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THE EXPERIENCE OF ASIA WITH INTERNATIONAL ADJUDICATION

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Throughout the entire period of activities of the Permanent Court of International Justice (1922-1946), there were altogether only three cases that involved, in some form or other, Asian states. Japan herself was exposed to this community of civilised nations only in the latter half of the 19th century. The initial attitude of Meiji Japan towards the "law of nations" was manifested in particular in her positive posture towards international arbitration. However, the loss of Japan in the Yokohama House Tax case led to the lesson drawn that international law was not really a body of principles based on natural justice which the East could share in common with the West, but a bunch of technical rules which were devised by the West for their interest and which could be manipulated to the tactical advantage of the West. Thus a gradual but pernicious new development came to surface that under the ostensible guise of superficial observance of international law, Japan tended to cloak an inner distrust vis-à-vis international adjudication. A similar attitude of reticence and reserve towards international adjudication appears to have been prevailing for many years in Asia and in East Asia in particular, even after the independence of many Asian nations since the end of World War II. Be that as it may, it is remarkable that with the most recent success in nation-building in many nations of Asia, with the corresponding growth in confidence of their capacity to be significant players in international affairs of the contemporary world, that the nations in this region have, apparently, come a long way towards putting their trust in international law and its institutions. As a result, the International Court of Justice appears to have come to gain, little by little, a degree of confidence among Asian countries.

The history of Asia's experience with international adjudication is not very old. It goes back to the time when nations of Asia, for the first time in history, came in contact with the main currents of the international community, as it called itself in those days as the "Community of Civilised Nations" governed by the law of nations in the latter half of the 19th century. What is more, the creation of a full-fledged permanent court for international adjudication itself came about only at the turn of the 19th century. It was in 1920 that the Council of the League of Nations appointed a Committee of Jurists, charged with the mission of submitting an organisational plan for the creation of a permanent international court which would be associated with the League system. This plan developed into the Permanent Court of International Justice—the institutional predecessor of the present-day International Court of Justice. Understandably, in this historic undertaking to create a permanent international court to settle disputes between sovereign States through adjudication on the basis of law, Japan was practically Asia's only link to this process. At that time, she was the only country from Asia to be represented on the work of this Committee of Jurists.

The reason for this weak link between Asia and international adjudication during this period is very simple. At the turn of the century from the 19th to the 20th, there were not yet many sovereign members of the international community from Asia. Many of the

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territories in this region, which nowadays enjoy wide membership in the United Nations, were still under the colonial rule of Western states. Thus, when the Permanent Court of International Justice finally came into existence in 1922, only five Asian states had already been members of the League of Nations, *i.e.*, Afghanistan, China, India, Japan and Siam, became signatories of the Statute of the Court. Throughout the entire period of activities of the Permanent Court of International Justice (1922-1946), there were altogether only three cases that involved, in some form or other, Asian states. While Japan twice appeared before the Court, it was only as one of the five co-plaintiffs in *The S.S "Wimbledon" Case*[1] and the *Interpretation of the Memel Convention* case[2] of 1932, in her capacity as one of the Principal Allied and Associated Powers which had special responsibility under the Treaty of Versailles. China was a party to the *Termination of Sino-Belgian Treaty of 1865* case[3] of 1927 brought before the Permanent Court by Belgium, but the case was eventually settled between the parties out of the Court. All in all, it cannot be said that the presence of Asia before the International Court during the period of existence of the Permanent Court of International Justice was very remarkable.

It should be recalled that Japan herself had gone through the experience of being exposed to this community of civilised nations only in the latter half of the 19th century and of having the baptism of international law in general and international adjudication in particular. In fact, this first encounter of Japan with the "community of civilised nations" came about when in 1853 the four "black ships" led by Commodore Perry of the United States came to the shores of Japan to force Japan to open her door to the outside world. This effectively put an end to the more than two hundred year long history of *sakoku*—the closure of the country (1639-1853)—of Japan.[4]

The period during which Japan remained closed to the outside world also coincided with the time when the modern international system of Europe, established on the principle of coexistence of nation States in Europe on the political level, and on the emergence of industrial capitalism as a tool for development on the economic level, was being consolidated. The orientation of these European states in this period was mutually competitive and expansionist in outlook. Politically, they were interested in expanding the sphere of application of this new political system; economically, they were interested in enlarging the markets for selling the products of this new economic system and for buying the raw materials needed for the development of the system.

