Foreword

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Twenty years have passed since preparations began for the Third United Nations Conference on the Law of the Sea — the longest, largest, and most complex international conference ever held. As regular readers of this journal know, this development was triggered by the now classical address by the Delegate of Malta, Ambassador Arvid Pardo, to the United Nations General Assembly on November 1, 1967. The chain of events sparked by that speech culminated in the adoption of the United Nations Convention on the Law of the Sea (LOS Convention), in December, 1982. The LOS Convention was signed by 157 states and two non-state entities, and it has been ratified by thirty-four. Sixty ratifications are needed for the Convention to come into force. A Preparatory Commission for the International Seabed Authority and for the International Tribunal for the Law of the Sea, in Jamaica, and a Secretariat for Ocean Affairs and the Law of the Sea at the United Nations in New York, are giving guidance to an interim regime, until the LOS Convention becomes effective.

The Maltese initiative was a stunning event, probably unique in history in its consequences. What Malta proposed was a new order for the seas and oceans, in essence a new order for the world. It was an order, not based on competition and conflict, but on cooperation, on the revolutionary principle that the oceans are the common heritage of mankind and that the marine environment and its resources, therefore, had to be managed for the common good of all — through ocean institutions in which all states, whether landlocked or coastal, would participate, sharing the benefits, regardless of the stage of their technological or economic development. This signified a new approach to development cooperation, conceived not as alms-giving but as sharing of what rightfully belongs to all. The first of these institutions was to be the International Seabed Authority, entrusted
with the management of the mineral resources of the seabed, which would have generated an international revenue of billions of dollars annually. The Common Heritage of Mankind, furthermore, was to be reserved exclusively for peaceful purposes, so as to exclude seventy percent of the surface of the globe from the arms race. It was to be shared, finally, not only by the present but also by future generations of mankind, which meant it had to be managed with due consideration to resource conservation and the protection of the marine environment.

This may be a good time to ask ourselves some fundamental questions: After two decades of turmoil and change, after twenty years of painstaking negotiations and hard bargaining, what has remained of the “Maltese Dream?” Are we moving in a direction toward the world order it advocated or are we moving away from it?

Cynics and idealists — the cultivators of nightmares and dreams — converge on the opinion that little, if anything, is left. The Conference, they say, quickly transformed its goals from creating an international order to vindicating exorbitant claims of national aggrandizement. The LOS Convention, they say, accordingly, is full of holes and ambiguities abetting further expansions of national jurisdiction, as demonstrated, for instance, by the recent claims of Ecuador and Chile. The sections sanctioning coastal states’ rights, they say, are strong and clear; the sections defining coastal states’ limitations and responsibilities, are far less so. The Common Heritage, which, in 1967, would have included everything up to the 200 meter isobath delimitation of the continental shelf — which explains Pardo’s high estimates for international revenues — has sadly shrunk, and continues to shrink, to a point where it is easy to predict that wherever a significant resource is found, there will be a coastal state, an island, or an archipelagic state, that will claim it. The consequences will be those Pardo warned against in his historic address: 1) conflict; 2) an unchecked arms race in the oceans; and 3) unchecked pollution, against which the LOS Convention, with its rather generic and exhortative provisions and its lack of institutional infrastructure, would remain impotent.

Together with Pardo’s expectations, those of his technical main source, John Mero, have been dismissed, whether gloatingly or sadly. Mero’s figures, it is claimed, were wildly exaggerated. Polymetallic nodules, of the quality, density, and geomorphological accessibility required for economic exploitation are scarcer, by orders of magnitude, than he imagined; besides, who needs them, considering the glut in land-based resources? So there goes the dream — or the nightmare — of the common heritage of mankind.

If we want to be realistic, we need a dose of both cynicism and idealism; without the latter, nothing ever moves. More often than
not, the idealists of today are the realists of tomorrow. Without the
former, things would move like cars without brakes: not very far,
and not without serious trouble.

Looking at reality, one can safely say that Pardo’s dream has not
been completely realized; however, quite a bit of it has and from a
perspective of twenty years, one might marvel at how much has sur-
vived rather than despair at the thought of how much is still to be
done and will always remain to be done. The “new order” is always
unfinished business, and for every problem solved, a new one is
created.

Nevertheless, the LOS Convention has accomplished a great deal.
1. It has codified and articulated the principle of the common heri-
tage of mankind as a norm of international law of the universal va-
lidity of a *jus cogens*. It is up to us now, and to the next generation,
to interpret, implement and further develop this principle. But it is
there, enshrined in the LOS Convention and already “creeping” into
other areas of international and economic relations, outer space, the
Antarctic, science and technology, and other areas yet to be defined.

