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EXECUTIVE LAWMAKING IN COMPLIANCE OF INTERNATIONAL TREATY

C L **LIM** *

Treaty obligations, including any obligation imposed by the Security Council under the United Nations Charter, are not automatically a part of Singapore law. In response to September 11, Singapore was therefore required to devise a flexible legal mechanism by which further and better domestic legal standards could be set in a timely fashion should the Security Council so require. The United Nations Act is that mechanism. A principal difficulty is that, in its drafting language, the Act is not confined to Security Council decisions to combat terrorism. Instead, whenever the Security Council of the United Nations calls upon the Government to apply any measure to give effect to any decision of the Council taken under Article 41 of the United Nations Charter, the Minister may, if he considers it necessary or expedient, issue regulations under the Act in order to apply those measures. In addition, Article 41 in itself is a potentially far-reaching provision. It authorises any measure short of armed force which the Council may consider appropriate in the face of a threat to the peace, breach of the peace or act of aggression. The Act therefore raises domestic questions about the extent and scope of the Minister's powers, about whether the courts may review the Minister's decisions, and if so what standard(s) of review may be applied by the courts. At common law in Singapore, even where the Minister characterises his decision as one involving "national security", that characterisation may be challenged on grounds of legal irrationality. Furthermore, on the proper construction of this Act, the Minister's decisions, it would seem, must also be based on the existence, and proper construction, of a binding Security Council obligation. Yet whether a Security Council resolution imposes binding legal obligations can sometimes present "mixed" legal and foreign policy questions. This may be reason enough for the courts in Singapore to exercise restraint when called upon to review the Minister's decisions taken under the Act.

I. INTRODUCTION

On 15 October 2001, Parliament committed to a Second Reading and, following debate, passed the United Nations Bill. The Bill received the President's assent on 17 October 2001, and thus the United Nations Act

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("the Act" or "the Singapore Act") was enacted.[1] The purpose of the Act, according to the Honourable Minister for Law and Foreign Affairs, is to implement Security Council Resolution 1373 ("Resolution 1373") and like obligations.[2] Resolution 1373 was adopted unanimously by the United Nations Security Council on 28 September 2001, a little more than two weeks before the passage of the Act, in response to the tragic events that took place in the United States in New York, Washington, DC, and Pennsylvania on 11 September 2001.[3] Described as "a wide-ranging, comprehensive resolution with steps and strategies to combat international terrorism",[4] Resolution 1373 calls for the suppression of the financing of terrorism and the improvement of international cooperation on counter-terrorism measures.

In Resolution 1373, the Security Council reaffirmed that the terrorist attacks constituted, as with any act of international terrorism, "a threat to international peace and security".[5] The phrase is significant. International lawyers know that the Council, by using these operative words, had thereby invoked its enforcement powers under Chapter VII of the United Nations Charter (the "Charter"). The Singapore Act, on the other hand,[6] states, in its long title, that it is "[a]n Act to enable Singapore to fulfil its obligations respecting Article 41 of the Charter of the United Nations", a provision that is found in Chapter VII of the Charter. In a key provision, s 2(1) of the Act states, further, that:

> [s]ubject to subsection (2), if, under Article 41 of the Charter of the United Nations signed at San Francisco on 26th June 1945 (being the Article which relates to measures not involving the use of armed force), the Security Council of the United Nations calls upon the Government to apply any measures to give effect to any decision of that Council, the Minister may, from time to time, make all such regulations as appear to him to be necessary or expedient for enabling those measures to be effectively applied…

The intention here is clear as s 2(1) of the Act adopts the language of Article 41 of the United Nations Charter. Article 41 states, with my emphasis, that:

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1 United Nations Act 2001 (No 44 of 2001), Republic of Singapore Government Gazette, Acts Supplement, No 43, 26 October 2001. I leave discussion of the regulations made to date under the Act to my able colleagues, in this volume.

2 Singapore Parliamentary Debates, Official Record, 15 October 2001, Col 2436.

3 S/RES/1373 (2001), 28 September 2001, adopted unanimously. For the text of the resolution, see http://www.un.org/terrorism/sc.htm.

4 UN press release, SC/7158, 28 September 2001.

5 S/RES/1373, *supra* note 3, third preambular paragraph.

6 *Supra* note 1.

> [t]he Security Council may decide what measures not involving the use of armed force are to be employed to give effect to its decisions, *and it may call upon the Members of the United Nations to apply such measures.*

Article 41 states, further, that these "measures" referred to

> …may include complete or partial interruption of rail, sea, air, postal, telegraphic, radio, and other means of communication, and the severance of diplomatic relations.

This is not an exhaustive list. Such "measures" could also include fresh legislation on any matter that falls under Article 41, in the view of the Security Council. According to the Minister, "failure to give effect to the measures mandated by the Security Council would be a breach of our international obligations for which Singapore may be subject to censure and sanctions by the Security Council."

What is the scope and extent of the Minister's powers under the United Nations Act?

II. THE KEY TEXTUAL PROVISIONS OF THE ACT

A. *Section 2(1) of the Act*

No mention is made in the Act itself of Security Council Resolution 1373, and no limitation *ratione materiae* is imposed by the words of the Act to decisions taken in relation to international terrorism. In principle, any binding Security Council decision under Article 41 of the United Nations Charter could, therefore, lead the Minister to conclude, under s 2(1) of the Act, that it is "necessary or expedient" to enact new laws by way of Ministerial regulation.[7] In sum, the Act confers a broad discretion on the part of the Minister.

B. *Section 2(3) of the Act: The "Henry VIII Clause"*

Section 2(3) of the Act provides, further, that "no regulation made under this Act shall be deemed to be invalid because it deals with any matter provided for by any written law, or because of repugnancy to or inconsistency with any written law other than the Constitution". Sections

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[7] Although too much ought not to be read into this, the Minister referred to Security Council Resolution 1373 as "a good illustration" of mandatory decisions which would require Singapore to take appropriate action; Singapore Parliamentary Debates, Official Record, 15 October 2001, Col 2436.

2(1) and (3), viewed together, therefore amount to a "Henry VIII Clause".[8] What is the purpose underlying this broad formulation of the Minister's powers under the Act?

In order to understand the scope of the Minister's powers under the Act, we have to understand the difficulty faced by a legal system such as Singapore's in coming to terms with international treaty obligations that are not known beforehand, and which also have to be implemented as soon as they come into being. This difficulty presents the single most significant explanation for the broad powers conferred upon the Minister, and it also raises some interesting questions under Singapore's administrative laws. The difficulty will, first, have to be explained in greater detail.

III. Legislative Object: Dealing with "Moving" International Treaty Obligations

A. *The Means of Incorporation or Transformation under Singapore Law: A Matter of Municipal Law*

Neither Singapore law nor international law requires the form of domestic implementation of an international legal duty found in the present Act. Where a treaty obliges a State party to give that treaty municipal effect, or where the treaty empowers a body constituted by it to make laws that require of its parties the effect of law within their territories, the means of such "transformation" or "incorporation" into municipal law is, without more, left to the sovereign prerogative of the various parties.[9] This was

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[8] Cmd 4060 (1932) at 61. The House of Commons Committee on Ministers' Powers ("the 1932 Committee"), appointed by the Lord Chancellor in response to widespread public interest following the publication of the Lord Chief Justice, Lord Hewart's *The New Despotism*, took the view, perhaps unsurprisingly, that such clauses, while not uncommon in England at the time, should only be used when justified before Parliament in England on compelling grounds. The composition of the committee included Professor Harold Laski whose views, as Professor Griffith puts it, "would have been considered dangerously radical by most of his colleagues on the Committee"; John Griffith, *Judicial Politics Since 1920, A Chronicle* (Oxford/Cambridge Massachusetts: Blackwell, 1993) at 17.

[9] *De Smith, Woolf & Jowell's Judicial Review of Administrative Action* (London: Sweet & Maxwell, by The Rt Hon The Lord Woolf & Jeffrey Jowell, with A P Le Sueur, 1995) refers, in § 28-023, to an example of how the State-obligor under the treaty could avoid giving the treaty domestic legal force by only granting such force to the respect required of it by a domestic State official or other public decision-maker. An example is s 2 of the United Kingdom's Asylum and Immigration Appeals Act 1993, which states: "Nothing in the immigration rules…shall lay down any practice which would be contrary to the Convention". In that sense, "domestic legal force" is granted in respect of the conduct/abstention required of the State acting through its officials, but no remedy is thereby granted in respect of rights and duties between private parties. With the greatest respect and deference due to *De Smith, Woolf and Jowell*, this confuses public and private law rights in the basic sense of rights had by a private citizen against the State and against others. The cause for that lies perhaps in a "false distinction", if I might respectfully term it thus, in Lord Oliver's speech in *JH Rayner (Mincing Lane) Ltd v Dept of Trade and*

confirmed, albeit indirectly, by the Minister who, during the debate in Parliament, explained that "[w]here we have not been able to give effect to Security Council resolutions through existing laws, we have sought to amend specific legislation".[10] The question as to means of transformation or incorporation remains a domestic matter. More precisely, as long as there are laws that do what the Security Council requires, for example, it matters not what form they take, and so much the better if they already exist. The likely answer to the question about means (of transformation or incorporation) lies therefore in the subject-matter of the Act, not international law or the way that international law intersects with Singapore's domestic legal system. The problem is not that of a pre-existing international or domestic legal obligation, but one of legislative design and craftsmanship.

