

THE USES OF PACIFIC SETTLEMENT TECHNIQUES IN MALAYSIA–SINGAPORE RELATIONS

C L LIM*

[States are compelled to seek flexibility in the design of their international law-related policies. Malaysia and Singapore are not exceptional in this respect. Both countries appeal to international law not infrequently when presenting their respective foreign policy positions. Both countries are active members of the UN; neither has submitted to the compulsory jurisdiction of the International Court of Justice but both have resorted to the Court by special agreement. However, while Malaysia's decisions to litigate the Ligitan and Sipadan issue with Indonesia and to go to court with Singapore over Pedra Branca/Pulau Batu Puteh presented relatively little risk, a low-risk legal strategy remains a legal strategy. While there may be differences in the way the two countries frame their strategies or perceive the other's approaches, Singapore's approach is not materially different from Malaysia's; in truth, these differences represent a difference merely of emphasis. Both nations are 'legalists', but arguably neither is more 'legalistic' than the other. This paper proposes a bespoke institutional arrangement between Malaysia and Singapore for the pacific settlement of bilateral disputes, and discusses what such an institutional arrangement might add to the present situation. In particular, routine technical issues which may lead to dispute could be managed before they become politicised and compel litigation.]

CONTENTS

- I Introduction
- II International Pacific Settlement Techniques: The European Experience
- III 'Political Realism' in the Foreign Policies of Malaysia and Singapore
- IV Divergent Perspectives on the Characterisation of International Disputes
- V Distinguishing the Problem of Characterisation from Calculations of Foreign Policy
- VI The Uses and Merits of Commissions of Inquiry and Conciliation
 - A The Idea of a Malaysia–Singapore Commission
 - B Conciliation Commissions
 - C Commissions of Inquiry
 - D Two Procedures Coordinated in a Single Instrument: The 'American' and 'European' Models Compared
 - E Four Procedures (or More) Coordinated in a Single Instrument
 - F The Question of Suitability and Other Means of Calibrating the Device
- VII Conclusion

I INTRODUCTION

A recent development in the management of the Malaysia–Singapore bilateral relationship is the introduction of adjudication and arbitration as a means of dispute settlement. This paper is about the use of these devices in handling some

* Associate Professor, Faculty of Law, National University of Singapore. I am grateful to Ms Jolene Lin for her care, consideration and substantial assistance in preparing the manuscript for publication, and to the organisers of the National University of Singapore–University of Malaya Law School Centennial Seminars for inviting me to present this paper. These views are purely personal, and I alone am responsible for any errors or omissions. All translations, unless otherwise indicated, are the work of the author.

longstanding issues between Malaysia and Singapore, two nations in a region which has drawn more criticism than understanding about the traditional, informal 'ASEAN way' in which the relations of the Association of Southeast Asian Nations are conducted.

Having followed the progress of the *Sovereignty over Pulau Ligitan and Pulau Sipadan* case¹ between Indonesia and Malaysia, observers may speculate that we are witnessing a significant development in the contemporary conduct of intra-Southeast Asian international relations. The downturn in Malaysia–Singapore relations in the last days of the Mahathir administration led both sides to experiment with international litigation in their relations with each other. In this context, some international lawyers may perceive that the latest controversies would have at least prompted Malaysia and Singapore to explore, in a more active way than has been seen previously, the various available means of international pacific settlement.

This development is noteworthy since both Malaysia and Singapore, while being members of the United Nations since independence and having had their own uses for international law, have rarely sought to handle their relations with each other on the basis of bilateral legal institutions or by way of international litigation.

II INTERNATIONAL PACIFIC SETTLEMENT TECHNIQUES: THE EUROPEAN EXPERIENCE

Neither Singapore nor Malaysia has previously demonstrated an inclination to deal with disputed issues through legal and/or legal-institutional means. This is perhaps unsurprising when the foreign policy cultures of Malaysia and Singapore are considered in light of the Southeast Asian preference for 'quiet diplomacy'. Additionally, in historical terms, the case for use of pacific settlement techniques or legal-institutional responses to matters of high international politics is sometimes overstated, and few pause to consider that the use of these measures to effect peaceful relations between states is, in truth, a relatively recent innovation that has had both moments of glamour and disrepute in the course of the last hundred years or so.

In the late 19th century, settlement through international arbitration was revived from antiquity with the overall success of the use of mixed commissions, comprising one or two arbitrators chosen by each side who in turn chose a third or fifth — such as the commission established under the 1794 *Jay Treaty of Amity, Commerce and Navigation* between the United Kingdom and the United States.² Arbitration was subsequently given renewed impetus by the 1872 *Alabama Claims* arbitration (sometimes referred to as the *Geneva Arbitration*)³ and, by that time, had once again become an established feature of European foreign affairs. In the last 20 years of the 19th century, there were about 90

¹ (*Indonesia v Malaysia*) (*Merits*) [2002] ICJ <<http://www.icj-cij.org>> at 1 October 2005 ('*Ligitan and Sipadan*'). See also John Merrills, 'Sovereignty over Pulau Ligitan and Pulau Sipadan (*Indonesia v Malaysia*)', *Merits, Judgment of 17 December 2002*' (2003) 52 *International and Comparative Law Quarterly* 797.

² Opened for signature 19 November 1794, UK–US, 12 Bevens 13 (entered into force 24 June 1795).

³ John Moore, *History and Digest of the International Arbitrations to which the United States Has Been a Party* (1898) vol 1, 495–682.

international arbitrations.⁴ From around 1870 onwards, the use of mixed commissions with persons appointed by both sides came to exist alongside a growing trend of resort to independent jurists.⁵ Thus, in 1872, the dispute over Delagoa Bay⁶ between the UK and Portugal, while submitted to the President of France, was decided by a commission of five eminent Frenchmen appointed by the President and chaired by an eminent French jurist.⁷ It was in the same year that the *Alabama Claims* arbitration also instituted a new feature, with three other appointees of different European sovereigns joining the traditional one member from each side to sit together as a collegiate international court of five persons.⁸ The 1891 France–UK dispute concerning the Newfoundland lobster fisheries⁹ was also decided by two members from each side and three ‘jurisconsults’ chosen by the common consent of both France and the UK.¹⁰ The 1893 *Behring Sea* arbitration¹¹ between the UK and the US is another example.¹² These developments made arbitration what John Simpson and Hazel Fox call ‘a widely spread international custom’.¹³

However, it would be a mistake to think that Southeast Asian foreign policy decision-makers today would tend to resort to arbitration in the event of a dispute breaking out. Without wishing to intrude unduly into the province of the diplomatic historian, perhaps a little may be said here of the true record of arbitration during the period of these developments, up to the outbreak of the Second World War. With hindsight, the use of arbitration was not only badly overstated, but contributed to much subsequent scepticism about international arbitration and adjudication during the Cold War period, despite the establishment of the International Court of Justice in 1945.

The Hague Peace Conferences of 1899 and 1907 took place in the wake of this 19th century revival of the use of arbitration and conciliation procedures.¹⁴

⁴ John Simpson and Hazel Fox, *International Arbitration: Law and Practice* (1959) 10.

⁵ *Ibid.*

⁶ An inlet of the Indian Ocean, situated on the east coast of South Africa.

⁷ Simpson and Fox, above n 4, 10.

⁸ *Ibid.* 8.

⁹ See *Agreement between Great Britain and France*, signed 11 March 1891, as reproduced in (1890–91) 83 *British and Foreign State Papers* 415.

¹⁰ Simpson and Fox, above n 4, 11.

¹¹ *Treaty between Great Britain and the United States for Submitting to Arbitration the Questions relating to the Seal Fisheries in Behring Sea*, signed at 29 February 1892, as reproduced in (1891–92) 84 *British and Foreign State Papers* 48. See also Moore, above n 3, 935; *Award of the Tribunal of Arbitration Constituted under the Treaty Concluded at Washington, the 29th of February, 1892, between the United States of America and Her Majesty the Queen of United Kingdom of Great Britain and Ireland* as reproduced in (1912) 6 *American Journal of International Law* 233.

¹² Simpson and Fox, above n 4, 11.

¹³ *Ibid.* 12.

¹⁴ See, eg, James Scott, ‘The Work of the Second Hague Peace Conference’ (1908) 2 *American Journal of International Law* 1, 6–7.

Chapter II, pt IV of the 1899 *Convention for the Pacific Settlement of International Disputes* established the Permanent Court of Arbitration.¹⁵ By way of an elaborate procedural device, the parties would each choose two persons from a list of potential arbitrators ‘of known competency in questions of international law’, who themselves would choose an umpire.¹⁶ Failing this, a third power agreed between the two countries would elect an umpire.¹⁷ If this procedure also failed, each country would choose a separate power who would then agree on the choice of umpire.¹⁸ There were also procedures for good offices, mediation and international inquiry.¹⁹ The procedure for international inquiry was intended to exclude disputes concerning vital interests and honour.²⁰ In addition, international inquiries were set up by ad hoc agreements to deal with questions or disputes of fact only, so as to facilitate a solution by elucidating the facts in an impartial manner.²¹ Article XVI of the 1899 *Pacific Settlement Convention*, which stated that

[i]n questions of a legal nature, and especially in the interpretation or application of International Conventions, arbitration is recognized by the Signatory Powers as the most effective, and at the same time the most equitable, means of settling disputes which diplomacy has failed to settle ...

also contributed to the crystallisation of the presumption that foreign affairs disputes ought to be settled by legal-institutional means.

The 1899 *Pacific Settlement Convention* was hailed as ‘the most notable and enduring single triumph of human reason of the nineteenth century’.²² In truth, the four arbitrations conducted under this mechanism were only of secondary importance and did not touch on questions of international politics which may have been taken to prove the utility, effectiveness and efficacy of international arbitration in the case of most international disputes.²³ Both the 1899 and 1907 Conferences failed to achieve the aim of establishing a mechanism for *compulsory* arbitration.²⁴ Professor James Scott wrote of the failure of the 1907

¹⁵ Opened for signature 29 July 1899, [1901] ATS 130 (entered into force 4 September 1900) (‘1899 *Pacific Settlement Convention*’).

¹⁶ *Ibid* art XXIII.

¹⁷ *Ibid* art XXVI.

¹⁸ *Ibid*. Under the 1907 *Convention for the Pacific Settlement of International Disputes*, opened for signature 18 October 1907, 54 LNTS 435 (entered into force 26 January 1910) (‘1907 *Pacific Settlement Convention*’), which remains in force, the matter is governed by art 45: see below n 125.

¹⁹ 1899 *Pacific Settlement Convention*, above n 15, arts II–XIV.

²⁰ Charles Hyde, ‘The Place of Commissions of Inquiry and Conciliation Treaties in the Peaceful Settlement of International Disputes’ (1929) 10 *British Year Book of International Law* 96, 98.

²¹ Ko Nakamura, ‘The *Convention for the Pacific Settlement of International Disputes* in Historical Perspective (In Commemoration of the Centennial of the First Hague Peace Conference)’ (2000) 43 *Japanese Annual of International Law* 3, 5. See also Hyde, above n 20, 98. More will be said of conciliation in Part VI of this article.

