Northeast Asian Perspectives on International Law

Contemporary Issues and Challenges

Edited by Seokwoo Lee and Hee Eun Lee

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Northeast Asian Perspectives on International Law

To my mentor, the late Professor Jon M. Van Dyke who shed his light on me.
—Seokwoo Lee

To my loving parents, who taught me to seek first his kingdom and his righteousness.
—Hee Eun Lee

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IN MEMORIAM

During the editing of this volume, Professor Jon M. Van Dyke of The William S. Richardson School of Law at the University of Hawai'i at Manoa passed away on November 29, 2011. Professor Van Dyke, a contributor to this book, was a renowned expert on international law and maritime issues. He will be remembered as a dear friend and mentor who devoted his life trying to resolve difficult international conflicts in Asia and beyond. He will be dearly missed.

PREFACE

This book is based largely on selected papers from the first joint international academic conference of international lawyers from the Chinese Society of International Law, Japanese Society of International Law, and Korean Society of International Law that took place in Seoul, Korea on July 3, 2010. The conference was the first of its kind that brought together these three societies of international law and was entitled "Northeast Asia and International Law." Prominent international legal scholars delivered papers that covered topics such as Northeast Asian Perspectives on International Law, International Law on Foreign Policy-Making, Role of International Law in Promoting Cooperation and Resolving Conflicts in Northeast Asia, International Legal Education in Northeast Asia, and Northeast Asian Perspectives on International Adjudication. Professor Seokwoo Lee of Inha University Law School (Incheon, Korea) and Hee Eun Lee of Handong International Law School (Pohang, Korea) co-edited this volume.

CONTENTS

CHAPTER ONE

OVERVIEW—"NORTHEAST ASIAN PERSPECTIVES ON INTERNATIONAL LAW: CONTEMPORARY ISSUES AND CHALLENGES"

Seokwoo Lee* and Hee Eun Lee**

Since the end of the Cold War, Northeast Asia has been one of the most dynamic and dangerous parts of the world. Encompassing the People's Republic of China, North and South Korea, and Japan, the region has undoubtedly taken on greater global geopolitical and economic significance. The region is now home to two of the three largest economies (China and Japan) in the world and with the inclusion of South Korea, accounts for about 20 percent of global gross domestic product.[1] With the exception of North Korea, all of the countries in the region experienced, or in the case of China currently experiencing, rapid economic development that has resulted in Northeast Asia accounting for one-fifth of world production, one-sixth of world trade, and about one-half of the world's foreign currency reserves. This great economic transformation is accompanied by the tremendous political forces that animate the region. During the early part of the 21st century, Northeast Asia has seen China's ascendancy from regional hegemon to a global power challenging the United States and the European Union. The region has experienced tensions over nuclear weapons on the Korean peninsula. There is more open talk about the possibility of Korean unification and its prospects for the region. Japan has made clear that it desires to validate itself as a legitimate international leader with a permanent seat on the UN Security Council, yet there continues to be the lingering impact of old conflicts between Japan and her neighbors that continue to shape the character and volatility of the relations between Northeast Asian countries.

Consequently, the popular narratives of contemporary Northeast Asia are often described in the context of the political economy of rapid industrialization

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[1] *Momentum Building for Northeast Asia Trade Deal*, KOREA HERALD, Nov. 1, 2011, *available at* http://www.koreaherald.com/national/Detail.jsp?newsMLId=20111101000818.

or from the point of view of international relations in light of the global balance of power and Cold War fault lines between the actors in the region. The dramatic economic growth of Japan and Korea during the latter half of the 20th century and the Chinese economy's meteoric rise in this century has been well documented and researched. Northeast Asia has also been the focus of much study in relation to the geopolitical climate of the Cold War in the context of the conflict between the United States and the Soviet Union. While economists and political scientists have made great contributions to 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, the argument that is being made in the pages of this volume is 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 up through the period of the Cold War. It has 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 Northeast Asia can be attributed in large part to the forces of globalization that has brought about fundamental changes in the economic, political, and cultural spheres. Broadly defined, the phenomenon of globalization describes a process of integration that has come to dominate the latter half of the 20th century and continues to shape the world today. Although globalization encompasses both political and cultural activities, it is most well-defined in the popular discourse of what is commonly known as the "global economy." This economic globalization is identified by: global production, as demonstrated by multinational corporations having the capacity to locate and relocate modes of production to different parts of the world in the search for markets and lower costs; trade liberalization, as states have come together to embrace free trade through multilateral agreements like the General Agreement on Tariffs and Trade; and finally, through the relative free movement of finance capital where the global economic landscape is dotted by global capital markets as world financial centers like New York and London and those in Northeast Asia such as Tokyo, Hong Kong, and Seoul are becoming principal players in a new supranational order.[2]

