

SPEECHES

THE LAND RECLAMATION CASE:
THOUGHTS AND REFLECTIONS

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A geographically small country, with a shortage of land, Singapore has traditionally relied on land reclamation as a means of providing additional physical space to accommodate its housing, industrial and economic needs. Singapore has been reclaiming land since its early colonial days without attracting much attention from its neighbours. However, in 2002, Singapore's land reclamation works in Pulau Tekong and Tuas View Extension attracted complaints from Malaysia. Malaysia alleged that the reclamation works, *inter alia*, impinged on Malaysia's territorial waters, caused pollution and other adverse harm to the marine environment in the Straits of Johor. This culminated in Malaysia invoking the provisions of the 1982 UN Convention on the Law of the Sea and referring the dispute to arbitration, under Annex VII of the Convention. Subsequently, Malaysia applied to the International Tribunal for the Law of the Sea (ITLOS) for provisional measures to stop Singapore's land reclamation works pending the outcome of the arbitration. This article briefly describes the chain of events leading to the two countries appearing before the ITLOS arbitral tribunal and the final peaceful settlement of the dispute. The authors then go on to reflect on the important lessons gained from this episode, in the hope that future differences may continue to be amicably resolved.

I. LAND RECLAMATION IN SINGAPORE

Singapore is a small island republic in Southeast Asia situated just off the tip of the Malayan peninsula. Since the beginning of its independent existence, Singapore's physical constraints have made it a challenge to balance its competing needs and to optimise the use of its scarce land area.

Therefore, Singapore has been reclaiming land from the sea since the beginning of colonial Singapore. Recent reclamation projects include the Kallang River in the 1960s for industrial and housing purposes, Marine Parade in the 1970s for housing purposes, Changi Airport in the 1980s for infrastructure purposes, Jurong Island (joining seven islands in south-western part of Singapore) in the 1990s for industrial purposes, and Changi East in 1994-2002 for the expansion of Changi Airport, development of infrastructure and industrial purposes.¹ The reclamation works carried out over the last thirty years have enabled Singapore to increase its land area from 580 to 680 square kilometres (58,000 ha to 68,000 ha).²

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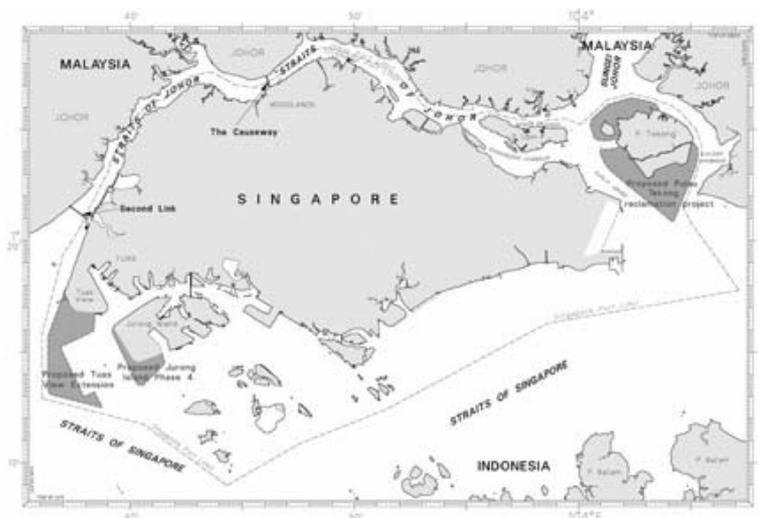
[†] This article is based on a talk given by Ambassador Koh to students at the Faculty of Law, the National University of Singapore, on 14 April 2005.

¹ See Para. 29 of *Response of Singapore*, 20 September 2003, *International Tribunal of the Law of the Sea, Malaysia v. Singapore* ["Response of Singapore"], online: International Tribunal for the Law of the Sea <http://www.itlos.org/start2_en.html>.

