Asian Attitudes to International Law

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In a field where inaccurate generalizations abound, one generalization can with confidence be made: there is no Asian attitude to international law. Rather there are a series of attitudes—attitudes, moreover, towards particular areas of international law and not towards the system as a whole.

A second generalization related to this last point may be hazarded: no Asian State[1] not even Communist China[2] has ever claimed to reject the whole system of international law; the claims have always been more discrete and have related to specific issues. Before looking at several of these issues, some of the general factors, which, it has been said, condition Asian States’ attitudes, should be identified. They will also be touched on in the context of specific international legal issues.

I

First, the Asian States had no part in the creation of much of modern international law which has largely been fashioned by the States of Europe in the past three or four hundred years. This is said[3] to have two consequences: there is a general desire to be associated in reviewing and reframing the law and, more specifically, to quote the Indian delegate in the Security Council debate about the Indian invasion of Goa:—

“We cannot in the twentieth century accept that part of international law which was laid down by European jurists—though great men,

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* This paper was originally prepared for a seminar in Asian International Politics held at the University of Wellington in 1966. Some later material and references have been included.


3 By, amongst many others, Roling, International Law in an Expanded World (1960); Łissitzyn, International Law in a Divided World (1963), International Conciliation (No. 542), pp. 38-9, and International Law Today and Tomorrow (1965), pp. 73-4; quoting a distinguished Indian jurist, Judge Pal (in vol. 9, No. 9 U.N. Review 29, at p. 31); Anand, “Role of the ‘New’ Asian-African States in the Present International Legal Order” (1962), 56 A.J.I.L. 383, at pp. 383-91, and most of those who have written on this topic, some of whose writings are cited below.
great jurists whose contribution to law has been really remarkable—specifying that colonies in Asia and Africa which were acquired by conquest conferred sovereignty on the colonial Power.”

In other words, the States of Asia may reject those parts of international law, developed without their participation, which they consider contrary to their interests.

Secondly, specific factual situations may have been established under these unacceptable parts of international law: Goa, indeed the whole colonial system, provides an instance. In this context interesting use has been made of the generally accepted principle of international law that the continued existence of a right is dependent on continuing compliance with the evolving law. Accordingly, title to territory may be undermined by a change of the law.

A third factor has been the opinion expressed by many European writers in the nineteenth and early twentieth centuries—and even more perhaps, their tone—that, to quote one of them,

“the Christian nations of Europe and their descendants across the Atlantic, by the vast superiority of their attainments in arts and science, and commerce, as well as in policy and government, and above all, by the brighter light, the more certain truths and the more definite sanction which Christianity has communicated to the ethical jurisprudence of the ancients, have established a system of law peculiar to themselves.”

The Asian States were not amongst this privileged, “civilized” group, they were “barbarous humanity”. It could hardly be expected, when they again became independent, that they would take very kindly to a system which had so characterized them.

Fourthly, Asian States and peoples are said to be less legalistic, less in favour of codes, and more prone to settlement according to more flexible criteria. This contention, which has been challenged will

4 Security Council Official Records (S.C.O.R.), 988th mtg., par. 79. See also id., 987th mtg., par. 47; 988th mtg., pars. 101, 102.
6 Chancellor Kent, an American jurist, as quoted in Jenks, Common Law of Mankind (1958), p. 70. See id., pp. 70-4, for other similar utterances.
7 These words of Lorimer were quoted by the Ceylon delegate in the Goa debate: S.C.O.R., 988th mtg., par. 101.
8 See especially Syatauw, op. cit., pp. 22-5; Wright, “The Influence of the New Nations of Asia and Africa upon International Law” (1958), 4 Foreign Affairs Reports 38; “Asian Experience and International Law” (1959-60), 1 International Studies 84-6; “The Strengthening of International Law” (1959), 98 Hague Recueil 1, at pp. 78-9. Anyway, how “legalistic” and “inflexible” are non-Asian theories of international law? Consider, for instance, the policy-oriented jurisprudence of McDougal and his colleagues. See further below n. 105 and accompanying text.
9 See especially Anand, op. cit., n.3, ante, at pp. 393-400; Shibata, “The Attitude of New States Toward the International Court of Justice” (1965), 19 Int.Org. 203.
be considered later—especially in the context of the Asian attitude to compulsory third-party settlement of disputes although it has, of course, a wider significance; it goes to the very basis of a system ordered by objective rules.

Fifthly, the Asian States as a group are comparatively weak militarily and economically. They might be expected to see the advantages of extensive protection by law.\[10\]

Sixthly, and this relates back to the first point, they, together with the African States which often have similar interests, have in recent years acquired considerable numerical strength in international organizations, especially the General Assembly of the United Nations. They realize that this voting power can be used to press their views in the process of codifying and progressively developing international law.\[11\]

The first of these points—that the Asian States were not party to the development of much of modern international law and that they wish to be involved especially because they consider that some parts of the law are directed against their interests—requires closer consideration.

In the first place, it is historically inaccurate to say that these States became members of the international law community for the first time only in recent years. Recent writing, especially by Asian scholars,\[12\] has indicated the role that law played in intra-Asian relations in ancient times. Further, it is now generally accepted that relations between European and Asian peoples before the time of Asian colonization were governed by international law.\[13\] Thus the International Court of Justice in ruling on Portugal's claim to a right of passage between its enclaves in India noted and interpreted in accordance with what it conceived to be the international law of the day—the intertemporal principle again—a treaty between the local sovereign, the Maratha, and the Portuguese.\[14\] The Court did not even suggest that these relations were governed by other than international law.\[15\] It has even

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12 See especially the studies, first in the Indian Yearbook of International Affairs and, later, in the Indian Journal of International Law.
15 For an award of an international tribunal which, in the writer's opinion, held that the Treaty of Waitangi was, contrary to the usual view, a valid international treaty effective to transfer sovereignty to Britain, see the William Webster Claim, Anglo-American Claims Tribunal, Nielsen's Report (1928), p. 540. For a contrary assessment, see Foden, New Zealand Legal History (1642-1842) (1965), ch. XIV.
Asian views with general world legal opinion expressed in the work of the International Law Commission, and, secondly, an assessment of Asian views on the—occasionally—more controversial issues referred by governments. Three of the topics recently discussed by the Committee—diplomatic immunities and privileges, immunity from the jurisdiction of courts of state trading organs, and the legality of nuclear testing—are considered here. These are not, of course, the only topics the Committee has considered but they are reasonably illustrative of the Committee's work. Other areas of international law of current interest are also briefly discussed: treaty succession, state responsibility, self-determination and friendly relations.

Diplomatic Relations

Following three years of discussions, the Committee adopted a final draft on diplomatic relations. It commented:

"The Committee's recommendations are broadly on the same lines as that [sic] of the International Law Commission. The Committee, however, took a different view on two major questions. The International Law Commission had recommended that the immunities and privileges of a Diplomatic agent should be accorded on a basis of reciprocity. The Committee by majority decided that whilst reciprocity could be the basis for grant of privileges, the concept of reciprocity should find no place in matters of Immunities of a Diplomatic agent as these were to be granted to an envoy as a matter of right under international law. The Committee was also of the view that it was too premature to make any recommendation regarding the method to be adopted for settlement of disputes between States in the matters of diplomatic immunities. It considered the recommendations contained in Article 45 of the Draft prepared by the International Law Commission to be inappropriate for adoption."

The second of these differences from the Commission's draft raises the general question of compulsory—as opposed to optional—judicial settlement of disputes. The Asian attitude to compulsory adjudication will be considered later. For the moment it is enough to note that the Asian attitude prevailed at the Vienna Conference on Diplomatic Relations. The compulsory adjudication provisions were removed from the principal text, the Convention, and placed in a separate, optional protocol.

The reciprocity point is a rather technical one that has given rise to some controversy in Western literature. The Committee, however, was not quite as opposed to the operation of reciprocity as its quoted comments would indicate. First, only five of the eight countries represented acceded to the view stated. Secondly, after prohibiting discrimination, the draft states that discrimination (in the grant of immunities) shall not be regarded as taking place

24 Asian African Legal Consultative Committee, Third Session, Colombo, 1960, pp. 16, 17. See also Sinha, op. cit., ch. VIII.
26 A.A.L.C.C., 3rd Sess., p. 54, note.
"Where the receiving State applies to one of the present rules restrictively, because of a restrictive application of that rule to its mission in the sending State."[27]

Surely this is reciprocity under another name. But whatever view is taken of the rights and wrongs of retaliation in the operation of these rules, one view or the other hardly turns on ideology, national interests or any specific concern of Asian States. It is really a technical, non-political difference of opinion.