Against this background, various maritime powers of the period had tried, even before the arrival of the black ships from the United States, to open Japan for intercourse with nations of the world. These attempts, however, had been in vain. Thus Russia tried to establish trade relations with Japan through the visit of A. Laxman to Nemuro in 1792 and the visit of N.P. Rezanov to Nagasaki in 1804. Great Britain sent her vessel S.S. *Phaeton* to Nagaski in 1844. Holland, the only country that had maintained trade relations with Japan throughout this period of *sakoku*, tried to persuade the Tokugawa Shogunate of the importance of opening the country through sending a State Note of King Willem II to the *Shogun* in 1844. All these attempts, however, met with flat refusal by the Shogunate

1 *Case of the S.S Wimbledon* (*Britain v. Germany*) (1923) P.C.I.J. (Ser. A) No. 1.

2 *Denunciation of the Treaty of November 2nd, 1865, between China and Belgium*, Order of 21 February 1928, P.C.I.J. (Ser. A) No. 14.

3 *Interpretation of the Statute of the Memel Territory* (1932) P.C.I.J. (Ser. A/B) No. 47.

4 This of course was not the first time in her history that Japan had contact or intercourse with other countries. The history of Japan is full of cases where the Government of the time entered into official relations, peaceful or belligerent, with her neighbouring countries. Thus, it is reported that between the Korean Peninsula and the Japanese Archipelago, official relations between the two Governments of the time already existed in the 3rd century, as is claimed by the story of the invasion of the Japanese forces led by Empress *Jingu-Kogo* into the Korean Peninsula, resulting in the establishment of an official mission of Japan (*Nihon-fu*)" in the southern part of the peninsula. Also in the 5th century, the Government of Japan entered into official contacts with the successive Governments of China in the era of the Northern and Southern Dynasties (420-489), opening the way to full-scale formal interstate relations that lasted for more than a century with the Sui Dynasty (589-618) and T'ang Dynasty (618-909) on the Chinese side.

(*Bakufu*) authorities, who insisted that the closure of the country was a "long established ancient law" of the Shogunate that they had to observe under the "ancestral command of the founder of the Shogunate". It was thus only in 1853 when Commodore Perry of the United States arrived in the Bay of Yedo (present-day Tokyo) with four "black ships" to present President Fillimore's letter to the Japanese "Emperor" (*i.e.*, *Shogun*) that a western power succeeded in forcing Japan to open the country by the show of arms. While the mission of Commodore Perry, according to the instruction he carried with him, was humanitarian and commercial,[5] the personal interest of Commodore Perry was as much political as economic.

If Perry opened Japan's door with a show of arms, it was Harris, the first US Consul-General in Japan, who gave the first baptism of the "law of nations" to the Japanese officials. When Harris was negotiating the Treaty of Amity and Commerce with the commissioners of the Shogunate in December 1857, Harris invoked the "law of nations" again and again. This first encounter with the new concept of the "law of nations" gave a great shock to the *Bakufu* authorities who were involved in those negotiations. The concept of the "law of nations" was not only totally alien and novel to them; they were particularly alarmed by the warning given by Consul Harris that the whole precept of "the law of nations" was the essential prerequisite for Japan to be admitted into the "community of civilised nations". The need for the study and understanding of the "law of nations" suddenly became a problem of immediate urgency.

