

How to Deal With Border Issues: A Diplomat-Practitioner's Perspective

Masataka Okano*

Objective of the Paper

The subject of border issues is a complex one, involving a variety of different aspects. They can sometimes refer to disputes concerning territorial sovereignty, and they can also relate to the delimitation of territorial seas, continental shelves and exclusive economic zones. Border regions are often located in remote areas far from their capitals, benefiting from trade with the other side of the border. The management of cross-border flows of people, goods, services, capitals and information; and how to economically and socially support these local regions or isolated islands near borders may well be treated within the framework of border issues.

This paper will discuss some ways in which the practitioners of foreign policy deal with these territorial issues or maritime delimitations in light of international law. Although the paper will refrain from going into the strategies or tactics of the Japanese government over the cases in which Japan is involved, I hope that it will be useful because the views of practitioners have rarely, if ever, been presented in a comprehensive manner.

Why do We have Territorial Disputes?

- a) A state has a territory within which it has territorial sovereignty. The border is the outer limit of the area where the state has its territorial sovereignty. These borders often happen to be areas where a state's territory meets with that of another state.
- b) Situations become a little more complicated on the sea. Outside the territory of a state extends the territorial sea. According to Article 3 of the UN Convention of the Law of the Sea, "Every state has the right to establish the breadth of its territorial sea up to a limit not exceeding 12 nautical miles, measured from baselines determined in accordance with this Convention." A state may exercise its territorial sovereignty over the territorial sea, but this comes with certain restrictions. For example, foreign ships are entitled to the right of innocent passage; meaning that a coastal state shall not prevent the passage of foreign vessels within its territorial sea, provided that they do not give prejudice to the state's peace, good order or security.

Outside the territorial sea extends the exclusive economic zone and the continental

* Masataka Okano is the Director for International Legal Affairs at the Ministry of Foreign Affairs in Japan. The analyses and opinions expressed in this paper are his personal ones which do not necessarily reflect the official position of the Japanese government.

shelf. According to Article 57 of the UN Convention of the Law of the Sea, “the exclusive economic zone shall not extend beyond 200 nautical miles from the baselines from which the breadth of the territorial sea is measured,” and the coastal state has sovereign rights for the purpose of exploring the continental shelf and exploiting its natural resources in the Exclusive Economic Zone (EEZ).

The continental shelf extends from the territorial baseline up to the limit of 200 nautical miles, but where a natural prolongation of the shelf exists, the coastal state may extend its outer limit beyond 200 miles in accordance with Article 76 of the United Nations Convention on the Law of the Sea (UNCLOS). In such a case, the continental shelf might extend as far as 350 miles and even beyond. The coastal state has sovereign rights over the continental shelf for the purpose of exploring and exploiting its natural resources.

When there is overlap of the territorial seas of two states, the median line will become the delimitation line unless otherwise agreed by the two states. In case of overlap of the EEZ and the continental shelf, “the delimitation shall be effected by agreement on the basis of international law, as referred to in Article 38 of the Statute of the International Court of Justice, in order to achieve an equitable solution.”

- c) Using the same analogy, if two states claim their territorial sovereignties over the same area on land, a question of territorial delimitation arises. Usually we may identify the following factual elements in territorial issues:
 - i) First, the change in occupying forces over the territory in question. For example, an area used to be occupied by state A, but state B then came to occupy it. (In some cases the area had actually been *terra nullius* but state A claims that it had controlled it.)
 - ii) The occupying state (state B) incorporates the area into its own territory.
 - iii) State A continues to claim its territorial sovereignty over the area in question by denying the legality of state B’s claim.
- d) Territorial issues typically arise when:
 - i) in an armed conflict, state B occupies an area and will not leave;
 - ii) an area had been transferred from state A to state B by a treaty, but state A has come to doubt the validity of the treaty;
 - iii) a treaty stipulates the transfer of an area from state A to state B, but state A claims that the territory in question is not part of the area that should be transferred.

In any of these cases, it is crucial for state A to maintain its claim. If state A drops its own claim on the area, there will no longer be any territorial dispute under the terms of international law.

What kinds of Formulae are Available to Settle Territorial or Maritime Delimitation Disputes?

