

The detention of the SAF's Terrex Infantry Carrier Vehicles by the Hong Kong Customs authorities has fuelled speculation that Sino-Singapore ties are at a new low. Nothing could be further from the truth, says Associate Professor Eugene Tan, adding that bilateral ties are strong, deep and multifaceted. PHOTO: AGENCE FRANCE-PRESSE



Terrex vehicles: Ball now in HK's court

The Terrex vehicles seized by Hong Kong Customs belong to Singapore and should be returned. Hong Kong's reputation as a port is at stake.

Eugene K.B. Tan

For The Straits Times

It has been over six weeks since the Hong Kong Customs authorities on Nov 23 detained nine Singapore Armed Forces (SAF) Terrex Infantry Carrier Vehicles (ICVs), which were shipped from Taiwan where they had been used for military training, en route to Singapore.

After maintaining a stoic stance, saying the issue over compliance with shipping documentation was one between the commercial shipping company, APL, and the Hong Kong Customs authorities, the Singapore Government elaborated in Parliament yesterday its position with regard to the ICVs' detention.

Defence Minister Ng Eng Hen asserted Singapore's sovereign immunity in the case, saying that under international law, property belonging to a sovereign state should not be subject to constraints by another state.

While investigations may be ongoing into APL, Dr Ng said the vehicles belonged to Singapore and must be returned. In asserting

sovereign immunity, the Singapore Government and the Ministry of Defence (Mindef) are adopting a sensible policy and legally sound approach in seeking the expeditious release of the nine Terrex vehicles.

As is the usual practice, the SAF had shipped the ICVs from Taiwan back to Singapore using a commercial shipping line. As training platforms, the nine ICVs have no ammunition or sensitive equipment on board.

The Hong Kong authorities have not publicly released the reasons for the ICVs' detention. According to Mindef, the ICVs were impounded amid queries over whether there were necessary permits required for their Hong Kong transit.

In actively yet quietly setting in motion the effort to recover the ICVs, SAF had advised APL to extend its full cooperation to Hong Kong, while letting investigations take their course.

At the same time, as Dr Ng suggested in Parliament, Singapore had also scrupulously asserted its full sovereign rights over the ICVs on the basis of the doctrine of sovereign immunity. The ICVs are unequivocally emblems of Singapore's sovereignty.

SOVEREIGN IMMUNITY IN INTERNATIONAL LAW

Put simply, as a rule of customary international law, the doctrine of sovereign or state immunity states that a sovereign state is exempt from the jurisdiction of foreign national courts (or immunity from jurisdiction) at the very least in respect of its sovereign activities. In other words, a sovereign state cannot be sued before the courts of another sovereign state without its consent.

As Singapore's Court of Appeal had put it in a 2008 judgment, "the doctrine of state immunity is founded on the concept of the equality, independence and dignity of states, and the principle that an equal has no authority over another equal".

State immunity is a "privilege of exemption" extended by one sovereign state to another, and with the expectation of reciprocal treatment by the latter. Countries adopt one of two competing conceptions of state immunity: absolute or restrictive.

In essence, the distinction between the two lies in whether a state's activity and assets, when they are of a commercial nature, are granted immunity from the jurisdiction of a foreign court.

Under restrictive state immunity, a government's activity and assets that are of a commercial nature are denied immunity. In contrast, they are protected under absolute state immunity. The practice of states indicates that the trend is towards restrictive state immunity.

For instance, the 1972 European Convention on State Immunity, the laws of the United Kingdom, United States and Singapore provide for restrictive state immunity. The 2004 UN Convention on the Jurisdictional Immunities of States and their Property, which is not in force yet, is structured similarly.

It may well be that the APL did not comply with Hong Kong's laws in transporting the ICVs into the territory. If so, the matter of any alleged breach of Hong Kong's import and export laws is clearly a matter between Hong Kong and APL. However, as owners of the ICVs, Singapore and the SAF are caught in the legal tussle.

Let's assume that APL did not fully comply with Hong Kong's laws in shipping the ICVs through the territory. In cases where state immunity did not apply, the cargo could be seized and forfeited under Hong Kong's Import and Export Ordinance. This formal enforcement action for violation of

laws is to ensure that they are followed.