**Immunity of state trading organs**

There has been some debate, mainly since the Communist revolution in Russia, whether foreign state trading organs should be entitled to the immunity from the jurisdiction of national courts which is traditionally accorded to foreign States.[28] There is Anglo-American authority suggesting absolute immunity, although the authority is equivocal, but the practice of many other States, with the conspicuous exception of the Soviet bloc, favours refusing immunities in respect of trading activities. The absolute theory would give short-range advantage to the Asian States, several of which have extensive state trading agencies, but all delegates to the 3rd Conference of the Asian-African Legal Consultative Committee, except the Indonesian, accepted that States would not be immune in respect of their commercial and private activities. Even Indonesia agreed that separately organized state trading organs should not be immune, and argued—consistently with the view of some eminent Western jurists—that the functional distinction made by the majority was very difficult to apply.[29] Further, Indonesia argued that additional limitation of immunity should be the subject of agreement.[30]

**Nuclear testing**

Nuclear testing is obviously a much more controversial issue than diplomatic immunities and state trading. Not unexpectedly, the Committee, at its 1964 session, found that all testing other than underground testing is contrary to international law. (The Committee did not consider the legality of the use of nuclear weapons in wartime). The 1964 conclusion concerning underground testing reads, in part:—

"Having regard to its harmful effects, as shown by scientific data, a test explosion of nuclear weapons constitutes an international wrong. Even if such tests are carried out within the territory of the testing State, they are liable to be regarded as an abuse of rights (abus de droit).

The principle of absolute liability for harbouring dangerous substances or carrying on dangerous activities is recognised in International Law.

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27 Article 45 (2) (a) of recommended draft, id., p. 54.
28 See, e.g., Sucharitkul (a Thai jurist), *State Immunities and Trading Activities in International Law* (1959), for a careful review of the relevant authority.
A State carrying out test explosions of nuclear weapons is therefore absolutely liable for the damage caused by such test explosions.

Test explosions of nuclear weapons are also contrary to the principles contained in the United Nations Charter and the Declaration of Human Rights [sic].

Test explosions of nuclear weapons carried out in the high seas and in the airspace thereabove also violate the principle of the freedom of the seas and the freedom of flying above the high seas, as such test explosions interfere with the freedom of navigation and of flying above the high seas and result in pollution of the water and destruction of the living and other resources of the sea.

Test explosions of nuclear weapons carried out in trust territories and non-self-governing territories also violate Articles 73 and 74 of the United Nations Charter. [31]

There must be a real question whether this does represent a generally accepted view: certainly France and Communist China of the five nuclear powers do not agree and it is clear that, at least at the time when they signed the Nuclear Test Ban Treaty in 1963, the other three considered testing to be legal. But the Committee's position is not untenable; the arguments used are on the whole those considered by most writers, Western,[32] Soviet,[33] and Asian,[34] who have studied this question. Indeed, one of the interesting aspects of the Committee's work is the extent to which it uses the procedures and techniques traditionally used by institutions and individuals in attempting to codify and develop international law—or law in general. State practice, judicial and juristic opinions, general principles—including Western, as well as Asian—are assembled, the alleged principles are examined, inconsistencies and inadequacies are exposed and finally a rule involving both restatement and change is drafted. There has been no radically new approach to the procedure for developing and elaborating international law, at least in this Committee.

Succession to treaties

Asian States which have become independent since World War II have been faced with the question whether they remain bound by treaties which applied to their territories before independence. The opinion generally held at that time was that "newly established States

34 E.g. District Judge Mallik (India), VIIth Congress, pp. 75-7; Singh, Nuclear Weapons in International Law (1959); Attorney-General Setalvad of India, "Nuclear Weapons and International Law" (1963) 3 Ind. J.I.L. 383.
start with a clean slate in the matter of treaty obligations ... except as regards the purely local or 'real' obligations of the State formerly exercising sovereignty over the territory of the new State". \[35\]

An example of the exception would be a boundary treaty. The Asian States, accordingly, were in a position where, although they might be bound by customary international law, they could throw off any treaty obligations. But consider their practice: all the former British territories—India, Pakistan, Burma, Ceylon, Malaya and Singapore on leaving Malaysia—signed agreements with the parent State in which they acknowledged in general terms that "applicable" treaties continue to remain binding. Similar agreements were concluded by Indonesia, Laos and Vietnam. \[36\]

Further, these States and the other "new" Asian States have, in various ways, indicated that they remain bound by many specific treaties of varying kinds: e.g. multilateral lawmakers treaties (e.g. slavery, traffic in women and children, obscene publications, labour conditions, road transport and customs), trade agreements, air transport agreements, economic and technical assistance agreements, consular agreements, extradition treaties. \[37\]

Thus, in this field, the dire predictions that the result of the inclusion of many new States in the international law community would be anarchy has not been realized. On the contrary, the contribution of the Asian States—the same applies to African States—has been to maintain the legal order and to develop the law in a particularly healthy way.

State responsibility

The traditional doctrine is that a State has the right to take the property of an alien but only for public purposes and only if prompt, adequate and effective compensation is paid. \[38\]

Another, slightly different, formulation is that vested or acquired rights are to be respected. This doctrine was established in the days of occasional,
specific takings, long before anyone thought of extensive expropriation by the State in pursuance of some reform policy. But when these extensive reforms were introduced in Russia and Mexico the creditor nations insisted that the traditional doctrine applied. Not all Western commentators concurred. Two arguments at least were available: (1) the old cases were mostly cases of discrimination of specific action directed towards a particular individual or group of individuals and such discrimination must always be established before liability to compensate arose; (2) other forms of destruction of property—e.g. by devaluation, by changing the exchange rate, by controlling investment, by regulating and prohibiting a trade, by taxation, by town planning legislation—were not required to be accompanied by compensation unless discriminatory or contrary to a treaty. Accordingly, the argument runs, the alien is entitled only to the same treatment as the equivalently placed national; he is entitled to national treatment, but not to some independent, possibly superior, minimum standard established by international law. Moreover, there was the general policy argument that these States would be prevented from carrying out domestic policies which were conceived to be urgently required; the necessary cash, especially the foreign exchange, for meeting extensive compensation claims would not be available.

At the same time, however, new States have appreciated that their domestic development will often be largely dependent on extensive


40 But cf. Norwegian Ships Claim, 1 U.N.R.I.A.A. 307, Hague Court Reports, 2nd Series, p. 40. A recent article calls attention to the fact that Belgium, shortly after seceding from the Netherlands, argued that it was obliged to accord aliens only national treatment in respect of damage caused to property during the Civil War. Laurent, "State Responsibility: A Possible Historic Precedent to the Calvo clause" (1966), 15 I.C.L.Q. 395.

41 Serbian and Brazilian Loans Cases, P.C.I.J. Ser. A. Nos. 20/21; Zuk Claim (1958), 26 I.L.R. 284; Malan Claim, id. I.L.R., p. 291; Tabar Claim (No. 1) (1953), 20 I.L.R. 211; Mascotti Claim (1958), 26 I.L.R. 275; Bondareff Claim, id., p. 292; Chobady Claim, id., p. 350; Chobady Claim, supra; Evanoff Claim (1958), 26 I.L.R. 301.

42 E.g. Tabar Claim (No. 3) (1953), 20 I.L.R. 242; Chobady Claim, supra; Evanoff Claim (1958), 26 I.L.R. 301.


foreign investment and technical assistance. To nationalize without compensation will, unless equivalent technical and financial aid is available from some other, invariably Soviet, sources confer only an illusory short-range benefit. Accordingly, States\[^{45}\] expropriating alien property have in fact, whatever theoretical position they may maintain, paid compensation—although not usually in accordance with the "prompt adequate and effective" formula.

The whole question has been the subject of careful consideration within the U.N. in recent years.\[^{46}\] The Declaration of Permanent Sovereignty over Natural Resources notes the sovereign rights of States freely to dispose of their national wealth in accordance with their national interests, and the desirability of international co-operation to promote the economic development of developing countries and declares first:—

"Nationalisation, expropriation or requisitioning shall be based on grounds or reasons of public utility, security or the national interest which are recognised as overriding purely individual or private interests, both domestic and foreign. In such cases the owner shall be paid appropriate compensation, in accordance with the rules in force in the State taking such measures in the exercise of its sovereignty and in accordance with international law. In any case where the question of compensation gives rise to a controversy, the national jurisdiction of the State taking such measures shall be exhausted. However, upon agreement by sovereign States and other parties concerned, settlement of the dispute should be made through arbitration or international adjudication";

and secondly:—

"Foreign investment agreements freely entered into by, or between, sovereign States shall be observed in good faith; States and international organisations shall strictly and conscientiously respect the sovereignty of peoples and nations over their natural wealth and resources in accordance with the Charter and the principles set forth in the present resolution."\[^{47}\]

Disputes continue to rage, of course, over the meaning of "appropriate compensation", but one point should be noted: the developing States rejected the Soviet view that the fixing of compensation was a purely domestic question to be governed only by national law and supported the inclusion of the international law standard.\[^{48}\]

The Asian-African Legal Consultative Committee has also con-

\[^{45}\] Including Eastern European States; see recent practice assembled in White, op. cit., and, e.g., the recent action by Ceylon to compensate Shell and other oil companies, see 5 I.L.M. 224; 6 Ind. J.L. 76. See also Ceylon's Policy on Private Foreign Investment (1966), 5 Int. Leg. Mats. 591.

\[^{46}\] See especially the Secretariat's invaluable study, Status of Permanent Sovereignty over Natural Wealth and Resources (1962).

\[^{47}\] G.A. Resn. 1803 (XVII), pars. 4 and 8.

\[^{48}\] For a discussion of the debates on the Declaration, see Gess, "Permanent Sovereignty over Natural Resources" (1964), 13 I.C.L.Q. 398.
sidered the somewhat broader topic of status of aliens in recent years. This includes not only the property but also the personal rights of the alien—e.g. to admission, to protection of the law, to fundamental freedoms, etc. The relevant drafts and commentaries oscillate between the traditional minimum standard determined by international law and the more recently advanced national standard. Thus civil liberties—freedom of religion, from arbitrary arrest, access to the courts, etc.—are all stated to be subject to the local law and this appears to negate any separate objective international law standard. And the provision dealing with compensation for nationalized property states that compensation is to be paid “in accordance with local laws”. But the commentary and indeed the draft articles themselves do not necessarily support the view that each State has an uncontrolled discretion.

