



CENTRE FOR INTERNATIONAL LAW *CIL*

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*Colloquium on Singapore and International Law:
The Early Years*

“My Experience with International Law”

S Tiwari

Visiting Senior Research Fellow,
Institute of Southeast Asian Studies

National Service Days - International Law Lessons from the Israelis

My experience with International Law started during my national service days. I commenced national service immediately on completing my law studies in the beginning of 1968. I was among the first batch of graduates required to do national service.

2 I spent the next 18 months at the Singapore Armed Forces Training Institute (SAFTI) at Pasir Laba Camp doing my Basic, Section Leader and Officer Cadet training. This was a period in our history when we faced many uncertainties and there was even the question of whether we could survive.

3 It was whilst doing my Officer Cadet training that we had a visit from the Commandant of SAFTI. As our whole company listened in silence, he said, in a serious tone, that there were communal disturbances in certain parts of the island and Singapore did not have enough Police officers and troops to cover these areas. The next group of unformed personnel Singapore had to rely on were officer cadets. We would thus have to perform patrolling duties in aid of the Police in the Chua Chu Kang area. We donned our combat ready field training gear and headed to Chua Chu Kang to patrol the many tracks leading to its villages.

4 We tried to look as fierce as possible during the patrolling. I do not know, however if the villagers really found us fierce.

5 I felt that Singapore was very much alone at this time. The incident taught me two very important lessons about international relations and our place in the world. One, when it came to the crunch, Singapore was on its own. We had to have a strong security set-up internally and a credible military force, as in the international arena we had had to rely on ourselves at the end of the day. Two, as a very small country we had to master the international law rules and cultivate and build up a large group of countries internationally as friends. I felt that both these would help our fledging nation to survive.

6 My learning of the international law rules started during national service itself. On completion of my 18 months training in SAFTI, I was posted to the newly set-up Legal Unit at the Ministry of Defence. My immediate job was to assist in drafting our own legislation to enable us to set up a national service armed force, the disciplinary set up for the force and the Law of War manual. As our model for the military force was the Israeli Defence Force, I worked on the legislation and the manual in consultation with Capt Shabath Levy of the Israeli Defence Force Legal Department who had been seconded to help us. I remember having long discussions and arguments with Captain Levy regarding the Law of War manual and thus learned the robust way in which the Israelis applied these international law rules of war.

Two Giants Clash at the Law of the Sea Negotiations

7 I consider myself very fortunate to have been a member of the Singapore team to the Law of the Sea (LOS) negotiations. I doubt if there will be another Conference of the same breadth, intensity and length for a long time to come. It was literally international law in action and being developed right before your eyes!

8 I learnt a great deal from the distinguished members of our team (Professor S Jayakumar, Professor Tommy Koh and Justice – then Mr - Chao Hick Tin) and the numerous legal luminaries from so many countries in the world. I saw the international law authorities I had come across in the text books walking right before our eyes.

9 I learnt - and utilized at the Conference and later on in the course of my work for the Government - how nations negotiate, how they try to attain the interests of their countries and how they organize and persuade. Unlike the larger countries which had delegations running in the hundreds – for example the US delegation had 160 members who were specialist in each of the areas being negotiated at the Conference - covering the variety of issues, there were only four of us. We had to constantly run from one negotiating group to another, be familiar with the issues being taken up and try to make intelligent interventions. We hope we did our duty by Singapore in having succeeded in ensuring that issues which

were critical to our national interest were resolved to our satisfaction.

10 There was one incident during the Law of the Sea work which has stuck in my memory. Singapore was one of the Vice-Presidents of the Conference when Mr. Shirley Amerasinghe was the President of the Conference. This meant that if the President was not available we had to chair the Conference, if it was our turn. On one occasion, the unbelievable happened. Neither Professor Koh, Professor Jayakumar nor Justice (then Mr) Chao Hick Tin were in the Conference room when we were required to chair. I thus had no choice but to chair the Conference – though I had never done it before and was a little worried as to what might happen. I managed until two heavy-weights at the Conference – Ambassador Alexander Yankov of Bulgaria (Chairman of the Third Committee) and Ambassador Arias Schreiber of Peru (a short gentleman but a legendary fighter) clashed and Arias Schreiber kept interrupting and asking me to stop Yankov from speaking further as he had taken the floor for too long. I asked the Secretary of the Conference for advice. He said he did not know what to say. He was obviously frightened and did not want to anger either of the giants. I was on my own and had to exercise my judgment as Acting President I thus interrupted Yankov and told him that I was giving him five more minutes after which he would have to stop. Yankov was taken aback at my stopping him and by my ruling but he complied.

