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SHAPING THE LAW OF THE SEA
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SOVIET STRENGTH AND FEARS
A CENTER REPORT

SHAPING THE LAW OF THE SEA

by Elisabeth Mann Borgese

After every session of the United Nations Law of the Sea Conference, the press reports that the Conference has not adopted a treaty and therefore it has failed. I don't know the purpose of this kind of reporting. To us it is outrageous. We don't feel we have failed. Everybody who went into this sixth session of UNCLoS knew we were not going to have a treaty at the end of this session.

It is true that the day-to-day work of the eight-week session in New York was frustrating. The whole mechanism of the Conference is frustrating. Everybody seems to want only his own immediate advantage, losing sight of the great original design of this whole enormous enterprise. Everybody is interested only in his own immediate advantage.

But in spite of itself, the Conference is moving; it is making progress; it is tidying up its work. The result of this session is the so-called Informal Composite Negotiating Text, which is, in effect, a draft for a constitution for the oceans. I will say something about that at the end of my report here.

The Composite Text is not perfect but it is so much more than any one of us could have dreamed was possible ten years ago. It will be studied by governments between now and the next session, scheduled to begin in March, 1978, in Geneva. At this time, the text will be subject to a plenary discussion which should last for about three weeks. The president of the Conference will then revise the Composite Text, and the revised text will be sent to the three main working committees of the Conference. They will work on it for another six weeks. Then they will turn over their work to the drafting committee, which will work on the text for a year. By 1979, if all goes well, we will have voting on and the adoption of this unprecedented piece of work.

This Conference is the biggest, the longest, and the most complicated one that mankind ever has seen.

The first of its three major working committees is concerned with drafting a constitution establishing an international Seabed Authority to exploit the oceans' resources in the international area.

The second committee deals with the more conventional uses of the sea and with the traditional law of the sea, which has to be modernized.

The third committee deals with scientific research, with marine environmental protection, and with the development and transfer of marine technology.

Finally, there is the plenary of the Conference which is a kind of committee to frame a world constitution. Its task is to set up a dispute-settlement system and to create a new kind of world or ocean court, the Law of the Sea Tribunal.

Against that background, I would like to discuss a few of the major issues we worked on — to some extent successfully — during this last session of UNCLoS. These issues fall into two broad classes: non-institutional and institutional.

The non-institutional issues can be codified more or less within the present international framework.

They strain that framework and they entail some institutional requirements, but basically they are non-institutional in nature.

The first such issue concerns the continental shelf and delimitation. According to present law, the limit of the continental shelf is poorly defined. It was originally down to a two-hundred-meter depth, and, beyond that, wherever technology allowed the exploitation of the area. But since technology now permits exploiting the whole ocean floor, this boundary went haywire. New definitions of the limits of the continental shelf have been attempted; all have been unsuccessful.

However, that may be a blessing in disguise. Perhaps there is now a better chance than ever before to go back to the simple solution proposed by Malta and by me and others a few years ago and supported, above all, by the African states: that is, that as a political concept the whole continental-shelf idea should be abandoned. It has been superseded by the concept of the economic zone, to which countries now lay claim. That is, coastal states have jurisdiction and sovereign rights over all the resources within a two-hundred-mile zone from their coast. That includes the continental shelf, and these rights should terminate at that two-hundred-mile limit, both in the water and on the shelf. I think that a majority of nations would now favor coming back to that simple, neat solution. It is one within which we could really work.

The second major non-institutional problem the Conference dealt with was the whole notion of the economic zone.

No matter what one thinks about the usefulness of the economic zone, realistically I think there is no going back on the two-hundred-mile economic-zone concept. We are saddled with that. It is an accomplished fact. Some states, including the United States, have already unilaterally announced they have jurisdiction and sovereign rights in the two-hundred-mile economic zone.

The distinction one should preserve here is between the economic zone and the territorial sea. Coastal states have complete sovereignty over the latter; and the line at which that sovereignty is going to be stopped is twelve miles. On the other hand, states claim sovereign rights over all resources across an area of two hundred miles from their coast. A lot of implied rights go beyond the mere use of resources, including the rights of scientific research, environmental control, development and transfer of marine technology.

