

SRI LANKA AND THE LAW OF THE SEA AT 20

M.C.W. Pinto *

Honourable Minister for External Affairs, Honourable Secretary to the Ministry of Defence and Urban Development, the Commander of the Sri Lankan Navy, Your Excellencies, distinguished participants in Galle Dialogue 2014.

The National Ocean Affairs Committee has invited me to address this meeting in order to commemorate the Twentieth Anniversary of the entry into force of the *United Nations Convention on the Law of the Sea* which began in New York in 1973, and continued at various locations until it was opened for signature on 10 December 1982. Further negotiations then commenced aimed at resolving issues of critical importance for some technologically advanced countries, resulting in a new “Implementing Agreement”, to be read together with the 1982 Convention, both Convention and Implementing Agreement entering into force together upon deposit of the 60th instrument of ratification on 16 November 1994.

To date, the Convention and its Implementing Agreement have been adhered to by 166 States, large and small, some with long coastlines, others land-locked, with no coast at all, and from every continent.

Elliot Richardson, widely respected Chairman of the United States delegation to the Conference, considered the Convention to be “... a precedent-setting document By far the most comprehensive multilateral agreement ever negotiated...” Some 21 years in the making, it might also be that this was also the longest of multilateral negotiations, and represented, in the

*Attorney of the Supreme Court of Sri Lanka, and of the Inner Temple (United Kingdom), barrister, Member of the *Institut de Droit International*.

result, the intellectual contribution of literally thousands of legal and technical experts from every country represented at the numerous formal and informal gatherings that took place over that period.

The origin of this unique enterprise, which absorbed the minds of legal and technical experts for almost a quarter of a century, was the path-breaking proposal at the United Nations made by Ambassador Arvid Pardo of Malta in November 1967, that the area of the seabed lying beyond the limits of national jurisdiction, and that area's untold resources, should be declared in perpetuity to be the "Common Heritage of Mankind", reserved for peaceful purposes, and to that end, subject to an internationally agreed regime supervised by "appropriate international machinery" so as to ensure equitable sharing by all States in the benefits of that area and its resources.

Ambassador Pardo's proposal was received with enthusiasm by the developing countries, but with some reserve by the technologically advanced countries who found the "common heritage" concept to be "of uncertain legal content". The developing countries accepted the challenge, determined to provide acceptable "legal content" for Pardo's proposal, a task that many thought unlikely to succeed, given the multiple and competing State and commercial interests involved.

Following a United Nations practice in dealing with innovative proposals, a Committee of interested States was established with a view to formulating the basic principles to serve as the foundation for the "legal content" of Pardo's proposal. To lead what came to be called the "Sea-bed Committee" in this complex task, the General Assembly chose Sri Lanka's Permanent Representative to the United Nations, Ambassador H.S. Amerasinghe, who had already acquired a reputation both for outstanding competence, and uncompromising fairness and integrity.

Disregarding the many negative expressions as to the ultimate success of the project, Amerasinghe was able within just two years, to achieve his personal aim of presenting to the General Assembly at its Twenty-fifth Anniversary Session in 1970, a "Declaration of Principles governing the Sea-bed and the Ocean Floor, and the Subsoil thereof beyond the Limits of

National Jurisdiction”. The Declaration was adopted in Resolution 2749 (XXV) on 17 December 1970, by 108 votes in favour, none against, with 14 abstentions.

Discussion of maritime issues at the United Nations had by now fully engaged the attention of the developing countries, which sensed that the time had come to review the entire Law of the Sea which many had considered unchangeable throughout centuries of colonial rule under major maritime powers. Accordingly, the Twenty-fifth Anniversary Session of the General Assembly saw the adoption of other resolutions on issues of the Law of the Sea, notably Resolution 2750 (XXV)¹ Part C of which records the decision to convene a Conference on the Law of the Sea in 1973 which would deal with the establishment of an international regime for the sea-bed and ocean floor beyond the limits of national jurisdiction, and also with a range of related subjects and issues, including the breadth of the territorial sea and questions relating to straits used for international navigation, the rights and duties of coastal States in adjacent marine areas, marine scientific research and protection and preservation of the marine environment. Ambassador Amerasinghe’s success at drafting and negotiating the Declaration of Principles contained in Resolution 2749 resulted in unanimous support for his election as President of the *Third United Nations Conference on the Law of the Sea*, a position he held until his death in 1980. His successor was another outstanding Asian lawyer-diplomat, Ambassador T.T.B. Koh of Singapore.

