CENTRE FOR INTERNATIONAL LAW CIL

Official Launch of the Centre for International Law

30 October 2009

Colloquium on Singapore and International Law:
The Early Years

“Early forays in International Law”

Justice Chao Hick Tin

Judge of Appeal, Supreme Court

I was keenly interested in international affairs even while I was in high school. I recall that, at the time in the 1950s, the international events that made the daily news headlines made me wonder if there was such a thing as "international law" and whether "international law" was in fact law. It must be remembered that the 1950s were tumultuous times marked by the Korean War, the Suez Canal crisis and, closer to home, the struggle for independence by the nations of Cambodia, Laos and Vietnam from their French colonial rulers. The questions which I had about international law at the time continued to intrigue me even while I was at law school. This was a factor which prompted me to pick public international law as one of my optional electives in the final year of my LL.B. course. I wanted to better understand how international law came into being and its role in international relations. To further deepen my understanding of the subject, and as international institutions seemed to be playing a critical role in the development and interpretation of modern international law, during my LL.M. programme, I took a course on the law of international institutions under the tutelage of two public international law luminaries, Professor Bin Cheng, who introduced the idea of "instant customary international law", and the late Professor George Schwarzenberger (1908-1991), who was an ardent believer in an interdisciplinary approach to international studies. The LL.M. programme marked the end of my formal education on international law but the beginning of my practising it and seeing first-hand its impact on international relations.

Is International Law "law"?

Four decades after my first foray into international law, how would I answer the question: "Is international law 'law'?" My answer is a positive one, but with a qualification. Let me now go into it briefly.

1 The question of whether international law is law cannot be answered meaningfully without an inquiry as to the definition of "law". The answer to such an inquiry, however, has proved elusive: while there are different ways of defining law, there is no universally accepted definition. Thus, what we have as a response to the question, "is international law 'law'?", is not *an answer*, but *answers*. In the compendium of legal thought are both formative theories and dominant theories on law and, more specifically, on international law.

2 There are two main schools of thought – namely, the naturalist school and the positivist school – as far as the Western concept of international law is concerned, and they continue to influence present legal thought. The leading naturalist proponent, Dutchman Hugo Grotius (1583-1645), who is often regarded as the founder of modern international law, held the view that the basic principles of all law, *both national as well as international*, were derived not from any deliberate human choice or decision, but from principles of justice which had a universal and eternal validity and which could be discovered by pure reason. Law was to be found, not made.[1] Grotius's theory of law, which drew no distinction between national law and international law, undoubtedly recognised the latter as "law". In the sixteenth and seventeenth centuries, this theory was universally accepted and performed a useful function in encouraging respect for justice not only at the domestic level, but also internationally at a time when the collapse of the feudal system and the division of Europe between Catholics and Protestants might otherwise have led to complete anarchy.

3 A problem with the naturalist school of thought, however, was its denial of practical realities: States made law by entering into treaties which were driven by political considerations, and did not seek to derive norms from pure reason alone. This problem is illustrated by reference to the works of other naturalist writers. As an example, Pufendorf (1632-1694) attempted to identify international law completely with the law of nature. He refused to acknowledge treaties as being in any way relevant to a discussion of the basis of international law. Other naturalists echoed those sentiments in minimising or ignoring the actual practices of States in favour of a theoretical construction of absolute values.

4 By 1700, because the views of the naturalists were completely at odds with reality, a new theory began to emerge that law was largely positivist, that is, man-made; consequently, law and justice were not the same thing, and laws might vary from time to time and from place to place. Applied to international

[1] See *Akehurst's modern introduction to international law* (ed. P. Malanczuk), 7th rev. edn, New York: London: Routledge, 2002 at p 15.

law, positivism (as this new theory was called) regarded the *actual behaviour of States* as the basis of international law; in short, law was made, not found.

5 One of the great positivists, the English philosopher John Austin (1790-1859), defined law as the general command of a sovereign, supported by the threat of sanction. Since international law did not fit within that definition, Austin did not regard international law as law; instead, he relegated it to the category of "positive morality".[2] Austin's conclusion is, at first blush, unsurprising and even persuasive. Indeed, virtually anyone who studies international law does so after having first learnt something about the characteristics of domestic law and expects international law to have those same characteristics. On this basis, as there exists no Legislature, Judiciary and Executive (or an equally effective analogue of such institutions)[3] on the international plane, it is understandable if one were to conclude that international law is not law.

