Resolving Territorial Disputes: Cambodia-Thailand, the South China Sea, and the Role of International Law

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As indicated on the IISS Web site, the session chair was Dr Andrew Parasiliti, Executive Director, IISS-US. Panellists were HRH Prince Norodom Sirivudh, Supreme Privy Counsellor to HM the King; Founder and Chairman, Cambodian Institute for Cooperation and Peace; Dr Panitan Wattanayagorn, Deputy Secretary-General to the Prime Minister - Political Affairs, Thailand; and Professor Simon Chesterman, Vice Dean and Professor, Faculty of Law, National University of Singapore.

Introduction

International law — indeed, the present international order — is grounded on the concept of the modern state. The foundation of that state, and thus of international law, lies in the effort to limit conflict by agreeing on the inviolability of borders.

That was the essence of the 1648 Treaty of Westphalia, which ended the Thirty Years War. It established, among other things, that rulers would respect one another’s territorial sovereignty.

There have been many challenges to the absolutist conception of sovereignty. A recent example is the rise the doctrine of R2P, which caused a brief flurry of concern when the French Foreign Minister invoked it with respect to Myanmar. A more sober application is the ongoing military action in Libya, which both shows the promise and the limitation of the doctrine.¹

But the basic mission of international law remains the facilitation of peaceful dispute resolution within existing borders.

Though the twentieth century was the bloodiest in human history, the willingness of states to settle territorial disputes — disputes that go to the heart of what a state is — by law rather than by force of arms, is a remarkable achievement.

Four Tools

International law assists in the avoidance or resolution of territorial disputes in four ways.

¹ See my forthcoming piece in Ethics and International Affairs.
First, and most importantly, the threat or use of force is outlawed.

Colonialism and conquest have not disappeared completely, but it would be highly unusual for one state to eye the territory of another and invade.

Transparent efforts to do so, such as Iraq’s invasion of Kuwait in August 1990, have inspired the wrath of the international community. In that instance, the Security Council responded and Kuwaiti sovereignty was restored.

We might think of other examples of cross border incursions, but mere annexing of territory is very rare and tends to be unsuccessful.

There are, however, pieces of territory — or, more commonly, bodies of water — over which there is some uncertainty as to the sovereign.

A second tool is the various forms of good offices that can be lent by third party states, or international organizations, such as the UN through its Secretary-General.

Ongoing efforts in Cyprus, Western Sahara, and the Middle East suggest that even if they can’t be resolved, the UN’s engagement can sometimes prevent conflicts turning violent.

An interesting development here is the possibility of an ASEAN capacity to assist in dispute resolution, including a possible Institute for Peace and Reconciliation.

Another model from the Asian region is the Shanghai Cooperation Organization, which began its life as the Shanghai Five in 1996 with a mandate basically limited to the resolution of border disputes.

A third important tool offered by international law is the systematic effort to document claims to territory, or to define what territory can be claimed.

An example of the former is the encouragement of states to submit their continental shelf claims to the Commission on the Limits of the Continental Shelf.

An example of the latter is the definition, in article 121 of the UNCLOS, of an “island” as “a naturally formed area of land above water at high tide”, or the agreements on Antarctica and the surface of the Moon and other celestial bodies.

Frequently, however, a dispute may not be susceptible to conciliation and there may be no authoritative statement on sovereignty.

In such circumstances, international law offers a fourth tool: the possibility of judicial determination of a dispute.

This now makes up much of the business of the ICJ.

As an international lawyer, for example, it was remarkable to see Malaysia and Singapore agree to allow the ICJ to determine the Pedra Branca/Pulau Batu Puteh dispute — and that both sides have complied with the judgment.
Choice

Which of these tools is used will depend on the state concerned, but there is some interesting literature suggesting a link between the domestic legal regime of a state and the preferred dispute resolution method.

If both parties are civil law countries, they tend to prefer legalized dispute resolution. Common law parties tend to resolve disputes through bilateral negotiations. Islamic law parties are most likely to use nonbinding third party methods.  