By the end of the 1850s, the opening of Japan was complete through a series of treaties of commerce and friendship with a number of major Western powers (the *Treaty Powers*). It was through this process of negotiations that the *Bakufu* officials of necessity came to acquire some fragmentary knowledge of international law. Thus compelled, the Japanese officials were eager to learn and understand the essence of what was described to them as the "law of nations". What was particularly significant in this process was that these Japanese scholars, in trying to grasp what the "law of nations" was all about, paid particular attention to the problem of the nature and philosophical basis of this novel precept. This development was as much due to the circumstances in which the concept was introduced to them as described above, as to the fact that the teaching of international law introduced to Japan at that time was under the dominant influence of the naturalist doctrine of the Grotian tradition.[6] Under these circumstances, these scholars, who had been brought up in the neo-Confucian tradition of *Chu Hsi* school, tried to comprehend the concept of the "law of nations" as preached to them by comparing it to what they had already known in their learning. Specifically, they tried to assimilate this cannon of basic rules of conduct for States, which they were expected to observe in their mutual intercourse as members of this "community of civilised nations", with their own neo-Confucian metaphysical concept of the "principles of the universe (*ten ri* or *ten do*)" which also were regarded in their

5 The instruction Commodore Perry had from the Acting Secretary of State, Charles M. Conrad, contained the following points to be addressed to the Japanese authorities:

(a) the protection of shipwrecked sailors;
(b) the opening of Japanese ports for provisions and repair of vessels;
(c) the opening of Japanese ports for commerce.

6 In late 1864, the American missionary, W.A.P. Martin, produced a Chinese translation of Henry Wheaton's *Elements of International Law* and published it in Peking under the title *Wan Kuo Kung Fa* ("Public Law of all Nations"). It is significant to note that the Chinese translation of the book, in which the author essentially followed the naturalist doctrine of classical school of Hugo Grotius rather than the positivist school of 19th century England, covered only the General Part of the work dealing with the nature and the sources of international law. The work was received with so much favour in Japan that it was said that "copies could not be sent out in time to supply the [Japanese] demands". In less than a year after Martin's work appeared in Peking, the *Kaiseijo* published a reprint in Yedo, followed by other private editions of the Chinese text adapted for Japanese use. Later in 1868, the first Japanese translation of Martin's work in Chinese was published, and in the following decade various publication of Japanese versions with commentaries appeared.

learning as the basic principles of conduct for individuals in their relations as individuals in society. Thus, they came to associate the Western "law of nations", which in those days was strongly coloured by the natural law doctrine advocated by Hugo Grotius, with the Confucian principles of universal justice, by referring to it as *koho* (public law) or *kodo* (public principles).[7]

We can see an illustration of this basic attitude of Japan of the day towards the "law of nations" in the subsequent history of the new Meiji Government. Shortly after the Tokogawa Shogunate returned its political power to the Emperor in Kyoto, the newly established Imperial Government issued in 1868 various proclamations and decrees to enunciate the new policy outlook of the Government to the outside world as well as to the Japanese people. In these proclamations and decrees, we find the "law of nations" frequently invoked. Thus, in the Imperial Proclamation of Foreign Policy issued on February 8, 1868, for example, we find the following reference:

> "Our foreign intercourse shall be conducted henceforth in conformity with the public principles of the universe (*udai no kodo)*."

This initial attitude of Meiji Japan towards the "law of nations" was manifested in particular in her positive posture towards international arbitration. Japan's first experience with international arbitration came with a dispute between Japan and Peru in which the Meiji Government was involved in early years of Japan's exposure to the outside world. This dispute which came about in 1873, involved the question of the maltreatment of Chinese labourers carried on a Peruvian vessel that had come into the port of Yokohama. The Government of Japan ordered the detention of the vessel on the ground that it was engaged in slave trade. It was eventually brought before an international arbitration by the Government of Japan after only five years of the birth of the Meiji Government. This international arbitration, known as the *Maria Luz* case, ended in an award by which Japan successfully won the case in her favour. After this first exposure to international arbitration, Japan was party to no less than four arbitration cases in the short span of thirty years between 1873 to 1903.[8] It is believed that this is a record which no other country of the period could equal. Despite the different background surrounding each of the cases, it can safely be said that this is evidence of the degree of confidence that Japan held at the time towards international law in general, and her positive attitude towards international adjudication in particular.

