Elisabeth Mann Borgese’s Invisible Hand in Ocean Governance: Past, Present, and Future

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In the history of Planet Ocean (after all 75 percent of it is covered by ocean) three human beings as no others have defined its destiny through the genius of thought, passion, and craft: Hugo Grotius, Arvid Pardo, and Elisabeth Mann Borgese. For centuries, the Grotius principle of freedom of the seas was unsailable. Then came that virtuous day when Pardo, the then Ambassador of Malta at the United Nations, made his marathon speech to the United Nations General Assembly (UNGA) on 1 November 1967 advocating a new principle for a new law of the sea. That principle was destined to be that of the common heritage of mankind, which transcends both concepts of sovereignty and freedom in human relations with the ocean and its governance.¹

That speech in its totality galvanized Elisabeth, who at that time was a fellow of the Center for the Study of Democratic Institutions. She saw Pardo’s ideals aligning with those of the Center and her own beliefs, in particular Pardo’s emphasis on the peaceful use of the ocean and its living and non-living resources. This was to lead to several narratives that impacted the convening and processes of the Third United Nations Conference on the Law of the Sea (UNCLOS III). She grafted Pardo’s ideas on the framework of Pope John XXXIII Pacem in Terris, thereby creating Pacem in Maribus. As Pardo’s intellectual partner, and with the support of the Maltese government, she convened the 1970 Pacem in Maribus conference to discuss the broad issues of the use of ocean services and resources into internationally agreed law.² In 1972 she established the International Ocean Institute (IOI) in Malta as the think tank for the evolving negotiations at UNCLOS III. She wrote:

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¹ United Nations General Assembly (UNGA), 22nd Session, Official Records, First Committee 1515th Meeting, 1 November 1967, http://www.un.org/depts/los/convention_agreements/texts/pardo_ga1967.pdf.
² E. Mann Borgese, “The Years of My Life,” Ocean Yearbook 18 (2004): 1–21, 12–14.
We followed UNCLOS III very closely, analysed its emerging results, proposed new approaches and solutions. All major actors participated in UNCLOS III participated in Pacem in Maribus, coincidently the President of UNCLOS III, Shirley Amersighe, was also the President of the International Ocean Institute.3

Elisabeth had both the personality and the opportunity to influence the decision-making process to a large extent. As the ultimate friendly persuader, she also used IOI and Pacem in Maribus as the ‘bully pulpit’; she was both the antagonist and the pragmatist in the crafting of the United Nations Convention on the Law of the Sea (UNCLOS).

As negotiations continued at UNCLOS III, developing countries were increasingly gaining their political independence and were in search of their economic independence. Development was at the center of the United Nations agenda. An atmosphere of euphoria prevailed. The negotiations for the New International Economic Order (NIEO) were also underway in several UN fora, and an optimistic commitment to global management including the ocean through the institutions of the United Nations predominated.4 Elisabeth sought to combine both the principles of the NIEO and the objectives of UNCLOS. In contrast, Pardo was never happy about the way in which the NIEO was being promoted by the newly independent developing countries and feared for the dilution of the concept of the common heritage at the negotiating table.5 UNCLOS, after some ten years of politically charged negotiations, was finally adopted in 1983 as the ‘constitution of the ocean’.

After praising the achievements of UNCLOS in letter and spirit, Elisabeth stated in her 1999 Nexus lecture:

This is not to say the convention is perfect. Nothing human ever is perfect; and this convention is riddled by political compromises, concessions to greed and power and vested interests, ... so much so that Arvid Pardo, ... was bitterly disappointed by what he thought was a dilution, even betrayal of his ideas. I, on the contrary, was surprised to see how much of his original design had survived the wrangling of the political arena from

3 Id., 13.
4 A. Behnam, “Developing Countries in the Group of 77: A Journey in Multilateral Diplomacy, 1964 to 2004,” in Towards World Constitutionalism: Issues in the Legal Ordering of the World Community, eds., R. St. J. Macdonald and D.M. Johnston (Boston: Martinus Nijhoff, 2005), 355–380.
5 P.S. Inglott, “Elisabeth Mann Borgese: Metaphysician by Birth,” Ocean Yearbook 18 (2004), 22–74.
which no concept can emerge in its virginal purity! Arvid Pardo said, the glass is half empty. I said, the glass is half full.6

However, as early as 1996, Elisabeth, then Honorary President of IOI, was at the center of new and emerging international dialogue of globalization. She was frustrated at the way that the ocean and the principle of the common heritage of humankind within UNCLOS was being denied at international fora in preference to market solutions to ocean challenges, promoted in the rush to embrace globalization. In fact, by the beginning of the 1990s, the ocean was no longer on the sustainable development agenda. At the 1992 United Nations Conference on Environment and Development (the Rio Conference), the ocean did not figure specifically in the adopted text; nevertheless, and perhaps cynically, the language of UNCLOS was used very liberally in areas of conservation and the environment.