Land reclamation is also an important activity in several other small countries, such as Belgium, the Netherlands, Dubai and some of the other Gulf States.³ It has also become an industry and a fine art. The best practices, which Singapore adopts, enables it to embark on some quite massive land reclamation projects, in Pulau Tekong and in Tuas, without causing significant impacts on the marine environment, for example, pollution.

II. MALAYSIA'S RESPONSE TO THE LAND RECLAMATION WORKS IN PULAU TEKONG AND TUAS

In 2002, Malaysia began to voice its displeasure at Singapore's land reclamation works in Tuas and Pulau Tekong.⁴ As can be seen from the map below, Pulau Tekong is situated in the north-eastern part of Singapore. Tuas is in the Western part of Singapore.



Map of the main island of Singapore, showing the Tuas View Extension and Pulau Tekong reclamation areas⁵

Malaysia alleged that Singapore's land reclamation works in Pulau Tekong and Tuas impinged on Malaysian territory, caused pollution and other harm to the marine environment in the Straits of Johor, damaged the jetties, reduced the catch of the fishermen who made their living in the Straits of Johor, *etc.* Singapore repeatedly asked for details of Malaysia's concerns so that proper investigations could be made. However, although Malaysia promised to do so each time, at both levels of the Prime Ministers and Foreign Ministers, no such information was provided.

² Para. 30, Response of Singapore.

³ Examples of well-known reclamation projects include Kansai International Airport in Osaka, Japan, the Shannon Estuary in Ireland, the Palm in the United Arab Emirates and the IJburg Project in Amsterdam, the Netherlands.

⁴ More specifically, Malaysia did not protest against the reclamation in Tuas until January 2002, and then only in respect of the alleged encroachment into its territorial waters. At that point in time, the Tuas reclamation project had already been in progress for more than one and a half years. It was only in April 2002 that Malaysia raised the issue of any geophysical and hydrographical impacts arising from the Tuas reclamation project. On 30 April 2002, Malaysia raised objections for the first time concerning the alleged environmental impact and narrowing of the waterway in Kuala Johor as a result of the Pulau Tekong reclamation works. See Para 57, Response of Singapore.

⁵ This map was reproduced in Para. 24, Response of Singapore.

III. REFERRING THE DISPUTE TO INTERNATIONAL ARBITRATION

Finally, more than a year later, Malaysia provided Singapore with the details of her technical studies on 4 July 2003. However, at the same time, Malaysia invoked Article 286 of the 1982 *UN Convention on the Law of the Sea* (UNCLOS), and initiated arbitration under Annex VII of the UNCLOS.

Article 286 of the UNCLOS states:

Subject to section 3, any dispute concerning the interpretation or application of this Convention shall, where no settlement has been reached by recourse to section 1, be submitted at the request of any party to the dispute to the court or tribunal having jurisdiction under this section.

Singapore reminded Malaysia that under Article 283, parties to a dispute are under an obligation to exchange views and to attempt to settle the dispute through negotiations.

Article 283 (Obligation to exchange views) states:

1. When a dispute arises between States Parties concerning the interpretation or application of this Convention, the parties to the dispute shall proceed expeditiously to an exchange of views regarding its settlement by negotiation or other peaceful means.
2. The parties shall also proceed expeditiously to an exchange of views where a procedure for the settlement of such a dispute has been terminated without a settlement or where a settlement has been reached and the circumstances require consultation regarding the manner of implementing the settlement.

