

An Asian Perspective

by Xue Hanqin

[Judge Xue Hanqin is a judge on the International Court of Justice. This post is part of a joint Opinio Juris/EJIL:Talk! symposium. For the latest symposium post on EJIL:Talk!, click [here](#).]

The rise of the new economies, particularly those in Asia, has caused considerable apprehension in the West. The concern is not just about shift of wealth to the East, but more about their increasing balancing power and influence in international affairs. It is against this background that the topic of Asia's attitude towards international law has attracted relatively wide attention.

Professor Chesterman starts his article with a "paradox" as a basic proposition of his analysis, namely, while Asia enjoys most the benefits of the security and economic dividends secured by international law and institutions, it has the least participation and representation in international treaties and structures; Asian States in general are not willing to delegate sovereignty; far fewer of them have accepted the compulsory jurisdiction of the International Court of Justice and the Statute of the International Criminal Court. Above all, Asia has the least prospect for regional integration. Before proceeding to consider the reasons he has outlined, it is worthwhile to address this proposition first.

Undisputedly, in the past decades Asia has witnessed the fastest growth of economic development in the world, with China and India in the lead. But to credit Asia's development to international law and institutions may be a bit self-conscious of the discipline. As is well known, the driving forces for Asia's economic development come from both internally and externally. At the regional level, economic reforms in China and India and the economic integration process of ASEAN are among the decisive factors that ensure the world the widest possible access to the Asia's markets and the best possible investment and labor conditions. Internationally, economic globalization in the wake of the Cold-War not only provides more opportunities for international cooperation with the developed countries, but also lends a propitious international environment for the promotion of regional cooperation. However, international trade and investment based on international rules and agreements can never be a one-way street; rights and obligations always go hand in hand. Faster growth does not mean more benefit from the system. Economically speaking, the majority of Asian States are recipients of foreign investment. On what basis can we claim that international law provides better protection to these countries than it does to foreign investors?

The implication of the paradox is that Asia so far has been a free-rider, taking advantage of the existing rules and institutions that were formed and maintained by the West. If not for the security guarantee underwritten by the Western States, particularly the United States, Asia would not have been able to long enjoy a peaceful and stable environment for economic development. Notwithstanding its underlying tone of encouraging Asia to be active in international law and institutions, the message, unfortunately, could be easily misunderstood by the listener, a point to be addressed later.

On the reasons for the current state of affairs of international law in Asia, Professor Chesterman's survey is succinct and perceptive. With regard to Asia's historical experience of international law, a few words should be added. Historically, Asia was subjected to an entirely different world order by force. China, India and Japan, the three major Asian nations, reacted to the change in different ways. Apart from what they each experienced in international law in the past, their attitude to international law today is still largely dictated by where they are positioned in the contemporary world order. Authoritarian or liberal, the type of national political system does not determine how a State treats international law; it is only relevant when ideology and international law are tangled.

It is true that, compared with other regions, Asia is not so active in international law and institutions. However, the data and statistics listed in Professor Chesterman's article are largely taken through the lenses of the Western institutions. Their selection of the legal institutions and treaties, by itself, demonstrates their ideological preference. Legally speaking, Asian States' "under-participation" in these regimes and treaties cannot be characterized as "being wary" of international law because, by virtue of the provisions of each legal instrument concerned, States have the right to opt out of them if they consider that they are not yet ready to take part. In the EU's practice, the purpose to impose such participation as a condition for new membership is primarily to promote the basic values of the EU. Given its historical origin, international law is understandably embraced in these values.

Asia's inability to promote regional integration is often attributed to its diversity. Indeed, Asia is very diverse in terms of culture, tradition, and religion. However, such diversity may not be the main, and crucial, reason for Asia's failure to establish any comparable regional institutions as the ones in Europe, Africa and Latin-America. Geopolitical division of the region that reflects the world order lies at the heart of the matter. The loose structures of the regional institutions in Asia, to a large extent, bear the attributes of the region, as well as its relations with the outside Powers.

Regional grouping may inspire common aspirations and regional identity of States, but integration is not a matter of law, but policy. Notwithstanding its impact on the rule of law, regional integration, first and foremost, serves in a collective manner the interests of the sovereign members. Take Brexit, for example. Although some may not like the decision to leave the EU, Britain has not been perceived due to that choice as becoming wary of international law. While a regional grouping may enhance the collective voices and influence of its member states in international law and institutions at the global level, membership in a regional organization is not a necessary element to assess one's participation in international law.

Asia's growth, and particularly the growth of China and India, is unprecedented in human history. The West's apprehension shows that such growth may likely produce substantive effect on the existing geopolitical structures, and hence its legal institutions and constructs. From a "rule-taker" to a "rule-maker," Asia only seems to be asking what is justified for itself, if democracy has any real meaning at all in international relations. But that is not at issue. What is at issue is where this "substantive effect" would lead.

Asia's attitude to international law, if deemed ambivalent, is deeply rooted in its history. As is rightly pointed out, that only offers a partial explanation. More relevant is the contemporary practice of international law, particularly of the Western world. Asian States are more sensitive of delegating sovereignty, not because they are ambivalent of international law, but because they do not believe that international law as thus advocated and practiced would protect their fundamental rights and interests. In many a case, their under-participation is not a matter of willingness, but capacity to influence. To be a meaningful rule-maker, Asia still has a long way to go.

The tone may sound a bit cynical when it says that as the existing Powers, particularly the U.S., may no longer be able to underwrite for the security guarantee of the Asia-Pacific region and that Asian States must undertake their own responsibility for the region. The United States is and will continue to be the dominant Power in the region. There is no doubt about it. Whether the region will remain peaceful and stable very much depends on its policy and on its adherence to the principles of international law that it has committed itself, particularly with China. The future of international law and institutions very much depends on the cooperation of these major players, on the mutual understanding of the East and the West. To take away Asia's "ambivalence," the current practice of international law and institutions first needs to be reviewed. For a more representative and democratic legal system, the focus perhaps is not on the East, but the West. In that sense, we can say "it takes two to a tango."

January 18th, 2017 - 11:37 AM EDT | [Trackback Link](#) |

<http://opiniojuris.org/2017/01/18/an-asian-perspective/>

Related Posts

[International Law in the Asian Century: Conclusion to Opinio Juris and EJIL:Talk! Mini-Symposium](#)

[Asia, International Law and International Institutions: A Comment](#)

[Comment on Simon Chesterman, 'Asia's Ambivalence about International Law and Institutions: Past, Present and Futures'](#)

[Asia's Ambivalence About International Law & Institutions: Introduction to Opinio Juris and EJIL:Talk! Mini-Symposium](#)

One Response

Trackbacks and Pingbacks

[...] Xue Hanqin puts at the forefront an argument about which I may have been too delicate. Asian states are not wary of delegating sovereignty [...]

1.20.2017

at 7:20 am EST

[EJIL: Talk! – International Law in the Asian Century: Conclusion to Opinio Juris and EJIL:Talk! Mini-Symposium](#)