First, the commentary at various points refers to the minimum standard practice and jurisprudence, and, although some doubts are raised and it is suggested that the national standard is overwhelmingly accepted in practice, it is also accepted (at least by the Secretariat of the Committee) that

“'bad faith, fraud, outrage resulting in injury cannot be defended on the ground that it is the custom of the country to which nationals must also submit’, nor can it be maintained that the State concerned normally does not provide any protection whatever for its own nationals.”

Secondly, the commentary also refers to the growing body of international law relevant to the human rights and fundamental freedom of all persons, not just aliens.

“In the context of the United Nations Charter and the Declaration of Human Rights [sic] every State was expected to accord a fair treatment to its own nationals, which should be taken note of whilst formulating principles on the treatment of foreigners.”

The separate minimum standard for aliens rule accordingly had become out of date. In this context, the point was also made that

“A vast majority of the modern written Constitutions have incorporated these provisions [relating to civil liberties] . . . . Broadly, the rights and

49 In some cases, of course, practice acknowledges that aliens are not entitled to national treatment: acquisition of land, political rights, practising trades, professions etc. See, e.g. Asian African Legal Consultative Committee, Fourth Session, Tokyo, 1961, Secretariat Articles 9-11, pp. 97-130, and the general practice reviewed there; Committee Articles 9, 10 and 11; Secretariat Article 8, p. 74, and Committee Article 8, p. 48.

50 Id. Secretariat Article 12, p. 131, and Committee Article 12 (1), p. 49. The Japanese delegate dissented: “full” compensation should be paid to a foreign national irrespective of local laws.

51 Id., p. 89, and see id., n. 91.

52 Id., Third Session, Colombo, 1960, pp. 83, 84; see also id., Fourth Session, p. 75.
freedoms ... are made available to citizens and non-citizens alike ...”.[53]

Thirdly, the stated reason for the reference to local law in the case of the liberties (i.e. leaving aside property rights) is that none of these freedoms are absolute: they are usually subject to limitations for reasons of “internal security, public order, health and morality”. [54] The reference to “local laws” does not, therefore, envisage a wholesale abandonment of any non-national standard.

Fourthly, so far as compensation for property rights is concerned, the following points may be made: (1) although not clear from the draft, the principle of non-discrimination was accepted;[55] (2) the alien is not to be deprived arbitrarily and some compensation is to be paid;[56] (3) recent practice does not, says the Committee, support the traditional theory of prompt, adequate and effective compensation; rather partial compensation appears to be the norm.[57]

The Committee, then, has, like the General Assembly of the United Nations, been careful to steer a central course between the two extremes of prompt, adequate and effective compensation and compensation as determined, if at all, in the unfettered discretion of the nationalizing State. Equally, on the more general question of the treatment of aliens, it has not denied the existence of international standards, but has tied the standards to the treatment States are now obliged by international law to accord to their own nationals. Such positions are scarcely unreasonable or anarchic. Indeed, the second involves the enormously important proposition that individuals everywhere are now obtaining rights under international law which they can assert not only against foreign governments but also against their own.

Self-determination

Another controversial area is that of self-determination. The traditional view was that international law is not concerned with the efforts of a part of a State to detach itself; it is solely concerned with the relations between recognized States. Thus a Committee of Jurists advised the Council of the League in 1920 (only a short time after President Wilson’s and the Soviet Peace Decree’s vigorous espousal of the principle of the self-determination of peoples) that

“the right of disposing of national territory is essentially an attribute of the sovereignty of every State. Positive International Law does not

53 Id., Fourth Session, p. 75.
54 Id. Further, the draft makes a fairly clear distinction between those rights which must be granted without discrimination to aliens and those where discrimination is possible, see, e.g., note 49 above. Accordingly, civil liberties guaranteed cannot, under the draft, be infringed in a discriminatory manner.
55 Id., p. 132.
56 Id., p. 131.
57 Id., pp. 142-3. Note also the European Convention on Establishment of 1955, quoted id., p. 144, which provides only for national treatment. See also Sinha, op. cit., chs. VI and VII.
recognise the right of national groups as such, to separate themselves from the States of which they form part ... any more than it recognises the right of other States to claim such a separation."[58]

The Charter of the United Nations was in several respects a considerable development, but even it was equivocal; for instance, it spoke only of the "principle" of self-determination, not of the "right".[59] But the ambiguous, general language provided a basis for subsequent developments which, at first anyway, were mainly promoted by the Asian States. Up to 1960 they were active in several ways.[60] First, they were largely responsible for the Assembly taking the power to determine which territories fell under ch. XI of the Charter as non-self-governing territories: the claim of the administering powers exclusively to decide this was rejected. Secondly, they led the argument that the colonial power should report on political development as well as on the other more specific matters mentioned in art. 73 (e) of the Charter. Thirdly, they helped in the establishment of a committee to assess this information forwarded under art. 73. Finally, at their insistence, the Assembly adopted resolutions establishing the criteria by which accession to self-government would be measured. And then, in 1960, the Asian and African States wrested the initiative from the Soviet bloc in the famous debate which led to the adoption of the Declaration on the Granting of Independence to Colonial Countries and Peoples.[61] This declared, inter alia, that

"All peoples have the right to self-determination; by virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development."

(The freedom to develop in the economic field bears, of course, on the question of state responsibility discussed earlier, and the Assembly resolutions on that topic refer to self-determination.)[62] But under the Charter the Assembly has power only to recommend; it does not have the power to legislate, to make law. What force, then, do the Declaration, and others like it, have? There is now substantial agreement that Assembly recommendations can have legal effect;[63] first,

58 The Aaland Islands question, Report of the Committee of Jurists, *League of Nations Official Journal*, Special Supplement No. 3 (October 1920), p. 5. The Council accepted the advice. The only relevant provisions of the Covenant were art. 22 relating to mandated territories (former enemy territories only) and art. 23 (b), a vaguely worded innocuous article which equally applied to metropolitan territory.

59 Articles 1 (2), 55. See also arts. 73 and 76.


61 G.A. Resn. 1514 (XV).

62 See especially G.A. Resn. 1803 (XVII); also G.A. Resn. 1515 (XV), adopted on the same day as the Colonialism Declaration.

as authoritative interpretations of the Charter (at least where, to quote a conclusion of the San Francisco conference, the interpretation is "generally acceptable") \[64\]—one possible instance is the Declaration on Racial Discrimination; second, as an expression by members of what they consider customary international law to be—the resolutions on the Nuremberg Tribunal, on Permanent Sovereignty over Natural Resources and on Space are possible examples; and, thirdly, as embodying an agreement between interested States—the resolution of 1963 prohibiting the orbiting in space of nuclear weapons for instance. In all these cases there was "general acceptance", a large majority, with the principal States at least not dissenting. Such consensus, it is generally agreed, is essential to the development and codification of international law. Here then is a powerful new instrument in the hands of the Afro-Asian majority in the Assembly for the development of the law: apparently they do not have to depend on either the slow and difficult process of the drafting of treaties, signature, ratification and domestic constitutional requirements, or the usually slower process of development by custom, to change the law to meet their needs. All they require is a majority of votes in the Assembly. And as indicated earlier, the new States—and others—have come to appreciate the advantages of this technique. But it has its limitations. Principally, it is most doubtful whether Assembly recommendations can have legal force in any of the senses mentioned unless there is "general acceptance"—a test akin to those usually stated for customary international law.\[65\] Moreover, it is generally agreed, the general acceptance must be that of a wide group of States including those primarily concerned. Accordingly, one can doubt the force of the General Assembly Resolution adopted in 1961\[66\] against the dissenting votes of all the nuclear powers except one which declared that the use of nuclear weapons violated the Charter, international law, the laws of humanity and was a crime against mankind. (The resolution was adopted 55-20-26.) Similar although much less compelling doubts are raised by the vote on the Declaration on the Granting of Independence: all the colonial powers, except the Netherlands and New Zealand, abstained. These doubts may be partly removed by the subsequent actions of some of these States: the United States, for instance, after the installation of the Kennedy Government, changed its position,\[67\] and others have co-operated in varying degrees in the work of the Committee of Twenty-Four established to consider whether the Declaration was being implemented.