However, like diplomatic assets, military equipment like the ICVs and other SAF assets detained are immune from seizure and execution (immunity from enforcement) in Hong Kong under the doctrine of state immunity, whether absolute or restrictive.

HONG KONG APEX COURT'S DECISION IN 2011

This is buttressed by a 2011 majority decision where Hong Kong's apex court, the Court of Final Appeal (CFA), ruled that foreign states enjoy absolute state immunity from jurisdiction in Hong Kong, including a foreign government's activity and assets of a commercial nature. This fundamentally reversed Hong Kong's longstanding position of restrictive state immunity during British rule.

The basis for the CFA's landmark decision in Democratic Republic of the Congo v FG Hemisphere was that China applied absolute state immunity, and "HKSAR cannot, as a matter of legal and constitutional principle, adhere to a doctrine of state immunity which differs from that adopted by the PRC. The doctrine of state immunity practised in the HKSAR, as in the rest of China, is accordingly a doctrine of absolute immunity".

As a Special Administrative Region (SAR) of China, Hong Kong's adoption of "a divergent state immunity policy (from China) would embarrass and prejudice the State in its conduct of foreign affairs".

Under Hong Kong's Basic Law (its de facto constitutional document), the territory does not exercise sovereign powers. China is responsible for Hong Kong's foreign affairs, and Hong Kong courts have no jurisdiction over acts of state such as defence and foreign affairs.

Subsequently, upon judicial reference made to it in accordance with the Basic Law, China's National People's Congress Standing Committee confirmed the CFA's ruling. China has not ratified the United Nations Convention on the Jurisdictional Immunities of States and their Property that had signed in 2006.

China's continued adherence to absolute state immunity after signing the convention, including always asserting absolute immunity for itself before foreign domestic courts, confirms that it has not abandoned the practice of absolute state immunity.

The Congo case unifies Hong Kong's law and policy of state immunity with that of China. Following China's consistent position, the case emphasises that Hong Kong recognises and applies absolute state immunity. This means that a state and its property enjoy absolute immunity from jurisdiction and enforcement in Hong Kong in respect of both sovereign activities and private commercial activities.

In the present case, the ICVs were shipped through Hong Kong neither as commercial assets nor as part of a commercial activity, but as Singapore Government military property. They are clearly entitled to state immunity from the jurisdiction of and enforcement actions in Hong Kong.

SAF did not attempt to conceal the ICVs. APL would have known

the nature of Mindef's shipment. As published photos of the detained ICVs show, they were not stored in containers during shipment but were covered with tarpaulin.

The ICVs' detention has fuelled speculation that Sino-Singapore ties are at a new low. Such speculation plays to the idea that bilateral ties are weak. Nothing could be further from the truth.

Bilateral ties are strong, deep and multifaceted. Singapore has also consistently, and recently, reaffirmed its commitment to the "One China" principle.

Other political dynamics may well be at play, not least cross-strait relations involving China and Taiwan (and the United States). But that is neither determinative nor relevant to the Customs regulatory issue the ICVs are embroiled in. It also takes us into the realm of realpolitik.

Legal issues are best dealt with through legal means. Letting the investigative process take its course gives effect to the rule of law in both domestic governance and international relations.

Given Hong Kong's adherence to absolute state immunity, it would be very surprising if the ICVs were not duly returned to Singapore. Should the ICVs be detained longer than is necessary, or seized and forfeited, that would constitute a serious and flagrant infringement of Singapore's national sovereignty and interests.

Furthermore, Hong Kong's reputation and standing as a key trans-shipment port and its commitment to the rule of law would be adversely affected should it not provide Singapore with the full measure of state immunity. A prompt resolution, in accordance with Hong Kong's law and international law, would enhance the rule of law and augur well for the comity and strong ties that exist between Singapore and Hong Kong (and China).

stopinion@sph.com.sg

* The writer is associate professor of law at the Singapore Management University and a former Nominated MP.

Should the ICVs be detained longer than is necessary, or seized and forfeited, that would constitute a serious and flagrant infringement of Singapore's national sovereignty and interests. Hong Kong's reputation and standing as a key trans-shipment port and its commitment to the rule of law would be adversely affected should it not provide Singapore with the full measure of state immunity.