

## Report on the IPS Corporate Associates Lunch Dialogue on UNCLOS at 40: Implications for Singapore ASEAN and the World

By R Avinash

The speaker was Ambassador-at-Large at Singapore's Ministry of Foreign Affairs and Special Adviser to IPS, Professor Tommy Koh. As President of the Third United Nations (UN) Conference on the Law of the Sea, he led the "Conference" to adopt UNCLOS on 30 April 1982, four decades ago. It came into force in 1994 and has 168 parties.



*Professor Tommy Koh (standing) delivering his opening remarks at the lunch dialogue*

## **The Demise of the Old Legal Order**

Prof Koh explained that for centuries, maritime boundaries were drawn according to the “old law of the seas”. Under it, every coastal state could claim a three-mile Territorial Sea because that was how far it could be defended by a cannon ball.

Post-World War II, there were many newly independent states that wished to extend their Territorial Seas to 12 miles. In September 1945, US President Harry Truman issued the first unilateral claim to resources on rights and jurisdiction over the continental shelf of up to a depth of 600 feet or 200 metres isobar. This opened a Pandora’s Box — Latin American countries like Brazil, Peru and Chile followed suit in issuing their own unilateral claims.

## **Period of Legal Chaos and Conflict**

In some instances, these claims were extreme — Peru wrote its claim of a 200-mile Territorial Sea into its Constitution. (Till today, Peru is not a party to UNCLOS because it is unwilling to amend this in its Constitution, unlike other countries that were willing to amend their domestic laws to conform to UNCLOS.) The period between 1945 and the 1970s saw a wave of such unilateral claims that resulted in legal chaos and conflict.

## **Decision to Build A New Legal Order**

As a result, the member states of the UN, including the US and the Soviet Union (USSR), decided that it was time to negotiate and adopt a new legal order for the oceans. This effort began in 1973 but because the agenda was very broad and decision-making was by consensus, it took nine years to conclude.

UNCLOS remains one of the most important post-colonial treaties the UN has negotiated. It was not merely a codification treaty as many new laws were created in it.

## **UNCLOS and Singapore**

Post-independence, Singapore had only a small group of diplomats and few experts in international law. However, it had a deep interest in these negotiations and sought to contribute to them. Singapore began by playing a modest role in the “Conference” but enhanced this by doing two things.

The coastal states dominated the discourse at the “Conference” from the start. Singapore considered itself a geographically disadvantaged state because it was locked in by its neighbours and could not claim extensive maritime zones. According to a US State Department report, there was a group of countries in the same situation as Singapore.

## **LL-GDS Group**

In light of this situation, Singapore, represented by Prof Koh, took the lead in creating the “Group of Landlocked and Geographically Disadvantaged States”. The members of the group made up more than a third of the “Conference”. This gave the group influence at the “Conference”.

### **Jayakumar's victory at UNGA**

In 1972, Prof S Jayakumar succeeded Prof Koh as Singapore's Representative to the United Nations. That year, he tabled a draft resolution in the General Assembly (UNGA) requesting the Secretary-General to conduct a study on the impact of the extensive unilateral claims of the coastal states on the "common heritage of mankind".

The coastal states decided to oppose Prof Jayakumar's resolution by introducing a "killer" amendment. This amendment was defeated in a vote by the members of the UNGA present at the time, and the Singapore-sponsored resolution was passed.

Prof Koh said these two moves raised Singapore's stature as a small state that was able to mobilise support, not only in the "Conference", but also in the UNGA.

### **12-Mile Territorial Sea**

UNCLOS allows a coastal state to claim a Territorial Sea of up to 12 miles from its baseline. Any claim exceeding this is illegal. The Convention also contains a special regime of passage through international straits, or more precisely, "straits used for international navigation".<sup>1</sup> There are many straits in the world that are of strategic importance to the maritime powers. With the Territorial Seas being extended to 12 miles, straits that were narrower than 24 miles would have lost their "high seas corridor".