Further, in the instant case, how important is the question whether the Declaration is legally binding? More significant, surely, is what

64 13 UNCIO Docs., p. 709.
66 G.A. Resn. 1653 (XVI).
67 For a discussion of the change, see Schlesinger, A Thousand Days (1965), pp. 509-12.
in fact happens. Is it in practice an effective instrument? This is no place for a detailed review, but it is beyond doubt that the Declaration, and especially the Committee, have had some effect at least on the timing of developments towards self-determination.\[68] To take a local example, the former New Zealand Minister for Island Territories, speaking in the debate on the Cook Islands Bill 1964 (which gave the islands internal self-government), said that never once between 1957 and 1960 when he was Minister was the question of complete self-government mentioned. He had

"a feeling that the resolution by the United Nations in 1960 and the setting up of the 24-man committee caused something of a panic in the mind of the Hon. Mr. Gotz [Minister, 1960-1963]."\[69]

Government speakers also referred to the importance of the Declaration.

Once it is accepted that there is a right to self-determination, extremely difficult problems remain: what unit can avail itself of the right? by what procedure? how often? what is the area's status before exercise of the right? what does the right consist of (self-government, independence or integration)? what is economic and cultural self-determination? what is the effect of these changes on the law relating to the use of force? Several of these issues were discussed in the Security Council debate of the Goa Case.\[70]

(a) Status of Goa.—The League's Committee of Jurists referred to above would probably have said that Goa was under Portuguese sovereignty and whether it was called a colony or not was irrelevant. Portugal went even further; it said that regardless of the development of the law concerning non-self-governing territories Goa was an integral part of the State of Portugal. At the other extreme was the view, expressed by the Soviet and Asian delegates, that Goa was part of India; accordingly, there was no question of aggression against Portugal: indeed, the matter was, according to Mr. Zorin of the U.S.S.R., exclusively within India's competence and the Council was not competent to discuss the issue. But in a vote on the adoption of the agenda this view was rejected, only the Soviet Union and Ceylon favouring it. Some of the Asians referred to Assembly resolutions\[71]


69 1964 New Zealand Parliamentary Debates, p. 2835.


71 Therefore, this case not only involved the legal force of the 1960 Declaration, but also the "decision" in the same year that Goa was a non-self-governing territory under ch. XI of the Charter; G.A. Resn. 1542 (XV). See, e.g., S.C.O.R., 987th mtg., par. 125.
concerning Portuguese territories in reaching their position. These declared that Goa was a non-self-governing territory and clearly helped refute the Portuguese argument. Equally, however, they contradict the argument that India was the sovereign: in terms of the resolutions Goa was a non-self-governing territory, under Portuguese administration and in respect of which Portugal was obliged to take immediate steps to transfer all powers to the peoples of the territory. India might have had some kind of right over the territory but it was inchoate and final title had to await the transfer of power. In view of this, it is hardly surprising that more emphasis was put by the Asian delegates on a second argument: that force could be used when a State had obstinately refused to accord self-determination especially where its retention of control could be characterized as illegal (see (c) below).

(b) Right of Goanese to what?—India was careful to limit the rights of the population of Goa. They had no general right to determine their own future. Their self-determination—if indeed that was really involved—was to be achieved only with the Indian Union:—

"How can there be self-determination by an Indian in order to say that he is part of India or self-determination by an African to say that he is an African, or by a Frenchman to say that he would remain a part of France? . . . There can be no self-determination by an Indian against an Indian. . . . there is only one choice for them and that is to be free as part of their great motherland. There is no other basis on which there can be freedom for the people of India nor any other basis on which the people would like their freedom."

The Goanese are not a “people” entitled to self-determination: nor, it would seem, are the Nagas or the Kashmiris. Some such limitation on the doctrine of self-determination—even if, as in the instant case, motivated by self interest—is clearly desirable if it is not to be used to justify massive disintegration. The problem is, of course, where to draw the line; but practice at the moment supports the position that geographically attached units do not have a right to separate—the “salt water” theory of self-determination.

(c) Use of force against colonial powers.—A principal—perhaps the main—argument used by India and its supporters was that the Charter prohibition on the use of force was inapplicable. Article 2 (4) of the Charter provides:—

72 See, e.g., the view of Bains, op. cit., p. 78, that the Kashmiris are not entitled either under the Mountbatten statement or general international law to a plebiscite. “[T]he political claim to self-determination . . . has not yet . . . attained the position of a legally sanctioned demand . . . .” He quotes Kelsen and Oppenheim, but on pp. 201-4, quoting Scelle and Wright and in the context of the Goa Case, he argues that there “is sufficient legal opinion supporting the view that the colonial powers are under an obligation to grant self-government and independence to such territories”. But self-government and independence for Goa means the handing over of Goa to the Indian Government! Clearly Bains is not as careful in his argument and language as the Indian delegates.
"All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the Purposes of the United Nations."

This was not, it was said, an attack against the territorial integrity or political independence of Portugal. For the reasons above, the Portuguese occupation of Goa was illegal as contrary to the Declaration or, more moderately, the territory was non-self-governing and Portugal was only the temporary administering power. Indeed the action was in accordance with the purposes and principles of the United Nations, especially as elaborated in the Declaration on Colonialism. In other contexts the analysis has been taken further. Any use of force by the colonial power is held to be in violation of the colonial peoples' right to self-determination and is aggression; the people have the right to resist, in exercise of their right of self-defence, and may seek assistance from outside under the rubric of collective self-defence. 73

Not all of these arguments and suggested developments have been accepted by the major interested States, but there is little doubt that the Asian States have been responsible for extensive changes in the international law relating to colonial territories.

Principles of international law concerning friendly relations

In several of the above cases the Asian States have been concerned with accommodating their interests by changing traditional, accepted bodies of rules. As we have seen, this accommodation has not always been a painful process. In fact, to repeat a point made earlier, many of the rules of international law take little account of events and policies within a State, and the diversity of nations in the present world community has little or no effect on them. But the Asian States, or some of them, have also been in the forefront of efforts to extend the role of law in international affairs, to elaborate the basic rules of the international system, to codify the principles of peaceful coexistence, or to use the U.N.'s synonym, the principles of international law concerning friendly relations and co-operation among States. There has been a growing feeling that talk of the law relating to, say diplomatic relations, to state trading immunity, even to fishing, is strangely irrelevant to the real problems of a world faced with nuclear annihilation and seriously divided politically and economically. The "new" States have, accordingly, pressed and supported efforts within the U.N. and outside to promote efforts progressively to develop and to codify these and other basic principles. The theory is that if these rules are more precisely articulated and generally agreed States will comply and the use of force will be proportionately reduced. Thus in January

73 See, e.g., the resolution adopted by the Committee of Twenty Four in June 1966 inviting all States to provide material and moral assistance to the national liberation movements in colonial territories (July 1966), vol. III, No. 7, United Nations Monthly Chronicle, 24.
1966 the General Assembly of the United Nations unanimously reaffirmed its view that

"the faithful observance of the principles of international law concerning friendly relations and co-operation among States in accordance with the Charter of the United Nations is of paramount importance for the maintenance of international peace and security and the improvement of the international situation."[74]

The general principles which the Assembly and its committees have considered are: the prohibition on the use of force; settlement of disputes by peaceful methods; non-intervention in the domestic affairs of a State; the duty of States to co-operate; equal rights and self-determination of peoples; sovereign equality of States; and the good faith fulfilment of Charter obligations.

This whole effort raises several important and basic questions. Two are: what role does law in fact play in the policy-making of States, and what role should it play? These are questions to which final answers can never be given. As to the second, the Assembly has stressed that law should be more significant. Further, the point that it is in the States' own national interests, in most cases, to know what the agreed rules of the game are and to know that they will usually, on a basis of reciprocity, be observed, is surely a good one.[75]

The answer to the first question—the actual role of law—cannot be pursued here but one or two points relevant to the friendly relations codification effort can be made. First, the U.N., like the League of Nations, has often been reluctant to make any ruling on the legal merits of particular disputes. Thus it rarely finds that a particular State has committed aggression;[76] indeed, 'as the Rhodesian case shows, ch. VII does not require the Security Council to allocate blame.[77] Secondly, not only might the Council not use any definitions drawn up, but there is the further point that no definition would be binding on it. But, thirdly, and paradoxically, as a distinguished member of the legal staff of the U.N. has recently noted,[78] in the hard cases, the extreme cases, where co-operation seems beyond reach, where compromise appears impossible, the United Nations has made specific findings on the legal obligations of the parties. Outstanding instances are Korea, Hungary, the Congo, South Africa and the Portuguese

74 G.A. Resn. 2103 (XX).
75 For two typical expressions of this view, see Grotius, De Jure Belli ac Pacis (1646), Prolegomena, par. 18, and Friedmann, "United Nations Policy and the Crisis of International Law" (1965), 59 A.J.I.L. 857.
overseas territories. The law is relevant in these extremely difficult, intractable cases. Consider some of the advantages of such a legal finding: (i) practice tends to indicate that the States involved, leaving aside the intransigents, will find it easier to comply with any recommendations based on the legal opinion since the political controversy surrounding such compliance may be reduced by the consideration that the State is complying with the law; (ii) equally, public opinion at large may rally to a greater extent behind a decision based on the legal holding; (iii) the Organization will have a firmer base on which to take later action; such action may appear less arbitrary, less politically inspired.

