

CHAPTER 5 SINGAPORE AND INTERNATIONAL LAW

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SECTION 1 INTRODUCTION

5.1.1 Adherence to and observance of international law in Singapore foreign policy is well-known. Affirmation of the demands of international law has been a key feature of various foreign policy statements. This is unsurprising. Small states, in particular, benefit from a rule-based and rule of law-based international order. A trading nation like Singapore, in particular, thrives on a relatively predictable global environment. International legal rules help to foster such an environment.

5.1.2 What is less well-known is how the Singapore courts have actually addressed international law rules that have, on occasion, arisen for consideration before them. While the *Constitution of the Republic of Singapore* is silent in key respects on the interaction between international law and the Singapore domestic legal system, the executive, legislative and judicial branches in Singapore have all demonstrated a keen appreciation of what international law requires and allows.

5.1.3 This article is an introduction to Singapore's engagement with international law-making and the rules of international law. It does not focus on any particular area of law or treaty regime. Instead, it seeks to provide a brief introduction to the international law work of the executive, legislative and judicial branches in Singapore, with an emphasis on the work of the Singapore courts.

5.1.4 Aside from the present introductory section, this article is divided into five further sections :-

Section 2: The Treaty Making-Power and the Effect of Treaties in the Domestic Legal Order. The executive treaty-making power may be used to bind Singapore on the international plane, and that may in turn affect the governance by Singapore law of private law relations. Examples of the latter include the *Convention on the Recognition or Enforcement of Foreign Arbitral Awards* (the 'New York Convention'), or the *United Nations Convention on Contracts for the International Sale of Goods*. Treaties entered into by the executive branch have, however, only a limited legal effect under Singapore domestic law unless incorporated into Singapore law by way of Parliamentary legislation. Therefore, Section II also considers Parliament's legislative role in this regard, and as a forum in which points of international law may, in any case, be raised for public debate.

Section 3: Treaties and the Singapore Courts addresses points of treaty law that have appeared before the domestic courts of Singapore.

Section 4: The Singapore Courts and International Law deals with how the courts in Singapore have handled other general points of international law arising before them.

Section 5: Conclusion. The article concludes with a few observations about the increasing relevance of international law developments to Singapore and its domestic legal order.

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SECTION 2 THE TREATY-MAKING POWER

The Executive Treaty Power

5.2.1 The Constitution of the Republic of Singapore does not say that Parliament's advice and consent is required in executive treaty-making with foreign nations. For that matter, it does not say that the executive branch possesses the treaty-making power of the State. The Constitution is, simply, silent on these matters.

5.2.2 However, Singapore has, effectively, adopted practice in this regard. Parliament's consent is not sought or deemed to be required, and the executive branch has never been challenged in its exercise of the treaty-making power.

Parliament and International Law

5.2.3 It is accepted that Parliament's consent is not required before the executive branch may bind Singapore by way of treaty. However, the Constitution does not say that Parliament cannot debate questions of international law, including such treaties which the executive branch wishes to negotiate and conclude.

5.2.4 A key feature in the evolution of Singapore practice in this regard is the close adherence shown to the separation of powers doctrine. Article 38 of the Constitution says that Parliament possesses the law-making power in Singapore. As such, treaties which the executive branch conclude on behalf of Singapore can neither impose duties nor create rights that may be enforced in the Singapore courts. Logically speaking, since the grant of legal rights and imposition of legal duties in Singapore the context involves the exercise of legislative power, only Parliament possesses that power to translate treaty law into Singapore law.

5.2.5 Where the treaty expressly requires its implementation by way of domestic statute, such that failure to do so would amount to a treaty violation, Parliament could still refuse, at least in legal principle, to endorse the decision of the executive branch to enter into the treaty in question by refusing to pass such implementing legislation.

Judicial Review

5.2.6 The Singapore courts have the power to declare a statutory provision null and void where it violates the Constitution. This would include the power to review a treaty rule which has been transformed into Singapore law by way of statute. As such, the executive branch could enter into a treaty which requires the implementation of certain rights and duties under Singapore's domestic law, Parliament could consent to implement what the treaty requires by way of an Act of Parliament, but the courts will decide what the Act means and whether it is constitutional.