According to the Minister, the Act fills a gap in Singapore law in light of Singapore's Charter obligations. The Minister explained in Parliament that "our existing laws do not", for example, "criminalise the provision or collection of funds by Singapore citizens outside Singapore for criminal or terrorist acts committed outside Singapore", whereas s 6 of the Act provides for such extraterritorial effect.[11] One purpose of the Act is therefore to implement legal measures not otherwise available in Singapore's pre-existing laws. There is, however, a second purpose. The Minister explained in Parliament that

> [w]e also have to consider the possibility that there may be future UN Security Council resolutions to deal with terrorism or other pressing international crimes. We would not be able to anticipate or predict the

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Industry [1990] 2 AC 418 at 500 where his Lordship said: "Treaties are not self-executing. Quite simply, a treaty is not part of English law unless and until it has been incorporated into the law by legislation". So far so good, but His Lordship added immediately after that "[s]o far as individuals are concerned, it is *res inter alios acta* from which they cannot derive rights and by which they cannot be deprived of rights or subjected to obligations; and it is outside the purview of the courts not only because it is made in the conduct of foreign relations, which are a prerogative of the Crown, but also because, as a source of rights and obligations, it is irrelevant".

10 Singapore Parliamentary Debates, Official Record, 15 October 2001, Col 2436.

11 *Supra* note 1. Section 6 reads:

> (1) The provisions of this Act have effect, in relation to citizens of Singapore, outside as well as within Singapore, and where an offence under this Act or any regulations made thereunder is committed by a citizen of Singapore in any place outside Singapore, he may be dealt with in respect of that offence as if it had been committed within Singapore.
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> (2) Any proceedings against any person under this section which would be a bar to subsequent proceedings against that person for the same offence, if the offence had been committed in Singapore, shall be a bar to further proceedings against him, under any written law for the time being in force relating to the extradition of persons, in respect of the same offence outside Singapore.

> breadth and depth of these possible future resolutions. Nonetheless, we must ensure that we are in a position to be able to give effect to them effectively and promptly.[12]

The Act, therefore, aims also to address the future likely need to combat the sorts of transnational mischief whose redress would also, in future, be likely to occasion Security Council action by facilitating the implementation of further legal measures whenever required of Singapore. This need for "open-ended" legislation granting broad subordinate law-making powers to the Minister will henceforth be referred to, in this article, as the "forward-looking" function of the United Nations Act.[13]

B. *Some Constitutional Dimensions Considered*

One grave difficulty emerges in all this. Public lawyers have for long viewed broad executive powers with some reservation, and the following sorts of objections to the United Nations Act can easily be imagined:

1. Delegated powers are not required to fit the mischief intended by Parliament to be addressed here since the more obvious route is through direct primary or secondary legislation. The approach adopted in the present Act is unwarranted (*ie* a reservation based on redundancy).
2. From the Act's language, the legal powers actually conferred, even if necessary are too extensive (*ie* an objection to the language of the Act in connection with the constitutional wisdom of having a "separation of powers").
3. Since the Act delegates powers to the Minister, it is presently unclear what it will and should entail in terms of the scope of the powers conferred upon the Minister (*ie* a reservation based on the need for legal certitude, and the current absence of it).

It would be helpful, in seeking to understand the Act, to also see if these objections, which are presented separately only for the sake of analytical clarity, are truly as attractive as they might at first appear.

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[12] Singapore Parliamentary Debates, Official Record, 15 October 2001, Col 2437.

[13] As the Minister explained, *ibid*: "This Bill is therefore necessary to ensure that our laws are adequate and to overcome any possible lacuna that would prevent Singapore from effectively fulfilling our international obligations. This Act will enable the Government to pass such regulations necessary to give effect to the decisions of the UN Security Council. It will avoid a situation where gaps in our laws prevent us from implementing the UN Security Council resolutions."

C. *The Objection of Redundancy*

The first objection touches upon the position that Parliament occupies under Singapore constitutional law. Treaty laws, including the United Nations Charter, do not have any direct effect in Singapore law without an Act of Parliament giving such treaty laws the force of domestic law by way of an enabling Act of Parliament. Writers who refer to Singapore as a "dualistic" legal system which treats domestic and international law as separate legal systems are merely stating a conclusion. The reason lies in a number of negative propositions. The Singapore Constitution does not make international law automatically a part of Singapore law, and nothing else suggests a departure from the English view, subject only to Singapore's written Constitution, that since Parliament is otherwise the supreme law-maker, the executive cannot be permitted, in the eyes of the courts, to have the power to make laws without the leave of Parliament. Were treaty laws to be considered automatically a part of Singapore law, the executive would thereby be granted the power to make law without the leave of Parliament, as it is the executive that concludes treaties on behalf of Singapore.

In "dualistic" legal systems then, treaty laws are *normally* made a part of domestic law by way of incorporating the treaty into an enabling Act of Parliament wholesale, either in the Act itself or in a schedule attached thereto, or by transforming the treaty's contents by restating them, with modifications, in a "transforming" Act of Parliament. Conferring powers upon the Minister in the way that the United Nations Act does is therefore properly seen, in this scheme of things, as a species of "transformation". This is because the Minister is empowered by Parliament to decide which of Singapore's international obligations within the scope of the Act are to be given effect in Singapore law.

Granting the executive the power to bring a treaty into effect in domestic law by means of a proclamation in the Government Gazette is sufficiently well-known,[14] and is well-established in law. Any objection here would, in truth, be a criticism of the breadth of the Minister's discretionary powers. It would be a vastly different thing if we were talking about mere publication without the delegated authority to do so, for example.[15] In other words, the objection being about substance not form is really a version of the second sort of objection, discussed below. As such, I think it is convenient to elaborate upon that second objection before addressing both objections together.

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[14] F Morgenstern, "Judicial Practice and the Supremacy of International Law" (1950) 27 BYBIL 42 at 51.

[15] See the South African Appellate Division case of *S v Tuhadeleni & others* 1969 (1) SA 153 (A) at 173-5.

D. *The "Broad Powers" Objection*

A word of caution is, first of all, required. Undue apprehension at the wide powers conferred upon the Minister would be misplaced were such apprehension to result from confusing the two ("gap filling" and "forward looking") principal legal aims of the Act, discussed earlier. Whereas the first function could be fulfilled without the device of delegated or subordinate legislation (here, in the form of Ministerial regulation), the second cannot. Any objection that arises on the basis of "broad powers" must also be about the Act granting the Minister the power to make law in order to address future Security Council resolutions, and cannot be directed, simply, at the fact that the "gap filling" function could be performed otherwise.

Having said that, the second objection suggests, for example, that the Act could simply say that "all mandatory decisions of the Security Council shall have the force of law in Singapore" if we are to avoid substituting the critic's reservations for the Minister's judgment. In the form that the United Nations Act takes presently, the Minister is, instead, given the power of selection as to which of such decisions should, or in what manner such decisions should, have the force of law, and therefore the power to make certain conduct criminal through the exercise of Ministerial regulation. Recall the Statute of Proclamations of 1539 by which Henry VIII was given the power to legislate by proclamation, such critics might say. Yet, such an objection would be based on an objection to delegated legislation *generally*.

The objection also disregards the more specific law-making problem here, which is that of how we are to transform international law into municipal law in terms of what we have called the "forward looking" function of the Act. The objection overlooks the fact that the approach adopted in the Act negotiates a more fundamental constitutional reality rather handsomely, since treaty law does not "automatically" have the force of law in Singapore. The objection, when taken to one extreme, actually comes close to suggesting what it seeks to avoid. The extreme suggestion here would be that the executive should only conclude treaties and present them to Parliament for enactment into domestic law wholesale. On this view, Parliament either turns "forward-looking" treaty obligations into domestic law *a priori*, where those treaty obligations are not known beforehand, or may choose not to, for the sole purpose of not allowing the executive to exercise some control over domestic law-making. The objection ignores the fact that it is not only in the domestic context that government has witnessed the rise of the administrative state in modern times, but also in the international context. Today, there are not only a multitude of multi-lateral treaties on the international plane, but also a multitude of treaty regimes with institutions established thereunder that engage in standard-setting, thereby imposing obligations upon the parties to such treaties that would have to be complied with, often in a timely fashion. Furthermore, the objection ignores the fact that we are talking about the

actual conduct of Singapore's foreign relations, which is primarily in the hands of the executive branch of government. Bearing all this in mind, the law-making challenge is, in truth, to strike a balance, preferably on a case-by-case basis, between the conduct of Singapore's foreign policy and the enactment of its "foreign relations" legislation. Where day-to-day conduct of foreign affairs lies in the hands of an executive that is politically accountable to Parliament, a "one size fits all" piece of legislation that "automatically" incorporates both present and future (and thereby unknown) decisions of the Security Council taken under Article 41 of the United Nations Charter into Singapore law would not only be inappropriate, it could be argued to achieve the exact opposite of "tighter Parliamentary control". Law-making will be wholly relegated to some international institution instead,[16] while excluding foreign policy decision-making by the executive altogether. Alternatively, Parliament would be compelled to undertake some detailed part of the daily management of foreign affairs, and this too would exclude the foreign policy function of the executive.

This second sort of objection is therefore based upon unrealistic and unworkable assumptions. Taken to one extreme, the objection could even undermine Singapore's sovereignty.