### **Straits Used for International Navigation**

The two superpowers at the time, the US and USSR, told the "Conference" leaders that there would be no agreement at the "Conference" if there were no special regime of passage through these international straits. Special passage was needed for ships to pass, aircraft to fly above the straits, and for submarines to pass in a submerged mode.

### **Initiative by Fiji and UK**

The "Conference" was not able to agree on a compromise between the straits states and the great maritime powers. In the face of this impasse, Fiji and the United Kingdom took it upon themselves to convene a small private group of 13 states to break the deadlock. This group excluded the superpowers as well as straits states like Indonesia and Malaysia because they were opposed to a special regime of passage. This group of 13 moderate states, including Singapore, came up with draft treaty articles for "Straits Used for International Navigation". The "Conference" adopted the draft treaty articles and incorporated them into the Convention.

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<sup>1</sup> Editor's note: "Straits Used for International Navigation" include the Malacca and Taiwan Straits.  
<https://digital-commons.usnwc.edu/cgi/viewcontent.cgi?article=2943&context=ils>

### **Exclusive Economic Zone**

UNCLOS also allows coastal states to claim an Exclusive Economic Zone of 200 miles within which they have exclusive rights to the resources, living and non-living. On fishing rights, the coastal states had won and the distant fishing nations had lost.

### **Archipelagic State**

The Convention also created a new concept of international law called Archipelagic State. Indonesia and Philippines are Archipelagic States. This entitles them to Internal Waters, Territorial Seas, Economic Zones, and Continental Shelves. In return, they conceded that there would be special corridors through their archipelagos called Archipelagic Sea Lanes Passage, similar to Transit Passages in the Straits Used for International Navigation.

### **Reagan's Attempt to Destroy UNCLOS**

The part of the Convention which the Reagan Administration did not like concerns the resources of the deep seabed and ocean floor beyond the limits of national jurisdiction. Under the Convention, the resources are the common heritage of mankind. The Convention established a new international organisation, called the International Seabed Authority, to regulate the exploitation of such resources. The Reagan Administration objected to this part of the Convention because it undermined US sovereignty.

### **Compulsory Settlement of Disputes**

UNCLOS contains a system of compulsory dispute settlement. Most treaties do not have this feature. However, because the Convention was the result of many compromises, it was determined that such a system was necessary to protect the integrity of the Convention. Parties to it cannot opt out of the system. When a state becomes a party of the Convention, it can choose one of three options to settle a dispute: (a) the International Court of Justice, or ICJ; (b) the International Tribunal for the Law of the Sea, or ITLOS; and (c) arbitration. If a state does not make a choice, the Convention will deem the state to have chosen arbitration. This is how Malaysia was able to take Singapore to arbitration in the dispute concerning Singapore's land reclamation activities.

### **Benefits of UNCLOS to Singapore and ASEAN**

The Convention is important to ASEAN because most ASEAN countries are coastal states. UNCLOS benefits them because they are able to extend their Territorial Seas to 12 miles and claim 200-mile Exclusive Economic Zones. In the dispute between four ASEAN claimant countries and China in the South China Sea, the ASEAN position is that these disputes are governed by international law, including UNCLOS. China is trying to downgrade UNCLOS.

UNCLOS is important to Singapore because it protects our shipping industry, our maritime trade and port, and also the right of our navy and air force to conduct military training exercises in Indonesia's Archipelagic Waters and Territorial Sea.

## Q&A Session

### ***The United States and UNCLOS***

A participant asked why the US, which has gained tremendously from UNCLOS especially with regard to free passage for its navy and the enjoyment of coastal provisions, could not be persuaded to ratify it.

Prof Koh said that until the election of President Ronald Reagan in 1981, there was a bipartisan US ocean policy. However, President Reagan was a revolutionary. After becoming president, he asked for a thorough review of US ocean policy and UNCLOS. The Americans were given a year to do this. The US came back to the “Conference” with a “Green Book” containing over 300 amendments. The developing countries refused to negotiate with the US on the basis of the Green Book.

