

REFLECTIONS ON UNCLOS III: CRITICAL JUNCTURES*

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I used to speak for the Group of 77 in the Law of the Sea Conference. In fact, I did so until the 30th of April, the day the Convention was adopted. As of the first of May I have been working with the Secretary General of the United Nations, for whom I am not speaking today either. You will find that because of the identity crisis I am suffering at the moment, this being my first public appearance on the Law of the Sea since the 30th of April, my remarks will sound more like nostalgic musing than anything else. Those of you who recall me as a firebrand or extremist, who by the way were always wrong, will, I am sure, be very disappointed. This will be an anti-climax.

Let me tell you a bit about my identity crisis. Over the years, my identity as a representative of Peru to the Law of the Sea Conference and before that to the Seabed Committee had become somewhat blurred. Tommy Koh, who is a friend of fifteen yeras, was recalling that I was a spokesman on seabed issues from 1974 onward. I tried to subsume the position of Peru on seabed issues into the position of the Group of 77 and lost the habit of speaking for Peru. When I was asked to contribute to a delegation general statement regarding the seabed, I had considerable difficulty remembering what Peru's individual position was. Chairing the Group of 77 was a considerable experience, and I could perhaps best describe my identity as a spokesman, or at least my genealogy, more or less as the grandson of two couples constituted by Buckminster Fuller, Evil Knievel, Isadora Duncan, and Gina Lollabrigida in her role in *Trapeze*. You are free to combine and permute those two couples as you wish. That is how one breeds a spokesman for the Group of 77. Now, however, I am not sure what I am. I know, to quote Eliot, that "I am not Prince Hamlet, nor was meant to be." If anything, I "am an attendant Lord, one that will do to swell a progress, start a scene or two, advise the Prince." I am certainly no longer a Prince, if ever I was one.

Now looking back on the Law of the Sea Conference—and on this I am departing somewhat from the terms of reference of this symposium, and I do so to some extent in order to flee from the problem of what to say and in what capacity to say it—I would like to say that if the Law of the Sea Conference had to retrace its steps and begin again from scratch, I don't think it would be well advised to do things much differently from the way it did. I think that, if we delve into the approach followed by the Law of the Sea Conference, it provides many lessons and many answers to some of the doubts which were expressed even today at this sym-

* Luncheon remarks delivered extemporaneously.

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posium. You will recall that, departing from the criteria followed at the 1958 Conference on the Law of the Sea, the most recent Conference adopted a comprehensive approach to the problem. This approach was not merely comprehensive in the sense that the 1958 Conference was comprehensive, but rather the new Convention was drafted as a package, whereas in 1958 five conventions were attempted, and four were approved. I think this was necessary in order to impose a sort of discipline on the Conference and on states participating in the Conference and to achieve an agreement in which the results would be broadly acceptable to all. The straitjacket of a package deal was precisely what was needed to achieve that objective. Not only was there the possibility of achieving small trade-offs—local trade-offs within parts of the mandate of the Conference—there was also that overall package which created a tension that obliged the major blocs of participants in the Conference to lock their horns in a way that made them inseparable. This overall trade-off was essentially between communications and resource interests.

It is of course difficult to trace such a broad distinction rigorously. One should not be categorical about it, because the Law of the Sea Conference was basically a pragmatic exercise, one in which clear-cut distinctions as between developed and developing countries did not occur in the pervasive way in which they have occurred in negotiations between the North and the South, for instance, on trade and development issues. Indeed, I think that the record of the Conference was good in keeping away what Frederick Tipson referred to as forces of darkness, and—if I may dip into pop culture again—what I would call the Darth Vader of multilateral conferences: ideology.

I feel that were we to retrace our steps, we would be well advised to take the decisions that were in fact taken as we went along. And I refer to landmark decisions, such as the one taken in 1969 on the comprehensive approach to the Conference. There was, as long ago as 1969, the issue of whether one should address law-of-the-sea problems in manageable packages, which might have been more practical, but probably would have resulted in isolated sectorial conventions (such as those of 1958) which would have been signed and ratified by relatively small numbers of states which adhered to the purposes of those packages. The Conference was well advised to adopt the comprehensive approach, where one had to take the good with the bad.

Another landmark decision was the one taken in 1974, when the Conference adopted the rules of procedure—rules of procedure which provided, as you know, for an attempt at reaching consensus and, failing that, resort to a vote. The Conference record in resorting to a vote is also a very good one. It only did so ultimately, and with a result which seemed to confirm the consensus approach rather than anything else. I do not believe you can call 130 votes anything less than that.

Another adroit decision in 1974, in the context of the seabed negotiations, was that of shirking the drafting of a full-fledged mining code, which would have meant including in the Convention the detailed rules and regulations regarding seabed mining. I think it was very wise of the Conference to defer the drafting of a mining code stage to the Preparatory Commission of the Seabed Authority.

Among the reasons this deferral was wise—and this is related to the symposium theme of “Where Now?”—is that we have gained some time. This is an important consideration which should be borne in mind particularly by those who are having hesitations about signing the Convention because of its seabed mining aspects.

One can refer to several crucial decisions in 1976, one of them being the essential package on the Exclusive Economic Zone, which in miniature symbolized the large trade-off which I referred to earlier between navigation or communications and the resources to be held by coastal states. This decision also deftly skirted the ideological issues which plagued several countries on both sides of the fence. I will be getting back to that later. Around 1976, or perhaps shortly thereafter, the landlocked and geographically disadvantaged countries—a major group both in its size and in the importance of its input into the Conference—determined in a very statesman-like way that they had received as much as it was possible to obtain from the Law of the Sea Conference, given the existent realities: they did not do what they could have done, which was to scuttle the Conference and lay to waste the work of years by blocking agreement on other remaining aspects. Rather, they went along in a pragmatic spirit.

