



Dalhousie University

International Ocean
Institute



FAXED

July 12, 1994

Mr. Nobuhiro Habuto
Deputy Director of the Foreign News Dept, NHK
FAX 81 3 3485 6218
Tokyo, Japan

Dear Mr. Habuto,

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 1st 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. Here 40 States, none of whom need to have ratified the Convention, can fundamentally amend it! Here a Convention, adopted by a Plenipotentiary Conference and duly ratified by the required number of States, is fundamentally changed by a Resolution of the General Assembly which cannot be binding! 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 decision-making process is seriously faulted. It is impossible to combine interest-group voting, regional representation, and chamber

voting in one system. This arrangement was a thin disguise for giving three industrialized States the power to veto any decision of the Council. Add to this the "Finance Committee which has the power to suspend any meeting of the governing bodies under the pretext of "cost-effectiveness" --and it is clear that this Authority is not intended to function in earnest. The poor Enterprise is never going to see the light of day.

The Agreement abolishes, among other things, also 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 your,



Elisabeth Mann Borgese
Professor



Dalhousie University

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FAXED

June 14, 1994

H.E. Ambassador Samuel R. Insanally
Permanent Mission of Guyana
to the United Nation
866 U.N. Plaza, Suite 555
New York, N.Y. 10017

Excellency,

Permit me to introduce myself. I am the Chairperson of the International Ocean Institute, well known to your Law of the Sea Delegation. Your representative. Mr. Bissember, is in fact an outstanding Alumnus of our training programme! And we have had quite a few participants in this programme from your country.

Mr. Ambassador: I am deeply concerned 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.

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. It would be splendid if Guyana, with your support, could take the initiative.

With all good wishes,

Sincerely yours,

A handwritten signature in blue ink, reading "Elisabeth Mann Borgese". The signature is fluid and cursive, with a long horizontal flourish extending to the right.

Elisabeth Mann Borgese
Professor