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The New International Economic Order and the Law of the Sea

ELISABETH MANN BORGESE*

INTRODUCTION

The interrelationship between the development of the New International Economic Order¹ (NIEO) and the new law of the sea (LOS) is a complex and inadequately studied subject. Because the oceans play an important and rapidly expanding role in the economic life of nations, it is impossible to build an NIEO without including the oceans. The principles developed by the Sixth and Seventh Special Sessions of the General Assembly and the Charter

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1. The goals of the NIEO and the means to reach these goals have been defined by a number of intergovernmental conferences and nongovernmental institutions. Among the former are the Sixth and Seventh Special Sessions of the General Assembly of the United Nations which adopted a Declaration, a Programme of Action, and a Charter of Economic Rights and Duties of States; the United Nations Conference on Trade and Development (UNCTAD), Fourth Session, Nairobi, Kenya, 1976, which adopted a Report; and the Fifth Conference of Heads of State or Government of Non-Aligned Countries, Colombo, Ceylon, August 16-17, 1976, which adopted a series of documents. The work of nongovernmental institutions includes the Report of the Hammerskjold Foundation (1975) and the RIO Report (1976).

of Economic Rights and Duties of States must be applied to States and to the international community in their activities both in the seas and on land, or no NIEO can come into existence.

Building new international institutions in the oceans, one of the tasks of the United Nations Conference on LOS (UNCLOS), provides the first occasion to create an institutional framework to embody the principles of the NIEO. The oceans, in a way, are our great laboratory. This fact has been recognized by the leading minds of the UNCLOS, from the Secretary-General of the United Nations² to Chairman Engo.³

Nevertheless the UNCLOS has done little toward building an NIEO. Moreover, LOS and ocean management have almost disappeared from the declarations adopted by actions of other forums engaged in building the NIEO on land. The two developments are moving on separate and often divergent tracks. This situation is tragic for both the NIEO and the LOS.

There are several reasons for the divergence. First, LOS appears to be a highly specialized and rather complicated matter, mainly an exercise for lawyers, and most people engaged in the general effort of building the NIEO simply have not done their "homework" in LOS. Second, the bureaucratic division of labor within States is such that integrating policies is difficult. This

2. Inaugurating the Fourth Session of the UNCLOS, the Secretary-General of the United Nations Dr. Kurt Waldheim said:

We will have lost a unique opportunity if the uses made of the sea are not subjected to orderly development for the benefit of all, and if the law of the sea does not succeed in contributing to a more equitable global economic system. There is a broad and growing public understanding and appreciation of the issues involved, and the successful outcome of your work would also have a major impact on the establishment and implementation of the new international economic order It is not only the law of the sea that is at stake. The whole structure of international cooperation will be affected, for good or for ill, by the success or failure of this conference.

3. In U.N. Doc. A/Conf. 62/L. 16, the Chairman of the First Committee reminded the Conference that:

As I explained in the introduction to [Part I of the Informal Single Negotiating Text] I worked in the light of the provisions contained in the Declaration of Principles Governing the Seabed and the Ocean Floor beyond the Limits of National Jurisdictional. . . . Also of considerable importance for me was another international document commanding wide universal support: the "Declaration on the Establishment of a New International Economic Order" adopted by the General Assembly on 1 May 1974 at its sixth special session.

compartmentalization is so entrenched that even within the marine sector of many governments, it is difficult to form a unified policy. The divergent interests of shipping, mining, fishing, the marine sciences, navigation, and the military are hard to reconcile. Few countries have even begun to harmonize the marine sector as a whole with the other sectors of international economic policy. Third, the marine revolution (the penetration of the industrial revolution into the oceans) is of such recent date that its far-flung implications are not generally understood.

The fourth reason for the separation between building the NIEO and the LOS is the most serious: LOS has become a very controversial, very divisive issue. As it has developed over the past few years, it threatens to divide developing nations—coastal from landlocked, mineral importing from mineral exporting, and Latin American from African. Yet these are the States which most need a change in the structure of international relations and on whom both the building of the NIEO and the LOS depend.

The LOS is that part of contemporary international law most vehemently in flux. LOS is where new concepts are developing, such as the "common heritage of mankind," which have a potentially revolutionary impact and where time-honored concepts, such as those of property and sovereignty, are being transformed and modernized. Every issue that has to be dealt with by the makers of the NIEO is reflected in the oceans.