²² David Hill, ‘The Second Peace Conference at the Hague’ (1907) 1 *American Journal of International Law* 671, 680.

²³ Scott, above n 14, 11.

²⁴ *Ibid* 24.

Conference:

It was a matter of great regret to the thirty-two powers voting on behalf of a general treaty of obligatory arbitration, against which there were only nine votes recorded, that the opponents of this great and beneficent measure stood upon the rights of the majority to block the will of the majority; but as Germany and Austria refused to yield ... and as an attempt to sign a special convention dealing with the subject, to be binding only on those who voted for it, would have created bitterness of feeling ... it was deemed in the interests of peace and international understanding to adopt the principle in the abstract without seeking to incorporate it in the concrete form of a convention.²⁵

In fact, however, it was common to view certain sorts of 'political' questions as not being amenable to international arbitration and international commissions of inquiry. In other words, there was never any question of 'universal' obligatory arbitration but only one of 'inclusive' obligatory arbitration, whereby only certain specified classes of dispute were submitted to obligatory arbitration.²⁶

The year of the Second Hague Conference, 1907, probably represented the high point of public optimism in Europe and the American continent about the utility of international arbitration and conciliation procedures. In that year, a survey of existing arbitration agreements demonstrated five different classes or categories of such agreements.²⁷

The first category, consisting of 18 treaties involving a wide range of European countries, included differences of a judicial kind or questions concerning the interpretation of treaties, but excluded questions involving the vital interests, independence or honour of the parties, as well as cases where the interests of third powers were involved.²⁸

The second category comprised a general treaty between Spain and Portugal which included differences of a judicial kind and related to the interpretation of treaties, but excluded questions involving the vital interests, independence or honour of the parties.²⁹ It differed from the first category in that it also provided for a two-step procedure. Disputes that had failed to settle by direct diplomatic means were submitted to a commission, and only if that failed to procure a settlement would the matter be submitted to arbitration instead.

A third category comprised six Belgian treaties, which included within the scope of their arbitration clauses those questions related to the interpretation of treaties or to pecuniary claims, but (as with the first category of treaties) excluded questions involving the vital interests, independence or honour of the parties as well as cases where the interests of third powers or countries were involved.³⁰

A fourth category comprised six treaties involving Norway, Spain, Sweden, Switzerland and Russia, which submitted any question to arbitration, but

²⁵ Ibid 24–5.

²⁶ See William Hull, 'Obligatory Arbitration and the Hague Conferences' (1908) 2 *American Journal of International Law* 731, 731–2. On the other hand, 'exclusive' obligatory arbitration focused on what classes of dispute ought to be excluded rather than what ought to be included: at 736.

²⁷ Hill, above n 22, 681.

²⁸ Ibid 681–2.

²⁹ Ibid 682.

³⁰ Ibid.

excluded (as with the first category) disputes involving the vital interests, independence or honour of the parties and cases where the interests of third powers or countries were involved.³¹

A fifth category, consisting of only two treaties — between Denmark and the Netherlands, and between Denmark and Italy — submitted all questions to arbitration without any reservations whatsoever (ie to ‘universal obligatory arbitration’).³²

The upshot is that few states considered compulsory arbitration for all questions without reservation, despite Hill pointing out at the time that ‘[t]he facts show a steady growth of public opinion and of governmental confidence in many different countries in the direction of favouring the obligatory arbitration of international disputes’.³³

As Baron Russell of Killowen, then Lord Chief Justice of England, put it:

It behoves ... all who are friends of peace and advocates of arbitration to recognize the difficulties of the question, to examine and meet these difficulties, and to discriminate between the cases in which friendly arbitration is and in which it may not be practically possible. Pursuing this line of thought, the shortcomings of international law reveal themselves to us and demonstrate the grave difficulties of the position ... there are differences to which ... arbitration is inapplicable ... Men do not arbitrate where character is at stake, nor will any self-respecting nation readily arbitrate on questions touching its national independence or affecting its honour.³⁴

Putting aside the existence of a widely-felt need to enter ‘carve-outs’, or even to commit only certain specific classes of dispute to compulsory settlement (ie the doctrine of limited jurisdiction), the single largest blow to the idea of institutional means for pacific settlement of disputes was dealt during the inter-war period. This was despite the continued use of such procedures in the aftermath of the First World War, and the creation of the Permanent Court of International Justice. These institutional procedures, together with the League of Nations, had reflected a sense of optimism that war could be averted and denounced through such means. However, the strain of events during the inter-war period was to prove this hope false. The prohibition of the use of military force in international affairs was, famously, not recognised by Japan in the context of the Manchurian Incident.³⁵ Even the US could only urge the recognition of the Stimson doctrine — namely, that acquisitions of territory by force would not be recognised.³⁶ This was to prove to be of little effect at the

³¹ Ibid 682–3.

³² Ibid 683.

³³ Ibid.

³⁴ Baron Russell of Killowen, ‘On the Sentiment for Peace and in Favour of Arbitration as the Alternative for War’ (Speech delivered at the Law Congress of the American Bar Association, Saratoga Springs, US, 20 August 1896) as reproduced in Jan Gillis Wetter, *The International Arbitral Process: Public and Private* (1979) vol 1, 9–10.

³⁵ See Ian Brownlie, *International Law and the Use of Force by States* (1963) 294.

³⁶ David Turns, ‘The Stimson Doctrine of Non-Recognition: Its Historical Genesis and Influence on Contemporary International Law’ (2003) 2 *Chinese Journal of International Law* 105, 105.

time, at least in restraining Japan's conduct.³⁷

At the same time, Europe had also begun experimenting unsuccessfully with resolving French concerns about European security through international arbitration.³⁸ This device took the form of the ill-fated *Geneva Protocol*,³⁹ the purpose of which was to close two 'gaps' in the League of Nations collective security system — firstly, to address situations where the Council failed to agree, and secondly to address situations where the subject matter of the particular dispute was considered to be within the domestic jurisdiction of a party.⁴⁰ Regarding the first issue, the *Geneva Protocol* proposed to submit such disputes which could not be resolved to the PCIJ for arbitration.⁴¹ Regarding the second issue, the *Geneva Protocol* proposed an international conciliation procedure instead.⁴² These proposals failed to satisfy the French demand for greater powers to be accorded to the League Council under art 16 of the *Covenant of the League of Nations*.⁴³ Japan's awkward questions concerning the second principle (ie that questions concerning 'domestic jurisdiction' should be submitted to conciliation) also raised the controversial issue of Japanese immigration to the US.⁴⁴ As far as Britain was concerned, the change of government with the rise of Stanley Baldwin, a Conservative, meant that Britain would not accept the *Geneva Protocol*.⁴⁵

The eventual failure both of the ability of the League to handle the Manchurian Incident (through art 16 of the *Covenant of the League of Nations*) and the collapse of the *Geneva Protocol*, signified the death in all but name of

³⁷ Indeed, Japan's international law adviser, Thomas Baty, had argued in his advice that:

[I]f, by the means recognized by the law of nations, a few states arise in the geographical area of the old Chinese Empire, an outside nation ... can and must treat that State as independent. Whether it shall expressly or tacitly by acts or declarations recognise that independence or not is a question for itself. It is admitted that such a recognition, if made, constitutes no just offence to the parent State, and it is submitted that it constitutes no just cause of offence to the other States.

Thomas Baty, 'Recognition Move Approved by Baty', *Japan Advertiser* (Tokyo, Japan), 17 August 1932 as reproduced in Anthony Carty and Richard Smith (eds), *Sir Gerald Fitzmaurice and the World Crisis: A Legal Adviser in the Foreign Office, 1932–1945* (2000) 121, 122. See also Shinya Murase, 'Thomas Baty in Japan: Seeing through the Twilight' (2002) 73 *British Year Book of International Law* 315, 328–32.

³⁸ The proposal to settle these questions with the *Protocol for the Pacific Settlement of International Disputes*, signed 2 October 1924, [1924] *League of Nations Official Journal*, Special Supp 23, 498 ('*Geneva Protocol*'), was, of course, hardly the sole, or even the primary cause. Numerous factors contributed to the Second World War, amongst which may be cited the lacklustre nature of the League of Nations' efforts in disarmament on the whole between 1920–34; an inability to deal with French security fears (which had also been augmented by the League's impotence in China against Japanese aggression); German resurgence and German determination to break free of the shadow of Versailles (not to mention a growing impatience with the League's inability to effect French disarmament or accept German rearmament); the UK not wishing to join in provision for broader collective security arrangements; and US isolationism: Frederick Northedge, *The League of Nations: Its Life and Times, 1920–1946* (1986) 114–17.

³⁹ Above n 38.

⁴⁰ See Edward Carr, *International Relations between the Two World Wars, 1919–1939* (1967) 90.

⁴¹ *Geneva Protocol*, above n 38, art 4. See also *ibid*.

⁴² *Geneva Protocol*, above n 38, art 5. See also Carr, above n 40.

⁴³ Carr, above n 40, 91.

⁴⁴ *Ibid* 92.

⁴⁵ *Ibid* 92–3.

the League of Nations and, in part, gave rise to the Second World War, something which all had hoped to avert.⁴⁶ It also gave the sense that proposals such as those contained in the *Geneva Protocol* were at least partly to blame. In retrospect, the failure of idealistic notions such as those embodied in the *Geneva Protocol*, which had inflated the value of international arbitration and conciliation, together with the idealism of the 1928 *Pact of Paris*,⁴⁷ which sought to outlaw war for the first time, paved the way for the realist view of international politics. It is this realist view that came to dominate so much of mainstream foreign policy thinking, not least in a newly emergent and independent Asia after the war.

III 'POLITICAL REALISM' IN THE FOREIGN POLICIES OF MALAYSIA AND SINGAPORE

Malaysia and Singapore therefore came into being at a time when disenchantment with international institutions and international law was arguably at an all-time high, and the US and the Soviet Union held the balance of power in international relations.⁴⁸ In the midst of these global realities, the newly emergent states of Asia and Africa sought to define their foreign policies in terms of non-alignment.⁴⁹ The UN, which had started with such great hope, itself

⁴⁶ See above n 38.

⁴⁷ *General Treaty for Renunciation of War as an Instrument of National Policy*, opened for signature 27 August 1928, [1929] ATS 1 (entered into force 24 July 1929) ('*Pact of Paris*').

⁴⁸ See generally Hedley Bull, *The Anarchical Society: A Study of Order in World Politics* (1977).

⁴⁹ Ram Prakash Anand, *Studies in International Law and History: An Asian Perspective* (2004) 22. Note, however, that the first Malaysian administration of Tunku Abdul Rahman had earlier taken a 'pro-Western' approach, with the Tunku saying that

where there has been a conflict between the two ideologies — Western and Eastern ideologies — then I have made myself quite clear before that we side with the Western ideology, or the Western understanding of democracy.