E. *Response To These Two Objections*

Further considerations outweigh the first two objections above, when taken together. The scheme of the Act is, in the first place, a reaction to a novel foreign policy issue but preserves fidelity to Singapore's current constitutional and administrative division of labour. The practical advantages of this division of labour might, moreover, be illustrated with the following curious scenario. Were the present approach taken in the Act rejected in favour of "tighter Parliamentary control", it could, quite unwittingly, thereby import some of the current controversies surrounding the actions of the Security Council directly into Singapore's domestic law and policy-making. For example, where the well-known veto power of the Permanent Members of the Security Council ("P-5")[17] is not used to block a

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[16] Plainly, as it would thereby confer European Community-style "direct effect" in the domestic sphere, in Singapore law, to decisions of the Security Council in New York. In the case of the present Act, a crucial distinction should be maintained between treaties that are given statutory legal force domestically, and statutes that, without giving domestic legal force to treaty obligations, simply seek to ensure respect for treaty obligations. The present Act belongs to the latter category; *cf* the treatment by the English courts of s 2 of the United Kingdom's Asylum and Immigration Appeals Act 1993 in *R v Secretary of State for the Home Department, ex parte Mehari and others* [1994] QB 474 at 489 (*per* Laws J).

[17] Article 27(3), Charter of the United Nations, encapsulating the so-called "Yalta formula", on which see further US Department of State (ed), *The United Nations Conference on International Organization at San Francisco* (Washington DC: US Department of State, 1946) at 746-54 and 810-831.

resolution, and that resolution is therefore passed, yet circumstances subsequently change and thereby require corresponding foreign policy adjustments, the "veto problem" arises again where its exercise by any one of the P-5 effectively blocks the repeal of the resolution previously passed. In all this, some leeway is provided to the various Foreign Ministries of Member States to interpret the legal status of the particular resolution; such as whether the resolution, or any part of it, might impose mandatory obligations. Mr. Simon Tay, speaking during the Parliamentary debate, put the difficulty this way:

> The UN is the most important international organization today, specifically for a small country like Singapore. Yet, there is no world government. In this sense, there is always a tension between what each country must do to fulfil its international obligations and what each country must do on the basis of the sovereignty of its own people as represented in Parliament.[18]

By granting the Minister discretionary powers under the Act, Parliament's approach has been to allow the Minister to manage the tension between international undertakings and the national interest on a case-by-case basis. There is nothing surprising in this. The late HWR Wade, who was hardly a firm supporter of wide executive discretion, or of delegated legislation, once put it this way: "[i]f we look at the practical side, it is at once plain that administration must involve a great deal of general law-making, and that no theory which demands segregation of these functions can be sound".[19]

F. *The "Uncertainty" Objection*

Admittedly, however, the Act, designed as it is to deal with the unexpected, is consequently unclear. This is what the third objection mentioned earlier is about. The proper question, nonetheless, is whether the Act is *avoidably* unclear. If its subject matter requires it to be unclear in a way that cannot be avoided, the reservation is mischievous at best. Having said that, any plausible objection would probably be directed at the fact that the Act is unclear as to the exact nature of the international obligations called into question, and the corresponding domestic measures required of it. As we have already seen, the most explicit guide in the Act itself, in response to this, is that the Act is "[a]n Act to enable Singapore to fulfil its obligations respecting Article 41 of the Charter of the United Nations."[20]

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[18] Singapore Parliamentary Debates, Official Record, 15 October 2001, Col 2438. Professor Tay was speaking as a Nominated Member of Parliament.

[19] HWR Wade, *Administrative Law* (Oxford: 1961) at 250. Compare his *Constitutional Fundamentals* (London: Stevens, 1980).

[20] *Supra* note 1, long title.

As we have also seen, Article 41 is, however, a very broad provision. Any ambiguity in the present Act rides, in fact, on that ambiguity in the United Nations Charter. Article 41 raises questions as to the precise limits of the Council's powers thereunder, and in turn, raises further questions as to the exact purpose(s) of the Act. What are the "measures" referred to in Article 41, for example?

From the domestic point of view, some light is shed on the matter when the debate in Parliament is consulted under s 9A(3)(e) of the Interpretation Act. The United Nations Act is, principally, an Act to combat aspects of terrorism which have, or would, come under consideration by the Security Council. However, and this is the problem, the Act, and regulations made under it which are deemed necessary or expedient by the Minister, are not confined to the implementation of Security Council Resolution 1373, perhaps not even to terrorism measures. Where the Act is plain in its words, to wit, an Act designed to further the implementation of Singapore's obligations under "Article 41", *not* "Security Council Resolution 1373", *or even* Resolution 1373 "and subsequent resolutions", or even, broader still, "measures taken by the Security Council in relation to global terrorism", or some such drafting language, it ought therefore to be given a broader meaning. There is some sense in this once we reflect on the potential practical difficulties that may be caused by objections based on what terrorism is or is not. To make too much of this objection would, therefore, be to introduce the issue of having a "one size fits all" piece of legislation, again. It would seem that the response to the first and second objections above apply equally here.

In sum, all these objections, as we have seen, are really about the safeguards usually considered necessary in relation to the exercise of broad executive powers, not the soundness of the legislative design adopted in light of the "mischief" for which the present Act seeks to provide. As for that mischief, it also requires a device that will allow international treaty obligations that alter in content over time to be fulfilled. The question of appropriate safeguards belongs, instead, to the subject of judicial control of executive powers, and I shall now turn to that.

IV. JUDICIAL REVIEW?

In relation to such regulations as appear to the Minister "necessary or expedient for enabling those measures to be effectively applied", s 2(1) of the Act states that they include:

> (without prejudice to the generality of the preceding words) provisions for —
>
> (a) the apprehension, trial and punishment of persons offending against the regulations;

and

(b) empowering any person or class of persons to exercise, when investigating any offence under this Act or any regulations made thereunder, all or any of the powers of a police officer under the Criminal Procedure Code (Cap 68) in relation to seizable offences.[21]

In other words, the "regulations" in s 2(1) include those stated in sub-paragraphs (a) and (b) above, but are, as expressly stated, not limited to them. Is the inclusion of the express words in sub-paragraphs (a) and (b) simply to be taken *ex abundante cautela*? Or would they indicate, instead, the view, indeed a common underlying apprehension with regard to such laws, that "there must be some limit on the Minister's powers"?[22] Whichever view is preferred, the words "without prejudice to the generality of the preceding words" shall have to be given their clearly intended effect. Nonetheless, that limitations exist to curtail the Minister's powers is an incident of Parliament's delegation of power; *delegated* legislation being, after all, *limited* legislation. The only real question relates to the extent of such presumed limitations.

In that regard, it is legally significant that s 2(1)(a) empowers the Minister to impose restrictions on liberty. According to the Constitution,[23] "[n]o person shall be deprived of his life or personal liberty save in accordance with law." In the present case, the question would be whether a person has been deprived of his liberty "in accordance with law".

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[21] The draft provision in the Bill that was to become s 2(1)(b) occasioned question in Parliament, to which the Minister responded that the draft provision refers only to Singaporean officials acting on Singapore soil, such as "customs officials, immigration officials or commercial affairs officers" who "have powers of investigation with respect to the Acts under which they have been appointed" although "if not for this Bill and the regulations, they may not have powers of investigations for offences under the proposed Bill"; Singapore Parliamentary Debates, Official Record, 15 October 2001, Col 2442.

[22] Sir William Wade, in referring to the position in England, put the point well in his original Hamlyn Lectures: "Parliament is far too prone to grant blank cheque powers…and ministers, through their legal representatives, have been too prone to argue that blank cheque powers could be used or abused in any way that suited them"; HWR Wade, *Constitutional Fundamentals*, *supra* note 15 at 44. That even a discretionary authority falls under the common law invention of "the rule of law" was already accepted in the England of 1598, by none other than Sir Edward Coke who, famously, took the view, in relation to the discretionary authority of the commission of sewers, that "although the words of the commission give authority to the commissioners to act according to their discretion, their proceedings ought nevertheless to be limited and bound within the rule of reason and law, for discretion is a science". He added that the commissioners, therefore, "are not to act according to their wills and private affections": *Rooke v Withers* (1598) 5 Co Rep 99 at 100. See also 11 Co Rep 98; Co Inst, vol IV, at 71.

[23] Constitution of the Republic of Singapore, Article 9(1).

A. *The Legal Issue*

One is, in the first place, concerned with the words, context and purposes of the Act. While s 2(4) of the Act states that "[a]ll regulations made under this Act shall be presented to Parliament as soon as possible after publication in the *Gazette*", compliance with s 2(4), would not, in itself, preclude judicial review.[24] Should the Minister be challenged, the courts may have to consider certain special features of the present Act.

That the Act imposes restrictions on individual liberty is evident; indeed the Act says so, effectively, in s 2(1). However, s 2(3) also expressly provides that the Constitution, and thus certain fundamental rights (which includes, for example, the guarantee of liberty in Article 9 thereof) would trump Ministerial regulation made under the Act in case of conflict. True, the broad terms of the Act, which grant the Minister the power to issue a regulation where he finds such regulation "necessary or expedient", leaves the Minister much discretion, and that discretion would fall to be included as a discretion "in accordance with law", meaning the parent Act. However, broad formulations of executive discretion could occasion precisely what the breadth of formulation seeks to avoid – judicial construction.

The key issue here is what the Minister "deems necessary or expedient". The presumption *omnia esse rite acta* applies.[25] Would it, however, be true to say that so long as there is direct evidence that the Minister deems such regulation made under the Act necessary or expedient, any further challenge would be non-justiciable? On the one hand, Article 9 of the Constitution would, ordinarily, be thought to enable the courts to inquire into the exercise of Ministerial discretion, ie as to whether a particular deprivation of liberty is "lawful". That a particular regulation might, for example, be "irrational" or "disproportionate" in relation to the mischief to be addressed would ordinarily constitute grounds for judicial review. On the other hand, there is also reason to argue that this Act would require special treatment because of its nature and subject matter.