INTERRELATIONSHIPS

Food

Few of the projections for increasing the world food production to cope with the rising spectre of starvation and malnutrition take into account the potential of the oceans. Presently, commercial fisheries contribute only a small percent of the world food supply, and this percent is decreasing rather than increasing because of overfishing, mismanagement, and pollution. Hence ignoring the potential of the oceans in these projections is generally thought to be the correct approach. Yet, under a renewed LOS and with proper management, conservation measures, and new technologies, food from the oceans could be multiplied. For example, significant potential exists in the so-called unconventional living resources, plant and animal species that have not been exploited by traditional fisheries but that can now be exploited, and in mariculture of all kinds. The ancient Polynesians had a unified concept of food production, ranging from dry land to wetlands and into the seas. Their agriculture and their mariculture moved on the same level. How-

ever, occidentals and moderns have fragmented this concept. And worse, we have galloped with the agricultural leg into an industrial and scientific age while remaining, with the maricultural leg, in the primitive hunting stage. We have to learn to walk with both legs again and to reunify the food production concept. This reunification will be of enormous ecological importance. The ecological impact of cultivating the oceans may be far less destructive than the ecological impact of, for instance, deforesting the tropical rain forests in order to increase food production. Also, the international character of the ocean facilitates international participation in production and distribution according to need. Ocean management thus may establish new forms of international cooperation in food production and distribution.

Energy

The real and lasting significance of the so-called energy crisis is that we are moving from a fossil-fuel based economy to an economy based on non-conventional, renewable energy resources. The great question before us is: How does the energy revolution relate to restructuring the relations between developing and industrialized nations? Will the energy revolution, like the preceding phases of technological revolution, benefit only the industrialized nations, thus widening the gap between the poor and the rich?

The energy revolution is ocean oriented. The oceans play an enormous and rapidly increasing role in the production, transportation, storage, and distribution of energy as well as in the disposal of energy waste products. This statement applies to both conventional and unconventional energy resources. The potential of the latter—tides, waves, currents, thermogradients, chemical and biological processes—is enormous.

Physically, the oceans are a great equalizer, moderating the climates and breaking the harshness of continental seasonal contrasts. Ocean management, conceived as an element of the NIEO, can make the oceans a great equalizer also in economic and political terms, mitigating the harshness of the land-based inequalities among nations.

Transnational Enterprises

Nowhere are we faced with the challenge and the necessity of creating a new institutional framework for the operation of the

transnational enterprises as directly as we are in the oceans. The international mining consortia have to be structured into a new framework of international cooperation which must enable them to operate effectively while assuring the international community control through participation. Building this framework is indeed the heart of the task now before the First Committee of the UNCLOS, which may be nearing a breakthrough on the subject.

Miscellaneous Issues

To a large extent international trade is shipborne. Other areas which also demonstrate the relationship between the NIEO and LOS are policy and regional economic integration. One could go through each of the issue areas on the program of actions and declaration of principles of the various forums engaged in the building of the NIEO and show their relationship to the new LOS.

FUNCTIONAL APPLICATION OF THE NIEO AND LOS RELATIONSHIP

Situations exist in which the UNCLOS can and must create new forms of participation and cooperation in the management of the common heritage of mankind. If these forms are successful in ocean management, they can be adapted to other areas of international economic cooperation. There are also instances in which the UNCLOS can succeed in solving its own problems only by taking them out of the narrow context of LOS and inserting them into the wider one of building a NIEO. An example of the first type of situation is the International Sea-bed Authority (ISA) and its Enterprise. An example of the second type of situation is the issue of the landlocked versus the coastal States.

The ISA's Enterprise

With regard to the ISA and its Enterprise, clearly as far as the Single Negotiating Text⁴ is concerned, the First Committee has come to a deadlock.⁵ In somewhat blunt terms, the alternatives

4. U.N. Doc. A/Conf. 62/WP. 8/Rev. 1/pt. 1 (1976).

5. "It would clearly be less than candid," the Chairman of the First Committee reported to the closing plenary meeting, "to describe this as one of our more productive sessions." He also stated: "If it was regrettable that the First Committee failed at this session to make spectacular gains, it was, nevertheless, entirely understandable and, if I may say so, both foreseeable and foreseen." The Committee, he said, had progressed as far as it possibly could down its present road. "The time has come for the Committee to make a radical departure from its existing processes. At the heart of our problems lie a number of basic and highly political questions that

before us are one that is unworkable because it is unacceptable and another that is unacceptable because it is unworkable.

On the one hand, the industrialized States' insistence on free access to the resources of the area within the ISA's jurisdiction under a so-called contract from the ISA amounts to a return to the licensing system. This position reduces the ISA to a weak, pro forma entity and relegates the concept of the common heritage of mankind to the realm of rhetoric and myth. This alternative is probably not acceptable to the majority of States and is therefore not a workable option.

