STEPPING OUT OF THE POLITICS—LEGAL SOLUTIONS TO MARITIME DISPUTES IN ASIA

This panel was convened at 9:45 am, Thursday, April 4, by its moderator, Nilfer Oral of the Faculty of Law, Istanbul Bilgi University, who introduced the panelists: Robert Beckman of the Centre for International Law, National University of Singapore; Rosalyn Higgins, former President of the International Court of Justice; Galo Carrera Hurtado of the Commission on the Limits of the Continental Shelf; Loretta Malintoppi of Eversheds LLP, Paris; and Alexander Yankov of the Tribunal for the Law of the Sea.*

The ICJ and Dispute Settlement in the Asian Seas: An Assessment

By Rosalyn Higgins†

This panel is dealing with a very ''hot topic''—many informative pages have been written on the great number of territorial and maritime disputes in the South China Sea; much government action, almost day by day, has been occurring; and the January 2013 *American Journal of International Law* contains a detailed Agora, from different national perspectives, on the legal and factual issues concerned. Indeed, one of our panelists, Rob Beckman, was a contributor to this Agora.

My modest task is very briefly to mention some of the key problems, and to say some words as to whether the International Court of Justice could have a useful role in settlement of the issues.

And this requires me to draw a distinction between substance and jurisdiction.

Substance

The International Court of Justice has universal subject-matter jurisdiction: it may deal with the interpretation or a treaty, any question of international law, or the existence of any fact which, if established, would constitute a breach of an international obligation.[1]

It will apply the provisions of UNCLOS where the contending states are parties thereto. It can address (''any question of international law'') the relationship between UNCLOS and ownership claims, including those based on historic title.

The complicated web of disputes in the South China Sea, the East China Sea, and the Sea of Japan all relate to issues that are bread and butter for the Court (the Chinese ''nine-dash line,'' the legal nature of which seems not fully developed by China, would present some interesting novel arguments!).

Let me very briefly outline what I mean. In the South China Sea, China and Taiwan (which occupies Taiping Island, the largest feature in the Spratlys) are at odds with each of the Philippines, Thailand, Cambodia, Malaysia, and Vietnam. In the East China Sea, there is an acrimonious and politically charged dispute between China and Japan. In the Sea of Japan, Japan and Korea are at odds. In all of these, the legal issues are very familiar to the Court. To name but a few:

(1) Sovereignty over small islands that lie at a considerable distance from continental or insular coasts.

* Mr. Beckman, Ms. Hurtado, and Mr. Yankov did not contribute remarks to the *Proceedings*.

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[1] Statute of the International Court of Justice [hereinafter ICJ Statute] art. 36(2).

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(2) What maritime entitlements are generated by those features: which are non-generating rocks, which are islands?
(3) Overlapping maritime entitlements.
(4) The impact of physical occupation of some islands and claimed *effectivités* by some claimants.
(5) Which maritime features under Article 121 UNCLOS are in whose continental shelf, and the legal implications.

Over the past 67 years, the ICJ has built up an impressive body of case law on maritime matters. So far as sovereignty over maritime features is concerned (and this arises with reference, inter alia, to the Spratly Islands, Senkaku/Diaoyu Islands, the Liancourt Rocks, the Paracel Islands, Scarborough Shoal, and others), one only has to recall that the Court has great experience already in examining geographical and historical evidence in the Asian region.

Thus, the decision of China in July 2012 to place the entire disputed maritime region in the South China Sea under the authority of the Chinese province of Hainan, and the passing of a law requiring foreign vessels to obtain Chinese permission before entering the disputed region are familiar enough issues for the Court.

Cases involving sovereign title and delimitation, including of overlapping maritime claims, have been a near-constant presence on the Court's docket over the decades. The Court, for example, is currently deliberating on a maritime dispute between Peru and Chile.

Claims have been made in the South China Sea that, on the one hand, claim proximity as the basis for title, and on the other, assert sovereign over small islands lying far from the continental coasts. The entitlement of disputed islands to generate an EEZ is part of what is contested. The nine-dash line would present more novel issues for the Court. It is not wholly clear what the legal function of this is claimed to be—something other than an identification of claimed boundary lines. China insists that it is compatible with UNCLOS, but founded on the historic title.

Obviously, sovereignty over maritime features is a central issue in many of the disputes in Asia. The Court has also addressed what maritime features are not capable of generating maritime entitlements, including, in *Qatar v. Bahrain* (2001), having to determine an issue not covered in UNCLOS. Are the Scarborough Shoal, Ieyodo/Suyan Reef, Cuarteron Reef, and Fiery Cross Reef islands low-tide elevations or submerged banks?

This is not the occasion to go through the Court's voluminous case law on maritime matters. I will merely refer to *Indonesia/Malaysia* (2002) and *Malaysia/Singapore* (2008) as reminders that the Court is experienced in examining geographic and historical evidence in Southeast Asia.

Many of the disputes in Southeast Asia relate, directly or indirectly, to oil and gas. The Court is familiar with this, although it is generally reserved about treating oil and gas claims or factors as ''relevant circumstances,'' which may alter a line provisionally drawn by the Court (*Nicaragua v. Colombia* (2012)).

And of course the Court has great experience in delimiting a single maritime boundary or overlapping EEZs, as would arise, for example, for the Scarborough Shoal/broader South China Sea claims and the Ieyodo/Suyan Reef. The era of ''equitable result by an equitable method'' (*North Sea Continental Shelf* (1969), *Libya/Malta* (1985)) has been somewhat overtaken by *Cameroon v. Nigeria* (2002) and *Romania v. Ukraine* (2009) where the three-step methodology for delimitation is clearly laid out. *Nicaragua v. Honduras* (2007) explains the use of a bisector where reasons of geography make the preferred equidistance line

impossible to construct. And *Nicaragua v. Colombia* (2012) and *Jan Mayen* (1993) address legal issues that may arise from substantial disparities in the lengths of parties' coasts.

