THE COMMON HERITAGE

Selected Papers on Oceans and World Order

1967 - 1974

by

ARVID PARDO

Malta
University of Malta Press, 1975.

CONTENTS

CONTENTS

CONTENTS

APPENDICES

CONTENTS

To H. Shirley Amerasinghe
President of the
United Nations Conference
on the Law of the Sea
with affection and admiration
for his unremitting efforts
in our common cause

INTRODUCTION

by

Elisabeth Mann Borgese

INTRODUCTION

Arvid Pardo, son of a Maltese father and a Swedish mother, was born in Rome on February 12, 1914. He obtained a degree in law at the University of Rome and a diploma in history at the University of Tours. In 1940 he was arrested in Rome for organizing underground groups to aid the Allies and sentenced to eighteen years imprisonment. His first two years were spent in solitary confinement at Regina Coeli prison in Rome. In October, 1943, he was deported to Germany and placed in the concentration camp of Grossbeeren, and later, in Alexander Platz prison in Berlin where he experienced the Allied bombing of Berlin. In April, 1945, he was freed by the International Red Cross, which, however, was unable to evacuate him. He accordingly remained in Berlin, witnessed its capture, and was briefly arrested by the Russians. He then made a 150-mile journey on foot through German territory to the Allied lines.

After the war he joined the staff of the United Nations and served as Acting Chief of the Archives in 1946. In 1947 Pardo joined the Division of Non-Self-Governing territories (colonial territories) where he served in various capacities from 1947 to 1960. He then became deputy representative of the U.N. Development Program in Nigeria from 1961 to 1963 and in Ecuador from 1963 to 1964. In 1964 Malta gained its independence and Arvid Pardo became the first permanent representative of Malta to the United Nations, a position which he held until 1971 while serving simultaneously as ambassador of Malta to the United States from 1967 to 1971, nonresident ambassador of Malta to the Soviet Union, and Malta High Commissioner to Canada from 1968 to 1971. From 1971 to 1973 he led the Malta delegation in the United Nations Sea-Bed Committee. From 1971 to 1972 he was Visiting Fellow at the Center for the Study of Democratic Institutions in Santa Barbara, California, and from 1972 he has been a Fellow and Coordinator of the Marine Studies Program at the Woodrow Wilson International Center for Scholars in Washington, D.C.

I.

On November 1, 1967, Arvid Pardo rose in the First Committee of the General Assembly of the United Nations to

introduce an item on the Agenda: "Examination of the question of the reservation exclusively for peaceful purposes of the seabed and the ocean floor, and the subsoil thereof, underlying the high sea beyond the limits of present national jurisdiction, and the use of their resources in the interest of mankind." He drew the attention of the Assembly to the vast riches hidden on the deep floor of the world ocean which the technological revolution was rapidly making accessible to exploration and exploitation, and which did not belong to any nation. He pointed to the dangers of a military competition to dominate the deep seas. He saw a race developing to carve up the no-man's-land of the ocean floor in the way the black continent had been carved up by the colonial powers in past centuries, which would give rise to acute conflict and pollution. He explained how the old law of the sea, based on the premises of the sovereignty of coastal states over a narrow belt of ocean along the coasts and of the freedom of the seas beyond this, was being eroded. He suggested that a new concept, the common heritage of mankind, must take the place of the old freedom of the sea. He stressed the ecological unity of ocean space and the interactions between all areas and all uses of ocean space. He concluded by suggesting that the United Nations General Assembly declare the seabed and its resources beyond the present limits of national jurisdiction a common heritage of mankind, elaborate a set of principles to govern activities relating to the seabed, and then proceed to negotiate a treaty which would both clearly define the limits of the international seabed and create a new type of international organization to administer and manage its wealth for the benefit of all mankind. The common heritage of mankind would be used for peaceful purposes only, thus excluding the arms race from an area that comprises over two-thirds of the surface of the globe.

Few speeches heard at the United Nations General Assembly have triggered off as much activity as Arvid Pardo's address. An ad-hoc committee of thirty-five nations was formed to study the question and make recommendations to the General Assembly. A year later, in December, 1968, the committee was reconstituted as a permanent Committee on the Peaceful Uses of the Seabed and Ocean Floor Beyond the Limits of National Jurisdiction, with a membership of forty-two states, which became ninety-one by 1973. A moratorium resolution, proposed originally by Pardo in 1967, and a resolution declaring the nineteen-seventies the first decade of ocean exploration, proposed by the U.S.A., were adopted in 1969.

In the meantime, the Soviet Union and the United States submitted to the committee proposals for the demilitarization of the seabed. These were then transferred to the Disarmament Committee in Geneva, and eventually resulted in the 1971 treaty on the prohibition of the emplacement of nuclear weapons and other weapons of mass destruction in the seabed and ocean floor and the subsoil thereof.

During the summer of 1970, the United Kingdom and France submitted working papers on the regime for the international seabed area, while the United States introduced an elaborate draft convention. In the autumn of the same year, the Twenty-fifth General Assembly of the United Nations adopted a Declaration of Principles governing the seabed beyond the limits of national jurisdiction, which spelled out and enlarged the Pardo proposals and elevated the principle of the seabed as a common heritage of mankind to a norm of international law.