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SECTION 3 TREATY OBLIGATIONS BEFORE THE SINGAPORE COURTS

5.3.1 As we have seen, Parliament's power to translate treaty laws into Singapore law is limited by the Constitution for the Singapore Courts will, ultimately, determine the scope and extent of any repugnancy with the Constitution.

5.3.2 There is no limitation as such in terms of the types of treaty which Parliament could seek to implement in Singapore domestic law. Indeed, Parliament could even legislate to give effect to treaties to which Singapore is not a party. For example, Singapore's *State Immunity Act* (Cap. 313) resembles closely the United Kingdom Act of 1978 which, in turn, was drafted with the *European Convention on State Immunity*, 16 May 1972, in mind, and which is a treaty to which Singapore is not a party.

5.3.3 Similarly, a Parliamentary enactment transforming treaty law into Singapore law may expand the scope of the terms of the treaty, so long as that does not conflict with the obligations imposed by the treaty itself. No issue arises so long as the treaty's requirements are met, but even if the treaty's requirements are not met, such that the enactment conflicts with the treaty, the domestic statute prevails so long as the domestic statute's words are clear – *Tan Ah Yeo v Seow Teck Ming* at 263.

5.3.4 In interpreting Parliament's intent, the courts have nonetheless applied the presumption that Parliament intends to adhere to international law or "international comity" – *Public Prosecutor v Taw Cheng Kong [1998] 2 SLR 410* at 434 ("international comity", *per* Yong Pung How C.J.); *Tan Ah Yeo v Seow Teck Ming* at 263 (*per* Chao Hick Tin J.A.) at 263. This includes adherence to Singapore's international treaty obligations, and the Singapore courts will, as we have seen, usually seek to construe a statute in line with such treaty obligations that bind Singapore's conduct on the international plane, again subject only to conflict with the clear words of the domestic statute.

5.3.5 Furthermore, section 9A(2) of the Interpretation Act (Cap. 1) permits recourse to "any material not forming part of the written law". It states that "in the interpretation of a provision of a written law, if any material not forming part of the written law is capable in assisting the ascertainment of the meaning of the provision, consideration may be given to that material". Article 9A(2) is the more general

interpretative rule compared to section 9A(3)(e) which states, in turn, that: "Without limiting the generality of subsection (2), the material that may be considered in accordance with that subsection in the interpretation of a provision of a written law shall include...any treaty or other international agreement that is referred to in the written law..." Section 9A(3)(e) is narrowly worded in requiring the statute to refer expressly to the treaty. But this is cured by section 9(A)(2) which is broader and sits more comfortably with the established English doctrine - a statutory provision should be interpreted in light of Singapore's treaty obligations unless the clear words of the statute demand otherwise.

5.3.6 In all such cases, the Singapore courts will therefore determine the proper meaning, scope and application of such statutory rights and duties.

5.3.7 When determining whether there exists a legally binding treaty in the first place, the courts have also accepted the broad customary international law definition of what constitutes a treaty.

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SECTION 4 THE SINGAPORE COURTS AND INTERNATIONAL LAW

Customary International Law before the Singapore Courts

5.4.1 The Singapore courts have generally adhered to common law orthodoxy in approaching customary rules of international law; namely, that customary international law may be invoked in the Singapore courts as part of the common law. This reflects the dominant approach taken of the matter by and Commonwealth courts -

5.4.2 Nonetheless, such reception of international law would remain subject to the hierarchy of domestic legal sources. In other words, an international law rule received into Singapore law by way of the common law remains subject to the contrary demands of statute and the Constitution in Singapore. This accounts for the majority of cases in which it has been said that domestic law would prevail in the case of conflict with an incompatible rule of international law. However, the basic proposition that Singapore law prevails in a conflict between international law and domestic law is, said to apply more broadly to conflicts between an international treaty and any Singapore law. But this seemingly broad doctrine must have its limits - an international law rule contained in a statute which conflicts with a common law rule would prevail over the common law rule, for example.