- e) Each dispute has its own character and there is no one-size-fits-all solution. However, we may sort solution models into the following four categories:

- i) The first formula is to draw a border line. In this scenario, we can clearly mark the limits of the sovereignty or jurisdictions of state A and state B. The line drawn as a border often indicates how much of a concession each state has made, and this package therefore tends to be a difficult sell to each state's respective domestic audience. Nevertheless, once the border line is drawn, the states will no longer have overlapping areas and they will be able to enjoy legal stability in the region. The International Court of Justice stated in its decision on the *Temple Case*, "In general, when two countries establish a frontier between them, one of the primary objects is to achieve stability and finality."¹ A recent example is the border delimitation between Russia and China, which was finally settled in 2004.
- ii) The second formula is to cover a contentious area with a zone of an intermediary character. Within the zone, state A and state B coordinate their exercise of jurisdiction. In many cases the two states agree that the *modus vivendi* does not give prejudice to each respective legal position.

Good examples of this formula are the intermediary fishing zones established under the Japan-ROK fishery agreement of 1999. In the Japan-ROK fishery agreement, a large intermediary zone was established in the Sea of Japan, within which ships are under the control of their flag states and the two countries cooperate with each other on the conservation of living resources. Both states had tried to draw a single delimitation line, but were unsuccessful because of the territorial issue in the Sea of Japan. The existence of the disputed islands in the middle of the overlapping area had led to different interpretations by both countries as to where to draw the delimitation line. After difficult negotiations, the two countries agreed to establish an area for joint management in such a way as to cover the contentious area. A similar zone was set up under the Japan-China fishery agreement of 2000 due to different points of view on the principles of maritime delimitation.

In another set of examples of this formula, the Commerce and Navigation Treaty of 1855 between Japan and Russia provided that Sakhalin remained undelimited so that the peoples of the two countries could live together. New Hebrides was jointly governed by the UK and France under the terms of a 1906 treaty and jointly governed by the two authorities until it became independent as Vanuatu in 1980. Under this regime, which is often called "condominium," British and French nationals were generally subject to their respective national administrations. Nationals of third-party states had to opt for the legal system, and thus the administration, applicable to the nationals of either of the signatories. In practice, the British and French Resident Commissioners, representing the respective High Commissioners and acting jointly, comprised the condominium government.

¹ Case concerning the Temple of Preah Vihear (Cambodia v. Thailand), Judgment, 15 June 1962, *ICJ Reports 1962*, p. 32.

The merit of this formula is that it is apparent that the package is a compromise between the two states, which could help the two governments assuage their domestic audiences. The management of this intermediary zone is a difficult matter of administration and should be the subject of an agreement between the two states. This formula is more feasible on the sea than on the land, where people's activities are intense and complex. The condominium in New Hebrides was not regarded as a successful example, mainly because the decision-making process was slow and inefficient.

- iii)** The third formula is to lower the existing border barrier. The role of a border is to control the flow of people, goods, services, capitals and information between states. If states agree to liberalize these flows, then the border will no longer play a large role. Borders have practically been abolished inside the EU in terms of economic activities. Once you are inside the Schengen Space created by 25 European countries, you can move around freely without your passport being checked at the border control of each individual state.

Cross-strait relations between mainland China and Taiwan are not territorial issues, but several attempts have been made to reduce the barrier by eliminating restrictions on direct trade and even concluding a free trade arrangement. Around 270 weekly flights are in service between the two sides of the Strait and we can fly directly from Beijing, Shanghai and Guangzhou to Taipei today.

These two simple examples show that globalization of the economy has rendered borders almost meaningless. However, there is a limit to the role of globalization. It is indeed the case that this third formula would be effective to reduce tensions in the border area, but this method alone may not lead to a final settlement of territorial issue because police and military activities, which are the core components of public administration, still remain within each respective border.