The neglect of the ocean and the threats to its health and the sustainability of its resources weighed heavily on Elisabeth’s conscience. She strongly believed in the critical need for a new institutional focus through a forum that would motivate the international community to address ocean challenges and threats under UNCLOS, including capacity building for developing countries and countries in transition. She also criticized the manner in which individual international organizations addressed sectoral issues of the ocean, mainly the lack of an interdisciplinary and horizontal approach and the failure to integrate ocean challenges and uses under one common roof. She became increasingly committed to change the status quo, advocating for a forum at the United Nations that integrates ocean challenges, threats, and opportunities and brings them to the attention of the UNGA specifically.

Elisabeth decided to launch a new initiative in 1998, the Year of the Ocean. She sought the support of Ambassador Neroni Slade of Samoa, Chair of Small Island Developing States, and the Maltese government, with the strong backing of Ambassador Saviour Borg and Minister George W. Vella, to create a unique forum to address ocean issues and bring that to the attention of the UNGA.7

President Guido De Marco of Malta, in the plenary of the fifty-third session of the UNGA (1998), called for the creation of a forum to consider the closely interrelated problems of ocean space as whole. Elisabeth, who knew so well how the bureaucracy and culture of the UN system as whole functions,

6 Mann Borgese, supra note 2, 14.

7 See E. Mann Borgese, “UNICPOLOS: The First Session,” Ocean Yearbook 16 (2002), 1–21; see also iconic video interview with Noel Brown, Halifax, Canada, 2001, IOI Archives Malta; S.F. Borg, 50 Years (1964–2014) Malta’s Foreign Policy with Dedication and Commitment (2015).
pointed out that the proposal was not aimed at creating a new institution, but a mechanism to enable the General Assembly to make better informed decisions on ocean affairs and the law of the sea. Thus, the United Nations Informal Open-ended Consultative Process on the Law of the Sea (UNICPOLOS) was born.

This turned out to be a milestone in the history of the ocean. UNICPOLOS was not designed to replace UNCLOS, but rather to protect it as the constitution of the ocean. Elisabeth envisaged the General Assembly engaging in a universal informal consultative process regarding the law of the sea. Such a process would bring together member states, civil society, business communities, and institutions and organizations concerned within the remit of UNCLOS to facilitate an annual review on developments in ocean affairs by the UNGA in an effective and constructive manner. UNICPOLOS would suggest particular issues to be considered by the Assembly, with an emphasis on identifying areas where international co-operation should be enhanced. Elisabeth, celebrating its first meeting in 2000, wrote:

The establishment of UNICPOLOS by the General Assembly must be considered a breakthrough in the process of building a global system of ocean governance. It is the only body of the United Nations system with a membership comprising the whole membership of the General Assembly and intergovernmental and regional organisations as well as major groups of civil society, and with a mandate to consider the closely related problems of ocean space as a whole. ... The International Ocean Institute (IOI) has been deeply involved with the establishment of UNICPOLOS and will follow and support its activities in every possible way.\(^8\)

Due to Elisabeth’s persistent will and the traditional support of the Government of Malta, the ocean was back again on the international development agenda in the new millennium. She then lobbied for a focus on the protection of marine biodiversity, especially as it related to the area of common heritage under UNCLOS and the manner in which the International Sea Bed Authority (ISA) would conduct deep sea bed mining. She felt that the institutional architecture of the ISA was as outdated as its capacity to deliver its responsibilities. The enormous developments since 1973 in science and technology had made the deepest parts of the ocean accessible to exploitation. She was also aware that marine genetic resources were of increasing relevance, but were not addressed in UNCLOS.