2. It embodies the recognition that the problems of the oceans are
closely interrelated and need to be considered as a whole, thus
spearheading a wholistic, as opposed to a fragmentary and sectoral-
ized, approach to world affairs. These first two achievements are Ar-
vid Pardo’s major contribution to the Conference and the LOS Con-
vention, as stated by President Tommy Koh in his address at
Montego Bay on December 10, 1982, when the LOS Convention was
opened for signature.

3. It updates and codifies the traditional and customary law of the
sea, balancing the interests of coastal and maritime states and assur-
ing at least minimum rights to the land-locked and geographically
d’advantaged states.

4. It provides a framework for the management and conservation
of marine resources, replacing the previous system of laissez-faire
which had become untenable in the wake of technological advance
and political change and threatened the marine environment with
“the tragedy of the commons.” This transition from laissez-faire to a
management system for the marine environment may indeed be the
real and lasting significance of the institution of the Exclusive Eco-
nomic Zone, while the expansionist “land-grab” aspect may be inci-
dental and transitory.

5. It provides a new regime for the conduct of marine scientific
research and the development of marine technology, as the basis of
resource exploration and management. It increases the responsibilities and widens the mandate of the existing "competent international organizations," and enhances South-South and North-South cooperation through the establishment of regional centers.

6. It institutes the first comprehensive framework of international environmental law.

7. It creates a new type of international institution, the Seabed Authority which is operational and has the power to both impose international taxation and bring multinational companies into a structured relationship. It may thus become a prototype for international organization in the 21st century.

8. It introduces a number of concepts into international law: transit passage, archipelagic state, mandatory conciliation, obliging states to go through a process of conciliation in the most controversial areas reserved for national sovereign decision-making, even if the result of the process is not binding, and gives form to an international law of cooperation, making regional and international co-operation mandatory in a number of areas (environment, management of living resources, and marine scientific research).

9. It establishes the most comprehensive and most binding system for the peaceful settlement of disputes ever designed.

10. It strengthens world peace through cooperation in development, through its dispute settlement system, and through the reservation for peaceful purposes of not only the seabed but both the high seas and marine scientific research as well.

Even the most perfect convention or instrument may, of course, be misused as well as used — and the LOS Convention is far from perfect; it has been buffeted, marred and scarred by the long, tedious negotiations and the resulting compromises and "constructive ambiguities." But there is enough there for the next generation to use if it so desires. It is a framework, a beginning, from which to build something that otherwise could not have been built.

This is its enormous merit. This is why, in my opinion, it must be ratified and brought into force, because only then can we build on it, interpreting, developing, improving parts rather than trying to rebuild the whole, an effort in which we would more likely fail than succeed.

Trends of interpretation, development, and the solution to problems created by the LOS Convention, already can be projected. They are already in course. Ruling out, for argument's sake, major conflagrations or disruptions, which, alas, always loom large on the horizon, one could predict — or already note as existing — such trends on three interacting levels: national, regional, and global.

At the national level, states are busy adjusting their legislative and institutional infrastructures to the LOS Convention. Old laws have
to be updated and new laws created for new ocean uses; all have to be harmonized among themselves, and with the new international law. States have created new departments for ocean development or introduced some type of mechanism for the coordination and integration of policy-making of all the departments involved in one way or another with ocean affairs. This is a process already in course, at a more or less advanced stage in many countries, and will eventually have to be carried out everywhere. It is likely that it will affect other areas of governance and government as well.

At the regional level, replacement of a laissez-faire system with a system of management in economic zones is having the counter-intuitive consequence of more, not less, international cooperation. Even the largest economic zone is not a closed system. Pollution and fish move across boundaries; economic and ecological spaces do not coincide. National management is adjusting to the realities of ecological space, and regional cooperation, mandated by the LOS Convention, is developing at an unprecedented rate as a result. The United Nations Environment Programme initiated Regional Seas Programme is covering a good part of the world ocean with its eleven plans of actions, conventions, and protocols, dealing with all uses of the oceans in an integrated way. At this level, too, the institutional infrastructure needs strengthening. The establishment of regional centers for the advancement of marine sciences and technology may well be the next step. In this development, the International Ocean Institute has been a leader in proposing new forms of international cooperation and organization. A proposal for the establishment of a Mediterranean Center for Research and Development in Marine Industrial Technology, and a way of financing it, is now before the States Parties to the Barcelona Convention.