Similar considerations apply to the relevance of law to any later operational—i.e., post decision—action of the U.N. If, in taking action, say in the Congo, the Secretary-General can say that he is acting in accordance with established principles he may be, to that extent, immune from political attack. Thus, in peacekeeping operations certain principles are established: non-participation of the forces of principal members of the Security Council, freedom of movement, and exclusively international control of the forces.

Despite the use made of rules in these latter cases, practice does raise doubts about the value of attempts to reach agreement on the basic rules of international law. These doubts have been clearly reflected in the work of the General Assembly and of its delegate, the Committee on Principles of International Law concerning Friendly Relations and Co-operation between States. The Committee reached agreement at its 1964 meeting\(^{79}\) only on the principle of sovereign equality and then substantially in the general interpretative language which was agreed upon at San Francisco in 1945. The Committee also reached tentative agreement on a vaguely worded elaboration of art. 2 (4) of the Charter—that prohibiting the use of force—but the United States Government decided that even its general elastic language might restrict its "right of hot-pursuit" of Vietcong into Cambodia and withdrew its consent. Fifteen months later it indicated its adherence, but this incident (and this is the only reason it is mentioned) shows the great difficulties involved in getting governments to agree to comparatively detailed statements of these basic rules. The committee met again in 1966\(^{80}\); once again it agreed on a sovereign equality text, also in vague and general terms. It also reached agreement on the principle of peaceful settlement, but in terms which stress the disputants' free choice of methods. Consensus could not be obtained on the other five

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principles. In 1967 again only limited progress was made on the principle that States shall fulfil in good faith their Charter obligations and on the duty of States to co-operate with one another in accordance with the Charter. The Committee was not able even to reaffirm the 1964 text on the use of force.\textsuperscript{[81]} Technical reasons, it has been suggested,\textsuperscript{[82]} have contributed to the Conferences' failure: insufficient time; the large size of the drafting committee; the requirement of unanimity; and the calibre of members. There is an element of truth in this, but surely the reasons are more basic: many States feel that they are being asked to commit themselves in these highly political areas without adequate knowledge of what might be involved. Further, and somewhat inconsistently, States also tend to consider the drafts in terms of their immediate political problems. Accordingly, they are often willing to accept formulae only if they are general enough to allow them subsequently to take into account a broad context of political and security factors.

This initiative has so far then had limited positive results. It has, however, given the "new" States an important forum and an opportunity to participate in making and reshaping the law, it has required them to state with some precision what their positions on basic issues are, it has shown in greater detail the areas of agreement and disagreement, and it has called for more careful consideration of the role law can play in international affairs.

Another and related initiative, which conflicts to some extent with the Asian States' insistence on their sovereign independence, looks to the development of what has been called international welfare or social protective law.\textsuperscript{[83]} The interminable discussions of aid and trade are frequently based on the idea that the developed States are under some kind of obligation to the underdeveloped. One English international lawyer recently went so far as to say that

\begin{quote}
"There is probably ... a collective duty of member States [of the U.N.] to take responsible action to create reasonable living standards both for their own peoples and for those of other States."\textsuperscript{[84]}
\end{quote}

But it can hardly be said that such a principle—however desirable it may be—has yet been established at any but the vaguest level of generality.

III

Any assessment of Asian attitudes to international law should also take account of Asian positions on particular cases. We have looked at some of the questions raised by the Goa case. Others have assessed the

\begin{itemize}
\item \textsuperscript{81} U.N. Doc. A/6799.
\item \textsuperscript{82} E.g. by Lee, "The International Law Commission Re-Examine" (1965), 59 A.J.L.I. 545, at pp. 560-2.
\item \textsuperscript{83} E.g. Roling, \textit{International Law in an Expanding World} (1960); Friedmann, \textit{The Changing Structure of International Law} (1964).
\item \textsuperscript{84} This paper was originally prepared for an honours seminar in Asian International Politics held at the Victorian University of Wellington in 1966. Some later material and references have been included. Brownlie, \textit{Principles of Public International Law} (1966), p. 227.
\end{itemize}
legal issues involved in such cases as the Sino-Indian border dispute, the Kashmir dispute and Indonesia's extensive claims over the waters within its archipelago. A reading of the materials indicates, with one possible qualification—suggested by one commentator rather than by the language of the contestants and which will be considered later—that the techniques and substance of argument are the same as those which would be employed by Western States, except, of course, where the Asian State takes a different position on some substantive rule. Even in such a case the style of argument is still familiar. A consideration of the only purely Asian case to be litigated before the International Court of Justice tends to confirm these conclusions. The Temple of Preah Vihear Case concerned a bitter dispute between Thailand and Cambodia about sovereignty over the ancient Khmer Temple (which Thailand had occupied since 1953) and surrounding area. The Temple was situated on a southward facing promontory. Accordingly, access to the Temple from the Cambodian (south) side could only be obtained by passing up the steep face. The area was the subject of border agreements between France and Thailand in 1904 and 1907, but it was clear—at least in the result—that the border near the Temple was never finally delimited in the manner prescribed in the agreements. The basic line of the border was to be the watershed line which probably would have favoured Thailand—the line virtually follows the cliff edge. Cambodia, however, depended in the main on what it considered to be action or non-action by Thailand acquiescing in Cambodian (i.e. French) sovereignty: most importantly France had forwarded maps to Thailand showing the Temple on the French side of the boundary and Thailand had not protested. The Court by a vote of nine to three accepted this view. The dissenting judges considered that Thailand had not acquiesced since it was not obliged to react to the various French acts, and that the watershed line which (at least in the view of the two of them) favoured Thailand was the correct border.

As the first, and only case between two Asian States to come before


87 E.g. Syatauw, op. cit., pp. 168-205.

88 Case Concerning The Temple of Preah Vihear (Cambodia v. Thailand), Merits, I.C.J. Reports, 1962, p. 6.

89 Judges Moreno Quintana (of Argentina), Wellington Koo (of China) and Sir Percy Spender (of Australia).
the International Court does it have any special Asian flavour? Does it show specifically Asian attitudes towards international law and adjudication?

First, the parties did not apparently consider the Court an inappropriate tribunal: both had deposited instruments accepting the Court’s compulsory jurisdiction. Moreover, neither State exercised its right to have a judge of its own choosing on the Court: they were presumably satisfied (1) with the Court’s existing composition, and (2) that it would take adequate account of the cases they presented: one of the rationales for judges ad hoc is that they will continue to press their country’s case even in the judges’ conference room.

This leads to a second point: a reading of the judgments and of the pleadings does not indicate that the Asian origin of the case is of special significance. For one thing, the parties for the most part depended on American and Western European counsel, apparently they did not think that Asian counsel nor Asian judges ad hoc were required to press any peculiarly Asian aspects of the case. And the arguments used by counsel and the judges, with one exception, appear equally applicable to any similar boundary dispute. Only in one respect was the Asian background thought to be relevant. Two of the dissenting judges, the Australian Sir Percy Spender and the Chinese Wellington Koo, argued that in assessing Thailand’s alleged acts of acquiescence


"regard must . . . be had to the period of time when the events we are concerned with took place, to the region of the world to which they

90 See the earlier judgment in which the Court unanimously rejected Thailand’s argument that the Court was not competent: I.C.J. Reports, 1961, p. 17. Such an argument is very common in the case of actions based on the compulsory jurisdiction of the Court and is hardly indicative of any different attitude to the compulsory jurisdiction. Moreover, Thailand, at least early in the proceedings, appeared to be playing for time. See, e.g., Pleadings etc. vol. II, p. 725.

91 See Statute of International Court of Justice, art. 31. Such a refusal is most unusual; in only one other case before the Court—Sovereignty over Certain Frontier Land (Belgium v. Netherlands), I.C.J. Reports 1959, p. 209—have the parties not exercised this right.