B. *Non-Justiciability on Account of National Security?*

Let us, first of all, consider national security.

Chan Hiang Leng Colin v Minister for Information and the Arts held that where the Minister has in mind "national security" considerations, the courts would inquire only into the characterisation of the issue as involving one of national security, and ask if no reasonable Minister would have issued the particular regulation. The courts would not inquire into the merits

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[24] *MacKay v Marks* [1916] 2 IR 241; *Institute of Patents Agents v Lockwood* [1894] AC 347 at 366; *Hoffman La Roche v Secretary of State for Trade and Industry* [1975] AC 295; *Laker Airways Ltd v Department of Trade* [1977] QB 643 (CA); *cf Bowles v Bank of England* [1913] 1 Ch 57.

[25] *Per* Viscount Maugham: *Liversidge v Anderson* [1942] AC 206, at 225-6.

of the measures actually carried out.[26] On this view then, potential challenges to the present Act based on the contention that the Minister took into account irrelevant considerations (for example, something other than Security Council decisions taken under Article 41 of the United Nations Charter), or did not take into account what he ought to have (an Article 41 Security Council decision), or even that the sanction he imposes in a regulation is disproportionate and thereby unreasonable, could be defeated where Singapore's "national security" is in question. As the Court of Appeal put it:

> Once it is accepted that matters of national security are not justiciable, there is very little room (if any) left for any doctrine of proportionality (assuming it exists) to apply, other than the well-established one of irrationality. To apply any higher test than the *Wednesbury* test would necessarily involve the court in a decision on the merits. It would require the court to balance the reasons, pro and con, for Order 405/94, albeit with 'a margin of appreciation'. However, this is precisely what the courts are not permitted to do, even with 'a margin of appreciation', for that would involve an usurpation of power and responsibility that rightly belongs to the minister.[27]

According to the Court of Appeal, counsel in *Chan* was "in fact urging the court to allow him an opportunity to put the issue of Jehovah's Witnesses' refusal to do National Service before the court in a full hearing for judicial review", but "[i]t is not for the courts to say how many men must refuse to do National Service before the government can legitimately consider that the refusal constitutes a threat to national security". However, the view taken by the court was that "[s]uch issues can only be judged by those on whom the responsibility for national security lies" as "we are of the view that even if the appellants could muster all the evidence they could on this

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[26] *Chan Hiang Leng Colin v Minister for Information and the Arts* [1996] 1 SLR 609 at 618 G-I.

[27] *Chan Hiang Leng, supra* note 26 at 621 D-F. In the colourful speech of Karthigesu JA (with whom LP Thean and Goh Joon Seng JJ concurred), at 621G-I - 622A:

> In the picturesque words of counsel, we will even assume at this stage that the Minister may have used a sledgehammer to crack a nut when he issued Order 405/94…However, in order for Mr. How to show a prima facie case of reasonable suspicion or what might turn out to be an arguable case for judicial review, that is not sufficient. The test for irrationality is whether no reasonable minister would issue Order 405/94. Using the same metaphor, it is not sufficient for Mr. How to show a prima facie case of reasonable suspicion that the minister had used a sledgehammer to crack a nut. He must show what might turn out to be an arguable case that *no reasonable* minister would use the proverbial sledgehammer to crack the figurative nut. And he must be able to do so within the restriction that issues such as the size of the nut, the thickness of its shell, the force required to crack it, how many attempts one has to crack it, the consequences of failing to crack it, and the adequacy or otherwise of any other alternative such as a smaller nutcracker, are all non-justiciable.

issue, they would still not be able to mount an arguable case along these lines, for the simple issue remains that the issue is not justiciable".[28]

The matter is not, however, as cut and dried as that in *Chan* in the case of the present Act. The drafting language of the Act in s 2(1), and the overall scheme of the Act, particularly the reference in its long title to Article 41 of the United Nations Charter might raise a difficult issue of legal significance; quite apart from the sorts of objection towards "Henry VIII" clauses generally, which are inevitably based on some preferred constitutional theory.

C. *The Precedent Fact Principle*

The Act does not spell out, for example, the kinds of consideration that would prompt the Minister to deem regulation "necessary or expedient" (*eg* that considerations of national security are involved[29]). Such an indication of Parliament's intent could have dispelled doubt. Instead, the long title states, and I must repeat this, that it is "[a]n Act to enable Singapore to fulfil its obligations respecting Article 41 of the Charter of the United Nations." In that reference to Article 41, the Act can only be taken to refer to Security Council decisions thereunder, for Article 41 speaks of "measures" which the Security Council may decide upon "to give effect to its decisions", and the power of the Council to "call upon" States Members to apply such measures.[30] If this view is correct, the Act therefore introduces, by way of that reference to Article 41 in its long title, a "precedent fact" to the Minister's proper exercise of his discretion.[31]

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[28] *Chan Hiang Leng*, *supra* note 26 at 619B-E.

[29] For indeed, in some, perhaps many, cases, they might not.

[30] This is only my interpretation of the matter, but the Interpretation Act (Cap 1) does state, in the chapeau to s 9A(2) that "in the interpretation of a provision of a written law, if any material not forming part of the written law is capable of assisting in the ascertainment of the meaning of the provision, consideration may be given to that material", whereas s 9A(3)(e) states that "[w]ithout limiting the generality of subsection (2), the material that may be considered in accordance with that subsection in the interpretation of a provision of a written law shall include…any treaty or other international agreement that is referred to in the written law". Moreover, s 9A(3)(c) would also include "the speech made in Parliament by a Minister on the occasion of the moving by that Minister of a motion that the Bill containing the provision be read a second time in Parliament." Recall the Minister's speech in Parliament during the Second Reading of the Bill, *supra* note 12, and the text thereto, which referred to "future Security Council resolutions" as well as the need to "ensure that we are in a position to be able to give effect to them effectively and promptly". These references to "future Security Council resolutions" are, in my view, references to resolutions adopted under Article 41, which is a treaty provision "referred to in the written law" for the purposes of s 9A(3)(e) of the Interpretation Act.

[31] The Interpretation Act is silent as to the effect of the long title of an Act. Whereas it was once considered that the long title of an Act is not a part of the Act, that view has long been discarded at common law. Wightman J, in *Johnson v Upham* (1859), 2 E & E 263 took the view that "the title of an Act of Parliament is no part of the law, but it may tend to show the object of the Legislature", but Lindley MR, stating the position at common law forty

Against this, the words "necessary or expedient" in the present Act would seem to suggest the contrary - that no inquiry should be made at all of the merits of the Minister's decision, as these operative words would suggest, literally, that it is a matter of pure judgment; *ie* a "subjective" test. At common law in Singapore, however, these words do not preclude an inquiry into the legal merits of the Minister's decision, and I will now turn to this. I will cite some English authorities, but they are only those already taken judicial notice of here in Singapore.

In *Secretary of State for Education and Science v Tameside MBC*, the House of Lords was presented with a statutory requirement that the Secretary of State, in giving directions, should be "satisfied" (this being the operative word in the statute) that a local education authority had acted unreasonably. Lord Wilberforce took the view there that:

> [t]he section is framed in a 'subjective' form – if the Secretary of State 'is satisfied'. This form of section is quite well known, and at first sight might seem to exclude judicial review. Sections in this form may, no doubt, exclude judicial review on what is or has become a matter of pure judgment. But I do not think that they go further than that. If a judgment requires, before it can be made, the existence of some facts, then, although the evaluation of those facts is for the Secretary of State alone, the court must inquire whether those facts exist, and have been taken

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years later, in *Fielden v Morley Corporation* [1899] 1 Ch 1 at 3, said "I read the title advisedly because now and for some years past the title of an Act of Parliament has been part of the Act. In old days it used not to be so, and in the old books we are told not to regard it, but now the title is an important part of the Act and is so treated by both Houses of Parliament". The matter can also be viewed in terms of the need to construe a statute as a whole, for as Lord Moulton said, in *Vacher v London Society of Compositors* [1913] AC 107 at 128, "[t]he title is part of the Act itself and it is legitimate to use it for the purpose of interpreting the Act as a whole and ascertaining its purpose".

Even if I am wrong about the way in which Article 41 would have to be accounted for (*ie* as a "precedent fact" to the consideration of the proper exercise of Ministerial discretion under the United Nations Act), there is ample comparative common law authority on a presumption in favour of compliance with an international treaty to the same effect. There are two versions of the presumption. The narrow version is akin to the terms of s 9A(3)(e) of the Interpretation Act. Whereas s 9A(3)(e) requires the statute to refer to the treaty explicitly, the narrow version of the presumption only requires cogent evidence that the statute seeks to give effect to the treaty in question, and therefore allows for that conclusion to be drawn by way of an implication. This version was expressed by Diplock LJ in *Salomon v Commissioner of Customs and Excise* [1966] 3 All ER 871 (CA) at 875-6. A wider version was expressed by Lord Denning MR in *R v Secretary of State for Home Affairs, ex parte Bhajan Singh* [1975] 2 All ER 1083 (CA) at 1083. The difference between the two, it would appear, is that, according to Lord Denning's version, the statute need not even seek to give effect to the treaty in question, so long as the statute affects the rights and liberties of the individual.

Whether we take the "long title plus s 9A(3)(e)" theory, or seek, instead, to rely on (whichever version of) the presumption in favour of compliance with an international treaty, either approach would support the application of the "precedent fact" principle of review.