However, a dispute which arose at the turn of the century between Japan and some of the *Treaty Powers* (Great Britain, France and Germany) concerning the interpretation and application of the newly revised "unequal treaties" came to change in a drastic way this benevolent picture of Japan's attitude towards international adjudication. The treaties of establishment, commerce and friendship, which had been concluded by the Shogunate at the time of the opening of the country with some Western powers (*i.e.*, the *Treaty Powers*) under pressure, had imposed grossly unfair and unequal status on Japan, such as the grant to the *Treaty Powers* of extraterritoriality, the denial to Japan of tariff autonomy and the imposition of unconditional and unilateral Most Favoured Nation (M.F.N.) treatment. With the establishment of the Meiji Imperial Government, the revision of these treaties, called "unequal treaties", became the number one priority issue of Japanese diplomacy in the

[7] Soeshima Taneomi, one of the senior statesmen of the Meiji era, stated in the recollections of his life that, "the Japanese intellectuals of the late Tokogawa period had interpreted Martin's Chinese translation of international law as being in consonance with their own Asian way of thought". Thus, the law of nations was popularly referred to through such expressions as *bankoku kôhô* (public law of all nations), or *tenchi no kôdô* (public principles of the universe), which was interpreted as metaphysical rules of justice in human relations applied to the conduct of interstate relations.

[8] They were, chronologically, the *Maria Luz* case (1873), the *Peiho* case (1884), the *Japanese Immigrants to Hawaii* case (1899), and the *Yokohama House Tax* case (1903).

Meiji period, representing a fervent aspiration of the new Meiji Government. After long and painful negotiations over some thirty years, the long-cherished dream of the nation to get rid of these "unequal treaties" was finally realised towards the end of the 19th century. It was against this background, that Japan, acting under the new revised treaties, which, *inter alia*, abolished extraterritoriality that the *Treaty Powers* had enjoyed under the old treaties, tried to levy anew a house tax upon the nationals of these *Treaty Powers*, who were residents in Yokohama on the basis of a perpetual lease granted to them under the old treaties. When the three *Treaty Powers* of Great Britain, France and Germany lodged their protest to the Meiji Government over the imposition of this house tax upon their nationals as a violation of certain provisions in the new revised treaties, Japan proposed to the three major *Treaty Powers* to submit this dispute to the Permanent Court of Arbitration which had just been created by the First Hague Peace Conference of 1899. The prevailing opinion among intellectuals in Japan at that time was one of enthusiasm in welcoming this submission to international adjudication. In fact, the public opinion had been so enthusiastic in embracing the system of international arbitration just created by the First Hague Peace Conference that many people in Japan had advocated that Japan should be the first in the world to appear before this new international tribunal by submitting this case, which came to be known as the *Yokohama House Tax* case, to this new Permanent Court of Arbitration. Many in Japan were convinced that such a course would be in line with the position that Japan had come to adopt, *i.e.*, that international law should be the guiding principle to lead Japan in her intercourse within the "community of civilised nations".

Given this background, it is easy to see how stunned the Japanese people were, including statesmen, government officials as well as scholars, with the final outcome of the arbitration. Contrary to their conviction in the justice of their case, the award was given against Japan in favour of the three *Treaty Powers*. Their disillusionment was all the greater because of their earlier conviction that justice in the case was on their side. After all, the case involved the interpretation and application of the new revised treaties which, as the end product of long years of Japan's efforts, must have eliminated all the elements of inequality contained in the old treaties with these Powers. Indeed, Japan had not the slightest doubt that her case would be upheld by the Permanent Court of Arbitration. It had never occurred to those intellectuals that their case could in some respects have weaknesses from a purely legal point of view. Under such circumstances, the loss of Japan in that case had two major repercussions, both of which were going to exert an immeasurable negative impact on the subsequent course of Japan especially in relation to international adjudication.