The General Assembly also took another important decision in 1970: it decided to convene in 1973 a conference on the law of the sea which, in addition to dealing with the question of the seabed beyond the limits of national jurisdiction, would also examine "a broad range of related issues including those concerning the regimes of the high seas, the continental shelf, the territorial sea (including the question of its breadth and the question of international straits) and contiguous zone, fishing and the conservation of the living resources of the high seas (including the question of preferential rights of coastal states), the preservation of the marine environment (including, inter alia, the prevention of pollution) and scientific research."

This decision by the United Nations (Resolution 2750 C, XXV) marked a turning point in the work of the United Nations Sea-Bed Committee which was both expanded and reorganized into three subcommittees (Subcommittee I: international regime and machinery for the seabed; Subcommittee II: other subjects and issues relating to the law of the sea; Subcommittee III: preservation of the marine environment and scientific research).

It soon became clear that many aspects of the existing law of the sea were challenged. This gave Pardo the opportunity to make a second major intervention on March 23, 1971, in which he set forth his concept of a new legal order for ocean space which was subsequently articulated in the articles

of his preliminary Draft Treaty for Ocean Space, first presented at Pacem in Maribus II and subsequently submitted to the U.N. Sea-Bed Committee in August 1971. Major revisions of parts of the Draft Treaty were submitted by Pardo to the U.N. Sea-Bed Committee in 1973, but circumstances prevented him from completing the work.

There had been dramatic changes in Malta. The Nationalist Government was defeated in 1971 and replaced by the Labour Government of Dom Mintoff. Naturally this fundamental domestic change affected the conduct of foreign affairs. Pardo had continued to represent Malta in the Sea-Bed Committee after the change of government, but by the end of 1973, changes in government interests and priorities had extended to questions relating to the oceans. Thus, when the Law of the Sea Conference opened in December 1973, Pardo was not a member of the Malta delegation which has played no further active role in law of the sea matters. The man who almost single-handedly had set into motion one of the greatest international conferences ever held in history, was out on the sidelines, an observer rather than an actor. He attended the Caracas session of the conference as a Consultant to the United Nations.

II.

What had motivated the first Ambassador of newly independent Malta, the second-smallest member state of the United Nations, to throw himself and his nation into this awesome venture, which may turn out to be the beginning of a revolution in international relations?

Pardo gave some of the reasons in his address of November 1, 1967. "The Maltese islands are situated in the center of the Mediterranean," he said. "We are naturally vitally interested in the sea which surrounds us and through which we live and breathe."

Malta is not only an island state, it is also a very small state, and this factor, too, influenced Pardo's thinking. To create a new and equitable law of the sea, and a new type of international organization based on the concept of the common heritage of mankind, meant to give Malta a significant role in international affairs: it meant also to open new paths for the evolution of the international system and to strengthen international cooperation in general. It is above all the small and weak nations that

stand to gain from peace and the strengthening of international cooperation within an equitable world order. "In the United Nations, we, the small nations, enjoy the right to have our voices heard and to exercise a role of responsibility in promoting a cooperation essential to world peace for the benefit of mankind as a whole," he said in his address to the Plenary of the General Assembly in 1968. "This privilege which we share with bigger countries in equal measure makes us even more conscious of our duty to play our part in this organization with wisdom and great care."

He saw four areas in which the work of the United Nations should be strengthened: disarmament, peaceful settlement of disputes, peace-keeping, and the economic and social activities of the organization.

His most substantial contributions, during the first years of his mission to the U.N., were in disarmament and in the economic and social work of the organization, until the plunge into the law of the sea provided scope for all four areas. For the establishment of an international ocean regime providing for an efficient administration of the seabed and its resources could "become a vehicle for the equitable distribution of the wealth of an area which does not belong to any country, and finally provide for a regime which will insure that at least one area of our planet is used exclusively for peaceful purposes." The ocean is the Great Laboratory. In dealing with the problems of the sea we are forced to face nearly all problems of war and peace, mirrored, concentrated, so to speak, in a medium that is apart and yet appertains to all, res nullius and res communis. And if these problems can be solved in that medium, many of the solutions would be applicable in due time to other areas of international organization and integration.

Pardo's first contribution to the disarmament and arms control issue was the introduction of a resolution on trade in weapons in 1966. "We believe," he explained, addressing the Plenary of the General Assembly in 1968, "that it has become urgent to elaborate a comprehensive and fair system designed effectively to publicize and thus to control the transfer of armaments between states." The resolution was

defeated by two votes. His next major attack on the problem of disarmament was his address in the First Committee of the U.N. General Assembly in 1967. Here he gave a learned and grueling dissection of the horrors of contemporary chemical and biological weaponry from which a number of factors emerged: first, that contrary to the electronic and atomic arsenals which continue to depend on Big Science and Big Technology and therefore remain more or less the restricted property of the big and rich nations, chemical and biological weapons are cheap and easy to produce. Any nation that can produce fertilizer has a potential for poison gas; any nation that can produce a vaccine can wage biological warfare. Second, therefore, chemical and biological weapons may become, increasingly, the arsenal of the poor nations (as well as of non-nations such as guerrillas and terrorist organizations). As Johan Galtung later pointed out, this will be a fact to be weighed by the international community in its attempt to ban the nightmare of B.C. weaponry. For an exclusive approach to this type of weapon might be discriminatory, leaving the power of the rich intact while disarming the poor. A draft resolution which Pardo introduced had to be withdrawn because of strong opposition, but the subject of chemical and biological weapons was taken up by other states in the subsequent year and a treaty on the prohibition of biological weapons was eventually concluded in the Geneva Conference of the Committee on Disarmament.