Singapore therefore invited Malaysia to come to the negotiating table. On 13 and 14 August 2003, meetings were held in Singapore. Both parties began to identify the issues at hand. Singapore gave detailed presentations on the Tuas and Pulau Tekong reclamation projects as well as oral and written responses to Malaysia. Both parties agreed that the talks were useful and both the Agents for Singapore and Malaysia agreed to continue them. Singapore then proposed that a second meeting be held and that the parties consider the formation of technical working groups to discuss the technical information. However, Malaysia imposed a pre-condition for the continuation of the talks, that is, that Singapore should stop all reclamation works in the meantime. Singapore could not accept this condition. Instead, Singapore replied that its studies and reports had demonstrated that the ongoing and planned reclamation works had not caused and would not cause any significant impact on Malaysia's concerns. Further, Singapore reassured Malaysia that it had always ensured that its reclamation works would not impede navigation through the Straits of Johor. Singapore also gave an undertaking that it would notify and consult Malaysia before it proceeded to construct transport links between Pulau Tekong, Pulau Ubin and the main island of Singapore if such links would have any effect on Malaysia's passage rights. Malaysia responded on 4 September 2003 by applying to the ITLOS for provisional measures under Article 290(5) of the UNCLOS.⁶

⁶ See *In the Dispute Concerning Land Reclamation Activities by Singapore Impinging Upon Malaysia's Rights In and Around the Straits of Johor Inclusive of the Areas around Point 20, Malaysia v. Singapore, Request for Provisional Measures*, 4 September 2003 ["Request for Provisional Measures"], online: International Tribunal for the Law of the Sea <http://www.itlos.org/start2_en.html>. Article 290(5) states: "Pending the constitution of an arbitral tribunal to which a dispute is being submitted under this section, any court or tribunal agreed upon by the parties or, failing such agreement within two weeks from the date of the request for provisional measures, the International Tribunal for the Law of the Sea or, with respect to activities in the Area, the Seabed Disputes Chamber, may prescribe, modify or revoke provisional measures in accordance with this article if it considers that prima facie the tribunal which is to be constituted would have jurisdiction and that the urgency of the situation so requires. Once constituted, the tribunal to which the dispute has been submitted may modify, revoke or affirm those provisional measures, acting in conformity with paragraphs 1 to 4".

The provisional measures that Malaysia sought were:⁷

- (a) that Singapore shall, pending the decision of the Arbitral Tribunal, suspend all current land reclamation activities in the vicinity of the maritime boundary between the two States or of areas claimed as territorial waters by Malaysia (and specifically around Pulau Tekong and Tuas);
- (b) to the extent it has not already done so, provide Malaysia with full information as to the current and projected works, including in particular their proposed extent, their method of construction, the origin and kind of materials used, and designs for coastal protection and remediation (if any);
- (c) afford Malaysia a full opportunity to comment upon the works and their potential impacts having regard, *inter alia*, to the information provided; and
- (d) agree to negotiate with Malaysia concerning any remaining unresolved issues.

Malaysia appointed Dr. Kamal Hossain of Bangladesh as its ad hoc Judge. Singapore appointed Prof. Bernard Oxman of the USA as its ad hoc Judge. On 20 September 2003, Singapore submitted its response to Malaysia's Request. Oral hearings were then held at five public sittings on 25-27 September 2003.⁸

While the two Agents were in Hamburg, Germany, the President of the ITLOS, Judge Dolliver Nelson, consulted with them about the composition of the Arbitral Tribunal. Article 3 of Annex VII of the UNCLOS prescribes a tribunal of five members. The two ad hoc Judges, Dr. Hossain and Prof. Oxman, were appointed by the Parties. Since the two Parties could not agree on the remaining three arbitrators, the President of the ITLOS could exercise his power under Article 3(e) of Annex VII to make the appointments and is, in fact, required to do so within thirty days of receiving a request from either party to the dispute. Singapore made such a request on 9 September 2003, which meant that the appointments of the arbitrators had to be made by 9 October 2003. Consultations in Hamburg between Judge Dolliver Nelson and the two Agents resulted in the appointment by Judge Nelson of Dr. Christopher Pinto of Sri Lanka as the President of the Tribunal. Prof. Ivan Shearer of Australia and Sir Arthur Watts of the UK were appointed as the two other members.

