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The Law of the Sea: Some Personal Reflections

by Professor Tommy Koh

I wish to begin my lecture by thanking the members of the Steering Committee and of the Host Committee for inviting me to deliver this lecture. I join my Singaporean hosts in welcoming all our foreign friends and to wish them a happy and productive stay in Singapore. Since I chair the National Heritage Board, which looks after our state-owned museums, I want to extend a warm invitation to you and your spouses to visit our National Museum, Art Museum, Asian Civilisations Museum and the Philatelic Museum. I am sure that the Host Committee would be happy to help you arrange your visit.

Tribute to Cedric Barclay

Since this lecture is dedicated to the memory of Cedric Barclay, whom I did not have the pleasure of knowing, I have made an effort to find out something about him. From my research, it would appear that Cedric Barclay was, what Readers' Digest would describe, an unforgettable person. He was born in Istanbul in 1916 and became fluent in eight languages, including Turkish and Uzbek. He was, therefore a multicultural and cosmopolitan person. He qualified as a naval architect and is given credit for having designed the pioneer long-distance passenger and vehicle roll-on, roll-off vessel, "Sunward" in 1966. He founded a shipping line. He gained renown in London, where he settled, as a maritime arbitrator.

Indeed, Bruce Harris has described him as "probably the greatest maritime arbitrator the world has ever known". I am, of course, familiar with the romantic story of how Cedric Barclay, Clifford Clark, Donald Davies, Roger Jambu-Merlin, Michael van Gelder and Professor Lebedev, conceptualised the idea of launching the International Congress of Maritime Arbitrators, in the Moscow underground in 1972. It would seem from all the accounts I have read that Cedric Barclay was an exceptionally talented, kind, charming and charismatic individual. I am happy to dedicate this lecture to his memory.

Arbitration and the Peaceful Settlement of Disputes

I want to say a few words about the importance of arbitration and the peaceful settlement of disputes. One of humankind's eternal quests is to settle disputes, whether between individuals, corporations or States, peacefully and without resort to intimidation, sanctions and armed conflict. There are, of course, different modalities for settling disputes, such as, conciliation, mediation, arbitration and adjudication. I am told that arbitrators in general, and maritime arbitrators in particular, make a good living. Apart from your financial rewards, you can derive satisfaction from knowing that through your work, you are making a contribution to the peaceful settlement of disputes and to the rule of law. I have tried, in my life, to walk my talk. Thus, when the UN asked me to serve as a special envoy to make peace between Russia, on the one side, and Estonia, Latvia and Lithuania, on the other, I readily accepted. On three occasions, I have also accepted the WTO's requests to be a member of dispute panels, twice as chairman. I am currently a member of a task force which has been mandated to draft the ASEAN Charter. One of our collective ambitions is to strengthen the culture of taking obligations seriously and to strengthen the mechanisms for the settlement of disputes.

Theme of Lecture

The theme of my lecture is the law of the sea. I had devoted about a decade of my life to helping to negotiate the 1982 UN Convention on the Law of the Sea. In the final year of the Conference, due to the unfortunate demise of Shirley Amerasinghe, I was drafted to fill his shoes as the President of the Conference. The Conference, which began in December 1973, was concluded in April 1982. The Convention was open for signature in December 1982 and came into force on 16 November 1994. The Convention has been supplemented by the 1994 Agreement relating to the implementation of Part XI (on the mining of the deep seabed and ocean floor) of the Convention and the 1995 Agreement relating to the conservation and management of straddling fish stocks and highly migratory fish stocks. The architect of these two agreements is Ambassador Satya Nandan of Fiji.

I will share four reflections with you:

What makes the UN Convention on the Law of the Sea a landmark international treaty?

Has the Convention been successful?

Are there any threats to the Convention?

What are some of the recent developments pertaining to the Straits of Malacca and Singapore?

UN Convention on the Law of the Sea

What is the significance of the Convention? Let me just mention three of them.

First, it is the first comprehensive convention governing all aspects of the uses and resources of the world's oceans. It respects the interrelationships among the different aspects of the law of the sea. It treats ocean space as an ecological whole.