6 Austin's views are, however, not without their critics. These critics (e.g. Akehurst (1940-1989)) point out that Austin and his fellow ideologues have confused the question of whether international law is "law" with the problem of the effectiveness and enforcement of international law.[4] Austin's theory, which makes the domestic legal system (and its features) the *starting point of reference* in determining whether international law is "law", fails to appreciate the historical, structural and functional differences between the legal system *within* a State and the legal system *between* States.[5] Each domestic legal system is concerned primarily with the legal rights and duties of legal persons (individuals) within a body politic – namely, the State. Domestic law is thus derived from a legal superior which is recognised as competent by the society in which it operates, and which has both the authority and practical competence to make and enforce that law. The international legal system is different. There is no identifiable legal superior (although certain States seem to wield greater power than others). Instead, the international legal system is constituted by States which are in theory legal equals, amongst whom it is neither likely nor desirable for a relationship of legal superiority to exist. The international legal system is thus horizontal in nature and operates in a different manner from a domestic one, and is based on reciprocity and consensus rather than on command, obedience and enforcement. In short, a system of law designed primarily for the external relations between States does not work like the internal legal system of a State. Thus, Austin's assumption that the international legal system must follow historical models of centralised systems of national law must be regarded as wholly inappropriate. Just because international law does not share the same features as domestic law does not mean that the former is not "law". Instead, it is just different.

7 An interesting variation to the naturalist and the positivist theories was expounded by the Swiss lawyer, Vattel (1714-1767), who introduced the doctrine of the equality of States (regardless of their socio-economic conditions) into international law.[6] Vattel's theory is that all States are sovereign and equally so. On this theory, and as a corollary thereof, the sovereign, since he possesses supreme power, is not himself bound by the laws which he has made. Taken to its logical conclusion, international law is denied for no State, rightfully sovereign, ought to conform to *any* normative system. Under Vattel's approach, international law is not "law" because it cannot bind that which it seeks to bind, i.e., sovereign States are not subject to any laws. It is clear that Vattel's view, if accepted without qualification by the international community, would lead to international lawlessness.

8 It should come as no surprise that Vattel's concept of unbridled sovereignty has been severely criticised.[7] It has been invoked (directly or indirectly) to justify actions by rogue States. The justification of the pursuit of nuclear capability as an exercise of national sovereignty immediately comes to mind. It seems to me that the reliance on State sovereignty as a purported justification for anti-social behaviour

---

[2] See J. Austin, *The Province of Jurisprudence Determined* (ed. H.L.A. Hart), London, 1954 at pp 134-142.

[3] General Assembly Resolutions are non-binding, save for certain of the organs of the United Nations for certain purposes (see Art 17(1) of the United Nations Charter). The International Court of Justice does exist, but it can only decide cases when the parties agree and it cannot ensure that its decisions are complied with. Above all, there is no executive or governing entity. The Security Council of the United Nations, which was intended to have such a role, has at times been effectively constrained by the veto power of the five permanent members (See e.g. *Bowett's Law of International Institutions* (eds. P. Sands and P. Klein), 5th edn, London, 2001).

[4] *Supra* note 1 at p 5.

[5] *Supra* note 1 at p 6.

[6] See A. Nussbaum, *A Concise History of the Law of Nations*, rev. edn, New York, 1954 at pp 156-164.

[7] *Supra* note 1 at p 17.

stems from a failure to appreciate the fact that State sovereignty ought only to describe the freedom of State authorities to act *within* the State. While it may be that State authorities may act freely within the borders of the State concerned, where that State's actions may have significant consequences for other States, the invocation of State sovereignty is clearly an insufficient justification for those acts. Increasingly, the category of acts which are unjustifiable as an exercise of sovereignty consist of not only acts which affect other States (such as polluting an international waterway or the environment), but also acts against individuals within a State where such acts violate rights (fundamental human rights for instance) which all States are obligated to protect, i.e. *erga omnes* rights.[8] Therefore, while States rightly enjoy sovereignty, they are not above the law. This must lead one to the conclusion that the concept of State sovereignty is not anathema to international law as "law" in the normative sense.

9 On a related point, it must be noted that, thankfully, international relations are not characterised by lawlessness. There is empirical evidence that international law exists as a normative system. It is now widely acknowledged that international law is observed most of the time and violated only exceptionally.[9] States continuously conclude and implement bilateral and international treaties, as well as establish and operate international and regional organisations (such as the ASEAN Inter-governmental Commission on Human Rights, which was launched just last Friday on 23 October 2009). More and more compilations of State practice in international law have emerged. Serious efforts are being made to codify international law. Modern national Constitutions usually contain references to international law. All of this corresponds with the empirical fact that most States are careful, and want to be seen, to observe obligations of international law. It must be borne in mind that spectacular violations of international law tend to dominate international headlines because they make good sound bites, and are the exception rather than the norm. Such instances should not be confused with the ordinary course of business between States, in which international law is largely observed.

