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Colloquium on Singapore and International Law: The Early Years

"My Adventure with International Law"[1]

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Introduction

1 I studied international law in my final year in the academic year of 1960 to 1961. The course was taught by a part-time teacher. We followed a very conservative curriculum based on a standard British textbook. I remember that I wrote a paper on humanitarian intervention which was published in a student magazine. I did not imagine that 18 years later, I would have to refute Vietnam's invocation of the doctrine of humanitarian intervention to justify its invasion and occupation of Cambodia. Nor could I have foreseen my subsequent involvement with the practice of international law.

2 The course I took at the University of Malaya was not well taught. It was taught in a very didactic manner. It focused too much on the learning of black letter law. There was no attempt to relate the law in the book to the real world in which we lived. The course was not exciting and challenging. I was so disenchanted that when I went to Harvard Law School, I did not take any courses in international law even though I became acquainted with some of that Law School's legendary teachers in international law, such as, Louis Sohn.

3 The reason which led me to study international law was my desire to help build a world ruled by law. The quest for a just world order would dominate my thinking for the rest of my life. But, my interest in international law was rekindled only when I accepted a posting to the UN in 1968. At the UN, international law was relevant to so many of our daily pre-occupations, everything from the Soviet invasion of Czechoslovakia, to war and peace in the Middle-East, to the right to self-determination and the right to development, to the prohibition of genocide, torture, racial discrimination and gender discrimination. The UN was, however, both an exciting and a frustrating arena for an international lawyer. On one occasion, I remember the Soviet Ambassador telling me that international law should be supportive of Soviet foreign policy and not the other way around. The interrelationship between international law and foreign policy has been a constant refrain in my work.

Vietnamese Hi-Jackers: To Extradite or Not to Extradite?

4 In 1977, a Vietnamese civilian airline was hi-jacked by four Vietnamese and flown to Singapore. The hi-jackers surrendered to the Singapore authorities and asked for political asylum. The government of Vietnam demanded that the aircraft be returned and the hi-jackers be extradited to face trial in Vietnam. The Singapore government returned the aircraft and rejected the appeal of the hi-jackers for political asylum. It had, however, to decide on the fate of the hi-jackers.

5 Singapore and Vietnam did not have an extradition treaty between them. Singapore was, therefore, not legally bound to extradite them to Vietnam. Under international law, Singapore had two options: first, to extradite them to Vietnam; and second, to prosecute them in Singapore.

6 I was then serving as Singapore's Permanent Representative in New York. I decided to canvass the opinions of my colleagues at the UN. The sample I constructed was a microcosm of the UN membership. By a big majority, my UN colleagues were of the opinion that the hi-jackers should not be extradited to Vietnam, but should be tried in Singapore. The reason for their preference was their perception that the hi-jackers would not receive a fair trial in Vietnam. The hi-jackers were, in fact, tried and convicted in Singapore.

The Law and Politics of Recognition

7 When Singapore seceded from Malaysia and became an independent country, one of Singapore's pre-occupations was whether other States would recognise Singapore as a new sovereign and independent State. Our early fears proved to be unfounded as no State withheld its recognition. Singapore's membership of the United Nations, the Commonwealth and other international organisations helped to give it legitimacy.

8 The recognition of the government of a State is usually not controversial. Controversy can, however, arise if there is more than one party claiming to be the lawful or legitimate government of a

State. Often, the issue is brought up at the UN in New York in the form of the question, who is entitled to occupy the seat of the country in question. When debated at the UN, especially during the Cold War, the question becomes highly politicised. International law is often subordinated to the primacy of realpolitik.

Cambodia's Representation at the UN

9 The question of Cambodia's representation at the UN came up twice. The first time was in 1970, when King (then Prince) Norodom Sihanouk was overthrown by General Lon Nol. While my personal sympathies were with Sihanouk, who had been a good friend of Singapore, Singapore had no choice but to vote for Lon Nol. Why? Because under international law, the issue is not whether Lon Nol had achieved power lawfully, but whether his government was in control of the country. In this respect, international law is based upon reality not morality. Lon Nol ruled Cambodia from 1970 to 1975, when his government was overthrown by the Khmer Rouge. The Khmer Rouge government, which styled itself as the government of Democratic Kampuchea, occupied Cambodia's seat at the UN from 1975.