The Conference, which held its first working session in 1974 at Caracas, Venezuela, was attended by representatives from some 150 Member States of the United Nations with highly variable legal and marine scientific and technical expertise, as well as negotiating experience. From the outset, Amerasinghe sought to apply novel conference procedures and techniques designed to ensure that the content and wording of texts destined for inclusion in the emerging “UN Convention on the Law of the Sea” had received due consideration by all interested States, and as far as possible in one of the “UN languages” with which each was familiar. While over-

¹ Resolution 2750 (XXV)

Resolution A (special interests and needs of the developing countries relating to exploitation of the sea-bed, 104 votes in favour, none against, with 14 abstentions.)

Resolution B (issues concerning the land-locked, 111 votes in favour, none against, with 11 abstentions)

Resolution C (decision to convene a Conference on the Law of the Sea in 1973, 108 votes in favour, 7 against, with 6 abstentions)

Note also: Resolution 2660 (XXV) adopted 7 December 1970, annexed to which is the *Treaty on the Prohibition of the Emplacement of Nuclear Weapons and other Weapons of Mass Destruction on the Sea-bed and the Ocean Floor, and in the Subsoil Thereof* (E/F 18 May 1972).

arching Rules of Procedure of the Conference always governed the adoption and incorporation of those texts, beginning during Amerasinghe's presidency, the Conference adopted and institutionalized novel negotiating methods designed to secure timely informed participation by interested States, supervision by elected chairmen or other officers of the Conference, all to ensure transparency and fairness in the negotiation and decision-making processes, and thus to inspire confidence in the emerging rules that would comprise the new Law of the Sea. Among these novel features were (1) the convening, after due notice, of "negotiating groups" of all interested representatives on specific "core issues" before the Conference, supplied where necessary with technical guidance, and under the supervision of the Chairman of one of the three Main Committees of the Conference; (2) the early preparation and circulation of "negotiating texts" that would be subject to adjustment as the negotiations on an issue progressed, until found by the group to be acceptable for presentation to the responsible Main Committee; (3) the submission of all emerging draft texts to a group of the principal officers of the Conference (which came to be called "The Collegium") charged with determining whether a draft text emerging from a negotiation was likely to garner "widespread and substantial support ... indicating that it offered a substantially improved prospect of consensus."; and (4) in response to universal awareness that all issues of the Law of the Sea were essentially connected, that all the rules adopted at the Conference to be included in the new *UN Convention on the Law of the Sea* should be accepted and treated as a "package", and "reservations" or "exceptions" would not be permitted unless expressly provided for. What was called the "package deal" was described by Singapore's Ambassador Koh, who succeeded Amerasinghe as President, and contributed immeasurably to the success of the Conference, in the following terms:

"... the provisions of the Convention are closely inter-related and form an integral whole. Thus, it is not possible for a State to pick what it likes and to disregard what it does not like ... rights and obligations go hand in hand and it is not permissible to claim rights under the Convention without being willing to shoulder the corresponding obligations."

Another feature of this *Third UN Conference on the Law of the Sea* was the level of cooperation and information exchange on technological issues between the industrialised and the developing countries. This was particularly important in the context of exploration and exploitation of the deep-seabed, but extended also to issues relating to the living resources of the sea, preservation of the marine environment, marine scientific research and shipping.

With the level of confidence generated among participants by novel and transparent negotiation mechanisms and procedures, the institutionalized aim of reaching a consensus, and the ready availability of technical advice and assistance from the major inter-governmental organizations (including IMO, IHO, FAO, UNESCO, and WMO), the Conference was able to resolve centuries-old issues concerning, for example, the maximum breadth of the territorial sea, the maximum breadth of, and coastal States' rights and responsibilities within a "contiguous zone"; the maximum breadth of an "Exclusive Economic Zone" of a coastal State in its adjacent waters and seabed, as well as in its continental shelf within and beyond that Zone; the rights and duties of a State with respect to ships flying its flag in the open sea, and in particular, when transiting narrow seas such as territorial seas, straits used for international navigation and archipelagic waters; the rights of land-locked and geographically disadvantaged States, and the rights and duties of all States in the open sea, and in action to protect and preserve the marine environment and to carry out marine scientific research.

Where practicable and agreed, the Convention lays down maximum limits to a coastal State's sovereignty and jurisdiction over adjacent marine areas and their resources (e.g. for the territorial sea, a maximum of 12M from the coastal State's baselines; for a "contiguous zone", 12M beyond that limit; for an Exclusive Economic Zone, 200M from the baselines for measuring the territorial sea; and specified depth, distance, and isopach thickness criteria for delimiting the continental shelf. Where it was not practicable to agree such limiting criteria, the Convention lays down methods and procedures for negotiating agreement between States on such limits on the basis of international law, in order to achieve an equitable solution; (2) pending such agreement, to enter into provisional measures and arrangements not to hamper or jeopardize reaching final agreement; (3) and where no such agreement has been reached within a reasonable time, to have recourse to the dispute settlement procedures set out in Part XV of the Convention.