On the other hand, the position of the majority of developing States advocating the Enterprise system in its present form is not workable and therefore not acceptable.

One of the great challenges in building the ISA is to find a new synthesis of economic and political processes. However, as the ISA is constructed in the Revised Single Negotiating Text, these two processes appear confused. The ISA is a political body, but it has institutionalized, in its decisionmaking organs, interest groups: poor and rich States, producers and consumers. The Enterprise, which should be an economic, operational entity, is instead largely a political body, duplicating the structure of the ISA itself. Like the ISA, it is nonoperational and depends on "contracts" with States and companies. The Enterprise is a costly and unwieldy entity, not likely to be very effective.

But suppose that the ISA were much better than it is now. The fact remains that it is not acceptable as the sole manager of the common heritage of mankind either to the socialist States or to the free-enterprise States: It is not acceptable to any of the States having the technology and the capital necessary to start operations on the seabed. Hence the search for a compromise. But can there be a compromise between an unacceptable alternative and an unworkable alternative? Such a compromise probably would be both unworkable and unacceptable.

The parallel system, proposed by the United States and other industrialized nations is such a compromise. Under the parallel

have to be answered before any actual drafting of a compromise text can be undertaken in good faith, and these questions should be answered at the highest political level."

system both the ISA's Enterprise *and* States and their companies would operate under equal terms within the ISA. This structure places the Enterprise in a position of competition which it simply cannot sustain; it also makes the Enterprise unnecessary. If the States and companies having the technology and the means are free to mine all the minerals they need for their own use and for international trade, where is the incentive for the international community to pour aid into an artificial "Enterprise?" Former Secretary of State Henry Kissinger's offer to "finance the Enterprise" in return for the acceptance of free access to States and their companies means, in simple terms, to try to buy such free access—which, of course, may be worth quite a lot. In addition, it means offering to pay for private profits with public funds. But that is not all. The parallel system also completely changes the significance of the ISA's Enterprise.

The ISA's Enterprise was to embody a new form of active, participatory cooperation among industrialized and developing countries. Sharing in the common heritage of mankind was to replace the humiliating concept of foreign aid. This sharing was to be the historic significance of the Enterprise.

Now, by a slight of hand, we are faced with a completely different concept. The industrialized States and their companies "do their own thing." They take what they need or want on the basis of free access, provided merely with a "contract" which the ISA cannot refuse. The ISA's Enterprise becomes the status symbol of the poor, depending once more on aid from the rich nations and grant-giving institutions. Do the poor nations really need this kind of aid? There might even be more useful ways to spend such aid money than on deep-seabed mining which is certainly not something developing nations need most.

Thus the parallel system in any form or fashion or disguise is unacceptable and unworkable. This fact means that on this one point we really need a fresh start—a breakthrough. Both alternatives have to be abandoned.

Here the question arises: What is an Enterprise? Is it a building? Must it be a fixed structure that needs to be maintained even when it is not operational? Or can it be conceived as something functional and operational—something that ceases when its function or operation ceases? Perhaps the second concept is more practical, more economical. An Enterprise, in this case, would be established only in the context of precise projects of exploration and exploitation. There would not be only one Enterprise, but

rather, between now and 1985, perhaps a dozen. These Enterprises need not be restricted to mineral mining; they might engage in other marine activities. The structure and function of the ISA's Enterprises, according to this concept, might be described approximately as follows:

1. Enterprises operating in the area must operate under a charter from the ISA.

2. Enterprises under a charter from the ISA are governed by a board whose members are appointed in the following manner:

(a) At least one-half plus one of the members are appointed by the Assembly of the ISA, upon the recommendation of the Council, in accordance with Article 28(2) (iii). In its appointments, the Assembly gives special regard to the participation of developing countries and of organizations representing consumers and labor.

(b) Up to one-half minus one of the members are appointed by States parties or State enterprises or persons natural or juridical which possess the nationality of States parties or are effectively controlled by them or their nationals, or any group of the foregoing, in proportion to their investment in the Enterprise.

3. The ISA must provide at least fifty-one percent of the investment capital for any Enterprise operating under a charter from the ISA.

4. Profits are apportioned between the ISA and the others in proportion to their investment—that is, the ISA receives at least fifty-one percent of all profits.⁶

6. See A. PARDO & E. BORGESE, *THE NEW INTERNATIONAL ECONOMIC ORDER AND THE LAW OF THE SEA* (2d ed. 1976). In this study we examined in detail the questions of investment, operational costs, and revenue for the ISA. The total investment for all Enterprises projected until 1985 is on the order of one billion dollars, of which the ISA would have to provide 51%; obviously the only way to control the production in the area is to control investment and decisionmaking. Five hundred million dollars could be obtained from the World Bank alone under the circumstances here envisaged. Also the money could be obtained partly from the World Bank and partly from some other sources. The problem is not financial but rather political. By 1985, the revenue to the ISA under this system would be well over one-half billion dollars. This is a respectable amount, but it is not so much the money that constitutes the advantage of this proposed system. Even if the revenue were smaller—and projecting these revenues is difficult in the light of present uncertainties—other advantages would remain.