Choice of Two Evils

10 On Christmas Day, 1978, Vietnam invaded and occupied Cambodia. Vietnam overthrew the Khmer Rouge and installed a new Cambodian government in Phnom Penh. At the UN General Assembly in 1979, a huge fight took place over the representation of Cambodia. The world was faced with an invidious choice between two evil options: the murderous regime of the Khmer Rouge or the puppet government of Vietnam. I had the un-enviable task of leading the ASEAN team in arguing that allowing the Khmer Rouge to retain Cambodia's seat was the lesser of two evils. My argument was that the other option was worse because it would condone Vietnam's invasion and occupation of her smaller neighbour, Cambodia, and establish a bad precedent in international law and practice. My involvement with Cambodia, which began in 1965, would continue until 1991, when the Paris Agreement was signed. Today, the Khmer Rouge threat is gone. Cambodia is, once again, sovereign and independent. The country is at peace and the government and people are busy rebuilding their country after 20 years of war and destruction. The Cambodian story could be a source of inspiration to the people of Afghanistan.

Establishment of Diplomatic Relations with China

11 I had one other experience with the practice of recognition. In 1990, I was asked to lead Singapore's delegation to negotiate with China on the establishment of diplomatic relations between our two countries. Although Singapore and China did not have formal diplomatic relations, the two countries enjoyed a warm and substantive friendship. Also, Singapore had no diplomatic relations with Taiwan or the Republic of China. The only reason for the delay in establishing diplomatic relations with China was that, because of Singapore's ethnic composition, it preferred to wait until Indonesia had re-established its diplomatic relations with China.

12 The negotiations with China were successfully completed after three rounds of talks, one in Singapore and two in Beijing. What were the sticking points in the negotiations? There were three. First, Singapore did not want to humiliate our old friend, Taiwan. Second, Singapore wished to retain the right to send its national servicemen to Taiwan for training. Third, Singapore was unwilling to downgrade certain agreements which it had concluded with Taiwan. Given the tremendous goodwill existing and the benign intervention of leaders on both sides, the two delegations successfully concluded the negotiations in September. A ceremony was held at the UN in New York, on 3 October 1990, to witness the establishment of diplomatic relations between the two countries. In the past 19 years, the relationship between China and Singapore has flourished in all fields.

The Law of the Sea

13 Singapore has one of the world's two busiest ports. Singapore lives on its trade with the world. The bulk of world trade is sea borne. It is therefore logical for Singapore to be interested in the law of the sea. The opportunity for Singapore to play an active role in the evolution of the law of the sea arose in the late 1960s, when the UN began the preparatory process leading to the convening of the Third UN

Conference on the Law of the Sea. Several distinguished Singaporeans, including Professor S Jayakumar, Justice Chao Hick Tin and Mr S Tiwari, were members of our delegation to the Conference. By a stroke of fate, I was drafted to serve as President of the Conference during the two concluding years. The point I wish to make here is that this was not a mere codification conference. In addition to codifying pre-existing law, the Conference also made new law. Concepts such as the exclusive economic zone, transit passage, archipelagic sea-lane passage, common heritage of mankind, etc, are new in international law. I have written extensively on the 1982 UN Convention on the law of the Sea as well as on the negotiating process leading to its adoption. Professor S Jayakumar and I co-authored a comprehensive chapter on the negotiating process of the Conference in Volume 1 of the Commentary by the University of Virginia (1985).

International Maritime Organisation

14 The international organisation identified by the 1982 UN Convention on the Law of the Sea as "the competent authority' is the International Maritime Organisation (IMO). The IMO's vision is safe ships and clean seas. Towards that end, it encourages States to become parties to treaties to promote the safety of navigation and to combat marine pollution. Our own Maritime and Port Authority of Singapore (MPA) works closely with the IMO. Together, they run many training courses in Singapore.

