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and the Law of the Sea**

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Twenty nine years ago, on December 3<sup>rd</sup>, 1973, the Third United Nations Conference on the Law of the Sea met for the first time in one of these conference rooms, giving way to one of the most ambitious and original negotiating processes ever undertaken within the United Nations.

Given its wide scope, its far-reaching objectives, the complexity of the issue, the multiplicity of the interests involved and the deep political, diplomatic and legal consequences it entailed, the Conference was regarded as an exceptional event. During the seventies, the Conference became the favorite object of hyperbole within academic and diplomatic circles. Of the Conference, it was said that it was the "most ambitious, comprehensive and complex diplomatic exercise of modern times", that its task was a "mammoth" task, that its purposes were "utopian" purposes, and that its outcome was going to be a "monument" to international cooperation. Perhaps there was some exaggeration in this, *ma non troppo*.

Actually, in its purpose of imposing order while ensuring a balance of national interests in the vast oceanic space, the Conference can be compared to the most important international congresses and conferences that redrew the political map of the world after the wars of the 19<sup>th</sup> and 20<sup>th</sup> centuries.

The task was in fact gigantic, because the Conference not only had to solve once and for all the problems raised by national claims of jurisdiction over the marine space, which had previously created numerous conflicts. The task was to carry out the mandate of the

General Assembly, contained in resolution 3067 of 16 November 1973, consisting in establishing a comprehensive regime "dealing with all matters relating to the law of the sea,... bearing in mind that the problems of the ocean space are closely interrelated and need to be considered as a whole".

In other words, it was nothing less than establishing a constitution for the oceans, to replace the obsolete principles and rules then in force.

Those principles and rules had proved insufficient in providing the international community that emerged after the Second World War, with effective legal means to ensure the peaceful uses of the marine spaces and their resources. The old myths upon which the traditional legal order of the oceans was based, such as the idea that the sea cannot be appropriated, the inexhaustibility of their resources and the conviction that unrestrained freedom of use was the best way to ensure benefits for all nations, these myths, were demolished by the increasing dependence of mankind on the sea as a source of food, minerals and energy, by the extraordinary technological developments that allowed the expansion and diversification of the uses and exploitation of the marine space, by the increasing dangers to the marine environment derived from over-exploitation and pollution and by the multiplication of national claims and conflicting interests related to the seas and their riches.

The imbalance between the changing international reality surrounding the uses of the sea and the static and antiquated legal order governing that reality resulted in an accelerated process of change which, in a brief period, radically transformed the foundations of the law of the sea. It can be safely stated that in the history of this legal order, the last thirty years have been richer and more creative than the 300 years preceding them.

The effort undertaken in the decade of the 50s to codify and update the law of the sea resulted in the adoption of the four Geneva Conventions in 1958. But the Geneva Conventions were rapidly

overtaken by events. A similar effort seemed imperative only a decade later, and hence the Third Conference on the Law of the Sea convened in 1973.

The profound changes that affected the law of the sea during the last decades is a clear illustration of what happens when changes in the world of social realities are not closely followed by corresponding changes in the law governing those realities. To be effective, law must reflect and sometimes anticipate changes. The role of the law is not only to perpetuate the status quo by providing order, stability and predictability to social relations; its role is also to lead the process of change and mould patterns of behavior. Law is stability but also change. Even better, as stated the French jurist Bourquin, change in law is a condition of its stability. By producing the Convention, the Conference changed the law of the sea and ensured its stability for the next decades.

The Conference was exceptional for several reasons.

First of all for its universality; it constituted then a diplomatic event of unparalleled proportions, in which near 165 States and territories, (more than the membership of the United Nations at that time), 8 liberation movements, 12 specialized agencies, 19 international organizations and 57 NGOs participated.

The Conference summoned hundreds of politicians, diplomats and other government representatives, representatives of the business sector in fields such as fisheries, mining, and navigation, and representatives of the civil society, all surrounded by highly qualified experts in marine, biological, geological, military and meteorological sciences, among others, and by an army of members of that ubiquitous but indispensable professional group, the international lawyers, many of them of great prestige, some of whom are here among us today.