> into account, whether the judgment has been made upon a proper self-direction as to those facts, whether the judgment has not been made upon other facts which ought not to have been taken into account. If these requirements are not met, then the exercise of judgment, however bona fide it may be, becomes capable of challenge: see *Secretary of State for Employment v Aslef (No 2)* [1972] 2 QB 455, per Lord Denning MR at p 493.[32]

Owing to the delegated or derived authority of subordinate law-making powers, this "precedent fact principle" of review would require the satisfaction of the courts that all conditions precedent stated in the parent statute as to their validity have been fulfilled. Citing Lord Wilberforce, Chan Sek Keong J[33] said in *Re Fong Thin Choo* that:

> Having regard to Lord Wilberforce's statement of the law, I do not think that the condition of 'satisfaction' under reg 12(6) [the regulation in question] is as a matter of pure judgment or opinion, e.g. a judgment as to whether an orchestral performance is good or bad or a play is entertaining or not. Reg 12(6) clearly does not call for that kind of judgment as it is concerned with an inquiry as to a fact, i.e. whether dutiable goods have been exported or not exported.[34]

According to Chan Sek Keong J, the court "should appraise the quality of the evidence and decide whether that justifies the conclusion reached".[35]

The words "necessary or expedient" in the United Nations Act might nonetheless then be seen to require that the Minister should show a number of things. Firstly, that there exists the precedent fact of a Security Council decision that makes the regulations issued "necessary or expedient". Secondly, that he has taken the decision into account in pursuing his judgment under the Act. Thirdly, that he has also properly directed himself to the decision in exercising that judgment. And, finally, that his discretion under the Act was not exercised on the basis of other facts which ought not to have been taken into account. This last can cause some real difficulty, precisely because the determination of how any Member or Non-Member State is to approach a Security Council resolution could involve, in practice, not only a legal judgment but also a foreign policy determination. We will return to this issue, below.

The precedent fact principle was also referred to, *obiter*, in the earlier Singapore case of *Chng Suan Tze v Minister of Home Affairs & Ors and other appeals*. The Court of Appeal took the view that the Minister's view

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32 *Per* Lord Wilberforce: [1977] AC 1014 at 1047.

33 As the Honourable Attorney-General then was.

34 [1992] 1 SLR 120, at 130A-B.

35 *Ibid*, at 130D-E, quoting Lord Wilberforce, in *R v Home Secretary, ex parte Khawaja* [1984] 1 AC 84 at 105.

would suffice to invoke the presumption *omnia esse rite acta*, and thus "it is for those who allege that the exercise of the discretion is wrong to prove it to be so."[36]

That, however, only tells us where the onus lies. There is a larger question. If the aforementioned principle remains good law in Singapore, would its application be desirable in relation to the present Act? What is or not a mandatory Security Council decision, or which parts of a particular resolution contain mandatory decisions therein, are matters which would require the construction of an international legal and political instrument. Such construction involves also the conduct of Singapore's foreign affairs. Who better to decide this than the executive?

If, truly, the United Nations Act introduces on its proper construction a precedent fact to the Minister's proper exercise of his discretion, and does not seek to exclude judicial review by way of an ouster clause (which the Act does not), that the Minister might consider that a particular Security Council resolution makes it "necessary or expedient" to enact subsidiary legislation under the Act on grounds of national security may not therefore be sufficient to constitute a plea in bar to judicial review of the Minister's subsidiary law-making discretion . While framed in evidentiary terms, this was the view taken, albeit not the *ratio*, in the earlier case of *Chng Suan Tze*.

There the Court of Appeal noted that where the precedent fact principle applies, the court would apply an objective standard, as opposed to a "subjective test" whose satisfaction depended purely on the Minister's own decision. The court said:

> With respect to s 8 of the ISA, what must be noted first is the fact that the nature of the discretion therein itself involves national security. Where a decision is made that it is "necessary" to detain someone "with a view to preventing that person from acting in a manner prejudicial to the security of Singapore", it is plain that the decision to detain would be one based on considerations of national security. Whether, on grounds properly falling within the scope of s 8, the detention order is necessary is therefore, really, a question as to what national security requires and therefore would be a matter solely for the executive's judgment. However, just as the court can determine that a decision was in fact based on national security considerations, equally the court can in our view determine whether the matters relied on by the executive in the exercise of discretion can be said to fall within the scope of s 8 of the ISA. [37]

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[36] *Chng Suan Tze v Minister of Home Affairs & Ors and other appeals* [1988] SLR 132 at 165G-H.

[37] *Ibid*, at 158B-E.

There is another important consideration. In the case of the United Nations Act, Parliament could indeed have limited or precluded judicial review by making such an intent plain in the Act, but that it did not do so expressly could mean that Parliament did not intend to exclude judicial review. If this view is correct, the executive would have the burden of proving both the satisfaction of the jurisdictional fact, and other requirements of the particular statutory provision in relation to the exercise of Ministerial discretion, perhaps even to the point of requiring the discretion exercised by the Minister to bear "a reasonable relation to the object of the law".[38]

Compare the Internal Security Act,[39] s 8B(2) of which now contains an "ouster clause" with regard to judicial review. According to s 8B(2):

> There shall be no judicial review in any court of any act done or decision made by the President or the Minister under the provisions of this Act save in regard to any question relating to compliance with any procedural requirement of this Act governing such act or decision.

Admittedly, contending views are possible in the case of the United Nations Act. One view is this. While, as a result of this 1989 Amendment to the Internal Security Act, the reasoning in *Chng Suan Tze* no longer applies to acts done or decisions made under the Internal Security Act, this is true only of cases in Singapore wherein the Internal Security Act, or other Acts employing an ouster clause with a similarly demonstrable legislative intent, are involved.[40] Another view, however, would point in the opposite direction. According to this other view, the general disapproval of judicial review of executive action on security matters shown in the course of Parliamentary debate on the Amendment should be extended by way of judicial policy. It should be extended to any executive decision involving considerations of national security; *ie* regardless of whether the Internal Security Act is involved.[41] Singapore law remains unclear on which route our courts will take.

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[38] *Ibid*, at 155B-C, citing Lord Diplock in *Ong Ah Chuan v Public Prosecutor* [1981] 1 MLJ 64.

[39] Internal Security Act (Cap 143).

[40] *Chng Suan Tze* has been superseded by Constitutional and legislative amendments in Parliament with respect to judicial review of acts or decisions taken under the Internal Security Act; see *Singapore Parliamentary Debates, Official Records*, 25 January 1989, cols 461, 467-71, 531.

[41] See Singapore Parliamentary Debates, Official Record, 25 January 1989, cols 531-56.

D. *The Principle in* Chan Hiang Leng, *Again*

There is also a second sort of "national security argument". While *Fong Thin Choo* did not involve national security considerations, *Chan Hian Leng* (which did not involve the Internal Security Act) did. To apply *Chan Hian Leng* then, if an executive act or decision involves national security considerations, the act or decision would simply not be reviewable, but for the characterisation by the decision-maker of his decision as one involving national security. The legal principle therein seems clear enough, but its application is arguably less so. That difficulty, plainly stated, is that in order to determine whether the United Nations Act, or a regulation made under the Act, actually involves considerations of national security, the courts might be required to inquire precisely into that which is forbidden in legal principle (*ie* into the *merits* of the Minister's decision).

The United Nations Act is silent as to the characterisation of the Minister's discretionary power under the Act. It does not say, for example, when and where the exercise of that discretionary power would involve considerations of national security, let alone that a decision taken under the Act need involve such considerations. One who reads the Act will have to draw that inference. The Court of Appeal in *Chan Hiang Leng*, while declaring national security decisions to be non-justiciable, affirmed that the actual characterisation of an act or decision as involving such considerations is itself subject to the test of irrationality, so that the courts would step in only where no reasonable Minister would have acted or decided in that way.[42]

There is one crucial consideration, however. In *Chan Hiang Leng*, the applicants had failed to show that the Minister's characterisation of the issue was such that no reasonable Minister would have done so. More importantly, for our present purposes, is the fact that the applicants themselves had shown in *Chan* that national security considerations were involved by way of their own conduct and professed beliefs, insofar as the issue of compulsory national service is patently a national security issue. You could say, perhaps, that the applicants shot themselves in the foot.

It is also easy to imagine other sorts of cases where the conduct of the applicant does not, in itself, show that the issue of national security is involved. Therein lies the rub. Might the courts, while following *Chan Hiang Leng* above, not be forced to look, in just these sorts of cases, into the Minister's decision? In the absence of an ouster clause, so long as the applicant can show, in seeking leave for a full hearing on judicial review, that there is an "arguable case" or "a prima facie case of reasonable

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[42] *Chan Hiang Leng*, *supra* note 26, at 621H.

suspicion",[43] on the basis of a precedent fact to be considered, would not the courts thereby be moved to grant leave to inquire into the matter?

E. *The Scope of Review – Betwixt and Between* Chng *and* Chan

Regarding the scope of review then, much would depend on the proper construction of Parliament's intent.[44] *If* Parliament intended to exclude the Minister's discretion from the precedent fact category, the scope of review would, in effect, be very much the same as that in relation to the decision-maker's characterisation in national security cases of those cases as such. This is what *Chan Hiang Leng* stands as good authority for; *ie* only on the *"Wednesbury"* basis that no reasonable decision-maker would have done the same.[45] The Court of Appeal added that "[s]o long as Parliament makes its intention clear, the scope of review would be so limited, even where the liberty of the subject is concerned."[46] Even so, some cases may not present themselves in the way that the facts did in the case of *Chan Hiang Leng*, and the courts may indeed be compelled to inquire precisely into what the Court of Appeal in *Chan Hiang Leng* avoided.