10 What explanation then do we have for the existence of this normative system? The view which is widely proffered is that norms exist in the international legal order and are binding on States because they consent to be bound. This view is based closely on the sovereignty of States, which in turn emphasises the freedom of States to act unilaterally save to the extent that they agree to be constrained. This view, however, does not explain why customary international law should be binding. If norm X is derived from customary international law, why should it bind State Y which has not consented to or accepted that custom? Even in respect of treaties, this view may come up short. As Fitzmaurice argued, why should we deem even the expression of consent to be binding?[10] The answer, he felt, was that the concept of the consent of States was anterior to the international legal system itself. Koskenniemi too had something to say about consent being the basis of the international legal system. In his view, if rules of international law exist because States consent to them, then these rules cannot be considered "law" in the normative sense.[11] If States simply *want* to obey rules of international law, then international law is not a system of law which they are *obliged* to obey. In other words, if the basis for international law is the consent of States, then international law is not law at all, but just an agreement by States that certain modes of behaviour will be *regarded* as normative. These are powerful arguments.

---

[8] This concept of *erga omnes* rights was recognised in the International Court of Justice's decision in the *Barcelona Traction* case (Belgium v Spain) (Second Phase) ICJ Rep 1970 p 3 at [33] and [34], where the court stated that:
"an essential distinction should be drawn between the obligations of a State towards the international community as a whole, and those arising vis-à-vis another State in the field of diplomatic protection. By their very nature, the former are the concern of all States. In view of the importance of the rights involved, all States can be held to have a legal interest in their protection; they are obligations erga omnes. Such obligations derive, for example, in contemporary international law, from the outlawing of acts of aggression, and of genocide, as also from the principles and rules concerning the basic rights of the human person, including protection from slavery and racial discrimination. Some of the corresponding rights of protection have entered into the body of general international law … others are conferred by international instruments of a universal or quasi-universal character."

[9] M. Shaw, *International Law*, 6th edn., Cambridge: Cambridge University Press, 2008 at p 6; *Akehurst* at p 6; M. Dixon, *Textbook on International Law*, Oxford; New York: Oxford University Press, 2007 at p 10.

[10] G.G. Fitzmaurice, 'The Foundations of the Authority of International Law and the Problem of Enforcement' (1956) 19 Modern Law Review 1.

[11] See V. Lowe's review of Koskenniemi in Cambridge Law Journal 3 (1989) at pp 527-529.

11 This conundrum of whether “law” can exist in the international legal order is precipitated by the fact that the international legal order is horizontal in nature. There being no supra-national authority to impose rules, jurists rely on the concept of the consent of States to explain the binding nature of international law. They end up tying themselves in knots because, having accepted that States may voluntarily consent or refuse to consent to international legal norms, the norms that are derived from such consent appear to be the result of an exercise of power by the State, as opposed to a true expression of acceptance of a normative system.

12 I now turn to see how the former President of the International Court of Justice (“ICJ”), Rosalyn Higgins, looks at this jurisprudential issue. She explains that jurists such as Koskenniemi find difficulty in accepting international law as “law” in the normative sense when they view law as the vindication of authority over power. These jurists face difficulties in regarding international law as “law” the moment they identify norms as the result of the exercise of a State’s power to consent to be bound by rules. These jurists are of the view that, where rules are made binding as a result of an exercise of a State’s power, those rules cannot be regarded as law because law, properly understood, entails authority trumping power. In the domestic law context, we expect law to represent the trumping of power by authority; we expect law to take the nature of authority which *restrains* power. But, in a horizontal legal system without a supra-national authority, it seems that law cannot exist because there is no authority to restrain power. All that we are left with is the exercise of power by States in terms of accepting (through consent) legal norms, and such legal norms, Koskenniemi would say, are not truly “law” in the normative sense.

13 Higgins, however, regards the view that law is the trumping of authority over power as being based on a faulty perspective.[12] In her view, “it is *not* the case … that international law is concerned with authority *alone*, and that ‘power’ stands somehow counterpoised to authority, and [has] nothing to do with law, and is indeed inimical to it.”[13] The authority which animates the law does not exist in a vacuum – it has a source. While, in the national context, we may look towards governments as the source of authority, we are not able to identify such a legal superior on the international plane. Where then does the authority come from? According to Higgins, it comes from States themselves. Higgins characterises law not as authority battling against power, but as *authority interlocking with power*. In a horizontal legal system, the authority of law exists exactly where it intersects with power – the very subject of the law (i.e. States) confers authority on that law (through consent). This is a monumental step in legal thought. It has profound implications on theories about international law. On Higgins’ view, the fact that there exists no supra-national authority on the international plane no longer matters in terms of whether international legal rules can properly be called “law”. International law exists as a normative system whereby the authority of law *intersects* with the power of the subject of such law (i.e. sovereign States). Seen in this light, international law is “law” in the normative sense.

14 In short, even though there is no supra-national authority to enforce international law, the authority of such law stems from States themselves. States, in the exercise of their power, choose to consent to international legal rules and, in doing so, bind themselves to a body of law. Such rules are properly called “law” even though they are the result of an exercise of power. In a horizontal legal system, the authority of law intersects with the power of its subjects. While this may not apply in a domestic legal system this does not mean that international law is not “law”; it just means that international law is different from domestic law.

