

Volume 2, Number 1

Published September 2, 2021

Is there an “Asian” Perspective on International Law?

By [José E. Alvarez](#)

A year ago, inspired by Anthea Roberts’ path-breaking work on [“comparative international law,”](#) I began encouraging the all-star invited guest presenters in USALI’s [Program on International Law and Relations](#) to try to answer the question posed by the title above. Now, thanks to their responses over the past academic year, I am vastly more educated about the multifaceted nature of the question and why it matters.

USALI’s international law program, including our new annual [USALI colloquium on Globalization, International Law and East Asia](#), has provided tantalizing glimpses of partial and alternative answers to the titular question. Essays related to international law in our [Perspective series](#), many of our [weekly speaker talks](#), and some of our [special research projects](#) have explored how countries in the region are reacting to the “rise of China” within diverse legal regimes, responding to maritime disputes, and using their national courts to apply international law to such diverse topics as women’s rights, transitional justice issues stemming from World War II actions, trade protectionist legislation, the labor rights of overseas workers, or the legality of same-sex marriage.

Our two international law conferences over the past year addressed Asian perspectives on significant legal reform efforts now underway with respect to the [global health regime](#) and [investor-state dispute settlement](#). Invited guests from the region expressed views on contemporary international legal challenges, including how to reconcile regional trade agreements with multilateral efforts at the World Trade Organization, Taiwan’s and Hong Kong’s respective statuses under international law, and the accountability of China’s overseas investments. Some of our events looked to the past for insights, including a conversation with those present at the creation of the UN Convention on the Law of the Sea, who reminded us of Asia’s role in building what was then dubbed [“a new legal order for the oceans.”](#)

The answer to the question posed in the title matters now more than ever because Asia is at the cross-roads of virtually every international law challenge. It is the site for the world’s largest and most significant (in terms of percentage of world trade flows) regional trade/investment pacts (including the Regional Comprehensive Economic Partnership, the EU-China Investment Agreement, and the Comprehensive and Progressive Transpacific Partnership). The central thoroughfare for the world’s most significant global supply chains. The place where the world’s two superpowers go to seek to win “hearts and minds.” Asia is a key region for those debating whether we are witnessing [“the end times for human rights”](#) – either because of China’s rise or the West’s

populist implosion. Where “Asia” stands may determine if the World Health Organization will survive the current pandemic, how or whether the WTO’s dispute settlement system will be revived, and whether Facebook or Google will be rendered unrecognizable by multilateral rules governing the collection of big data, consumers’ privacy, or antitrust. What “Asia” does matters – to whether the world will mitigate climate change, reach agreement within the UN Security Council on what constitutes the next threat to international peace and security, or induce resurgent authoritarians to return to democracy (as in Myanmar).

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But, as our contributors have made clear, “Asia” is defined by its diversity – by stark differences among countries with respect to development status, relative economic or military power, and affinity for major powers outside the region. Past assertions by prominent scholars that the Asia-Pacific region shares a single perspective that is hostile to international legalization, its institutionalization, and formal international dispute settlement (see, e.g., Miles Kahler, [“Legalization as Strategy: The Asia-Pacific Case”](#)), ignores the reality that “Asia” includes multiple sub-regions with different cultures

and historical legacies. [“Asia” includes common law and civil law countries \(and some in between\), economic superpowers with close ties to the West and considerably poorer nations more closely aligned with others, and governments that range from avowedly secular to those that are Christian, Muslim, and/or Buddhist.](#) Some Asian countries see a need for international law’s traditional protections; others are strong enough to want to break those rules or mold them to their needs. Moreover, as [Xin He’s essay on Chinese divorce courts](#) illustrates, an individual country’s procedural rules and incentive structures may have a greater impact on whether it actually enforces an international treaty (in that instance, the Convention on the Elimination of All Forms of Discrimination Against Women) than its attitude toward international law as such. If Anthea Roberts’ work on “comparative international law” tells us anything, it is that a country’s approach to international law is the product of all these factors. Given Asia’s diversity, it stands to reason that it would be difficult to identify a single “Asian” school of, or approach to, international law.

Among our weekly speakers, Tom Ginsburg, in his description of [“Authoritarian International Law,”](#) came the closest to suggesting that there is, despite all national differences, an emerging Asian international law perspective -- one equally resistant to formal dispute resolution and to the grant of law-making powers at the multilateral level. But on closer inspection, Ginsburg was describing, like other speakers (see [here](#), [here](#), [here](#), and [here](#)), the sovereigntist

views of China and countries within its orbit. Others from the region did not articulate a common reaction to China’s alleged “exceptionalist” treatment of its state-owned enterprises, human rights, or internet governance. Further, even topics that generated more consensus among China’s neighbors – for example, common complaints that China’s actions in and around the South China Sea are not consistent with the UN Convention on the Law of the Sea – have not generated a united position on how to respond. As is suggested by their votes in forums such as the UN General Assembly, Asian countries also differ among themselves with respect to the powers that ought to be exercised by the Human Rights Council and UN special rapporteurs.

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At the same time, USALI’s search for “common Asian views” has not been in vain. Irrespective of whether ASEAN will adopt formal common positions with respect to the reform of the WHO, our speakers indicated that it is likely that many ASEAN members will endorse certain changes to the global health regime, including more transparent processes for adopting WHO declarations of public health emergencies and related policy recommendations. It also seems clear that, whether or not most Asian states would ultimately choose to replace investor-state arbitration with some

alternative, most are on board with a wide number of “rule of law” changes to investment protection agreements in order to expand states’ rights to regulate in the public interest. On these and other topics, some speakers saw congruent de facto action among the members of ASEAN and Asian states more generally even if organizations in the region have not taken a formal united stance.

Our USALI programs don’t tell us that “Asians” view international law the same way. They certainly don’t tell us that all Asian governments define their “sovereignty” in opposition to it. And some of our experts point to the intriguing prospect that there is in fact some Asian unity within diversity.

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Suggested Citation:

José E. Alvarez, “Is There an ‘Asian’ Perspective on International Law?” in *USALI Perspectives*, 2, No. 1, Sept. 2, 2021, <https://usali.org/usali-perspectives-blog/is-there-an-asian-perspective-on-international-law>

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