The first is that the award in this case kindled the suspicion, which had already been latent in the minds of some in Japan, that the West after all was not really interested in treating Japan on a fair and equal footing. Largely through the experience in the process of negotiations for the revision of unequal treaties, there had already been a growing apprehension that under the name of law and justice, the Western Powers might in fact be trying to swindle Japan. The unfortunate outcome of this case turned this suspicion into the conviction that the West must have some inherent prejudice against the East on racial or other grounds of civilisational character and that they were in fact conspiring against the just interests of Japan.

The second significant repercussion of this case, which to my mind is no less important, is that the experience taught the Japanese a lesson—at least to those Japanese who were in a position to handle and apply international law. The lesson they drew from the case was that international law was not really a body of principles based on natural justice which the East could share in common with the West, but a bunch of technical rules which were devised by the West for their interest and which could be manipulated to the tactical advantage of the West. They could work to your advantage if you were sufficiently skillful; they could work to your disadvantage if you were not skillful in manipulating this tool. The disappointment and disillusionment on the part of many in Japan at this unexpected loss of

the case was all the stronger because of their initial conviction in the justice of their cause. Thus a gradual but pernicious new development came to surface that under the ostensible guise of superficial observance of international law, Japan tended to cloak an inner distrust *vis-à-vis* international adjudication. It is indeed significant to find that precisely a hundred years had had to pass since the *Yokohama House Tax* case before Japan came to be involved again in international adjudication. It was only two years ago in the *South Blue Fin Tuna* case[9] of 2002 with Australia and New Zealand that Japan found herself before the forum of international adjudication.

A similar attitude of reticence and reserve towards international adjudication appears to have been prevailing for many years in Asia and in East Asia in particular, even after the independence of many Asian nations since the end of World War II. While all the territories held under the colonial rule until the end of World War II in Asia came to acquire their independence in the immediate post-World War II period and have since joined the United Nations and thus become parties to the Statute of the International Court of Justice, the weight of Asia in the international arena remained less than significant for many years. Thus, the contribution of the countries of Asia towards the consolidation and development of international law has not been quite commensurate with the growth in the number of States in the region, although by now the Asian group in the United Nations, together with the African group, is one of the largest regional groups in the United Nations with its membership of over 50.

It is interesting to explore the background as to why this process of a growing Asian link with international law and international adjudication has been slow in developing. One can detect a number of factors as the background for that state of affairs:

(1) A skeptical perception of international adjudication as being an institution developed by the West, which could also be seen in the earlier experience of Japan described above, has tended to linger for a long time, especially among the newly independent countries of Asia and Africa. This skepticism developed into something bordering on mistrust *vis-à-vis* the International Court of Justice in the wake of the controversial judgment on the *South West Africa (Second Phase) (Ethiopia v. South Africa; Liberia v. South Africa)* cases[10] (1966).

(2) This mistrust *vis-à-vis* the International Court of Justice, exacerbated by the unfortunate decision in the *South West Africa* cases, had a broader background fostered during the period of confrontation maintained by the "East" against the "West" in the course of the Cold War in the form of a challenge against the traditional "western international law" in general. It would seem fair to say that against the backdrop of the prevailing atmosphere of anti-neocolonialism, the validity of traditional international law that the International Court was supposed to apply came to be questioned as the product of the "West" against the background of an alliance among countries of the Socialist camp and the Non-aligned group.

(3) There may however be yet another element which has played a role in the situation as far as East Asia is concerned. It is the cultural heritage of this region that tends to tilt towards the direction of reconciling differences—whether they be between States or between individuals—through negotiation and accommodation, rather than through adjudication on the basis of a clear-cut application of the law. In fact, one reason why East Asia remains to this day the only region of the world where no multilateral framework exists for the pacific settlement of international disputes, such as arbitration and judicial settlement, on a regional or sub-regional basis, may well be linked with this cultural trait of the region.

[9] *Southern Bluefin Tuna Cases (New Zealand v. Japan; Australia v. Japan), Provisional Measures*, online: International Tribunal for Law of the Sea <http://www.itlos.org/start2_en.html>.

