



Dalhousie University

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FACSIMILE TRANSMISSION

To: H.E. Judge Abdul Koroma  
FAX No: 212 688 4924

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

Date: January 7, 1994

Subject: Nonpaper

My dear Abdul,

here it is. This was the last version which we discussed, and you said the changes were o.k.

As I mentioned, I think you know best what to do with it next.

My own gut feeling --but it is only a gut feeling --is that the time for waiting has passed. One must rub it in now, and rub it in again, that there is an alternative. I would like to see the paper distributed officially by the Secretariat again (it is an amended version) and in the hands of all Delegations --but I may be wrong.

I am much looking forward to seeing you soonest.

Love,

*Elisabeth*



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FACSIMILE TRANSMISSION

To: H.E. Judge Abdul Koroma  
FAX No: 688 4924

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

Date: February 4, 1994

Subject: Nonpaper

My dear Abdul,

Here are a few notes. I am also attaching the new piece of the Boat Paper, in case you do not have it yet at the Mission.

I do think you ought to take all your time and make a fairly long and explicit statement so that it can sink into the minds of the Delegates! It is also your last statement!

Some delegates (the Swede, one of the Germans, said, our Nonpaper leaves too many things "dangling." I ask you: can anything be more "dangling" than a provisional agreement implemented by provisional members??

Thanks. See you soon,

*Elisabeth*

Mr. Chairman,

With the completion of the second reading of the substantive part of the Boat Paper, our discussions are entering a new phase. A procedure has been proposed to us which, as we all know, raises quite a few problems.

Now, before going into the procedural questions, I would like, once more, raise a fundamental issue.

Distinguished Delegates, I would like to ask you to look at the broader implications of what we are doing here. No matter how we present or disguise it, the Boat Paper amounts to a radical rewriting of Part XI of the Convention. On each and all controversial points the Boat Paper proposes alternatives which change the Convention, and, as stated in Article 2 of the procedural part of the Boat Paper, "In the event of any inconsistency, the provisions of this Agreement shall prevail."

The point I want to make is this: If we admit today that this Convention, duly ratified by now 61 States and about to come into force, can be changed, we are setting an extremely dangerous precedent. We open a Pandora's Box. We initiate the process of the disintegration of the Convention. We begin to unravel our work of a quarter of a century, which stands for all the things the Secretary-General pointed out again so eloquently at the opening of this round of the Negotiations.

Heed this warning: The next to go is the Exclusive Economic Zone. It is already under attack, and if we establish that indeed this Convention can be changed at will at this stage, we will see the United Nations Conference on Straddling Stocks and Highly Migratory Stocks in the High Seas ending with the unilateral extension of jurisdictional claims by a dozen of States -- and we will be back at square one of 1958.

*Let us safeguard the integrity of this Convention.*

The Boat Paper purports to do this -- but in fact it does not.

Let me now return to the question of procedure [Abdul: I think you want to say here a few things about the unacceptability of the whole procedure. I would like to draw your attention to the following articles which seem to me to be absurd:]

Article 2, paragraph 3. "After the ADOPTION of this Agreement, any instrument of ratification...of the Convention... shall represent also CONSENT TO BE BOUND by this Agreement....Don't we need a DECISION for the provisional application?"

Article 6 "This Agreement shall enter into force 30 days after the date when 40 States have established their consent to be bound...Why 40 States? Would it not be more logical to have 60, as in the case of the Convention? ..."provided at least five developed States...have established their consent to be bound." China has already objected against this provision. It seems to me, it would be far more important to make sure that States that have already ratified are in agreement! According to the Boat Paper 40 States, none of which is a State Party to the Convention on November 16, can bring this Agreement into force. I do not think this is fair towards the States which, in good faith, have ratified the Convention and are States Parties.

Article 7. This, to my mind, is totally unacceptable. How can this Agreement be applied as provisionally binding for those States which have consented to its adoption, since, in the first place, consenting to the adoption is not binding under international law, and secondly, how can this Agreement be binding for some States and not for others? How can the Authority be run under these circumstances?

What happens after 16 November 1998, if those 5 States still have not agreed (now they are just "States," no longer "developed States" as in Article 6, and what happens if there are 5 States, but less than 40 ratifications? This Article surely must be redrafted!

Distinguished Delegates: I do not want to return, at this point, to the many and profound disagreements we still have with the substantive part of the Boat Paper.

In the meantime, the clock is ticking, and the moment of the coming into force is drawing nearer.