Tunku Abdul Rahman, 'Three Concepts of Democracy — We Follow Western One, Says Tengku', *The Straits Times* (Singapore), 15 December 1962, 6. Putting aside the question of the communist threat, there is nonetheless truth in the observation that the 'pro-British' or 'pro-Western' approach of the administration of Tunku Abdul Rahman nonetheless 'displayed the assessment that any specific alignments would be untenable, based on a reading of the divergent ethnic, religious and cultural alignments of the country's population': Shanti Nair, *Islam in Malaysian Foreign Policy* (1997) 56. The initial strong 'pro-Western' stance, Nair argues, was simply a reaction to the perception at the time of the source of the most immediate threat: at 56. The Tunku went on subsequently to reflect that:

Well, as I saw it when I was in power before, I did not reject particularly the relationship with the Chinese [ie the People's Republic of China] ... In fact it is a power in the world and there is nothing that I said that would have prevented diplomatic relations with the communists. In fact, during my time we set up diplomatic relations with the Russians, the Yugoslavs, with most East European Communist countries. That shows that I am not that anti-communist.

Tunku Abdul Rahman, as cited in Kua Kia Soong (ed), *K Das and the Tunku Tapes* (2002) 100. However, the subsequent Tun Razak Administration demonstrated a clear shift in Malaysia's position, for as Tun Ismail put it, '[w]e cannot ask Communist China to guarantee the neutrality of Southeast Asia and at the same time say we do not approve of her': as quoted in 'Malaysia Backs UN Seat for Red China', *Malaysian Digest* (Kuala Lumpur, Malaysia), 16 October 1970, 1. It was also during the administration of Tun Razak that Malaysia began to establish its Islamic credentials on the international plane: Nair, above this note, 60–5.

became subject to these Cold War realities and constraints.⁵⁰ Its answer to war in the conduct of international affairs was to collectivise resort to armed force, with a limited exception for Member States acting in self-defence.⁵¹ Together with the disproportionate powers given to the so-called ‘Permanent Five’ Member States of the Security Council, the UN — despite all rhetoric to the contrary — embraced concert diplomacy at the expense of international law.⁵² At the same time, foreign policy in the newly-independent African and Asian nations was steeped in the international law doctrines of sovereignty, territorial integrity, noninterference in domestic affairs, pacific settlement of disputes and the prohibition of force in international relations. Foreign policy became a tool for protecting their newly-won independence and self-determination against the encroachments of hegemonic influence, something that remains true to the present day.⁵³ If international law talk helped in this, so much the better, but that was an ancillary benefit at best.⁵⁴ No one could seriously believe that, in substantive terms, wars would no longer exist, nations were truly equal, or that sovereign independence or existence could be taken for granted.

In pre-independence Malaya, the Malay kingdoms themselves had not truly sought, as the Japanese did,⁵⁵ to counter the unequal treaties imposed by Britain by actively seeking to prove that they were nations at least equal to the ‘civilised nations’ of Europe and the West. Japan did so by, amongst other things, seeking

⁵⁰ According to Thomas Franck, for example, the invasion of Czechoslovakia compelled the US, at least, to ask if it was supporting the UN because of the ideals which the UN represented, or because it was in the interests of the US to do so. As Franck commented in *Nation against Nation: What Happened to the UN Dream and What the US Can Do about It* (1985):

Such a reevaluation, undertaken honestly, would compel the repudiation of an earlier, idealistic innocence, or, rather, compel a realization that the US’s earlier idealism had been more opportunistic than anyone had cared to admit: at 76.

⁵¹ ‘The *UN Charter* emphasizes State sovereignty on the one hand and aims to maintain order by force’: Robert Cooper, *The Breaking of Nations: Order and Chaos in the Twenty-First Century* (2003) 23.

⁵² This is precisely the issue that has come to dominate the current discussions of Security Council reform.

⁵³ David P Fidler, ‘Revolt against or from within the West: TWAIL, the Developing World and the Future of International Law’ (2003) 2 *Chinese Journal of International Law* 29, 38–40.

⁵⁴ See, eg, the assessment of Singapore’s foreign policy perspective given by the late Michael Leifer, *Singapore’s Foreign Policy* (2000) 98–130.

⁵⁵ See Anand, above n 49, 47.

to prove its acceptance of international law, particularly in its armed campaigns.⁵⁶ Unlike in Japan, there was no establishment in British Malaya of a learned society devoted to the study of international law, no journal of international law and, for all intents and purposes, no foreign office international law advisers. Instead, it could be said that, by and large, the Malay kingdoms succumbed to total domination.⁵⁷ For the sultanates of British Malaya, it was accepted that Britain would remain forever in Malaya. Likewise, modern Singapore is very much the product of a treaty entered into on behalf of the East India Company by Sir Stamford Raffles with a (somewhat contested) Malay ruler.⁵⁸ It was Japanese imperialist expansion, following the reception of Japan as a 'civilised' Imperial power by the Western powers, that awakened serious Southeast Asian nationalism,⁵⁹ without which there was no incentive in the first place to demonstrate one's credentials as a 'civilised' modern nation.

Thus, to a nation established during the subsequent period of decolonisation (1950s–70s), international law signified the basic guarantees in the *UN Charter* of the sovereignty and territorial integrity of members, the requirement that disputes be settled by peaceful means and the condition that the unilateral use of force be avoided but for the necessities of self-defence.⁶⁰ As members of ASEAN, Malaysia and Singapore were again called to apply these same

⁵⁶ Ibid 48–70. China had received international law as early as 1839 in the form of Emmerich de Vattel's *Le Droit des gens, ou Principes de la loi naturelle, appliqués à la conduite et aux affaires des Nations et des Souverains* (1758), although it was not until 1864 that official support was given for a translation of Henry Wheaton's *Elements of International Law* (1836) for the use of Chinese officials: Wang Tiejia, 'International Law in China: Historical and Contemporary Perspectives' (1990) 221 *Recueil des cours* 195, 226–37. The Japanese, who had used their expertise in international law to great national advantage (at least until Japanese militarism threatened the Western Powers themselves), had acquired Wheaton's writings originally in their Chinese translation: Anand, above n 49, 43. These writings formed the basis of Chinese and Japanese attempts to counter foreign incursions into their sovereignty by invoking the European law of nations. Japan was by far the more successful, at least towards the end of the 19th century: see generally at 25–104. By its invocation of the law of nations against itself, Japan ultimately succeeded in proving its status as a civilised nation and having the Western Powers relinquish extraterritoriality: at 56.

⁵⁷ The one notable exception was His Royal Highness Sultan Abu Bakar bin Ibrahim, whose efforts bear some resemblance to Imperial Japan's strategy towards countering European imperialism: Farish Noor, *The Other Malaysia: Writings on Malaysia's Subaltern History* (2002) 15–55.

⁵⁸ The 'ruler' was Tengku Long (also known as 'Tunku Long' and 'Tengku Hussain'), whom Raffles recognised as the Sultan of Johor, under the style of Sultan Hussein Mohamed Shah. References to rival views on the legitimacy of Tengku Long's claim may be found in Rupert Emerson, *Malaysia: A Study in Direct and Indirect Rule* (1964) 83. See also Khoo Kay Kim, *Malay Society: Transformation and Democratisation* (1991) 123–4 (regarding the letter from Temenggong Abdul Rahman to the Yang di-Pertuan Muda of Rhio on the circumstances surrounding the conclusion of the treaty; Demetrius Boulger, *The Life of Sir Stamford Raffles* (1973) 167 (regarding Raffles' views on the question of succession). The text of the treaty appears in Roland Braddell, *The Law of the Straits Settlements: A Commentary* (1982) 144.

⁵⁹ This occurred with the signing of the *Treaty of Peace between Japan and Russia*, 199 ConTS 144 (signed and entered into force 5 September 1905) ('*Treaty of Portsmouth*') and the subsequent Japanese occupation of much of Asia, including British Malaya, in order to fulfil the Japanese aim of 'liberating' the 'Asiatic races' under Japanese tutelage and creating a Greater Asia Co-Prosperity Sphere: Anand, above n 49, 46–79.

⁶⁰ See especially *UN Charter* arts 1(1), 2(1), 2(3)–(4), 2(7).

doctrines, first in the founding 1967 *Bangkok Declaration*⁶¹ and subsequently in the 1971 *Kuala Lumpur Declaration*.⁶² As such, international law for them was about these basic constraints, and intra-ASEAN affairs would be handled mainly by way of ASEAN diplomacy.

These factors may be said to have existed alongside the post-war view that there was limited scope for international law and the methods of international judicial settlement where sensitive questions of international politics were involved. Beginning with the conclusion of the First World War and during the Second World War, the discipline of international relations had become established as part of a professional viewpoint about the management of foreign affairs. In this, the early pioneers such as Edward Carr in the UK, Hans Morgenthau in the US and prominent scholar-practitioners George Kennan (architect of the US containment policy) and Dean Acheson, advocated a 'realist' conception of international relations, which was opposed to the adoption of decidedly moral or legal perspectives.⁶³ At the risk of simplification, it may be fair nonetheless to say that today's professional foreign policy managers are the disciples of a professional worldview which has defined itself by not allowing moral or legal niceties to cloud rational and calculated decision-making based on national interest. National interest alone presented a reliable criterion of foreign policy formulation and execution. Even Sir Robert Jennings, sometime President of the ICJ, remarked that the view that 'wars and other resorts to force' would necessarily 'answer to the adversarial procedures of a court of justice' 'rested upon an egregiously mistaken assumption'.⁶⁴

Such views have found expression in the foreign policies of Malaysia and Singapore, particularly in respect of the stance which both countries adopt towards the 'Big Powers'. For example, the present Prime Minister of Singapore, Lee Hsien Loong, speaking then as Deputy Prime Minister, remarked publicly in an oft-quoted statement that '[t]he world of states share many characteristics with the world of beasts' such that 'good will alone is no substitute for astute self-interest'.⁶⁵ According to Michael Leifer, a highly respected commentator on

⁶¹ *Declaration Constituting an Agreement Establishing the Association of South-East Asian Nations*, opened for signature 8 August 1967, 1331 UNTS 3 (entered into force 8 August 1967) ('*Bangkok Declaration*').

⁶² *Declaration on Southeast Asia as a Zone of Peace*, opened for signature 27 November 1971, 11 ILM 183 (1972) (entered into force 27 November 1971) ('*Kuala Lumpur Declaration*'). See Amitav Acharya, *Constructing a Security Community in Southeast Asia: ASEAN and the Problem of Regional Order* (2001) 48.

⁶³ See Edward Carr, *The Twenty Years' Crisis, 1919–1939: An Introduction to the Study of International Relations* (1940); Hans Morgenthau and Kenneth Thompson, *Politics among Nations: The Struggle for Power and Peace* (6th ed, 1985) ch 1; George Kennan, *American Diplomacy* (1984) 91–103; Dean Acheson, 'Law and Conflict: Changing Patterns and Contemporary Challenges — Panel: Cuban Quarantine: Implications for the Future: Remarks' (1963) *American Society of International Law: Proceedings of the 57th Annual Meeting* 13, 13–15.

⁶⁴ Robert Jennings, 'The Role of the International Court of Justice' (1997) 68 *British Year Book of International Law* 1, 53. In addition, Jennings stated that:

Some uses of force, or resort to war, have indeed had legal disputes at the core of the matter — notably disputes about boundaries or entitlement to territory, both land and sea — but many again have not. Neither of the World Wars have even remotely lent themselves to so simplistic an analysis: at 53.