A second factor that appears to be important is the past record of success and failure. This is particularly true of challenging states, which tend to rely on binding dispute resolution methods if they have been successful in the past. Target states, by contrast, tend to place greater trust in their experience of non-binding third party methods.

Competing objectives

The legal regime in place therefore has two competing — and sometime inconsistent — objectives: one the one hand, peaceful resolution of conflict; on the other, clarity as to title.

In a domestic context, this is relatively simple as there is a vertical hierarchy that can enforce the law. In international law, however, the horizontal nature of the international system is such that legal institutions must be sensitive not merely to justice being done, and being seen to be done, but also to there being a reasonable prospect of justice being implemented.

For that reason, in some situations the two objectives of law — peaceful dispute resolution and clarity — has to sacrifice one.

Typically, that is clarity.

Two Examples

Let me briefly cite two examples of this that are intensely relevant to our discussions today.

1. Temple of Preah Vihear

This was the subject of a 1962 ICJ Decision.

Now the ICJ has a history of Solomonic Decisions that appear to resolve a problem but may simply postpone it. The ICJ Western Sahara advisory opinion in 1975 confirmed a right of self-determination without helping answer the crucial question of who would get to exercise it. Last year’s Kosovo

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Advisory Opinion was a case study in how to answer the question you wish you had been asked instead of the one you had been asked.

In 1962, in a case fraught with inconsistent maps, the Court held that the temple itself was in Cambodian territory but made no formal conclusion on the land surrounding it.

Half a century later, and three years into an escalating border dispute between Thailand and Cambodia, Cambodia has requested an “interpretation” of the judgement.

Oral arguments in the request for provisional measures concluded on Tuesday this week.

Meanwhile, within ASEAN there has been talk of Indonesia taking on a larger role. Unarmed observers were allowed in last February.

The success or failure of this will have implications for the ongoing dispute, but also for the credibility of ASEAN.

2. South China Sea

A second example, that is of ongoing interest, is the South China Sea.

As in Preah Vihear, we have a situation that is provoking anxiety in significant part because of the lack of certainty.

In May 2009, Malaysia and Vietnam made a joint submission to the Commission on the Limits of the Continental Shelf.

This provoked a series of diplomatic notes, most famously including China’s note of 7 May 2009 maintaining its sovereignty over the Spratly Islands (or Nansha Islands) and their adjacent waters. China also claimed sovereign rights and jurisdiction in the “relevant” waters in the South China Sea, attaching a map with nine dashed lines that encompassed much of the South China Sea.

There is no provision in the UNCLOS for claims to “relevant” waters, however, and there was uncertainty as to whether the dashed lines asserted claims to the entire South China Sea or to relevant waters in the sense of waters adjacent to claimable islands.

On 14 April 2011, in response to a note from the Philippines, China repeated its claims but did not mention the map with the nine dashed lines and it stated, for the first time, that the Spratly or Nansha Islands were entitled to a territorial sea, EEZ, and continental shelf. As Professor Robert Beckman has noted, this appears to be significant as it links China’s claims to the language of the UNCLOS.4

Conclusion

It’s easy to be critical of lawyers and the legal system.

Even in the Pedra Branca case, the ICJ tried to keep everyone happy: Pedra Branca went to Singapore, Middle Rocks went to Malaysia, South Ledge went to the lawyers.

It may be an example of the old lawyer’s adage: never ask a question unless you want to hear the answer.

But international law, in the absence of effective enforcement, one cannot always achieve clarity.

In the two examples I gave, lack of clarity is causing much of the present tension.

Yet, in the case of the South China Sea, international law offers a language and a framework for inching towards consensus.

And in the case of the Cambodia-Thailand dispute, the ICJ decision bought half a century of relative peace — and for this week at least, most of the fighting between the two countries was between lawyers in The Hague rather than soldiers on the ground.