GA3: Special Political and Decolonization

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Issue: The question of negotiating the rights, control, and exploitation of natural resources found within international waters

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I. Introduction

As the onshore resources, such as gas, oil, and ore are getting exhausted, countries and companies have become increasingly interested in exploring, extracting, and exploiting resources under the oceans. These offshore resources in the International Seabed Area, mostly known as the "Area", are extremely rich in commercially valuable mineral deposits such as nickel, copper, cobalt, iron, manganese and can presumably meet the energy needs of the world in years to come. However, the "Area" is located beyond the limits of national jurisdictions and is known as "global commons", namely global common property. The issue of governing these global commons raises a number of difficult questions: Who has the right to explore and exploit these resources? How can these resources be shared among nation-states in a fair, just manner while recognizing the costs and efforts involved in exploring and extracting these resources?

The 1982 United Nations Convention on the Law of the Sea (UNCLOS), commonly referred to as the constitution of the seas) which aims to preserve the "Area" and its resources as the "common heritage of mankind," is an international agreement designed to address some of these questions and provide some guidelines and principles in the management of these global commons, in this case, the seabed resources. The Area covers around 54 percent of the total area of the world's oceans (ISA). Managing such common pool resources, however, is always a problem. Since there are no clear property rights, all parties can harvest these resources and no one can preclude others from getting access to these resources in any way. Everyone has the incentive to be the "first-mover" to use these resources on a 'first come, first served' basis, creating serious problems overexploitation such as overfishing, all fishermen exploiting the common resource, and/or pollution if not environmental disasters.

Another related problem that UNCLOS aimed to address is to resolve disputes and establish due processes regarding maritime boundaries. Disputes over continental shelves and EEZs and the rights of coastal states and how the costs and benefits of these claims can be fairly distributed have become a major concern. Such disputes also have significant implications not only for international politics but also for environmental protection and maritime resource conservation.

The challenge then is to create a cooperative mechanism that will ensure safe, clean, and fair marine resource extraction where the international community and the coastal states act in harmony in accordance with universally recognized global standards. In effect, UNCLOS is the most comprehensive treaty of its kind establishing guidelines for all types of use, navigation, fishing, oil-gas extraction, seabed mining, marine conservation, and marine scientific research.

II. Involved Countries and Organizations

DOALOS (the Division for Ocean Affairs and Law of Sea)

The subdivision of the United Nations Office of Legal Affairs called the DOALOS (the Division for Ocean Affairs and Law of Sea) helps coordinate the activities and regulations in the region of marine affairs. DOALOS cooperates with two institutions upon this matter: The International Tribunal of the Law of Sea and the International Seabed Authority. DOALOS is also engaged with encouraging and managing the development and adoption of the law of the sea, providing assistance to States about the ratification and implementation process of the convention.

ISA (International Seabed Authority)

Comprising 167 member states, and the European Union, the International Seabed Authority is commanded under the UN Convention on the Law of Seas to monitor and manage all mineral-related exercises in the universal seabed territory for global benefit. In this manner, ISA has an obligation to guarantee the protection of the marine environment from harmful impacts that may emerge from deep-seabed related activities.

International Tribunal of the Law of Seas (ITLOS)

The International Tribunal for the Law of the Sea is an independent judicial body built up by the United Nations Convention on the Law of the Sea to arbitrate debates emerging out of the understanding and use of the Convention. The Tribunal consists of 21 independent members elected among people with recognized competence and experience on the Law of Sea. The Tribunal has jurisdiction over any question concerning the understanding or utilization of the Convention.

III. Focused Overview of the Issue

1982 UNCLOS convention principles have laid the groundwork for peaceful resolution of disputes when there are multiple/overlapping claims over a given marine resource. Some of these principles date back to the first Convention on the law of the seas in 1958, adopting 4 principles through ((i) the Convention on the Territorial Sea and the Contiguous Zone; (12 m and 24 miles off the baseline respectively) (ii) the

Convention on the High Seas; (iii) the Convention on Fishing and Conservation of the Living Resources of the High Seas; (iv) the Convention on the Continental Shelf; and, (v) an Optional Protocol of Signature concerning the Compulsory Settlement of Disputes. In effect, these conventions divided the sea into national and international maritime zones with different legal property regimes. Accordingly, within the territorial sea, both the surface of and seabed belongs to the coastal country. (known as 12-mile zone). But the high seas (defined as surfaces beyond the national 200 nautical mile units) has a unique legal status (based on the principle of the freedom of the high seas) which means that even though no state can claim sovereignty over the high seas, high seas are open to all states and any activity over its resources can be claimed as the property of the entity that obtained these resources. Though there are still some limitations and regulations regarding fishing, for instance, coordinated by Regional Fisheries Management Organizations (RFMOs) setting limits on total available catches for individual species, the principle of freedom of the high seas is noncontroversial and universally accepted.