The Uruguay Round Negotiations

11 In 1986, the world launched the Uruguay Round of Multilateral Trade Negotiations in Sep 1986 in Punta Del Este, Uruguay. The Uruguay Round negotiations have so far been one of the most significant Multilateral Trade Negotiations and lasted for seven years. They ended on 15 Apr 1994 in Marrakesh, Morocco with the replacement of the General Agreement on Tariffs and Trade (GATT) by the World Trade Organisation (WTO).

12 Being the Legal Adviser to our team to the Uruguay Round negotiations, I remember spending numerous hours poring over and discussing the numerous legal texts in Geneva with See Chak Mun (then our Permanent representative in Geneva), Margaret Liang and Yong Siew Min before the actual negotiations and advising where required. The three of them worked very hard during the Uruguay Round.

13 I was, in addition, Singapore's negotiator for intellectual property during the Uruguay Round. Intellectual property had become a very important issue by the 1980s in view of the rising competition faced by the developed countries- especially the United States. The United States thus adopted an aggressive position in favor of improved intellectual property protection throughout the world. The need to have higher intellectual property standards and enforcement internationally was also the reason for the tremendous pressure by the developed countries to include intellectual property in the Uruguay Round negotiations.

14 The outcome of the intellectual property negotiations was the Agreement on Trade-Related Aspects of Intellectual Property ("TRIPS Agreement"). Through the TRIPS Agreement, all WTO members became obliged to provide minimum standards of intellectual property protection and domestic procedures and remedies so that right holders could effectively enforce their rights.

15 The TRIPS negotiations were conducted in a small working group of ten countries. I was one of those included in the small working group. As the TRIPS Agreement would require almost all developing countries – including ourselves- to revamp their intellectual property regimes completely, we fought hard to preserve leeway under the fair use provisions, the conditions for issue of compulsory license and to be allowed a regime for parallel imports, whilst realizing that cross-deals were being made elsewhere. The parallel import provision is very important to us as a trading nation. If an intellectual property right holder sells his product - either himself or under license - at a lower price in country A our traders should have the freedom to purchase – if they so choose- the product so sold and sell it in Singapore.

16 The drafting of Article 6 of the TRIPS Agreement reflects the tough fight over parallel imports. It indicates that the issue of intellectual property rights exhaustion was considered but that no agreement could be reached over the matter. However, the language makes it clear that each WTO member is free to define its own laws regarding intellectual property rights exhaustion.

17 However, the developed countries did not give up. Through threats of action by their right holders and provisions in bilateral free trade agreements they continued their attempts to whittle down the hard fought position won under the TRIPS Agreement. The developing countries were greatly upset by this and this state of affairs continued until it had to be corrected through a reiteration of the TRIPS Article 6 position via the Doha Declaration on TRIPS and Public Health in 2001

18 The issue of parallel imports also became a difficult issue under the United States- Singapore Free Agreement (USSFTA) negotiations.

The Mother of all Free Trade Agreements (FTAs)

19 On 16 November 2000, President Bill Clinton and Prime Minister Goh Chok Tong, following a game of golf in Brunei, issued a joint statement to launch negotiations on a US- Singapore Free Trade Agreement. The negotiations started immediately in the bitter cold of Washington in December 2000

20 The USSFTA was for Singapore the mother of all FTAs. In view of the difficult US demands in every area, we had to review many of our important policies and this gave rise to difficult issues and very often lead to a great deal of tension within the negotiating team and the negotiating team and our Ministries and agencies.