Second, the Conference was exceptional for the complexity and vastness of its task. The Conference had to provide legal solutions to

a broad range of problems related with the use of the sea, including the regime of the high seas, the continental shelf, the territorial sea, fishing and conservation of the living resources, the preservation of the marine environment, scientific research, an international regime for the sea-bed and ocean floor beyond the national jurisdiction, what is called in the Convention the Area, and settlement of disputes.

And third, the Conference was exceptional for the intricate network of many conflicting interests cutting across the traditional regional or ideological lines. The Third Conference differed widely from the contemporary diplomatic conferences in which the interest groups operated along some relatively simple lines. Risking simplification, it could be said that in general terms the negotiations undertaken by then in political conferences, developed around the two ideological groups which rivaled during the post war era (the socialist east and the capitalist west) and in economic conferences -dedicated then to building the "new international order" that never came to life - the industrialized North confronted the underdeveloped South. The four cardinal points were sufficient to identify the main groups.

At the Third Conference, the thirty-two divisions of the rose wind would have not been enough [to name the multiple interest groups]. Industrialized countries versus developing countries, yes, but also coastal states, geographically disadvantaged states, archipelagic states, islands states, land-locked states, states bordering straits, states with wide continental shelves, states without continental shelf, states with marine-mining technology, states with investments in the international area... you name it.

In 1974 the Conference started in Caracas the substantive work for the conclusion of a convention. The endeavor was to require nine years of work (fourteen years, if we add the years of work performed prior to the Conference by the Committee on Peaceful Uses of the Seabed beyond National Jurisdiction). During those nine years the Conference held meetings in New York and Geneva, ninety-three weeks of meetings, during which the Plenary, the main Committees and several informal groups met simultaneously. In addition, almost

uninterrupted informal consultations and negotiations took place during the periods between sessions.

There were moments in which the Conference seemed not to move forward. Some people doubted that such a gigantic task of agreeing upon a legal statute for the seas could ever be accomplished. Some others suggested that it might be better to reduce the aspirations and settle for a convention that could regulate those traditional aspects in the law of the sea in which there were real possibilities of reaching an agreement.

In 1978 the New York Magazine declared the Third Conference on the Law of the Sea one of the ten most boring places in New York, together, among other places, with the Dendur Temple in the Metropolitan Museum and Roosevelt Island.

Surely, the Conference might have seemed a boring place for the occasional tourist who took a guided tour to make a quick visit through the Organization's headquarters or for the journalist who briefly poked his nose into part of the debate. Surely, the Conference might have seemed for moments a huge still machine. But only to those who watched it from the outside.

For those of us who participated in it, there had not been a single moment of boredom throughout the Conference. On the contrary, since its beginning and until the end on December 1982, the Conference became a stage of a thrilling and enriching intellectual experience that ended up changing radically the legal system that would govern two thirds of the surface of the planet.

Just as the ocean conceals beneath its vast, seemingly impenetrable expanse a world teeming with astonishingly rich and varied life forms, so at the Conference, behind the lengthy debates and discreet negotiations that may have appeared boring to an uninitiated observer, behind this appearance of immobility, what a trove of innovative ideas! What a wealth of original solutions! What a continuous exchange of proposals and counterproposals! And

especially, what a determination, of all those involved in the negotiations, to achieve a successful culmination of the Conference!

The Convention was not only the product of an intellectual exercise, but, above all, the product of the imagination and of creativity. The novelty and complexity of problems, the aspiration to find consensus-based solutions, the need to reconcile an infinite number of conflicting interests, all of these factors often required the negotiators to depart from pre-existing conceptual models and resort to new ideas that were at times revolutionary.

The outcome of the Conference, the Convention, is a voluminous instrument comprising 320 articles and 9 annexes, in which, while some of the principles and rules of traditional law of the sea are reasserted, profound changes are introduced prescribing a redistribution of national and international jurisdiction over marine spaces aimed at ensuring a peaceful, stable and more equitable use of the seas and their resources.