The major economic-zone issue concerns the legal status of that zone. Is that zone to be considered part of the high seas, in which the coastal state has certain rights? Or is the zone a new kind of entity, neither territorial sea nor high seas, something *sui generis*? The coastal states, of course, do not want to declare it part of the high seas; they want to declare it *sui generis* and to claim quite substantial rights in that two-hundred-mile area. The naval maritime powers, who are concerned about transit and freedom of navigation, want to consider the economic zone as part of the high seas, as do the landlocked countries. The latter see their possibilities restricted if the coastal states have too many rights and two few obligations in the economic zone.

On this issue I feel that a real breakthrough has been made. A small group of delegations, including the United States, and chaired by Ambassador Jorge Casteñeda of Mexico, literally worked day and night and elaborated a set of articles which, for the first time, provides an acceptable basis of discussion for all groups of states. There is now a clear division between resource-linked activities in which the coastal state has "sovereign rights," and others in which the coastal state has "jurisdiction," which is not so exclusive and can be harmonized with the rights of other states and international jurisdiction.

True, a similar distinction between "resource-oriented" and "other" scientific research turned out to be impractical for the resolution of the dilemma between scientific freedom and coastal state control (see below). But the Castañeda text is at any rate far better and clearer than the preceding text which, besides, or between, "sovereign rights" and "jurisdiction," introduced two further categories, "exclusive rights and jurisdiction" and "exclusive jurisdiction": a rather complicated conceptual framework. The new text is a far better basis for discussion.

Also, the conflict between the *"sui-generis"* school of thought and the "high-seas" school of thought has been ably resolved by defining the zone as "subject to the specific legal regime established in this Part (*sui generis*)," but adding that the articles on the freedom of the high seas (Articles 88 to 115) "apply to the exclusive economic zone insofar as they are not incompatible with this part."

Undoubtedly, more will have to be done on the rights of landlocked states. The landlocked states, together with the so-called "geographically disadvantaged" states, are poten-

tially a powerful group in the Conference. They have fifty-six votes, and Austria is the chairman of the group. Potentially they can block any decision that goes against them.

One might think that the Conference would respect such a group, and deal fairly with its demands, which are actually not exorbitant. What the landlocked states want is some formula under which they can participate in the exploitation of living and nonliving resources in the two-hundred-mile zone. They want a guaranteed free access. And they want fair representation on the organs of the institutions that will be established.

The fact is, thus far these desires have not been satisfied. To date, the only thing conceded to them with regard to living resources is participation in the fishing of whatever is declared surplus by the coastal state in its economic zone, that is, beyond whatever is the exploitation capacity of the coastal state itself. If the coastal state is a developing country, it may have no big fleet, of course, but it may have a lot of living resources. If that state establishes that it cannot exhaust its resources, then the landlocked states would have a right to come in and take at least part of what is left over. The landlocked states are not satisfied with this prospect.

The coastal states also want to exclude the landlocked states from sharing in the exploitation of mineral resources on the continental shelf. No progress has been made on this issue. The question of access has been settled to some extent, but a lot of discretion is left to bilateral arrangements between the coastal state and the landlocked state. That may or may not be satisfactory.

Why are the coastal states so cocky about that? How do they hope to get away with it, when the landlocked states potentially could block the Conference? The fact is that everybody knows that the landlocked states are not going to exercise their power as a bloc. They are a most heterogeneous group, consisting of Western European nations, Eastern European nations, African and Asian states, belonging to the "Group of 77." Since they thus belong to the three big blocs dividing the Conference — Western industrialized states, socialist states, and developing nations — they divide on almost every substantive issue. When it comes to voting, it is likely they will vote with their political bloc. This diminishes the leverage they might have on the Conference.

To look for solutions for the problems of the landlocked states within the United Nations Law of the Sea Conference is thus not very helpful. The basis of negotiations is not sound. The landlocked states are in a position where they have to make demands, and only demands, and the coastal states are required to make concessions, but only concessions. That is no basis for negotiating.