The Straits of Malacca and Singapore

15 One of my ambitions was to implement Article 43 of the 1982 Convention, with respect to the Straits of Malacca and Singapore. Article 43 enjoins coastal States and user States to cooperate to ensure the safety of navigation and to prevent and combat pollution in the international straits. The three straits States – Indonesia, Malaysia and Singapore – have cooperated closely through the Tripartite Technical Experts Group (TTEG). Of the user States, only one, Japan, had been cooperating with the straits States, both financially and in other ways, such as, by undertaking hydrographical surveys of the straits. I had convened two conferences, in 1993 and 1996, and had succeeded in bringing together all the stakeholders. I was, however, unsuccessful in forging a consensus at those two conferences. The parties were not ready. In 2007, I had the great pleasure of chairing a conference convened by the IMO, at which the three strait States adopted a cooperative mechanism which has given life to Article 43 of the Convention.

International Environmental Law

16 In 1990, the UN decided to convene, in 1992, the sequel to the historic 1972 Stockholm Conference on the Environment. The 1992 Conference would be known as the UN Conference on Environment and Development (UNCED) or the Earth Summit or the Rio Summit, in short. The UN set up a preparatory committee for the Summit. I was persuaded by my good friends, Chan Heng Chee, our then Ambassador to the UN, and Kishore Mahbubani, our then Permanent Secretary, to make a bid to chair the preparatory committee. Proceeding on the false assumption that the job would be easy compared to the Law of the Sea Conference, I agreed. I subsequently found that the issues were highly politicised and it was extremely difficult to forge a consensus in Rio. An account of the Earth Summit's negotiating process is contained in my Singapore Law Review Lecture, delivered on 15 December 1992, and published in the Singapore Law Review.

17 Chairing the UNCED negotiations gave me an opportunity to contribute to the development of international environmental law. I chaired the drafting of the Rio Declaration of Principles, which can be described as "soft" law. I also chaired the negotiations on the monumental document known as Agenda 21, setting out an agreed programme of work in each sector for the next 20 years. Two environmental treaties, on Climate Change and Biodiversity, were opened for signature in Rio. Subsequently, a good friend, Parvez Hassan, and I were able to play a modest but catalytic role in the founding of the Asia Pacific Centre for Environmental Law (APCEL), which is based at the National University of Singapore's Law Faculty.

International Trade Law

18 My involvement with the World Trade Organization (WTO) and international trade law came about accidentally. In 1996, the WTO held its first Ministerial Conference in Singapore. I was one of a group of officials, from the Ministry of Trade and Industry and the Ministry of Foreign Affairs, assisting our then Minister for Trade and Industry, Mr Yeo Cheow Tong. By tradition, the Minister of the host country was elected Chairman of the Conference. The then Director-General of the WTO was Mr Renato Ruggiero. One of the reasons for the success of the Conference was the seamless way in which the Chairman and the Director-General and their officials worked together. For an account of the negotiating process, see my lecture, "The WTO's First Ministerial Conference: The Negotiating Process", delivered on 19 March 1997, at the book launch of the Singapore Society of International Law.

Helms-Burton Act

19 Since the 1996 WTO Ministerial Conference, I have been appointed three times to serve on WTO dispute panels, twice as Chairman. The first case was a dispute between the European Union, as complainant, and the United States, as respondent. The European Commission had requested the WTO for a ruling on the legality of the Helms-Burton Act, which imposed sanctions against Cuba. The European Commission argued that the Act's extra-territorial effect contravened both WTO law and international law. The case was political dynamite and was fortunately settled before the panel met.

20 The second case was brought by the US and New Zealand against Canada. The two complainants argued that Canada had acted in contravention of WTO law by subsidising its milk and dairy exports. The legal issue of subsidies in agriculture was a very important one. The panel ruled in favour of the complainants and was upheld on appeal.

