



Dalhousie University

International Ocean
Institute



FAXED

FACSIMILE TRANSMISSION

To: H.E. Minister Dr. Guido de Marco
FAX No: 356 24 33 03

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

Date: June 24, 1994

Subject: Law of the Sea

Dear Dr. de Marco,

I have just had a long talk with Layashi Yaker (he is coming here to Halifax tomorrow) and he told me about his talks with you, and about your concern with regard to the integrity of the Law of the Sea Convention and the principle of the Common Heritage of Mankind enshrined in Part XI as well as the legality of the proceedings proposed by the Secretary-General's "Informal Consultations."

I have already expressed my own deep concerns to Salvino Busuttil, but Layashi, who attaches very great importance to these matters, suggested that I should try to get in touch with you, so here I am.

I am sure you are fully aware of the situation.

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 procedure proposed is a flagrant violation of the Vienna Convention on the Law of Treaties. This is not the way a Convention has ever be changed, or can be changed! 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!" Simultaneously we will also have the regime as contained in Part XI of the Convention! The International Sea-bed Authority established by the "Agreement" is

a mockery, and insult has been added to injury by the budget accorded by the U.N. for the first year! I wonder whether this decision will, at the last moment, open the eyes of our Jamaican colleagues!

As a matter of fact, criticism and opposition to the Resolution and Agreement is beginning to build up. A number of South-East Asian countries, especially, Thailand, Malaysia, and the Philippines have expressed severe doubts, so has Venezuela, and there may be more.

I understand, the vote will be taken in the Fifth Committee, and it will be by regional blocks, and that it is expected that no regional block will oppose. But one never knows. If there is even one vote against, the legal situation that will emerge really will be chaotic.

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.

Malta has invested so much in this Convention and in the basic principles on which it is founded, starting with the principle of the Common Heritage of Mankind, which is undermined by this Agreement and reduced to a flourish of rhetorics. It would be good and, I think, in the long-term interest of Malta, if Malta, could distance itself a little from this initiative --perhaps with a statement before the vote is taken.

With all good wishes,

Ebrahim Masun Boyer



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FACSIMILE TRANSMISSION

To: Annick de Marffy-Mantuano
FAX No: 212 963 2811

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

Date: 14 January, 1995

Subject: Am.Journal of Internat.Law

Dear Annick,

Together with my warmest wishes for 1996, I want to send you my compliments for your article in the October 95 issue of the American Journal of International Law. I just read it and find it extremely useful. That is just what was needed. My own conclusion had been that the Law of the Sea Convention will be in a legal limbo until 1998 --thus vulnerable to being further eroded. I hope that our newly established Independent World Commission on the Oceans --with Dupuy as a member! --will understand the situation and come up with something constructive!

It would be great if you could follow up this paper with a second one, on the substance of the Agreement, and the consequent debacle of the Council elections, etc.!

I am off to India, for an interesting seminar organised by the Swaminathan Foundation, but I hope to see you on February 27, at 18:00, when the IOI is sponsoring a "special event" at the U.N., for the benefit of the CSD. It will be a seminar on ocean governance, human resources development, and transfer of technology. We will have a little panel discussion, myself on governance, Phil Reynolds on human resources development, and Krishan Saigal on technology transfer, and this will be followed by a Wine and cheese reception, up on the 4th Floor. Do please join us --actively!

Much love and all the best,

Elisabeth

CHAND
DANE

COPY

Dr. Kullisberg



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ORIGINAL
SENT TO
KULLENBERG
(SWEDEN) - 6th AUG.
1998



FACSIMILE TRANSMISSION

To: Dr. Al Duda GEF
Fax No. .202 522 3240

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

Date: August 3, 1998

Subject: More on the Deep Sea-bed

Dear Al,

As I am going to Jamaica, to the Sea-bed Authority in a couple of weeks, it would be great to have a sort of general indication as to whether GEF would, in principle, be interested in doing something about biodiversity and genetic resources on and under the deep sea-bed.

There are two more developments that I want to bring to your attention in this connection:

IUCN has just (1998) published a very important study, *A Guide to Designing Legal Frameworks to Determine Access to Genetic Resources*, by Lyle Glowka. I have just studied it, and it is an extremely useful work. It has one "Box" on "Marine genetic resources" which are extremely rich and varied and of very great industrial and financial interest -- but there is a lacuna: the deep sea-bed.

Now, the big difference between land and sea is that, on land, if a resource is not under the jurisdiction of one state, it is under that of its neighbour. There is no "no-man's land," and therefore one can protect the resource and the rights of local communities and indigenous people.

In the ocean, you cannot do that. As amply demonstrated in the case of living resources, you cannot protect them in areas under national jurisdiction, you cannot protect the rights of coastal states, local communities and indigenous people, if you do not take the same protective measures in the no-man's land of the high seas or on the ocean floor. Companies may observe commercializable uses of marine genetic resources in local coastal communities -- and then go out and take the same resource from the high sea adjacent to the EEZ, or from the deep sea-bed

adjacent to the Continental Shelf -- everything flows -- and make a pot of money without owing anything to anybody. This is not noted in Glowka's study, nor is it noted that there are obligations both on the part of the International Sea-bed Authority and under the Biodiversity Convention, to take care of that situation.