⁶⁵ Lee Hsien Loong, as cited in Leifer, above n 54, 98.

Singapore's foreign policy, this view has become closely bound up with Singapore's approach towards preserving a balance of power in the region — an approach towards foreign policy in which international law may be counted as useful precisely because its major premises (sovereignty, sovereign equality, noninterference in domestic affairs) buttress the balance of power doctrine.⁶⁶

Expressions of Malaysian foreign policy spanning various administrations have been characterised by notable shifts. The administration of Tunku Abdul Rahman was decidedly 'pro-British'.⁶⁷ However, from the Razak Administration onwards, Malaysia's policies may be said to have become clearly identified with a typically realist, balance of power approach in the form of the idea of Southeast Asian neutralisation.⁶⁸ Mooted by Tun Dr Ismail, and with the highly experienced Tan Sri Ghazali Shafie as one of its chief architects, the Razak Administration's 'neutralisation' policy soon evolved into the less formal notion of a 'Zone of Peace, Freedom and Neutrality' ('ZOPFAN').⁶⁹ This was a key plank in Malaysia's policy regarding China — indeed as part of Malaysia's policy to seek China out as a co-guarantor in the 'neutralisation' of Southeast Asia.⁷⁰ The neutralisation concept has survived through the long years of the Mahathir administration in the form of a policy of 'equidistance' or 'non-alignment' to the present day.⁷¹ Non-alignment achieves at least one key realist purpose — the rejection of specific ideological premises.

Malaysia's and Singapore's foundational perspectives on foreign policy are therefore receptive to approaches towards foreign policy issues that tend to buttress and support conceptions of the national interest that, in effect, are free of ideological connotations and designed to maintain policies that are conducive to the notion of 'equidistance' and the preservation of the regional balance of power. Such views limit resort to international law discourse to certain key doctrines pertaining to the inviolability of national sovereignty enshrined in the

⁶⁶ Leifer, above n 54, comments that:

To the extent that International Law, with all of its shortcomings, is viewed as a supporting pillar of the independence of the Republic, then it serves as an instrument of the balance of power in its traditional function of upholding the independence of all states: at 99

⁶⁷ Robert Milne and Diane Mauzy, *Politics and Government in Malaysia* (1978) 295.

⁶⁸ See, eg, *ibid.*

⁶⁹ *Ibid* 305–7.

⁷⁰ *Ibid* 304–9.

⁷¹ Reference to Mahathir's 'equidistance' doctrine (ie non-alignment) may be found in Khoo Boo Teik, *The Paradoxes of Mahathirism: An Intellectual Biography of Mahathir Mohamad* (1995) 75. For the (sometimes seemingly iconoclastic) foreign policy of the Mahathir administration, see Robert Milne and Diane Mauzy, *Malaysian Politics under Mahathir* (1999) 122–43 (note the examples at 143 of Mahathir's 'pragmatism'). For a critique of Malaysia's 'neutralisation' policy, see Tommy Koh, *The Quest for World Order: Perspectives of a Pragmatic Idealist* (1998) 239–47.

UN Charter and in key ASEAN constitutive documents.⁷²

In addition, Malaysia, like many developing countries, has 'sought to change the hegemonic process through which international law was historically made and implemented'.⁷³ Unsurprisingly, developing countries have demonstrated a visceral ambivalence towards structures of international law and organisations that are perceived to have been derived from a distinctly European experience. Other commentators have also pointed out the complexities of making certain European assumptions about conceptions of the rule of law in relation to the Asian region when assessing the (slow) growth of transnational legal and institutional procedures and mechanisms in Asia.⁷⁴

All of these factors may be said to bear on the question of the propensity of Malaysia and Singapore to resort to fuller use of legal solutions and legal-institutional mechanisms in handling their relations with each other.

⁷² As the Malaysian Prime Minister Abdullah Ahmad Badawi has said:

Malaysia's foreign policy has always been, and will continue to be, the protection and promotion of national interest. Malaysia has no ideology to export ... [but] will ... work to promote the establishment of a regional and international environment that is stable and peaceful. ... In the conduct of bilateral relations with other countries, Malaysia shall always be guided by the fundamental principles enshrined in the 1976 *Treaty of Amity and Cooperation in Southeast Asia*, in particular the principle[s] of:

- Mutual respect for sovereignty and territorial integrity;
- Non-interference in the internal affairs of one another;
- Settlement of disputes by peaceful means.

Dato Seri Abdullah bin Haji Ahmad Badawi, Prime Minister's Office, Malaysia, 'Conference of Malaysian Heads of Mission: Malaysian Foreign Policy in the Era of Globalization' (Speech delivered at the Conference of Malaysian Heads of Mission, Putrajaya Convention Center, Putrajaya, Malaysia 5 July 2004) available at <<http://www.pmo.gov.my/WebNotesApp/PMMain.nsf/0/01df0d8d2bbe883c48256ec80033e387?OpenDocument&Click=>> at 1 October 2005. The position is virtually identical to Singapore's, aside from subtle differences of emphasis, perhaps due to Singapore's acute consciousness of its status as a small island city state: Diane Mauzy and Robert Milne, *Singapore Politics under the People's Action Party* (2002) 172–6. It has also been observed that Singapore's attitude towards preserving a balance of power has not been 'addressed in crude mechanical terms based solely on responding and adjusting to indices of military strength through changing alignments in the promiscuous manner of eighteenth-century Europe': Leifer, above n 54, 98–9. Instead, Singapore's attitude has 'consistently been one of discrimination': at 99. According to Leifer, '[a]t issue has not been how to counter each and every potential and actual hegemon but whether or not such a hegemon is likely to be a benign or a malign factor affecting Singapore's interests [ie Singapore's approach towards the US]': at 99. Again, there are similarities here with Malaysia's approach, especially since the Mahathir Administration; in July 1981 Malaysian Prime Minister Mahathir announced a formal ranking of Malaysia's relations in 'concentric circles of interest', namely 'in the order of: (1) ASEAN; (2) Islamic countries; (3) the non-aligned community; and (4) the Commonwealth': Nair, above n 49, 80. Even during the administration of Tunku Abdul Rahman, Malaysian foreign policy had approached the non-aligned movement with great circumspection, due partly to the hostile use of the ideals of that movement by Indonesia in criticising the formation of Malaysia as a neo-colonialist ploy and in the then Prime Minister's perception of the link between the non-aligned body as 'a Communist satellite organisation': Tunku Abdul Rahman, *Viewpoints* (1978) 146.

⁷³ Fidler, above n 53, 38.

⁷⁴ Sienho Yee, 'The Role of Law in the Formation of Regional Perspectives in Human Rights and Regional Systems for the Protection of Human Rights: The European and Asian Models as Illustrations' (2004) 8 *Singapore Yearbook of International Law* 157. See also Paul Davidson, 'The ASEAN Way and the Role of Law in ASEAN Economic Cooperation' (2004) 8 *Singapore Yearbook of International Law* 165.

IV DIVERGENT PERSPECTIVES ON THE CHARACTERISATION OF INTERNATIONAL DISPUTES

While political realism and a legal approach towards international disputes are not necessarily antithetical in their aims or methods, one of the toughest issues on which the political realist and international legal perspectives on international affairs would differ involves the anterior act of characterising international issues and events. Thus, while the price of raw water supplied to Singapore may be described simply as a technical legal issue involving the meaning of particular legal agreements⁷⁵ and therefore constituting a legal dispute,⁷⁶ another view is that what is involved is getting a fair price, which has less to do with the law than with a sense of fairness.⁷⁷ However, Singapore characterised this issue as involving the proper interpretation of the review clauses in the *Water Agreements*,⁷⁸ which it saw as an issue involving the sovereignty of the republic.⁷⁹ Malaysia denied this, and argued that (in any case) it had not lost the legal right to revision and possessed the legal right to backdate any revision.⁸⁰ Singapore argued that Malaysia had lost its right of review,⁸¹ although it should be observed that this was said in connection with Singapore's view that the matter should be resolved 'through the legal process as provided for in the two *Water Agreements*'.⁸²

⁷⁵ In particular, cl 21 of the *Tebrau and Scudai Rivers Water Agreement*, signed 1 September 1961, Malaysia–Singapore, available at <<http://www.mfa.gov.sg/internet/press/water/Vol2-B.pdf>> at 1 October 2005 and cl 19 of the *Johore River Water Agreement*, 29 September 1962, Malaysia–Singapore, available at <<http://www.mfa.gov.sg/internet/press/water/Vol2-C.pdf>> at 1 October 2005 (collectively, '*Water Agreements*'), which deal with resort to arbitration, as well as the question of whether these agreements have become 'internationalised' by the two nations' subsequent obligation to guarantee these *Water Agreements* in annex B of the *Agreement relating to the Separation of Singapore from Malaysia as an Independent and Sovereign State*, opened for signature 7 August 1965, Singapore–Malaysia, 563 UNTS 89 (entered into force 9 August 1965) ('*Separation Agreement*'). On the guarantee issue, see *UN Conference on the Law of Treaties, Summary Records of Meetings of the Committee of the Whole*, 1st sess., [382], UN Doc A/CONF.39/11 (21 May 1968).

⁷⁶ S Jayakumar, Ministry of Foreign Affairs, Singapore, 'Statement by Minister for Foreign Affairs, Professor S Jayakumar, in Parliament' (Press Release, 25 January 2003) available at <<http://www.mfa.gov.sg/internet/press/water/speech.html>> at 1 October 2005.

⁷⁷ See, eg, 'Singapore Must be Reasonable over Price of Water, Says Dr Mahathir', *Bernama* (Kuala Lumpur, Malaysia), 6 August 2002, 1, where Prime Minister Mahathir Mohamad was quoted as saying that 'Singapore must be reasonable about the price it pays to buy water from Malaysia', that '[t]he price should be fair' and that 'it doesn't make sense that the price has remain unchanged for 75 years'. Malaysian Government advertisements in the *Asian Wall Street Journal* also focused on this issue: see eg, 'Malaysia Gets Nothing, Singapore Gets Rich', *Asian Wall Street Journal* (Hong Kong, China), 14 July 2003, A5; 'The Central Issue Is a Fair Price — For Both Parties', *Asian Wall Street Journal* (Hong Kong, China), 23 July 2003, A5.

⁷⁸ Above n 77.

⁷⁹ 'Singapore Says It Again: The Real Issue Is Not Price of Water', *The Straits Times* (Singapore), 1 February 2003, 1.

⁸⁰ 'Malaysia to Backdate Water Dues from Singapore', *Bernama* (Kuala Lumpur, Malaysia), 11 October 2002, 1.

⁸¹ See, eg, Jayakumar, 'Statement to Parliament', above n 76, who asserted that 'Singapore's position was that Malaysia had lost its right of review' under 'Clause 17 and Clause 14 of the 1961 and 1962 *Water Agreements* respectively'.

⁸² *Ibid* [74].