Early years

In many ways, my engagement with the fascinating subject of international law followed closely the development of Singapore in the international arena. When I first joined the Attorney-General’s Chambers (“AGC”), it was just one and three quarter years after Singapore became an independent State and had to be responsible for its own international affairs. At AGC, I was assigned to the Civil Division (the other two Divisions then were Crime and Legislation). International law matters came within the purview of the Civil Division, and I recall that, within a few days of my being appointed as State Counsel, I was assigned a piece of work on international law. It related to the question of State succession. At that time, the UN’s

[12] R. Higgins, *Problems and Process : International Law and How We Use It*, Oxford: Clarendon Press; New York: Oxford University Press, 1994 at p 15.

[13] *Id*. at p 4.

International Law Commission was undertaking a study of the subject with a view to formulating draft articles which would form the basis of a draft convention that would eventually be placed for consideration and adoption by a plenipotentiary conference to be convened specifically for that purpose. The comments which I gave were duly transmitted to the International Law Commission Secretariat.

From that point onwards, I became the main person at AGC to whom most international law issues were referred. I would underscore the word "most" because, at that time, there was no formal demarcation. But by the fact that I was assigned the bulk of the international law work it was clear that the AG then had intended to start with me in specializing in International Law. I should think that this must be due to the fact that I had studied public international law and the law of international institutions at law school. I remember an event in the early 1970s. The then Permanent Secretary of the Ministry of Foreign Affairs was Mr Chan Keng Howe. On one occasion, after I attended a meeting with him and others on some matters, he asked me to stay back. He mentioned to me the need for specialisation as he noticed that different officers from AGC had been assigned to advise on different issues raised by his Ministry. He even mentioned that, perhaps, Legal Officers could be seconded to his Ministry to deal with the international law work which arose there. While I saw the sense of his suggestion and duly conveyed the same to the AG. I was not unhappy with the then arrangement which gave me an opportunity to also keep in touch with domestic law and allowed me to appear in court from time to time. Formal change did come later when the International Affairs Division was established within AGC.

In 1970, after I had spent three years at AGC, there was a proposal to transfer me to the Civil District Court as a district judge as part of my career development. If that had materialised, it would have changed the nature of the work which I would thereafter have done and it could well have changed my career path. For reasons which are now apparent to me, the proposed transfer was aborted and another legal officer was sent to the Civil District Court in my place. I thus stayed the course with international law work.

In dealing with international law issues, the challenges which confronted me as a young legal officer were threefold. First, there were almost invariably no precedents which I could rely on or use to help me address the problems at hand. Second, there were not many among my peers who were knowledgeable about international law and with whom I could engage in discussions to get a better feel of the issues I was confronted with. Of course, the staff strength of AGC then was small. The whole of the Civil Division consisted of only seven to eight Legal Officers. There was my immediate superior, the Senior State Counsel in charge of the Civil Division, whom I could consult. Together, we would set out the tentative policy, which would always be subject to the approval of the Solicitor-General and the Attorney-General. Third, unlike the position now where legal research can be carried out very easily through Internet search engines, legal research then had to be carried out manually. Moreover, AGC was then still building up its collection of international law materials. Clearly, the materials in AGC itself were incomplete. The law library at the then University of Singapore ("the Law School Library") had a much better collection, and that was another source which I could look to for assistance. It must also be borne in mind that, in the 1960s and early 1970s, documents had to be physically delivered. There were no facsimile machines then. In order to have access to materials at the Law School Library, one had to either request that the desired materials be loaned to AGC (and, for this purpose, if the request was granted, we had to ask a despatch rider to go to the Law School Library to pick the materials up) or personally go to the library to peruse the materials.

Quite apart from these challenges, my early experiences in international law as a young Legal Officer were experiences of a nature which I would never have been able to obtain had I not joined the Legal Service or had my career path in the Legal Service been different. I now turn to give a brief account of some of those experiences.

The Law of Treaties

It was during the very early stages of my career at AGC that I was given a unique opportunity to see the development and codification of a very important area of international law, and even played a small part in shaping that aspect of international law. At the time, I had completed barely nine months of service.

The UN had called for a plenipotentiary conference ("the Law of Treaties Conference") to consider a set of draft articles drawn up by the International Law Commission concerning the law of treaties and to conclude a convention on the subject. I was nominated by the then Attorney-General, Tan Boon Teik, to attend the conference as the sole representative of Singapore. My nomination to attend the Law of Treaties Conference, which was approved by Government, was an event which caused me considerable excitement and concern. Excitement, because this was a rare privilege to participate in the progressive development of the law of treaties, which would lead to the adoption of a convention setting out the rules governing, *inter alia*, the formation, interpretation and termination of treaties. The importance of the law of treaties cannot be overemphasised. The domestic equivalent of this aspect of international law is the law of contract. Analogous to the law of contract, which forms the basis of legal relations between individuals, the law of treaties is the critical foundation upon which relations between States are based. In many respects, the law of treaties in international law is much more significant than the law of contract in domestic law. This is because treaties can be the source of new international law.