As economic globalization has progressed, national boundaries have become more permeable to the influx and outflow of capital as well as to goods and services. In the case of capital, it has flowed more freely due to liberalization of national and international financial markets and the introduction of novel financial products and services, as well as the facilitation of financial investments in foreign markets through upgraded technological innovations and the presence of powerful new investors. For goods and services, the push for the successful

[2] Saskia Sassen, *Global Financial Centers*, FOREIGN AFFAIRS (1999).

completion of the Uruguay Round resulting in the ratification of the GATT and GATS and the eventual creation of the World Trade Organization has brought about momentous changes in the way trade is conducted between states. Borders are becoming more porous to non-domestic products and services.

In Northeast Asia, the depth and breadth of globalization's impact in the region can be seen through the growing and deepening economic linkages between all three countries. While the United States was Japan and South Korea's largest trading partner at the end of the 20th century, it has now been replaced by China. Recently, China, Japan, and South Korea have made increasing efforts to bring about the creation of a free trade bloc and have openly called for the drafting of a free trade agreement that would bring about a new legal order in the region. It is under these conditions that international law is poised to take on a greater role in bringing about greater regional cooperation and integration through a formal institutionalization of these trade and investment relationships. However, despite movements towards greater interdependence and the creation of a regional economic bloc, the region is also the source of serious political tensions that have their roots in ancient and recent history.

In contrast to the European Westphalian system of state sovereignty, interstate relations in Northeast Asia trace their origins to the tributary system established and maintained by various Chinese empires in which power was centered in imperial China and where tributary states in Japan and Korea took part in ritual obeisance to the "Celestial Empire." While it is understood that tributary states maintained relative independence in relation to the Chinese empire, it was clear that interstate relations were viewed in the context of Chinese imperial and cultural hegemony. With the wane and the eventual collapse of the Chinese empire and the epochal events that marked the West's engagement with Northeast Asia, the passing of the old order gave rise to Japan's rise and eventual recognition of Japan by the West as a legitimate sovereign power. The region then experienced a Communist revolution in China and Japanese expansion into the Asian continent through Korea and into parts of China and Southeast Asia in the first half of the 20th century. With Japan's defeat in World War II, there was a reordering of the Northeast Asian order which saw the establishment of independent states under the influence of both the United States and the Soviet Union which was exemplified by the division of the Korean peninsula into North and South marking the beginning of the Cold War. Due to the regional balance of power configuration during the Cold War, there was very limited official contact between Japan and South Korea with China and North Korea.[3] Northeast Asian relations were

[3] After the establishment of the People's Republic of China in 1949, China did not have any formal relations with Japan or South Korea until 1978, when Japan and China signed and ratified their Treaty of Peace and Friendship while South Korea normalized relations with China in 1992. Japan and South Korea have no formal diplomatic relations with North Korea.

defined in terms of the broader tension between the United States and the Soviet Union. Historically then, interstate relations in Northeast Asia were based not on international legal principles of state sovereignty and sovereign equality but were rather largely subject to the politics of hegemony in the form of either the Chinese tributary system, Japanese imperialism, or Cold War politics.

Thus, it was not until the end of the Cold War and the flourishing of globalization that the countries in the region engaged each other on common issues of interest and have 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 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 through which most Northeast Asian states engage each other. The increasingly important role of international law in Northeast Asia cannot be ignored in attempting to paint a complete picture of the international relations of the region.

Indeed, it is hoped by international lawyers in Northeast Asia that international law will bring about greater regional cooperation and integration as seen in other regions of the world. Thus, it is not surprising then that the inspiration for this volume comes from the first joint international academic conference of international lawyers from the Chinese Society of International Law, Japanese Society of International Law, and Korean Society of International Law that took place in Seoul, Korea on July 3, 2010. Many of the contributors of this volume participated in this landmark conference that brought the three societies together for the first time to examine the ways in which international law could help promote peace and justice in Northeast Asia. It is in that spirit that Kak-Soo Shin, South Korean Ambassador to Japan, in the second chapter offers his comments about the importance of international law in promoting regional peace, prosperity, and justice.

