



Dalhousie University

International Ocean
Institute



FAXED

July 12, 1994

Dr. Yuzuru Shimazaki
Member of Parliament
FAX 81 3 3502 5864
Tokyo, Japan

Dear Mr. Shimazaki,

Aware of your interest in Law of the Sea issues, may I take the liberty of drawing your attention to what I think is a very serious issue of erosion of the Law of the Sea as well as of international law and, in particular, the Law of Treaties.

As you know, on July 27, a resumed session of the 48th General Assembly is being called, for the adoption of a Resolution and Agreement with regard to the implementation of Part XI of the Law of the Sea Convention.

We all agree that, to be effective, the Convention must be accepted universally, or almost universally. We also all agree that Part XI is already obsolete and in any case cannot be implemented today, and as long as the future of nodule mining is as uncertain as it is.

But the document we are about to adopt raises many problems, both procedurally and substantively.

The procedure is indeed without precedent. It would be difficult to maintain that it is in accordance with the Vienna Convention, and this sets an extremely dangerous precedent. It leaves the Law of the Sea Convention in a very ambiguous situation, with a lot of "provisional members" of a "provisional regime" of "provisional universality"!

In substance, the Agreement creates institutions which are not viable, either now or in the future. The millions of dollars to be spent on them, even though they are few, are money down the drain.

The Agreement abolishes, among other things, the Review Conference, and yet, a Review Conference will be absolutely inevitable before commercial sea-bed mining commences. We do not know enough today about the technological, economic, and

political situation of that future time, and it is futile to try to bind our descendants to arrangements which they might find totally unsuitable. It would have been so much more meaningful simply to suspend Part XI and continue with the Prepcom/Pioneer regime, and review and revise Part XI in accordance with international law at that future time, as suggested by the Delegation of Sierra Leone!

What can be done in the present situation?

There are a number of scenarios.

Considering the unfortunately very low priority of the whole issue on the agendas of most States, it is quite possible that the Resolution and Agreement will be adopted without vote. It is also possible that a vote is called for, that there are votes against or abstentions. In this case, there will be two regimes in force: the Convention regime and the "provisional" regime.

It is also possible that, sooner or later, the legality of the whole procedure will be put into question, both nationally and internationally.

Take the example of the United States: The way the "Fiji Resolution" is now being introduced, to vote in favour of the Adoption of the Resolution means to vote in favour of the adoption of the Agreement. To vote in favour of the Agreement implies consent to be bound by it. Consent to be bound by the Agreement means consent to be bound by the Convention.

The United States Delegation, or State Department, cannot agree to be bound by the Convention without the consent of the Senate. Should President Clinton lose Senators next November, the Senate might challenge the legality even of a vote in favour of the adoption of this unprecedented Resolution!

Internationally, sooner or later a competent international organisation might request an advisory opinion of the ICJ on the legality of the procedure, just as a request has just been made for an advisory opinion on the legality of using or even possessing nuclear weapon! I have no doubt that the Court would find the procedure in violation of the Law of Treaties.

It is not a happy situation.

Japan has been rather low-key during the consultations leading up to this situation. Moreover, the change of Government enables Japan to take a somewhat independent position which might have long-term benefits, especially for its relations with developing countries.

Would it be possible for Japan to request a roll-call? Would it be possible for Japan to abstain from the vote?

On another level: Japan has announced that it will conduct a comprehensive ocean-mining test in, I think 1996. Would it be possible for Japan to open this comprehensive pilot test up to the cooperation of other countries -- especially developing countries? The joint Pioneer exploration plan for the first mine site of the Enterprise --which was a beautiful project --is dead. The Authority, such as it now is, is incapable of promoting international cooperation in technology development. Could Japan fill this unfortunate vacuum? I believe an initiative like this --especially if the comprehensive test could include a long-term environmental component as proposed by the Germans --would be highly appreciated by many countries.

Please excuse the length of this letter, dictated by my deep concern for international law and the law of the sea, which I know you share.

With all good wishes,

Sincerely yours,


Elisabeth Mann Borgese
Professor

KEITH D. SUTER

GPO BOX 4878
SYDNEY, NSW
AUSTRALIA

TELEPHONE AND FAX
61 2 358 5847

COPY

DATE:

22/8/95

TO:

ELIZABETH MANN FORGERS

FAX NO.:

1 902 868 2455

SUBJECT:

LAW OF THE SEA

PAGES (INCLUDING THIS ONE):

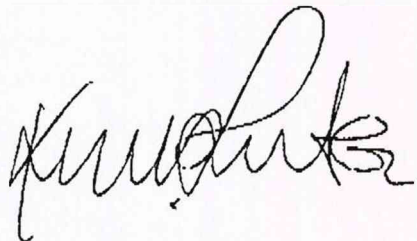
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MESSAGE

Thank you for your letter of August 15, which has arrived via Federal Express.

