



## Resolving Southeast Asian Territorial Disputes A Role for the ICJ

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Southeast Asia has turned to the International Court of Justice (ICJ) on three occasions. The first case was *Cambodia v. Thailand* in 1959 and concerned the Preah Vihear Temple. Indonesia and Malaysia turned to the ICJ in 1998, in order to resolve an ongoing dispute over sovereignty over Pulau Ligitan and Pulau Sipadan, two islands in the Celebes Sea. In 2003, Malaysia and Singapore turned to the ICJ in a bid to resolve territorial disputes regarding Pedra Branca (known as Pulau Batu Puteh in Malaysia), Middle Rocks and South Ledge.

This essay will consider these cases in greater detail in an attempt to establish the effectiveness of the ICJ as a means of resolving territorial disputes in the Southeast Asia region. The ICJ, one of the six principal organs of the United Nations, serves as its main judicial organ. It acts as a world court and has a dual jurisdiction, deciding disputes that are brought to it by states and giving advisory opinions on legal questions at the request of organizations like the UN. The 15 judges of the ICJ are elected by the UN General Assembly and the Security Council for a period of nine years. The election process was designed with the aim of restricting political pressures in the selection of judges. However, one of the criticisms of the Court is that in practice politicization does occur.

Southeast Asia is currently embroiled in a number of territorial disputes, the resolution of which would greatly increase progress towards regional integration. This essay argues that the ICJ has the potential to play a much greater role in resolving these disputes and that action should be taken to increase the court's credibility among Southeast Asian nations. It is important to note that China is involved in a number of territorial disputes with countries in Southeast Asia. The Spratly Islands is

the most notable of these, although there are also issues relating to the land borders between China and Vietnam and China and Laos.

### I ROLE OF THE ICJ: A CRITIQUE

In 2002, sovereignty over both Pulau Ligitan and Pulau Sipadan was awarded to Malaysia by the ICJ. The dispute over the territories was brought before the ICJ in 1998 by the governments of both parties to the dispute. However, the ICJ did not determine the maritime boundaries between Malaysia and Indonesia in the area around the two islands. As a result one could argue that the dispute has not been settled completely. It is important to note that the sole reason for this was that the ICJ was not requested to resolve that particular issue by the parties involved in the dispute.

In May 2008, sovereignty over Pedra Branca was awarded to Singapore, Middle Rock was awarded to Malaysia and South Ledge was split between both countries according to their territorial waters. Both Malaysia and Singapore accepted the ICJ's ruling, with the Singaporean Deputy Prime Minister S. Jayakumar stating that Singapore was pleased with the judgment and the Malaysian Foreign Minister Rais Yatim describing the outcome as a "win-win" judgment. This was to be expected as the two countries had jointly submitted the request for the ICJ to resolve the dispute in 2003. It is however important to note that despite this ruling, outstanding issues remain. Singapore and Malaysia have yet to decide how the territorial waters around Pedra Branca and Middle Rocks will be delimited. A joint technical committee will be responsible for this.

In both the cases mentioned above, the ICJ has

only resolved half the issue. This is certainly a step in the right direction, but years of negotiation remain to fully resolve the disputes, even after the outcome of the lengthy ICJ hearings. It is however important to note that the ICJ fulfilled its remit in both the aforementioned cases as it was not asked to determine maritime boundaries in either case. The time-consuming process of starting fresh negotiations after the ICJ has presented its ruling does however suggest that alternative means of conflict resolution, preferably in the form of bilateral negotiations, may be more effective in resolving territorial disputes than referring cases to the ICJ.

In 2003, Singapore and Malaysia also referred a territorial dispute to the International Tribunal for the Law of the Sea (ITLOS) in Hamburg for arbitration. The dispute related to Singapore's land reclamation projects which Malaysia alleged encroached on Malaysian territorial waters. Once again the Tribunal, as arbitrator, only played a partial role in the resolution of the conflict. Several rounds of negotiations took place before the dispute was finally resolved by the signing of the Settlement Agreement on 26 April 2005.

