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Regional Outlook

THE RULES-BASED ORDER IN THE INDO-PACIFIC:
OPPORTUNITIES AND CHALLENGES FOR
AUSTRALIA, INDIA AND JAPAN

Policy Brief

Ian Hall and Michael Heazle

Regional Outlook Paper: No. 50, 2017

Griffith Asia Institute

The Rules-Based Order in the Indo-Pacific

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'The Rules-Based Order in the Indo-Pacific: Opportunities and Challenges for Australia, India and Japan Policy Brief', Regional Outlook Paper No. 50, 2017.

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Acknowledgements

The authors are grateful above all to the Ministry of Foreign Affairs of Japan and to Griffith University's Vice-Chancellor and President, Professor Ian O'Connor, for their generous provision of funds to allow the conference to be held.

We would also like to thank all the participants at the conference from Australia, India, and Japan. The collaboration of the Japan Institute of International Affairs, long-standing and much-valued partners of GAI, was essential to the project's success. The organisers are particularly grateful to Ambassador Shingo Yamagami, Director General (Acting) of JIIA, and Mr Koichi Ai, Director of Research Coordination of JIIA.

We are very grateful too, to the professional staff of the Griffith Asia Institute – Kathy Bailey, Lin Cheng, Christine Kowalski, and Meegan Thorley – for their excellent work on the logistics and organisation of the conference.

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Executive Summary

This Policy Brief presents a summary of the findings of a Trilateral Conference on the theme of 'Strengthening Rules Based Order in the Indo-Pacific' hosted by the Griffith Asia Institute on 27-28 February 2017, with participants from Australia, India, and Japan.[1]

Australia, India and Japan have recently reaffirmed their commitment to the rules based order in a series of policy statements, especially in relation to freedom of navigation and trade. These efforts have included the institutionalisation of an annual official-level Trilateral Dialogue, held in New Delhi in 2015, in Tokyo in 2016 and in Canberra in 2017.

To explore these various developments, the GAI Trilateral Conference focused on:

- The evolution of the rules-based order, its key elements, and its contemporary condition;
- The roles significant powers like Australia, India, and Japan can play in extending that order, singularly and in collaboration;
- The challenges faced in broadening and deepening the rules-based order;
- The current and future potential use of strategic partnerships and mini-lateral groupings to bolster and extend the rules-based order;
- The roles of regional institutions in the regional rules-based order.

In brief, the Trilateral's findings and recommendations are:

- While the underlying principles, authority, and efficacy of the current rules-based order might be contested, it remains a useful means of mitigating competition between states in the region;
- That continued engagement by the United States is a necessary condition for maintaining the rules based order in the Indo-Pacific;
- That Australia, India, and Japan have a shared interest in ensuring that Washington remains engaged with shaping and upholding the authority of the rules;
- That the rules need to reflect the widest possible regional and international consensus if they are to command authority;
- That greater diplomatic, security, and economic policy cooperation and coordination between Australia, India, and Japan ought to be pursued to help maintain the rules-based order, using the official Trilateral Dialogue mechanism and other means where necessary;
- That Australia, India, and Japan should also explore ways of building capacity and enhancing mechanisms for burden-sharing between the three states, and others across the region.

1. The Rules-Based Order

Although the phrase 'rules-based order' has only come to prominence in the last decade, the concept of an international order incorporating certain rules of conduct for states and other key actors is, of course, much older.[2]

The rules of the current international order originate largely from the settlement at the end of the Second World War that brought into being the United Nations (UN) and the various so-called Bretton Woods institutions. These rules cover a wide range of issue areas and activities, in particular the incidence and conduct of war, international trade and economic development, the conduct of inter-state diplomacy, navigation and over-flight, and the rights of individuals and communities.[3]

This rules-based order was predicated on the notion that sovereign states consent to be bound by the rules and consent to their application and enforcement, whether by the UN Security Council (UNSC), in the case of international conflict; or by the General Agreement on Tariffs and Trade, and later the World Trade Organization, in the case of disputes over trade; or by bodies like the International Court of Justice, in the case of other types of dispute between states.

