

Singapore and International Law: A 50 Year Review

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Salutations

1. Judge of Appeal, Chao Hick Tin, The Attorney-General, Mr V K Rajah, Justices Vinodh Coomaraswamy and Lee Seiu Kin, Judicial Commissioners Valerie Thiam, Debbie Ong and Hoo Sheau Peng, Michael Hwang, Mr Pang Khang Chau, Prof Locknie Hsu, Mr Thio Shen Yi, President of the Singapore Law Society, Mr Lok Vi-Ming, fellow lawyers, ladies and gentlemen.

Thank You

2. I wish to begin by thanking the Law Society for inviting me to deliver the Biennial Lecture for 2015. When Mr Lok first invited me, I declined the invitation on the ground that I am not qualified to speak to the legal profession. Although I was admitted to the Bar and joined the Law Society in 1962, 53 years ago, my career has been spent in legal education and in diplomacy. Mr Lok is a very persuasive man and would not take no for an answer.

A Small State In A Dangerous World

3. Singapore has existed as a sovereign and independent state for 50 years. Small States cannot take their security and existence for granted. History is replete with examples of small states which had fallen victim to the aggression of their bigger neighbours. Some small States have disappeared. Others have been dismembered. Historically, the world had always been a dangerous place for small States.

The UN And The Rule Of Law

4. Following the Second World War, the United Nations was created to usher in a different world, a world based on the Rule of Law and on collective security. The Security Council lies at the heart of the UN. Decisions of the council require a majority of nine votes out of fifteen. However, each of the five permanent members of the council has a veto and can block a decision of the council. This is the fatal but necessary flaw of the UN collective security system. Without the veto, the US and the Soviet Union would have refused to join the UN.
5. Because of the veto, the Security Council is powerless to act against Russia when she invaded Ukraine and incorporated Crimea into the Russian Federation. Because of the veto, the Security Council is unable to act in the disastrous civil war in Syria, which has already generated millions of refugees and is destroying the country.
6. The bottom-line is this. Although the UN cannot guarantee the security of small states, it has helped to create a world which is less dangerous for small states than the pre-1945 world. The UN General Assembly is like the parliament of the world. There is no veto in the Assembly. Small States can hold big States to account in the Assembly. However, unlike the Security Council, the Assembly's decisions are not binding.

Singapore's Foreign Policy

7. Singaporeans are a realistic people. We have no illusions about the world. We believe that we must be strong, economically and militarily so that we cannot be bullied or intimidated by bigger countries. I would call this the first principle of our foreign policy.

Lee Kuan Yew's Seminal Influence

8. Our founding Prime Minister, Mr Lee Kuan Yew, was a lawyer by training. I am sure that this had influenced his worldview. He believed that small countries are better off in a world governed by the Rule of

Law than one governed by the rule that might is right. He insisted that Singapore should always abide by international law.

9. In his foreword for a book on the Pedra Branca case, co-written by Prof S Jayakumar and me, Mr Lee wrote:-

“Singapore must remain committed to upholding the rule of law in relations between states. If a dispute cannot be resolved by negotiation, it is better to refer it to a third party dispute settlement mechanism, than to allow it to fester and sour bilateral relations. This was my approach and subsequent Singapore Prime Ministers have continued to subscribe to it.”

Puzzle Explained

10. Mr Lee Kuan Yew's attachment to international law was a puzzle to many political scientists. They regarded him as a Realist. Dr Henry Kissinger once said that Mr Lee had a “cold-blooded” attitude towards the realities of international politics. How could a Realist attach so much weight to international law? The answer is that Mr Lee was not an ideologue but a pragmatist. He would have approved of Mr Deng Xiaoping's famous saying that it does not matter whether the cat is black or white as long as it catches mice. Pragmatism is the Tao of Singapore.

The Sword and the Shield

11. My thesis this morning is that Singapore has no illusions about the nature of the world we live in. We know that the International Rule of Law is weak and cannot deter an aggressive big power, such as, Russia, from using its superior military force to secure its strategic objectives. We acknowledge that, at the end of the day, Singapore must look to the SAF to defend it against any external threat.