The majority of territorial disputes in Southeast Asia have not been resolved this way, confirming that for the majority of nations in the region, the ICJ and other international courts like the ITLOS remain something of a last resort. Bilateral dispute resolution is more common. Brunei and Malaysia, for example, reached agreements to resolve a number of territorial disputes regarding both land and sea boundaries in August 2008.

## II UNRESOLVED DISPUTES

The Preah Vihear Temple dispute between Thailand and Cambodia has shown signs of escalation despite a period of calm since the latter half of 2008. On 19 September 2009, a mob

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raised by the People's Alliance for Democracy (PAD) clashed with riot police and local villagers who were blocking their way to the temple, on the Cambodian side of the Thai-Cambodian border. The conflict was initially thought to have been resolved in 1962, when the temple was awarded to Cambodia by the ICJ. However the problem with the 1962 ruling was that much of the territory surrounding the temple remained a part of Thailand. The way in which the territory was divided has arguably facilitated the recent rise in hostilities between the two parties to the dispute.

The territorial dispute over Sabah also remains unresolved. The Philippines claims Sabah on the basis that all land on the Northeastern part of Borneo was once subject to the Sultanate of Sulu, which is part of the Philippines. The Philippines first staked their claim to the territory in 1962, when the Malaysian Federation was being formed. Bilateral relations between Malaysia and the Philippines were restored in 1969, but the Philippines has yet to officially renounce its claim to Sabah. Bilateral relations between the two countries have improved dramatically in recent years and it is hoped that the Philippines' dormant claim to the territory will eventually be renounced completely.

According to the 2008 issue of the Heidelberg Conflict Barometer, there are outstanding territorial disputes between Cambodia and Vietnam, Singapore and Malaysia, and Thailand and Myanmar. Other sources list many more regional territorial disputes. According to [Amer](#), Vietnam alone was embroiled in five different territorial disputes with other Southeast Asian nations in 2005. These include disputes with Cambodia, Thailand, Malaysia, the Philippines and Brunei. Differences in dispute classification are one of the factors responsible for this data diversity. Regardless of the exact figures there can be no doubt that a significant number of territorial disputes in Southeast Asia remain unresolved.

One of the reasons behind the plethora of territorial disputes in Southeast Asia relates to the fact that land borders have yet to be demarcated in many parts of the region. Cambodia and Laos have taken steps in this regard and Thailand has suggested that it is interested in taking steps to demarcate its border with Cambodia in order to prevent an escalation in hostilities between the two countries. Indonesia and Timor-Leste also took steps to demarcate their joint border in 2004. All these initiatives are a step towards eliminating territorial disputes within the region.

### III A GREATER ROLE FOR THE ICJ?

The ICJ appears, at first glance, to have great potential for resolving the many outstanding territorial disputes in Southeast Asia. The cases referred to the court by Indonesia and Malaysia and Singapore and Malaysia respectively were resolved and the judgments were accepted by the parties involved. This suggests that the ICJ is an effective mediator. Moreover, the ICJ, as an international court, is in theory impartial and thus ideally placed to resolve territorial disputes in a non-partisan manner. The court has however been widely criticized by nations and scholars alike. These criticisms include arguments that the Court's rulings are not binding, that the Court is biased and that some states choose not to accept the Court's jurisdiction. These criticisms must therefore be considered in more detail when assessing the ICJ's role in resolving Southeast Asian territorial disputes.

While it is true, that the ICJ has failed in bringing about a lasting resolution to the Preah Vihear Temple dispute, the original ruling took place in 1962. The situation therefore remained stable for a period of over 40 years. Dismissing the ICJ's role in the resolution of this dispute as a failure is thus overly simplistic.

Questions about the courts partiality have however also been raised. In their assessment of the court's partiality Posner and de Figueirado conclude that judges vote for their home states 90 per cent of the time. They also find that in cases when their home states are not involved judges vote for states that are similar to their home states in terms of wealth, culture and political regime. There is also evidence to suggest that judges vote in favour of the strategic partners of their home states. The evidence for this tendency is however relatively weak. These conclusions are not as damning as they appear. While the findings raise questions about the integrity of individual judges, they do not prove that the ICJ as an institution is biased. With a total of 15 judges, some of whom will almost certainly be from countries with no connection to the parties in a particular case, it seems unlikely that the above findings will have a significant influence on the Court's final rulings. Supporting this argument is the fact that Posner and de Figueirado themselves point out that the evidence that the Court is biased is not overwhelming.

