, will remove nearly all remaining tariffs on certain EU products, simplify customs procedures and set high standards and rules. It simplifies trade in goods like electronics, food products and pharmaceuticals, while stimulating green growth. It opens up the market for services like telecommunications, environmental services and engineering.

Asian states have always faced the challenge of negotiating with other regional blocs. The ability of smaller Asian economies to command bargaining


strength has in part depended on unity in their approach to negotiations. The ASEAN+1 negotiations reflect this approach.39

In addition, as Asian states continue to develop economically, they often face the challenge of adapting to a change in strategy made by larger negotiating partners. Recently, the United States has withdrawn from several international trade and investment agreements, most notably the Trans-Pacific Partnership (TPP). The European Union is currently pursuing a policy of negotiating trade and investment agreements on behalf of all its member states. In particular, smaller Asian states negotiating investment protection agreements with the EU currently face the question of whether to take model provisions preferred by the EU with regard to the setting up of an international investment disputes court.40

These external challenges pose complications for the domestic implementation of international law by Asian states. The implementation of preferential treatment in trade and investment policies for one group of nationals would result in different treatment of such nationals under domestic law.

2.4.4 Withdrawal from International Economic Treaties

As of December 2019, India has taken steps to terminate more than 68 bilateral investment treaties. India has been negotiating joint interpretative statement (JIN) with BIT partners to address concerns in the agreements. Similarly, Indonesia has since 2014 taken steps to terminate its 67 bilateral investment treaties. It remains to be seen whether other Asian states that have found themselves on the receiving end of investor-state arbitrations commenced by investors would follow.

Implementation of international trade and investment obligations by domestic courts remain a significant challenge in Asian states. The Indian Supreme Court and Indonesian courts have separately issued judgments deciding that international tribunals do not have jurisdiction to order the states to cease domestic legal proceedings as they constitute a violation of the states’ sovereignty.41 There will continue to be differences between the


courts of Asian jurisdictions in their enforcement of arbitral procedural orders and awards against states.

2.4.5 Failure to Participate in the WTO Regime and the Effects of a Potential “Trade War”
Asian states would face the dual challenges of resolving their existing trade disputes in the face of a malfunctioning WTO dispute settlement regime and navigating a potential “trade war” helmed presumably by the competing policies of the United States and China. The US slapped 25 percent duties on majority of the Chinese imports to the US, which was reciprocated by China with similar action. Similarly, concerns are on the rise in US-India trade and the US terminating US GSP status with effect from 5 June 2019. According to recent news reports, the US is accusing India of not providing equitable and reasonable access to US products, particularly unfair treatment of dairy products and price controls on medical devices.

2.4.4.1 How Would Asian States Resolve their Trade Disputes without a Functioning Appellate Body?
On 11 December 2019, with the expiry of the term of two of the remaining three members of the WTO Appellate Body, the WTO’s dispute resolution mechanism has formally ceased to function, raising questions on the future of the rules-based trading system. The US has blocked appointments to the WTO Appellate Body and demanded systemic change in its functioning. An appeal requires a minimum of three Appellate Body Members. The functioning of the WTO Dispute Settlement regime critically depends on the ability of the Appellate Body to hear appeals from panel decisions and to issue binding decisions. The last time that the Appellate Body was fully composed of 7 Appellate Body Members was June 2017. This crisis has been described as a matter of “trade multilateralism” with serious implications on the “prospects for international cooperation in trade for the next decades”.

As on January 2020, 14 appeals from Dispute Settlement Board (DSB) panel decisions are pending, possibility indefinitely, unless the WTO members find bilateral means to settle the dispute. Two of these notices of appeals were filed

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by India and one by Thailand, and another appeal was against India filed by the US.

No less than 117 WTO members, including most of the Asian states, have repeatedly made joint proposals urging the DSB to fill the vacancies. They have also made proposals to reform the appellate review procedure and resolve outstanding issues with the Appellate Body. The joint proposal, of which China, India and Singapore were signatories, suggested procedural improvements such as allowing outgoing Appellate Body members to complete a disposition of a pending appeal in which a hearing has already taken place and non-extension of the 90-day appeal timeframe without approval by the parties to a dispute. The proposal also attempts to limit Appellate Body’s interpretation of the meaning of contested national laws and restrict appellate review to issues on appeal only to the extent necessary. The United States has, however, taken a position that its systemic concerns remain unaddressed. This crisis may become an existential threat to the rule based multilateral trading system that the WTO represents.

Following the frustration of the Appellate Body, Asian states with existing trade disputes are facing the following risks:

1. Appeals falling “into the void”, followed by a block on panel reports;
2. Agreements to appeal ex post or ex ante no appeal pacts, followed by regular adoption of panel reports by the Dispute Settlement Body (DSB) under the negative consensus rule;
3. Article 25 arbitration appeals making panel and appeal reports automatically binding without DSB adoption; and
4. “floating” panel reports (or interim panel reports) that are neither adopted nor appealed/blocked.