The other point that I wanted to mention is that we just had Dr. Alexander Malahoff from Hawaii lecture and show his videos for a few days in our training programme. It was breathtaking. The fascinating thing is that these advanced deep-sea exploring geologists now are talking about the bacteria all the time. It is the big new thing for geologists! It is the agenda for the future! The distinction between "living resources" and "non-living resources" in that environment where life originated is not all that meaningful. The "realm" of hyper thermophile bacteria that we are talking about is not the ancestor the "living resources," whether plants or animals, but has characteristics which neither of them possess. They are, nevertheless, a vital part of biodiversity.

I think we could do a great, original, exiting and important job!

I'll try to give you a call tomorrow.

All the best,

Yours as ever,

Frank



Dalhousie University

Also faxed to
Mascho - 4th July
to check he received
it.

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FACSIMILE TRANSMISSION

To: Professor Tsutomu Fuse
FAX No: 81 45 787 2316
From: Elisabeth Mann Borgese
FAX No.: 1 902 868 2455
Date: July 1, 1994

Subject: **Law of the Sea**

Dear Tsutomu,

I hope you received my fax yesterday. Please give a sign of life so I know our communication system works!

Now today there is another matter that, as you know, concerns me deeply. And that is the imminent decision (July 27) on that very bad "Resolution and Agreement" on the implementation of Part XI of the Law of the Sea Convention. The change of Government and the appointment of the new Prime Minister gives me a glimmer of hope. This change certainly would justify a change in the position of Japan vis a vis this "Resolution and Agreement." It would be ideal if Japan could simply vote against the adoption of the Resolution, because the annexed Agreement clearly is a violation both of the spirit of the Convention and of international law, in particular, the Vienna Convention on the Law of Treaties. This agreement will certainly not enhance peace and international social justice. It is a big stride backwards -- of course in line with general developments today. The fall-back position still is the Sierra Leone proposal. The Prepcom still exists. Its existence can be extended.

Japan has been very low-key during the "consultations." It would be splendid if it now could speak up. Japan's position undoubtedly would have a strong impact on the other "Pioneer Investors."

However, if a softer position is required, I have jotted down a few comments which I am attaching. I have made a similar recommendation to the Government of Canada.

I am sure you can help on this matter! Do let me know.

Yours as ever



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In the evolution of the law of the sea and ocean development, the international community has reached another cross-roads. 1994 is a year of decision. As the United Nations Convention on the Law of the Sea is about to enter into force (November 16, 1994), there are ominous signs of erosion of the Law. On the positive side, however, the convergence of UNCLOS and UNCED developments has already begun to impact on the restructuring of the United Nations system and offers new opportunities for initiative, leadership, with its political and, possibly, economic rewards.

We are about to send to the General Assembly, for adoption, an agreement which fundamentally changes one Part of the United Nations Convention on the Law of the Sea, with effects on other Parts of that Convention, just at the time when this Convention, duly ratified by 61 States, is about to come into force.

- . We all agree that universal, or near-universal, acceptance of the Convention is necessary if its implementation is to be effective.
- . We all agree that times are changing and that the March of Science and Technology, combined with structural changes on the commodity market, has made many articles of Part XI obsolete and inapplicable today.
- . We all agree that there must be political accommodation in the real world in which we are living.

This accommodation has been put forward under the assumption that, if it were adopted, the United States would accede to the Convention and thereby make its acceptance universal. There are many indications, however, that this assumption may be unfounded, and that the Senate will not give its consent to accession.

I would like to stress, also, that the procedure proposed by the Draft Resolution and Draft Agreement leaves a number of problems of international law unresolved. I see in it a clear violation of the Vienna Convention on Treaties which may be setting a dangerous precedent.

I feel that the "Authority" established by the "Agreement" is fundamentally in conflict with the very spirit of the Law of the Sea Convention. It never could have been the intention of the Convention to have the Authority practically dominated by a "finance committee" which, for the sake of "cost-effectiveness," can totally suspend

its activities, including even the meetings of its governing bodies. It never could have been the intention of the Convention to give to three industrialised States veto power over any decision of the Council. It never could have been the intention of the Convention to have the effective establishment of the Enterprise depend on a vote of the Council subject to this voting procedure!

It has always been social-democratic policy to support the just interests of developing countries. It is the developing countries who lose most, and most unfairly, through this Agreement. They are to lose much of what they had gained in their long struggle for a more equitable economic order: Not now, but for the future, because this "Agreement" reduces the principle of the Common Heritage of Mankind to an empty shell, a flourish of rhetorics.

The "Agreement" abolishes, among other things, the Review Conference provided for by the Convention. And yet, a thorough review of Part X will be inevitable at the time when sea-bed mining becomes economically feasible and environmentally sustainable --under circumstances which we cannot predict today.

Recommendation

It appears to be impossible to stop this Agreement, although there still may be surprises before July 27. Criticism and opposition is mounting in many countries, especially in South-East Asia and Latin America (especially Venezuela). Nevertheless, it is possible that the Resolution will be adopted practically without opposition.

If Japan could assert a somewhat independent position, which might have a long-term pay-off in its relation with developing countries, Japan could make a statement at the General Assembly at the time the Resolution and Agreement is put forward. That statement might convey that

We accept the adoption of the Resolution and the Agreement with some reservations and with the understanding that we will press for a comprehensive review and revision of the "agreement" at the time when seabed mining will become economically feasible and environmentally safe.

Japan would speak for many countries. It would speak for the conscience of humankind.