92 Counsel for Cambodia included former Secretary of State (U.S.) Dean Acheson (the Thais were reported to be very offended by this), and two distinguished Paris Professors of International Law. Counsel for Thailand included Sir Frank Soskice, former Attorney-General of England, Professor Henri Rolin of Brussels, a frequent practitioner before the International Court, and distinguished New York, Brussels and London lawyers. The named counsel bore the burden of the argument. Because of his election to the Court Thailand was unable to retain Professor Philip Jessup of the United States who had advised them and who, accordingly, was unable to sit on the Court for the Temple Case.

One of the more diverting aspects of the case is the barbed, witty exchanges between Soskice and Acheson: e.g. Pleadings etc., vol. II, pp. 87, 110, 288, 289, 446, 447.

93 The Court included two Asian judges: Tanaka of Japan and Wellington Koo of China.
related, to the general political activities of Western countries in Asia at the time and to the fact that of the two states concerned one was Asian, the other European.”

Such an argument would apply equally, of course, to any country which is in similar circumstances, and is not peculiar to Asia. As to its merits one may doubt whether a State should be allowed to take advantage in this way of its inefficiency; but this relates to the acquiescence argument which the Court accepted and which will be considered below. In this context—of the possible “Asian” nature of the case—it is interesting to note the dissenting judgment of Judge Moreno Quintana of Argentina. He starts his opinion by implying the existence of separate regional systems of international law:

“In American international law questions of territorial sovereignty have, for historical reasons, a place of cardinal importance. That is why I could not, as a representative of a legal system, depart from it.”

He does not say why the American system—“America” is here used in the wider, geographic sense—should apply to Asia. But the interesting thing to note about his judgment is that its technique and reasoning do not appear to differ from those in the other judgments. Like Spender and Koo, he stresses the watershed line established by the treaty and denies that the Thai actions amounted to acquiescence. He makes no further reference to various regional systems.

Finally and more generally, the question may be asked whether the Court—and there was no dissent from this—should have refused to widen the scope of its inquiry:

“The Parties . . . relied on other requirements of a physical, historical, religious, and archaeological character, but the Court is unable to regard them as legally decisive.”

No reasons were given for this refusal, but Judge Fitzmaurice in his concurring opinion expanded on this.

“The Court has dismissed these [considerations of a topographical, historical and cultural character] in a sentence, as not being legally decisive. I agree that they are not; but I think it desirable to say why, since these considerations occupied a prominent place in the arguments of the Parties. Such matters may have some legal relevance in a case about territorial sovereignty which turns on the weight of factual evidence that each party can adduce in support of its claim, and not on any more concrete and positive element, such as a treaty. In the present case it is accepted, and indeed contended by both Parties, that their rights derive from the treaty settlement of 1904, and on the subsequent events relative to or affecting that settlement. In consequence, extraneous factors which might have weighed with them in making that settlement, and more particularly in determining how the line of the frontier was

94 Spender, I.C.J. Reports, 1962, at p. 128. See also Wellington Koo, id., at p. 91. Kelly, “The Temple Case in Historical Perspective” (1963), 39 B.Y.L.L. 462, at p. 470, stresses this point: too rigorous a standard is being set by the Court.
96 Id., at p. 15.
to run, can only have an incidental relevance in determining where today, as a matter of law, it does run. Moreover, for these factors to have any serious influence, it would at least be necessary that they should all point in the same direction, and furnish unambiguous indications. This is not the case here. As the Judgment of the Court points out, no certain deduction can be drawn from the desire of the Parties for natural and visible frontiers—the Dangreks in themselves furnished that, and would, in a general way, have done so, whether the line along the Dangreks was a crest, a watershed or an escarpment line. Equally, it is difficult to draw any certain deduction from the siting of the Temple. It overlooks the Cambodian plain: but it faces in the direction of Thailand. Its main access is from the latter direction; but there is also access from the Cambodian side—and this access, because steep and hard, must—precisely for that reason—have been contrived deliberately and of set purpose, contra naturam as it were, since it involved a climb of several hundred metres. Yet difficulty of access is not—or was not—all on one side: there is much evidence in the documentation of the case that the thickness of the jungle on the northern (Thai) side of the Temple had the consequence that visits had to be specially prepared, by the clearing of paths and the blazing of trails. This particular difficulty was much less prominent on the Cambodian side: but what remains certain is that if, though for different reasons and in different ways, access was not easy from either side, it was feasible from both, and was also achieved from both, at varying times and in varying degrees.

As to the Khmer origins of the Temple—this factor (put forward by Cambodia) operates in an equally neutral way, since it seems to be admitted that there are and were, in these regions, populations of Khmer race on both sides of the frontier."

This argument appears compelling to this writer. As several of the judgments stressed, the parties desired stability in their border relationships, and it would be inconsistent with that intent to go beyond the boundary settlement to factors which were relevant before, but only before, the settlement. It might be answered that such a judicial attitude is unduly mechanistic: but is it? And note in any case that flexible rules of acquiescence, estoppel, preclusion, etc., were applied to reach a result probably inconsistent with the watershed rule established by the treaty in 1904. In assessing the arguments based on these rules, the Court had to take account of the post-1904 diplomatic and other relations of the parties and of the acts of each party in the area. It was on the assessment of their relations and acts that the Court decided—and divided. But the general point can clearly be made that such assessments enable many particular and varying factors to be taken into account. To put it generally and somewhat inaccurately, there is room for varying the application of any strict rules of law by reference to the justice and peculiar facts of the case.

97 Id., at pp. 53-4, Kelly argues that “as a precedent the Temple Case may be dangerously narrow in declining to look beyond immediate questions of treaty law into the broad and equivocal sphere of historical justice”: op. cit., p. 470. But surely in addition to the point made in the text as to the intention of the parties to settle the question by agreement, it would be a foolhardy court that attempted to adjudicate upon equivocal notions of historical justice. Adjudication usually involves the elaboration and application of reasonably precise and reasonably predictable rules.
Syatauw proposes a qualification to the conclusion suggested by the evidence—that, some specific issues of substance aside, the Asian attitude and approach to the legal aspects of international disputes does not differ from Western attitudes. He indeed concludes that in fact “a legalistic approach” usually runs parallel with a “non-legalistic approach”. But he argues that the Asian States should follow a method which includes at least the following questions:

1. What are the facts, the events, the value changes between people, to which the decision maker must respond?
2. What have been the decisions on comparable facts in the past and what facts appear to have influenced the decisions?
3. Who are the probable decision makers and what variables are likely to influence their decisions?
4. What ought to be the decision?

Such a method, he said, be very acceptable to Asian nations for the simple reason that it shows striking similarities with their legal procedures. In fact, the settlement of legal disputes in village communities follows more or less the same stages of the above method. This approach is more subjective and more flexible than the mechanical view of the law applying process held by many people. But is it really basically different from Western approaches? First, when disputes are settled by compromise—as they usually are—doubtless considerations like those mentioned are taken into account by the negotiators. Secondly, the suggested theory has much in common with the influential “policy oriented” schools of jurists in the West. Generally, in fact, “the over-emphasis on technical rules and legal technicalities” of which Syatauw complains has been abandoned by Western writers. So the argument presented to the International Court by the legal advisor to the U.S. State Department in the U.N. Expenses Case demonstrates the inseparability of law and politics. Finally, the evidence assembled—even by Syatauw—does not show any such distinction between Asian and other attitudes. This suggested “non-legalistic” approach also bears on compulsory adjudication which will now be considered.

98 Syatauw, op. cit., pp. 221-34.
99 Id., at p. 25.
103 Pleadings etc., p. 413, especially at pp.425-7.
IV

The view that Asian traditions allegedly favour compromise rather than third-party settlement according to specific codes of law, and the extrapolation that, accordingly, Asian States would not accept third party settlement as readily as Western States,\(^\text{104}\) have been seriously doubted.\(^\text{105}\) It has been doubted whether this practice is carried over from the village to the international area. Further, the point has been made that Indians, anyway, are amongst the most litigious of peoples: a glance at the All India Reporter tends to confirm this! Again there is the fact that even in Western societies with a strong legal tradition there is a reluctance to go to court; litigation is an unfriendly act; it is chancy; and, in the West, the United States especially, strenuous institutionalized efforts are made to get a settlement before trial.

Further, the view is frequently expressed that the existing substantive law is unsatisfactory to the Asian States,\(^\text{106}\) and that they are, accordingly, reluctant to have their disputes settled in accordance with it. The validity of this view can best be assessed in the light of (i) the earlier discussion of the substantive rules, (ii) the actual record of the Asian States in accepting international adjudication, and (iii) the fact that the new States have rarely objected to the rules stated by the Court.\(^\text{107}\)

A third factor which allegedly reduces the pressure on Asian States to litigate is the prohibition, in international law, of the use of force. An eminent Australian international lawyer has argued:—

"As Sir Gerald Fitzmaurice (the Legal Adviser to the British Foreign Office) and others have pointed out, the enthusiastic efforts to ban all uses of force in relations between states, except in defence of one's own territory against armed attack, have had the ironic effect of weakening international law. Formerly, when the use of force in support of legal rights was regarded as licensed, small powers favoured third-party settlement because equality before the law was better than inequality on the battlefield. But when atomic weapons are obviously too formidable to use in vindicating most kinds of legal rights; and when the opposed military bloc threatens nuclear retaliation against pressure exerted by conventional forces (as the Soviet Union did in the Suez and Cuban crises), then plausibility is given to the notion that force is out of the question even for the defence of legal rights. When it begins to appear

\(^{104}\) Expressed, e.g., by Wright and Syatauw, n. 8, ante.