[10] *South West Africa (Ethiopia v. South Africa; Liberia v. South Africa)*, [1966] I.C.J. Rep. 6.

Be that as it may, it seems remarkable that the recent success in nation-building in many nations of Asia, with the corresponding growth in confidence of their capacity to be significant players in international affairs of the contemporary world is changing this traditional vista of the region. These nations in this region apparently have come a long way towards putting complete trust in international law and its institutions. As a result, the International Court of Justice appears to have come to gain, little by little, a degree of confidence among Asian countries. It is true that already in the *Right of Passage over Indian Territory (Portugal v. India)* case[11] as early as in 1955, India became the first Asian country to appear before the International Court of Justice in the post World War II period. However, this was a case in which India was brought before the Court as Respondent. Much more significant in this respect was the famous *Temple of Preah Vihear (Cambodia v. Thailand)* case[12] which was referred to the International Court of Justice already in 1959. These pioneering attempts were followed by a succession of cases which included two countries of South Asia—*i.e.*, the *Appeal Relating to the Jurisdiction of the ICAO (India v. Pakistan)* case[13] and the *Trial of Pakistani Prisoners of War (Pakistan v. India)* case.[14] Nevertheless, one could safely say that these were the exceptions to prove the rule to the contrary.

The new trend in Asia to resort to international adjudication as an important means of peaceful settlement of disputes, by comparison, would seem to reflect a higher degree of confidence on the part of many Asian nations in the International Court of Justice. This, however, is of a more recent origin. It has come to gain momentum especially since the last decade of the 20th century. It would seem that this is due mainly to two elements which marked this period. The first element relates to an exogenous factor in the international environment. The demise of the Cold War in early 1990s has resulted in the disappearance of the "divided world", torn in an ideological conflict between the East and the West. Together with it, the disappearance of the "divided international law" born out of this ideological conflict has ensued. A new trust in international law as the guiding principle of a new international order is now emerging. This factor would appear to be present in relation both to Asian and African states, which had suffered so much under the yokes of colonialism. Largely due to this factor, a rapidly increasing number of cases involving non-Western states, and especially many from Asia and Africa, are finding their way in the docket of the International Court of Justice. Thus, out of 55 cases which have been submitted to the Court for judgment in its contentious proceedings since 1980, no less than 24, or almost a half of them, are cases involving States from the regions of Asia and Africa; in many of them these States have brought their cases as applicants against their fellow Asian or African states or against Western states.

The second element involves an indigenous factor and is particularly applicable to the Asian region. With the tremendous economic growth achieved in particular by many East Asian states throughout 1980s, sometimes referred to as the "East Asian Miracle", those Asian states have now succeeded in their nation-building efforts and to gain a high degree of self-confidence in their management of domestic and foreign affairs. Through the process of these efforts, they have become quite accustomed and skilled in making use of international law as an important tool for diplomacy. What is more, most of these newly born nations, somewhat like Japan in the late 19th century, presumably have come to view the consolidation of the "rule of law" in international affairs as an important shield for them as the younger partners of the international system. This new activism in promoting the rule of international law in international relations is particularly noteworthy in those areas of international law which have seen new developments in the post-World War II era, in which these countries have themselves participated, such as the Law on Friendly Relations among

[11] *Case concerning Right of Passage over Indian Territory (Portugal v. India)*, [1960] I.C.J. Rep. 6.
[12] *Case concerning the Temple of Preah Vihear* (*Cambodia v. Thailand*) [1962] I.C.J. Rep. 6.
[13] *Appeal Relating to the Jurisdiction of the ICAO* (*India v. Pakistan*), [1972] I.C.J. Rep. 46.
[14] *Case concerning Trial of Pakistani Prisoners of War* (*Pakistan v. India*), [1973] I.C.J. Rep. 328.

States under the Charter of the United Nations, the Law of the Sea, and the International Humanitarian Law. The contribution of Asian countries for law-making and law-applying in these areas of international law has been much more visible and significant.