Second, it represents the most ambitious effort at the codification and progressive development of international law ever undertaken by the international community since the founding of the United Nations. The

Convention contains many new and innovative concepts, including transit passage through straits used for international navigation, archipelagic baselines and archipelagic sealanes passage, the exclusive economic zone, the concept of a comprehensive environmental law of the sea based on the obligation of all States to protect and preserve the marine environment, etc.

Third, the Convention forbids reservations and contains mandatory provisions for the settlement of disputes. These are unique features of the Convention. Under the Convention, a State Party has the right to choose one of three forums for the settlement of disputes, viz, the International Court of Justice, the International Tribunal for the Law of the Sea (ITLOS) and Arbitration. If a State fails to express a preference, it is deemed to have chosen Arbitration. Malaysia and Singapore have not expressed a preference. In 2003, Malaysia invoked the Convention and referred a dispute with Singapore to arbitration. A full and final settlement of the dispute was reached amicably through the signing of a bilateral Settlement Agreement on 26 April 2005. Singapore found our experience with ITLOS positive. We also feel that such third-party dispute settlement mechanisms are the best ways to resolve bilateral problems rather than let our bilateral relations be paralysed by issues which have reached an impasse.

Has the Convention been Successful?

The Convention has been successful. It has 153 States Parties including the European Commission. Countries such as the United States, which has not yet acceded to the Convention, have largely complied with the provisions of the Convention, arguing that they have become part of customary international law. There have been relatively few disputes between States on the interpretation and application of the Convention. The Convention would appear to have settled the law and, as a result, there have been few instances of armed conflict at sea between States, unlike the situation prior to 1982 when there were many conflicts between States over the limits of maritime jurisdiction, fisheries, and competing sovereignty claims.

Threats to the Convention

Although, on the whole, the Convention has worked well, we must not become complacent. This is because various attempts have been made and will be made by coastal States to expand their rights and jurisdictions in contravention of the Convention. Let me cite a few examples. First, although the Convention does not allow States Parties to make reservations, this has not prevented a number of States from seeking to do just that by filing disguised reservations in the form of interpretative declarations. Second, some coastal States have enacted national legislation in relation to their exclusive economic zones (EEZ) which are inconsistent with the Convention. Under the Convention, the EEZ is neither territorial sea nor part of the high sea, but is *sui generis.* Some coastal States have sought to subject the EEZ to their sovereignty just like their territorial sea.

Navigation and Environment: The Torres Strait

Third, attempts have been made and are being made by some coastal States to weaken the navigational rights regime under the Convention in the interest of protecting the marine environment. A current example is a disagreement between Australia, supported by Papua New Guinea and New Zealand, and a large number of other States, including the US, UK, Japan, Singapore and others, over the Torres Strait. The Torres Strait lies between Australia and Papua New Guinea. It is a strait used for international navigation. Australia has imposed a system of compulsory pilotage on ships transiting the Torres Strait. The penalty for non-compliance is that the owner, master and/or operator of an offending ship can be prosecuted on its next entry to an Australian port.

Australia has sought to justify its action on three grounds:

UNCLOS is silent on the question on whether a coastal state can introduce compulsory pilotage in an international strait;

The IMO is the competent organisation to approve the system of compulsory pilotage; and

The IMO has approved the system of compulsory pilotage in the Torres

Strait.

In my view, Australia's case is weak because:

Australia has no authority, under Part III of the Convention, to legislate a system of compulsory pilotage on ships enjoying the regime of transit passage in straits used for international navigation. The power of States bordering straits to adopt any laws and regulations is limited to four specific categories set out in Article 42(1). Adopting laws and regulations requiring ships exercising transit passage to take on a pilot does not fall within any of these categories.

An objective reading of the records of the various meetings of the IMO since 1991, at which the subject was discussed, including the Safety of Navigation (NAV) subcommittee meeting and the Marine Environment Protection Committee (MEPC) meetings show that the IMO's decision on pilotage in the Torres Strait was of a recommendatory nature. What the Committee had approved was a system of voluntary pilotage, not compulsory pilotage, as Australia alleges.