\(^{105}\) See especially Anand and Shihata, op. cit., n. 9 ante, and Anand, "Attitude of the 'New' Asian-African Countries toward the International Court of Justice" (1962), 4 Int. Studies 119. But see the interesting discussions by Cohen and Lubman respectively, "Chinese Mediation on the Eve of Modernization" (1966), 54 Calif. L.R. 1201 (he begins with a Chinese proverb: it is better to be vexed to death than to bring a law suit), and "Mao and Mediation: Politics and Dispute Mediation in Communist China" (1967), 55 Calif. L.R. 1284.

\(^{106}\) E.g. Castaneda, op. cit, n. 11, ante; cf. Shihata, op. cit.

\(^{107}\) Shihata, op. cit. The South West Africa Case, I.C.J. Reports, 1966, p. 6, is the clearest exception.
that small states can violate with impunity the rights of big states, the
interest of the small ones in third-party settlement understandably
diminishes. In so far as a blanket prohibition is now assumed to be
placed on the use of force by any state, even to enforce its legal rights,
the effect is to undermine the modest binding power which international
law enjoyed in the old-fashioned days before the League of Nations
and the United Nations."[108]

Several questions arise: (1) How significant was the use or
threatened use of force in persuading governments to litigate in the
past; the Venezuelan debt arbitration is one case where litigation
followed an Anglo-German blockade, but this appears to be unusual.
(2) The prohibition on the use of force does not prevent other lesser
pressures. (3) More fundamentally, should any self-respecting law
ordered system condition the initiation of adjudication on the greater
amount of force which happens to be available to the prospective
plaintiff? Is this really equality before the law? Isn't it a continuation
of inequality on the battlefield? But again the significance of this factor
can perhaps be assessed by looking to the actual record of the Asian
States. Only when this record has been examined, if at all, can a
satisfactory estimate be made.

A final practical factor which to this writer does appear significant
is the lack, except in Japan and perhaps India, of adequately trained
personnel in sufficient numbers and the partly resultant lack of
sophisticated studies of international legal issues by Asians. The Legal
Consultative Committee and some notable Asian scholars are starting
to fill the gap, but the great bulk of international law writing still
comes from the pens of Europeans and Americans. Given these two
gaps, at least some Asian States would probably want to avoid lengthy,
difficult and time-consuming legal disputes.[109] But let us consider the
actual record of the Asian states.

Members of the United Nations are, by virtue of that fact, parties to
the Statute of the International Court,[110] but, they are not, of course,
bound to accept the jurisdiction of the Court; they must independently
consent. Consent to the jurisdiction can, broadly speaking, be given in
three ways[111]:—

(a) ad hoc for the particular dispute;
(b) in an international agreement with one or more States: such
consent may relate to disputes arising from the particular

108 Stone, "Law, Force and Survival" (1961), 39 Foreign Affairs 553, 554; see
similarly Jennings, "The Progress of International Law" (1958), 34 B.Y.I.L.
334.
109 See Syatauw, op. cit., pp. 19-20, 227-8; and note the recently begun
efforts of the U.N. to give technical assistance of various kinds in the field
of international law: e.g. Stavropoulos, "United Nations Programme of
Assistance and Exchange in the Field of International Law" (1966 April),
vol. III, No. 4, United Nations Monthly Chronicle 41, reprinted in (1966),
60 A.J.I.L. 526; (1966), 6 Ind. J.I.L. 244.
110 Charter of the United Nations, art. 93 (1).
111 See Statute of the International Court of Justice, art. 36.
agreement, or to all international legal disputes arising between the parties;
(c) by accepting as compulsory the jurisdiction of the Court in a declaration deposited with the Court; practice has established that this consent can be subject to limitations and conditions—in formal language, reservations.

One measure of the attitude of countries to judicial settlement is whether they have accepted the compulsory jurisdiction of the Court (c) above), and, if so, on what terms. At the moment 42 States are subject to the compulsory jurisdiction of the Court: 17 from Western Europe, North America, Australia and New Zealand; nine from Central and South America; eight from Africa, and seven from Asia. The Asians are Cambodia, China, India, Israel, Japan, Pakistan and the Philippines. In terms of percentages 68 per cent of the West European etc. members of the U.N., 37.5 per cent of Central and South American members, 23 per cent of African members, and 28 per cent of Asian members have accepted the Court’s compulsory jurisdiction. None of the Soviet bloc States have accepted this jurisdiction, and of the Middle Eastern States only the U.A.R. (included in Africa in the above calculation) and then only in respect of certain disputes concerning the Suez Canal.

The reservations to these acceptances of the jurisdiction of the Court are also relevant to an assessment of attitudes. The most famous and most far-reaching reservation is that originally included in the American acceptance and known, after its sponsor, as the Connally Amendment. The Court is not competent in respect of

“disputes with regard to matters which are essentially within the domestic jurisdiction of the United States of America as determined by the United States of America;”

The Connally Amendment consists of the final eight words: “as determined . . .”, etc. (Several declarations contain a domestic jurisdiction reservation but without this final phrase. Such a reservation probably makes no difference to the Court’s powers, and certainly does not attract the objections raised about the Connally Amendment). The effect of this provision is that where a matter is, in all other respects, within the Court’s jurisdiction, the United States has an unfettered discretion to withdraw the matter from the Court’s jurisdiction. In other words, the American acceptance of jurisdiction is illusory. Whenever it is a defendant it can terminate the Court’s consideration of the case by its own unilateral act. Further, the reservation is illegal; it is in patent conflict with a provision of the Statute of the Court which reserves to the Court, not to the parties, the power to determine disputes about jurisdiction.

113 Id., pp. 71-72.
114 See the U.S. interpretation of the reservation in its dispute with Bulgaria about the Aerial Incident of 27 July 1955, Pleadings etc., pp. 676, 677.
115 Article 36 (6).
whole declaration of acceptance is invalid, or whether the invalid portion can be severed leaving the acceptance remaining. This unfortunate example was followed by several other States: India, Liberia, Mexico, Pakistan, South Africa, Sudan, and (in a rather milder form) the United Kingdom. In the present context it is important that both India and Pakistan (as well as the United Kingdom) have abandoned the reservation. Further, the declarations of acceptance of the Asian States are comparatively broad, and unrestricted by reservations. Many of the Western European, etc. declarations are more limited. Thus Dean Acheson was able to say, when appearing for Cambodia in the Preah Vihear Case, that "Thailand has a long and honourable history of accepting compulsory international judicial jurisdiction. Many of us in my own country wish that our own record had been as unqualified".

A second test of attitudes to the International Court is the view taken of clauses in multilateral treaties providing for the compulsory jurisdiction of the International Court (b) above). We have already noted that the Vienna Conference on Diplomatic Relations separated the compulsory jurisdiction provisions of the I.L.C.'s draft from the principal text and drafted a separate optional protocol. Similar decisions were taken at the 1958 Conference on the Law of the Sea, the 1963 Vienna Conference on Consular Relations, and the U.N. meetings which drafted the Convention on Consent to Marriage. The Friendly Relations Committee has also rejected compulsory adjudication.

Multilateral lawmaking conventions adopted under the auspices of the U.N. in its first 10 years regularly included a compulsory adjudication clause, but equally regularly—or almost—Soviet bloc States, and some others, reserved their original option. Does the more recent rejection of attempts to include these clauses result from and indicate a negative Asian attitude? The 1958 Geneva Conference on the Law of the Sea shows that it is difficult to be dogmatic about this. The International Law Commission in its draft provided that disputes relating to claims over the continental shelf could be submitted to the Court at


118 Pleadings etc., vol. II, p. 43.

the request of one of the parties. There was also a complicated series of provisions for the settlement of fishing disputes. But even the I.L.C. did not provide generally for compulsory adjudication. The provision relevant to the continental shelf was included because of the general, fairly subjective assessment which would be made by States from time to time under the draft articles.