And then there is the quintessential landmark of a nonideological, pragmatic success in negotiation—the parallel system for seabed mining, which essentially arose or was proposed in 1976. If it responds to any ideology, I can't think of anyone who would subscribe to it. It is a compromise from all points of view.

Lastly, of course, was a decision taken in 1982 to proceed to adoption of the Convention. I believe that when President Tommy Koh told the Conference in late April that he had a rendezvous with history on the 30th and he had to keep it, he was right. It could not be postponed any further. Given the realities, it would not have been possible to reach a broader agreement, and there was no sense in postponing the decision. It was probably even dangerous to do so. Now, even though the Law of the Sea Conference is essentially a pragmatic compromise, I am quite proud of the results. I am not implying that I am its father. It has too many fathers, probably hundreds of them. But I certainly hope that in this spirit, as many states as find it possible to do so will sign the Convention. In fact, I would hope, having in mind what I referred to earlier, that essentially the law of the sea has not yet been finalized, has not been totally perfected, but rather that there is still some work to do in the Preparatory Commission—I would hope *all* will sign it, even those who have difficulties with it, in order to participate in drawing up the rules and setting the modalities of seabed mining which have still to be shaped.

There has been a lot of talk regarding what is going to happen from here on. I found arguments on both sides extremely interesting. I have heard several scenarios. My own view regarding seabed mining, which you may be surprised to learn, is that whether or not it will take place at all will largely be determined by market forces. It will not be determined at all, in my view, by the contents of the Law of the Sea Convention. If there is a need for the minerals, then I expect that some time, perhaps before the end of the century, ways will be found by states which are potential sponsors of a seabed miner to participate under the Law of the Sea Convention. I would not feel very sanguine about breaking my piggy bank to invest in

seabed mining outside the Law of the Sea Convention. I just do not think that it would be safe to do so: I should think that would be likely to require some sort of subsidy by governments, and I just do not see that as being politically very feasible. I would suggest that the decision on the lawfulness of seabed mining may once again be skirted as a doctrinal issue and may be taken from us—by “us” I mean states, international organizations and even, if I dare say, the mining industry—essentially by bankers and not by miners, governments, or international organizations.

As to the speculations on what will happen regarding communications and navigation, I must recall from the early stages of the Conference that one of the major driving forces behind holding the Conference at all was the need felt by maritime powers to establish rule of law—predictability—in a Convention. I do not know whether or not that has evolved. I don't know whether those maritime powers today feel safe without a convention or feel that their rights are protected. I don't know how quickly these matters evolve. But I was struck by one point that Burdick Brittin made about the Convention and about its duration—twenty or thirty years, he said—and about it not necessarily being an immutable document or instrument, one that would be carved in marble. I wouldn't dare set a time as to the duration of this Convention. But I would certainly associate with his remark that the Convention should not be immutable. One of the objections made to the provisions of Part XI on the seabed regime was to the provision regarding the Review Conference and the possibility of changing the system for exploitation of the seabed—which, by the way, was put in the Convention as part of a proposal regarding the parallel system, on the understanding that the system should be reviewable in order not to lock ourselves into a particular modality or compromise if it should turn out to be impractical after a given number of years. The fear was expressed by some of the industrialized countries that the rules of the game might be changed abruptly on that occasion by developing countries anxious to achieve overall control by the International Seabed Authority covering all activities. If the modalities of application of the Convention are not adapted to some of the pending concerns of the industrialized countries in the Preparatory Commission in drawing up the rules and regulations, and in view of the unlikelihood of seabed exploitation outside the scope of the Law of the Sea Convention, it might not be surprising—and this is getting back in a rather roundabout way to what Burdick Brittin was saying—if industrialized countries, rather than the developing countries, leaped at the opportunity to modify the Convention at the review conference.

Now, I have listened to the forecast of the number of countries that are going to sign the Convention at the signing ceremony in Montego Bay. I am not surprised, I must say. It seems very much more than likely that the Preparatory Commission will have to be convened early next year in view of the fact that there are clearly going to be at least 50 signatures to the Law of the Sea Convention. That should probably have an influence on the final decisions of some states—after Montego Bay, but before the opening of the Preparatory Commission—as to whether they sign it or not.

I heard one statement regarding a decision neither to sign nor to ratify on the part of one government. I think that as compared with a legal commitment, when one deposits his instrument of ratification of a convention, a statement like that should be interpreted as policy rather than anything else. It doesn't legally commit the government of the person making that statement not to sign the Convention. Policies are not irreversible, and there is no time limit for accession.

I can well understand some of the pangs and pains and anguish about signing which many governments are undergoing. In fact, the country that I used to represent many years ago, before I became a spokesman for the Group of 77, is now undergoing those very pangs and pains and anguish, and, you may be surprised to hear, on an essentially ideological issue. The ideological issue is that the 200-mile zone which Peru established in 1947, when no one had yet thought of a pragmatic concept such as the Exclusive Economic Zone, was set forth in a way which is interpreted by many lawyers in Peru, including the very eminent lawyer and statesman who signed the decree when he was President in 1947, as being territorial sea. The delegation which represented Peru is being accused of having sold out on the principle, and critics are virtually wrapping themselves up in the national flag and immolating themselves on this basis, or threatening to do so if Peru signs the Convention. If I had anything to say in this, if I were not at present bound by my situation, what I would ask is that internally Peru do the same thing which the Law of the Sea Conference did, which is to demythify the law of the sea issues, and look to interests, not to legal texts, not to one's interpretation of doctrine, and certainly not to ideology.