In January 2020, around 17 WTO member states, including China, Republic of Korea and Singapore from Asia, agreed to form a multi-party interim appeal

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44 WTO, Joint communication from the European Union, China, Canada, India, Norway, New Zealand, Switzerland, Australia, Republic of Korea, Iceland, Singapore and Mexico, WT/GC/W/752, 26 November 2018.

arrangement based on Article 25 of the WTO Dispute Settlement Understanding, until a reformed WTO Appellate Body becomes fully operational.46

2.4.4.2 How Would the “Trade War” Affect the Implementation of International Law by Asian States?

The US-China “trade war” and US-India “mini trade war” has the potential of causing serious harm to business interests, financial markets and trading relationships across the Asian region. The US has long accused China of unfair trading practices and intellectual property theft, and India of not providing equitable and reasonable access to US products in Indian market. The US and China have since imposed tariffs amounting to more than $360bn against Chinese goods and more than $110bn against US products respectively.47

The WTO Appellate Body findings against the US tariffs measures imposed on Chinese goods, and allowing China to impose retaliatory trade measures has only strengthened US position against China and its continued withdrawal from the international trade regime by blocking the nomination of Appellate Body Members and withdrawing from trade commitments to Asian states such as India.48

WTO economists have attempted to quantify the medium-run economic impact of a wider trade conflict in which international cooperation on tariffs breaks down completely and all countries set tariffs unilaterally. The International Monetary Fund (IMF) has cited US-China trade tensions as one of the factors that contributed to a “significant weakened global expansion” in the 2019 global growth forecast. A “trade war” is estimated to lead to a reduction in world GDP in 2022 of about 2% and a reduction in global trade of about 17% compared to baseline projections. For comparison, global GDP fell about 2% and global trade dropped about 12% in 2009 following the financial crisis. The January 2020 “phase one” deal between the US and China seems to have slightly eased trade tensions, though several unresolved issues remain. A potential positive effect of the US trade war is that India and China may look to each other for closer trade ties.49

The failure of the WTO dispute settlement regime would exacerbate any growing “trade wars” as there would be no reliable dispute settlement system to resolve disputes that arise from tariffs or anti-competitive measures imposed by the US, China, or other states. If multilateral dispute settlement breaks down completely, Asian states would have to consider the viability of settling trade disputes through consultations, good offices, mediation, or alternative legal bodies formed under free trade agreements.

Bilateral or regional trade agreements may be strengthened through optional dispute settlement protocols. During the mandate of this Study Group, Asian states party to the leading multilateral trade agreements such as the CPTPP and the ASEAN FTAs may have to consider invoking dispute settlement provisions and financing dispute settlement bodies under these agreements.

Further, the question remains whether the monitoring of domestic implementation of international trade obligations under the WTO system, would continue in the face of challenges to the multilateral enforcement mechanism under the WTO. Asian states may have to consider other monitoring mechanisms to ensure the domestic implementation of trade obligations.

2.4.6 Resolving Conflicts between International and Domestic Environmental Obligations, and International Trade and Investment Obligations

Public scrutiny of the negative impact of international trade and investment agreements on the ability of state regulators to enforce international and domestic environmental protection obligations has increased. For instance, multi-national trade and investment agreements have been described as:

The RCEP and the TPP are both extensions of the WTO framework – designed to concentrate wealth in the hands of global corporate elites.
Neither the US-led TPP nor the China-led RCEP will address the long-standing demand for an international trading system that responds to people’s needs.51

Domestic challenges are likely to be unique to the existing laws of each Asian state. For instance, in Malaysia, domestic debate over the CPTPP has intensified as the Malaysian government is required to modify approximately 18 domestic regulations related to issues such as intellectual property, labour and government procurement in order to align the country’s regulatory environment with commitments taken under the CPTPP. This means a slow process of ratification, which would be a common issue for many Asian states.

One issue in particular is likely to gain importance during the mandate of this Study Group – Asian states could face increasing pressure to comply with international environmental laws and to promote domestic regulations for the health and safety of their populations.

The CPTPP provides an Environment Chapter which includes both binding and non-binding commitments relating to environmental protection. Generally, the binding obligations require CPTPP Parties to effectively enforce its environmental laws in a manner affecting trade or investment between the Parties, provides that the Parties should not derogate from environmental laws in order to encourage trade or investment between the Parties, and prohibit subsidies, to protect fisheries.