5.4.3 Fidelity to the hierarchy of domestic sources requires the view that only where the international law rule is received by way of the Constitution itself can it be said that the international law rule would trump a rule found in a Singapore statute. However, this remains a theoretical possibility only since the point has neither been successfully nor unsuccessfully argued before the Singapore courts.

5.4.4 Even in cases where statute grants the Minister the right to make subsidiary legislation on the basis of Singapore's international law obligations that would

(according to the parent statute, in this example) prevail over any inconsistent statutory provision, it is because the international law obligation in question derives its force ultimately from the parent statute that gives it a higher status than a conflicting rule of Singapore law – see (e.g.) sections 2(1) and 2(3) of the *United Nations Act (Cap. 339)*.

Reception of Customary International Law in Singapore Law

5.4.5 The leading authority is the case of *Nguyen Tuong Van v Public Prosecutor [2005] 1 SLR 103*. There the reception of customary international law into Singapore law became a focal issue and had the benefit of extended judicial inquiry. For our purposes, two noteworthy points that arose were (1) the position taken by international law on the punishment of death by hanging, and (2) the reception into Singapore law of certain consular rights under customary international law.

5.4.6 First, the question of the death penalty under international law. In *Nguyen*, Singapore's Court of Appeal stressed that a customary international law prohibition of the death penalty under the *Misuse of Drugs Act (Cap. 185)* must, first, be proven. The question there was whether the punishment of death by hanging falls under the customary international law prohibition of torture and cruel, inhuman or degrading treatment or punishment. The court found that there was no general customary rule as such which prohibits the punishment of death by hanging. The evidence sought to be relied upon by the defence was insufficient to establish the existence of such a prohibitory rule. This leaves open the issue of what would have occurred had there been such a customary international law prohibition.

5.4.7 Secondly, the consular rights of the accused under international law also arose for consideration in *Nguyen*. These rights are contained in the *Vienna Convention on Consular Relations*, 24 April 1963. Singapore was not a party to the Convention at the time, and was not bound by the treaty rule, but the Court of Appeal accepted that an identical rule applies nonetheless to Singapore under customary international law. According to Kan J in the High Court, the Government did not deny the application of the rule to Singapore as a rule of customary international law and this view appears also to have been accepted on appeal where the Court of Appeal went on to cite a recent decision of the International Court of Justice (ICJ) in determining the true meaning of the rule contained in the *Vienna Convention*.

International Law Writings and International Decisions Before The Singapore Courts

5.4.8 On occasion, the Singapore courts have also considered and applied the writings of publicists. In any event, the views of such publicists are carefully scrutinized even if, ultimately, they are to be distinguished from the facts of the case. Such writings particularly of the most eminently qualified publicists should, therefore, be considered to be of some persuasive authority before the Singapore courts, as are foreign (especially English) decisions involving questions of international law and the decisions of international courts or tribunals.

5.4.9 Resort to the writings of publicists in the field may be justified to the extent that they provide cogent evidence of the established international legal rule.

Judicial Approach Towards Conflicts Between International Law And Singapore Law

5.4.10 Mention has already been made of the fact that the Singapore courts have had occasion to refer to situations of conflict between international law and Singapore law; see [Section 5.4.2](#) above.

5.4.11 In such cases, much could still turn on the precise basis for invoking the international legal rule. If that basis should lie at common law, a Singapore statute would prevail in the hierarchy of domestic legal sources. Likewise, an international law rule embodied in statute must yield to the Constitution in case of conflict. An interesting question which has been mentioned is whether the domestic force of an international law rule may have its basis in the Constitution itself; see [Section 5.4.3](#) above.

Proof of International Law Distinguished from Proof of Foreign Law

5.4.12 It may be appropriate to mention also that proof of international law is not usually considered to involve proof of fact, unlike proof of foreign law. The point has not been tested in the Singapore courts. The view has been taken in Malaysia that proof of international law is a matter that requires expert evidence.

