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Where's the Law in the Rules-based International Order of the Indo-Pacific?

Looking at US-China geopolitical strategizing through the lens of law

By Tan Hsien-Li
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Tensions between China and the United States have continued unabated over the past two years. There were initial hopes that, after the unilateralist rhetoric of President Trump, the escalating bipolarity in the world order would ease under the Biden administration. Instead, the Sino-US rivalry has only intensified and expanded, with the liberal, democratic powers on one side and the more "autocratic" China on the other.

Multilateral cooperation has fractured further, with the US and China each seeking support from members of the international community and justifying their respective strategies to uphold the "rules-based international order of the Indo-Pacific." Although it was initially unclear what the geographic and strategic parameters of the Indo-Pacific were and what its rules would encompass, the sub-regions of focus, specific players, and normative lines have become more distinct.

While the Indo-Pacific spans a vast region, the focus of current strategizing by government decision makers and defense forces and the attention of policy analysts seems to be on China, the 10 members of the Association of

Southeast Asian Nations (ASEAN), and to some extent ASEAN's other partners. As for the rules-based international order, the discussion centers around economic partnerships and security alliances – not just on what the major powers want, but also how ASEAN members are going to engage with them.

Both sides tried to strengthen their respective positions in 2021. To cite just a few examples: two prominent economic programs were created to compete with China's Belt and Road Initiative. In June 2021, President Biden and other Group of Seven leaders launched the "Build Back Better World Partnership" (B3W) to support the infrastructural needs of, and engage with, low- and middle-income countries. In December 2021, the European Union announced a similar project called the "Global Gateway" to reinforce the B3W. In September 2021, Australia, the United Kingdom, and the United States signed a trilateral security pact dubbed "AUKUS" to help Australia purchase nuclear-powered submarines. On China's part, during the November 2021 summit between ASEAN and China to strengthen their strategic economic and security partnership, President Xi offered assurances that China would not "bully" smaller countries.

Unsurprisingly, commentaries on international relations and political economy are replete with narratives of "another Cold War," "containment," and "who makes the rules" in this Indo-Pacific order.

Yet, apart from Stephen Walt – who pointed out that both the US and China support a multilateral system, and that the former emphasizes a more or less equal order "albeit one with special privileges for some states" and champions democratic norms such as human rights, while China espouses a more "Westphalian" arena where respect for sovereignty is absolute with non-interference in any state's affairs – many other commentators curiously overlook such critical points as what international laws might be called into question by the outcome of the US-China competition and which norms matter in the Indo-Pacific.

This omission is ironic as these international economic and security arrangements are rooted in binding treaties (or, if not, soft law declarations) and thus are themselves forms of international law that must uphold the general principles of the international legal order. Moreover, although power and politics are undeniably the dominant navigational tools in the Indo-Pacific, law is also deemed integral to regional management. Both large powers and smaller state actors hold fast to international law – even as it is comparatively understated and receives much less media attention than major power diplomacy and strategy.

The longstanding international laws that impact peace and security in this region include the United Nations Charter and

the Treaty of Amity and Cooperation (especially on non-use of force and peaceful settlement of disputes), the United Nations Convention on the Law of the Sea or UNCLOS (particularly on territorial delimitation and exclusive economic zones), and the Southeast Asian Nuclear Weapons Free Zone (on nuclear non-proliferation).

On international economic law, multilateralism through the World Trade Organization remains a cornerstone. There are also numerous free trade agreements (FTAs) that ASEAN and its individual member states have signed (or are negotiating) in various combinations with the eleven ASEAN dialogue partners. Apart from the numerous bilateral agreements, examples of multilateral FTAs include the ASEAN-China FTA and the recently launched discussions for an ASEAN-Canada FTA. In addition, there are of course two newly-minted "mega-multilateral agreements," the Regional Comprehensive Economic Partnership and the Comprehensive and Progressive Trans-Pacific Partnership.

All these laws have shaped and continue to shape the rules-based international order of the Indo-Pacific. The state actors and international organizations involved have themselves regularly highlighted the need to respect international law.

For the large powers, this is understandable because relying on international law principles affords them some form of "moral high ground" to act – though this platform is considerably lower if international law is more rhetoric than real action. As Ben Scott observes, if the US improved its international law compliance – for example, by ratifying UNCLOS – this would "greatly enhance" its defense of the rules-based international order, its surveillance of the South China Sea, and its support of ASEAN members' claims to territorial waters. Despite being an UNCLOS signatory, China faces similar skepticism in light of its activities in the South China Sea.

More crucially for the smaller states in the region – and a heads-up to bigger powers that want to engage them – international law really does matter. By providing a "rulebook" of acceptable behavior, international law gives them some protection against capricious actions by larger powers. The smaller state actors – particularly ASEAN members – are mindful of protecting their own interests via international law and may be less swayed by big power courtships. This is seen clearly in the highly-contentious and long drawn-out negotiations for a binding Code of Conduct for the South China Sea, where ASEAN members are firm vis-à-vis China that the agreement must abide by UNCLOS.

It must be noted that relationships in the contemporary Indo-Pacific arena lack the relative "straightforwardness" of Cold War bipolarity. ASEAN members may also be less keen on taking sides

between the US and China as a matter of domestic policy.

Incidentally, if one were alert to what the law undergirds, it would easily be noticed that while ASEAN members remain wary of Chinese overtures, they not only espouse similar Westphalian norms of absolute sovereignty and non-interference in their intraregional treaties and declarations but frequently behave accordingly. Thus, even if ASEAN members largely view the US as a benevolent hegemon, it would not be so easy for them to take on liberal democratic values via new external treaties with the US, whether in the form of bilateral or multilateral agreements on security or trade and investment.

In summary, the law really does matter. By paying more attention to law – in addition to might and money – geopolitical strategizing in the rules-based international order of the Indo-Pacific could be more precise and fruitful.

Tan Hsien-Li is an assistant professor of law at the National University of Singapore, co-director of ASEAN Law and Policy at the Centre for International Law, and editor of the Asian Journal of International Law.

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