\(^8\) Id., 1.
Also, for the first time, the nature of the interdependence of climate change and health of the ocean were being discussed. UNICPOLOS opened the door for civil society institutions and stakeholders to enrich the debate with experts and science for policy-makers and to understand and comprehend the need for ocean governance in certain areas. The first issue on the UNICPOLOS agenda was illegal, unreported, and unregulated (IUU) fishing, a neutral subject that brought all on board. The discussion consolidated the need for such an open ended informal consultative process and attracted the attention of decision-makers at the UN.

Elisabeth Mann Borgese died in 2002. In 2004, UNICPOLOS addressed the subject of new sustainable uses of the oceans, including the conservation and management of the biological diversity of the sea bed beyond national jurisdiction. I can still remember the large number of delegates at that meeting recalling Elisabeth in their statements and paying tribute to what she started as a peaceful revolution in human international management of the ocean.

In 2004, on the recommendation of UNICPOLOS (now commonly referred to as the Informal Consultative Process), the UNGA established an Ad Hoc Open-Ended Informal Working Group to study issues relating to the conservation and sustainable use of marine biological diversity beyond areas of national jurisdiction, or the Working Group on BBNJ for short. This was not an easy decision; the United States, Canada, Russia, Republic of Korea, and Japan strongly objected to any such agreement. IOI has continued on the path of Elisabeth's mission by engaging in the process and delivering statements. Naturally, the IOI took the position to support a call for the elaboration of an implementation agreement under UNCLOS, thus backing-up the position taken by the European Union, developing countries, and China.

A turning point came at the United Nations Conference on Sustainable Development (Rio+20) in 2012. One of the Conference outcomes was support for the move towards an implementation instrument under UNCLOS and help in defining the areas of coverage. Consequently, the Working Group completed its task with a recommendation to the UNGA on 19 June 2015. UNGA resolution 69/292 approved the development of an internationally legally binding instrument under UNCLOS on the conservation and sustainable use of marine biological diversity of areas beyond national jurisdiction, together and as a whole, marine genetic resources, including questions on the sharing of benefits, measures such as area-based management tools, including marine protected areas, environmental impact assessments and capacity-building and the transfer of marine technology. The negotiating conference will be convened in 2018 after the preparatory committee made its substantive recommendations to the General Assembly in 2017.
It took ten years for the Working Group on BBNJ to conclude its deliberations and to make its recommendation to the UNGA. The major stumbling blocks were the nature of the international instrument and its scope of application. From the early days, developing countries in the Group of 77 and China, and later the European Union supported the call for elaboration of an internationally legally binding instrument.

The High Seas Alliance brilliantly submitted ten governance principles for the prospective international legally binding instrument on marine biodiversity in areas beyond national jurisdiction. Those principles reflect already existing international obligations under UNCLOS and other international instruments, as well as global norms relevant to the subject of the proposed instrument on which nations will begin negotiations in 2018. Those principles refer to protection and preservation of the marine environment, co-operation, science, stewardship, the precautionary principle, ecosystem-based management, sustainability and equity, good governance, polluter pays, and respect for the law of the sea. Incidentally, these are also principles necessary and applicable to achieving the goals of Sustainable Development Goal 14 adopted at Rio+20.

Unless the ocean community promotes a culture of responsibility, policies of reason, and benefit sharing in the peaceful exploitation of ocean services and resources through science-based policy-making, there is no doubt that traditional negotiators will continue to resist changing the status quo, and the ocean will continue to deteriorate. It is time to stop this culture of procrastination and the pursuit of gains in one ocean sector at the expense of another. This requires a change of the current narrative to one of benefit sharing that is both equitable and sustainable.

More than a decade since Elisabeth Mann Borgese’s departure, her legacy lives on. The forthcoming negotiations, which may take as long as UNCLOS itself took to complete, will open new opportunities to all countries, particularly small island developing states. The IOI must now step forward once more and be available to assist developing countries and countries in transition, particularly through building and developing human capacity, to be able to influence negotiations for the best outcome and to prepare their human resources for the prospective implementation international legally binding instrument on marine biodiversity in areas beyond national jurisdiction.

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9 “Ten Governance Principles for International Legally Binding Instrument on Marine Biodiversity in Areas Beyond National Jurisdiction,” High Seas Alliance, http://highseasalliance.org/ten-governance-principles-international-legally-binding-instrument-marine-biodiversity-areas-beyond, last accessed 16 February 2018.
Perhaps it is relevant to conclude this essay remembering words of wisdom that Elisabeth loved to quote from T.S. Eliot:

*Time present and time past*
*Are both perhaps present in time future*
*And time future contained in time past*