Ambassador Shin notes that formal interactions between China, Japan, and South Korea toward regional cooperation and integration have been on the rise. Despite significant obstacles such as a historical legacy of tensions, strong nationalist sentiments in each country, and differing political systems and states of economic development, the countries are engaged in fifty consultative bodies and more than one hundred joint cooperation projects and have also declared their intention to establish a permanent secretariat in Korea to strengthen and promote trilateral cooperation. He adds that there has been movement towards the drafting of a trilateral investment treaty along with nascent efforts to establish a free trade agreement. While regional interdependence can be readily found in the economic sector, he is confident that this will spill over into other areas such as the environment, human rights, maritime affairs including piracy, and other issues of common concern. Given this growing importance of international law in

Northeast Asia, Ambassador Shin observes that Korea faces a number of challenges when it comes to fully engaging international law. For one, Korea's recent shift to a graduate, professional law school model has precipitated a drop in enrollment in public international law courses, and he worries about the ability of future Korean lawyers to handle such matters domestically. As a second observation, he notes that Korea, outside of the WTO dispute resolution system, is generally reluctant to engage in third party adjudication because of a lack of experience. In the effort to further peace and prosperity in the region, international law should not be limited to rhetoric, but it should be put into practice and believes it is time for the region to have its own Court of Justice.

In Chapter III, Professor Toshiya Ueki of Tohoku University School of Law follows with a depiction of Northeast Asia's encounter with "European" international law and traces its use and application in the region up through the present day. Among the powers within the traditional East Asian system, he describes the relations between them as being unequal with the Japanese and Korean rulers paying tribute to the Chinese emperor. He observes that the relations between them could not be thought of as being "international" in the sense that there was a conception of sovereign equality. In contrast, in terms of relations with the West, Professor Ueki notes that while engagement between Northeast Asia and the outside world began from a "long time ago," he acknowledges that it is difficult to determine on what basis Asian and European powers dealt with each other. Nevertheless, he imagines that there could have been a *jus gentium*, a common set of rules for both sides. Thus, unlike Europe's relationship with the South American continent in the 15th and 16th centuries, there were no colonies in East Asia during the same period.

According to Professor Ueki, by the 19th century, the European understanding of its relationship with Northeast Asia was mixed. In Europe, there was recognition that there were distinct sovereign states in Northeast Asia, however, European dealings with the region where characterized by a series of unequal treaties through which European states opened Qing China and the Japanese Shogunate to trade and commerce with Europe. From this experience with Europe within the same century, Northeast Asian states began to adopt the substance and character of European international law. China, Japan, and Korea began to transform their engagement with each other into interstate relations that resembled Europe as bilateral treaties were concluded between them. With this embrace of international law, China and Japan saw an extensive engagement in the international legal system during the early part of the 20th century in the League of Nations system. However, as Professor Ueki notes, this participation came to an end in the years preceding World War II which continued to impact the region after the War and during the Cold War period where the countries in the region maintained relatively low profiles in utilizing international law. However, the 21st century has seen a dramatic change for Northeast Asia as individuals from the region have attained positions at the highest levels in international

political and legal circles from the Secretary-General of the United Nations to the President of the International Court of Justice (ICJ). Given these contributions and the growing commitment of government officials and the legal academy in the region, he claims that East Asia will become an important hub for international law.

Embracing this observation of the growing significance of international law in Northeast Asia, the following chapters either provide perspectives on a number of contemporary international legal issues that are important to the countries in the region or provide a context to understand the significance of international law in historical or educational terms. Beginning in Chapter IV, Dr. Yann-huei Song from Academia Sinica in Taipei, Taiwan assesses the challenges of resolving present disputes over the South China Sea (SCS). He begins by detailing the rising tensions in the SCS, especially concerning the disputed claims of sovereignty over the Paracel and Spratly Islands by China, Taiwan, Vietnam, Malaysia, and the Philippines. Dr. Song argues that these persistent tensions (1) evince the ineffectiveness of the Declaration of the Conduct of Parties in the South China Sea (DOC), and (2) point to the necessity of a regional Code of Conduct (COC) concerning the SCS. He details the process by which the DOC was concluded between the Association of Southeast Asian Nations (ASEAN) and China, which was concluded in 2002 after three years of negotiations. While the DOC included several confidence-building and cooperative measures, Dr. Song stipulates that the final product was not legally binding and was not favored by countries like Vietnam.