Another example involves the question of legitimate title to Pedra Branca/Pulau Batu Puteh, Middle Rocks and South Ledge (hereafter, 'Pedra Branca/Pulau Batu Puteh').⁸³ This may be characterised as something which involves a legal dispute or a dispute over territorial integrity. Viewed in 'legal' terms, Malaysia had issued a map in 1979 indicating Pulau Batu Puteh as a part of Malaysia. Singapore protested. According to the Singapore Government:

Prior to that, Singapore had occupied and exercised full sovereignty over the island for more than 150 years since the 1840s without any protest from Malaysia. Previous Malaysian maps, even as late as 1974, showed Pedra Branca as belonging to Singapore.⁸⁴

However, Malaysia claimed in one report that 'the Johor Sultanate has exercised complete jurisdiction and sovereignty' over Pulau Batu Puteh since 1513.⁸⁵ The ICJ became seized of the dispute on 24 July 2003 by way of notification of a Special Agreement concluded by Malaysia and Singapore to submit the dispute to the Court.⁸⁶ In it, the parties requested the Court 'to determine whether sovereignty over: (a) Pedra Branca/Pulau Batu Puteh; (b) Middle Rocks; (c) South Ledge, belongs to Malaysia or the Republic of Singapore', and agreed in advance 'to accept the Judgment of the Court ... as final and binding upon them'.⁸⁷ However, as the then Prime Minister of Malaysia, Mahathir Mohammad, reportedly said:

Although Pulau Batu Puteh does not have natural resources like oil, Malaysia still considers the small rocky outcrop, located 15 nautical miles off Pengerang, Johor, as important *because it is situated in Malaysia's territory*.⁸⁸

In other words, the territorial dispute is important to Malaysia because (according to this view) it involves Malaysia's territorial integrity.

The truth is that the resolution of disputes often involves their very characterisation. In terms of international law, this often concerns questions about the kinds of disputes that a particular agreement to resort to arbitration or international adjudication excludes. More generally, international lawyers have long debated the issue of whether there may be certain kinds of dispute that are simply unsuitable for international adjudication as a class. These debates are not particularly illuminating, nor are distinctions drawn between, say, 'political disputes' and 'legal disputes', as these distinctions often involve debates about what is meant by the terms 'political' and 'legal'. In any event, the fact that a dispute may be political (as international disputes are, by definition) does not

⁸³ Pedra Branca/Pulau Batu Puteh is located at 1° 20' north, 104° 24' east; Middle Rocks at 1° 19' north, 104° 25' east; South Ledge at 1° 18' north, 104° 25' east.

⁸⁴ Ministry of Foreign Affairs, Singapore, *Singapore and Malaysia — Frequently Asked Questions* (2003) available from <<http://www.mfa.gov.sg>> at 1 October 2005.

⁸⁵ Brendan Pereira and Lydia Lim, 'Singapore Refutes "Wild" KL Allegations', *The Straits Times* (Singapore), 27 December 2002, 3.

⁸⁶ *Special Agreement on Pedra Branca*, opened for signature 6 February 2003, Malaysia–Singapore, 2216 UNTS 1 (entered into force 9 May 2003); ICJ, '*Sovereignty over Pedra Branca/Pulau Batu Puteh, Middle Rocks and South Ledge (Malaysia/Singapore)*' (Press Release, 9 September 2003) available at <<http://www.icj-cij.org>> at 1 October 2005 ('*Pedra Branca/Pula Batu Puteh Press Release*').

⁸⁷ *Pedra Branca/Pula Batu Puteh Press Release*, above n 86.

⁸⁸ Malaysian Chinese Association, Malaysia, *Dr M: Palua Batu Puteh Important to Malaysia* (2002) <<http://www.mca.org.my>> at 1 October 2005 (emphasis added).

necessarily preclude its susceptibility to legal analysis and determination by an international court or tribunal. Simply, what it means is that states may not want to submit such disputes to arbitration or adjudication.⁸⁹

However, it is precisely this sort of distinction (between 'political' and other sorts of disputes) that is likely to suggest to a government that it should not allow certain kinds of issues to be the subject of a prior agreement to refer disputes to international adjudication or international arbitration. This is something which the relevant government would claim to be in the best position to decide, and may also involve the sensitivity, due to a range of potentially extraneous considerations, of certain sorts of issues rather than their essential nature.⁹⁰ It is precisely because there is no obligation to submit such matters to arbitration or adjudication that a government can choose to leave itself more room to manoeuvre should there come a time when it has to contest the proper characterisation of the dispute.

V DISTINGUISHING THE PROBLEM OF CHARACTERISATION FROM CALCULATIONS OF FOREIGN POLICY

It follows that the theoretical debate about the true nature of international disputes and the proper methods by which they ought to be addressed is less a conceptual problem to do with characterisation (even if that problem is real) than it is a question of a government's policy about how it would prefer to handle certain issues or its relations with certain countries. The matter has less to do with the challenge of designing appropriate dispute settlement mechanisms and more to do with foreign policy perceptions about the ultimate uses of such mechanisms.

It is well-known that the sort of diplomacy which Malaysia's and Singapore's leaders have traditionally preferred involves having what is euphemistically termed a 'four eyes' (ie face-to-face) meeting whenever especially delicate matters are involved. A relationship of trust and familiarity is required, in conformity with the so-called 'ASEAN way'.⁹¹ While this has obvious advantages, it places the burden on personal diplomacy. More importantly, no issue (however technical) is precluded at the outset from demanding personal attention should it prove to be intractable in discussions at the level of state officials. Therefore, potentially any dispute, by virtue of its failure to be resolved, could demand attention at the highest political level.

While this may simply be seen as a rejection of a rule-based or institutions-based approach towards handling bilateral relations, it also means a preference for what international relations experts call 'international anarchy' (in its strict technical sense). However, unlike the scenario discussed in the

⁸⁹ Cf Takane Sugihara, 'The Judicial Function of the International Court of Justice with respect to Disputes Involving Highly Political Issues' in Sam Muller, David Raič and Hanna Thuránszky (eds), *The International Court of Justice: Its Future Role after Fifty Years* (1997) 117.

⁹⁰ See, eg, Richard Bilder, 'Some Limitations of Adjudication as an International Dispute Settlement Technique' (1982) 23 *Virginia Journal of International Law* 1, 2-5. See also Derek Bowett, 'Contemporary Developments in Legal Techniques in the Settlement of Disputes' (1983) 180(2) *Recueil des cours* 169; cf C Wilfred Jenks, *The Prospects for International Adjudication* (1964) 104.

⁹¹ Acharya, above n 62, 47-79.

preceding section about the ‘conceptual’ problem of characterising international disputes, what this entails is a rejection of ever characterising matters in legal-technical terms.

The political–legal distinction drawn here may also be described in the following way. It is one thing to say that disputes are not only legal but may also be political in nature, or may touch on sensitive matters of domestic policy (ie the ‘conceptual’ problem of characterising international disputes). It is quite another thing to say that some issues should not, as a matter of prudent political principle, be decided at the outset as having a predominantly legal-technical nature. For example, both Malaysia and Singapore are WTO members that may be compelled into litigation under the WTO dispute settlement procedure against their will. Such disputes may receive a diplomatic settlement even after one party has triggered the litigation procedure. Indeed, many WTO disputes are settled in this way. However, the number of cases that have been settled through litigation demonstrates at least some of the advantages of a prior determination (eg through the WTO *Dispute Settlement Understanding*⁹²) that certain kinds of potential disputes largely involve legal or technical matters. It is illustrative that the first dispute brought under the *Dispute Settlement Understanding* after the 1986–94 Uruguay Round of trade negotiations was a dispute between Singapore and Malaysia.⁹³

Examples of the kinds of difficulties that a rejection of legal and institutional methods could run up against in the form of the general problem of dispute characterisation may be found in the various disputes between Malaysia and Singapore that are currently pending legal settlement. In the case of the *Water Agreements*, Malaysia has suggested that the matter should go before arbitration in Kuala Lumpur, and that the arbitration should be conducted under ‘Johore law’.⁹⁴ At bottom, the *Water Agreements* contain two similar, but essentially rudimentary arbitration clauses, which on their face speak only of arbitration under ‘Johore law’.⁹⁵ Singapore, on the other hand, has argued that the *Water Agreements* have become ‘internationalised’ and the dispute should therefore

⁹² *Marrakesh Agreement Establishing the World Trade Organization*, opened for signature 15 April 1994, 1867 UNTS 3 (entered into force 1 January 1995), annex 2 (*Understanding on Rules and Procedures Governing the Settlement of Disputes*) 1869 UNTS 401 (1994) (‘*Dispute Settlement Understanding*’).

⁹³ *Malaysia — Prohibition of Polyethylene and Polypropylene*, WTO Doc WT/DS1/1 (1995) (Request for Consultations by Singapore). See also Bernard Hoekman and Michael Kostecki, *The Political Economy of the World Trading System: From GATT to WTO* (1995) 242–3.

⁹⁴ Simon Tay, ‘Singapore: Review of Major Policy Statements’ (2004) 8 *Singapore Year Book of International Law* 219, 224.

⁹⁵ *Ibid.*

appear before an international tribunal.⁹⁶ Singapore relied, in this argument, on the fact that in 1965, the sanctity of these two agreements was affirmed by both parties in annex B of the Malaysia–Singapore *Separation Agreement*.⁹⁷ However, the *Separation Agreement* itself does not contain an arbitration clause. The different viewpoints expressed by Singapore and Malaysia could be resolved as a purely technical issue, having to do with the proper construction of the status of the *Water Agreements* and the arbitration clauses therein, as well as their connection with the *Separation Agreement*. However, the difficulty here is that there is no impartial body to determine these technical legal questions so that the two parties can move on. This is not to say that if each party truly believes in the legal merits of their respective arguments, there should be no difficulty, in logical terms, with proceeding to an ad hoc arbitration to determine these preliminary questions. In this case, each party would seek nonetheless to preserve the balance of advantage, as may be expected. However, such a balance could have been struck beforehand had there been (with the artificiality of hindsight) an arbitration clause in the *Separation Agreement* itself to clarify any doubt.

Likewise, the dispute over Pedra Branca/Pulau Batu Puteh suffered an extended period of to-ing and fro-ing in respect of the requisite special agreement to bring the matter before the ICJ since neither Malaysia nor Singapore have submitted to compulsory adjudication (the ‘optional clause’ procedure) under the Court’s statute.⁹⁸ This is not to say that both parties should have signed up to compulsory adjudication, or should now do so, as there are other considerations such as the relative inexperience of both parties with litigation before the ICJ.

In contrast, the dispute over Singapore’s land reclamation activities, mentioned above, was brought swiftly before the International Tribunal for the

⁹⁶ As S Jayakumar, Singaporean Minister for Foreign Affairs, asserted:

[I]t is better for international credibility and transparency and the signals we are giving to the international community that even this dispute is referred to, say, like the PCA [Permanent Court of Arbitration]. But they have said, no. But how do we resolve it amicably? So we have to fall back on the provisions.