5. Enterprises have an international legal responsibility and such legal capacity as is necessary for the performance of their functions and the fulfillment of their purposes. Enterprises function in accordance with their statutes.⁷

6. Enterprises have their principal seat at the seat of the ISA or at any of the regional centers or offices established by the ISA.⁸

The advantages of this system are several.⁹ First, the proposed system would effectively separate business from politics. The Enterprises would really be Enterprises, not political bodies. They would represent interest groups—investors and producers (in proportion to their investment), consumers, developing nations, management, and labor. Thus the representation of interest groups in the ISA's Council could be avoided. For example, representation might be based simply on the criterion of regional balance. The Council would be a political organ—not half business, half politics.

Second, *all* production in the area would be effectively brought under the management of the ISA, which would control decision-making and investment in all Enterprises and would receive over half the profits from all production. The proposal introduces

7. See, e.g., the Statute for European Companies. The Statute of the Enterprise will have to be considerably more complex than the one now proposed in the Revised Single Negotiating Text. It will have to contain an enforceable code of conduct for multinational companies as well as detailed provisions for technology transfer, a description of the structure of the (joint venture) Enterprise, voting procedures, and financial arrangements.

8. Regional centers or offices are provided for in Article 20(4) of the U.N. Doc. A/Conf. 62/WP. 8/Rev. 1/pt. I (1976).

9. In his paper, *Sea-bed Mining: Establishment of an "Enterprise,"* presented at *Pacem in Maribus VII* in Algiers, October 25-28, 1976, Ambassador C.W. Pinto of Sri Lanka had the following comment:

Finally, in the context of contractor or partner financing as contrasted with financing of the Enterprise itself, it has been suggested that instead of concentrating on efforts to bring into being and finance an autonomous operational arm like the Enterprise, one might contemplate mining under a uniform system of equity joint ventures. Where an applicant was accepted by the Authority for participation with it in seabed mining, the Authority and the other entity would bring into being through procedures to be provided for under the Treaty, a new enterprise, a new international personality, which would itself then be authorized to borrow or by other agreed means obtain the necessary financing. Thus neither the Authority nor any of its organs nor, indeed the joint venture partner, would be directly involved in the question of financing. Under this system there would be no need for a single organ called the Enterprise. On the other hand, the system would spawn several "Enterprises"—as many enterprises in fact as there were seabed mining ventures. This system certainly offers many advantages and should be considered in greater depth.

a unified system, which is, nevertheless, quite flexible. It includes the possibility—if and when the ISA has the capital, the technology, the managerial capacity, and the desire—of creating an Enterprise or Enterprises fully financed and controlled by the ISA. Although the ISA will probably not establish such an Enterprise, at least during the next twenty-five years, this point is crucially important in making the system acceptable to the developing States. The advantage of the proposed system to the developing States is that if they do not now choose to establish an ISA owned and controlled Enterprise, activities do not switch to the other track of a parallel system, thereby railroading a licensing system. Rather, they *remain in a unified system* which the ISA manages on a sliding scale ranging from fifty-one percent to one-hundred percent control.

Third, the problem of how to finance the Enterprise would be solved. Half the capital and technology would come automatically with the consortia and State enterprises applying for a charter. This fact, together with the fact that the resource (value of the nodules *in situ*) is the common heritage of mankind, vested in the ISA, would be a sufficient guarantee for the World Bank and other institutions to advance the remaining needed capital.

Fourth, the proposed system advances the goal of bringing multinational corporations under public international control, a need keenly felt by the international community. The pattern it provides of participatory cooperation between rich and poor nations could subsequently be applied to other enterprises. Thus, a new ISA would be a significant step in the direction of building an NIEO.