From the start, however, the legitimacy of this post-war rules-based order was questioned. Critics observed that key elements, such as the make-up of the UNSC, were structured in ways that favoured the victors of the Second World War.[4] Anti-colonial movements in areas under European imperial rule pointed out discrepancies between the principles on which the rules-based order was supposedly based, including the principle of national self-determination, and the ways they were applied in practice. Following decolonization, 'Third World' critics then turned to the rules regulating the global economy, arguing that they had been structured in ways that systematically disadvantaged developing economies.[5]

Over time, the rules-based order's scope and character has evolved with the creation of a plethora of new treaties and also the introduction by Western advocates a number of new, and politically contentious, norms of behaviour Change is most evident in three areas: the global economy, maritime rights, and human rights protections.

- The global economy has witnessed major shifts in its underlying rules and principles. These include the move from pegged to floating exchange rates in 1971-73 after the US ended the convertibility of the dollar into gold, as well as the rise of the so-called Washington Consensus on economic development's key principles during the 1980s – ideas drawn exclusively from neo-liberal prescriptions for more open economies, more free trade, and fewer foreign investment restrictions.

- In the maritime area, among other developments, we have seen the creation and reaffirmation of Exclusive Economic Zones, agreement on rules for demarcating maritime boundaries and seabed rights and more broadly the conversion of customary maritime law into treaty law under UNCLOS.

- Finally, a trend towards more universal recognition of a wide array of human rights among states gained momentum in the 1970s. During the 1990s, these led to demands from Western states for the recognition of a right to intervene militarily to protect human rights in certain circumstances, leading to the emergence of the Responsibility to Protect doctrine , as well as a broader push for the democratisation of hitherto authoritarian states. However, attempts to make the rules based order *more* liberal remain highly contentious, particularly in Asia.[6]

The rules based order is thus neither fixed nor uncontested. But this is not to say that the order's foundational rules are not generally upheld or that states routinely flout them. Indeed, as Louis Henkin famously pointed out, most of the time, most states abide by most of the rules.[7]

States follow the rules, in general, because their elites believe that the rules (a) create circumstances that benefit the state in some way, or at least do not compromise its interests; (b) are, in some broader sense, just and equitable in that they do not *only* favour great power interests; and (c) generate an element of stability and predictability in international affairs.

2. The Current Regional Order and its Challenges

In the broader Indo-Pacific region, which stretches from the Persian Gulf to the Pacific, the post-war rules-based order is under pressure as a consequence of several different, and interlinked, factors.

In structural terms, two major changes have caused confidence in the authority of the rules that have underpinned the regional order throughout the post-war period to wane over the last decade. The first of these is China's emergence as a competitor to US leadership and influence in the Indo-Pacific. The second, more recent, change is the growth of concern among states about the extent and nature of the US's commitment to upholding the rules-based order in the region.

This waning confidence in the regional order is arguably at its clearest in the current dispute over interpretation of the rules and principles covering freedom of navigation and over-flight; the "lawful" means of resolving conflicting territorial claims, especially in the South China Sea, as well as rights under the United Nations Convention on the Law of the Sea (UNCLOS) regarding the exploration and use of marine resources; the deployment and use of military and paramilitary forces into contested areas in both the South and East China seas; and the management of unplanned encounters between navies and other vessels at sea, including coastguards and fishing boats, in these contested areas.

In each of these domains, a strong tension has arisen over the proper source of authority for interpreting and applying existing rules and principles as set out under UNCLOS and customary practice. In addition to questions of proper authority, discontent over the treatment of historical rights and the negotiation of contemporary international law's earlier treaties and agreements (e.g., the UN Charter, the 1951 San Francisco Peace Treaty) also underlies the region's current tensions but are not explicitly part of the formal arguments made by disputing governments.

Many territorial disputes and conflicts in Asia are long standing. At the current time, however, disagreements over the authority and the legitimacy of maritime law's ahistorical jurisprudence are being escalated by China's expansive maritime claims in East Asia. As a consequence, disputes over territorial claims and the sources of legitimate authority for resolving them are now a feature of regional international relations, which means that the stakes involve much more than only ownership of one or another piece of territory but rather the ability to determine how all such disputes are "legitimately" resolved under international law.