S Jayakumar, Ministry of Foreign Affairs, Singapore, *Excerpts of Replies by Minister for Foreign Affairs, Professor Jayakumar, to Supplementary Questions in Parliament, 25 January 2003* (2003) available from <<http://www.mfa.gov.sg>> at 1 October 2005. A connected argument is Singapore’s view that not honouring the *Water Agreements* would also undermine the sanctity of the *Separation Agreement*, which in turn is the document that underpins Singapore’s ‘existence’ (ie sovereign independence): Jayakumar, ‘Statement to Parliament’, above n 76. See also S Jayakumar, ‘Water Issue is about Sanctity of Agreements, Not about Price Alone, Says Singapore Foreign Minister Prof S Jayakumar’ (Press Release, 25 January 2003) [10] available from <<http://www.mfa.gov.sg>> at 1 October 2005. To this, the then Malaysian Prime Minister Mahathir Mohamad was reported to have replied: ‘Fantastic, you know, the price goes up from 3 [cents] ... to 3 1/2 [cents] ... and Singapore loses its sovereignty. Is that so? Sovereignty is so cheap’: Brendan Pereira, ‘Mahathir Dismisses Sovereignty Issue and All Talk of War’, *The Straits Times* (Singapore), 31 January 2003, 1. For an assessment of the potential linkages between Singapore’s sense of vulnerability, particularly in relation to its sovereignty, and a range of outstanding issues with Malaysia, including those discussed in this paper, see Leifer, above n 54, 146–53.

⁹⁷ Above n 75.

⁹⁸ For the uncertainties caused by perceived delays in bringing the case to the ICJ by special agreement, see Pereira and Lim, above n 85; cf Carolyn Hong, ‘Spotlight on Batu Puteh’, *New Straits Times* (Kuala Lumpur, Malaysia), 2 January 2003, 8. The ‘optional clause’ procedure is that contained in art 36(2) of the *Statute of the International Court of Justice*.

Law of the Sea ('ITLOS') at the provisional measures phase because both countries are party to the *United Nations Convention on the Law of the Sea* ('UNCLOS').⁹⁹ *UNCLOS* contains the necessary compromise clause which allowed the two parties to submit to the compulsory adjudication of the tribunal beforehand. The decision on Malaysia's application for provisional measures paved the way for third party fact-finding under the supervision of the ITLOS and precluded the need for ad hoc arbitration on the merits.¹⁰⁰ Malaysia and Singapore issued a Joint Statement on 9 January 2005:

Both Governments accepted the recommendations of the ... GOE [Group of Experts] ... and agreed to use these recommendations as the basis of a mutually acceptable and beneficial solution. Very good progress was made during these two meetings, and the two delegations concluded an *ad referendum* agreement. Malaysia will be submitting the draft *Settlement Agreement* to its Government for approval and signature.¹⁰¹

The *Settlement Agreement* was signed by both parties on 26 April 2005.¹⁰² One conclusion is that the institutional procedures under the *UNCLOS* have helped, in particular the availability of the GOE tasked to conduct an impartial fact-finding mission. The essential technicality of the issues involved would also have been conducive to such an approach. Be that as it may, it could be said that, in contrast, the absence of such institutional procedures unnecessarily aggravated the situation where, notably, both countries had already decided that some form of judicial or arbitral settlement would be suitable in the cases of the Pedra Branca/Pulau Batu Puteh and water disputes.¹⁰³

Finally, it has been observed that the use of pacific settlement techniques may have wider foreign policy benefits. For example, an experienced commentator has suggested that resort by Southeast Asian nations to pacific settlement methods in island disputes may be viewed in connection with the need to

⁹⁹ Opened for signature 10 December 1982, 1833 UNTS 3 (entered into force 16 November 1994).

¹⁰⁰ *Land Reclamation by Singapore in and around the Straits of Johor (Malaysia v Singapore) (Request for Provisional Measures)* (8 October 2003) ITLOS Case No 12 <<http://www.itlos.org>> at 1 October 2005 ('*Land Reclamation Case*'). See also the website of the Singapore Ministry of Foreign Affairs <<http://www.mfa.gov.sg>> for documents related to the case; Philippe Gautier, 'The International Tribunal for the Law of the Sea: Activities in 2003' (2004) 3 *Chinese Journal of International Law* 241, 254–65.

¹⁰¹ Ministry of Foreign Affairs, Singapore, '*Case Concerning Land Reclamation in and around the Straits of Johor (Malaysia v Singapore): Joint Press Statement*' (Press Release, 14 January 2005) <<http://www.mfa.gov.sg>> at 1 October 2005. The announcement followed a marked improvement in Malaysia–Singapore relations, with the new administration of Malaysian Prime Minister Badawi: see Tay, 'Singapore: Review of Major Policy Statements', above n 94, 224. Signature of a treaty *ad referendum* by a state representative constitutes a full signature of the treaty upon confirmation by the state concerned: *Vienna Convention on the Law of Treaties*, opened for signature 23 May 1969, 1155 UNTS 1, art 12(2)(b) (entered into force 27 January 1980). The rule in art 12(2)(b) reflects the position adopted in customary international law. See also, on the practice of signing a treaty *ad referendum*, Lord Gore-Booth (ed), *Satow's Guide to Diplomatic Practice* (5th ed, 1979) 270.

¹⁰² *Land Reclamation by Singapore in and around the Straits of Johor (Malaysia v Singapore): Settlement Agreement*, 26 April 2005, available from <<http://www.mfa.gov.sg>> at 1 October 2005.

¹⁰³ See, eg, Jayakumar, 'Water Issue Is about Sanctity of Agreements, Not about Price Alone, Says Singapore Foreign Minister Prof S Jayakumar', above n 96, [21]–[25].

develop appropriate means to handle the dispute between China and some Southeast Asian countries over territorial claims to the Spratly Islands.¹⁰⁴ The use of such techniques by maritime Southeast Asian nations (in the form of Indonesia's and Malaysia's resort to the ICJ in respect of Pulau Ligitan and Pulau Sipadan, and Malaysia's and Singapore's recourse to the same in respect of Pedra Branca/Pulau Batu Puteh) would at the very least, have increased confidence in such methods. This in turn may be 'projected' onto the management of Sino–Southeast Asia relations. At present, management of ASEAN nations' security concerns vis-à-vis a rising China is a matter of the highest priority in the several chancelleries and foreign affairs offices of the Southeast Asian nations. Developing confidence in the methods of pacific settlement is one way of approaching the matter.

VI THE USES AND MERITS OF COMMISSIONS OF INQUIRY AND CONCILIATION

A *The Idea of a Malaysia–Singapore Commission*

All of this brings us to the idea of developing bespoke pacific settlement methods to supplement the future handling of Malaysia–Singapore relations. According to one observer,

both countries [should] establish a joint committee for the study, consultation and conciliation of bilateral issues. Unlike the committee prescribed in the [land] reclamation dispute, this joint committee should be given a broad brief to discuss a broad spectrum of bilateral issues that are outstanding between the two countries. Unlike efforts in recent years, the joint committee should not be overly reliant on political leaders and civil servants. Rather, it should involve a broad cross-section of experts and men and women of goodwill. In appropriate cases, this can extend to experts and eminent people who are neither Singaporean nor Malaysian. This can usefully search for ways in which legitimate concerns from both sides can be addressed. Such a joint working committee would be useful counter-point to the friction of our current disputes and the process of litigation.¹⁰⁵

¹⁰⁴ Zou Keyuan, 'Implementing the *United Nations Convention on the Law of the Sea* in East Asia: Issues and Trends' (2005) 9 *Singapore Yearbook of International Law* 37, 51–2. It may be noted in passing that, barring the *Temple of Preah Vihear (Cambodia v Thailand) (Merits)* [1962] ICJ Rep 4 and *Ligitan and Sipadan* [2002] ICJ <<http://www.icj-cij.org>> at 1 October 2005, East Asian countries have been absent from the ICJ. Japan, prior to the *Southern Bluefin Tuna Cases (Australia v Japan; New Zealand v Japan) (Award on Jurisdiction and Admissibility)* (4 August 2000) 39 ILM 1359 (2000), had twice submitted to arbitration in the *Maria Luz* arbitration in the 19th century and the *Decision of the Permanent Court of Arbitration in the Matter of Perpetual Leases* [1916] Hague Court Reports 78 ('*House Tax* arbitration') at the turn of the 20th century, but not for lack of a number of unsuccessful attempts to adjudicate disputes with Australia and South Korea in the 1950s, and New Zealand in the 1960s: see Norio Tanaka, 'Some Observations on the *Southern Bluefin Tuna Arbitration Award*' (2001) 44 *Japanese Annual of International Law* 9, 9–10. For Japan's experience in WTO dispute settlement, see Yuji Iwasawa, 'WTO Dispute Settlement and Japan' in Marco Bronckers and Reinhard Quick (eds), *New Directions in International Economic Law: Essays in Honour of John H Jackson* (2000) 473.

¹⁰⁵ Simon Tay, 'The Singapore–Malaysia Relationship and the Future Roles of International Law' (2004) 24 *Singapore Law Review* 78.

This proposal deserves attention. If properly devised, such a body could inject an element of stability into the everyday maintenance of bilateral relations while avoiding an unnecessary loss of sovereign control. Such loss may be perceived to accompany most forms of compulsory dispute settlement, which a government may justifiably feel does not result in a sufficiently clear benefit in return. The difficulty lies in striking the right balance between convenience and practicality in light of the foreign policy perceptions of the two countries.

The first thing to note is that there is a very wide variety of such bodies, which we may generally classify as falling within the class of international conciliation commissions and commissions of inquiry. These are different from judicial or arbitral bodies, for their job is not to decide the zero-sum question of which party is right, or which party should win. This is precisely what could make the use of such commissions more attractive than resort to litigation.

B *Conciliation Commissions*

A standing ‘umbrella’ conciliation commission with powers of confidential inquiry based on the model of a stability pact is one of several possibilities. Its functions could be based on the traditional model of the 1925 treaty between France and Switzerland — namely, to collect the facts and recommend the terms of settlement within a stipulated time frame.¹⁰⁶ In addition, such a mechanism could, by way of a bilateral agreement, be made compulsory and its use a condition precedent before either party were allowed to trigger proceedings under any other treaty regime to which the two countries are party.

The procedure adopted by the Chaco Commission in 1929,¹⁰⁷ for example, may be especially well-suited. The Commission was required to take two steps instead of one, and to draw up a report *only* if no settlement had been achieved upon its inquiry and recommendations. Only if conciliation had failed at this juncture would the Commission be tasked ‘to establish both the truth of the matter investigated and the responsibilities which, in accordance with international law, may appear as a result of its investigation’.¹⁰⁸ In that case, there was no need to draw up a report as the Commission succeeded in unanimously adopting a resolution of conciliation to which the parties could agree.¹⁰⁹ Such a mechanism could help to obviate the grosser effects of inflamed public sentiment. It would contain the additional safeguard that if no settlement were reached, an impartial body would be entrusted to set out the facts in its report.

C *Commissions of Inquiry*

Alternatively, a less intrusive mechanism may be preferred to the model of commissions of conciliation referred to above. Such an alternative mechanism

¹⁰⁶ John Merrills, *International Dispute Settlement* (2nd ed, 1991) 60.