But *if* Parliament is to be taken to have intended the precedent fact category, "the scope of review extends to deciding whether the evidence justifies the decision,"[47] meaning the inquiry would extend beyond asking only if no reasonable decision-maker would have done the same. Illegality, which would include the Minister acting outside his lawful powers, procedural impropriety, irrationality (and maybe even proportionality as a subset thereof) could all constitute grounds for review.[48] Conceivably, the courts would have to be satisfied, on the evidence, whether, or which part of, a Security Council resolution imposes an obligation on Singapore to act. The courts may also have to be satisfied as to why the Minister considers it so, as well as how he ought (not) to act.[49]

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43 *Chan Hiang Leng*, *supra* note 26, at 615G – 616F.

44 *Chng Suan Tze*, *supra* note 36, at 161D-E ("whether a particular discretionary power is subject to any jurisdictional or precedent fact depends on the construction of the legislation which creates that power"), citing *R v Secretary of State for the Home Department, ex parte Khawaja* [1984] AC 74.

45 *Ibid*, at 161E ("A discretionary power may be required to be exercised based on objective facts but Parliament may decide to entrust all relevant decisions of these facts as well as the application to the facts of the relevant rules and any necessary exercise of discretion to the decision-maker, in which case the scope of review would be limited to *Wednesbury* principles"). See *Associated Provincial Picture Houses Ltd v Wednesbury Corp* [1948] 1 KB 223.

46 *Ibid*, at 161F.

47 *Ibid*, at 161E.

48 The principles enunciated in Lord Diplock's speech in *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374.

49 As to relief sought, the difficulty is that Singapore law remains that of the old English Order 53 of the Rules of the Supreme Court. Hence, a declaration would be unavailable, not only procedurally under Singapore's Order 53 of the Rules of Court, Supreme Court of

Judicature Act (Cap 322, s 80), but also in relation to illegality as illegality, including actions outside the lawful powers of the decision-maker, would only go towards voidability. The orthodox view therefore would be that since a declaration would achieve little, it would not be available. One response, argued by Zamir, is that a declaration could be constitutive, and that would be a way around the problem; I Zamir, "The Declaratory Judgment Revisited" (1977) Current Legal Problems 43, at 49-51. Another approach is that taken in the Malaysian case of *Hong Leong Equipment Sdn Bhd v Liew Fook Chuan and another appeal* [1996] 1 MLJ 481 that the court has jurisdiction to fashion the appropriate remedy to fit the facts of the particular case, and is not confined to the grant of the usual prerogative orders known to English law so long as that jurisdiction is not expressly prohibited by written law pursuant to paragraphs in the Schedule to the Malaysian Courts of Judicature Act 1964 (hereafter "the Schedule"). The Malaysian Court of Appeal held, in that case, that paragraph 1 of the Schedule conferred such "additional powers". This argument would, in the Singapore context, hinge on the construction of s 18 of the Supreme Court of Judicature Act, which is *in pari materiae* with the Malaysian statutory provision. Section 18 of the Singapore Act states that:

> (1) The High Court shall have such powers as are vested in it by any written law for the time being in force in Singapore.
> (2) Without prejudice to the generality of subsection (1), the High Court shall have the powers set out in the First Schedule.
> (3) The powers referred to in subsection (2) shall be exercised in accordance with any written law or Rules of Court relating to them.

The First Schedule thereto states, in turn, in paragraph 1, that:

> Power to issue to any person or authority directions, orders or writs, including writs of the nature of habeas corpus, mandamus, prohibition, quo warranto and certiorari, or any others, for the enforcement of any of the rights conferred by any written law or for any purpose.

The view taken of Malaysian law by Gopal Sri Ram JCA was highly progressive, in that "the power of the High Court in the field of public law remedies is not confined to the grant of usual prerogative orders known to English law. Our courts should not consider themselves to be fettered by those antiquated shackles of restrictive traditionalism which the common law of England has imposed upon itself." *Contra*, in Singapore, the case of *Re Application by Dow Jones (Asia) Inc* [1988] 1 MLJ 222, at 225 A-D, where Sinnathuray J took the view, instead, that "the procedure that applies for prerogative orders is based on the old English Order 53…So, as I have sought to show, there is no provision in our substantive law or our rules of court to make orders of declarations or give other ancillary reliefs in an application made under Order 53". The difficulty is that, under the old English Order 53, there was no avenue for obtaining a declaration in public law proceedings, but only by way of writ or originating summons; declarations were not available in respect of any decision of a public nature of a public body; and, perhaps more importantly, since the procedure for declaratory relief was distinct from that relating to an application for *mandamus*, *certiorari* or prohibition, an applicant would not be able to "switch horses midstream" with the leave of the court where justice would require this; *Zamir & Woolf's The Declaratory Judgment* (London: Sweet & Maxwell, by The Rt Hon The Lord Woolf & Jeremy Woolf with Sidney Prevezer & The Hon Lord Clyde,1993), §§ 2.43 – 2.48. These constraints, if they are to apply in Singapore in the way they did in the English law of old, would mean that, in Singapore, the view that a declaration would be unavailable where the complaint is that of error of law, or of the decision-maker exceeding his or her powers, could not be "cured" by the courts in the same application; see Zamir, "The Declaratory Judgment Revisited", *supra.* If Singapore law should prefer this approach to that adopted in Malaysia, the better view, in order that justice be better served, would be that errors of

Perhaps such "full-blooded" judicial intervention is preferable. Maybe the "gap" in *Chan Hiang Leng* discussed above, involving the case where it is not at all plain on the face of the decision-making power that national security issues are involved, is all to the good. As a matter of judicial policy, however, we should be wary of quick assumptions about the complexities presented in the very subject-matter of the present Act. What makes a decision of the Security Council legally binding is a notoriously difficult subject, and international lawyers know that the legal issues therein remain largely unresolved.

V. UNITED NATIONS LAW & STATE FOREIGN POLICY

A. *Mandatory Security Council Decisions under the Charter*

Although he did not say so expressly, the Honourable Minister's remarks in Parliament, as to the consequences for Singapore of non-compliance with resolutions such as Resolution 1373, refer to

(1) Charter Articles 25 and 49, regarding binding decisions of the Security Council, and
(2) Charter Articles 41, 42 and 48 concerning the "censure and sanctions" which might be initiated by the Security Council in the event of failure by a member State to comply.

The usual view is that the Security Council need not cite Articles 25 or 49 of the United Nations Charter in its resolutions in order for these resolutions to become binding decisions of the Security Council. [50]

Article 25 requires that States Members of the United Nations Organisation "agree to accept and carry out the decisions of the Security Council in accordance with the present Charter", whereas Article 48 requires that such "action required to carry out the decisions of the Security Council for the maintenance of international peace and security shall be

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law are jurisdictional defects which render the decision-maker's exercise of discretion null and void; *Anisminic Ltd v Foreign Compensation Commission* [1969] 2 AC 147. The applicant, in the case of a challenge under the United Nations Act, would then commence an action simply by way of writ or originating summons, and not under Order 53 at all.

Certiorari would be available in respect of errors on the face of the record, and the argument here would be that a wrongful interpretation of a resolution of the Security Council would constitute an error on the face of the record since the resolution would be, by way of the long title in the United Nations Act, part of the record.

However, *mandamus* would not be precluded by the reasoning of the House of Lords in the English case of *R v Secretary of State for Foreign and Commonwealth Affairs, ex parte Rees-Mogg* [1994] 1 All ER 457, for in the case of the present Act, a question of domestic law is actually involved. Having said that, *locus standi* would be an issue; on which, see further the Malaysian case of *Kajing Tubek*, *infra* note 66, discussed below.

[50] SD Bailey, *The Procedure of the UN Security Council*, 2nd ed (Oxford: Clarendon, 1988) at 238.

taken by all the Members of the United Nations or…some of them, as the Security Council may determine." The operative word "shall" therein brooks no dissent, and imposes a binding obligation on States Members which, by virtue of Article 103 of the Charter, also supersedes any contrary international treaty obligation undertaken by a State Member.[51] Article 49 requires States Members to afford "mutual assistance in carrying out the measures decided upon by the Security Council".

These three provisions spell out the duties owed by Member States to the Council and to each other in the face of a binding Council decision. But although Article 48 uses the operative word "shall", and gives further hint in the words "decisions of the Security Council for the maintenance of international peace and security", Articles 25 and 49 do not spell out the *calculi* and criteria by which a Security Council "decision" would be considered binding or mandatory. Bailey points out, in an authoritative work on the subject, that the word "decision" alone does not automatically mean a binding decision, and can therefore be used to mean a non-binding decision.[52] So what is or not an Article 25, 48, or 49 binding or mandatory decision is not always plain on the face of the record.

The usual view, if true, only tells us what is not required for a Council resolution to contain binding or mandatory elements, it does not tell us what is required. This last could cause genuine difficulties both in legal theory and practice since, within the same Security Council resolution, there may

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[51] Article 103 states that "[i]n the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail".