- iv)** The last formula is to maintain the status quo. Those states who occupy the area in question would usually opt for this option and they often claim that there is no territorial dispute. They avoid discussion with the other party and they sometimes strengthen their occupation of the disputed area.
- f)** The determination of which formula might be relevant to a given situation is difficult to say. At least we can point out the following:
- i)** In cases where state A and state B have different ethnic, cultural and social backgrounds, drawing a single borderline may be an ideal solution to realize stability in the region.
 - ii)** In cases where the backgrounds of the two states are similar, lowering the border might be an appropriate formula.
 - iii)** If natural resources are the focus of contentions, covering an area with a zone may work. In this scenario, a close working relationship should exist between the two states in order to manage the area, as in the case of the Japan-China Fishery Agreement.

- iv) However, in most cases, the occupying state tries to maintain the status quo. The settlement of territorial disputes will not move forward unless the occupying state recognizes the dispute. For the state claiming the return of a territory, it is crucial that the other party recognize the dispute. For example, the Soviet Union did not recognize the dispute with Japan over the Northern Territories for a long period of time during the Cold War. In this context, we should note that if the issue is brought to international arbitration or a tribunal, it is the role of that body to decide whether a dispute exists or not.

How to Solve Disputes?

What kinds of methods can we use to settle land disputes or maritime delimitation issues? Here we will just deal with land disputes, which have different characteristics from maritime delimitation.

- a) The most fundamental rule of settling territorial disputes is that they should be done in accordance with international law. International law regulates relations between states, and any dispute between states should in principle be solved according to international law. Today the use of force or the threat of force to solve international disputes is outlawed except in cases where UN Security Council resolutions so authorize. Territorial disputes must be resolved peacefully.
- b) Article 33 of the UN Charter provides that, “the parties to any dispute, the continuance of which is likely to endanger the maintenance of international peace and security, shall, first of all, seek a solution by negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means of their own choice.” Whichever of these methods may be used, international law is the substantive criteria for solving a dispute. It is therefore important for a state party to present legal arguments which are more easily justified and convincing than the other state party in light of international law. I would like to review, hereafter, the basic tenets of the relevant international law.
- c) In order for a state to acquire and exercise its territorial sovereignty over a piece of land, the state must have occupied it and effectively control it. There are basically two modes of acquiring territory:
 - i) The first mode is a derivative acquisition whereby a state cedes a territory to another State. These types of acquisitions are usually done by treaties. Subjugations and conquests which involve use of force would fall into this category but they are not lawful titles under today’s international law, as was determined by the UN Security Council when Iraq invaded Kuwait in 1991.
 - ii) The second mode is to occupy a *terra nullius*, a land which has not been controlled by any state. For a state to acquire sovereignty over such a land, it should first occupy it. Once a state occupies a land, it must exercise a continuous and peaceful display of state

authority over it. This conduct is called an act *à titre de souverain* and this requirement is called “effective control” Elements of proof that support the effective control over the land in question are referred to as “*effectivités*.” If a state wishes to assure a continuous display of authority, it should show the intention and will to act as sovereign and some actual exercise or display of such authority. The degree of *effectivités* required varies according to the geographical situation, the density of population, and claims by foreign countries. A no man’s land does not require the same level of effective control as that which would be needed for a populated area. Uninhabited small islands of little economic importance would require scarce *effectivités*.² This point is important when we discuss the legal status of isolated islands. The degree of continuity also varies depending on the situation, and control need not be exercised at every minute. In the famous *Island of Palmas* arbitration, the Permanent Court of Arbitration stated that state authority should not necessarily be displayed “in fact at every moment on every point of a territory.”³

In the real world, it is not easy to distinguish between a *terra nullius* and a territory which was previously under the sovereignty of one state but claimed as a *terra nullius* by another state due to the scarcity of activities by the former state. In the *Eastern Greenland Case* in 1933, Norway maintained that Eastern Greenland was *terra nullius*. But the Permanent Court of International Justice stated in its judgment, “Denmark must be regarded as having displayed during this period from 1814 to 1915 her authority over the uncolonized part of the country to a degree sufficient to confer a valid title to the sovereignty.”⁴