Contested Authority, Not Contested Rules

Various aspects of the existing Asia-Pacific rules-based order are from time to time contested by states in the region. But these disagreements have mostly concerned, as they do today, competing interpretations of the rules and their application, calling into question the sources of authority behind these interpretations rather than the legitimacy of the rules themselves.[8] Indeed, China's assertion of claims over certain features in the South China Sea and its militarization of some of those features does not constitute a challenge to the rules as they stand under UNCLOS, but rather involves a challenge to their interpretation and enforcement.[9] China's government, in pursuing its territorial claims, has chosen to interpret the rules in ways that do not align with other regional players, and to reject attempts to apply them in ways that do not align with its interests.

Beijing thus rejected the Philippines' initiation of a case against China's occupation of several features in the Spratly Islands at an Arbitral Tribunal administered by the Permanent Court of Arbitration (PCA) at The Hague[10]– not by addressing the substance of the rules or the claims, but by challenging the jurisdiction of the PCA. It argued that the arbitration action went beyond the provisions of UNCLOS, in that it addressed matters of territorial sovereignty; that it should not be brought at all, since the Philippines had agreed on multiple occasions to settle disputes bilaterally, without reference to outside parties of any kind; and that this dispute was about 'maritime delineation', which was beyond the scope of UNCLOS.[11] After the ruling, China reiterated these points, arguing that it was 'null and void' with 'no binding force'.[12]

In this way, China has contested not so much the substance of the rules, but rather their interpretation by others, in particular the PCA arbitral tribunal's determination that it did have jurisdiction – contrary to China's claims – and that China was bound by its decisions regardless of its participation in proceedings.[13]

Authority and Efficacy

The release of the PCA arbitral tribunal's ruling on 12 July 2016 was greeted by a series of similarly worded statements from likeminded states – including Australia, India, Japan, and the US – calling on China to abide by its provisions within the context of the rules-based order.[14] As yet, however, little has been done to change the facts on the ground, as it were, and enforce the ruling. China remains in possession of the features it occupies and claims, and further tightening its control of those features by deploying anti-aircraft missiles and other weapons systems.[15] Moreover, there are signs that China may soon seek to make further changes to the status quo, perhaps including the declaration of an Air Defence Identification Zone (ADIZ) over much of the South China Sea, in parallel with the one declared in disputed areas of the East China Sea in late 2013, or even the imposition of Chinese pilots on some or all of the 40,000 or so ships travelling through the region's sea lanes of communication.[16]

The US, nevertheless, has continued to conduct so-called 'Freedom of Navigation Operations (FONOPs) through the South China Sea to challenge China's claims to 12nm territorial waters and 200nm (320km) Exclusive Economic Zones (EEZ) around the features it occupies. And other states, including Australia, India, and Japan, continue to send naval assets into the region for port visits or in transit to bi- or multilateral exercises. But no action has been taken either to dislodge Chinese forces from the Spratly Islands, or, arguably, to deter further militarisation.

This case demonstrates the major challenge to maintaining a rules-based order: the challenge of *upholding the rules*. The "rules" guiding inter-state relations, as formally agreed under international law, or informally as general principles and expectations, can only produce meaningful effect in so far that the states themselves are willing to provide both political, and if necessary material, support to back up and enforce them. Indeed, because in international law the rules are whatever states say they are, the notion of a broadly supported, and stable, rules-based order is essentially a collective action problem shaped by the extent to which the various interests and fears of states can be reconciled and accommodated to allow, if not cooperation, at least peaceful co-existence.

As a result, participants agreed that, in the current disputes over China's expansive territorial claims and in other regional disputes, the role and significance of the relevant rules is determined by the willingness of individual states, working both individually and collaboratively, to uphold the authority of the rules and their common interpretation, in this case UNCLOS as interpreted by the PCA's arbitral tribunal. And as the participants at the Trilateral Conference further observed, maintaining authority raises the question of capacity; that is, the means – diplomatic, economic, and military – by which Australia, India, Japan, and likeminded states are able to persuade and if necessary coerce rule-breakers, both unilaterally and in concert with others.