12. Our belief in international law is therefore not based on blind faith. We accept the reality that when there is a collision between law and military

power, the latter usually prevails. At least, in the short term. There is therefore a limit to the efficacy of international law.

13. Within those limits, Singapore has sought to use international law as a sword to advance our aggressive interests and as a shield to protect our defensive interests. Let me now turn to discuss the case law. Let me begin with the two Water Agreements and the Separation Agreement.

Water Agreements and Separation Agreements

14. Singapore used to be critically dependent on Malaysia for water. For this reason, the two Water Agreements which Singapore had concluded with Johor, in 1961 and 1962, were of the greatest importance. Johor was and is a constituent state of Malaysia. It did not and does not have the legal status to enter into an international treaty. The dilemma for Singapore was how to elevate those agreements to the status of an international treaty, so that the federal government of Malaysia would be bound by it.

15. The solution was to insert a so-called “water clause” in the Independence of Singapore Agreement. Article IV of the Separation Agreement required the Government of Malaysia to enact legislation in the form set out in Annex B of the Agreement. This took the form of the Constitution and Malaysia (Singapore Amendment) Act. Section 14 of the Act states:

“The Government of Malaysia shall guarantee that the Government of the State of Johore will on and after Singapore Day also abide by the terms and conditions of the said two Water Agreements”.

16. Singapore registered the Independence of Singapore Agreement with the United Nations as international treaty. This is an excellent example of how Singapore was able to use international law to protect a vital interest. I should add that today, Singapore is less dependent on Malaysian water for its survival. It has therefore allowed the 1961 Water Agreement to expire in 2011.

Trade Dispute With Malaysia

17. On 7 April, 1994, Malaysia imposed an import prohibition order on two types of petrochemicals, Poly-Ethylene (PE) and Poly-Propylene (PP) which are resins used to make products like plastic bags, moulded plastic containers and plastic pipes. A Malaysian importer of these products had to apply to the Ministry of Trade and Industry (MTI) for an Approved Permit. MTI's policy was that only those petrochemical products not produced or available in Malaysia would be granted an Approved Permit.
18. The Malaysian measure was intended to protect a Malaysian company against competition from Singapore. Malaysia's measure was a quantitative restriction on imports. Singapore felt that Malaysia had acted in contravention of her commitments under the General Agreement on Tariffs and Trade (GATT) and the World Trade Organisation (WTO).
19. Singapore tried to resolve the dispute with Malaysia through consultations and negotiations. When they proved to be fruitless, Singapore decided to invoke the newly established dispute settlement mechanism under the WTO. On 19 January 1995, Singapore formally requested for consultations with Malaysia. The two sides met on 13-14 February and 8-9 March but the consultations were unsuccessful. On 16 March, Singapore wrote to the Chairman of the Dispute Settlement Body (DSB) to request for the establishment of a panel to consider the dispute.
20. The two sides met again on 29 March with the DSB. Singapore reiterated its request for the establishment of a panel to consider the dispute. Following the meeting, Malaysia informed the DSB that it was modifying its measure and that import licences for PE and PP would be issued freely to all bona fide importers. On 19 July 1995, at a meeting of the DSB, Singapore announced that it was withdrawing its complaint against Malaysia under the WTO Dispute Settlement Procedures.

21. The moral of the story is that Singapore's reliance on GATT and WTO law and its invocation of the compulsory dispute settlement procedures had persuaded Malaysia to rescind its protectionist trade measure.

Dispute With Indonesia Over The Dumping of Waste

22. On 29 July 2004, a Singapore company exported to Batam a consignment of compost which was intended to be used as a soil conditioner and fertilizer. Indonesia alleged that the organic material contained heavy metals and was classified as hazardous waste under Indonesian law. Singapore does not regard the material as a hazardous waste under Singapore's law.