On 8 October 2003, the ITLOS delivered its unanimous judgement.⁹ A notable feature of the judgement is that the two ad hoc Judges filed a Joint Declaration.¹⁰ This is a rare occurrence. The court did not accede to Malaysia's request for provisional measures against Singapore. In that sense, the outcome was a victory for Singapore. Instead, the court required the two Parties to establish a group of independent experts, with the mandate to conduct a study on terms of reference to be agreed between Malaysia and Singapore. The group of experts was tasked 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 court because it compelled the two Parties to return to a co-operative mode and to resolve their differences on the basis of an objective study by independent experts.

IV. SUBSEQUENT TO THE DELIVERY OF THE ITLOS JUDGEMENT

Malaysia appointed Professor Roger Falconer and Professor Christopher Fleming of the United Kingdom as its two experts. Singapore appointed Professor Kees d'Angremont of the Netherlands and Professor William Kamphuis of Canada as its experts. Professor

⁷ Para. 13, Request for Provisional Measures.

⁸ Verbatim records of the oral proceedings can be found on the ITLOS website at <http://www.itlos.org/start2_en.html>.

⁹ The judgement can be found on the ITLOS website at <http://www.itlos.org/start2_en.html>.

¹⁰ See "Joint declaration of Judges *ad hoc* Hossain and Oxman" on the ITLOS website at <http://www.itlos.org/start2_en.html>.

Falconer and Professor d'Angremond co-chaired the Group of Experts (GOE). Several rounds of negotiations were held before both Parties reached agreement on the GOE's terms of reference. The two governments also agreed to appoint an official each to act as its liaison with the GOE. DHI-Water and Environment, an international consulting and research organisation, was appointed by both governments to assist the GOE in its work.

The whole process worked out very well. The four experts were able to work in a collegial, professional and independent manner. The two liaison officers, Hajjah Rosnani and Mrs. Cheong Koon Hean, developed a good working relationship. The relationship of mutual respect between the two liaison officers also greatly eased the process. Working under tremendous pressure of time, DHI-Water and Environment succeeded in presenting a rigorous (and voluminous) study to the GOE.¹¹ This report was carefully studied by the GOE which then submitted a unanimous report to the two governments on 5 November 2004. The fact that the report was unanimous made it difficult for either Malaysia or Singapore not to accept the report as a basis for their subsequent negotiations to resolve the dispute. Thus, the two governments agreed to the use of the recommendations of the GOE as a basis for seeking a settlement. The study found that Singapore's reclamation works had not caused any serious impact. Of the fifty-seven impacts identified by the experts, they found that forty of them could be detected only in the computer model, but were not likely to be detectable in the field. Of the remaining seventeen impacts, mitigating measures to eliminate them were recommended.

Two rounds of negotiations were held on 22-23 December 2004 in Singapore and 7-9 January 2005 at the Malaysian Embassy in The Hague, the Netherlands. On 9 January 2005, both parties reached an *ad referendum* agreement to settle the dispute.¹² At Malaysia's request, a third round of negotiations was held in Singapore on 8-9 February 2005.

On 10 January 2005, the Agents for the respective governments appeared before the Arbitral Tribunal at the Peace Palace in The Hague. The agreement to meet on 8 and 9 January was useful as it put pressure on the two delegations to settle before they appeared before the tribunal. Before the tribunal, the two Agents took turns to read a joint statement informing the tribunal that the two governments had reached an *ad referendum* agreement to settle the dispute. They promised to inform the tribunal as soon as the agreement had been approved and signed by both governments. The tribunal will then be able to make an order terminating the case.

On 26 April 2005, both governments signed the Settlement Agreement, marking an amicable resolution of the dispute.

V. LESSONS LEARNT

First, the national interests of Singapore are best served by its strict adherence to international law. The importance of international law to Singapore has been reinforced by this land reclamation case and the case of Pedra Branca which is before the International Court of Justice.¹³

¹¹ The report, "Report of the Group of Independent Experts (GOE) in the matter of the ITLOS Order of 8 October 2003, 5 November 2004", is available online at <http://www.mfa.gov.sg/internet/press/land/GOE-Final_Report.PDF>.