During the final meeting of the fifth session of the UNCLOS, Nigeria introduced a proposal in the First Committee. As Chairman Engo stated in his final report to the Conference, Nigeria suggested "in effect a joint venture system applying to all activities of exploration and exploitation in the Area; this . . . would avoid the problem of the types of relationships proposed between the Authority on the one hand and States and private parties on the other."¹⁰

10. U.N. Doc. A/Conf. 62/L. 16 (1976).

The Nigerian proposal, which consists of thirteen paragraphs, provides that States parties, persons natural or juridical, have a right to enter into a joint venture with the ISA and that the ISA shall be an effective partner to the joint venture. This proposal, it has been reported, met with the approval of former Secretary of State Kissinger. Thus a breakthrough is possible. The Concession the industrialized States would have to make is accepting the however theoretical possibility of the ISA's establishing an Enterprise which it wholly controlled and owned. The concession the developing States would have to make is rethinking their concept of the Enterprise and accepting its transformation from a rigid, structural concept to a functional, operational one.

If a breakthrough on this point could be made during the next session of the UNCLOS, the work of the First Committee could probably be successfully concluded within the year. A breakthrough in the First Committee, furthermore, would be a breakthrough for the UNCLOS as a whole. One of the points that became clear during the last session was that the success or failure of the First Committee will determine the success or failure of the UNCLOS.

Let us now look at the second type of situation—that in which the UNCLOS is not in a position to lead in building the NIEO but rather depends on its being built by other forums and in which the UNCLOS can solve its own problems only in the wider context of the development of the NIEO.

Landlocked States

In this wider context it is quite possible that the hopeless confrontation between landlocked and geographically disadvantaged nations on the one hand and coastal States on the other which characterizes and endangers the present stage of negotiations at the UNCLOS will completely change its nature over the next ten to twenty-five years. To achieve this change, a slightly different perspective is needed. Obviously it is difficult, if at all possible, to resolve this conflict within the narrowly circumscribed framework of the UNCLOS, in which one group (the landlocked States) makes only demands and the other group is supposed to make only concessions. This framework obviously is not conducive to negotiations. If, however, the conflict is taken out of this narrow framework and inserted into the wider context of the NIEO, the problem becomes soluble. One goal of the plan of action for the NIEO is regional economic integration in which *all* States of a region benefit

from, and make concessions to, a common economic policy and in which landlocked States have the same rights in all economic activities as do other members of the economic community. In the European Economic Community, which, despite its difficulties, is the world's most advanced example of economic regional integration, the citizens of any State, including the only landlocked one, Luxembourg, have the right to fish in the waters under the jurisdiction of any other member State.¹¹

With regard to the continental shelf, landlocked and geographically disadvantaged States, at least conceptually, have no special problems. Under the provisions of freedom of establishment, no discrimination may exist against the enterprises of any member country on the continental shelf of any other. Obviously, a number of problems remain to be solved.¹²

However, there is no problem regarding free transit, which is assured by the Treaty of Rome, and the Community "does have a potential field of activity by virtue of the powers which it may take in relation to the 'sea transport' (Article 84(2)), although it has not yet acted under the provision of this Article."¹³

This solution is obviously correct, but it can be accomplished only in the wider framework of building an NIEO through regional economic integration. Regional economic communities, customs unions and common markets already exist in Africa and Latin America, and in the future they will play an increasingly important role. The European Economic Community has already decided to become a party to LOS Convention,¹⁴ and other regional organiza-

11. European Community, Background, U.N. Doc. 1/1976 (1976):

The Community has established a common policy in the fisheries sector, which includes a common organization of the market in fisheries products and the application of common rules with respect to fishing in maritime waters under the sovereignty or jurisdiction of member States. Discussions are now being held within the Community on the future of the common fisheries policy in the light of the creation of 200-mile zones. The Community is in particular examining the arrangements to be made, on a Community basis, in order to ensure the pooling, sharing, conservation and exploitation of the biological resources of the single area formed by the future economic zones of the member States.

12. Vignes, *The EEC and the Law of the Sea*, in III *NEW DIRECTIONS IN THE LAW OF THE SEA* (Churchill, Simmonds & Welch eds. 1973).

13. *Id.*

14. European Community, *supra* note 11.

tions will undoubtedly follow this example. Instead of trying to solve all problems of the relationship between landlocked and coastal nations globally, the UNCLOS could recommend that these regional organizations solve problems within a geographically more specific and economically more comprehensive context.

CONCLUSION

Fully integrating the work of the UNCLOS into the work of building the NIEO must neither distract the UNCLOS from its own urgent tasks nor cause it to attempt to solve all the world's problems and thus to resolve nothing. The issue is a conceptual problem of direction, goal, and purpose. In some areas the UNCLOS may indeed lead in the process of building the new order. In other areas, where it must depend on other organizations to build the order, the very recognition of this dependence may facilitate compromises at the UNCLOS. In both cases the joining of the issues would enhance the building of the NIEO and the LOS, for the two concepts potentiate each other. In contrast the disjoining of the issues is fatal for both the NIEO and the LOS.