It seems to me, we have at least three options before us:

- (a) We agree to the Boat Paper, in spite of the tremendous problems it would make us face;
- (b) We agree on nothing and the Convention enters into force on November 16. Certainly, the States Parties, meeting in May, 1995, could adopt any kind of implementation agreement they might wish to adopt, and, most likely this agreement would be drawn with the intention to make acceptance and ratification as universal as possible.

However, in that case most of the eight issues discussed in the Secretariat's information notes would rear their heads again. We still would have to try to deal with issues with which we simply cannot deal today as we cannot foresee the situation 20 years in the future. Who will

be the "interest groups" at that time? How will the geographic regions have been re-organised? We will not do our children and grandchildren any favour by foisting on them rules and regulations that will be totally obsolete and will have to be changed again in any case.

Another disadvantage of this approach, for the States Parties is that without doubt they would have to pay the costs of the Authority.

- (c) We adopt an agreement along the lines of the Nonpaper --which, incidentally, could be enriched by those articles in the Boat Paper which are *not* in conflict with the Convention.

We decide, by Resolution of the General Assembly, to extend the mandate of the Prepcom. for the Interim Period, from November 16, 1994 to the beginning of commercial mining; we authorise the Prepcom. to exercise all the initial functions of the Authority and the Enterprise in an evolutionary manner; we decide to hold a Review Conference when commercial mining is about to begin; we request the General Assembly to make provision that the costs of the Prepcom be paid out of the general budget of the United Nations as heretofore.

We use what we have and what is tried and trusted; we safeguard the integrity of the Convention; we do not touch it at this point in time; we are pragmatic, cost-effective, and leave to the future what only the future can decide.

The industrialised States would not risk anything at all by ratifying the Convention under this interim agreement.. The Pioneer regime has been acceptable to practically all of them. It will continue. If, after the Review Conference, they are dissatisfied with the result, they denounce the Convention, and they are in the same situation in which they find themselves today.

These are the three options now before us, Mr. Chairman. Thank you.

3 February 1994

DRAFT RESOLUTION FOR ADOPTION BY THE GENERAL ASSEMBLY

The United Nations Convention on the Law of the Sea

The General Assembly

*Recalling* resolution 48/28 of 9 December 1993 on the Law of the Sea,

*Recalling* that Part XI and related provisions of the 1982 United Nations Convention on the Law of the Sea (the Convention) established a regime for the international seabed area ("the Area") and its resources,

*Reaffirming* that the Area and its resources are the common heritage of mankind,

*Recognizing* that political and economic changes, including in particular a growing reliance on market principles, show the need to re-evaluate some aspects of the regime,

*Noting* the initiative of the Secretary-General since 1990 to promote dialogue aimed at achieving universal participation in the Convention,

*Welcoming* the report of the Secretary-General pursuant to General Assembly resolution 48/28 and, in particular, the results of the Secretary-General's informal consultations set out in paragraphs [.....] of the report,

*Taking note* of the report of the Preparatory Commission for the International Seabed Authority and for the International Tribunal for the Law of the Sea,

*Considering* that the objective of universal participation in the Convention may best be achieved by the adoption of an agreement relating to the implementation of Part XI and related provisions of the Convention (Part XI) and to give effect to the results of the Secretary-General's informal consultations,

1. *Endorses* the results of the Secretary-General's informal consultations set out in paragraphs [.....] of the report of the Secretary-General;
2. *Reaffirms* the unified character of the Convention;
3. *Adopts* the Agreement relating to the Implementation of Part XI and related provisions of the Convention ("the Agreement"), the text of which is appended to this resolution and which shall be interpreted and applied together with Part XI as one single instrument;
4. *Considers* that future ratifications or formal confirmations of or accessions to the Convention shall represent also consent to be bound by the Agreement;
5. *Calls on* States which participate in the adoption of the Agreement to refrain from any act which would defeat its object and purpose pending entry into force;
6. *Recognises* the need to apply the Agreement definitively or provisionally from the entry into force of the Convention on 16 November 1994;
7. *Requests* the Secretary-General to transmit immediately certified copies of the Agreement to the States and the other entities referred to in Article 3 thereof, with a view to facilitating universal participation in the Convention together with the Agreement, and to draw attention to Articles 4 and 5 thereof;
8. *Requests* the Secretary-General to open the Agreement for signature in accordance with Article 3 immediately after its adoption.