In submitting at the 1969 session of the General Assembly draft resolutions on laser and radiological weapons (A/CI/PV 1706), Pardo discussed the dual nature of technology, including weapons technology: "Modern science and modern technology are increasingly ambivalent, in the sense that both scientific and technological advances usually have equally important peaceful and military applications. Indeed, in an increasing number of cases the same techniques may be used for peaceful or military purposes. It is only the end product, and sometimes only the use to which the end product is put, which enables us to distinguish between the two. This is true in the nuclear field, in chemistry, bacteriology, or microbiology, in the field of laser technology, and in many others." This, he concluded in the same address, completely transforms the problem of disarmament and arms control. "The problem of disarmament at the strategic level is insoluble in the present context, since it is linked inextricably with the wider question of the control of technology for human benefit." More than negative controls and prohibitions -- unenforceable, anyway, considering, among other things, the complexity and decentralization of the matters to be controlled -- this requires positive cooperation in the management

of resources, science, and technology. It requires a new science policy. For this, again, the oceans turn out to be a great laboratory, for marine technology is as ambivalent as any. Scientific exploration, military reconnoitering, and industrial prospecting are inextricably linked, and international management of the peaceful uses of ocean space and its resources would have a significant restrictive effect on the military uses of the oceans.

Pardo again stressed the interconnection between military and civilian technology in his last speech on disarmament in 1970, when he drew the attention of the General Assembly to the dangers that material produced by new technologies of uranium enrichment might be directed to military purposes if effective international safeguards were not adopted (Resolution 2661 B, XXV). This is a problem which is still with us.

The old law of the sea, based on the principles of sovereignty over a narrow strip of coastal water, and freedom over the vast expanses of the high sea, embodied a war system: with the arms race as a structural component which cannot be eliminated without changing the system as a whole. The new law of the sea as conceived by Pardo, based on the principle of the common heritage of mankind, is intrinsically a peace system, within which international resource management, a new science policy, and the control of technologies for development rather than destruction, would systematically restrict both military uses and abuses of technologies and resources. Specific measures of disarmament, such as the demilitarization of oceanic regions (the Indian Ocean, the Caribbean, the Mediterranean, for example) and the internationalization of tracking devices would still be necessary; they would, for the first time, also become possible. This is, of course, one of the explanations for the reluctance of the great naval powers to accept the establishment of a strong and comprehensive international ocean regime. However, events are inexorable, their sequence ineluctable. The old law of the sea has been eroded by modern technologies. The system of sovereignties and freedoms is collapsing, and something is bound to take its place. It may be chaos and destruction, for a while. Eventually it must be the management of the common heritage of mankind for the common good.

From the beginning, Pardo emphasized that "the work of the United Nations in the field of disarmament will remain sterile if a greater impetus is not given to the advancement of the poorer countries" (Plenary, 1968). And "tensions are increased by the lack of progress in implementing the economic and social purposes of the United Nations."

The advancement of the poorer countries, on which peace

must be based, requires, essentially, three developments: the streamlining, coordination, and integration of the activities of the specialized agencies and other organs of the United Nations system dealing with social, economic, and scientific matters; self-reliance and mutual cooperation on the part of the poor countries themselves; and, more than "aid," a "more direct approach to insure a fair share of the world's riches for those who suffer from an economic handicap."

Pardo's first independent initiative in the United Nations, in 1965, was a proposal for streamlining and integrating the social and economic programs of the U.N. system of organizations, a process which, in his opinion, might have "included even some structural changes in the system, if they were desirable, to meet the changing needs of member states, to enable the U.N. system to cope with problems of a global nature which were not envisaged when the U.N. system was established, and to elaborate an international machinery fully capable of utilizing effectively and of concentrating available international resources on direct assistance to member states for the achievement of the economic and social goals of the Charter of the Development Decade." His initiative led to the establishment of the Expanded Committee on Programs and Coordination in 1966. Reviewing the report of this committee at the Twenty-fourth General Assembly in December 1969, Pardo again stressed the need for an independent, over-all organ that could spend its full time on coordinating and integrating the planning of all U.N. bodies dealing with social and economic activities, harmonizing their budgets, and reviewing periodically programs and activities. The three-year effort of the Expanded Committee had fallen far short of his expectations. Again, it was the oceans that offered a laboratory for restructuring and integrating activities of the U.N. system of organizations. In 1969, Pardo introduced a resolution (Resolution 2580, XXIV) which, while expressing disappointment with the failure of the Enlarged Committee, proposed "a comprehensive review of existing activities of the U.N. system relating to the seas and oceans in the light of present and emerging needs of member states."

Over the years Pardo kept pointing out the deficiencies of the present system: the limitations of the activities of the Intergovernmental Oceanographic Commission within the restrictive framework of U.N.E.S.C.O.; those of the Department for Fisheries, within F.A.O.; the lack of coordination between the activities of the Department of Fisheries and those of the various Fishery Commissions; the lack of independent

scientific and managerial capacity of the organizations working within the U.N. framework; the duplication of efforts; the gaps of competence; the inability of the present international system to attack the problems of the oceans in an integrated and coherent fashion. His statements of December 2, 1969, June 2, and July 10, 1970, should be read in this connection. Hopefully these analyses may bear fruit should the Conference on the Law of the Sea lead to a restructuring of national and international activities in ocean space.