As a result, the use of the Court by Asian countries would seem to be growing especially in these areas. Of the four cases brought before the Court since the 1990s which involved Asian states in one way or another, the first was the one brought by Portugal against Australia. In the *East Timor* case,[15] Portugal charged that Australia, by concluding a treaty with Indonesia relating to the East Timorese continental shelf, had "failed to observe its obligation to respect the duties and powers of [Portugal as] the administering Power [of East Timor] … and … the right of the people of East Timor to self-determination and the related rights". Though the case strictly was one between Portugal and Australia, it included an extremely significant Asian component in it. While the Court ruled in its judgment in 1995 that it had no jurisdiction to entertain the claim of Portugal, it did so on the ground that the Court could not judge on the case without the consent of Indonesia to participate in the proceedings. At the same time, it confirmed that the right of people to self-determination [in East Timor] was "one of the essential principles of contemporary international law" and had an *erga omnes* character.

By far, the most significant development in the context of the Asian link with the work of the International Court of Justice came with the epoch-making submission to the Court by Indonesia and Malaysia of the case concerning *Sovereignty over Pulau Ligitan and Pulau Sipadan*[16] in 1998. This case involved a dispute between the two East Asian states concerning the territorial title of some islands. It was the first case, since the earlier *Temple of Preah Vihear* case[17] (1962), where two East Asian states decided to refer a territorial dispute to judicial settlement before the International Court of Justice. Indonesia invoked, as the basis of her claim to sovereignty over the islands in dispute, Article IV of the 1891 Convention which had been concluded between Great Britain and the Netherlands—the two former colonial powers of the territory in dispute—for the purpose of "defining the boundaries between Netherlands' possessions in the Island of Borneo and the States in that Island which [were] under British protection". The International Court of Justice, however, found that this Convention between the two former colonial powers had not established any allocation line between Malaysia and Indonesia in the area of the islands and therefore had no application, and that neither of the Parties had therefore obtained title to Ligitan and Sipadan by succession from their former colonial masters. Instead, the Court found the basis for its decision in the principle of "*effectivité*" of the activities of the present parties to the dispute as the administering state, and decided that sovereignty over the islands of Ligitan and Sipadan belonged to Malaysia.

While this case in its factual similarity immediately reminds us of the famous arbitration case decided by Judge Max Huber concerning the Island of Palmas of 1931 between the United States and the Netherlands,[18] there is to my mind a crucial difference between the two. As distinct from the Island of Palmas case, where the arbitral tribunal, under the doctrine of intertemporal law, examined the issue of acquisition of title by either of the original colonial powers as the basis of the territorial title to the island, the significance of this case lies in the fact that the present case was decided, not on the basis of the past colonial history of the islands, but on the basis of the application of the criterion of "*effectivité*" solely within the framework of the activities of the present parties to the dispute, as evidenced by the actual continued exercise of state authority over the islands by the newly independent Asian states in the post-colonial period.

15 *Case concerning East Timor* (*Portugal v. Australia*), [1995] I.C.J. Rep. 90.

16 *Case concerning Sovereignty over Pulau Ligitan and Pulau Sipadan* (*Indonesia v. Malaysia*), [2002] I.C.J. Rep. 575.

17 *Supra* note 15.

18 *The Island of Palmas Arbitration (United States v. Netherlands)*, (1928) 2 U.N. Rep. Intl. 4rb. Awards 829.

It is well known that in the footsteps of this remarkable judgment, another case also involving two East Asian states has been brought before the Court for judgment. This case, jointly submitted by Malaysia and Singapore, concerns another territorial dispute between these two ASEAN member States. The *case concerning Sovereignty over Pedra Branca/Pulau Batu Puteh, Middle Rocks and South Ledge* was brought before the International Court of Justice in July 2003 by special agreement of the two States. The case is pending before the Court for decision, as of the time of writing.