21 I lead the legal team which included two of my officers, Ms Deena Bajrai and Mr Daren Tang. With 21 negotiating groups – one for each negotiating chapter – the work was really hectic as we rushed from one negotiating group to another. We worked ourselves flat out from the start of the negotiations till the night before the signing of the USSFTA by President Bush and Prime Minister Goh on 6 May 2003

22 In addition, I was the lead negotiator for the very difficult Intellectual Property chapter and the Dispute Settlement, Final Clauses and Establishment of a Free Trade Area and Definitions chapters. Daren Tang assisted with the Services chapter negotiations. We worked well as a team and the two officers performed very well. We did our best and saw the FTA through.

23 The intellectual property chapter negotiations were among the most difficult. The area is critical to the US and thus it made many demands. The negotiations in relation to the chapter went on till the early morning of the date when the negotiations were completed, the last item to be settled being parallel imports on which there was a heated exchange

Shifting Sands Cause a Boundary Problem

24 Around 1980 a boundary problem arose between us and Malaysia.

25 The boundary between the two countries in the Straits of Johore had been demarcated by the 1927 Straits Settlements and Johore Territorial Waters Agreement. The Agreement provided that the international boundary between the two countries would be an imaginary line following the deep water channel in the Straits. However, it had become a problem to identify the deep water channel over the years due to silting, complicated by land reclamation on both sides. This made it difficult to determine the boundary along certain stretches of the deep water channel – thus necessitating the demarcation of the boundary precisely.

26 Settling the new boundary took 14 years. During this period two of my Malaysian friends leading the negotiations on the Malaysian side – both secretary-general in the Ministry of Land and Co-operative Development retired. The last Malaysian leader – Secretary-General Encik Azmeer Rashid – retired immediately after the settlement of the new boundary in Oct 1994. He was so happy that the matter had

been sorted out during his watch that he told me that the boundary agreement was a retirement present for him. On the Singapore side I lead the Singapore team for all the negotiations.

27 The two sides understood what had to be done. However, the problem was finding a boundary along the affected sectors which both sides felt was a fair one. No country wants to give up any territory if it can help it. Thus boundary negotiations are a difficult exercise to reach a meeting of minds without the other side feeling that it had been short-changed.

The Boundary Problem in the South

28 There was heightened sensitivity in regards to territorial claims in Indonesia following the outcome, in Dec 2002, of the Sipadan-Ligitan case it had with Malaysia. Indonesian nationalists started raising concerns that unchecked sand quarrying may cause Indonesian islands to disappear and enable its neighbours to expand their boundaries. It was said that this could happen to Pulau Nipah in the south of Singapore. There was also constant publicity that land reclamation in the south of Singapore may have an impact on Singapore's undemarcated boundary with Indonesia.

29 Following agreement between then President Megawati and Prime Minister Lee Hsien Loong, negotiations between the two sides commenced in Feb 2005. The Indonesian side was led by a very bright lawyer, Bapak Arif Havas Oegroseno, Director-General for Legal Affairs and Legal Treaties in the Ministry of Foreign Affairs of Indonesia. I led the Singapore side.

30 The first few rounds were not very productive as each side presented its arguments as to how the demarcation was to be done. However, as Havas and I became more comfortable with each other we decided to find a solution mainly through informal 4-eye discussions at each round to avoid the grandstanding necessary for the record at the plenary delegation meetings. The formula worked and we settled the boundary. The boundary agreement was formally signed by the Minister Hassan Wirayuda and Minister George Yeo in Mar 2009.

Finding a Formula

31 One of Singapore's most sensitive negotiations was working out the Agreement on the Establishment of Diplomatic Relations with the People's Republic of China (PRC). The negotiations were lead by Prof Tommy Koh and I was part of our delegation.

32 The challenge to me was to craft the wording for the recognition which would recognize the People's Republic of China as the sole Government of China, keep the proposed formula in line with our stand on the issue articulated earlier at the United Nations and not hurt our friend Taiwan. Our worry was that if this formula became a sticking point with China we would be in real difficulty.

33 I thought that I should try something which the PRC had accepted before and adapt it for our purposes. So I researched and collected the recognition formulas it had accepted with the large number of other countries. The problem was that the PRC had accepted wording which was not always the same from different countries –obviously reflecting who it was dealing with on the other side. However, through this method we managed to adapt a formula which both sides could accept.