23. On 29 July 2004, Indonesia notified the Secretariat of the Basle Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal (hereinafter referred to as the Basle Convention), based in Geneva, that it regarded the material to be a hazardous waste. On 17 August, the Secretariat transmitted Indonesia's notification, to all States Parties, including Singapore. Singapore received the notification on 27 August 2004.

24. Singapore replied to Indonesia that the material exported to Batam was not a hazardous waste and Singapore had not contravened the Basle Convention. Indonesia insisted that Singapore should take the material back to Singapore. When Singapore refused, Indonesia threatened to do so unilaterally. This raised unnecessary tension and a group of demonstrators attacked the Singapore Embassy in Jakarta. To defuse the tension, the two Foreign Ministers, George Yeo and Hasan Wirajuda met in Jakarta. They agreed that both sides should seek an amicable and mutually acceptable solution under the framework of the Basle Convention.

25. The Secretariat of the Basle Convention invited the two parties to meet in Geneva. It also offered to recommend an independent expert to visit Batam and Singapore and to carry out an investigation. This was accepted by the two sides. The expert found that the material was not a hazardous waste and that Singapore had not contravened the Basle Convention. Having cleared its name, Singapore generously offered to take the material back to Singapore from Batam. This was the

amicable agreement reached by the two sides when they met in Geneva on the 10 and 11 of May 2005.

26. What is the moral of this story? It is that we should abide scrupulously by international law, on the one hand, and, on the other, defend Singapore's good reputation and its legal rights. The second lesson is to give face to our neighbours. This is why we agreed to take back the compost even though we were not legally obliged to do so.

The Land Reclamation Case

27. Singapore is a very small island. We have no choice but to reclaim land from the sea. This has been going on since the nineteenth century. This is why there is no beach on Beach Road. This also explains why the Thian Hock Keng Temple, on Telok Ayer Street, whose deity is Mazu, the guardian of seafarers, is located so far from the sea. When the temple was built it was by the sea.

28. Singapore has been undertaking two massive land reclamation projects in Pulau Tekong, in the east, and Tuas, in the west. The former Prime Minister of Malaysia, Dr Mahathir Mohamed, objected to Singapore's land reclamation projects.

29. On the 28 of January 2002, Malaysia sent a diplomatic note to our High Commission in Kuala Lumpur, alleging that our land reclamation activities in Tuas had encroached into Malaysia's territorial waters. In April 2002, Malaysia complained that the reclamation works in Pulau Tekong and Pulau Ubin had caused transboundary environmental harm to Malaysia's waters.

30. Singapore asked Malaysia, on several occasions, for particulars of its allegations so that they could be looked into. Malaysia never responded to those requests. Instead, on 4 July 2003, Malaysia informed Singapore that it was unilaterally referring the dispute to arbitration under the UN Convention on the Law of the Sea. The diplomatic note was accompanied by a statement of claim and four technical reports.

31. It was at this point that the Singapore Government appointed me as its Agent. I should explain that, unlike other treaties, the UN Convention on the Law of the Sea has a compulsory dispute settlement system. States Parties may choose arbitration, the International Court of Justice or the International Tribunal For The Law Of The Sea, as its preferred modality. As neither Malaysia nor Singapore had expressed a preference, they are deemed to have accepted arbitration.
32. The Arbitral Tribunal would consist of 5 members. Malaysia appointed Dr Kamal Hossain of Bangladesh as its arbitrator. Singapore appointed Professor Bernard Oxman of the US. The two sides, in consultation with the President of ITLOS, chose three other arbitrators.
33. Malaysia also asked for 4 provisional measures, the most important of which was for Singapore to stop all reclamation activities until the Arbitral Tribunal had decided on the case.
34. In Singapore's reply to Malaysia, we pointed out that the UN Convention required the parties to negotiate before referring their dispute to arbitration. The two parties met in Singapore on 13-14 August 2003. The meeting had gone well and the two sides had agreed to hold a second meeting. However, on 5 September 2003, Malaysia applied to ITLOS for provisional measures against Singapore.
35. Singapore had 15 days to submit its written response. The oral proceedings took place at the tribunal, in Hamburg, from 25 September to 27 September 2003. In my final submission to the tribunal, I pointed out that the fundamental conflict between the parties was not on the law but on the facts. In view of this, I proposed to the tribunal that it should consider ordering the two parties to jointly sponsor and fund a scientific study by independent experts, to verify the facts.
36. The tribunal's judgement was delivered on 8 October 2003. It did not accede to Malaysia's request to order Singapore to stop its land reclamation works at Tekong and Tuas. Instead, the tribunal prescribed that Malaysia and Singapore cooperate and establish a group of independent experts to conduct a joint study.