21 The third case was brought by Australia and New Zealand against the US. The US had invoked its domestic safeguards law against the import of lamb meat from Australia and New Zealand. The legal issue was whether the US law was consistent with the WTO law on safeguards. The panel found in favour of the complainants and was upheld on appeal. I have written a paper on my experiences with the WTO dispute settlement process. The paper will be published in a forthcoming book, co-edited by Margaret Liang and Lim Chin Leng.

The Land Reclamation Case

22 Because of its small size and growing population, Singapore has been reclaiming land from the sea since the beginning of colonial Singapore. The reclamation works carried out over the last 30 years have enabled Singapore to increase its land area from 580 to 680 square kilometres. However, Singapore has always respected its international boundaries and adopted the international best practices in order to minimise marine pollution.

23 In 2002, Malaysia began to voice its displeasure at Singapore's land reclamation works in Tuas and Pulau Tekong. On 4 July 2003, Malaysia invoked Article 286 of the 1982 UN Convention on the Law of the Sea and initiated arbitral proceedings against Singapore. In its response, Singapore reminded Malaysia that, under Article 283 of the said Convention, the two parties had an obligation to exchange views and to attempt to settle the dispute through negotiations. Malaysia agreed to meet Singapore on 13 and 14 August 2003 in Singapore. I was appointed as the leader of the Singapore delegation. Although the negotiations made progress, Malaysia refused to hold a second round of the negotiations. Instead, it applied to the International Tribunal for the Law of the Sea (ITLOS) on 4 September 2003 for provisional measures under Article 290(5) of the 1982 Convention. In essence, Malaysia requested the Tribunal for an order for Singapore to suspend all its reclamation activities until the Arbitral Tribunal had issued its decision.

24 Singapore appointed me as its Agent in the case. On 20 September 2003, Singapore submitted its response to Malaysia's request. Oral hearings were held at five public sittings from 25 to 27 September 2003 in Hamburg. On 8 October 2003, the Tribunal delivered its unanimous judgement.

The Tribunal did not accede to Malaysia's request for provisional measures. Instead, the Tribunal required the two parties to establish a group of independent experts to determine, within a year, the effects of Singapore's land reclamation works and to propose appropriate measures to deal with any adverse effects. This was a brilliant move by the Tribunal because it required the two parties to return to a cooperative mode and to resolve their differences on the basis of an objective study by independent experts.

25 The group of independent experts submitted its unanimous report to the two governments on 5 November 2004. The study found that Singapore's land reclamation works had not caused any serious impact. The report recommended that Singapore should take mitigation measures to eliminate 17 impacts.

26 The report was accepted by the two governments. Three rounds of negotiations were held to arrive at an agreement to implement the report and settle the dispute. On 20 April 2005, the settlement agreement was signed by the two agents, in Singapore, in the presence of the two Foreign Ministers. I have co-written an article on this case, with Jolene Lin, in Volume X (2006) of the Singapore Year Book of International Law.

Pedra Branca

27 Since Professor S Jayakumar and I have co-written a book on the Pedra Branca case (NUS Press, 2009), I will not write in any detail about it here. I was appointed as Singapore's Agent in that case. I was a member of the team, led by Chief Justice Chan Sek Keong, which drafted Singapore's memorial, counter-memorial and reply. I was also a member of the team which appeared before the International Court of Justice (ICJ) in November 2007. As an international lawyer, the privilege of appearing before ITLOS in 2003 and the ICJ in 2007, was a dream come true. Those experiences have strengthened my commitment to international law and the peaceful settlement of disputes.

ASEAN Charter

28 Professor S Jayakumar and I were given the opportunities to make two modest contributions to the making of the ASEAN Charter. Prof Jayakumar represented Singapore in the Group of Eminent Persons (EPG) which was constituted by the 11th ASEAN Summit in Kuala Lumpur in 2005. The EPG's report was presented to the 12th ASEAN Summit in Cebu in January 2006. The Summit appointed a High-Level Task force (HLTF) to draft the Charter, to be ready for signature at the 13th ASEAN Summit in Singapore in November 2007. Ambassador Rosario Manalo of the Philippines was Chair of the HLTF from January until August and I held the chairmanship from August until November. I have co-edited a book, with Ambassador Manalo and Attorney-General Professor Walter Woon, on The Making of the ASEAN Charter (World Scientific Press, 2009).