5.4.13 Subject to the deference with which we are required to treat that Malaysian position, it may be suggested that this cannot be the correct view in Singapore. Four reasons may be given for this.

5.4.14 First, common law judges do not usually treat issues of international law arising before them as those which always require recourse to expert witness, even if that may be desirable. We may take the argument further and say that insofar as international law is taken by the common law to be a part of it, common law judges are presumed to know international law (see also [Sections 5.4.1](#) and [5.4.8](#) above).

5.4.15 Secondly, an appellate court may sometimes consider the view of international law taken in the courts below it to be incorrect. It does so more freely than if what is involved is a question of fact.

5.4.16 Thirdly, in private international law, at least in the absence of proof to the contrary, the rule under the foreign law is to be presumed to be the same as that under domestic law, but this has never been recognised to be so where a rule of public international law is involved instead.

5.4.17 Having said that, there are special considerations which may apply, and which may make the case involving a point of international law in ways more complex than that which only involves a point of domestic law. First, international lawyers have long acknowledged that domestic judges face a serious difficulty in finding reliable evidence on what international law is on a particular point absent formal proof and expert witnesses. This is usually caused by the variety and

unwieldiness of evidence of state practice, and even the confidential nature of much evidence that may be considered relevant. Secondly, as Brownlie has also observed of Commonwealth practice (at 40), there are often issues of public policy involved in conjunction with this first problem. One example is the need for the judicial and executive branches to “speak with one voice”, on which see, for example, the discussion by Chao Hick Tin JA of the problems attendant to departures from this doctrine where issues of immunity are involved (*Civil Aeronautics Administration v Singapore Airlines Ltd.* [2004] 1 SLR 570 at 576-580).

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SECTION 5 CONCLUSION

5.5.1 Singapore has turned, increasingly, to the application of international law in international judicial and arbitral proceedings in order to address specific foreign policy issues. This included the first ever dispute brought under the WTO’s dispute settlement system, although the dispute was subsequently withdrawn. More recently, in the Land Reclamation dispute, Malaysia requested provisional measures from the International Tribunal on the Law of the Sea to halt Singapore’s land reclamation activities. The Tribunal ordered that a Group of Experts (G.O.E.) be established to inquire into various facts pertaining to the dispute. The unanimous G.O.E. report which resulted eventually played a highly constructive role in helping both countries reach an amicable solution. As a result, the dispute over the merits before an *ad hoc* tribunal established pursuant to the terms of the *U.N. Convention on the Law of the Sea*, 10 December 1982, was withdrawn subsequently. Another dispute with Malaysia concerning sovereign title over Pedra Branca (or “Pulau Batu Puteh”) led to a special agreement to submit the case to the International Court of Justice. There has also been public discussion of the merits of submitting another long-standing dispute, over the price of raw water supplied by Malaysia to Singapore under two previous agreements (for all these, see the annual volumes of the *Singapore Year Book of International Law*).

5.5.2 Most recently, there was also a dispute with Indonesia that was settled amicably with the assistance of the Secretariat of the Basel Convention - see e.g. Simon Tay & C.L. Lim, “Singapore: Review of Major Foreign Policy Statements”, (2005) 9 *Singapore Year Book of International Law* 221 at 235. This example and those in the preceding paragraph demonstrate Singapore’s long-standing commitment to the rule of law in international affairs, a commitment that has also been demonstrated in past decades by the seriousness with which Singapore has taken its responsibilities in the multilateral international law-making process.

5.5.3 While Singapore’s conduct on the international plane is regulated by familiar rules, principles and doctrines on the international plane from the viewpoint of an external observer, the reception of international law into the Singapore legal system is perhaps less widely known and understood. It is hoped that this brief introduction might give some sense and appreciation of the more notable judicial developments in this regard, even if the case law in this area remains in its infancy.

5.5.4 Taken together with Singapore's regular invocation of international law in its official statements, a perceptible but unsurprising growth of treaty-implementing legislation, and Singapore's active participation in the international law-making process, the interpretation and application of international law rules and principles by the courts serves nonetheless to demonstrate the seriousness and extent to which international legal regulation has been received in Singapore.

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