In the Service of ASEAN

34 My work in ASEAN lasted over many years. It commenced sometime after my return back to the Attorney-General's Chambers in 1978 from the Ministry of Defence and went on till I left the Legal Service in 2008.

35 During these long years I was asked to assist in drafting numerous ASEAN legal instruments as ASEAN moved forward to develop a Free Trade Area, closer economic integration, a credible dispute settlement mechanism and many other initiatives in relation to the goods, services, investments, intellectual property areas etc.

- 36 A few of the landmark instruments I helmed in drafting included:
- a. The ASEAN Free Trade Area instruments;
 - Framework Agreement on Enhancing ASEAN Economic Cooperation (1992);
 - Agreement on the Common Effective Preferential Tariff (CEPT) Scheme for the ASEAN Free Trade Area (1992- AFTA);
 - Singapore Declaration of 1992.
 - b. ASEAN Protocol on Enhanced Dispute Settlement Mechanism (2004).
 - c. ASEAN Framework Agreement for the Integration of the Priority Sectors (2004) and the 11 ASEAN Sectoral Integration Protocols.

The Regional Intellectual Property Work

37 Through the TRIPS Agreement, intellectual property became an integral part of the world trading system. We thus wanted to make sure that the ASEAN countries developed their intellectual property systems too and developed cooperation in relation to the intellectual property area.

38 I thus helped in drafting the ASEAN Framework Agreement on ASEAN Intellectual Property Cooperation in 1995 and in setting up and developing the ASEAN Working Group on Intellectual Property (AWGIPC) to carry out the cooperative work in relation to intellectual property in ASEAN.

39 I served as the Chairman of the AWGIPC for 6 years. During this period we worked hard to try to get all the ASEAN countries – including those who were yet to join the WTO - to finalize their intellectual property legislation so that all would have TRIPS-conforming intellectual property regimes.

40 I also contributed to the intellectual property work in APEC for many years and served as Chairman of its APEC IP Expert's Group for two years.

Bilateral Issues with Malaysia

41 Singapore has had and continues to have a number of bilateral issues with Malaysia. These include the supply of water, Malaysian railway land in the Republic, Customs, Immigration and Quarantine facilities in Singapore, use of Malaysian airspace and the withdrawal of Central Provident fund savings of West Malaysians. My work also covered these issues.

42 In Sep 2001 then Senior Minister Lee Kuan Yew and Malaysian Prime Minister Mahathir Mohammed agreed on a broad framework to solve these issues. Negotiations to resolve the issues have, however, stalled and the issues remain to be taken up in future.

43 The progress and tone of the negotiations have depended on the political temperature between the two countries at the time of the negotiations and the personalities involved in the negotiations. During the period before Prime Minister Badawi took over, the tone of the negotiations was always very difficult. For example, during one round of the negotiations on the water issue in Johore Bharu the two sides landed up fighting over the banner for the meeting.

Pedra Branca and the Reclamation Cases– The Learning Experience

44 The story about the Pedra Branca case is found in the excellent book by Prof S Jayakumar and Prof Tommy Koh. Prof Koh has also written about the Reclamation case.

45 Having been involved in both the Pedra Branca and Reclamation cases, I only wish to add one point here. Both the cases provided me and my officers a tremendous learning opportunity. I am sure that the learning experience will serve Singapore well in the future. It is not very often that one gets an opportunity to be involved in cases which are dealt with by the International Law of the Sea Tribunal and the International Court of Justice.

US and China Fight over Intellectual property

46 I always had a wish to deal with a dispute at the WTO as a panel member. The opportunity came towards the end of 2007 through a call from my old friend Adrian Otten whom I had known since the

Uruguay Round days and who was working with the WTO. He sounded me out as to whether I was willing to serve on a WTO intellectual property panel.

47 The US had lodged a major intellectual property case at the WTO against China. As the parties had not been able to agree on the members of a panel, the WTO's Director -General had to set up the three member panel. The WTO proposed me as one of the panelists and following the agreement of the parties to the panel members, the panel was constituted.