37. Singapore appointed two Dutch experts and Malaysia appointed two Welsh experts. Together, the four experts spent a year investigating the facts. They submitted an unanimous report to the two Governments on 5 November 2004.
38. The report largely exonerated Singapore. It did, however, require Singapore to modify the contour of the reclamation in Tekong, compensate Malaysia for the damage sustained by two of its jetties in the Straits of Johor and to pay some compensation to Johor fishermen for the reduction in their catch and increase in their expenditure for fuel. Singapore complied with all the recommendations.
39. On the basis of the facts established by the experts, the two delegations returned to the negotiating table. After two rounds of negotiations, they arrived at an amicable settlement. The agreement was signed at the Ministry of Foreign Affairs in Singapore, on 26 April 2005. The two parties requested the Arbitral Tribunal to adopt the text of the settlement agreement as the award of the tribunal. If you would like to know more about this case, may I refer you to the book which I have co-written with Dr Cheong Koon Hean, the CEO of HDB and Lionel Yee, the Solicitor-General. The book is entitled, Malaysia and Singapore: The Land Reclamation Case, From Dispute to Settlement.

The Pedra Branca Case

40. The Pedra Branca case is quite well known and I will not dwell at length with it. For those of you who would like to know about the case, I would recommend the book which Professor S Jayakumar and I have co-written, entitled Pedra Branca: The Road to the World Court.
41. The dispute between Malaysia and Singapore is a dispute about sovereignty over territory. Both Malaysia and Singapore claim sovereignty over Pedra Branca, Middle Rocks and South Ledge. The British had built a lighthouse, called the Horsburgh Lighthouse, in 1851. From 1851 until 1979, no one had questioned the sovereignty of the British and, subsequently, Singapore over these maritime features. In 1979, Malaysia published a new map which, inter alia, claimed for the first time that the island, rocks and lowtide elevation belonged to Malaysia.

42. Singapore did not behave as other countries do when they are in possession of disputed territory. For example, Japan denies that it has a dispute with China over Senkaku/Diaoyu. For example, South Korea denies that it has a dispute with Japan over Dokdo/Takeshima. In the case of Pedra Branca, Singapore was not only willing to acknowledge Malaysia's claim as constituting a dispute but it also suggested that the two countries refer the dispute to the International Court of Justice.
43. Professor Jayakumar and I were involved in the case from 1979 until 23 May 2008, when the International Court of Justice delivered its judgement in the case. I was the Agent of Singapore and Professor Jayakumar was the Foreign Minister. We were, of course, relieved that the ICJ had ruled in favour of Singapore on Pedra Branca but, rather disappointed that the Court had ruled in favour of Malaysia, in the case of Middle Rocks.
44. The Governments of Malaysia and Singapore have accepted the judgement of the court. Pedra Branca is no longer a divisive issue in our bilateral relations. This is the justification for Singapore's generosity in being willing to acknowledge that it has a dispute with Malaysia and for being willing to take the risk of losing the case in the I.C.J.

Conclusion

45. I shall bring my lecture to a conclusion. I have 3 key messages. First, Singapore must be strong economically and militarily in order to be able to defend its independence and territorial integrity. Second, we should work assiduously to strengthen the International Rule of Law because we want to live in a world which is ruled by law rather than by force. Third, where appropriate, we will use international law as our shield to defend our interests and as our sword to advance our interests. In order to do this successfully, we need good international lawyers, in the government, private sector and academia. This is why we have established the Centre for International Law at NUS.
46. Thank you very much.

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