These problems will have to be solved on a regional basis. Within a context of regional economic development, everybody gains from a common economic policy, and everybody makes concessions. Only on that basis can it be resolved.

In the European Economic Community, that is already the case. The E.E.C. has established a common fishing zone in which all nations — coastal and landlocked alike — have the same rights; all are working toward a common policy on the continental shelf. When everybody is in an economic union — and only in that context — they can do it.

Another of the non-institutional issues concerns scientific research. Here, on the one hand, is a small group of scientifically highly developed countries, including the United States, the Soviet Union, Great Britain, France, and Japan. Up to now, these countries have strongly advocated freedom of research in the economic zone and on the continental shelf. (The Soviet Union, though, went through a rather dramatic change: from a staunch advocacy of freedom of research to total acceptance of coastal state control.) And up until now, the scientifically advanced states have encountered the ironclad resistance of developing coastal states, which do not have the means to conduct scientific research and who mistrust it. They are quite right in their assumption that scientific research is linked inseparably with both military and commercial operations. So, they have good reason to mistrust something like this being done in their own backyard, something in which they themselves cannot participate and so do not know what is being done.

Here, too, a breakthrough has been made and articulated in the Composite Text. The old distinction between "fundamental" research, which should be free, and "resource-oriented" research, which was to be carried out only with the consent of the coastal state, is unworkable and untenable. The only distinction that is workable and acceptable is between nationally and internationally sponsored research. We had proposed this distinction ever since 1970, and suggested that internationally sponsored research should be free, i.e., subject only to notification to the coastal state. This distinction has now been introduced in the Composite Text, on the initiative of

Australia: "A coastal state which is a member of a regional or global organization or has a bilateral agreement with such an organization, and in whose exclusive economic zone or on whose continental shelf the organization wants to carry out a marine scientific research project, shall be deemed to have authorized the project to be carried out, upon notification to the duly authorized officials of the coastal state by the organization, if that state approved the project when the decision was made by the organization for the undertaking of the project or is willing to participate." The way out of the dilemma between freedom of research and coastal state control is internationalization of research. The key is participation in decision-making on a research project.

The progressive internationalization of research requires the strengthening and restructuring of existing international organizations which, at present, are not equipped to assume this new task.

The most exciting and the most novel of the institutional issues arise in connection with the drafting of a constitution for the Seabed Authority. To me it is fascinating to recall the work we did on a world constitution back in the nineteen-forties, and to find that so much of these discussions, which were engaged in then by only a handful of scholars, are being carried out now in this enormous Conference of 157 states and 1,600 delegates.

In the nineteen-forties, we asked, for example, whether the world order can be based on a minimal requirement, such as disarmament, or whether the foundation of peace must be justice. Today, the latter is called the "new international economic order." In the nineteen-forties we dealt with the ownership or non-ownership of resources; we found that you cannot have a new international economic order unless you base it on a common ownership of natural resources. All of that was in the Chicago draft of a world constitution. In those days, we also dealt with the intricate interactions between regional and global development. Today the same kind of discussions are carried on at the Law of the Sea Conference . . . and one finds the same alignments and different points of view.

Things have moved over these last thirty years. They will continue to move.

We worked intensely on three issues in the committee on the Seabed Authority. The first concerns the system of exploitation. A number of countries, including developing and developed countries, Canada being one of the most important of the latter, feel strongly that the Seabed Authority must have the power to control production. Canada is a land-based producer. It produces nickel on a large scale, and it is worried that if the Authority's seabed production gets out of hand, it might compete with its own nickel production. Among the developing nations a few — Zambia, Zaire, Indonesia — produce copper. They are concerned that the production of copper from the manganese nodules will compete with their land-based copper production, and thereby be disadvantageous as far as their own development is concerned.

All these countries want to put in rigorous limitations on seabed production. Other countries, like the United States, Japan, and those of Western Europe, who are importers of these metals and who hope to gain a greater self-sufficiency by a large seabed production, are upset by this. They want no limitations on production.