AGREEMENT RELATING TO THE IMPLEMENTATION OF PART XI OF THE  
1982 UNITED NATIONS CONVENTION ON THE LAW OF THE SEA

The States Parties to this Agreement,

*Recognising* the significant contribution of the 1982 United Nations Convention on the Law of the Sea ("the Convention") to the maintenance of peace, justice and progress for all peoples of the world;

*Having considered* the report of the Secretary-General of the United Nations on the results of the informal consultations held from 1990 to 1994 on outstanding issues relating to Part XI and related provisions of the Convention;

*Wishing* to take account of important political and economic developments affecting the implementation of those provisions, in order to facilitate universal participation in the Convention;

*Considering* that an Agreement relating to the implementation of the Part XI would best meet that objective;

Have agreed as follows:

*Article 1*  
*Implementation of Part XI*

1. The States Parties to this Agreement undertake to implement Part XI and related provisions of the Convention ("Part XI") in accordance with this Agreement.
2. The Annex forms an integral part of this Agreement.

*Article 2*  
*Relationship between this Agreement and Part XI*

1. The provisions of Part XI and this Agreement shall be interpreted and applied together as one single instrument. In the event of any inconsistency, the provisions of this Agreement shall prevail.
2. Articles 309 to 319 of the Convention shall apply to this Agreement as they apply to the Convention.
3. After the adoption of this Agreement, any instrument of ratification or formal confirmation of or accession to the Convention shall represent also consent to be bound by this Agreement. A State or entity which has not established its consent to be bound by the Convention shall do so at the same time as it establishes its consent to be bound by this Agreement.

*Article 3*  
*Signature*

This Agreement shall be open for signature at United Nations Headquarters by the States and entities referred to in Article 305 of the Convention for 12 months from the date of its adoption.

*Article 4*  
*Consent to be bound*

1. A State or entity referred to in Article 3 may establish its consent to be bound by this Agreement by:
  - (a) signature with immediate effect;
  - (b) signature subject to ratification or formal confirmation, followed by ratification or formal confirmation;
  - (c) signature subject to the procedure set out in Article 5; or
  - (d) accession.
2. Formal confirmation by the entities referred to in Article 305, paragraph 1(f) of the Convention shall be in accordance with Annex IX of the Convention.
3. Instruments of ratification, formal confirmation and accession shall be deposited with the Secretary-General of the United Nations.

*Article 5*  
*Simplified Procedure*

A State or entity which has deposited before the date of the adoption of this Agreement an instrument of ratification, formal confirmation or accession in respect of the Convention and which has signed this Agreement shall be considered to be a party to this Agreement if that State has not notified the Depositary within 12 months of the date of adoption of this Agreement that it is not availing itself of the simplified procedure set out in this Article. In the event of such notification being made, consent to be bound by this Agreement shall be established in accordance with Article 4, paragraph 1 (b).

*Article 6*  
*Entry into Force*

1. This Agreement shall enter into force 30 days after the date when 40 States have established their consent to be bound in accordance with Articles 4 and 5, provided at least five developed States to which paragraph 1 (a) (i) or (ii) of Resolution II of the Third United Nations Conference on the Law of the Sea ("Resolution II") applies have established their consent to be bound.

2. For each State establishing its consent to be bound by this Agreement after its entry into force, this Agreement shall enter into force on the date of establishment of its consent to be bound.

3. States which avail themselves of the procedure set out in Article 5 shall be regarded as having established their consent to be bound upon the expiry of the period of 12 months specified in that Article.

*Article 7*  
*Provisional application*

signed  
If on 16 November 1994 this Agreement has not entered into force, it shall be applied provisionally in accordance with its terms by all States which have consented to its adoption or otherwise expressed their consent from 16 November 1994 until the date of its entry into force, provided that provisional application shall terminate on 16 November 1998 if at that time fewer than 5 States to which Resolution II, paragraph 1(a)(i) or (ii) applies have established their consent to be bound by this Agreement. During the period of provisional application, States and entities shall apply this Agreement provisionally in conformity with their respective laws, regulations and annual budgetary appropriations.

*Article 8*  
*States Parties*

For the purposes of this Agreement, "States Parties" means States and entities which have consented to be bound by this Agreement and for which it has entered into force.

*Article 9*  
*Depositary*

The Secretary-General of the United Nations shall be the depositary of this Agreement.

*Article 10*  
*Authentic Texts and Depositary*

The original of this Agreement, of which the Arabic, Chinese, English, French, Russian and Spanish texts are equally authentic, shall be deposited in the archives of the Secretariat of the United Nations.