This, then, is the context out of which the Maltese initiative arose. Pardo spoke for a small nation which had just gained its independence: a new member of the United Nations, aware that only in collective security would it find its own security, that only by strengthening international organization could it strengthen its own independence vis-a-vis the militarily and economically stronger nations. Pardo began his office as Malta's first ambassador to the U.N. by attempting to integrate U.N. machinery, to advance disarmament, and to promote international social justice and a fair distribution of the world's resources. In pursuing this threefold aim, he focused his attention on the oceans, always close to his islander's mind. A new order for ocean space, furthermore, was a startlingly new subject, and Pardo was quite aware that small nations, while dependent on a strong international order more than bigger nations, could make a greater impact in a new area not yet preempted by the activities of the big powers.

III.

All the major elements of Pardo's theory are already contained in his first address of November 1, 1967. His assessment of the potential, for good or for evil, of the marine revolution is complete. His later speeches, in this respect, expand upon the first one, spelling out and updating details. On August 10, 1972, he projected them into a rough time table: "The nineteen-sixties saw ocean space become accessible and exploitable in all its dimensions; the nineteen-seventies will see intensive commercial exploitation of all conventional resources of the seas and commercial exploitation of mineral resources far from the coast; the nineteen-eighties will see the industrialization of the oceans, widespread use of ocean space for a variety of purposes, and the implantation of man on a permanent basis in ocean space; in the nineteen-nineties access to ocean space

and participation in the exploitation of its resources will become an essential element in the viability of all states, large and small. Ocean space will then be universally recognized as vital to the maintenance of the world economic structure -- twenty years late. In other respects also, from military to ecological, the importance of ocean space will increase immensely in the next twenty years."

The open-endedness of the existing law of the sea was fully exposed in 1967, and the irresistible drive toward the expansion of national claims was anticipated. The inadequacy of existing international machinery was dealt with. The concept of the common heritage of mankind is there, already formulated in terms that were to be adopted in the Declaration of Principles by the Twenty-fifth General Assembly two years later. Yet, subsequently Pardo did much to develop the legal content of and constitutional framework for this concept. One should note, in particular, his address of October 29, 1968, in which he defined the Common Heritage of Mankind as "a new legal principle which we wish to introduce into international law." The concept of common heritage "implies the notion of peaceful use, since it is clear that military use of the ocean floor might impair or endanger the common property. The common heritage concept implies freedom of access and use on the part of those having part in the heritage, but also regulation of use for the purpose of conserving the heritage and avoiding the infringement of the rights of others; inherent in the regulation of use is, of course, responsibility for misuse. The concept finally implies the equitable distribution of benefits from exploitation of the heritage. It is possible to go further: the notion of property that cannot be divided without the consent of all and which should be administered in the interest and for the benefit of all is a logical extension of the common heritage concept."

Pardo prefers the term "common heritage" to the term "common property." "We did not think it advisable," he said at a Pacem in Maribus Seminar in Rhode Island, January/February 1970, "to use the word 'property' -- not because I had anything against property -- and I don't express any opinion as to the desirability or nondesirability of this ancient institution -- but I thought it was not wise to use the word property....Property is a form of power. Property as we have it from the ancient Romans implies the jus utendi et abutendi (right to use and misuse). Property implies and gives excessive emphasis to just one aspect: resource

exploitation and benefit therefrom." Pardo suggested that the content of common heritage be "determined pragmatically in relation to felt international needs." It is not limited by a complex of real or potential resources. "World resources," he pointed out, "should not be conceived in a static sense. New resources are being constantly created by technology." The common heritage of mankind, however, also includes values. "It includes also scientific research." Thus, if there were a set of ethical and legal rules to be derived from the principle of the common heritage, these would have to be applicable to science policy as well.

Pardo suggested three characteristics of the common heritage of mankind. First of all, "the absence of property." The common heritage engenders the right to use certain property, but not to own it. "It implies the management of property and the obligation of the international community to transmit this common heritage, including resources and values, in historical terms. Common heritage implies management. Management not in the sense of management of resources, but management of all uses." Third, common heritage implies sharing of benefits. "Resources are very important; benefits are very important. But this is only a part of the total concept."

In essence, the address of November 1, 1967, is an ocean space statement. It stresses the ecological unity of ocean space, the interaction of all activities in ocean space, and the practical indivisibility of jurisdiction. "Hence our long-term objective is the creation of a special agency with adequate powers to administer the oceans and the ocean floor beyond national jurisdiction in the interest of mankind. We envisage such an agency as assuming jurisdiction, not as a sovereign, but as a trustee for all countries over the oceans and the ocean floor. The agency should be endowed with wide powers to regulate, supervise, and control all activities on or under the oceans and the ocean floor."

In none of his speeches did he ever compromise the idea of the unity of ocean space.

Why, then, did he initially limit his practical and organizational proposals to the seabed -- from the title of the "item" he introduced to the establishment of a seabed rather than an ocean space regime?