The limitations proposed are a little bizarre. I talked with one of the leading personalities who worked on the Composite Text, and who was faced with all the complex proposals for limitations. He threw up his arms in despair. He said the proposals are so complicated he cannot understand them. As a matter of fact, nobody else can.

What is worse, the production-limitation proposals are based on a total misreading of reality. They are based on the assumption that the Seabed Authority really has a monopoly on the nodules and, hence, on all mining of minerals. That is not the fact. Again, the people working on the constitution for the Seabed Authority simply ignore what is happening in other parts of the Conference.

The fact, which is now recognized by everybody, but still is not openly discussed in the Conference, is that about twenty per cent of the nodules are outside of the international-jurisdiction area. They lie in areas under national jurisdiction. The new Composite Text goes even further than the preceding Revised Single Negotiating Text in bringing nodule areas under the national jurisdiction of archipelagic states in the southern Pacific. So when you limit production within the seabed area to a level below the technological and financial capacity of the industrialized states, you do not, in fact, limit over-all production. All you do is force the industrialized nations out of the international seabed; they will then move to areas under national jurisdiction and produce there. All you have done is help put the international Seabed Authority out of business.

I think that the production-limitation clause will

eventually have to be deleted from the Seabed Authority's constitution.

Another big question concerning the Seabed Authority is, who will do the actual exploitation of the ocean resources? The industrialized states want a kind of licensing system for their companies. The Soviet bloc wants to be sure that states have access to the international area to exploit the resources. The developing countries, on the other hand, have, from the beginning, defended the idea that these resources are the common heritage of mankind and so must be exploited only by the international Authority, and that for that purpose, the Authority should set up and control an Enterprise, a public international company, to do the mining.

This conflict has never been resolved. A compromise, proposed originally by the United States, makes no sense. It is that neither side can have its way, so let us put the two propositions together. Let us say that there will indeed be an Enterprise that can exploit, but that, on the other hand, there must be free access to these resources for both states and private companies. What that means is that the industrial states and their companies could take out of the international area whatever they want and whatever they need, and that the Enterprise of the international Authority, since it has no means or technology, has no reason for being and is just a kind of status symbol for the poor nations; it will never get off the ground.

The discussion then focused on how, within the framework of this so-called parallel system, one could still give some financial means and technology to the Authority and its Enterprise. Two kinds of proposals to do that have been made. One would set up a so-called banking system, a rather unusual idea. This is the way it would work: suppose a company applies for a site to mine. It is given an exploration license, and it explores the site. It finds that there are very good nodules in the area. That company would then be obliged to turn half of that site over to the Authority. This might be quite useful to the Authority if there were a situation where you have a scarce resource and at the same time an excess of technology and capital. In that case, the system would make sense, because the Authority would have a site, and there would be an excess of technology and capital looking for a site.

The fact, however, is that the nodules are abundant; there are fantastic quantities of them, so there is no lack of sites. To give a site is meaningless. It is as meaningless as giving some air to the Authority.

If, on the other hand, the industrial and financial capacities of the industrialized states are exhausted by their own enterprises in the area, they do not need to go to the Authority and help the Authority build up its own Enterprise. So I think the banking system is a complete illusion, based, like the production control, on a faulty assumption.

The second set of proposals to strengthen the Authority and the Enterprise concerns its financing. Here we find ourselves on a seesaw. Either the financial contributions to launch the Enterprise are significant, and in that case, the industrialized states will not accept what they deem an intolerable burden; or the burden is made light enough to be acceptable to the industrialized states, in which case their contributions to the launching of the Enterprise will be insignificant. One set of propositions is unacceptable to the industrialized states; the other set is unacceptable to the developing states, which want to build up this Enterprise. Within this context, there is no economic incentive for the Enterprise.

In fact, if the Enterprise is no longer a cooperative effort of all countries — rich and poor — for the exploitation of this common heritage, if the Enterprise is in fact an enterprise of only the poor nations, the poor nations don't really need it. The poor nations either are mineral exporters themselves, so they don't need the Enterprise's production of minerals, or they are importers of these minerals, and such small importers do not need an expensive seabed Enterprise. Neither the exporters nor the importers among developing nations can give any priority, within their own development plans, to the development of these enormously costly and sophisticated technologies.