¹⁰⁷ *Ibid* 62. The Commission, established under the good offices of the Conference of American States, consisted of two delegates from each party (Bolivia and Paraguay) and one each from the US and four other American states.

¹⁰⁸ *Protocol* (Establishing the Chaco Commission), signed 29 January 1929, Paraguay–Bolivia, as reproduced in (1929) 23 *American Journal of International Law Supplement* 98, 99.

¹⁰⁹ Merrills, above n 106, 62–3.

could be modelled on the 1914 *Bryan Treaties*,¹¹⁰ in which a commission of inquiry was employed instead. According to this alternative model, the report of the commission

does not embrace recommendations or give expression to an affirmative endeavour to effect accord between the states at variance is a distinctive feature of the service rendered. From the report of the commission those states remain free to draw their own conclusions as to the course thereafter to be followed. To this circumstance may perhaps be attributed the readiness of numerous states to conclude ... bilateral conventions providing for the use of the plan of inquiry set forth in the treaties concluded by Secretary Bryan in 1918 and 1914, for the Advancement of Peace.¹¹¹

Moreover, such reports are usually confidential. This model of a commission of inquiry, with the power to issue a confidential report, but without the power to issue recommendations, preceded the recommendatory commissions of conciliation which emerged largely at the turn of the 20th century.¹¹² This is perhaps the model that most closely resembles the mechanism that recently achieved a preliminary, but potentially comprehensive, settlement of the land reclamation dispute between Malaysia and Singapore. The order by the ITLOS in the *Land Reclamation Case* required the establishment of a group of independent experts, the GOE, with a mandate to prepare an interim report on the works around 'Area D' at Pulau Tekong.¹¹³ It also directed Singapore 'not to conduct its land reclamation in ways that might cause irreparable prejudice to the rights of Malaysia or serious harm to the marine environment, taking especially into account the reports of the group of independent experts'.¹¹⁴

¹¹⁰ Devised by William Bryan, the then US Secretary of State, these treaties were concluded by the US with 30 other states, and 'imposed on signatories the obligation in the case of the aggravation of a dispute between them not to attempt to settle it by force before the expiration of the specified cooling period': Edmund Osmanczyk and Anthony Mango, *Encyclopedia of the United Nations and International Agreements* (3rd ed, 2003) vol 1, 236.

¹¹¹ Hyde, above n 20, 97 (citations omitted).

¹¹² Ibid 98.

¹¹³ *Land Reclamation Case* (8 October 2003) ITLOS Case No 12 <<http://www.itlos.org>> at 1 October 2005.

¹¹⁴ Ibid. Note, however, that according to a spokesman for the Singapore Foreign Ministry, the establishment of a group of independent experts to conduct a joint study was 'something we had already agreed to after the August meeting and before the case at ITLOS': Ministry of Foreign Affairs, Singapore, 'MFA Spokesman's Comments on Judgement by the International Tribunal for the Law of the Sea' (Press Release, 8 October 2003) available from <<http://www.mfa.gov.sg>> at 1 October 2005. There were also other aspects to this case, including a dispute concerning the maritime boundary in and around Point 20, an area which lies to the west of Singapore. It appears, however, that both Malaysia and Singapore have consented to the procedure under s 2 of pt XV of the *UNCLOS* (arts 287-93) which includes the compulsory settlement of sea boundary delimitation disputes. There is an opportunity to carve out these procedures in so far as the dispute amounts to a dispute 'concerning the interpretation or application of arts 15, 74 and 83 relating to sea boundary delimitations' under art 298(1) of the *UNCLOS*. However, neither Singapore nor Malaysia have entered such a carve-out; cf the *Declaration under the United Nations Convention on the Law of the Sea concerning the Application to Australia of the Dispute Settlement Provisions of that Convention*, signed 21 March 2002, [2002] ATS 6, which contains such a carve-out.

D *Two Procedures Coordinated in a Single Instrument: The 'American' and 'European' Models Compared*

Conciliation and inquiry procedures could also be combined. In the earlier part of the 20th century, there were, in fact, two models of such a combined arrangement. Under the 'American' model, two standing permanent commissions, one in Washington and the other in Montevideo, were established. These were staffed by the three longest-serving US ambassadors in each capital. The commissions could be triggered to act as commissions of inquiry, but during the intervening period could also seek to effect conciliation on their own authority. This method was employed in the supplementary and amendatory provisions of the 1929 *General Convention of Inter-American Conciliation*.¹¹⁵

The American model may be adapted to meet the needs of Malaysia and Singapore through the creation of an ad hoc commission with two seats, one in each capital, staffed with the three (or any number of) previous ambassadors of the two countries. Should an even number of such commissioners be preferred, an ASEAN ambassador who has served in both capitals and who is not a national of either country, could chair the commission. Alternatively, there could be a permanent commission with two seats, staffed by the three (or any number of) longest-serving ASEAN ambassadors to the two capitals, who would choose a presently-serving or retired ASEAN ambassador to chair the commission. Another option would be to have an ad hoc commission comprising any number of retired ambassadors of each country who, at any time, served in the two capitals. Should an even number of such Malaysian and Singaporean commissioners be preferred, they could elect a further retired ambassador of their choice, who may be from an ASEAN member country. Further variations could be imagined, especially if it were thought undesirable that there should be any third country involvement.

The 'European' model, on the other hand, provides for conciliation only after an inquiry has failed. This type of commission has the benefit of having conducted a thorough and impartial investigation of the facts (and the law) before entering the conciliation phase of its work. The European model was adopted by the Chaco Commission of 1929.¹¹⁶ As Professor Hyde put it, by adopting such a model, 'Europe would safeguard a state against a mere weight of conciliatory opinion dealing harshly with its pretensions by minimizing the danger of recommendations having a political rather than a factual or legal basis'.¹¹⁷

Insofar as the 'European' model may be seen to possess this clear advantage, it may be preferred. In either case, the reports could be required to be kept confidential, subject to the mutual agreement of the parties to their release, in order to avoid any unnecessary embarrassment resulting from an inquiry.

¹¹⁵ Opened for signature 5 January 1929, 100 LNTS 399 (entered into force 4 April 1930). See Hyde, above n 20, 102–3.

¹¹⁶ Hyde, above n 20, 108.

¹¹⁷ *Ibid.*

E *Four Procedures (or More) Coordinated in a Single Instrument*

The suggestions above do not necessarily preclude more intrusive mechanisms, such as mediation and arbitration, from inclusion in a single coordinated instrument providing for inquiry and conciliation. For completeness, a clause modelled on the 1928 *General Act of Arbitration for the Pacific Settlement of International Disputes*¹¹⁸ may be mentioned here. It could provide the model for a means of final resort, and compel self-scrutiny in respect of legally ill-founded claims.

The 1928 *Geneva General Act* required arbitration in the event that compulsory conciliation proved unsuccessful.¹¹⁹ Of course, such provision for arbitration as a means of final resort need not be a necessary feature of a conciliation commission, especially if the two governments might be uncomfortable with the loss of sovereign control that such provision for arbitration could entail. The two governments might likewise reject the concept of having some limited means of arbitration in the foreground of a coordinated single instrument arrangement (inquiry plus conciliation and arbitration).¹²⁰ Considering also the availability of ad hoc arbitration and adjudication, such as resort to the ICJ by special agreement, strong arguments could indeed be made that arbitration or adjudication work best when both parties have reached an impasse and *voluntarily* submit the dispute to arbitration or adjudication.¹²¹

Finally, a single instrument approach could include the Brazilian proposal at the Conference for the Maintenance of Peace at Buenos Aires in 1936.¹²² Under this proposal, no provision would be made for a report by the mediator, but proceedings between the parties would take place before a mediator.¹²³ It is said that the informality of such an approach makes it attractive.¹²⁴

F *The Question of Suitability and Other Means of Calibrating the Device*

All of these proposals — whether for a commission of conciliation or of inquiry only; or for a body comprising both based either on the ‘American’ or ‘European’ model; or indeed for an arrangement that would also include some form of arbitration or mediation as part of a ‘single instrument’ approach — must ultimately be subject to the need to have the precise sort of institutional mechanism that may be considered most suitable in light of the specific characteristics of Malaysia–Singapore relations. Beyond the question of the appropriate institutional mechanism, further refinement could be introduced by careful consideration of the kinds of disputes that may be subject to such a mechanism (by considering the various ways of applying the doctrine of limited jurisdiction). In other words, consideration may be given to the kinds of disputes

¹¹⁸ Opened for signature 26 September 1928, 93 UNTS 344 (entered into force 16 August 1929) (‘1928 *Geneva General Act*’).

¹¹⁹ See *ibid* art 21; Hyde, above n 20, 106–7.

¹²⁰ Cf Charles Fenwick, ‘The Coordination of Inter-American Peace Agreements’ (1944) 38 *American Journal of International Law* 4, 10.

¹²¹ See, eg, Gary Scott and Craig Carr, ‘The ICJ and Compulsory Jurisdiction: The Case for Closing the Clause’ (1987) 81 *American Journal of International Law* 57, 75.

¹²² See Fenwick, above n 120, 8.

¹²³ *Ibid* 9.

¹²⁴ *Ibid* 9.

which may be excluded from the scope of the particular mechanism preferred. This matter has already been discussed above. Suffice to say here that the subject matter that may be amenable to one or another procedure, assuming multiple procedures in a single coordinated instrument, need not be the same and may be stated to be broader or narrower under a particular procedure as the circumstances of the two countries may require.

In addition to the questions of which institutional mechanisms are suitable and the scope of the subject matter that would be made amenable to an institutional process, further consideration may also be given to the question of composition, as well as the basis or criteria upon which recommendations and/or decisions would be made. The question of composition has already been discussed above. However, one other possibility is to emulate, subject to modification, the procedure laid down in the 1907 *Pacific Settlement Convention* in relation to the appointment of arbitrators.¹²⁵ After all, both Malaysia and Singapore are party to the 1907 *Pacific Settlement Convention* and presumably have no objection to the method for appointing arbitrators contained therein.¹²⁶ Other, perhaps more complex but nonetheless not unimaginable avenues could include the 19th century practice of resorting to, say, a ‘friendly’ monarch (eg the Sultan of Brunei or the King of Thailand), who may then appoint such persons as they think fit to staff such a commission. Similar invitations may be extended to the Secretary-General of the UN and perhaps even to the Secretary-General of ASEAN insofar as the incumbent is not at the same time a national of either

¹²⁵ 1907 *Pacific Settlement Convention*, above n 18, art 45 states:

When the Contracting Powers wish to have recourse to the Permanent Court for the settlement of a difference which has arisen between them, the Arbitrators called upon to form the Tribunal with jurisdiction to decide this difference must be chosen from the general list of Members of the Court.

Failing the direct agreement of the parties on the composition of the Arbitration Tribunal, the following course shall be pursued:

Each party appoints two Arbitrators, of whom one only can be its national or chosen from among the persons selected by it as Members of the Permanent Court. These Arbitrators together choose an Umpire.

If the votes are equally divided, the choice of the Umpire is entrusted to a third Power, selected by the parties by common accord.