I will make enquiries of the Australian Department of Foreign Affairs and Trade.





Dalhousie University

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FAXED

FACSIMILE TRANSMISSION

To: H.E. Mrs. Danielle de St Jorre
Minister of Foreign Affairs
FAX No: 248 224 845

From: Elisabeth Mann Borgese
FAX No.: 1 902 868 2455

Date: June 12, 1994

Subject: Law of the Sea

Dear Danielle,

You can imagine how upset I am about the situation arising from the Secretary-General's Consultations on the Law of the Sea Convention. The "Draft Resolution and Agreement" approved by these Consultations means a serious erosion not only of the Law of the Sea but of international law in general and the Law of Treaties in particular. The legal status of our Convention will be confused and ambiguous for the next four years -- and that is an understatement. We will have a lot of "provisional Parties" to a "Provisional Regime" of "provisional universality!"

What can we do?

I have thought a lot about it, and also discussed it with my colleagues and, in particular, with Arvid Pardo, and the best we can come up with is the idea of introducing in the GA, on July 27, a second Resolution

Requesting an Advisory Opinion from the ICJ on the Legality of the procedure proposed by the Resolution and Agreement Relating to the Implementation of Part XI of the United Nations Convention on the Law of the Sea of 1982.

We will not get it adopted. It will be considered as a nuisance, but I think it will save the conscience of humankind, throw some doubts on what is actually going on, and may have some long-term effect.



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Do you think you could do something in this direction? It is my impression that a many States have doubts about the legality of what is going on, as well, of course, about the substance. They do not dare to speak up. There are other priorities. But a initiative like this would be a relief for many.

All the very best,

Yours as ever

Elvén



Dalhousie University

FAXED

International Ocean
Institute



Facsimile Transmission

To: Elisabeth Mann Borgese
International Ocean Institute
c/o Hotel Columbus
Rome, Italy
Fax: 39 6 686 4874

From: Margaret J. Wood
International Ocean Institute
Halifax, Canada
Fax: 1 902 494 2034

Date: March 14, 1994

Total Number of Pages: 1

Dear Elisabeth:

Got your messages on my answering machine--I did have a good copy. The *New York Times* rudely informed me that they do not accept faxes--they get too many! We sent the Letter to the Editor by DHL today and faxed a copy to Boutros Boutros Ghali.

Could you please follow up with Malta (i.e., Anna Trigona) to be sure the Pergamon Press bill has been settled. I got a fax from Sue Smith at Pergamon Press this morning saying that they have still not received payment. I faxed her back and promised to keep her posted. I also sent a fax to Anna Trigona and asked her to look into the matter--argh!

Madeleine would like to know if you have any special instructions concerning your credit card bills.

I faxed A. Kolodkin today (found a copy of his telex in our Incoming Fax file).

Anna Trigona faxed me today to say that she is not authorized to transfer money from IOI call accounts--only Krishan. She wanted to know if sending a cheque would be OK. I recommended that she wait until Krishan returned to authorize the transfer (it would take far too long for a cheque to clear in Hawaii.)

That is all for now . . . it is dull and rainy here today . . . have a good trip to Milan and will touch base again when you get to Malta.

Margaret



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FACSIMILE TRANSMISSION

To: H.E. Mr. Layashi Yaker
FAX No: 251 1 51 28 14

From: Elisabeth Mann Borgese
FAX No.: 1 902 868 2455

Date: May 2, 1994

Subject: Law of the Sea

Dearest Layashi,

I have tried to phone a couple of times, but you were travelling, and then immensely busy -- and my hours here was hard to reconcile with your hours there!

First of all, I hope you have well received my previous faxes, with all the letters I had drafted and I hope you were able to use some of that material. Please do let me know whether there is anything I could do to follow up, etc. Also: Have you received a reply from Jan Pronk?

My concern today is the Law of the Sea situation.

I do not know how you assess it from your view point, from here it looks as if everything were already done and closed. There will be a very brief "consultation" on May 31 - June 4 -- a mere formality to get the text adopted *by consensus*. There will be no basic changes in the text you now have. Then it will go its way, nobody can stop it, and it will enter into force, "provisionally," on November 16, superseding the duly ratified Convention.

As you know, the text is now with the Governments in their capitals, and I have no idea how they are reacting. Is it possible to get Africans and Arab States to oppose the process at this stage? They have practically been absent from the negotiations (except Egypt) and are less compromised than the others. If you find that African Governments are reluctant to go along, I do think you should come to New York on May 31 and voice opposition on