I do not deem it appropriate here to give a complete list of the new ideas which the Convention introduced into the traditional law of the sea, especially since my colleagues will no doubt refer to some of them during the course of this colloquium. But permit me to mention briefly some that, in my view, are of the utmost importance.

In procedural matters: Delegates to the Conference were convinced, from the beginning, that progress would be very difficult to achieve in formal proceedings in view of the many problems to solve, the many interests to meet and the many actors at play. This is why into the model of classic multilateral negotiations various restricted mechanisms of consultation and negotiation were inserted, with diverse and heterogeneous participation.

Working groups, consultation groups, negotiating groups, friends of the President pullulated and functioned without interruption in parallel with the Plenary of the Conference and its main Committees, sometimes outside the official framework of the Conference and

sometimes, outside of the Conference itself.. It was especially at the interior of these informal groups that some celebrities of the Conference seized the occasion to exert a powerful intellectual influence that often determined the direction and the outcome of the negotiations.

The acceptance of a multiplicity of negotiating fora did not preclude the Conference from the application of the package deal approach, meaning by this that the results of the various groups were brought together to form an integral whole.

Another interesting innovation was the choice by the Conference of consensus as the principal procedure for the adoption of its own decisions. The Convention provides, moreover, that the Council, the principal organ of the International Seabed Authority, should adopt decisions on the most important questions of substance by consensus. By the way, if you look for a definition of consensus, go to the Convention and you will find it in article 161, 8, e) The Convention was the first, and as far as I know, the only international instrument up to now, that defines consensus.

Now, in matters of substance: The Convention provided criteria to determine the limits of national jurisdiction over the ocean space, including methods for determining baselines. For the first time, the outer limit of the territorial sea is established and the rights and obligations of coastal States and of third States in the different maritime areas are precisely defined.

The traditional dichotomy that for centuries characterized the legal status of the oceans, embodied in the principles of sovereignty and freedom of the seas, gives way to a variety of maritime zones in which elements of those principles are combined to differing degrees and in which the principle of international management of spaces and resources emerges.

New legal concepts are introduced such as the exclusive economic zone, the transit passage through straits and the archipelagic waters,

and the international area (the Area) is declared to be the common heritage of mankind.

The rights of States over the continental shelf are precisely formulated; the status of archipelagic waters is defined; the rights of land-locked countries are established; the use of straits is regulated; rules on the conservation and rational utilization of living resources are adopted. The Convention also provides a legal framework for international action for the protection and sustainable development of the marine environment, and sets forth rules on marine scientific research and the transfer and development of marine technology. Finally the Convention establishes an elaborate system for the settlement of disputes.

The Convention created new institutions, among them the International Sea-Bed Authority. The establishment of the Authority constitutes a turning point in the evolution of the law of international organizations in general. With the establishment of the Authority, and especially with the establishment of its operative arm, the Enterprise, the scope of the competence of international organizations, which has expanded steadily since the creation of the first "international unions" in the XIX century, expands again to cover an area of human activity completely new to them. On the one side, the Authority has been given competence to regulate and conduct economic activities associated with the production of minerals from the Area and to distribute among States and peoples of the world the benefits derived from such activities. For the first time in the history of international law a global inter-governmental organization will be directly involved in commercial and industrial activities that, until now, had been regarded as outside and beyond regulation by international law. The international organization "goes commercial".

On the other side, the Authority represents mankind. In recent times, treaties, resolutions of international organizations and other international instruments have referred with increasing frequency to the rights and interests of "mankind" in matters such as the

protection of human rights, international crimes, special legal régimes over spaces and resources. Activities carried out in the outer space have been declared to be the province of all mankind; mankind has even envoys in the persons of the astronauts sent to outer space. But never before the Convention has mankind been recognized as the holder of specific economic rights and been provided with the institutional means to implement those rights. "All the rights in the resources of the Area, says the Convention, are vested in mankind as a whole, and the exploitation of those resources shall be carried out for its benefit"

The representation of mankind by the Authority has taken us from the stage where mankind was a simple teleological reference into the recognition of its juridical existence before leading it on the way towards a real existence.