On the other hand, I was concerned at the prospect of participating in such an august gathering of experts. This arose out of a feeling of inadequacy. I knew that some of the biggest names in international law would be at the Conference. The draft articles drawn up by the International Law Commission were substantially the handiwork of none other than Sir Humphrey Waldock, the then Chichele Professor of International Law at the University of Oxford. As a student of international law just a couple of years earlier, I had heard of him and had read his numerous works. He was the editor of the then classic authority on international law, *Brierly on the Law of Nations*, which was really a gem to all newcomers to international law. The book was written in such an easy style that it made reading about and studying international law a pleasure. I have since been recommending this work as a "must read" to all newcomers to international law and even to someone who just wants to know something about the subject.

Leading the British team to the Law of Treaties Conference was the legal adviser to the British Foreign Office, Sir Francis Vallat, assisted by Ian Sinclair, who himself also later became the legal adviser to the British Foreign Office. In the US delegation as a special adviser was another world-renowned authority on international law, Professor Myles McDougald from Yale University. Elected as the President of the Conference was Professor Roberto Ago of Italy, who was later in 1979 elected a judge of the ICJ. Another distinguished personality was Taslim Elias of Nigeria, who was elected by the Conference as the Chairman of the Committee of the Whole. He steered the Committee through a thorough examination of the draft articles, going through them one at a time. Like Roberto Ago, Elias was later elected a judge of the ICJ and also served as its President. Lastly, there was one other personality at the Conference whom I should mention. He was Mr Hisashi Owada of the Japanese delegation, who was then a career diplomat with the Japanese foreign office. Mr Owada was in 2003 elected a judge of the ICJ, and he is now its President, having recently been elected to that office.

At that time, I had no idea as to how the Law of Treaties Conference would go about its endeavours. I wondered how approximately a hundred delegations would discuss the draft articles. I was greatly impressed with the very efficient manner in which the Delegations to the Conference went about their task of examining each draft article one at a time, with opportunity given for amendments thereto to be made. Voting on the amendments to each draft article was done systematically. At this juncture, I should explain that, in 1966, which was when the UN General Assembly decided to convene the Law of Treaties Conference, it was decided that the Conference would be held over two sessions – the first in 1968 and the second in 1969. For the first session in 1968, the work would be carried out by the Committee of the Whole. For the Second Session, the Conference in plenary would review the work of the Committee of the Whole. I did not attend the second session, which was attended by the then Solicitor-General Francis Seow.

Apart from the interesting discussions on the various issues set out in the draft articles, some of which were substantive while others were of a formalistic nature, one of the most significant, in so far as Singapore was concerned, was the consideration of Draft Article 60 on the effect of the severance of diplomatic relations between parties to an international treaty. Draft Article 60 provided:

> "The severance of diplomatic relations between parties to a treaty does not in itself affect the legal relations established between them by the treaty."

The International Law Commission, in its commentary on the draft article, observed:

> "There is wide support for the general proposition that the severance of diplomatic relations does not in itself lead to the termination of treaty relationships between the States concerned."

After referring to Article 2(3) of the Vienna Convention on Consular Relations 1963 and Article 45 of the Vienna Convention on Diplomatic Relations 1961, the International Law Commission concluded:

> "It therefore seems correct to state that in principle the mere breaking off of diplomatic relations does not of itself affect the continuance in force of the treaty, or the continuance of the obligation of the parties to apply it in accordance with the rule *pacta sunt servanda*."

In an earlier version of Draft Article 60, there was a second paragraph which expressly provided that severance of diplomatic relations might be invoked as a ground for suspending the operation of a treaty "if it result[ed] in the disappearance of the means necessary for the application of the treaty." But, the International Law Commission finally concluded that any question of the termination or suspension of the operation of treaties in consequence of the severance of diplomatic relations between the parties thereto should be left to be governed by the general provisions in the other draft articles concerning termination, denunciation, withdrawal from and suspension of the operation of treaties.

The discussions on and the amendments proposed to Draft Article 60 when it was considered by the Committee of the Whole did not question the principle set out in the draft article, but touched on the need to make the scope of that draft article clearer. As far as Singapore was concerned, I could see no problem with Draft Article 60. What was particularly important to and appreciated by Singapore was the statement by the Malaysian representative, who said (not that the Malaysian delegation had any objection to the draft article):

> "… the principle that treaty obligations between parties to a treaty should continue despite the severance of diplomatic relations between them was rooted in practice. Some treaties might be so fundamental to the very existence of States that they simply could not be dispensed with, whatever political differences might arise. For example, the new island State of Singapore was dependent on Malaysia for its water supply; the treaty under which Malaysia had to supply a certain quantity of water daily to Singapore could not be terminated or suspended between the two States for any political reason. Another kind of treaty whose continuance might be fundamental to the existence of a State was one concluded between a land-locked country and a neighbouring maritime State: a treaty providing the former State with an outlet to the sea essential to its economic survival must continue to exist despite the severance of diplomatic relations."