The Americans opposed the draft Convention because they felt it compromised America’s sovereignty and constrained their rights as the world’s leading technological power. The US was the only country with the technology to mine the resources of the deep seabed ocean floor and they did not see why they had to abide by an international regime and get a contract to do so.

To break the deadlock, Prof Koh appointed a group of 13 medium-size Western countries to develop a set of compromises. However, the US rejected the compromise proposals, insisted on their amendments, and demanded that the Convention be put to a vote. Ultimately, the Americans voted against it.

Prof Koh further explained that the US Senate has not ratified the Convention even though all subsequent administrations had wanted to, because under the separation of powers the Administration does not control the Senate. A small number of ultra-conservative senators have blocked the Senate from ratifying UNCLOS. The Senate’s non-action has damaged US national interests and US credibility. He added that it is morally embarrassing for the US to now call upon China to abide by UNCLOS when the US is not a party to it.

### ***China’s Territorial Claims in the South China Sea***

A further question regarding the validity of China’s nine-dash line and Beijing’s historical justifications for its claims over all of the South China Sea was brought up. Prof Koh explained that there is a fundamental misunderstanding between the Western powers and China. He reminded the audience that we are all the products of our cultural boxes.

Prof Koh noted that China’s cultural box is very different from Singapore’s cultural box. For example, the Chief Justice of China swears his allegiance to the Chinese Communist Party and not the Constitution. For the Chinese, history, power and relationships are more important than law. To the Chinese, treaties are not sacrosanct but must be changed to “keep up with the times”.

As a result, China has a very different view on how to resolve the disputes in the South China Sea. This explains Beijing's behaviour regarding the Philippines-China arbitration case and why it refuses to accept the tribunal's jurisdiction and award. The tribunal had found, *inter alia*, that there is no legal basis to support China's claims under its map with the nine dashed lines.

### ***Indonesia's Continental Margin***

It was also brought up that Indonesia is one of the biggest beneficiaries of the Convention because it is recognised as an Archipelagic State through it. The Convention also allows coastal states to claim the continental shelf and an additional area called the continental margin, which may stretch beyond 200 miles. The provision of the Convention also states that the revenue derived from the exploitation of resources in the continental margin should be shared with developing countries. Thus far, this has not been implemented but Indonesia could be the first to do so.

### ***Best Approach for Resolving South China Sea Disputes***

Finally, a participant asked about the best way to resolve the disputes between China and ASEAN states. More specifically, Prof Koh was asked if these could be settled through negotiation. Prof Koh replied that the Chinese would only agree to use negotiation. The trouble is that some disputes cannot be solved by negotiations. Such disputes should be referred to a third party. China rejects this. The third-party modalities include conciliation, mediation, arbitration and adjudication. Recently, Australia and Timor Leste resolved their disputes in the Timor Sea through compulsory conciliation rather than arbitration or adjudication. It is a "win-win" process, he said.

Prof Koh took the opportunity to mention that the approach was actually proposed by the late CCP leader, Deng Xiaoping. Deng's view was that sovereignty disputes were too difficult to resolve, and proposed the creation of joint development projects, the fruits of which could be shared by the relevant parties. An example of this is the joint extraction of gas resources in the Malaysia-Thailand joint development area (MTJA) of the Gulf of Thailand. The rewards of this venture are shared by the two countries.

However, given that China claimed the entirety of the South China Sea, ASEAN countries have pushed back, arguing that China's claims are invalid. The two sides are therefore unable to agree on an area for joint development.

### **Conclusion**

Prof Koh emphasised that UNCLOS is an important achievement as it is a key pillar of the international legal order and the rule of law. It is also important because it emphasises the peaceful settlement of disputes. It is a revolutionary treaty and contains many new concepts of international law. It reflects the interests of all countries, especially those of the developing countries. The treaty is important to Singapore, ASEAN and the world, he added, and we must not allow any country to undermine its authority and integrity.

[R Avinash](#) is a Research Assistant at IPS.

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