It was a practical necessity. Had he openly proposed to revolutionize the law of the sea as a whole, it would have

been impossible to place the item on the Agenda of the General Assembly. The great powers would have simply ruled it out. This was made quite clear to Pardo in private discussions with the members of several delegations. It was, in a way, the very abstrusity of the notion of the "seabed" that made it possible to smuggle the marine revolution into the United Nations. In reality the seabed has no independent existence. In a way it was a myth, albeit one of the most creative myths in history. The question of the physical "boundary" of the seabed, or the limits of national jurisdiction, arose at once and turned out to be as elusive as the delimitation of outer space. The 1958 Convention on the Continental Shelf left the boundary open-ended by applying the ambiguous concept of "adjacency" and the elastic "exploitability" clause to the definition of the area under national jurisdiction. It overlooked the interdependence between the ocean floor and the superjacent waters.

Pardo, as many of the more internationally minded, approached the issue in a straightforward and simple manner by suggesting that the boundary be drawn at the two-hundred-meter isobath, dropping the concepts of "adjacency" and "exploitation," or at twelve miles from the coast, thus recognizing the interdependence between seabed and superjacent waters. He was aware of the danger of "creeping jurisdiction" -- that is, the inevitability with which claims to jurisdiction would be extended from the ocean floor to the superjacent waters. He made a series of careful analyses of the economic potential of the international seabed in the function of various criteria of drawing the boundaries of national jurisdiction. His speech of March 16, 1970, should be read in this context. Since most of the known riches of the seabed lie in the continental shelf area, this potential rapidly shrank as national claims pushed farther and farther out. Pardo predicted the collapse of the seabed authority idea, for a seabed authority without significant economic potential would be meaningless. When he later accepted the extension of national jurisdiction to an area extending two hundred miles from the coast as inevitable, this acceptance coincided with his final abandonment of the concept of the seabed authority and its replacement by an ocean space authority. He thus extended the concept of the common heritage from the nonliving to the living resources of the oceans. The logic of this "coincidence" escaped both the "internationalists" who merely noted, and bitterly criticized, what they thought was a retreat from, or even a betrayal of, his internationalist ideal of the common heritage of mankind,

and the "nationalists," who welcomed his realism, while continuing their ritual eulogies of the revolutionary potential of the common heritage of mankind on the international seabed, which their advancing claims to national jurisdiction had simply wiped out for all practical purposes.

When, on March 23, 1971, Pardo delivered his second major address proposing a new legal order for ocean space, he had fully matured a new theory of boundaries in the oceans which is so simple, so logical, and so functional that one may venture to predict it will eventually become the basis of the new international law of the sea -- in spite of the initial resistance, which is offered to anything that is new. Pardo did away with the three-dimensional jigsaw puzzle of overlying and overlapping boundaries of territorial seas, contiguous zones, fishery zones, legal continental shelves, and pollution control zones that had been evolving since the First World War. "I see nothing sacred in existing legal categories," he said. "They were created haphazardly to meet in some way needs of coastal states that could no longer be adequately satisfied under existing international law -- a law that is largely obsolescent and in part obsolete." Anticipating that there would be no way by which international agreement could be reached on this profusion and confusion of unreal boundaries in ocean space, employing a Byzantine proliferation of criteria long since abandoned in the world of terra firma, he proposed one single line of demarcation between national and international ocean space, which he considered constituted one ecological whole. "The expanding interests of the coastal state in ocean space, although varied, are now so interlocked that they are no longer easily separable; man is increasingly penetrating all parts of the marine environment in a manner that makes the existence of different, largely uncoordinated, regimes scarcely conceivable; finally, several new uses of ocean space necessarily involve the different strata of ocean space. Thus, for instance, in a given area, seabed exploitation involves the surface, the water column, the bed, and often the subsoil. This fact makes the existence of different limits of coastal state jurisdiction confusing, irrational, even absurd.

"The time has come to consolidate the multiplicity of limits of coastal state jurisdiction in ocean space into an over-all, clearly defined outer limit of national jurisdiction that recognizes and reasonably satisfies the totality of coastal state interests in the marine environment."

This single boundary he proposed to place two hundred nautical miles from the coast -- on the basis of tabulations and calculations which indicated that this measure would be acceptable to the greatest number of nations.

A comparison between the two fundamental statements of November 1, 1967, and March 23, 1971, reveals an essential continuity of thought. Over this four-year period, Pardo evolved his theories mainly in two areas: the reconceptualization of ocean space, divided by one consolidated boundary between national and international ocean space; and the proposition of an ocean space regime to be established as a systematic whole, by one single treaty rather than by a series of treaties establishing a series of regimes starting with a seabed authority. The two changes, as we have seen, are linked. They were motivated by two apparently independent developments in the Sea-Bed Committee: the advance of national claims, and the decision, in 1970, to call an international conference on the law of the sea as a whole.

IV.

During the years from 1968 to 1973 Pardo covered in his speeches all the major issues which were debated so heatedly during the Caracas session of the U.N. Conference on the Law of the Sea, in all three committees. He discussed them with an objectivity and fairness which are hard to match, taking into consideration the interests of all nations, large or small, rich or poor, without partisanship for any; balancing the interests of the world community with those of coastal and landlocked states; never reaching for the unreachable; merely attempting to leave all options open for the future. A few examples will suffice to illustrate his position.