A brief survey of international adjudication in general and in the work of the International Court of Justice in particular thus reveals a general trend towards a greater involvement of Asia in the promotion of international law through the development of the jurisprudence of the Court. It is remarkable to see that many of the cases referred to the Court nowadays come from Asian and African states. As of the end of 2004, the International Court of Justice has in its docket as many as thirteen cases; of these thirteen cases, six cases, or almost half of them, have been brought by Asian and African states. The last few years since the turn of the 21st century, in particular, have seen a tremendous increase in the number of cases brought before the Court whose parties belong to the Asia-African region. They include the *Maritime Delimitation and Territorial Questions (Qatar v. Bahrain)* case,[19] the *Land and Maritime Boundary* (*Cameroon v. Nigeria*) case[20] and the *Sovereignty over Pulau Ligitan and Pulau Sipadan* (*Indonesia/Malaysia*) case.[21] The recent case brought before the Court concerning *Certain Criminal Proceedings in France* (*Republic of the Congo v. France*),[22] on which the Court ruled upon a request for the indication of provisional measures, also involves an African state as Applicant.

The general trend for an increase in the actual use of the Court in the international community should in itself be a source for our gratification. Granting this general trend, however, a marked increase in the use of the Court on the part of Asian, as well as African states should be particularly welcomed as a testimony to the growing recognition among Asian and African states that it is important to have their disputes settled on the basis of law by international adjudication. In addition, it is worth noting that for a more active use of the advisory proceedings by the United Nations and other competent organs, the nations of Asia and Africa can and do actually play an increasingly important role, in an effort to seek a rule-based international public order on a universal basis. Advisory opinions given by the Court in a series of cases relating to the *International Status of South West Africa* were a harbinger of this process. They have been followed by such significant cases as the *Legality of the Threat of Use of Nuclear Weapons Case*[23] and the *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights Case*.[24] This latter case involved an assessment by the Court of the position taken by the Government of Malaysia on the question of the privileges and immunities of UN personnel. In fact, these cases are just a few of the recent examples of this development. It must still be fresh in our memory that only last year, the Court gave an important advisory opinion on the *Legal Consequences of the Construction of the Wall in the Occupied Palestinian Territory Case*,[25] upon the request of the General Assembly based on a resolution co-sponsored by many Asian states.

19 *Case concerning Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar v. Bahrain)*, [2001] I.C.J. Rep. 40.

20 *Case concerning the Land and Maritime Boundary between Cameroon and Nigeria* (*Cameroon v. Nigeria: Equitorial Guinea intervening*), [2002] I.C.J. Rep. 9.

21 *Supra* note 19.

22 See online: International Court of Justice <http://www.icj-cij.org/icjwww/idocket/icof/icofframe.htm>.

23 *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, [1996] I.C.J. Rep. 226.

24 *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights*, Advisory Opinion, [1999] I.C.J. Rep. 62.

25 *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, [2004] I.C.J. Rep.

This new emergence of interest and confidence among the nations of Asia, as well as Africa, in the judicial settlement of international disputes and in the consolidation of the rule of law in the international community is to be regarded as an extremely promising development. It goes in the direction of dispelling a once widely held concern that certain reticence could exist among Asian states *vis-à-vis* the International Court of Justice and the judicial settlement of disputes, partly due to the fear that the Court might be biased towards the cultural and intellectual tradition of the West, as reflected in the composition of the Court and in the contents of the law it applies. The emerging new trend in Asia and Africa towards more frequent use of the Court is indeed a source for gratification in this respect, inasmuch as it is a testimony to the increasing confidence that the Asian and African states place on the primacy of international law in international relations and on the role of the International Court of Justice as its primary agent.

Seen from this perspective, the movement for a more active participation by the Asian states in the norm-creating process and norm-applying process is going to be extremely significant, since their more active participation in these processes will further strengthen their trust in the international legal process and in the universal validity of the norms that they actually participate in creating. I wish to conclude by emphasising that in this regard, it is all the more important for Asia to participate proactively in the norm-creating and norm-applying processes through promotion of the study and practice of international law, so that we in the Asian region of the world can consolidate our confidence in international adjudication and make a fuller use of the International Court of Justice for the peaceful settlement of disputes in our own Asian region.