It is rather fascinating to observe that transformations at the national level have their mirror images at the international level. There, too, the recognition that the problems of ocean space are closely interrelated and need to be considered as a whole has institutional implications that had not been foreseen generally. A trend has been set in motion toward the establishment of integrative mechanisms among United Nations institutions as well as nongovernmental organizations, just as between government departments within states: a forum is needed where the governments and the people of the world can discuss and formulate an integrated policy dealing with all the interrelated aspects of ocean management and development, which are playing an increasingly greater role in their economic and
political lives.

Pacem in Maribus (the annual conference of the International Ocean Institute (IOI) in Malta) has advocated the establishment of such a forum since 1974, for the first time, in the “Declaration of Oaxtepec,” issued by an IOI Seminar sponsored by the Ministry of Foreign Affairs of Mexico, and most recently again, in the declaration adopted by the prestigious Pacem in Maribus XV, in Malta in September 1987.

Coordination and integration will have to be horizontal as well as vertical: between functions (management of living and nonliving resources, shipping, coastal management, etc.) and between levels of governance (national, regional, global) entailing some interpenetrability and intensified interaction between domestic and foreign policy making.

Still at the global level, prospects for deep-sea ocean mining are undergoing kaleidoscopic transformations which are likely to affect the long term attitudes of the United States and its followers. Many of the provisions of the LOS Convention most offensive to the United States are obsolete, overtaken by changing circumstances. (It was, incidentally, the United States itself that was the main culprit in overloading the LOS Convention with obsolescent detail). The ocean mining regime emerging from the interim application of the LOS Convention by the Preparatory Commission will be fairly different from the one first encouraged and then abjured by the United States.

At the time of this writing, a breakthrough was made by the Preparatory Commission. A series of intense negotiations led to the solution of all outstanding “practical problems” not only among the pioneer investors, but also between them and the so called “potential applicants” (i.e., the four consortia) domiciled, partly, in non-signatory states, including the United States. Upon the signing of this agreement at the end of the first week of the summer session of the Preparatory Commission in New York, the commission of experts, appointed by the Preparatory Commission, met to begin the examination of the revised application of the pioneers. And on August 17, 1987, the first pioneer investor, India, was solemnly registered by the General Committee. This happened by coincidence, exactly on the 20th anniversary of the date when Malta requested the inclusion of an item in the agenda of the 22nd General Assembly entitled, “Question of the Reservation for Peaceful Purpose of the Seabed.”

The other three pioneer investors — France, Japan, and the U.S.S.R. — will be registered before the end of this year. Since the four mining consortia have settled to their full satisfaction all outstanding issues, it is not unreasonable to think that these companies, after all, find it to their advantage, at little cost, to secure their inter-
national rights through registration. They could do that under the sponsorship of any of the industrialized countries which have signed the LOS Convention and in which they have partners: Canada, Italy, the Netherlands, Belgium, Japan — even if the United States is not a signatory.

The next event in this scenario — approximately two years down the road — might be a quiet declaration by the President of the United States that the obstacles preventing the signing of the LOS Convention existing in 1982 no longer exist and that it would now be advantageous for the United States to accede and become a party to the LOS Convention.

Taking this scenario a little further, it would be plausible that the accession of the United States and its followers would considerably enhance the ratification process, which, in any case, is expected to be completed at about that time.

With the coming into force of the LOS Convention, a new phase begins: a phase of adjusting to a new decade, a new century; the uncertainties of economic and monetary developments in the Third Industrial Revolution, of which ocean mining undoubtedly is a part; the coming of age of a Space Regime; changes in Antarctica; so many things on which it would be useless to speculate. Our successors will have to catch up with the technological, legislative and institutional changes now occurring. They will no doubt confront questions and issues like: What to do with aquaculture and its growing impact on fisheries? How to integrate fresh-water and salt-water regimes and enhance the participation of the landlocked States who lord the springs of the fresh-water system? How to adjust to the implications of multi-modal transport and containerization? How to handle the problems of transformation and translocation of ports and harbours, and the integration of substantial quantities of ocean energy into terrestrial energy grids and how to deal with, and benefit from, the Reservation of Ocean Space for Peaceful Purposes?

Too bad we won’t be around. But our generation can take some pride in having contributed, no matter how fumblingly and bunglingly, to the making of the new order for the seas and oceans, to the opening of new ways of thinking about world order, and to the hammering-out of a platform from which in the future, a great many new initiatives can be launched. Pardo’s great concepts, besieged now in the battle between the old and the new, are bound to play a great role in shaping this future.