So, in a wider sense we are trapped in two major contradictions in this whole development. Think back: the industrialized states developed their deep-seabed technology at great cost in order not to be dependent on politically unreliable and unstable developing countries. Instead of getting their copper from developing states, where their facilities might be expropriated, the industrialized nations hoped to get it out of the deep seabed, which belonged to nobody. Now they find that, through the Seabed Authority, they again fall under the control of the majority of the very states that they have tried to elude. That is one contradiction.

On the other side, the developing countries had hoped to have a shortcut to development, to greater

capital and technologies. Now they are afraid that they are competing with their own land-based development. That is another tragic contradiction.

The "compromise" incorporated in the Composite Text offers no solution.

There was no opportunity, during this session, to explore alternative courses leading to more rational and more acceptable solutions, such as the "unitary joint-venture approach" proposed by Nigeria and Austria. Under that plan, states and companies would have access to mining in the international area, but only in joint venture with the Authority, which would have to provide half of the investment capital (including the value of the nodules *in situ,* which are the common heritage of mankind) and appoint half of the members of the board of directors of the joint-venture enterprise.

This solution, which already enjoys substantial support among many delegations, crept into the Text in the article on "The Review Conference" that is to take place twenty years after the adoption of the Convention: "If the Conference fails to amend or reach agreement within five years on the provision of this part of the present Convention governing the system of exploration and exploitation of the resources of the area, activities in the area shall be carried out by the Authority through the Enterprise and through joint ventures negotiated with the states* and entities referred to . . . on terms and conditions to be agreed upon by the parties thereto, provided, however, that the Authority shall exercise effective control over such activities."

If we now know that the solution lies in this direction, why postpone it by twenty-five years? It is our responsibility to work it out now: we may, at any rate, be forced to, when, at the next session, the "compromise" will turn out to be definitely unacceptable. That this will be the case seems certain, as already indicated by a statement by U.S. Ambassador Elliot L. Richardson, who rejects the compromise out of hand, as unacceptable to American industry and Congress.

The other major institutional issues dealt with in this session are the institutional structure of the Authority, consisting of an assembly, a council and its commissions, and a secretariat, and the dispute-settlement system for ocean space as a whole, including the international seabed area. Some progress, and a lot of tidying up, were achieved on the institutional structure, although the composition of the council remains unnecessarily complicated, reflecting the concern of the industrial nations not to be outvoted by a majority of developing states.

Simpler solutions, however, are beginning to appear elsewhere in the Text; e.g., the manner in which the Law of the Sea Tribunal is composed. That consists of twenty-one members; no two members may be nationals of the same state, and there shall be not less than three members from each geographical group as established by the General Assembly of the United Nations (Asia, Africa, Latin America, Eastern Europe, Western Europe, and others). This would appear quite adequate also for the composition of the council, albeit with a change in the numbers: there should be thirty-six rather than twenty-one members, and "not less than five members from each geographical group" rather than "not less than three."

The dispute-settlement system also has been greatly improved and streamlined. Where the previous version of the Text provided for two different, and poorly coordinated systems — one for the international seabed, and one for the rest of the ocean space — the Composite Text provides for one coherent system, with a Law of the Sea Tribunal, including a special chamber for seabed issues. True, the whole system is somewhat weakened by the admission of too many exceptions from the jurisdiction of the system, and some improvements might still be possible; but, as a whole, the Text goes as far as it can at the present time.

So, this session was anything but a failure; it was productive and constructive.

The general feeling of everybody is that the investment in this Conference has been so enormous that we are not going to give up. Nobody at the end of this conference said, "Let's stop." On the contrary, exhausted as all were from these eight weeks, the delegates began planning the eight-week session next spring. There is some kind of imperative that keeps it together and moving. Some kind of dynamism has developed. The Composite Text is something the like of which world history has never seen before.

In odd ways, gropingly but unfailingly, a new world order is taking shape.

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*The Text has "state"; this, obviously, is a misprint – one of many that must be ascribed to the real hurry with which the Text had to be produced at the end of the session.