- d) Territorial disputes arise when sovereignty claims over a land by more than one state overlap. If there exist treaties or other legal documents concerning the territory in question, their interpretation will be a key issue. For example, regarding the Northern Territory Issues, the Treaty of Commerce and Navigation in 1855, the Treaty concerning the Exchanges of Sakhalin and the Kurile Islands in 1875, the San Francisco Peace Treaty, and the Joint Declaration between Japan and the USSR in 1956 are all important materials for reference.
- e) However, if neither state concerned has a treaty-based title to the disputed area, the element of *effectivités* will be considered.⁵ In this context, international tribunals will be keen on what is known as “relative title” — which of the competing claims is stronger — rather than some absolute standard of title. The criteria for the tribunals will be which side has better proof to justify its claim. If there is ever a widely shared opinion among many third-party

² Case concerning sovereignty over Pulau and Ligitan and Pulau Sipadan (Indonesia v. Malaysia), Judgment, 17 December 2002, *ICJ Reports 2002*, p. 682.

³ *Islands of Palmas Case* (USA v. The Netherlands) Award, 4 April 1928, *Reports of International Arbitral Awards* 2, p. 829.

⁴ *Legal Status of Eastern Greenland*, Judgment of the Permanent Court of International Justice, 5 April 1933, *PCIJ Series A/B* 53, p. 54.

⁵ *Op. cit.*, as per note 3, para. 127.

states on that particular subject, this may impact the arbitrators or judges of tribunals. A third party’s voice may be influential and that is exactly the reason why third-party states tend to avoid expressing their opinions on territorial issues, which they usually do not wish to get involved in.

- f) The two state parties involved may agree to put aside their legal arguments and settle the issue politically. Provided the area in question belongs to either of the two countries, it is up to these two countries where to draw the line. However, the strength of each state’s position derives from their legal position, and political discussions cannot fully depart from legal arguments. Therefore, it is extremely important that state parties should secure their legal coherency until a final settlement is achieved. If you acknowledge the exercise of jurisdiction by another party whilst claiming your sovereignty, your legal position will be damaged. The following are good examples for diplomats to remember:

In the *Legal Status of Eastern Greenland Case* (1933), the PCIJ referred to a statement made by the Norwegian Foreign Minister in a conversation with his Danish counterpart. He said, “The Norwegian government would not make any difficulties in the settlement of the question.” The settlement meant that Denmark would raise no objection to Norway’s claims upon Spitsbergen and that Norway would not object to the Danish expansion of control over the whole of Greenland. The Court determined that Denmark had a valid title to Eastern Greenland.

In *The Temple of Preah Vihear Case* (1962), the International Court of Justice determined that the Temple was situated in Cambodian territory, not in Thai territory. In this case, the Mixed Delimitation Commission set up in 1904 by France and Thailand produced a map that showed the temple to be in French territory, which later became Cambodian