Appeal to Australia

Since I also had the privilege of chairing the Preparatory Committee for and the Main Committee at the Earth Summit, in Rio de Janeiro, I can say, with sincerity, that I attach great importance to the protection of the environment, marine, terrestrial and atmospheric. I believe, however, that the UN Convention establishes a fair balance between the interests of coastal States in protecting their marine and coastal environment and the interests of the international community in rights of navigation. I am also concerned that Australia's action will set an unfortunate precedent. I appeal to Australia to review its actions and to bring its conduct into conformity with the UN Convention and with the IMO's resolutions.

The Straits of Malacca and Singapore

The Straits of Malacca and Singapore are among the busiest straits in the world. It is estimated that half of the world's oil supply and a third of the

global trade pass through the Straits each year. The good news is that the three strait States, Indonesia, Malaysia and Singapore, work well together through a long existing mechanism called the Tripartite Technical Experts Group or TTEG. The further good news is that all three States are parties to the UN Convention, recognise that the two straits are straits used for international navigation and have always sought to cooperate with the IMO and user States.

Piracy in the Straits of Malacca

For a number of years, piracy incidents were increasing and posing a threat to the safety of navigation in the Strait of Malacca. The increasing concern over the situation saw the international community react in two ways. First, some user States offered to help the straits States. Second, Lloyds classified the Strait of Malacca as a "war risk zone", even though there has not been any incident of terrorism or war in the Strait. In response, the three strait States have taken more decisive actions, both at sea and in the air, to enhance surveillance, coordination and enforcement. As a result, the piracy incidents have declined substantially. Lloyds has since delisted the Strait of Malacca as a war risk zone.

I should add that the shipping industry has an office in Kuala Lumpur, called the International Maritime Bureau Piracy Reporting Centre, which as the name implies, reports on piracy incidents. In addition, 14 governments of the Asia-Pacific region have established an anti-piracy Information Sharing Centre (or ISC) under the Regional Co-operation Agreement on Combating Piracy and Armed Robbery Against Ships in Asia (ReCAAP). ReCAAP represents the first government-to-government co-operative agreement to combat piracy and sea robbery. The roles of the ReCAAP ISC include facilitating the exchange of piracy-related information, and providing accurate statistics and analysis of the piracy situation in the region.

Article 43 of UNCLOS

I have one other good news to share with you this morning. This pertains to Article 43 of the UN Convention which calls upon user States and strait

States to agree to cooperate:

in the establishment and maintenance in a strait of necessary navigational and safety aids or other improvements in aid of international navigation; and

for the prevention, reduction and control of pollution from ships.

This article in the Convention is not self-executing but depends upon the willingness of the user States and strait States to agree. Until recently, the only user State which has helped the strait States to carry out their responsibilities is Japan. The other user States were quite happy to be free riders.

The good news is that, in September 2006, at the IMO-Kuala Lumpur Meeting on the Straits of Malacca and Singapore, a breakthrough was achieved. The representatives of the strait States and the user States at that Meeting agreed to establish a Cooperative Mechanism, in accordance with Article 43 of the Convention. This agreement will be formalised and the Cooperative Mechanism established at the next IMO Straits Meeting in Singapore in September this year.

Conclusion

In conclusion, I wish to leave you with three messages. First, I wish to share with you the fact that the UN Convention on the Law of the Sea, supplemented by the two agreements of 1994 and 1995, is working well as the new legal order of our oceans and seas. Second, we should not become complacent because attempts have been made and will continue to be made by some coastal States to enhance their rights and jurisdiction in contravention of the Convention. In my view, the recent action taken by Australia to impose a system of compulsory pilotage in the Torres Strait contravenes the Convention and disrespects the IMO. Third, the good news from Southeast Asia is that piracy in the Straits of Malacca and Singapore is under control and the three strait States, Indonesia, Malaysia and Singapore, and the user States have agreed to establish a Cooperative Mechanism in order to implement Article 43 of the Convention.

Thank you very much.

The Rt Hon. Sir Anthony Evans

Sir Anthony was a barrister specialising in shipping and commercial law at Essex Court Chambers (originally 4 Essex Court) , before eventually being appointed as a High Court judge, sitting principally in the Commercial Court in London. Subsequently he was appointed as a Lord Justice of Appeal and sat in the Court of Appeal. Since retiring from the bench, he has worked as an international arbitrator, and in 2005 was appointed to be the first Chief Justice of the Dubai International Financial Centre Courts.