The participants observed that while Australia, India, and Japan have significant military forces and other assets, such as coastguards, they lack capacity in key areas and they lack established traditions and protocols for managing trilateral burden-sharing and collaborative action. These challenges must be overcome if the three, together or in concert with others, are to improve the efficacy of the rules-based order.

3. Strategic Partnerships, Minilateral Groupings, and Regional Institutions

In the fifty years since the founding of the Association of South East Asian Nations (ASEAN) in 1967, the Indo-Pacific has acquired complex and multi-layered institutional architecture, increasingly supplemented by a range of bilateral and 'plurilateral' arrangements, including so-called 'strategic partnerships' of varying content between key states.[17]

Since the mid-2000s, these institutions have been supplemented by a proliferation of strategic partnerships and plurilateral initiatives. China now has around 50 strategic partnership agreements; India about twenty; and Japan ten.[18] Conventionally, strategic partnerships blend all, or some, of six elements:

> … formalization in written agreements or statements; the creation of formal links or mechanisms at either a government-to-government or a Track II level, involving think tank professionals, academics, and business people; the institutionalization of processes for regular summit meetings or leadership dialogues; the establishment of some form of military-to-military communication; the commitment to improve economic ties; and the initiation or augmentation of bilateral public or cultural diplomacy.[19]

If two states share substantive agreement on what Thomas Wilkins has called "system principles"[20] – essentially the underlying norms and rules that they think should shape international order – these strategic partnerships can involve extensive and deepening cooperation in both the economic and security realms, as is the case with both the Australia-Japan and India-Japan strategic partnerships, and, to a lesser extent, in the Australia-India strategic partnership.

Among plurilateral initiatives, the various Trilateral dialogues, at ministerial and official levels, on foreign affairs and security – such as those between Australia, India, Japan; China, Japan, and South Korea; or India, Japan, and the US – stand out, alongside plurilateral initiatives on trade and investment, such as the Regional Comprehensive Economic Partnership (RCEP) and Trans-Pacific Partnership (TPP).

There is no doubt that the emergence of new bilateral strategic partnerships, some involving rapidly intensifying security cooperation, and new plurilateral arrangements, is complicating an already complex security architecture in the Indo-Pacific.

In terms of the rules-based order, this evolving architecture and the emergence of new bilateral and plurilateral arrangements are having a number of effects, some positive and some arguably less positive.

First, the expansion of ASEAN-centric security institutions and forums has drawn some potentially influential players that were once marginal to the security dynamics of the region – notably India – into regular dialogue and discussion.

Second, and more controversially, that expansion has been in large part about reaffirming commitments to the existing orders principles by 'socialising' states to the advantages of affirming, following, and upholding them.[21] The extent to which this process of highlighting mutual advantage through greater institutional engagement has influenced China now appears minimal at best. Resistance among many ASEAN states to

strengthening the order by making it more liberal, particular in the context of states' domestic circumstances as Australian Foreign Minister Julie Bishop recently argued, is also unlikely to change.[22] Indeed, all participants agreed the emphasis should be on *defending* rather than extending the existing order.

Third, turning to the emergence of new bilateral and plurilateral arrangements, broader and deeper strategic partnerships may have a positive impact on reinforcing the authority of the regional rules-based order and help extend it to the broader Indo-Pacific. Enhanced cooperation aimed at building and sustaining capacity and confidence among partner states was agreed by Conference participants to be a realistic starting point for greater trilateral cooperation. Joint exercises on a range of security issues (including disaster management, fisheries, and piracy) intelligence sharing, defence technology transfers, and strategic dialogue could all fulfil these objectives.

Fourth, it may, however, also be the case that broader and deeper strategic partnerships, and indeed even exclusive plurilateral arrangements, will further raise tensions with China and in particular North Korea, and potentially be of concern to some ASEAN states, raising suspicions about strategic intentions.