With regard to the First Committee's work, Pardo, one must admit, never warmed up to the "enterprise system," through which the developing nations hope to assure their fair share in the management of, as well as in the benefits from, sea floor mineral mining. Pardo's 1971 Draft Treaty provides for a licensing system which is today unacceptable to the majority of nations, and he did not revise this part of the treaty. This, however, is only partly due to the fact that he is not a socialist and therefore not a fervent believer in public enterprise. It is due more to his conviction that the real effectiveness of the management system devised by the First Committee and its potential benefit to the poor and technologically less developed nations does not depend so much on the prevalence of a socialist or private-enterprise

philosophy as it depends on the outcome of the work of the Second Committee in dealing with the limits of national jurisdiction. If present trends in the Second Committee continue unchecked, if national claims advance through loopholes and ambiguities in the evolving international law of the sea, a significant portion of the manganese nodules of the deep ocean floor, presumed to be "beyond national jurisdiction," will fall instead under national jurisdiction and escape the control of the international enterprise. Thus the Enterprise would have to compete with private enterprise operating under national jurisdiction. Either it would have to offer to companies conditions equal to or better than those obtained under national jurisdiction, or it would remain without business altogether. It is difficult to assume that, under these circumstances, the Enterprise could be in a position to protect mineral-exporting developing nations against fluctuation of prices or other negative consequences arising from seabed production. As early as August 12, 1970, Pardo stressed that such consequences might arise. Commenting on the French Draft Articles, he pointed out that "adoption of this system would establish at the international level a system of built-in cutthroat competition between producers of land-based and sea-based minerals, and between sea-based producers themselves, condemning the overwhelming majority both of the former and of the latter to bankruptcy, and totally disrupting world markets."

The Caracas session has done nothing to allay these fears.

There is another basic aspect of the work of the First Committee on the conditions of exploration and exploitation, on which Pardo anticipated and advocated the position of the majority of nations. At Caracas, it will be remembered, there was a division between a small number of rich nations which favored the inclusion, in the treaty, of an elaborate "mining code" specifying -- and freezing -- in a most painstaking way each and every condition that was to govern the granting of exploration and exploitation licenses, including sizes of lots, duration of leases, etc. The majority of nations preferred the inclusion of general principles and standards in the treaty while leaving detailed legislation to the appropriate organs of the international authority to be established. As early as March 16, 1970, Arvid Pardo said: "We do not favor the inclusion of detailed provisions for the evaluation and exploitation of seabed resources lying beyond national

jurisdiction in the treaty, establishing an international regime, both because this would confer excessive rigidity on the regime and because of the lack of reality of such an exercise. After delimitation of the legal continental shelf, few potential mineral resources are likely to be found in commercially exploitable quantities in the area beyond national jurisdiction, apart from manganese nodules. These have not yet been exploited commercially, and it would appear highly undesirable to incorporate in an international treaty detailed norms for their commercial development which, on the one hand, could well prove to be inappropriate in practice and, on the other, could not be changed without a lengthy and tedious process of treaty amendment. It would appear far preferable to create under the treaty establishing an international regime an equitably balanced organ to administer the provisions of the treaty and with well-defined but extensive powers to determine the entities entitled to participate in seabed resource evaluation and exploitation, together with their rights and their obligations "

With regard to the work of the Second Committee, Pardo, as we have seen, was the first to establish what amounts to an "Exclusive Economic Zone" (national ocean space) extending over an area of two hundred nautical miles from the coastline. He has remained the only one thus far to propose clear and unambiguous lines of delimitation specifying the way in which baselines were to be drawn and islands and archipelagos were to be defined. Recognizing the ambiguity of existing international law with regard to the outer limit of the legal continental shelf, and the rights some coastal nations deem themselves to have acquired under that law, he proposed that such states should be compensated for the voluntary renunciation of whatever area of continental shelf may extend beyond the two-hundred-mile boundary of their economic zone. Such compensation, to be paid by the international authority to the state concerned, should be negotiated on the basis of the economic potential of the area to be renounced. Whether a solution of this kind is acceptable to the handful of nations concerned, remains to be seen. It is a proposal, at any rate, that recognizes the sovereign rights of the coastal nations and equitably balances national and international interests. If no solution is found to this thorny problem of clearly delimiting the external boundary of the seabed of national ocean space, all the new treaty would do is to carry the ambiguities and open-endedness of the Continental Shelf Convention further out into the oceans. Instead of dealing with

a legal continental shelf, we would be dealing with a legal continental margin; the areas of conflict, between neighboring or opposite nations, or between nations and the international authority, would necessarily multiply.

At the same time, Pardo stresses that the geographic location of the boundary is not a question of primary importance, as long as the boundary is drawn clearly and unambiguously. "The main issue is not jurisdictional limits but the contents of the jurisdiction claimed," he said on December 4, 1972. In other words, the limits of national jurisdiction, which define, equally, the limits of international jurisdiction, are of a functional rather than of a territorial nature. This entails a basic transformation of the original concept of the seabed authority as a government ruling over a determined geographic area, to a functional concept of the governance of activities of nations in ocean space, regardless of geographical demarcation. It is a far more modern, far more flexible, and far more comprehensive concept.

In this new context, however, Pardo is careful not to attack or undermine the reality of national sovereignty. His provisions for the management of fisheries and scientific research (Maltese Draft Articles on National Ocean Space, 1973) are exemplary in this respect. Here, again, he is aiming at a balance between the interests of coastal states, landlocked states, distant-water fishing nations, and international community interests. He describes in concrete terms what is meant by the establishment of new forms of cooperation between national and international management systems, with particular consideration for the needs of developing nations. Yet he safeguards the sovereign rights of the coastal nation which, in the final analysis, is subject only to the kind of adjudication by an international tribunal that may be a concomitant to any treaty obligation freely assumed by sovereign states. These articles on fisheries management thus provide an answer -- thus far the most comprehensive and detailed that is available -- to the aspirations voiced by many of the developing nations at the Caracas session of UNCLoS.