[52] Bailey, *supra* note 43, at 235 *et seq*. In contrast, the International Court of Justice appears, simply, to have assumed that Article 25 decisions are binding. The Court took the view, without providing any further reasoning, that "Article 25 is not confined to decisions in regard to enforcement action but applies to 'decisions of the Security Council' adopted in accordance with the Charter"; *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South-West Africa) Notwithstanding Security Council Resolution 276* (1970), (1971) ICJ Reports 16, § 13. The Court also went further, and stated that since the resolution in question referred to Article 25, that would be sufficient to make it legally binding. With the greatest respect, the approach taken by the Court begs two questions. First, is a "decision" automatically binding? Secondly, can a decision taken under Chapter VI be legally binding where it does not refer to Article 25? As to the first, the drafting history of Article 25 does not point to the conclusion reached by the Court, and as the British representative pointed out in the Security Council "as a matter of law, my Government considers the Security Council can only take decisions generally binding on Member States only when the Security Council has made a determination under Article 39", and added that "only in these circumstances are decisions binding under Article 25"; SC 1598 mtg, 26 UN SCOR 5 (1971), with France expressing a similar view at 2; ND White, *Keeping the Peace, The United Nations and the Maintenance of International Peace and Security* 2nd ed (Manchester: MUP, 1997) at 61. As for the second question, if the pronouncement of the Court were taken as dogma, this could, in particular cases, fly in the face of the Court's own injunction that all the circumstances of the resolution ought to be taken into account. The better view is that the Court was addressing the particular circumstances of resolution 276 in that case, and that the pronouncement of the Court applies only to the facts of that resolution.

appear one or more mandatory decisions together with other "non-mandatory" recommendations. There are a number of interpretative guides, or pointers, albeit ones that are potentially inconsistent in their actual application in practice.

One helpful pointer lies in the origin of Article 25 in its present form. The legislative history or *travaux preparatoires* of Article 25 precedes the San Francisco Conference of April to June 1945. What is Article 25 today came into being in the "Plan for the Establishment of an International Organization for the Maintenance of International Peace and Security" of December 1943, which provided for the binding decision-making power of an "Executive Council" (something that did not come into being). Under the enumeration in the annex to the Plan, item "no. 4" states that it is the duty of members

> to accept as binding the decisions of the Executive Council in the settlement of a dispute of which the Council takes jurisdiction and to carry out in good faith the recommendations of the Council with respect to conditions or situations deemed by it as likely to endanger peace.[53]

Should we take the Plan as the guide, mention of such formulaic words as "threat to or breach of international peace and security" in the words of a Security Council resolution, or a reference to Charter Article 39 itself within which the words are contained, should suffice to indicate "bindingness". In other words, decisions taken under Chapter VII of the Charter are, on this view, binding whereas those not so taken are not. And if, perchance, Article 49 is cited in a resolution, with or without a reference to these formulaic words or to Article 39, that would also indicate that the decision in question was taken under Chapter VII, for Article 49 itself falls under Chapter VII.

This view has received wide acceptance, even if only implicitly at times.[54] But it is as well to be clear as to what the intention underlying advocacy of this view has often been. It has been held in opposition not only to the view that decisions under Chapter VI are equally binding,[55] but also in opposition to the view that decisions under Chapter VII are sometimes non-binding. The need to distinguish the two sorts of opposition complicates the task further of ascertaining what a binding decision of the Security Council looks like once it is accepted that use of the word "decision" in a resolution is not decisive in itself. And that is not all, for the

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[53] US Department of State (ed), *Postwar Foreign Policy Preparation*, Publication 3580 (Washington DC: US Department of State, 1950), at 526 *et seq*; Bruno Simma, *The Charter of the United Nations: A Commentary* (Oxford: OUP, 1994), at 408(1).

[54] The Security Council debates in relation to the question of Palestine in 1948, and over Kashmir in 1957 evince this view.

[55] For example, the Indian view during the Kashmir debate in 1957 was that a resolution taken under Chapter VI of the Charter is, by definition, not binding in legal character.

positions of States on the matter change, as did the erstwhile Soviet Union's from the early post-war years to the time of the famous Resolution 242 of 1967 on the Middle East in the aftermath of the "Six Day War".

In addition, the International Court of Justice took the view, in its *"Namibia"* Advisory Opinion, that Member States ought to look at "the terms of the resolution to be interpreted, the discussions leading to it, the Charter provisions invoked and, in general, all circumstances that might assist in determining the legal consequences of the resolution".[56] This could mean that whereas a binding decision could therefore be taken under Chapter VI, which was the view of the International Court of Justice,[57] equally a decision taken under Chapter VII may not be binding; for example, because the "terms, discussions leading thereto and all the circumstances" could point one way whereas the "Charter provisions invoked" point to another. We might ask: Where the Council passes a resolution while acting under its Chapter VII powers, is it automatically to be presumed that the Council cannot therefore "recommend" a course of action, even if the Council says so expressly? If this is true, it would fly in the face of the Court's suggestion that (all) the terms of a resolution, the discussions leading to it, and so forth, including all the circumstances, ought to be taken into account in deciding whether a Security Council resolution imposes a binding obligation on Member States. Moreover, the terms of one resolution may be insufficient to determine its legal effect where a series of follow-up resolutions ensue, and the inquiry as to "legal bindingness" may be asked equally at any point in that series.

My point is that the various Member States, or more particularly their various foreign ministries, would have to determine this legal question, guided by considerations that could extend far beyond simple legal interpretation and into the realm of the actual day-to-day conception and implementation of foreign policy, including foreign policy calculations of the effects of non-compliance. This last would/should in turn account for whether non-compliance is tantamount to the breach of a binding legal duty, and would therefore be linked, by way of an incidental or preliminary question, to the issue of "legal bindingness" discussed immediately above.[58] It is to this further issue, concerning foreign policy calculation of the price of non-compliance, that we ought now turn to.

B. *Legal Sanctions under Articles 41 & 42 of the Charter*

What is clear is that once a binding decision has been issued, non-compliance with it would constitute a violation of a legal duty specified

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56 *Namibia Advisory Opinion*, *supra* note 52, § 14.

57 See *supra* note 52.

58 L Henkin, *How Nations Behave – Law and Foreign Policy*, 2nd ed (New York: Council on Foreign Relations/Columbia University Press, 1979), at 39-87 for a treatment of the policy calculations that go into compliance with and violation of international law.

under the Charter. Turning to the Minister's warnings that action could be taken against Singapore in the form of "censure and sanctions" for not complying with such measures mandated by the Security Council, Articles 41 & 42 are again pertinent. Article 42 states that:

> Should the Security Council consider that measures provided for in Article 41 would be inadequate or have proved to be inadequate, it may take such action by air, sea or land forces as may be necessary to maintain or restore international peace or security. Such action may include demonstrations, blockade, and other operations by air, sea, or land forces of Members of the United Nations.

While it might be said that the words "to maintain or restore peace or security" amount to words of limitation, and that it is a little far-fetched to think that non-compliance with measures such as those called for under Security Council Resolution 1373 could in itself amount to a threat to international peace or security, it must be recalled that, under Article 39

> [t]he Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken in accordance with Article 41 and 42, to maintain or restore international peace and security.

Commentators have noted that this grants the Security Council a broad discretion in deciding whether there exists a "threat to the peace, breach of the peace, or act of aggression".[59] In the overall legal framework of the United Nations Charter then, violation of a binding Security Council decision, taken under Article 41 or some other Charter provision, could itself, conceivably, lead to action taken under Articles 41 or 42 in exceptional circumstances; for example, where such non-compliance is taken, rightly or wrongly, to be tantamount to complicity with the mischief or mischief-maker or makers which the original binding decision sought to address. The threat, however unlikely as a possibility as it may seem in abstract discussion, therefore becomes political as well as legal, and what is clear, for our present purposes, is that such matters are foreign policy

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[59] This broad discretion may be traced to the *travaux préparatoires* for Article 39. Bolivia had proposed a definition of aggression to reign in that discretion, and similar proposals were made by the Philippines and Czechoslovakia. While the Bolivian proposal received the support of numerous States, other States, including the United Kingdom and the United States, argued that binding the Security Council in this rigid fashion could lead to the opposite result of premature sanction, and a definition of aggression was finally rejected, and so too other proposals to restrict the discretion of the Security Council. See Simma, *The Charter of the United Nations*, *supra* note 53, at 607(3)-608(4).

matters *par excellence*, and are not particularly susceptible to domestic judicial consideration.

VI. "SUBSTANTIVE *LOCUS STANDI*" AND A POLICY OF JUDICIAL RESTRAINT IN THE SPHERE OF FOREIGN RELATIONS LAW

Even where the rule in *Chan Hiang Leng* is applied, the Singapore courts could, in some cases, review the exercise of the Minister's discretion under the Act. Yet, with the greatest respect, we should be wary of the potential pitfalls of seeking to determine, judicially, that a particular decision of the Security Council is legally binding, and, more than that, how that should be accounted for where the duty is one requiring changes to domestic law. Such a determination is not only uncertain as a matter of international law, but the determination of what is, or not, binding international law generally, and what is, or not, a measure that complies with such an international legal duty, should not adopt a view of the law that does not account for the reality that foreign policy determinations can, and do, enter into the view taken by individual States of the law. Moreover, what we call "international law" in these sorts of cases is, just as often, plain legal contestation.