Another achievement of the Conference was the establishment through the 1982 Convention of three new international institutions to give effect to the rights and duties provided for in the new Law of the Sea: 1) the *Commission on the Limits of the Continental Shelf*, empowered to consider the limits declared by a State as to resource jurisdiction over its continental shelf beyond 200M, and make recommendations thereon; (2) the *International Seabed Authority*, uniquely charged with the orderly and safe development and rational management

of the mineral resources of the deep seabed beyond national jurisdiction, or an area covering some two-thirds of the planet; and (3) the *International Tribunal for the Law of the Sea* consisting of 21 judges empowered to resolve any dispute concerning the interpretation and application of the Convention submitted in accordance with its provisions.

Settlement of an issue raised by Sri Lanka

Sri Lanka was among the many participating countries that benefitted from the negotiating mechanisms established by the Conference. Thus, when the leader of the Sri Lanka delegation, Dr. Hiran Jayewardene, was able to demonstrate that the rules for delimiting the continental shelf destined for inclusion as Article 76 of the Convention would, if applied to Sri Lanka, result in the loss of more than half of its continental shelf, Ambassador (later Judge) Andres Aguilar as Chairman of Committee Two of the Conference, decided to place the issue of the impending inequity that would result to Sri Lanka before a group of some 38 States over which he presided; and later, before the “open-ended” Negotiating Group 6 of the Conference. After general agreement had been reached through these intensive consultations on Sri Lanka’s proposal for an exceptional method of delimitation applicable in specific geological and geomorphological conditions of a particular zone, the Summary Record of the 141st Plenary Meeting of the Conference, reports:

“44. He (the President) was now able to announce that the Chairman of the Second Committee had informed him that the text of the statement of understanding concerning Sri Lanka’s proposal mentioned in document A/CONF.62/L.51 paragraph 6(d) and circulated on 21 August 1980 in document C.2/Informal Meeting/65 had not met with any objection and should be incorporated in an annex to the Final Act of the Conference as part of an over-all settlement. If there was no objection, he would take it that the Conference wished to incorporate the text in question in an annex to the Final Act of the Conference. It was so decided”²

Pending issues

It may justifiably be claimed that the two decades of negotiation that culminated in the entry into force of the *1982 Convention on the Law of the Sea* and its *Implementing Agreement* on 16 November 1994 had resolved complex political, legal and technical issues that had given

² For a more detailed account of the negotiation and legal force of the Statement of Understanding that resolved the issue raised by Sri Lanka, see the present author’s essay entitled “Article 76 of the UN Convention on the Law of the Sea and the Bay of Bengal exception” in 3(2013) *Asian Journal of International Law* pp. 215-235.

rise to conflicts among States for centuries, and provided, in addition, a range of mechanisms for dealing in an orderly manner with intractable disputes, designed to minimize tensions and bring about “equitable solutions”. However, it was inevitable that some issues of the Law of the Sea were not dealt with adequately, or not dealt with at all.

Among issues that received inadequate or no consideration at the Conference were the regulation of the so-called “straddling” fish stocks, and regulation of access to the genetic resources of the sea-bed beyond national jurisdiction. Issues relating to “straddling stocks” were dealt with subsequently in the *Agreement for the Implementation of Provisions of the UN Convention on the Law of the Sea on 10 December 1982 Relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks of 4 August 1995*. Given that fish observe no geographical boundaries, many believe that still more needs to be done, perhaps on a regional or sub-regional basis, to safeguard fish stocks from an Exclusive Economic Zone that move into adjacent areas of the open sea where superior technological capacity may harvest them at will.

Issues relating to regulation of access to the genetic resources of the “Area” i.e. the area of the sea-bed now agreed to be the “Common Heritage of Mankind” are currently under consideration by a Committee of the UN General Assembly, and its report may well lead to the convening of an international conference on the subject.

There is one group of legal issues relating to maritime security which regrettably did not receive adequate discussion and negotiation during the years 1973-82, and, since they did not concern the regime of the deep sea-bed, were not taken up after 1982 during consultations that led to the Implementation Agreement: legal issues concerning piracy. Piracy did not, during the negotiations at the Third UN Conference on the Law of the Sea, appear to present an existential threat to international shipping, and thus did not focus the attention of delegations. As a result, the international law governing piracy currently included in articles 100-107 of the UN Convention has remained unchanged for a century. Those provisions substantially reproduce articles 14-21 of the *1958 Convention on the High Seas*, which were themselves based on the International Law Commission’s draft articles prepared in anticipation of the First UN Conference on the Law of the Sea (1958), and relied heavily on the Draft Convention on Piracy prepared by the Harvard Research in International Law (1932).