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**FAXED** + non-paper

FACSIMILE TRANSMISSION

To: H.E. Ambassador Ramtane Lamamara  
FAX No: 212 759 9538

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

Date: January 11, 1994

Subject: Law of the Sea

Mr. Ambassador,

I am addressing this to you on the suggestion of our mutual friend, Undersecretary-General Layashi Yaker, who is also the President of our International Ocean Institute.

While obviously we are as desirous as any one to see the U.N. Convention on the Law of the Sea universally accepted, ratified, and implemented, we have, for years, rejected and criticized attempts to amend it before its coming into force. The Secretary-General himself has repeatedly --as recently as last November --made it clear that he objected to that approach as well. Now, with the 60 required ratifications in place, and the coming into force of the Convention on November 16 this year, attempts to change the text prior to that date have become all the more ludicrous.

Unfortunately, as you are aware of, these efforts are still being pursued, and I think the forthcoming round of the Secretary-General's Consultations will be of crucial importance in this respect.

There must be an alternative.

During the last round, in November 1993, Ambassador Koroma of Sierra Leone presented such an alternative. While not wanting to disrupt ongoing discussions, he introduced the proposal, of which I am attaching the latest, revised version, as a "fall-back position."

Now, with the 60th ratification in place, the time has come to fall back on this position, which is simple, practical, pragmatic, cost-effective, makes use and builds on whatever we have achieved during these last ten years while leaving the integrity of the Convention intact. For all practical purposes, the Prepcom and its Pioneer regime have evolved and functioned as an interim regime. This regime has enjoyed the trust and the full cooperation of practically all industrialised States, and there is no reason why this cooperation should not continue after the coming into force of the Convention.

We need to rally the G77 behind this alternative approach, and your role in this, Mr. Ambassador, obviously is of crucial importance. Otherwise, and by default, the "Boat Paper" will again dominate the discussion --and I hope I shall have an opportunity to explain to you personally why we think this would really be disastrous, for the Convention and, in particular, for the G77.

I shall arrive in New York on January 30 at about noon. I can be reached in New York at 876 7680, or through our Representative at the U.N., Ambassador Bhagwat Singh, at 734 7608. Until January 30 I shall be here in Halifax, and can be reached at home at 902 868 2818, or at my office, at 902 494 1737 or by fax at the number indicated above. Layashi Yaker suggested that we should get together before the beginning of the Consultations. If you could spare half an hour Sunday afternoon or early Monday morning, I would be most grateful, and perhaps your Secretary could give me an appointment.

With all good wishes, and looking forward to hearing from you,

Yours sincerely,



Elisabeth Mann Borgese

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Hi IOI!

As promised, the following is the info I received on one of the discussion groups I subscribe to re: the upcoming US debate on the LOS. I thought you might like to subscribe and follow the debate in the new year (but I could be wrong!).

Bye for now,  
PLEWIS :0}

> Early in 1995, the U.S. Senate is going to consider advise and consent on ratification of the United Nations Convention on Law of the Sea (LOS).  
I'm posting this message in order to begin work on compiling a list of any organizations, NGOs, or other groups which might have a significant interest in following these LOS proceedings. I have been asked by a congressional office to develop this list, which is intended to be used to identify those who should be provided continuing information as the ratification process progresses. My compilation of this information will be provided only to the requesting congressional office. If your group has such a significant interest and would like to be identified for possible information dissemination, please provide the following:

Group Name:

Group contact and address:

Telephone (voice/fax):

E-mail address:

Group's areas of interest within LOS (either keywords or several short sentences):

Send these to: Gene Buck, Congressional Research Service  
e-mail: gbuck@crs.loc.gov  
fax: (202) 707-3342

Patricia Lewis  
Administrator  
Marine Affairs Program

E-Mail: plewis@kilcom1.ucis.dal.ca  
Phone: (902) 494-3555



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**FAXED**

FACSIMILE TRANSMISSION

To: Dr. Luis Preval  
FAX No: 537 335 345

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

Date: June 12, 1994

Subject: Law of the Sea

Dear Luis,

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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Cuba has been and is the only country in the world that has taken positions apt to save the conscience of the world --e.g., in regard to the Gulf War!

Do you think Cuba could take this initiative?

I am writing to a few other friends, e.g., the Seychelles, Guyana, Tunisia, but my hope is on Cuba. It is the only country that has the guts to act according to its conscience.

I would be most grateful for your help and support.

Warmest regards,

*Elzohy*