Therefore, the Authority cannot be seen only as a forum where States meet to co-ordinate their interests and agree on rules defining the extent of their rights with respect to the Area. The Authority represents a new conception of the function of international law whose main role has been the maintenance of social order in the international community by establishing limits on State sovereignty and by conciliating opposing national interests on the basis of reciprocity. International law increasingly appears as a source of positive obligations for States; it not only mandates the respect of certain limits imposed upon their freedom, but also induces and compels them to co-operate in the resolution of common problems affecting universal welfare and the economic development of all nations. International law, in addition to being an instrument of social control becomes an instrument of social direction.

Despite the revolutionary nature of its purposes, the Authority has been organized and will function in accordance with the traditional institutional standards. The Authority reproduces the familiar model of existing international organizations of a political character. It is an institution of intergovernmental character, organized on the basis of

the principle of sovereign equality of States, and with an Assembly, a Council and a Secretariat, in addition to the Enterprise.

Nevertheless, three innovative or curious features of the Authority deserve to be mentioned here. The first is the composition of the Council and its decision-making procedures, which, although based on well-known precedents, are unusually intricate. So intricate, that they are reminiscent of the procedures for the election of the Doge of Venice in the 13<sup>th</sup> century, considered to be the most complicated ever instituted by a civilized State. In Venice, these complications were due to the almost pathological fear of Venetians that their Republic might fall under the hegemonic control of one family. The complications in the procedures for the election of the members of the Council of the Authority and for the adoption of its decisions were the result of similar fears: The fear that important decisions could be adopted against the will of any group of States with similar interests and, in some cases, against the will of one individual State.

The system was partially modified by the 1994 Agreement relating to the implementation of Part XI of the Convention.

The second institutional feature I wanted to mention is the establishment of procedures for control of the legality of the acts of the Authority. In spite of the extraordinary multiplication and development of international organizations in recent decades, there are very few examples of international organizations the acts of which are subject to the legal control by an international tribunal. In the case of the Authority, States Parties may submit to the Sea-bed Disputes Chamber (a chamber of the Tribunal) disputes arising from acts or omissions of the Authority they consider illegal. This implies the acceptance of a form of review of the legality of those acts. Although it is a review carried out indirectly and has limited effects, the procedure is nonetheless an important innovation because it seems to be the first time that the acts of an international organization of global scope have been subject to such review.

The third innovative feature relates also to the procedures for settlement of disputes with respect to the activities in the Area. Entities other than States are allowed to participate in these procedures. In general States are opposed to, or are reluctant to accept, the participation of individuals or other non-States subjects in the procedures for the settlement of disputes before international tribunals. The granting individuals international locus standi has been in the past, and it is still today, an exception. But the Convention provides for State enterprises and natural and juridical persons which conduct exploration and exploitation activities in the Area to have access to the Sea-Bed Dispute Chamber and be parts of disputes arising from the interpretation and application of Part XI of the Convention. I want to stress that these entities have been awarded complete international capacity to act before international tribunals or organs. without requiring the sponsorship of any State in the proceedings.

On April 30 1982 the Draft Convention and its nine annexes were adopted, not by consensus, as all participants had hoped during years, but by 130 votes in favor, 4 against, with 17 abstentions. At present 138 States are parties to the Convention, more than the number of States that voted for it 20 years ago. Among those that have ratified the Convention are some of the States that abstained. The four States that voted against are still at the margins of the Convention, but I think that now they are not very much against it.

138 countries are more than two thirds of the membership of the United Nations, but the number of countries that still have not ratified the Convention, some 50 of them, is not insignificant either. Some 30 coastal States are among those that have not ratified the Convention, including no less than the United States, Canada, and other countries with long coastlines on every continent. However, it can be stated without fear of contradiction that the Convention is also applied by those States that have not formally expressed their will to accept its obligations.