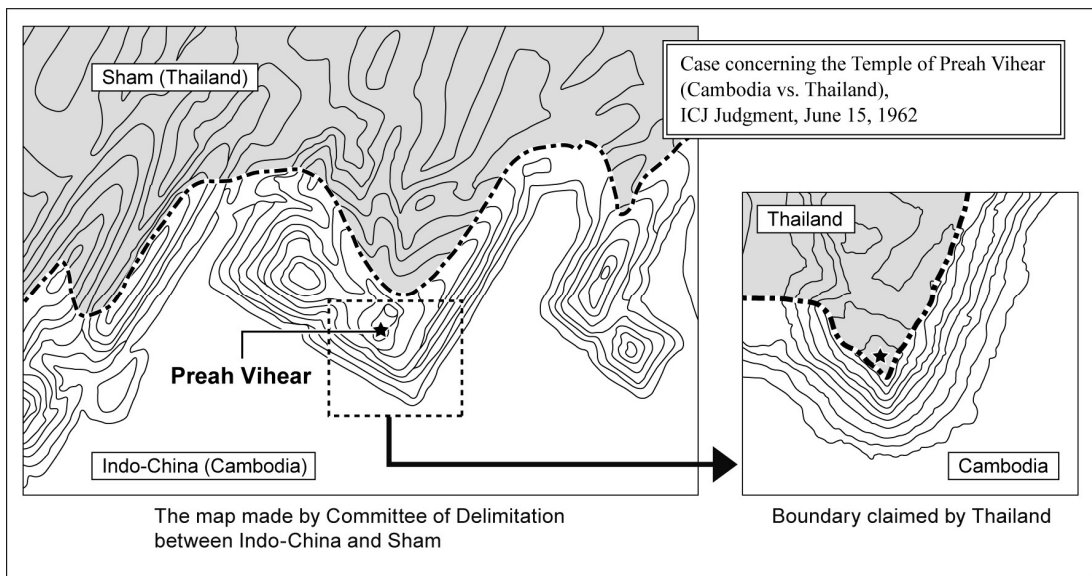


Fig.1 Map of ICJ Preliminary objections

territory. Not only did the Thai authorities not reject the map, they did not react to it for a long period of time. The ICJ stated that after the map had been published, “it is clear that the circumstances were such as called for some reaction, within a reasonable period, on the part of the Siamese authorities, if they wished to disagree with the map or had any serious question to raise in regard to it. They did not do so, either then or for many years, and thereby must be held to have acquiesced.”⁶

In its decision of the *Pedra Branca/ Pulau Batu Puteh* case (Malaysia /Singapore) on May 23, 2008, while the International Court of Justice first recognized the original title of Malaysia to Pedra Branca Island, which is located 24 nautical miles to the east of Singapore and 7.7 nautical miles to the south of Malaysia, it concluded that sovereignty over this island belongs to Singapore. In the ruling, the Court attached central importance to the letter by the Acting State Secretary of Johor (Malaysia) dated September 21, 1953, which said, “the Johor Government [did] not claim ownership of Pedra Branca.” The Court also referred to the conduct of Singapore in giving permission for Malaysian officials to visit Pedra Branca and stated that, “[it] does give significant support to Singapore’s claim to sovereignty over Pedra Branca/ Pulau Batu Puteh.”⁷

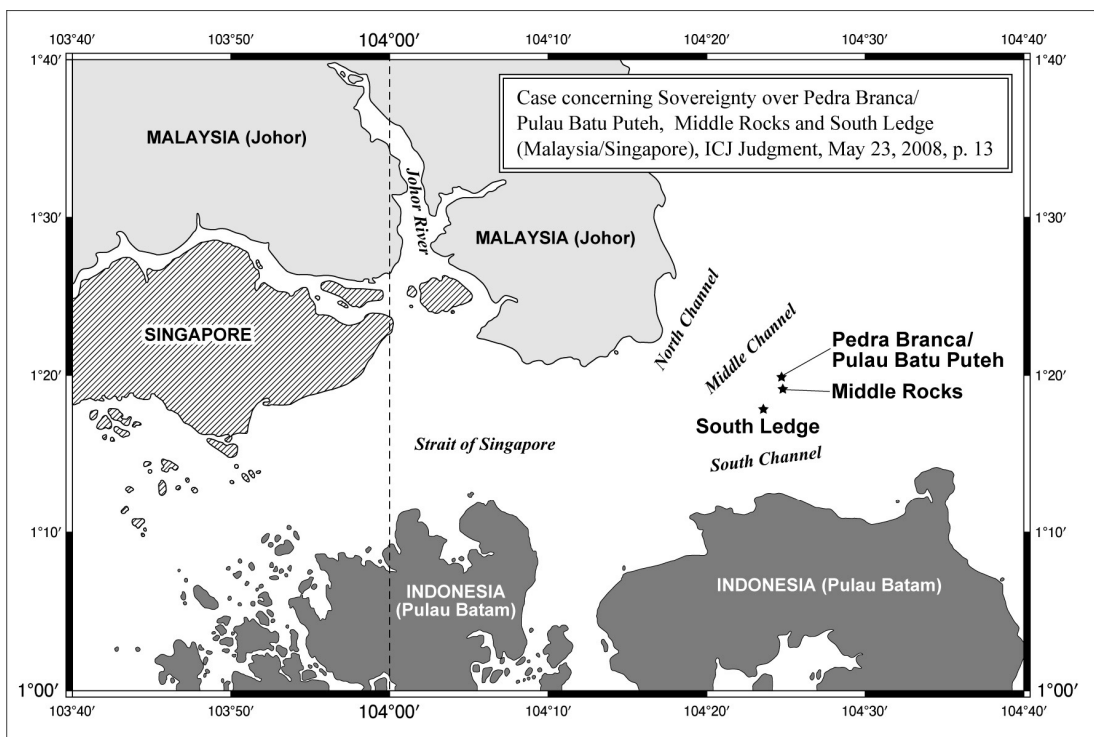


Fig.2 Pedra Branca map

⁶ *Op. cit.*, as per note 1, p.21.