29 The ASEAN Charter is regional law, rather than international law. The Charter has the potential to transform ASEAN, from a regional body which has evolved by what is often called "The ASEAN Way", to a new regional organisation which will rely more on laws, rules and institutions. ASEAN will also establish a new commission on human rights and a system for the compulsory settlement of disputes.

The Torres Strait

30 The Torres Strait is a strait lying between Papua New Guinea in the north and Australia in the south. It is a strait used for international navigation and Part III of the 1982 UN Convention on the Law of the Sea is applicable to it.

31 The Torres Strait is hazardous to navigation because of the strong currents and the narrowness of the strait at some critical points. It is also close to the Great Barrier Reef. In order to prevent accidents in the strait, the governments of Australia and Papua New Guinea (PNG) decided to impose compulsory pilotage on all ships transiting the strait, whether or not they are heading for an Australian port. A ship which does not take on an Australian pilot can be penalised financially on any subsequent visit to an

Australian port.

32 Singapore, the US and other user States objected to Australia's action, both at the IMO and at the UN General Assembly. There were two issues in the dispute. First, whether the IMO had authorised the imposition of compulsory pilotage. Australia said yes, but, except for PNG and New Zealand, the other members of the IMO said no. Second, is the imposition of compulsory pilotage in a strait used for international navigation consistent with UNCLOS? Again, Australia, PNG and New Zealand said yes, while the rest said no.

33 Singapore and Australia have held two rounds of bilateral consultations on the dispute relating to the Torres Strait. I led the Singapore delegation to the second round which was held in Singapore on 4 March 2009. Although the atmospherics were good, no progress was made on substance. The two sides have basically agreed to disagree.

34 In my view, the best writing on the Torres Strait is by Professor Robert Beckman in "PSSAs and Transit Passage – Australia's Pilotage System in the Torres Strait Challenges the IMO and UNCLOS", published in Ocean Development and International Law, 38: 325-357, 2007.

Conclusion

35 Looking back on the last 50 years, I have three concluding thoughts. First, I am struck by the vast expansion in the scope of international law. The international law I studied as a law student did not adequately prepare me for my subsequent career. In the past five decades, the law has grown and changed in so many areas. For example, in the field of human rights, international humanitarian law, international criminal law, law of treaties, law of the sea, air and space law, trade and technology law, intellectual property rights, refugees and internally displaced persons, inter-State and intra-State conflicts, etc. The curriculum of law schools should reflect the revolution which has taken place in international law.

36 Second, the teaching of international law should be modernised. Teaching should not focus on the regurgitation of black letter rules. Instead, international law should be taught as a dynamic body of rules which is constantly growing. Greater reliance should be made of case classes so that students can appreciate the relevance to and impact of the rules on real life situations. Whenever possible and appropriate, law teachers should attempt to use current legal problems in their classes. Students should be encouraged to do attachments with foreign ministries, defence ministries, international organisations, non-government organisations, and other agencies in order to experience, at first hand, the interactions between law and practice.

37 Third, international law teachers have an important job to do in educating the legal profession, the judiciary and the general public on the relevance and importance of international law. There is, at present, a huge gap of knowledge between the international lawyers and the rest. Let me illustrate my point with a personal anecdote. One of my good friends, who has held one of the highest offices in Singapore, wrote me a series of letters. In those letters, he contended that there is no such thing as international law. The arrest and extradition of Milosevic to The Hague to stand trial for war crime redoubled his conviction that the world is ruled by power, not by law. His letters have convinced me that we, the teachers and practitioners of international law, have a lot to do in convincing a sceptical world that, however imperfect, international law exists and that it impacts many aspects of our lives. We must continue to believe in a world ruled by power and law, and not by power alone.

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