In response to the Malaysian representative's affirmation that the agreements on the supply of water by Malaysia to Singapore ought never to be terminated or suspended for any political reason, I quickly "noted with satisfaction" Malaysia's position and hastened to add that the severance of diplomatic relations between Malaysia and Singapore "would never occur".

What I appreciated most about this statement was that the Malaysian representative spoke like a true lawyer, without being affected or constrained in any way by political considerations which then troubled our respective countries. At the time, Singapore had left Malaysia barely two and a half years earlier, and there were outstanding issues between us. Nor was the Malaysian representative's reference to the above water supply agreements in any sense inappropriate. On the contrary, it was entirely apt in the context of Draft Article 60. The point I would underscore is that a person less committed to principles of international law might, however, well have decided to hold his tongue.

The Law of the Sea

My involvement with the law of the sea also started early in my career. The question that arose for consideration was the status of Singapore's lighthouse on Pulau Pisang. Malaysia objected to a Port of Singapore Authority flag which was flying over the lighthouse and also wished to introduce some immigration control over the movement of the crew manning the lighthouse. After some search, the deed of the Johore authorities granting a lease to Singapore of the land on which the lighthouse stood, together with the access road thereto, was found. From this document, the status of the land on which the lighthouse stood was clear. There was nothing to dispute about. We accepted Malaysia's point that sovereignty over Pulau Pisang rested with Malaysia. The question of sovereignty over another island, Pedra Branca, however, did not meet with such swift resolution – a point to which I shall return shortly.

In the early 1970s, I was also involved in the work of the Committee on the Peaceful Uses of the Seabed and the Ocean Floor Beyond the Limits of National Jurisdiction ("the Seabed Committee"). The Seabed Committee was charged with the task of preparing for the Conference on the Law of the Sea ("the LOS Conference"), which was to be convened pursuant to a resolution passed at the 25th UN General Assembly. It will be recalled that, in 1970, the UN General Assembly had passed a resolution declaring that the seabed and the ocean floor beyond the limits of national jurisdiction was the common heritage of mankind. From the very start of the preparatory work for the LOS Conference, it was clear that many coastal states, particularly the territorialists from Latin America, advocated a very broad width of territorial sea or similar zone for each country. At best, they only paid lip service to the noble ideal of the seabed and the ocean floor beyond national jurisdiction being a common heritage of mankind. It was then believed that hydrocarbon and other valuable mineral resources were to be found beneath the continental shelf. Obviously, the broader each country's coastal zone, the less would be left for the common heritage of mankind.

The extension of territorial seas would have been of grave consequence to Singapore, which was (and still is) surrounded by waters that could potentially become the territorial sea of its neighbours, thus affecting Singapore's right of access to the high seas. A broad coastal zone would benefit particularly those States with long coastlines fronting the open sea. The landlocked States would get nothing. In a similar position were the so-called "geographically disadvantaged" States, such as Iraq and Zaire (both of which have very short coastlines and are also hemmed-in by other States), and States in close proximity to their neighbouring States, such as Bulgaria and Singapore. Given this position, it would not be difficult to understand why the landlocked States and the geographically disadvantaged States ("the LL/GDS group") banded together to advance their common cause, which was to safeguard the area that would form the common heritage of mankind. The greater the area that would fall outside national jurisdiction, the more there would be for the common heritage of mankind, and, through the sharing of this common property, the inequities arising from the uneven advantage which each State could obtain from the sea could hopefully, to an extent, be ameliorated.

In order to ensure that States were in possession of all the relevant data before they decided on what should be the breadth of the coastal zone, members of the LL/GDS group – including Singapore – presented a formal proposal asking the UN Secretary-General to undertake a study on the resource implications of the various limits proposed for the coastal zone of each State. This proposal met with vehement objections from the territorialists as well as States with long coastlines. Because the Seabed Committee operated on the basis of consensus, the LL/GDS group's proposal could not be carried any further. As we strongly believed in the importance of the proposed study, Singapore and other States in the LL/GDS group brought the proposal before the UN General Assembly in 1972, where we managed to persuade a large number of States (30 in all) to co-sponsor a draft resolution on the proposal as well as convince a good number of the moderate coastal States of the usefulness of such a study. The draft resolution was eventually passed by the General Assembly by a convincing vote of 69 in favour and 15 against, with 41 abstentions. It showed that enough States were in favour of uncovering sufficient material so that an informed decision could be made apropos the coastal zone and not decide based simply on ignorance. The significance of this episode is that it was the first time (and it remains the only time) that Singapore played a pivotal role in seeing through the successful passing of a resolution by the

UN General Assembly. It was not only a great learning experience for our delegates to the UN, but also an event of great moment for those of us stationed on home ground and working closely with our delegates who were in New York.