⁷ Sovereignty over Pedra Branca/ Pulau Batu Puteh, Middle Rocks and South Ledge (Malaysia/Singapore), Judgment, 23 May 2008, paras. 239, 275.

The behavior of the citizens may also have legal implications. Their behavior is not necessarily ascribed to their state, but if they repeatedly submit themselves under the other party's jurisdiction, this will create a factual situation which is not legally advantageous to their state. Therefore, the state has an interest in controlling its own nationals' behavior.

What will Urge States to Bring Forward a Dispute Settlement Process?

As mentioned above, international law plays a crucial role in settling territorial disputes, but lawyers cannot solve them on their own. Legal arguments alone are not enough for the success of a dispute settlement. What will urge states to push forward a dispute settlement process?

a) Convergence of strategic interests toward the settlement of the dispute

It is essential that the two states not only acknowledge the existence of a territorial issue, but also find strategic interests in settling it. To be more precise, the two states, and especially the state which occupies the territory in question, should come to a conclusion that the disadvantages deriving from leaving the dispute unsettled clearly and enormously outweigh the advantages which both parties would enjoy by settling the dispute. The occupying state (state B) would move to change the status quo only when much larger national interests are being held hostage by the territorial issue.

What are those larger national interests? They may be:

- i)** the need to ally with the other state to counter a third state (e.g., China and Russia in relation to the US since the 1990s, and Russia's rapprochement toward Japan after Japan-Sino normalization in 1972);
- ii)** to improve its national security environment by reducing the military threat from the other state (e.g., the recent moves in border negotiations between China and India, which is reportedly making slow progress),
- iii)** to realize another big political agenda (e.g., becoming a UN Security Council member),
- iv)** to gain enormous economic benefit from the other state,
- v)** and to gain an international reputation as a law-abiding nation.

b) Leaders' ambition to solve the dispute

It is often the case that the public opinions of either or both countries concerned will not be happy about the result of delimitation, which the leaders will present to their peoples after long and difficult negotiations. Territorial issues present enormous challenges to the political leaders in any country. Negative reactions from the public may cost leaders their political lives. Unless the leaders take political risks in taking on the issue and have the ability and will to convince their peoples that the deal will lead to the long-term national interest of their countries, it is hardly likely that the final package will come to pass. Therefore, it is essential that the leaders of the two states have strong political desire to have the issue settled during their tenure. In connection with this, it is worth noting that hard-line leaders have often been able to convince the domestic audience to accept difficult political packages with other

countries, as was the case with former US President Richard Nixon, who opened dialogue with the People's Republic of China (although this dialogue was not related to territorial issues). On the flip side, soft-line leaders may be amenable to deals with the other country, but the settlement package may face difficulties on the domestic front. We should also be careful in analyzing the statements pronounced by the political leaders of each state. We may hear a leader of one state say, "Our bilateral relations are extremely important. I will do my utmost effort to solve the territorial issues." This is certainly a sign of goodwill and we should not discredit it immediately. However, at issue is what kind of settlement this leader designs in his or her mind and whether he or she will be able to implement it on the domestic front. Soft language may sound forthcoming, but whether that language can be substantiated is another matter.

Also, it should be noted that political desire alone is not enough to achieve the settlement of a dispute. This is a necessary but not sufficient requirement.

c) Local residents' strong desire to see the dispute settled

Unless the territory in question is a no man's land or there have not been many people earning their livelihoods there, the aspirations and interests of the local residents – including those who have been expatriated – will be boosters to their government. However, if the local residents are satisfied with the status quo, their government's demand will be taken lightly and the frontier will most likely not be moved. While the desire of the local residents alone cannot settle a territorial issue, it could hardly be settled without their strong backing. Maintaining good communications with residents and understanding their wishes correctly is a big challenge for the negotiators.

d) Which of these elements is most important?