If an agreement is not arrived at on this subject each party selects a different Power, and the choice of the Umpire is made in concert by the Powers thus selected.

If, within two months' time, these two Powers cannot come to an agreement, each of them presents two candidates taken from the list of Members of the Permanent Court, exclusive of the members selected by the parties and not being nationals of either of them. Drawing lots determines which of the candidates thus presented shall be Umpire.

¹²⁶ The treaty came into effect for Malaysia on 6 May 2002 and for Singapore on 11 September 1993: Permanent Court of Arbitration, *List of the Signatory and Contracting Powers of the Hague Conventions of 1899 and 1907 and Dates on which the Convention(s) Took Effect for Each of Them* (1907) available from <<http://www.pca-cpa.org>> at 1 October 2005.

party.¹²⁷ Yet another option would be that proposed earlier in relation to a body with both powers of inquiry and conciliation — namely, by employing the services of currently serving or past ambassadors to the two capitals, derived only from the two countries themselves, or including ambassadors from other ASEAN Member Nations. This proposal has the merit of using commissioners who are, generally speaking, likely to have earned the trust of the countries in which they have served and offers an advantage which conciliation or inquiry under the 1907 *Pacific Settlement Convention*, for example, would not. As they would not be appointed in light of their expertise in international law, or indeed in other technical disciplines, provision would be required to furnish the necessary technical expertise and assistance to such commissioners. For example, in *Maritime Delimitation in the Area between Greenland and Jan Mayen (Denmark v Norway) (Order)*,¹²⁸ the commissioners convened a meeting with technical experts (geologists and geophysicists) at Columbia University.¹²⁹

As for the question of what criteria the recommendations of such a body should be based upon, one answer could be ‘international law’. In the absence of a stipulation by the parties, it is likely in any event that any provision for arbitration, for example, would be likely to lead to the application of the accepted rules of international law.¹³⁰ However, the basis of a recommendation need not be confined to this. For instance, under the treaty between the US and the Central American Republics in the 1923 *Convention for the Establishment of International Commissions of Inquiry*, the Commission was granted the ‘right to recommend any solutions or adjustments which, in its opinion, may be pertinent, just and advisable’.¹³¹

In sum, the importance of designing the most suitable institutional body possible cannot be underestimated. However, what is just as important is a policy assessment of the possible benefits which such a body could bring in light of the circumstances of Malaysia and Singapore, when coupled with a careful understanding of the scope of traditional concerns about the loss of sovereign control. Carving out matters in which neither Malaysia nor Singapore would ever want a third party or added institutional body to interfere, without the agreement and consent of both governments, could augment the attractions of such a proposal. Further attention to the precise mechanism, the question of composition and the basis of any recommendation (eg international law or recommendations *ex aequo et bono*) could address specific concerns. In essence, both governments have an interest in securing good relations between their countries. Therefore, at the very least, the proposal here may be said to present a rational option.

¹²⁷ This raises the question of whether ASEAN should be seen as what Tan Sri Dr Noordin Sopiee referred to in 1986 as ‘a quasi-security community’: Acharya, above n 62, 128. For the good offices role of the Secretary-General of the UN, see Thomas Franck and Georg Nolte, ‘The Good Offices Function of the UN Secretary-General’ in Adam Roberts and Benedict Kingsbury (eds), *United Nations, Divided World: The UN’s Role in International Relations* (2nd ed, 1993) 143.

¹²⁸ [1988] ICJ Rep 66.

¹²⁹ Merrills, above n 106, 68.

¹³⁰ See, eg, *Rann of Kutch*, 7 ILM 633 (1968).

¹³¹ Opened for signature 7 February 1923, 2 Bevans 387, art V (entered into force 13 June 1925). This right is simply the power to make a recommendation *ex aequo et bono*.

VII CONCLUSION

It has been suggested that the issues commonly faced by Malaysia and Singapore in their bilateral relations may be caused by domestic political factors. At the most extreme end of the scale, there has been the controversial suggestion that Singapore was at one point — during a sharp decline in the Malaysia–Singapore relationship — simply responding to the need to distract its population from the effects of an economic downturn.¹³² Likewise, it was suggested that at one point, Malaysia was simply ‘testing’ Singapore.¹³³ The thesis that disputes between Malaysia and Singapore are caused by domestic political factors is not dependent on the truth of the factual propositions on which it is based. Yet the thesis could be said to preclude the notion that Malaysia–Singapore relations can be dealt with adequately by legal institutions or the international lawyer’s institutionally and procedurally-minded solutions. In the author’s opinion, proponents of this view should employ more political sophistication and realism in their assessments of the situation. Another less controversial thesis is that Malaysia–Singapore relations will, quite simply, always have their ups and downs; in other words, aggravating episodes are just part of the ‘normal’ relationship between the two countries. This thesis, in the author’s view, does not present an obstacle to the proposals in this paper.¹³⁴ Moreover, neither of the two above theses suggest that nothing more can be done but to manage these episodes as and when they arise. Even if the theses are accepted, they should not thwart the institutional imagination of lawyers in searching for and designing effective stabilising devices that could be used in managing Malaysia–Singapore relations.

This paper has attempted a realistic appraisal of the prospects for and value of an institutional approach. It has not focused on legal and institutional solutions where other options are already available and work well, but has argued that the foreign policy outlook in Malaysia and Singapore should be extended to include an acceptance of such solutions in the event that disputes between the two countries arise. It may be that as time goes by, the two nations will inevitably absorb further institutional procedures and processes as part of their foreign policy management routine. One clear example is the use of bilateral and regional investment agreements. Likewise, Malaysia is currently party to a whole range of intra-ASEAN and extra-subregional disputes including disputes over

¹³² Kadir Dikoh, Daud Awang and Misiah Taib, “‘Kita Menhadi Sasaran’: Helah Singapura Elak Masalah Ekonomi Diketahui Umum”, *Berita Harian* (Kuala Lumpur, Malaysia), 31 January 2003, 1.

¹³³ ‘KL is Testing Singapore, Say Analysts’, *The Straits Times* (Singapore), 28 January 2003, H6.

¹³⁴ It should be noted, however, that even ‘when a particular method of settlement is available and utilized, there is no guarantee that it will be effective in a given case’, partly because ‘[t]he social element [too] is important’: Merrills, above n 106, 232–3.

maritime areas with petroleum potential.¹³⁵ While Malaysia has concluded a Memorandum of Understanding with Vietnam on joint development of contested maritime areas in the Gulf of Thailand, and a similar dispute with Thailand over the Gulf is also governed today by a promising joint development arrangement in the form of the Malaysia–Thailand Joint Authority, it may find that while some disputes may be amenable to bilateral treaty negotiation, others may nonetheless benefit from a different tack.¹³⁶

Malaysia's decision to litigate the *Ligitan and Sipadan* case with Indonesia involved what was arguably a relatively low-risk legal strategy.¹³⁷ Likewise, the decision to go to court with Singapore over Pedra Branca/Pulau Batu Puteh arguably presented minimal risks to Malaysia. Nevertheless, a low-risk legal strategy remains a legal strategy, and while Malaysia may on occasion present its decision to resort to adjudication or arbitration with Singapore as part of a 'sometimes you win and sometimes you lose' approach,¹³⁸ and might consider Singapore too ready to resort to legal and institutional arguments and processes,¹³⁹ Singapore's approach is not materially different from Malaysia's. Singapore's emphasis on the constructive use of legal means of dispute settlement so as to 'ring-fence' a specific bilateral issue and prevent it from affecting the overall bilateral relationship presents, in truth, a difference merely

Having said that, conciliation and inquiry procedures may present viable and attractive alternatives to adjudication and arbitration in the management of Malaysia–Singapore relations. This is especially so where issues that are essentially technical in nature may be involved, as in the *Land Reclamation Case*.¹⁴⁰ Issues that are primarily technical may nonetheless become overtaken by political events where political decision-makers at the highest level are

¹³⁵ At last count, there were four maritime disputes with (1) Thailand and Vietnam regarding the southwestern Gulf of Thailand; (2) Vietnam, Indonesia and China regarding an area north, west and east of the Natuna Islands; (3) Brunei and possibly China and Vietnam regarding offshore Brunei; and (4) Brunei, Vietnam, the Philippines, China and Taiwan regarding the Spratly Islands. This list excludes the disputes with Indonesia over Pulau Ligitan and Pulau Sipadan and the current dispute with Singapore over Pedra Branca/Pulau Batu Puteh. There are, in addition, other territorial disputes with Thailand in respect of the Thailand–Malaysia common border, the Malaysia–Brunei dispute over Limbang (a northern town in Sarawak) and the long-standing dispute with the Philippines over Sabah. See Acharya, above n 62, 130.

¹³⁶ For a discussion of these Memoranda of Understanding, see Zou, above n 104, 41–2. For the differences between a Memorandum of Understanding (which may or may not amount to a treaty on its proper construction) and an international treaty or convention, see Anthony Aust, 'The Theory and Practice of Informal International Instruments' (1986) 35 *International and Comparative Law Quarterly* 787, 794–6.

¹³⁷ One commentator even remarked that '[t]his latest judgment is of relatively minor significance, given that the islands concerned are not permanently inhabited by large populations': Pieter Bekker, 'An Appraisal of the 2002 Judicial Activities of the International Court of Justice' (2003) 2 *Chinese Journal of International Law* 321, 337. Of course, this is not to say that a small piece of territory, or one that is uninhabited, may be taken to be unimportant to the parties themselves; indeed the contrary may be the case.

¹³⁸ The former Malaysian Prime Minister Mahathir Mohamad remarked that: 'Sometimes you win, sometimes you lose', '[t]hat's the essence of arbitration', and that '[u]ntil you take the case to arbitration, you wouldn't know if you are right or wrong': 'Singapore's Statement on Case Is Ridiculous, Says PM', *New Straits Times* (Kuala Lumpur, Malaysia), 10 October 2003, 1.

¹³⁹ Jayakumar, 'Statement to Parliament', above n 76; Jayakumar, *Replies to Supplementary Questions*, above n 96.

¹⁴⁰ ITLOS Case No 12 <<http://www.itlos.org>> at 1 October 2005.

compelled to intervene in the face of official deadlock. However, the involvement of national figures as part of the routine of foreign policy management automatically involves the national honour, and where a settlement proves elusive at that level, arbitration or adjudication may become a second-best option, especially where negotiating positions have become hardened in the public gaze. As arbitration and adjudication tend to provide 'zero-sum' solutions, they are highly suitable as a means of final resort where finality in particular is prized. In such cases, these measures provide the best option for both parties, but not in cases where the choice to litigate may be due partly to other pressures. In the latter type of situation, litigation itself could prompt further 'tit-for-tat' litigation by the losing party to vindicate the prestige of the nation, which in turn could lead to even further litigation in a seemingly endless cycle of attempts to even the score.

Conciliation and inquiry procedures, on the other hand, could lessen the burden for elite decision-makers and prevent certain issues from becoming politicised at such a high level. It is an alternative to adversarial litigation as only a second-best method of conducting bilateral relations. Confidential procedures could further ensure that national honour is not offended, public opinion is not angered and that the conditions for mutual friendship are ultimately promoted.