Jurisdiction

However, problems of jurisdiction make it very hard to see any direct role for the International Court of Justice in resolving the myriad problems between the various contending parties in Southeast Asia.

Let us quickly say that claims made by Taiwan would immediately run up against Article 34 of the Statute of the Court, whereby ''only States may be parties to cases before the Court.'' Jurisdiction must be based on consent between the parties: ''The jurisdiction of the Court comprises all cases which the parties refer to it and all matters specially provided for in the Charter of the United Nations or in treaties and conventions in force.''[2] This mutual consent can be manifested in a variety of ways. Acceptance of the Optional Clause may afford a basis of jurisdiction. I refer here, of course, to Article 36(2) of the ICJ Statute whereby ''states parties to the present Statute may at any time declare that they recognize as compulsory ipso facto and without special agreement, in relation to any other state accepting the same obligation, the jurisdiction of the Court . . . ''

China, which is implicated in many of the disputes with its neighbors, has not accepted the Optional Clause. Nor have Brunei, Korea, Malaysia, or Vietnam. Looking at potential parties to legal disputes in Southeast Asia, only Cambodia has accepted the Court's jurisdiction without reservation. Japan and the Philippines have accepted jurisdiction, but with reservations. The Philippines' reservation concerns disputes ''in respect of the natural resources . . . of the sea-bed and subsoil of the continental shelf of the Philippines . . . or . . . in respect of the territory of the Republic of the Philippines, including its territorial seas and inland waters.''

None of this is very promising for the settlement of Southeast Asia disputes through the compulsory jurisdiction of the Court.

But the Court's jurisdiction would also cover matters provided for in treaties. Here one has an interesting interplay between the Statute of the Court and UNCLOS provisions for dispute settlement. All of the relevant states, save for Cambodia, have ratified UNCLOS.

Article 287 of UNCLOS provides that an UNCLOS party ''shall be *free to choose*,''[3] by means of a written declaration, one or more of the following means for the settlement of disputes. There is then listed: (a) the International Tribunal for the Law of the Sea, established in accordance with Annex VI; (b) the ICJ; (c) an arbitral tribunal constituted in accordance with Annex VII; and (d) a special arbitral tribunal constituted in accordance with Annex VIII for one or more of the categories there specified.

Not one of the parties to the bundle of Southeast Asian maritime disputes has selected the ICJ as its choice under Article 287. Further, several have specifically excluded disputes relating to boundaries from the dispute settlement procedures itemized in UNCLOS. So China declares that it does not accept any of the procedures itemized for the settlement of disputes. Korea says that it accepts none of the UNCLOS procedures, but reserves ''the right to submit a request to a court or tribunal referred to in Article 287 of UNCLOS should it so choose.''

[2] ICJ Statute art. 36(1).

[3] Emphasis added.

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Malaysia and Vietnam have used the opportunity of Article 287 declarations, and subsequent communications, to state their substantive claims, and also to counter China's actions and baseline drawing.

This is a somewhat depressing picture.

Of course, there is always the possibility that, in political and diplomatic circumstances not yet within our sight, the parties to one or more of the regional disputes might come to the ICJ on the basis of a Special Agreement—that is to say, jointly asking for certain specified legal issues to be resolved. This has been a growth area for the Court, with a considerable proportion of its cases arriving in this way. Maritime disputes involving *Indonesia/Malaysia* and *Malaysia/Singapore* came in recent years to the Court on such a basis.

There is also the possibility, however remote, of use of the Court through the so-called *forum prorogatum* route. Article 38(5) of the Rules of Court allows, even in the absence of an obvious basis for jurisdiction, for a party to submit a claim in the hope that the potential respondent may simply decide to let it go forward.

And, very occasionally, just once in a very rare while, the unexpected really can happen.

France, like China a permanent member of the Security Council, had always protected itself against being a respondent in unwanted litigation before the International Court.

Yet in 2003, when the Republic of the Congo sought unilaterally to start a case in the Court, lacking any apparent basis of jurisdiction for achieving this, France—to general astonishment—simply agreed to allow the Court to proceed to resolution of the claims. This highly unusual example of *forum prorogatum* was repeated in 2006 by Djibouti, which challenge France also accepted. France was undoubtedly confident in its legal position in each of the disputes—and with reason, as the first case was withdrawn by the Congo and the second case largely upheld France's arguments.

Just possibly, at some unascertained moment in the future, China might think it useful to emulate its P5 colleague, in allowing a claim to proceed to legal determination. But a good joke is never repeated. In 2012, France declined to respond to a hopeful *forum prorogatum* application from Equatorial Guinea.[4]

In summary, I think it unlikely in the extreme that any of these disputes will come to the International Court of Justice. But if there were to be third-party settlement for any of them, then I am sure that there will be heavy reliance on the law that has been enunciated by the International Court of Justice on the subject matter.

Trends and Perspectives of Settlement of Law of the Sea Disputes in Southeast Asia

By Loretta Malintoppi[*]

Introduction

My topic today focuses on some trends in the settlement of maritime disputes in Southeast Asia. It is certainly relevant to address this challenging question at a time when Asia is growing so rapidly in affluence, economic power, and political influence. However, it would be misleading to speak of Asia as a unity. Behind that name hides a vast region, with infinitely different people, cultures, and traditions, so that speaking of it as a whole invariably

[4] See also the attempt of Rwanda in 2007, where France equally declined to act on this basis.

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