Similarly, the ASEAN Comprehensive Investment Agreement (ACIA) contains several provisions that require ASEAN states to reconcile domestic environmental protection obligations with international trade and investment commitments. According to Annex 2 of the Amended ACIA, a tribunal deciding on a dispute regarding expropriation of an investment must consider “whether the action is disproportionate to the public purpose”. In addition, the ACIA expressly refers to protection of public health, safety and the environment when adopting the international law standard that “non-discriminatory measures of a Member state that are designed and applied to protect legitimate public welfare objectives, such as public health, safety and the environment, do not constitute an expropriation.”

The EU-Singapore also includes a comprehensive chapter on trade and sustainable development, setting high standards of labour, safety, environmental

and consumer protection, as well as strengthening joint actions on sustainable development and climate change.

Australia, the Republic of Korea and Japan in recent years have led in addressing environmental protection in their trade and investment treaties. Among others, the Colombia-Korea investment protection chapter may be studied as a recent model treaty. Specific provisions have been drafted which limit the scope of investment protection to take into account environmental protection measures. Article 8.11 provides:

Nothing in this Chapter shall be construed to prevent a Party from adopting, maintaining, or enforcing any measure otherwise consistent with this Chapter that it considers appropriate to ensure that investment activity in its territory is undertaken in a manner sensitive to environmental concerns.

The definition of indirect expropriation in Annex 8-B, Article 3(b) excludes nondiscriminatory measures to protect public health, safety, and the environment. It is limited to “rare circumstances, such as, for example, when an action or a series of actions is extremely severe or disproportionate in light of its purpose or effect.”

Chapter 8, Article 8.9(3)(c) addresses a state’s environmental measures in the context of its obligations not to adopt regulations that constitute in effect a “disguised restriction on international trade or investment”:

Provided that such measures are not applied in an arbitrary or unjustifiable manner, and provided that such measures do not constitute a disguised restriction on international trade or investment, paragraphs 1(b), (c), and (f), and 2(a) and (b), shall not be construed to prevent a Party from adopting or maintaining measures, including environmental measures: (i) necessary to secure compliance with laws and regulations that are not inconsistent with this Agreement; (ii) necessary to protect

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52 A more detailed study may include these treaties signed in the last five years: Colombia–South Korea, Morocco–Vietnam, Japan–Saudi Arabia, Japan–Mozambique, New Zealand–Taiwan, Colombia–Singapore, India–United Arab Emirates, Japan–Myanmar, South Korea–Myanmar, Australia–Japan, Canada–South Korea, Japan–Kazakhstan, ASEAN–India, Japan–Uruguay, Japan–Ukraine, Japan–Mongolia, South Korea–Turkey, South Korea–Vietnam, Eurasia–Vietnam, Korea–New Zealand, EU–Vietnam, China–South Korea, Australia–China, EU–Kazakhstan, Iran–Japan, Canada–Hong Kong, Japan–Kenya, Canada–Mongolia, Nigeria–Singapore, Chile–Hong Kong.
human, animal, or plant life or health; or (iii) related to the conservation of living or non-living exhaustible natural resources.

Ancillary to their free trade and investment agreements, China and New Zealand have a separate Environment Cooperation Agreement and a Memorandum of Understanding on Labour Cooperation.53

3 Preliminary Conclusion

As a preliminary matter, based on the research that has been done so far to address the primary question as to whether there is an Asian approach to international law that is distinct from international law that was derived from the West, it is too early at this point to make a substantive conclusion that there is a unique perspective to international law that emanates from Asia. That is not to state that there is no distinctive approach, but it is apparent that more data needs to be collected and analysis done to provide a more definitive account of the operation of international law within Asian states. That data will include specific instances of how a particular Asian jurisdiction implements international law through its judiciary, legislative and executive branches of government and its interaction with other states as well as the relevant historical experience of the Asian country’s encounter with and assimilation of public international law. It is at that point when some discernible pattern will emerge, if any, that will give an indication as to whether a unique Asian approach to international law exists and in what form.

What can be observed at this juncture is that there are international legal issues in areas such as the environment and human rights that look to be unique to parts of Asia on account of a shared and extensive history which existed between between civilizations, societies, and communities and commonalities in the political and social culture of some Asian states that is reflected in the matter in which government power is exercised and the importance of social hierarchy. At least on the surface, there appears to be similarities in the ways that Asian states have approached international legal issues within their jurisdictions.

In other areas such oceans and territory and trade and investment, Asian states have been active in application of legal principles to these matters, it is less clear that there is a particular Asian approach. The challenge towards isolating an Asian approach to international law is the presence of other factors that are not necessarily region specific such as the economic and/or geopolitical circumstances of a particular country or a group of countries that can also provide a compelling explanation of its usage of international law, not to mention the domestic forces present in a specific country that can affect the application and implementation of international law. Searching for an Asian region-specific approach to international law will need to address these important considerations before a conclusion can be made.