¹² A joint press statement was issued by both countries on 9 January 2005; "Case Concerning Land Reclamation by Singapore in and around the Straits of Johor — Joint Press Statement" online: SPRINTER <<http://app.sprinter.gov.sg/data/pr/2005011402.htm>>.

¹³ On 24 July 2003, Malaysia and Singapore jointly submitted to the International Court of Justice a dispute concerning sovereignty over Pedra Branca/Pulau Batu Puteh, Middle Rocks and South Ledge. They did so by notifying the Court of a Special Agreement between them which was signed on 6 February 2003 at Putrajaya and entered into force on 9 May 2003. For a succinct account of this dispute, see Simon S.C. Tay, "Singapore: Review of Major Policy Statement" (2004) 8 S.Y.B.I.L. 219 at 222-3. Also see *Sovereignty over Pedra Branca/Pulau Batu Puteh, Middle Rocks and South Ledge (Malaysia/Singapore)*, online: International Court of Justice <www.icj-cij.org>.

Second, there is no basis for the fear that the ITLOS would be more easily swayed by pro-developing country or pro-environment arguments than, say, the ICJ. The ITLOS has demonstrated competence and integrity which inspires confidence.¹⁴ Third, an important determinant or influence on the state of Singapore-Malaysia bilateral ties is the personality and preferences of the Malaysian Prime Minister. It is not certain that the land reclamation case would have been settled amicably if Dr. Mahathir were still the Prime Minister of Malaysia.¹⁵

Fourth, third-party processes, whether of a legal (*eg.*, submitting a dispute to the ITLOS under the provisions of the UNCLOS) or a technical (*eg.*, the GOE report) nature, are very useful tools to break impasses and to bring disputes to an amicable resolution. Often, the parties themselves would have politicised the dispute to the extent that it is difficult for either party to step back or compromise without third-party intervention.¹⁶ Third-party intervention also permits the application of objective criteria in the search for acceptable solutions. A good example is the employment of the technical expertise of the GOE in this case. This confidence in the effectiveness of third-party intervention explains Singapore's willingness to submit the dispute with Malaysia over Pedra Branca to the ICJ and why Singapore has also suggested the use of third-party resolution methods to resolve other seemingly intractable disputes with Malaysia, such as the Malayan Railway and the price that Singapore pays Malaysia for water supplied.

Fifth, as a maritime nation and State Party to the UNCLOS, Singapore should actively cultivate a keen awareness of its rights and responsibilities under the Convention. Its provisions touch on a broad range of activities in and affecting the oceans and their resources. It is also important that Singapore takes an active interest and, when needed, an active role, in the formulation of these agreements and international legal norms because, as a small country, Singapore relies on them.

Sixth, the ITLOS hearing in Hamburg underlined the importance of meticulous preparation and an intimate familiarity with every point of one's case. Nothing can substitute the need for hard work and careful preparation before one appears before an arbitral tribunal or

¹⁴ The ITLOS has heard thirteen cases since its formation. The case of *Malaysia v Singapore* was the third request for provisional measures to come before the ITLOS. For an overview of the jurisprudence of the ITLOS thus far, see Christoph Schwarte, "Environmental Concerns in the Adjudication of the International Tribunal for the Law of the Sea" (2004) 16 *Geo. Int'l Env'tl. L. Rev.* 421.

¹⁵ See Assif Shameen, "Commentary: Malaysia and Singapore: A New D tente", *BusinessWeek Online*, 6 September 2004, online at <http://www.businessweek.com/magazine/content/04_36/b3898081.htm> where the author describes how tensions in Malaysia-Singapore relations eased when Mahathir Mohamad stepped down and Abdullah Badawi became the Prime Minister of Malaysia. Similar sentiments were expressed in an article that appeared in the *Washington Times*; see Sonia Kolesnikov-Jessop, "Singapore Improving Ties with Malaysia", 26 August 2005, online: *Washington Times* <<http://washingtontimes.com/upi-breaking/20040825-095111-2962r.htm>>.