At Geneva this provision was voted on before a more general suggestion for compulsory adjudication of disputes relating to all the texts was discussed. The familiar arguments were made: under the Charter and Statute adjudication was optional not compulsory; indeed it would be a violation of the Charter and of the sovereign equality of States if two-thirds of the governments represented could compel the other third to accept the jurisdiction of the Court; unnecessary litigation could be used to bring pressure to bear on weak States; the draft covered a new area, and until there was more experience of the operation of the rules adjudication would be dangerous (this is of course in direct opposition to the I.L.C.'s reasoning); this was an eminently technical matter unsuited for Court decision; finally, those States which had indicated their objection to compulsory adjudication would be unable to accept the substantive provisions, and this was hardly to be desired. Latin America delegates were more prominent in making these arguments—also expressed, of course, by the Soviet bloc—than Asian delegates. These arguments did not persuade, however, for the I.L.C. draft article was approved in the committee by 33 (including Cambodia, China, Japan, Pakistan, the Philippines and Thailand)—15 (Korea and India)—14 (Ceylon).

But those opposed to compulsory settlement were not to be denied. The general proposals which would have given the Court compulsory jurisdiction in respect of all the conventions adopted at Geneva were rejected. The arguments were much the same, but perhaps more were persuaded this time by the consideration that the many States which were not prepared to accept the Court's jurisdiction would either reject the complete drafts or make reservations to the compulsory adjudication clause anyway. The vote in favour of compulsory adjudication was 33 (Japan, Nepal, Pakistan, Philippines, Vietnam)—29 (Ceylon, India, Korea, Malaya, Thailand)—18 (Australia, Burma, China, Indonesia, United Kingdom, United States, Yugoslavia) but, under the Conference rules a two-thirds vote was needed on mat-

121 Commentary to art. 73, id.
123 See e.g. id., vol. II (A/CONF. 13/38), Venezuela, 7th mtg., p. 10; 13th mtg., Argentina, p. 30; Ceylon, p. 33; cf. India, p. 30.
124 Id., vol. VI, 35th mtg., p. 106.
126 Id., 13th mtg., p. 33.
ters of substance.\textsuperscript{127} The Conference also failed to adopt a proposal that compulsory adjudication clauses be included in one or more of the final substantive texts.\textsuperscript{128} The continental shelf article was later voted on by the Conference and failed by the narrowest margin to get a two-thirds majority.\textsuperscript{129}

The record is hardly clear. The Asians were divided in their attitude to compulsory settlement; so too were the Western Europeans and the Latin Americans; only the Communist States—Yugoslavia aside—held a consistent position. The general proposition could have been adopted only with many more positive and many less negative votes, and the Western Europeans by virtue of their abstentions and negative votes were in as good a position as the Asians to change the balance.

So far as appearances before the Court are concerned, Asian States have been involved in two of the 12 cases upon the merits of which the Court has adjudicated. The first was the \textit{Right of Passage Case}\textsuperscript{130} between Portugal and India, the second the \textit{Temple of Preah Vihear Case}. Eight of the cases (including the \textit{Passage} and \textit{Corfu Cases}\textsuperscript{131} involved Western European States, two Latin American and the twelfth is the \textit{South West African Cases}.\textsuperscript{132} In both Asian cases the defendant States at first contested the jurisdiction of the Court; but this is not very significant—it is normal practice in the case of disputes put to the Court by unilateral application.

On a number of other occasions Asian States have suggested that disputes should be referred to the Court. Thus India has made such a proposal (in the knowledge perhaps that it would be rejected) to China relating to their boundary dispute,\textsuperscript{133} the Philippines offered to take its claim over Sabah to the Court, and India and Pakistan actually agreed that their dispute over the Rann of Kutch which had led to war should be arbitrated (a decision awarding part of the territory to Pakistan was given in February 1968).

Any assessment of the "new" States' attitudes to the Court must include a consideration of the remarkable decision of the Court in the \textit{South West Africa Case}, where, by the President's casting vote, it was held that Ethiopia and Liberia had no sufficient interest in the cases they had brought before the Court and that the claims should, accordingly, be dismissed. Reactions directed at the Court came mainly from

\begin{footnotes}
\item[127] Rules of Procedure, r. 35, id., p. XXXIII.
\item[128] Id., p. 34.
\item[129] Id., 17th mtg., p. 55. The vote was 38-20-7. The details of the vote are not recorded. Note also that the U.S. Senate rejected the proposal that the U.S. should ratify the optional protocol for the settlement of disputes arising out of the Conventions.
\item[131] I.C.J. Reports, 1949, p. 4.
\end{footnotes}
African States—not from Asian States. Moreover, the composition of the Court in 1966 was, for various fortuitous reasons, unusual and, especially following the elections in 1966, it now includes more judges from the "new" States. Perhaps the Court will recover quite quickly (at least in the eyes of Asians) and such resentment as remains will be directed towards the individual judges—some since retired—who voted in the majority. But the "self-inflicted wound"[^134] delivered when the Court was already suffering, in this case unjustifiably, from the non-implementation of the Expenses opinion[^135] undoubtedly affected the Court's prestige and effectiveness. Thus, in the two years since then, only the cases concerning the North Sea continental shelf have been brought before the Court; only two States have accepted while two have withdrawn from the compulsory jurisdiction of the Court[^136] and no advisory opinions have been sought[^137].

It is convenient to recall in this context Professor Stone's argument that the abolition of the right to use force has led to reluctance on the part of new States to litigate. His argument relates to their position as "debtors" in a broad sense, that is, as potential defendants. They would prefer, he says, to retain their freedom of movement on economic issues, and this applies equally to future indebtedness. But the record seems to be to the contrary. An Indian scholar wrote a few years ago:

"In most of the new agreements, whether for economic aid or otherwise, they [the new States] have been prepared to accept the jurisdiction of the [International] court in case of disagreements regarding the interpretation of application of the agreements. ... These new countries themselves also understand that it is in their own interest to create confidence among the Western countries that they will observe their legal obligations and burdens which they are freely assuming for their own benefit. ... All International Bank Loans are subject to an arbitration clause. The International Finance Corporation will undoubtedly follow the same practice. The Economic Co-operation Agreements concluded by the United States with different countries many of them Asian and African, contain such clauses conferring jurisdiction on the Court. It seems, therefore, that there is no reason for us to be unnecessarily doubtful about the future conduct of the new Asian and African states."[^138]

Similarly the hundreds of technical assistance agreements concluded

[^134]: To borrow the phrase used by Chief Justice Hughes of the United States Supreme Court in respect of certain of its decisions; e.g. Freund, *The Supreme Court of the United States* (1961), p. 165.


[^136]: Malawi (subject to a Connally type amendment) and Malta. The Turkish declaration has expired and South Africa has withdrawn.

[^137]: See, e.g., the rejection by the UNESCO General Conference of Portugal's request that the Court be asked to determine whether it was lawful for UNESCO to suspend a member from taking part in UNESCO Conferences: 6 I.L.M. 189-92.

by the U.N. and other international agencies with new States provide for compulsory arbitration. In 1965 the World Bank with the support of the capital importing countries drafted and adopted a Convention on the Settlement of Investment Disputes between States and Nationals of other States. The broad objective of the provisions which are said to maintain a careful balance between the interests of investors and those of most States is to encourage a larger flow of private international investment. And, finally, the constitution of the Asian Development Bank adopted in 1965 provides for the settlement of disputes between members and the bank or members inter se by the boards of directors and of governors and by arbitration.

Leaving aside, then, some reluctance to litigate disputes with pre-independence origins or governed by unacceptable pre-independence rules (which, we have seen, are probably few), the Asian record as far as compulsory adjudication is concerned does not seem markedly different from that of the Western European, etc., grouping. This assessment is consistent with the conclusion reached by Shihata following a recent thorough and careful review.

"The general attitude of [new] states is not on the whole much different from the attitude of older European and American states, and it is more favourable to the Court than the attitude of socialist states."

The foregoing compels the conclusion that there are no pat answers on Asian attitudes to international law. What is needed is a careful consideration of the various areas of international law and international legal disputes where Asian States have taken a position. The discussion above of some of these areas and disputes indicates that there will be different attitudes. (1) Many of the relevant rules of international law are completely acceptable; this is not really surprising when one considers that many of the rules result from the geographical facts of a world of separate independent States, and that internal policies are often not touched by the rules. (2) When the rules as traditionally stated are considered to be inconsistent with Asian States' interests they have often attempted to get the content of the rule changed. But, on the whole, these attempts have been moderate, they have been made remarkably orthodox techniques (if one includes Assembly recommendations), and they have been pressed with an appreciation of the States' long term interests. (3) In some areas the Asian and African States have been in the forefront of movements to develop international law which can only be described as highly desirable: human rights, self-determination, friendly relations. Other developments have received

139 4 Int. Leg. Mats. 524.
140 5 Int. Leg. Mats. 262; (1965), 5 Ind. J.I.L. 543.
141 Shihata, op. cit. Certainly the evidence contradicts Stone's view that the Asian attitude toward third-party settlement is apparently similar to that of Communist States. The International Court and World Crisis. (1962, International Conciliation No. 536).
a mixed reception, but it can hardly be otherwise given the possibility that apparently established rules of international law can always be broken down and changed by the continued non-compliance of a significant number of States. (4) Finally, the Asian attitude to third-party compulsory settlement of disputes does not appear markedly different from those with the best record in this area.