

The Asian Way To Settle Disputes

By Tommy Koh and Hao Duy Phan*

Introduction

China has refused to participate in an arbitration launched by the Philippines regarding their disputes in the South China Sea. Japan has refused to acknowledge that it has a dispute with China regarding Senkaku/Diaoyu. The Republic of Korea has rejected Japan's offer to refer their dispute over Dokdo/Takeshima to the International Court of Justice (ICJ) on the ground that there is no dispute. These developments may give the impression that Asians are against submitting their disputes to the international legal process. Such an impression would be incorrect.

Situation in Southeast Asia

The countries in Southeast Asia have a positive track record of referring their disputes to the international legal process. Let us briefly discuss some of the most important cases.

The Preah Vihear Case

The first case submitted by two Southeast Asian countries to the ICJ was the dispute over the Temple, Preah Vihear, between Cambodia and Thailand. In 1959, Cambodia brought the dispute to the ICJ, invoking both Thailand's declaration of 1950 and Cambodia's declaration of 1957 recognizing as compulsory the jurisdiction of the Court. In 1962, ICJ awarded sovereignty over the Temple to Cambodia. However, the court was not asked and therefore did not demarcate the boundary between the two countries. It did not rule on the ownership of 4.6 square kilometres of land around the Temple. This omission created different interpretations which would lead to border skirmishes between the two countries.

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In 2011, Cambodia surprised every one by applying to the ICJ and requesting the court to interpret its 1962 judgement. In particular, Cambodia requested the court to declare that it had sovereignty over the vicinity of the Temple and that territory had been delimited in the area of the temple and its vicinity. The Court agreed to accept the case and found that Cambodia had sovereignty over the whole territory of the promontory of Preah Vihear. The Judgement has been accepted by the two countries and peace has returned to the Cambodian/Thai border.

The Sipadan and Ligitan Case

Indonesia and Malaysia had a sovereignty dispute over two islands, Sipadan and Ligitan. In 1998, The two governments agreed to refer the dispute to the ICJ. In its 2002 judgement, the Court awarded sovereignty over the two islands to Malaysia. Although Indonesia was very disappointed with the Judgement, it has accepted it. The two sides have, however, been unable to agree on their maritime boundaries, in the vicinity of the islands.

The Pedra Branca/Pulau Batu Puteh Case

In 1847, the British Government in Singapore took possession of the island known as Pedra Branca, in Portuguese, and Pulau Batu Puteh, in Malay. The British built a lighthouse on the island in 1850 and it was inaugurated in 1851. From that time until 1979, no one had disputed Singapore's (as a successor to the British) sovereignty over the island. However, in 1979, Malaysia published a new map which, inter alia, claimed the island as Malaysian territory.

Although Singapore was in possession of the island, it was willing to acknowledge that there was a dispute and suggested referring it to the ICJ. In 2003, the two countries jointly submitted the dispute over Pedra Branca, Middle Rocks and South Ledge to the ICJ. In its 2008 Judgement, the ICJ awarded sovereignty over Pedra Branca/Pulau Batu Puteh to Singapore, sovereignty over Middle Rocks to Malaysia and the low-tide elevation, South Ledge, to the state in whose territorial sea it is located. The issue is still pending because the two countries have not yet demarcated the boundary of their Territorial Seas.

Myanmar-Banladesh Case

Another ASEAN country, Myanmar, had a dispute with its neighbour, Bangladesh, on their maritime boundaries. In 2009, after years of negotiations proved unsuccessful, Bangladesh submitted the case to an arbitral tribunal to be constituted under Annex VII of the 1982 United Nations Convention on the Law of the Sea (UNCLOS). The two governments agreed to refer their dispute to the International Tribunal for the Law of the Sea (ITLOS). The parties requested the tribunal to draw their maritime boundaries, with respect to the territorial sea, exclusive economic zone and continental shelf. In 2012, ITLOS delivered its Judgement which was accepted by both parties.

The Railway Land Dispute

In 2012, Singapore and Malaysia signed an agreement to submit their dispute concerning the Points of Agreement on Malayan Railway Land to Arbitration. In 2013, the Arbitral Tribunal rendered its Award. Singapore and Malaysia Issued a Joint Statement indicating that they were satisfied with the arbitral process and agreed to abide by and fully implement the decision of the Arbitral Tribunal.

The Timor Sea Treaty Case

In April 2013, Timor Leste instituted arbitral proceedings under the Timor Sea Treaty against Australia, seeking to have the 2006 Treaty between Timor Leste and Australia declared invalid or void. In December 2013, Timor Leste went to the ICJ and requested the Court to render provisional measures with regard to the seizure and the subsequent detention by the agents of Australia of documents, data and other property which belonged to Timor Leste. In 2014, the Court made an order and decided that Australia should ensure that the content of the seized material is not used to the disadvantage of Timor-Leste. In 2015, the Court made another order, authorizing the return of all seized documents and data seized by Australia to Timor Leste. The arbitration case is still pending.

The Philippines v. China Case

In January 2013, the Philippines notified China that it had instituted arbitral proceedings against China under Annex VII of UNCLOS with respect to its dispute with China over maritime jurisdiction in the South China Sea. In February 2013, China presented the Philippines with a diplomatic note in which it described its position on the South China Issues and rejected and returned the Philippine's notification. The case has proceeded in the absence of China's participation, in accordance with Article 9 of Annex VII of UNCLOS which provides that if one of the

parties to the dispute does not appear before the Arbitral Tribunal, the other party may request the Tribunal to continue the procedures. The Tribunal has ruled that it has jurisdiction on seven of the claims by the Philippines. It has also completed its oral hearing of the case on its merit. Judgement is expected to be delivered in the past half of 2016.

