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International Law and the Peaceful Resolution of Disputes: Asian Perspectives, Contributions, and Challenges

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Asian governments tend to be more sensitive about their sovereignty than governments in the contemporary West. Therefore, when differences occur and disputes arise, Asian governments tend to insist that they be resolved through bilateral consultations and negotiations. The reality is that, very often, the differences and disputes remain unresolved after years and even decades of negotiations. When left unresolved, some of these disputes have a tendency to contaminate the bilateral relationship as a whole. This is a great pity, because the disputes may revolve around relatively minor issues compared to the many other areas in which the two countries have convergent interests. Asian governments should therefore consider resolving such disputes by other peaceful means.

What are other modalities for the peaceful resolution of disputes? They are: (i) conciliation; (ii) mediation; (iii) fact-finding; (iv) arbitration; and (v) adjudication.

Conciliation, as a modality for resolving disputes, is culturally comfortable to Asians. It should, therefore, be a popular means for settling disputes between Asian states. Surprisingly, one cannot find in the literature recent examples of disputes between Asian states which have been settled by conciliation. I will, therefore, refer to a case between Iceland and Norway. The facts are as follows. On 28 May 1980, the governments of Iceland and Norway concluded an agreement concerning fishery and continental shelf questions. The agreement was to establish a conciliation commission to determine the dividing line for the continental shelf in the area between Iceland and Jan Mayen, an island belonging to Norway. The commission consisted of a conciliator from Iceland (Ambassador Hans Andersen), a conciliator from Norway (Jens Evensen) and a neutral chairman (Elliot Richardson of the United States). The three conciliators were the leaders of their respective delegations to the Third United Nations Conference on the Law of the Sea. The report and recommendations of the conciliation commission are contained in the Reports of International Arbitral Awards of the United Nations.[1]

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1. United Nations, [2007] XXVII Reports of International Arbitral Awards 1 at 1–134.

Both governments accepted the recommendations of the commission. I wish to bring this case to the attention of my Asian colleagues in the hope that some of the existing disputes between Asian states, for example, those relating to the South China Sea, could be settled amicably by using the device of conciliation commissions.

Mediation has deep cultural roots in Asia. When differences or disputes arose in Asia, in the past, there was a widespread practice for the disputants to call upon the village headman or community leader to help solve the disputes by conciliation and mediation. Asians like conciliation and mediation because the outcome is win–win and neither party is stigmatized as having lost the dispute. In this way, no one loses face. Recognizing the cultural acceptance of mediation and its merit, the Singapore government has made the option of mediation part of the judicial process in Singapore. Many cases have been successfully resolved by way of mediation. Cases only go to trial if the parties do not accept the resolution of the dispute through alternatives to litigation, such as mediation, or if these are not successful. The Singapore government has also established the Singapore Mediation Centre. The Centre trains and accredits interested individuals as mediators and provides mediation services to assist the parties to come to an amicable settlement without the need to go to trial.

Mediation has also been used to solve international disputes. On 26 December 2004, Indonesia, Malaysia, Thailand, Sri Lanka, India, the Maldives, and other countries around the rim of the Indian Ocean were hit by a killer wave called the tsunami. Many parts of the province of Aceh, in Indonesia, were almost completely wiped out. This made it impossible for the Free Aceh Movement (GAM) to continue its armed struggle for independence against the government of Indonesia. The two sides subsequently approached Martti Ahtisaari, the former President of Finland, to mediate in the dispute. He agreed and convened the first round in Helsinki in January 2005. Although Ahtisaari had no background on Indonesia, he had an adviser, Juha Christensen, who had lived for many years in Indonesia, spoke the local languages, and was trusted by both sides. Ahtisaari was a tough but fair mediator and personally chaired the face-to-face negotiations from the beginning to the end. Miraculously, after only five rounds, a comprehensive agreement was signed in Finland, on 15 August 2005, putting an end to thirty years of armed conflict.[2] The Aceh case should inspire Asians to think deeply on whether there are other disputes in Asia which could be solved in a similar way. The circumstances must, of course, be right and the two parties must have a genuine wish to seek an end to the dispute. What remains then is the choice of a skilful mediator acceptable to both sides. Who are the elder statesmen of Asia who would be willing to act as mediators and have the competence of Ahtisaari? Could the Association of Southeast Asian Nations (ASEAN) Secretariat make up such a list? Can the Asian Society of International Law play a role?