Twenty years after its entry into force, what is our evaluation of the Convention? What has been the impact of the Convention on the real world?

The Convention did put an end to the anarchy that reigned in the preceding decades resulting from the multiplicity of claims by States seeking to extend their sovereignty over the sea; in this way, the Convention made a gigantic step in the promotion of international peace and security in the seas; it established criteria that have been applied by States and by international tribunals for determining the external limits of maritime areas under national jurisdiction and maritime boundaries. It prevented the prospect of a race to colonize the seabed and it established the legal framework for ensuring its orderly exploration and exploitation on the basis of the principle of common heritage of mankind. It established rights and obligations to reconcile in an equitable manner the interests of coastal States and those of navigation and commerce. The institutions created by the Convention are functioning effectively. The Authority has approved plans of work for the first 7 investors exploring for polymetallic nodules in the international zone; the International Tribunal for the Law of the Sea has heard a number of cases; the Commission on the Limits of the Continental Shelf is already dealing with the first submissions by States with respect to the establishment of the outer limits of their continental shelves.

But the oceans remain to be a stage where a multi-faceted drama takes place: territorial conflicts persist that pose a constant threat to international security; ocean resources and environmental conditions are continuing to decline, the safety of the seas is seriously threatened by illicit activities that have increased in recent years.

Has the Convention failed? Well, it is not the Convention that has failed. It is the States that negotiated, adopted and ratified it that have failed. In this as in so many other respects, States have traveled only half the road that leads to effective international cooperation. They undertake commitments but do not live up to them.

The first paragraph of the report on "Oceans and the law of the sea" prepared by the Division of the Law of the Sea and Ocean Affairs, that the Secretary General submitted to the General Assembly this year, reproduces the words of Elizabeth Mann Borghese, a prominent member of the international ocean community. These words are the following:

The importance of the world ocean as a potential supplier of goods (food, fiber, genetic resources, metals, minerals) services (trade routes, tourism) energy, and as a repository of national, regional, and global security cannot be overstated. Above all, however, the world ocean is an essential part of the biosphere; it is a crucial factor in the carbon cycle and a determinant of the planet's climate...The ocean's contribution of "ecosystem services" is very much larger than that of terra firma"

The report submitted to the General Assembly last year, also starts with a transcription, taken from a report of UNEP: "The state of the world's seas and oceans is deteriorating. Most of the problems identified decades ago still elude resolution, and many are worsening"

These initial paragraphs of the two successive reports clearly illustrate the duplicity with which mankind is dealing with the question of the oceans: on the one hand, full awareness that the oceans are the source of life on which our survival and well-being depend; on the other, the abusive attitude and the negligence with which we relate to the ocean.

The Division for Ocean Affairs and the Law of the Sea has repeatedly pointed out the gap existing between the normative level and the implementation level. The main task ahead is not to produce more international instruments. In the last report prepared last March, the Secretariat insists on this idea and even suggests that the Johannesburg Summit, that was in the preparatory stage at the time the report was submitted, does not need to adopt new international instruments to assist in the conservation and management of marine living

resources. "What the Conference may wish to consider is to encourage the international community to pursue effective implementation of the existing international instruments"

Although the elaboration of international instruments may be necessary in some areas of the law of the sea, the task we urgently have to accomplish is to find the means and to adopt the measures to ensure the effective implementation and enforcement of the Convention and other related binding instruments. And this task cannot be put off any longer. At times when poverty and hunger become the reason for the hardest and most widespread sufferings, we cannot allow ourselves the mistake of adopting a passive attitude in front of the progressive impoverishing of our source of life in this planet.

In 1967, el Ambassador of Malta to the U.N. in a speech to the General Assembly that propelled the process that culminated with the Convention, asked the nations of the world to open their eyes to the looming dangers that could devastate the oceans. 35 years later, the nations of the world keep their eyes wide shut. From your places of work, you may help to open them.

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