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According to Knight, although the ICJ "has become an important element in peacekeeping not all UN member states accept its jurisdiction and those that do can hold out reservations on any of its judgments." This severely impedes the credibility of the court and its judgments. Both parties must accept the court's jurisdiction if it is to be successful in dispute resolution. Despite the fact that 64 states have accepted the compulsory jurisdiction of the court and numerous multilateral treaties provide for ICJ adjudication there have been a number of cases, including the Preah Vihear Temple case, where one of the parties has disputed the court's jurisdiction over the issue concerned. While that particular situation was resolved when it transpired that Thailand had undertaken to accept the court's jurisdiction prior to the Preah Vihear Temple case being referred to the ICJ these issues only serve to postpone hearings and to lengthen the time it takes for the court to reach a satisfactory conclusion.

Another criticism of the court is that it should not be necessary for Southeast Asian nations to turn to an international legal body to resolve regional disputes. There is widespread feeling that the Association of Southeast Asian Nations (ASEAN) should be playing a greater role in settling intra-regional disputes. However, ASEAN member states continue to support a policy of non-interference. In 2008, the ASEAN Charter was adopted by all the member states. An entire chapter deals with issues pertaining to the settlement of disputes. Article 22 of the Charter states that a dispute settlement mechanism will be established and maintained and Article 23 states that parties to a dispute may request "the Chairman or Secretary-General of ASEAN, acting in an ex-officio capacity, to provide good offices, conciliation or mediation." The blueprint for an ASEAN Political Security Community was unveiled at the ASEAN Summit in Thailand in March 2009. It declares "more efforts are needed in strengthening the existing modes of pacific settlement of disputes to avoid or settle future disputes." This is undoubtedly a step in the right direction but nothing concrete has been settled, suggesting that a change in ASEAN's stance on the issue of intervention



remains a long way off.

There has also been a tendency to favour bilateral conflict resolution in Southeast Asia. In the case of the Preah Vihear Temple dispute both Thailand and Cambodia rejected the idea of referring the case to the ICJ. They also dismissed the idea of third-party mediation proposed by Indonesia. Yet bilateral efforts to resolve the dispute have thus far failed as demonstrated by recent events on the Thai-Cambodian border. Moreover, Koh and Lin argue that third-party processes are a useful tool in bringing about amicable dispute resolution. They state that such processes are often the only way to break impasses. Singapore has turned to international bodies on a number of occasions and has suggested that third-party resolution methods could also be used to resolve Singapore's dispute with Malaysia regarding the Malayan Railway. This indicates that Singapore has a lot of confidence in the international legal bodies that it has turned to in the past. It is necessary to instill this level of confidence in the other Southeast Asian nations if the ICJ is to play a greater role in resolving territorial disputes in the region.

#### IV

#### CONCLUSIONS: TOWARDS REGIONAL INTEGRATION

The ICJ has the potential to play a key role in resolving territorial disputes where other forms of mediation have failed. Bilateral negotiations, as the least involved method of resolving conflicts, are undoubtedly the preferred means of dispute settlement but they are not always successful. Regional mediation is also preferable to international involvement but is not always viable due to fears that regional actors may have vested interests in certain cases. Moreover, ASEAN's current stance on intervention in regional disputes renders a greater regional role in the resolution of territorial disputes unlikely in the impending future.

If the ICJ is to assume a greater role in resolving the outstanding territorial disputes in Southeast Asia, the Court must gain greater credibility in the eyes of Southeast Asian nations. Faith in the Court's ability to settle disputes must extend beyond Singapore, Malaysia and Indonesia. Moreover, the ICJ must seek to reaffirm its non-partisan status in order to convince countries that any rulings made by the Court are fair and should be adhered to.

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