Situation in South Asia

The positive attitude of the ASEAN countries is shared by the countries of South Asia. Let us cite a few examples.

Bangladesh/India Bay of Bengal Case

In addition to the Bay of Bengal dispute that Bangladesh has settled with Myanmar through ITLOS, in 2009, Bangladesh also instituted arbitral proceedings concerning the delimitation of its maritime boundary with India pursuant to Annex VII of UNCLOS. In 2014, the Arbitral Tribunal issued its Award which was accepted by both countries.

India-Pakistan Indus Waters Kishenganga Dispute

Relations between India and Pakistan have been difficult since the painful partition of British India in 1947 into the two countries. One of the difficult bilateral issues is how the waters of the Hindus River would be shared between them. Due to the facilitation of the World Bank, the first Prime Minister of India, Jawaharlal Nehru and General Ayub Khan, the President of Pakistan, signed a treaty on the Hindus River. In the event of a dispute, which cannot be settled by negotiation, they agreed to refer the dispute to international arbitration.

In 2010, Pakistan invoked the treaty and referred a dispute with India, over the building of dams by India, to arbitration. It requested the Arbitral Tribunal to determine whether the Treaty permits India to (i) divert the waters of the Kishenganga River under the Kishenganga Hydro-Electric Project and (ii) deplete or bring the reservoir level of run-of-river hydroelectric plants below dead storage level. In February 2013, the arbitral Arbitral tribunal Tribunal ruled in favour of India. issued a Partial Award concluding that India has the right to divert the waters of the Kishenganga River; however, this right is subject to the constraints provided in the Treaty and customary international law. In December 2013, the Arbitral Tribunal issued the Final Award, determining the minimum flow that India must release into

the Kishenganga River. The award has been accepted by the governments of the two countries.

Non-Adversarial Modalities of Dispute Settlement

The above survey shows that Asians in South East Asia and South Asia have referred some of their disputes to arbitration or adjudication. A few Asian states, including Cambodia, Japan, the Philippines and Timor Leste, have declared that they recognized as compulsory the ICJ jurisdiction. Some Asians, especially in North East Asia, are however reluctant to submit their sovereignty disputes over territory to either arbitration or adjudication. They do not like the fact that the legal process is adversarial and the outcome is a zero sum game. We would therefore like to suggest the following alternative methods of dispute settlement: fact-finding, mediation, conciliation and joint development.

Fact-Finding

In some cases, a dispute between two states is primarily about the facts and not about the law. The Land Reclamation Case between Malaysia and Singapore is such an example. In that case, Malaysia alleged that Singapore's land reclamation activities in the Straits of Johor, had intruded into Malaysian territory, caused damage to the marine environment and adversely affected the livelihood of Malaysian fishermen. After launching arbitral proceedings against Singapore, Malaysia applied to ITLOS for provisional measures against Singapore. In its 2003 Judgement, ITLOS rejected Malaysia's request for provisional measures. Instead, it ordered the two Governments to establish an independent group of experts to verify the facts. After a year-long study, the four experts submitted an unanimous report largely exonerating Singapore. The report was accepted by both Governments. The two sides were able to negotiate an amicable settlement based on those findings of fact.

Mediation

Mediation is consensual in nature and it results in a win-win outcome. An example of a successful mediation is the settlement of the protracted dispute between the Government of Indonesia and the Free Aceh Movement. Following the devastating Indian Ocean Tsunami of 2004, the two sides approached the former President of Finland, Martti Ahtisaari, to mediate. In a Nobel Prize-winning performance, Ahtisaari, succeeded in brokering a peace agreement in 2005.

Conciliation

Conciliation is also consensual and yields a win-win outcome. Three distinguished diplomats, Hans Anderson of Iceland, Jens Evensen of Norway and Elliot Richardson of the US were members of a conciliation commission established by Iceland and Norway to settle a dispute over the boundaries of their continental shelves. Richardson was appointed by Iceland and Norway as the impartial chairman. The commission was able to make a proposal acceptable to both parties. The UN Convention on the Law of the Sea contains an article, Article 284 on Conciliation. The Conciliation procedure is contained in Annex V of the Convention. We urge Asian countries, which are parties of the UN Convention, to consider using conciliation to settle their disputes.

Joint Development

Many years ago, the Chinese leader, Deng Xiaoping, proposed that we should put aside our competing legal claims and concentrate instead on jointly developing the resources in the disputed territory and sharing them. To date, six Southeast Asian States (Brunei, Cambodia, Indonesia, Malaysia, Thailand and Vietnam) and three Northeast Asian States (China, Japan and South Korea) have either officially agreed to negotiate joint development arrangements or have been a party to a joint development agreement. The fact that joint development can work is demonstrated by an agreement between Malaysia and Thailand to jointly develop the gas resources in the disputed area of their continental shelves in the Gulf of Thailand and sharing the benefits. The joint development between the two countries started in 1979 and has been a great success.

Conclusion

In conclusion, we wish to debunk the myth that Asians are hostile to using international law and arbitration and jurisdiction to settle their international legal disputes. The track record does not support this view. However, we understand that, culturally Asians are more comfortable with a non-adversarial process. They also prefer a win-win outcome to a zero sum game. We therefore urge them to consider settling their disputes by way of mediation, conciliation and joint development.