¹⁶ For an interesting discussion of how this dispute was "securitised" (*i.e.*, made into a security issue) and why such securitisation or politicisation should be avoided, see Kog Yue-Choong, "Environmental Management and Conflict in Southeast Asia — Land Reclamation and its Political Impact", Project on Non-Traditional Security in Asia, Institute of Defence and Strategic Studies (IDSS), Nanyang Technological University, online: IDSS <<http://www.idss-nts.org/environment.htm>>. For an alternative view of how conciliation and inquiry procedures may present viable and attractive alternatives to traditional third-party dispute resolution methods such as adjudication and arbitration in the management of Singapore-Malaysia relations, see C.L. Lim, "The Uses of Pacific Settlement Techniques in Malaysia-Singapore Relations", (2005) 6(2) *Melbourne Journal of International Law* 313. Also see Simon S.C. Tay, "The 17th Singapore Law Review Lecture: The Singapore-Malaysia Relationship and the Future Roles of International Law", (2004) 24 *Sing.L.Rev.* 78-92; the author argues that "legal approaches and international law clearly are emergent factors in Singapore-Malaysia relations" (at 92). He also suggests that Singapore and Malaysia establish a joint committee for the study, consultation and conciliation of bilateral issues. However, unlike the committee established in the land reclamation dispute, the proposed joint committee should be given a broad mandate to discuss the spectrum of issues that remain outstanding between both countries. The author believes that this joint committee "...can usefully search for ways in which legitimate concerns from both sides can be addressed. Such a joint working committee would be a useful counter-point to the friction of litigation" (at 91).

in a court of law. A lawyer will not be able to effectively present her case without thorough knowledge of the case.

Seventh, Singapore benefited from the fact that the various agencies involved in the land reclamation process and the settlement of the dispute arising from the reclamation activities were united by a common objective. This engendered close and smooth coordination and cooperation which allowed the Singapore delegation to respond quickly and effectively to developments.

Eighth, an effective negotiator is one who is able to understand the mindset of the other party. To negotiate successfully with Malaysia, a Singapore negotiator should understand the content of the Malay “cultural box” and behave in a manner that is not offensive to a Malay. The way to approach such negotiations would be to adopt a “halus” manner, combining the “hard power” of solid facts and legal arguments with the “soft power” of courtesy, friendship and warmth. Therefore, a good negotiator must possess I.Q., E.Q. (emotional intelligence) and C.Q. (cultural intelligence).

Ninth, it is unrealistic and counter-productive for Singapore negotiators to enter discussions with their counterparts with the expectation that they will behave like Singaporeans. Singapore negotiators cannot expect others to be equally efficiency-driven and must cultivate the virtue of patience.

Finally, key to the resolution of disputes is good inter-personal dynamics between players at all levels. As mentioned earlier, the GOE members interacted very well amongst themselves even though each of them was appointed by one of the parties to the dispute. The good working relationship certainly contributed to the unanimity of the findings of the report, which in turn, provided an excellent basis upon which the two governments could find an amicable solution to the dispute. At the level of the liaison officials, both the Singapore and Malaysia liaison officers got on very well and this personal rapport was crucial to the successful joint administration of the consultancy contract with DHI-Water and Environment. This in turn facilitated the successful conclusion of the study. Finally, at the level of the Agents of the two governments, the very good personal relations between the two Agents developed over many years helped them to bridge the differences in arriving at the Settlement Agreement acceptable to both governments. It is clear that such good personal relations must continue to be fostered between officials of both governments at all levels. As neighbours, disagreements from time to time are inevitable. Good inter-personal dynamics, however, will help significantly in enabling both parties to have at least frank and friendly discussions of those differences, and optimally, the amicable resolution of them.