Dr. Song goes on to describe the various country dynamics at work in ASEAN and China concerning the SCS. For example, the governments of Vietnam and the Philippines want to continue negotiations with China as an ASEAN bloc in order to counterbalance China's assertions of power in the SCS. On the other side, countries with close relations to China like Cambodia, Laos, and Thailand are not as concerned about the SCS and are more reluctant to put the issue on ASEAN's agenda. Dr. Song concludes by detailing ASEAN's recent activities in dealing with the SCS. He posits that with Vietnam assuming the chair of ASEAN, the rising tensions between China and its neighbors in the SCS will be addressed more directly by ASEAN. He also argues that the increasing involvement of the United States, particularly related to commercial activity in the SCS, will boost the confidence of Southeast Asian nations in standing up to the aggressive stance of China. Meanwhile, he points out that China is attempting to address the issues through direct bilateral negotiations rather than through multilateral or international means. He notes that ASEAN and China have reached agreement on the guidelines for implementing the DOC and the countries are actively engaged in following through with their goal of greater regional cooperation.

Chapter V continues the discussion on the topic of the South China Sea as Professor Kuan-Hsiung Wang from National Taiwan Normal University addresses the issue of regional cooperation concerning high seas fisheries. Professor Wang

begins by outlining the crisis concerning fish stock depletion. He finds that, while the total amount of fish available for worldwide human consumption has increased, the problem of overfishing has led to the significant depletion of several species and impacted future fish stocks. He then goes on to describe three ongoing processes for managing fishery resources: international instruments, international organizations, and the actions of states. International instruments, like UNCLOS and UNFSA, set forth the duties of states to cooperate in conserving straddling and highly migratory fish stocks on the high seas. In the event that nations decline to participate in international instruments, Professor Wang asserts that Regional Fishery Management Organizations (RMFO) can also help to overcome collective action problems with overfishing. He cites as an example the Inter-American Tropical Tuna Commission which was able to strengthen conservation efforts by the parties through its 2003 Antigua Convention.

Professor Wang continues his discussion of the importance of regional cooperation by discussing in detail the case of the semi-enclosed South China Sea. He asserts that the combination of exclusive economic zones and highly migratory fish species creates the problem of maintaining a delicate ecosystem. As he points out, the complex boundary disagreements in the South China Sea do not need to be resolved before an agreement on the fishery issue is reached. In fact, Wang asserts that cooperation around fishery preservation might be a feasible way to begin the process toward broader regional cooperation in the South China Sea. He concludes by emphasizing sustainability and the precautionary principle as the foundational principles of regional ocean policy.

In Chapter VI, Professor Bing Bing Jia of Tsinghua University Law School explores the legal doctrine of *non liquet* and its impact in the realm of international law. He first addresses whether the gaps in the law that evince *non liquet* ought to be avoided in the international legal system. In answering this question, he begins by discussing the notion of *non liquet* in depth, comparing the views of Hersch Lauterpacht and Julius Stone. He goes on to highlight three instances in international law that can manifest *non liquet*: (1) a simple gap in the law; (2) incorrect formulation of the dispute by the parties; and (3) a dispute over a matter that one party deems non-justiciable. In this section, Professor Jia also addresses the tension between positivism and naturalism and the respective roles of the judicial and legislative bodies in the international legal system.

He goes on to describe two cases before the ICJ in which the doctrine of *non liquet* was employed. The first case was a 1996 advisory opinion on the *Legality of the Use or Threat of Nuclear Weapons*, in response to a question posed by the U.N. General Assembly. In its opinion, the Court stated that it could not definitively conclude whether the use of nuclear weapons would be lawful or unlawful under extreme circumstances involving self-defense. The second case concerns Kosovo's declaration of independence in 2008. The ICJ issued an advisory opinion concerning the legality of Kosovo's secession. While Japan and China took opposing views on the matter (the former invoking the doctrine of *non liquet*; the latter