The provisions on piracy set forth in the 1982 UN Convention on the Law of the Sea define piracy in Article 101 as consisting of (1) any illegal acts of violence or detention; (2) committed for “private ends”, by the crew or passengers of one ship; (3) on the high seas; (4) against another ship, or against persons or property on board that other ship. According to Article 105, every State may on the high seas seize a pirate ship, or a ship taken by piracy and under the control of pirates, and arrest the persons and seize the property on board. Article 105 then concludes:

“The courts of the State which carried out the seizure may decide upon the penalties to be imposed and may also determine the action to be taken with regard to the ships, aircraft or property, subject to the rights of third parties acting in good faith.”

Scholars have shown that each of the elements of the definition give rise to difficulties of interpretation that could gravely impair States’ efforts at enforcement of its provisions,³ a feature rendered even more problematic by the “permissive” nature of the wording of these articles which might have contained an imperative and unequivocal obligation to suppress piracy. It could well happen that some shocking terrorism-inspired incident at sea could drive an initiative at the United Nations to convene a new conference that would deal in depth with the challenges posed by modern forms of violence at sea, and produce a new international agreement that would give States adequate legal support in their actions to eradicate these threats. Meanwhile, States will continue to deal with such problems at the regional level.⁴

Distinguished delegates,

Since my presentation has dealt with Sri Lanka, and its contribution to the Conference that produced the 1982 Convention and its Implementing Agreement, I seek your indulgence as I

³ Lucas Bento, “Toward an International Law of Piracy Sui Generis: How the Dual Nature of Maritime Piracy Law Enables Piracy to Flourish (2011) *Berkley Journal of International Law* 399, 415.

⁴ *Regional Co-operation Agreement on Combating Piracy and Armed Robbery against Ships in Asia, which entered into force in 2006*; and see Robert C. Beckman, “Combating Piracy and Armed Robbery against Ships in South-east Asia (2002), Robert C. Beckman, “The piracy regime under UNCLOS: problems and prospects for co-operation” in Robert C. Beckman and Ashley Roach (eds.), *Piracy and International maritime Crimes in ASEAN: Prospects for Co-operation* (Elgar Publishing (2011) p. 27). Efthymios Papastavridis, *The Interception of Vessels on the High Seas: Contemporary Challenges to the Legal Order of the Oceans* (Hart Publishing 2013) Michael Bahar “Attaining Optimal Deterrence at Sea: A Legal and Strategic Theory for Naval Anti-Piracy Operations” (2006) *40 Vanderbilt Journal of Transnational Law* 1, 17, 30-35; Zou Keyuan, “New Developments in the International Law of Piracy”, (2009) *8 Chinese Journal of International Law* 323, 325; Tullio Treves, “Piracy, Law of the Sea and Use of Force” (2009) *European Journal of International Law*, 399, 402.

recall my countrymen who participated so actively and effectively in the negotiation of the modern Law of the Sea. I have already invited attention to the pioneering and foundational role of Ambassador H.S. Amerasinghe, the first President of the Third UN Conference on the Law of the Sea. Of critical importance to our country were the efforts of Ambassador Dr. Hiran Jayewardene, who recognized the inequity that would be caused by application to Sri Lanka of the continental shelf limits provided for in Article 76, and convinced the Conference that the solution lay in adoption of the “Statement of Understanding” and its incorporation in the 1982 Convention through Article 3 of Annex II to the Convention which established the *Commission on the Limits of the Continental Shelf*. Dr. Jayewardene continued his pioneering role first by establishing the National Aquatic Resources Agency (NARA) of Sri Lanka, and currently as Secretary-General of the Indian Ocean Marine Affairs Co-operation organization.

I would like here to honour three distinguished members of Sri Lanka’s delegation to the Conference who are no longer with us: the late Ambassadors Susantha de Alwis, Karan Breckenridge and Rodney Vandergert. It was their tireless efforts that secured for Sri Lanka and India the specific method of establishing the outer edge of their continental shelves in the Bay of Bengal.

In conclusion, I would like to express my gratitude to the Commander of the Navy and the organizers of Galle Dialogue 2014, as well as to Chairman Dharmakirti of Sri Lanka’s National Ocean Affairs Committee, for inviting me to address Galle Dialogue 2014. Such conferences represent significant steps toward creating a “Blue Economy” for our country.