48 Through the course of 2008, the panel heard the arguments of the parties and third parties, deliberated on the voluminous evidence and completed its draft report. The parties provided their comments on the draft report and it was finalized.

49 Towards the end of Nov 2008 I received the following letter from Mr Pascal Lamy, Director-General, WTO regarding the case:.

"25 Nov 2008

Dear Mr. Tiwari

I wish to express my sincere appreciation to you for the work you have done in serving as a panelist on the Panel *China - Measure Affecting the Protection and Enforcement of Intellectual Property Rights* (WT/DS 362). As you know, **this was the first international adjudication of enforcement provisions in the TRIPS Agreement and a particularly sensitive and complex case.** Your dedication to finding an appropriate resolution to this dispute and your expertise in this area have greatly contributed, not only to the resolution of this dispute, but also to the smooth functioning of the WTO dispute settlement system to the benefit of all WTO Members.

It is my sincere hope that WTO Members and the Secretariat will again be able to benefit from your expertise in the future.

With my best regards,

Yours sincerely,"

50 The Dispute Settlement Body adopted the report. The parties did not file an appeal.

Some Joy and Some Pain – The Investment Guarantee Agreement (IGA) Negotiations

51 Singapore is keen to attract investments into the Republic. Thus, apart from free trade agreements, we have also focused on negotiating investment guarantee agreements. The hope is that by providing a framework that sets out investment protection more investment flows between the two countries would be promoted.

52 I have had the opportunity to lead the negotiations in relation to a number of the IGAs. Some were settled efficiently. I particularly remember the negotiations with UK and US educated Saudi IGA delegation. We had difficult discussions but completed the agreement by late night on the second day in just one round. Our Saudi counterparts were meticulous and tough negotiators but business-like. I think very often we forget that the Arabs have been traders for centuries and are very shrewd people and clever at making deals.

53 My pleasant experience with the Saudis was repeated with the Omanis – though the negotiations were longer.

54 At the other end, I had a completely different experience with the Iranian IGA delegation. We

made some progress at the first round. At the second round there was a change in the head of delegation and we had a person who was only interested in lecturing how much he knew. As soon as I asked him to give me a text of his ideas for change in the light of his lengthy explanation he went off on another lecture. So each time he did this I would ask for a coffee break. We have yet to complete our negotiations with Iran.

55 There is one IGA negotiations I had very much wished would be settled. We started to negotiate with Russia for an IGA at a very early stage. In fact, I arrived for our first round when the tanks were attacking the Russian Parliament and I was thus stuck at the airport and prevented from going into Moscow.

56 We made progress in subsequent rounds through difficult drafting and negotiations and only one point was outstanding. Part of the problem was getting the Russians – who had just emerged from a socialist economy - to understand IGA concepts peculiar to a capitalist economy. I had to painstakingly explain the IGA concepts to them.

57 Then there was a stroke of bad luck. A new head of delegation was appointed. He obviously wanted to undo what his predecessor had done and reopened most of the agreed texts and started lengthy debates on each. I did not succeed in settling an IGA with Russia.

Increasing our Expertise Pool

58 I stated at the beginning of this paper that it sunk into me during my national service days that as a very small country we had to master the international law rules. Being the Head of the International Law Affairs Division, I had, internally, on occasions, also mentioned the need to build up a sufficient pool of people with this mastery. What we needed was a proper plan and funding.

59 Thanks to P S Peter Ho, we are now on our way in relation to the matter. Some of my most satisfying moments have been helming the work to settle the blueprint for the build-up project together with the help of one of my former officers, Mr Wilson Hue. The Centre for International Law is one of the initiatives under this project.

60 Having worked with Peter throughout the 40 years of my working life, I am aware that Peter takes a personal interest in international law matters ever since he started with the Ministry of Defence.

Prof Tommy Koh – An Inspiration

61 The other person I would like to pay a tribute to is Prof Tommy Koh. I have found him an inspiration. He has remained a friendly, kind, humble, helpful, respectful and cheerful friend to everyone during all the years I have known him. I consider him my Guru.

29 Oct 2009

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