Each territorial dispute has its own character, so oversimplification is not appropriate. In many cases, however, convergence of strategic interests is of primordial importance and without this – even with the strong guidance of political leaders or with the strong backing of local residents – it is most unlikely that the issue would go forward. We may also observe that without an appropriate strategic environment, political or diplomatic skills will not produce a positive result. It is crucial for the leaders to find the right time to move negotiations forward by gauging the strategic winds blowing between and around the two states. Even if you have good negotiation cards in your hand, they may be wasted should they be used at an inopportune time.

Some Important Rules to be Observed for Negotiation

We must bear in mind some rules when we engage in or observe a negotiation process.

a) Fostering mutual confidence between political leaders

While engaging in a deal, the leaders of the states involved play a dangerous political game which may backfire on the domestic front. Negotiations may not be concluded if the leaders are too vulnerable to their own domestic public opinions. The two leaders should share the

common goal of settling the dispute by their own hands, and work together to convince each domestic audience in spite of the severe criticism which may occur in each of the countries. Each government should not react to each and every tough statement which is pronounced in their respective domestic contexts. For this purpose, mutual confidence between the two leaders must be established.

b) Secret negotiations

Negotiations on the delimitation of borders should be conducted in a secret fashion. The number of participants should be limited to a bare minimum and strict control of information is indispensable. If the content of the discussion was revealed, the negotiation process would stall immediately. Secret discussion in a quiet environment is necessary, and open diplomacy does not have a role to play here. It is nevertheless becoming difficult to assure such an environment, not only because people have more exposure to information on diplomacy through global media outlets, but also because foreign policies are not immune to accountability, which is more and more often demanded by public opinion today.

c) Taking care in setting the negotiation stage

In the normal course of diplomatic negotiations, each state begins by presenting its first bid based on its legal position, and the two states then try to find a common ground between them. In the real world of diplomacy, it is rare that through negotiations one party manages to get 100% satisfaction and the other party loses completely. The end result tends to be somewhere in between. The rulings of international arbitrators or tribunals sometimes present their decisions so clearly that it becomes evident which state is a winner, and which state is a loser. However, many rulings are inclined toward an intermediary solution. Looking at the original positions of the two countries involved, it is likely that we can already see the range of solutions that can possibly be achieved by negotiations or a third-party decision. This means that the original negotiation position has a bearing on the course of negotiations, and negotiators should be careful about where to begin. This is one of the reasons why states are so cautious, and spend so much time to reach an agreement between the states concerned on the terms of reference which will be submitted to the International Court of Justice (a *compromis*).

d) Legal consistency

Negotiations on border delimitations tend to attract high-level political attention and the process is political by nature. However, the most important reference used therein is international law. Should one state take an action which is not consistent with its legal position, its negotiating position would be damaged. If you behaved in such a way as to contradict your own legal argument or if your behavior may be taken as acquiescing to the other party's legal argument, the other state would use these points as powerful evidence to discredit your legal position in the international judicial proceedings. The damage could not be easily recognized by ordinary citizens or those who are not familiar with international law, but as long as we wish to solve these issues legally, legal consistency should be maintained.

Conclusion

This has been an overview of how practitioners of foreign policy address the issues of border delimitations. As I discussed above, although issues related to disputed territories are political by nature and the political leadership is indispensable to achieving a breakthrough, international law is always an important frame of reference in the solving of disputes. It is true that international law cannot by itself bring a dispute to a settlement. However, in today's world where the use of force is basically excluded as an appropriate means to solve disputes between states, international law has come to play a bigger role in dispute settlements and the international community is showing more confidence in international law than ever before. International law exercises its primordial effect through the utilization of international arbitration or tribunals, which creates the merit of depoliticizing an issue by leaving it to technical experts. It is probably due to this advantageous attribute that a larger number of states refer their cases to the International Court of Justice today, which currently has fifteen cases pending before it (as of March 2010).

There are certain directives, however, that the states following this course of action must conform to in order for the international community to maintain its confidence in the process; for example, states must accept and abide by whatever judgment the court may render.

It is the role of the practitioners of foreign policy to use international law effectively and strategically in the solving of disputes, and at the same time to help political leaders and the public deepen their understanding of the usefulness and limitations of international law.