Pardo's contribution to the work of the Third Committee can be considered under three headings: pollution and pollution control, scientific research, and the impact of technology.

As early as 1967, he gave a detailed and scientifically documented picture of the pollution of the oceans and the dangers to the whole planet arising therefrom: long before the Stockholm Conference on the Human Environment was con-

ceived; long before environmentalism became the fad it was to become in the early nineteen-seventies. He never shared the hysteria, the wallowing in the good news of perdition that began to prevail in the industrialized nations at that time. "Large-scale irreversible effects have not yet occurred anywhere in ocean space," he pointed out on March 14, 1973; and on July 16 of that year he said: "Although pollution in certain areas is serious, we are not yet facing a global emergency with regard to marine pollution. We are facing a gradually deteriorating situation which, if present trends continue, may very soon have worldwide consequences, not now or tomorrow, but in one, two, or perhaps three generations." Nor did he see in environmental conservation the primary goal of his ocean regime. Reverence for nature and love for the wildlife on reefs, rocks, and forlorn islets can be sensed even through the legal language of his draft articles. He sees conservation not as an end in itself, however, but a condition for and a part of the rational development of marine resources. Pollution control measures thus cannot be taken piecemeal, or apart from the developmental activities of nations in ocean space or affecting ocean space. They must constitute an integrated whole of national and international measures. "We believe in a comprehensive -- not in a partial -- approach to ocean pollution, hence we would wish to see the problem assigned as one of the functions of comprehensive institutional arrangements for ocean space."

Technological developments may change pollution problems and suggest different control and prevention measures at different times. The adoption of elaborate and rigid standards in an international treaty therefore may be as little indicated as the adoption of a rigid, elaborate mining code in connection with seabed mining. "We do not place our trust in paper regulations elaborated by a technical advisory organization," Pardo said, "but more in the acceptance by the international community of two new principles of international law: first, a state is responsible for the payment of damages in connection with pollution from whatever source, caused either directly, or by persons physical or juridical under its jurisdiction, or by a vessel bearing its flag, to the marine environment under the jurisdiction of another state or to the marine environment beyond national jurisdiction. Second: coastal states and international institutions on behalf of the international community have a cause of action against a state which pollutes, or permits the pollution of, the marine environment outside its jurisdiction, whether such

pollution derives from activities within its jurisdiction or not." Pardo's proposed environmental legislation thus represents a dynamic interaction between development and conservation and between international and national activities.

No one has stressed the basic importance of scientific research for the development and conservation of the oceans more than Pardo. He considers scientific research as an "international public interest" that must be protected internationally in ocean space as a whole. At the same time, he recognizes the sovereign right of the coastal nations to protect its national ocean space against possible misuses of scientific research by another nation. Scientific research, in the Maltese articles, is defined as "any systematic investigation, whether fundamental or applied, and related experimental work, the primary aim of which is to increase knowledge of the marine environment for peaceful purposes." Thus Pardo rejects the distinction between "fundamental" and "applied" research. He is fully aware of the inextricable interdependence of "pure" and "industrial" and "military" research -- and of the dangers that may arise, especially for the less developed coastal nations, from this connection. Unrestricted freedom of research in the oceans has been rendered by advancing technologies as untenable as any other of the freedoms of the sea. "Whatever the results of next year's conference on the law of the sea and whether or not we reach agreement," he said on April 2, 1973, "one thing can be predicted with certainty: the law of the sea as we have studied it and know it will cease to exist. To tie the cause of scientific research to a law of the sea whose days are clearly numbered does no service to science."

"The basic choice facing the international community is quite clear: either freedom of scientific research in a diminishing area of ocean space, accompanied by a multiplicity of coastal state restrictions in a growing area of ocean space, or nondiscriminatory international regulation of scientific research which opens the possibility of scientific access to the near totality of ocean space."

The Maltese draft articles on scientific research, just as those on fisheries management, are probably the most equilibrated proposed to date. They attempt to overcome the dilemma of freedom and sovereignty by instituting a reasonable measure of international regulation, in which all nations participate, and to create new forms of cooperation between national and international research, which should be complementary rather than antagonistic.

There is, finally, a category of scientific/technological activities in ocean space which is not affected by controls either of scientific research or of pollution: activities to which the Third Committee has paid scant attention and which are, instead, part and parcel of the marine revolution awareness of which was the source of Pardo's entire initiative. They are based on new technologies or macrotechnologies capable of altering the natural state of the marine environment across national boundaries. These activities include weather modification, the construction of dams, isthmuses, canals, the transplantation of marine flora and fauna, the large-scale extraction of energy from the oceans, to name just a few. The Soviet Union introduced a resolution in the Twenty-ninth General Assembly (1974) demanding the prohibition of some of these activities, on land and on the seas.

In the Sea-Bed Committee, it was only Arvid Pardo who gave this matter early consideration. On August 1971, he said: "I do not intend to give examples of what could happen to the marine environment through the legally legitimate use of contemporary technology. My delegation, however, considers the threat sufficiently serious to warrant examination of a new principle of international law which we would tentatively formulate as follows:

"No state may use its technological capability in a manner that may cause significant and extensive changes in the natural state of the marine environment without obtaining the consent of the international community."