Correspondingly, a rigid separation of public law powers applies poorly in the domestic sphere of foreign relations law. For example, Professor Louis Henkin restated, in 1996, a view he first expressed in 1972 about the law in the United States:[60]

> The foreign relations powers too reflect commitment to separation and checks and balances, but what each branch can do alone, when the other is silent or even in the face of opposition is not determined by any "natural" division. As they have evolved, the foreign relations powers appear not so much "separated" as fissured, along jagged lines different to classical categories of governmental power. Whether they are theoretically legislative, executive, judicial, or administrative, some powers and functions belong to the President, some to Congress, some to the President-and-Senate; some can be exercised by either the President or the Congress, some require the joint authority of both. Irregular, uncertain division renders claims of usurpation more difficult to establish and the courts have not been available to adjudicate them.[61]

While the temptation may exist nonetheless to challenge the scope of executive authority in every aspect of the government of a nation because of the doctrine of the separation of powers, or apprehension caused by any delegation of legislative authority, the exercise of "wide authority" is not at

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[60] L Henkin, *Foreign Affairs and the Constitution* (New York: Norton, 1972), at 32.

[61] L Henkin, *Foreign Affairs and the Constitution* (Oxford: Clarendon, 2nd ed, 1996), at 26-27.

all unusual, *and ought not to be*, it may be added, where the conduct of foreign relations is implicated in the domestic legal process. At common law in England, with respect to the relationship between the executive and the courts, the courts there adopt "a procedure for taking judicial notice of material facts" (*ie* as a matter, formally, of evidence), the effect of which "where necessary [is] to subject the courts to the determination of important legal issues by the executive so as to avoid embarrassment of a conflict of opinion".[62] Or as Lord Atkin had put it more plainly, Britain "cannot speak with two voices…the judiciary saying one thing, the executive another".[63] That too is the position, in very broad terms, taken by the courts in the United States.[64] Even then, the American diplomat, George Kennan, speaking across the Atlantic a half century after Lord Atkin of the "many facets of governmental organization and method" that are involved in the conduct of foreign affairs, felt compelled to impress upon the American public the importance of privacy, deliberateness, and a long-term approach, and of the need, in connection with that, to resolve "in a manner better than we have done recently, the great challenges to the soundness of government policy and to the claim of an administration to speak for the masses of the people in foreign affairs".[65]

That the intervening agency of the State policy-making apparatus is required to handle asymmetries between having an international legal duty, and actually performing that duty through domestic legal action, raises these same considerations in favour of judicial restraint, not least in relation to our present Act. The Minister's speech in Parliament as to the rationale, and need, for his powers under the Act ought therefore to be taken seriously. This is particularly so in examining the scope of the Act regarding his powers thereunder, and in relation to the immunity that the Minister's discretion should enjoy from judicial review.

There are perhaps two principal ways open to the courts to choose to exercise restraint when called upon to review the Minister's decision. One

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62 I Brownlie, *Principles of Public International Law*, 5th ed (Oxford: OUP, 1998), at 51-2.

63 *The Arantzazu Medi* [1939] AC 256 at 264.

64 See Henkin, *supra* note 9, at 143-148 on the "political question" doctrine. According to Professor Henkin, there is more than one reason for the doctrine in the United States. It could be that a particular branch of Government was simply acting within its constitutional powers. Either there were no limits on the authority of the particular branch of Government (the President or Congress) to so act, or where there were limits, these (limits) were not breached. In none of the cases where this actually occurred was the phrase "political question" used. Yet this is not really a "reason" for a "political question" doctrine, or if it were, the doctrine would be uninteresting. The same may be said for cases where judicial abstention is required by the Constitution. However, there is sometimes an "unusual need for unquestioning adherence" to a political decision which has already been made, or the possibility of embarrassment should the State, as a whole, not speak with one voice; *Baker v Carr*, 369 US 186 at 217 *(per* Brennan J). The real question becomes this: Does the doctrine require/empower the Courts to be "prudent" in certain sorts of cases, including those involving the conduct of the nation's foreign affairs?

65 G F Kennan, *American Diplomacy*, expanded edition (Chicago: UCP, 1984), at 91-103.

would go towards the discretion exercisable by the court whose relief is sought in respect of the legal prerequisite of *locus standi*, whereas the other would go towards non-justiciability by way of a close analogy between national security and foreign affairs.

As for the first, a case directly on point may be found in the recent jurisprudence of the Malaysian courts. In *Ketua Pengarah Jabatan Alam Sekitar & Anor v Kajing Tubek & Ors and other appeals*, a declaration was sought as to the validity of subsidiary legislation. Gopal Sri Ram JCA considered the question of standing to bring an action for a declaration in public law, and considered that "courts have – by the exercise of their interpretative jurisdiction – recognized that certain issues are, by their very nature, unsuitable for judicial examination" and thus "[s]ubstantive relief is denied in such cases on the ground that the matters complained of are non-justiciable". However, "[e]ven if a particular issue may be litigated because it is justiciable, a court may be entitled, in the exercise of its discretion, to refuse discretionary relief after taking into account all the circumstances of the case". Gopal Sri Ram JCA quoted from *Zamir on The Declaratory Judgment*, to the effect that where the grant of declaratory relief could benefit the applicant, it could nonetheless prejudice the public, or national interest, as a whole "and the court is entitled to have regard to the wider consequences when deciding whether or not to grant relief".[66] What is required therefore is a balancing act between the interests of the applicant and the public, or national, interest, and, without saying more, this aspect of the discretionary nature of all relief in judicial review[67] could allow for the exercise of some measure of restraint by way of judicial policy.[68]

As for the second way, *ie* non-justiciability, Lord Denning took the view in *Laker Airways Ltd v Secretary of State for Trade and Industry*[69] that

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[66] [1997] 3 MLJ 23, at 40I – 41G (*per* Gopal Sri Ram JCA, whose reasoning and conclusions Ahmad Fairuz JCA concurred). The phrase "national interest" occurs subsequently, at 46C-D. See also *Tan Sri Hj Othman Saat v Mohamed bin Ismail* [1982] 2 MLJ 177 at 179.

[67] The usual explanation of this is by way of the historical usurpation of equitable jurisdiction by the Court of Kings Bench which, being a common law court, found a convenient explanation in the royal prerogative; Professor JH Baker, *An Introduction to English Legal History*, 3rd ed (London: Butterworths, 1990) at 165.

[68] As for the prior issue of so-called "threshold standing", where a "*prima facie* case of reasonable suspicion" or "arguable case" has to be made out for leave to be granted, the authorities would preclude arguments based on national interest, or purported non-justiciability, and would not preclude the applicant's case by reason thereof at this stage. Threshold standing simply concerns the demonstration by the applicant of a sufficient interest. See *Inland Revenue Commissioners v National Federation of Self-Employed and Small Businesses Ltd* [1982] AC 617 at 630 (*per* Lord Wilberforce), 643 (*per* Lord Diplock), and 656 (*per* Lord Roskill); followed in the Singapore case of *Re Application by Dow Jones (Asia) Inc* [1988] 1 MLJ 222, at 226E – 227A (*per* Sinnathuray J). In *Kajing Tubek*, *supra* note 66, the issue of national interest was discussed in the context of substantive not threshold *locus standi*.

[69] [1977] QB 643, at 705-707 but , in that case, the prerogative had been placed on a statutory footing in the form of the Civil Aviation Act 1971, and the applicable rule therefore was, in the view of the majority, that in *Attorney-General v de Keyser's Royal Hotel Ltd* [1920]

"misdirection in fact or in law" may nonetheless cause the exercise of the prerogative in foreign affairs to be impugned. But Lord Roskill considered this "*obiter*" (correctly), and, in any event, "far too wide" in the *GCHQ Case*.[70] Regardless of whether we take the popular English view today that a prerogative is reviewable, and that the only question that arises is that of non-justiciability,[71] or the "more conservative view" of Lord Fraser that that would, strictly speaking, only be another way of talking about the extent and scope of a prerogative,[72] that there are certain issues that are simply not amenable to the judicial process is, in either event, uncontroversial. Lord Roskill gave, as examples, the making of treaties, the prerogative of mercy, the grant of honours, the dissolution of Parliament and the appointment of ministers, in addition to national security.[73] *De Smith, Woolf & Jowell* states that "[f]oreign affairs warrant an analogous approach". Of course, whether a particular matter ought to be considered to involve affairs that are "foreign" or "domestic" can sometimes be a very difficult question, and should cases arise under the United Nations Act, they would certainly qualify.[74]

VII. CONCLUSION

The reasoning in *Chan Hiang Leng* would not always provide a complete solution when taken away from the facts in that case. Secondly, it would be insufficient to overlook the force of the reasoning of the Court of Appeal in *Chng Suan Tze*. What seems clear then is that there is some scope for the courts to review the Minister's exercise of his law-making powers under the Act. That is conceivably Parliament's intent, as a matter of legal construction. Having said that, because of the Act's subject matter, the courts in Singapore may still find the need for self-restraint should the Minister's decisions under the Act be challenged.

AC 508. Had that not been so, the conventional approach then would have been adopted to an entirely different conclusion.

70 *GCHQ Case*, *supra* note 48, at 416 (*per* Lord Roskill).

71 For which the *GCHQ Case*, *ibid*, is usually cited as authority (see the speeches of Lords Diplock, Scarman and Roskill). This is also the view favoured in *De Smith, Woolf & Jowell*, *supra* note 9, §§28-009 - 28-010; and in *Zamir & Woolf*, in relation to declaratory relief, *supra* note 47, § 3.116.

72 *Ibid*, at 398 (*per* Lord Fraser). See also the speech of Lord Brightman.

73 *Ibid*, at 420 (*per* Lord Roskill).

74 Where there exists a legal instrument stating the applicable rules (*sed quaere*: a statement of the applicable rules in the present Act?), the courts have a clearer policy; *De Smith, Woolf & Jowell supra* note 9, footnote 16 to §28-010; citing *New Zealand Maori Council v The Attorney General* [1987] 1 NZLR 641; [1994] 1 AC 466.