Pedra Branca

I turn now to talk about the island of Pedra Branca. Singapore and Malaysia recently went before the ICJ to present their respective submissions on which State Pedra Branca belongs to, and the court has given its verdict. Looking back, I must admit that the claim by Malaysia to Pedra Branca in 1979 came like a bolt from the blue. It was not something those of us officials who were then working on maritime matters had anticipated. At the time, we already had in hand the original copy of the letter written in 1953 by the then Acting State Secretary of Johore disclaiming ownership to Pedra Branca. In addition, before 1979, the Malaysian authorities had issued official maps indicating that Pedra Branca belonged to Singapore. Moreover, Singapore had been occupying the island since 1850 without recognising any other State as having sovereignty over that island. The status of Pedra Branca was clearly unlike that of Pulau Pisang. All that we realised, in view of the likely adoption by the then on-going LOS Conference of a new coastal zone to be called the "Exclusive Economic Zone", was that this development would naturally give rise to issues of demarcation with our neighbours, including that of demarcating the marine waters off Pedra Branca. An adverse claim to Pedra Branca by Malaysia was not something which, to our minds, was likely to occur; thus, the surprise to us when such a claim was made. There is a lesson to this – the least expected can sometimes happen. Nonetheless, it is fortunate that both Singapore and Malaysia had faith in the approach of resolving bilateral disputes through international law and were able to resolve their differences concerning the sovereignty of Pedra Branca via that approach. This, I think, is the best and most peaceful way forward in the settlement of cross-border problems when diplomacy has been exhausted.

Succession to Treaties

Another international law issue which Singapore had to address in its early years as a newly independent State was that relating to its position on international treaties which had applied to it while it was a British colony by virtue of acts taken by the United Kingdom as the then colonial power. Was Singapore still bound by those treaties, or were we entitled to start from a clean slate and take the position that none of those treaties were binding on us unless and until we signified our desire to be bound by a particular treaty? Having examined the prevailing practice of States at the time, it was clear that a newly independent State was entitled to consider afresh each treaty which had applied to it prior to its independence and decide for itself whether it wished to be bound by the treaty concerned.

In 1968, such an issue surfaced in relation to the Convention between the Republic of Austria and the United Kingdom regarding Legal Proceedings in Civil and Commercial Matters ("the 1931 Convention"), which had been signed in London on 31 March 1931. The application of this Convention was extended to Singapore while we were a British colony. On the basis of the principles described above, and having determined that it would be in Singapore's interest to continue to be bound by that convention (albeit subject to certain amendments), we initiated an exchange of diplomatic notes with Austria to constitute an agreement between our two countries to that effect. This exchange of diplomatic notes was duly registered with the UN on 2 April 1970.

In 1969, a similar question arose in relation to the United States/United Kingdom Extradition Treaty of 22 December 1931 ("the US/UK Extradition Treaty"). In line with the earlier precedent involving the 1931 Convention, and as both Singapore and the United States wanted to continue with the arrangements set out in the US/UK Extradition Treaty, an exchange of diplomatic notes was effected between the two countries on 23 April 1969 and 10 June 1969 confirming their agreement that the treaty would continue to be in force between them, subject to such formal amendments as were necessary. This exchange of diplomatic notes was also registered with the UN.

There is nothing unorthodox about constituting an agreement through an exchange of diplomatic notes. Generally, treaties may be made or concluded by the parties thereto in virtually any manner they wish.[14] There is no prescribed form or procedure, and how a treaty is formulated and by whom it is actually signed will depend upon the intention and the agreement of the States concerned.[15] An exchange of diplomatic notes is thus one of the ways by which a treaty may be constituted. This mode is expressly provided for in Article 13 of the 1969 Vienna Convention on the Law of Treaties,[16] which states that the consent of States to be bound by a treaty constituted by instruments exchanged between them may be expressed by that exchange when the instruments declare that such exchange shall have that effect or when it is otherwise established that the States concerned had agreed that the exchange of instruments should have that effect. Although the exchange of diplomatic notes began life as an informal means of concluding a treaty, it is now used at all levels and for any subject,[17] regardless of its importance.

The 1978 Vienna Convention on Succession of States in Respect of Treaties[18] (VCSS), which came into force in 1996 and which applies to State successions taking place after that date,[19] established a special category relating to decolonised territories. These were termed “newly independent states”, and were defined in Article 2(1)(f) as successor States, “the territory of which immediately before the date of the succession of [S]tates was a dependent territory for the international relations of which the predecessor [S]tate was responsible.” Article 16 lays down the general rule that such States are *not* bound to maintain in force or become a party to any treaty by reason only of the fact that the treaty in question was in force apropos the territory concerned at the date immediately before its succession as a State. While the VCSS expressly states that its provisions only apply to State successions occurring after it came into force in 1996, this does not mean that it cannot apply to State successions occurring before that date. In my view, the provisions in the VCSS on this aspect of international law essentially codify the then existing customary law. The exchange of diplomatic notes between Singapore and Austria in 1969 on the 1931 Convention and that between Singapore and the United States on the US/UK Extradition Treaty could have been examples of State practice which were taken into consideration by the International Law Commission in drafting Article 16 of the VCSS.