While participants at the Trilateral Conference generally agreed on the need for building trilateral cooperation in order to defend the existing order's integrity, particularly given ASEAN's inability to collectively respond to China's challenges to the rules based order, there were also some divisions over the specific ways further cooperation could best be implemented, in terms of both their effectiveness and also concerns about exacerbating regional tensions.

4. Policy Recommendations

Australia, India, and Japan have much in common, but they are also quite distinct and different players in the Indo-Pacific region. All three are democratic states and all three are clearly committed to the rules-based order at both the regional and international levels. But their capacity to maintain and shape that order differ, as do their relationships with other major players in the region, and these differences will shape their approach to strengthening it.

All of the participants at the Trilateral Conference agreed that goodwill exists for Australia, India, and Japan to work individually and collectively, and with other states too, to uphold the rules-based order. But many also had doubts about the political will and capacity of all three states to do so, and were cautious about the challenges involved in trilateral collective action, especially in establishing some form of burden sharing among the three to boost capabilities.

The Trilateral Conference participants made a range of recommendations for future policy, including

- Further clarifying the benefits of the rules-based order to public and political audiences in all states in the region, especially in terms of the predictability and stability in international relations that it provides in the Indo-Pacific;
- Reiterating commitment to key elements of that order, especially foundational norms, like freedom of navigation, which, if threatened, could cause major disruption to regional trade and economic development;
- Engaging effectively with the United States to ensure that it continues to play a stabilising role in the regional order;
- Working individually and collectively to build the diplomatic, economic, and military resources needed for each country to play an effective role in shaping and maintaining the rules-based order;
- Working towards greater burden sharing in key areas to offset the capacity and implementation shortfalls some states currently suffer.

Notes and References

[1] The conference discussed papers from the following participants:
- Professor Nick Bisley, LaTrobe University, Australia
- Professor Ian Hall, Griffith Asia Institute, Australia
- Mr Ryosuke Hanada, Japan Institute of International Affairs, Japan
- A/Professor Michael Heazle, Griffith Asia Institute, Australia
- Mr Yogesh Joshi, Jawaharlal Nehru University, India
- Professor Rikki Kersten, Murdoch University, Australia
- Assistant Professor Kei Koga, Nanyang Technological University, Singapore
- Mr Tetsuo Kotani, Japan Institute of International Affairs, Japan
- A/Professor Sarah Percy, University of Queensland, Australia
- Professor Rajesh Rajagopalan, Jawaharlal Nehru University, India
- Dr Tomohiko Satake, National Institute for Defense Studies, Japan
- Professor Ben Schreer, Macquarie University, Australia
- Commander Abhijit Singh (Ret.), Observer Research Foundation, India

[2] The phrase 'rules-based order' was relatively infrequently used by analysts and policymakers until the mid-2000s. One of the first to pick it up and begin to use it systematically was Kevin Rudd, sometime Prime Minister of Australia (2007-10; 2013). Rudd used the phrase, for example, in his 2004 speech, 'Australia and China: A Strong and Stable Partnership for the 21st Century', delivered to The Central Party School of the Communist Party of China in Beijing on 6 July. See http://au.china-embassy.org/eng/zagx/t142076.htm.

[3] For a useful discussion, see Stewart Patrick, 'World Order: What, Exactly, are the Rules?', *The Washington Quarterly* 39, no. 1 (2016), pp. 7-27.

[4] See the critique offered by the prominent British international lawyer, J. L. Brierly, 'The Covenant and the Charter', *British Year-Book of International Law* 23 (1946), pp. 83-.

[5] See especially Stephen Krasner, *Structural Conflict: The Third World against Global Liberalism* (Berkeley and Los Angeles: University of California Press, 1985).

[6] See especially Nicholas J. Wheeler, *Saving Strangers: Humanitarian Invention in International Society* (Oxford: Oxford University Press, 2000).

[7] Louis Henkin, *How Nations Behave*, 2nd ed. (New York: Columbia University Press, 1979), p. 47.

[8] China, however, more recently also has blended its criticism of how the rules are applied with criticism of existing maritime law itself, expressing opposition to its failure to address China's historical rights and claims and also to what the Chinese Communist Party sees as its exclusion from the negotiation of key treaties, in particular the UN Charter and the 1951 San Francisco Peace Treaty.