Fact-finding as a modality of dispute settlement is not very well known. I think its importance is underestimated. Very often, negotiations are bogged down because the

2. *Memorandum of Understanding between the Government of the Republic of Indonesia and the Free Aceh Movement*, 15 August 2005. See the excellent book by Katri MERIKALLIO, *Making Peace: Ahtisaari and Aceh* (Helsinki: WS Bookwell Oy, 2006).

two parties cannot agree on the facts. Let us consider a concrete example. In 2003, Malaysia applied to the International Tribunal for the Law of the Sea (based in Hamburg) for provisional measures to stop Singapore's land reclamation activities in the Straits of Johor. Malaysia alleged that Singapore's activities had, inter alia, caused pollution and other damage to the marine environment. Singapore denied the allegations. In its unanimous judgment, the Tribunal ordered the two parties to establish a group of independent experts to conduct a year-long study on the effects of Singapore's activities and to propose appropriate measures to deal with any adverse effects.[3] Malaysia and Singapore appointed two experts each, and the four experts submitted a unanimous report to the two parties at the end of their study. The experts concluded in their report that Singapore's land reclamation works would cause no major impact to Malaysia, while the minor and moderate impacts of the works could be mitigated. Malaysia and Singapore accepted the experts' recommendations and, on that basis, reached an amicable settlement after three rounds of negotiations. The text of the settlement agreement is contained in the decision of the Arbitral Tribunal dated 1 September 2005.[4] This is an excellent example of the use of independent experts, by the two parties to a dispute, to make an authoritative report on the facts. When the facts were accepted, the two parties were able to negotiate a settlement.

Arbitration should be more acceptable to Asian governments than adjudication. The process is less formal. A state has a say in the composition of the arbitral tribunal. The outcome is more likely to be win–win than a zero-sum game. Arbitration is the default dispute settlement process under the 1982 UN Convention on the Law of the Sea (UNCLOS). It is surprising that so few Asian states parties to the Convention have nominated arbitrators. Is this a case of neglect, indifference, or dislike for arbitration?

I wish to make three points on Asia and international adjudication. First, it is quite sad that out of the fifty-three states which belong to the Asian group at the UN, only five have accepted the compulsory jurisdiction of the International Court of Justice (ICJ). The five are: Cambodia, India, Japan, Pakistan, and the Philippines. Why are Asian states reluctant to accept the compulsory jurisdiction of the ICJ? Can anything be done to allay their concerns? Would it be useful for us to encourage more Asian states to do so? How can this best be done?

Second, according to the record of the ICJ, there have been only fifteen disputes involving an Asian state or states in the Court's history. The striking thing is that although China and Japan have nationals who are judges, neither country has brought a case to the ICJ. Nor has South Korea. In contrast, of the ten ASEAN countries, five have brought cases to the ICJ. They are: Cambodia, Indonesia, Malaysia, Singapore, and Thailand. Why? What is the legal or cultural explanation for the reluctance of the countries of North-East Asia to refer their disputes to the ICJ compared to the countries of South Asia and South-East Asia?

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3. *Case Concerning Land Reclamation by Singapore in and Around the Straits of Johor (Malaysia v Singapore)*, Request for Provisional Measures, Order of 8 October 2003, [2003] ITLOS Case No. 12, online: ITLOS 〈http://www.itlos.org/case_documents/2003/document_en_230.pdf〉.

4. *Case Concerning Land Reclamation by Singapore in and Around the Straits of Johor (Malaysia v Singapore)*, Decision of 1 September 2005, [2007] XXVII Reports of International Arbitral Awards 133 at 133–45.

Third, in the case of the International Tribunal on the Law of the Sea (ITLOS), which is a potentially useful court, it is currently languishing without work. How can we promote its use by states parties to the UNCLOS? There are disputes between some states parties concerning the interpretation and application of the Convention but, so far, the states concerned have been reluctant to refer their disputes to ITLOS for resolution. Why? Why are trade ministers willing to refer trade disputes to the WTO dispute settlement mechanism for resolution whereas foreign ministers are reluctant to refer their disputes on the law of the sea to ITLOS?

In conclusion, the Asian Society of International Law can play a useful role in promoting the greater acceptance of international law by Asian governments and peoples. We should promote the strengthening of the rule of law in Asia, both domestically and internationally. We should also encourage Asian governments to adopt a more open and positive attitude towards the various modalities for the settlement of disputes, other than negotiations. We should consider how best to encourage Asian governments to accept the jurisdiction of the ICJ and ITLOS, or at least to be less reluctant to refer their disputes to those courts by agreement. I will end on an optimistic note. The ASEAN Charter came into force on 15 December 2008. One of the chapters of the Charter (Chapter VIII) is on the compulsory settlement of disputes and it obliges ASEAN countries to resort to specific mechanisms to resolve disputes. The rules for the implementation of Chapter VIII of the Charter are being finalized by the legal experts. When completed and adopted by the ASEAN Summit, this will open a new chapter in ASEAN's journey towards a new future, one based on rules and institutions and which takes its commitments seriously. The fact that the ten ASEAN countries are willing to be bound by such an obligation is a good omen for the future. I hope the other regions of Asia will follow ASEAN's lead.