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

**By:**

Seokwoo Lee

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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 have 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 note 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 the impact of these developments 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.

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?

## Ocean and Territory

State reports reveal a number of areas in which domestic laws do not align exactly with provisions in the United Nations Convention on the Law of the Sea (LOSC) to take but one case. 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.

## Environment

The preliminary discussion 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.

## Human Rights

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 remedies for human rights violations is the national legal order, and thus, 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 regarding 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.

## Trade and Investment

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.

## 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 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.

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