The unilateral use of such technologies by any one nation would indeed play havoc with the sovereignty of other nations by subjecting the citizens of other nations to environmental and economic developments beyond their own control. In such cases it is only international cooperation, the participation in making decisions which directly affect the well-being of citizens, that can safeguard national sovereignty.

Ordered chronologically, the Pardo speeches appear as an active and concrete inspiration to the work for the conference on the law of the sea. They are also a running comment on these preparations, and a measure of their success or failure. He starts in a vein of enthusiasm tempered by prudence, offering a host of new legal concepts -- the common heritage of mankind, international public interest, ocean space, detailed criticisms of proposals under

discussion -- the American proposals for pollution control, for scientific cooperation; procedural suggestions -- timetables, methodology, resolutions; a proposal for the establishment of a U.N. Office for the Seas, etc. He passes to a phase of pessimism flavored by sarcasm. By August 1970, he foresaw that, if present trends continued, "the international community is invited to engage in the lengthy and essentially futile exercise of formulating a comprehensive regime and complex machinery to govern activities in an area which may prove to be so small as to be without either economic or political significance....There would still exist some marine plants, some floating seaweed, a few migratory species of fish and sea mammals, and some manganese nodules outside the area under coastal state sovereignty or exclusive jurisdiction," he comments on August 8, 1973, while submitting his remarkable Maltese articles on national ocean space. "This unfortunate oversight is thoughtfully remedied in document....Total irresponsibility within total sovereignty for the common benefit of mankind will no doubt be the memorable slogan of the forthcoming law of the sea conference." The real title of the committee for the peaceful uses of the seabed beyond national jurisdiction, he suggested on August 10, 1972, should be "the United Nations Committee for the first partition of ocean space in the interests of coastal states."

On December 4, 1972, he anticipated the "package deal" that was to epitomize the policy of the great powers at Caracas. "My delegation is aware that such a package deal is sought only for the highly laudable purpose of insuring the success of the conference. In our view, however, conference success is not necessarily synonymous with conference agreement on a package deal that would leave the law of the sea substantially unaltered, except for the creation of weak international institutions for the resources of the deep seabed and international recognition for the greatest extension of national sovereignty since the Congress of Berlin."

Pardo's post-mortem on Caracas -- first presented in condensed form in Malta at Pacem in Maribus V, then at the S.A.I.S. Conference in the form included in this volume -- confirmed his worst misgivings. The great goal of solving the burning problems of the oceans, created by modern technology, and of creating a new type of international organization to cope with these technological developments and to administer the common heritage of mankind for the benefit of all peoples, especially those in the developing world, has been diffused,

pushed out of focus. There can be no doubt about that. The consequences, as Pardo sees them today, are: increasing conflicts among nations; increasing conflicts among uses of ocean space; increasing pollution; increasing inequality among nations; increasing impediments to transnational activities such as scientific research or navigation.

The reason for failure -- if failure there should be -- is not necessarily the wickedness of nations, nor the fact that we are living, and will continue to live for some time, in an international order based on sovereign nation-states.

The reason is quite simply the radical novelty of Pardo's initiative and the enormous complexity of issues involved. We are at the beginning of a revolution in international relations. It will take time.

"Fortunately, it is unlikely that the forthcoming conference will conclude its deliberations this year," he said in June 1974, "and therefore there is still time to influence the attitude of governments."

Far from giving up, he continues with positive and practical suggestions:

"...it is apparent that international agreement is required on:

> "(a) replacement of the present concepts of high seas, territorial sea, continental shelf, pollution, fishery zones, etc., by the concept of ocean space, comprising the surface of the sea, the water column, the seabed, and its subsoil. This is essential because activities in the seas increasingly involve the oceans in all their dimensions: separate legal regimes for different strata of the seas unnecessarily create difficult problems;
>
> "(b) replacement of the concept of sovereignty or sovereign rights of the coastal state over marine areas and resources by the concept of jurisdiction, defined as the legal power to control and regulate a defined area of ocean

space adjacent to the coast, subject to treaty limitations designed to protect the interests of the international community; only thus can extractive uses and transnational uses of ocean space be securly reconciled within national jurisdiction;

"(c) clear and precise definition of the limits of national maritime jurisdiction for all purposes: if agreement cannot be obtained on this point, coastal state jurisdiction will inevitably expand;

"(d) the creation, not of a seabed agency, but of a balanced international system for ocean space beyond national jurisdiction with comprehensive powers of administration and resource management; only thus can there be some assurance that the provisions of the future treaty will normally be observed by states, that all states will benefit in some measure from the new international order, and that serious efforts will be made to control abuses of the seas beyond national jurisdiction."

As the U.N. Conference on the Law of the Sea gathers for the next round of its labors, the International Ocean Institute at the University of Malta takes pride in publishing Arvid Pardo's work from 1967 to 1974; for it represents the origin and the foundation of the whole awesome development within the United Nations. It constitutes by far the most comprehensive and systematic contribution to the evolution of the law of the sea in the nineteen-sixties and nineteen-seventies, and it may turn out to be one of the milestones in the history of international law and organization. By putting this work at the disposal of all delegations to this conference, we want not only to pay homage to a great work, but we want to renew the positive inspiration on which this conference has been convened and thus contribute to its success.

Elisabeth Mann Borgese

FIRST STATEMENT

to the First Committee of the General Assembly
November 1, 1967.