[9] For a broad discussion of China's position, see Katherine Morton, 'China's ambition in the South China Sea: is a legitimate maritime order possible?', *International Affairs* 92, vol. 4 (2016), pp. 909-940.

[10] The Arbitral Tribunal was constituted under Annex VII of UNCLOS.

[11] Position Paper of the Government of the People's Republic of China on the Matter of Jurisdiction in the South China Sea Arbitration Initiated by the Republic of the Philippines, 7 December 2014, http://www.fmprc.gov.cn/mfa_eng/zxxx_662805/t1217147.shtml.

[12] 'China loses South China Sea claim in ruling at The Hague', *The Australian*, 12 July 2016, http://www.theaustralian.com.au/news/world/china-loses-south-china-sea-claim-in-ruling-at-the-hague/news-story/6ac8cf62db5bd4f3be2035dbe51e4763?nk=5a1057c3ebe61c4d0f38815c0561fc59-1489456885.

[13] The South China Sea Arbitration (The Republic of the Philippines vs. The People's Republic of China), 12 July 2016, https://pca-cpa.org/wp-

content/uploads/sites/175/2016/07/PH-CN-20160712-Press-Release-No-11-English.pdf.

14 Department of Foreign Affairs and Trade, Australia, 'Australia supports peaceful dispute resolution in the South China Sea', 12 July 2016, http://foreignminister.gov.au/releases/Pages/2016/jb_mr_160712a.aspx; Ministry of Foreign Affairs of Japan, 'Arbitration between the Republic of the Philippines and the People's Republic of China regarding the South China Sea (Final Award by the Arbitral Tribunal)', 12 July 2016, http://www.mofa.go.jp/press/release/press4e_001204.html; State Department, 'Decision in the Philippines-China Arbitration', 12 July 2016, http://www.state.gov/r/pa/prs/ps/2016/07/259587.htm.

15 Asia Maritime Transparency Initiative, Centre for Strategic and International Studies, 13 December 2016, https://amti.csis.org/chinas-new-spratly-island-defenses/.

16 'China ready to impose air defence identification zone in South China Sea pending US moves', *South China Morning Post*, 1 June 2016, http://www.scmp.com/news/china/article/1960954/beijing-ready-impose-air-defence-identification-zone-south-china-sea

17 In East Asia, ASEAN has sought to remain central to regional architecture, building around it the ASEAN Regional Forum (from 1994), the (somewhat misnamed) East Asia Summit (2005-), which includes major powers like China, India, Japan, Russia, and the United States, as well as significant ones like Australia and South Korea, and a number of other institutions, including the ASEAN Defence Ministers' Meeting Plus (ADMM+) from 2010.[17] In Central Asia, the Shanghai Cooperation Organization (SCO, founded 2001) binds China and Russia to four key regional states, with expansion plans progressing to include India and Pakistan as full members. The South Asian Association for Regional Cooperation (SAARC), with eight regional member states, came into existence in 1985, while the Indian Ocean Rim Association (IORA, founded as IOR-ARC in 1997) has recently seen its profile upgraded, largely as a result of Australian, Indian, and Indonesia efforts.

18 H. D. P. Envall and Ian Hall, 'Asian Strategic Partnerships: New Practices and Regional Security Governance', *Asian Politics and Policy* 8, no. 1 (2016), p. 90.

19 Envall and Hall, 'Asian Strategic Partnerships', pp. 90-91.

20 Thomas S. Wilkins, 'Russo-Chinese strategic partnership: A new form of security cooperation?' *Contemporary Security Policy* 29, no. 2 (2008), pp. 358–383.

21 The classic text on these processes is Alastair Iain Johnston, *Social States: China in International Institutions, 1980-2000* (Princeton, NJ: Princeton University Press, 2008).

22 See, for example, Alice D. Ba, 'Who's socializing whom? Complex engagement in Sino-ASEAN relations', *The Pacific Review* 19, no. 2 (2006), pp. 157-179.