With regard to multilateral conventions which applied to Singapore while we were a British colony, we took the approach of acceding to each convention afresh if we deemed it appropriate and in our national interest to be a party to that convention. This has become the accepted practice among newly independent States.

Air Services

In order to enable the national air carrier of a country to fly to and from a foreign country, the first-mentioned country will be required to enter into an air services agreement with the foreign country concerned. Such rights were previously and are still accorded on a reciprocal basis. By the time I joined AGC, Singapore had already entered into a couple of air services agreements with other countries. So this was an instance where there were precedents in hand which I could usefully rely upon.

Until 1973, our national carrier was Malaysia-Singapore Airlines (“MSA”), a carrier jointly owned by Malaysia and Singapore. At the time, MSA did not fly to many cities. It was far from being the global airline which Singapore Airlines is today. Generally, negotiations then for air traffic rights were an exercise in ensuring that, as between the two countries concerned, each country had more or less even opportunities to fly to and beyond the other country to third countries. Each country would basically try to protect the interests of its own national carrier and there would often be a trade-off of air traffic rights. The convenience and needs of international travellers were not the paramount consideration at that time.

---

[14] M Shaw, *International Law*, 6th edn., Cambridge: Cambridge University Press 2008 at p 907.
[15] *Ibid*.
[16] 1155 UNTS 331
[17] A. Aust, *Modern Treaty Law and Practice*, New York: Cambridge Press, 2000 at p 80.
[18] 1946 U.N.T.S. 3
[19] See Art 7 of the VCSS.

I recall a negotiation with an advanced country ("Country A") in the late 1960s where the other side wanted more air traffic rights than we were willing to grant. I remember the legal adviser on Country A's team telling me that it would be in Singapore's interests to open up its skies so that more tourists would visit Singapore and thus help in Singapore's economic growth. MSA was then not in a position to fly to and beyond Country A. The legal adviser in Country A's team also raised the needs and convenience of international travellers, and mentioned that we should be forward-looking and encourage the free flow of travellers. All this sounded very sensible and logical, and I was impressed. However, that round of negotiations ended inconclusively. A second round of negotiations was held a year or two later. By then, MSA had advanced its plans and wanted more air traffic rights, of course on a reciprocal basis. However, at the second round of negotiations, I no longer heard of the wonderful ideal of having open skies or meeting the needs of international travellers. Instead, we were reminded that Singapore was a small market. The views expressed by Country A at that second round of negotiations were also reflective of protectionism on its part. This is perhaps the inevitable reality in international negotiations, where positions sometimes shift according to the dictates of national interests.

The UN General Assembly

Before I conclude my account of my early experiences in international law, I must not omit my experiences at the 25th UN General Assembly from September to December 1970, which I attended as a member of the Singapore delegation. It was a unique experience for me to witness international diplomacy at its zenith. I saw how delegates sought to influence one another in the most subtle of ways. Also, although all States are regarded as legal equals, the attention which each country commanded amongst the delegates at the General Assembly was far from equal. I recall the late President Nixon of the United States addressing the General Assembly. Just before it was his turn to speak, the Assembly Hall was packed to the brim, with hardly any vacant seats. But, the moment he finished speaking and left the Hall, almost half of the audience left with him. Perhaps, this is another aspect of political reality: the international community is not immune to the phenomenon of celebrity, and the big and powerful States certainly attract a lot more attention. My experiences at the 25th General Assembly made me understand why many delegations sought to have a speaking slot immediately before the speaker from a major power as that would ensure a maximum audience for the speaker from the smaller, less important country.

My attendance at this 25th UN General Assembly also gave me an invaluable insight into the workings of the various committees of the General Assembly, in particular, the Sixth Committee, which is the Legal Committee. The Sixth Committee examines all international law issues which are brought before the UN. It also examines the work of the International Law Commission and gives the necessary directions to the Commission. One gets to see first-hand how new international law rules are developed. In my view, attendance at a UN General Assembly provides one of the best training opportunities for any fledging international lawyer.

Conclusion

In conclusion, I return to the point which I made earlier – i.e. international law is law, and it lies at the intersection of authority and power. While an international normative system exists, it necessarily interacts with and draws its authority from power. International law therefore cannot be understood properly without both a study of the normative system upon which it rests and an experience in the realities of the politics underlying that system – an experience which I am thankful to have had. On that note, it is my belief that the establishment of the Centre for International Law will undoubtedly serve to promote the continued study of international law and to advance Singapore's involvement in and contribution to the international legal system.

. . . . .