But the main controversy has emerged over maritime boundary disputes. Maritime boundary disputes occur mostly due to the overlapping claims between adjacent or opposite states for 12 nautical-miles territorial seas, 200 nautical miles EEZs (exclusive economic zones), and continental shelves which may extend beyond 200 nautical miles and due to the contesting claim of sovereignty over the same island or the same area of the mainland. Of the estimated maritime boundary disputes around the world, fewer than half have been agreed upon. (M.M. Hasan et al, 2019:90). There are indeed numerous cases, such as continental shelf dispute between Denmark, Germany, and Netherlands over the North Sea, Canada and the US disputes over maritime domain, Norway and Russia dispute over Arctic resources and Barent sea, Aegean Sea continental shelf disputes between Greece and Turkey, maritime boundary issues between Indonesia and Malaysia, Bay of Bengal dispute between Myanmar India and Bangladesh. The East China Sea dispute over the Senkaku (Japan)/Diaoyu (China) Islands, as well as the Japan/Russia dispute over the Kuril Islands also reflect multiple claims over maritime boundaries. Finally, the most recent oil drilling by Turkish vessels off the coast of Cyprus with EEZ claims has sparked a major debate over the sharing of Eastern Mediterranean energy resources (Osthagen, 2019).

This wide scope of disputes also explains why the 1982 United Nations Convention on the Law of the Sea (UNCLOS) has taken yet another 12 years to finalize and establish a common implementation agreement. Primarily because of the objections of the industrialized countries to the seabed mining provisions contained in Part XI of the Convention, the Secretary-General convened in July 1990 a series of informal consultations which culminated in the adoption, on 28 July 1994, of the Agreement relating to the implementation of Part XI of the 1982 United Nations Convention on the Law of the Sea. The Agreement entered into force on 28 July 1996. Three international entities are currently implementing the rules and regulations envisioned in 1982 Convention and revised in 1994 agreement: International Tribunal for the Law

of the Sea (ITLOS) in Hamburg; (one of the four major dispute settlement mechanisms established in the Convention, The Commission on the Limits of the Continental Shelf (CLCS) which decides on the extension of individual states' exclusive economic zones, and The International Seabed Authority (ISA) is the organization through which States Parties to UNCLOS organize and control all mineral-resources-related activities in the Area for the benefit of mankind as a whole. In doing so, ISA has the mandate to ensure the effective protection of the marine environment from harmful effects that may arise from deep-seabed related activities.

1. Why are UNCLOS and ISA not sufficient? Fair distribution versus free markets

One of the fundamental weaknesses of the UNCLOS and implementing international organization International Seabed Authority (ISA) has been the fact that one of the major countries, the United States, has failed to sign and ratify the Convention along with Andorra, Eritrea, Israel, Kazakhstan, Kyrgyzstan, Perú, San Marino, South Sudan, Syria, Tajikistan, Turkey, Turkmenistan, Uzbekistan, the Vatican, and Venezuela. Though currently ratified by 167 states and the European Union, the US refusal to ratify the Convention undermines the capability of the body as ISA simultaneously attempts to exploit the deep seabed resources as the "common heritage of mankind" and to make itself a universal institution that accommodates the interests of developing and developed states.

That is why the Authority needs to incorporate the U.S. by revisiting some of the implementation principles without undermining the common heritage principle. But this is exactly the Part XI of the 1982 Convention regarding the implementation principles that have been fundamentally renegotiated to accommodate the objections of the US and other industrialized states. Institutionally, for instance, the power of the Assembly within ISA has shifted towards the Council, which includes only 36 countries. More importantly, the power of the "Enterprise" which was envisioned as the implementation arm of ISA, was initially given the authority to independently explore and exploit deep-sea resources in direct competition with private companies. Upon objections of global companies and other industrialized countries, "The Enterprise" can now only work with other companies through joint ventures. Furthermore, ISA and the Enterprise grants licenses for applicants trying to explore and extract deepwater resources, thus all public and private entities have to apply to ISA for licenses.

According to the original Convention principles, however, applicants were required to submit so as to work on two equally viable sites. The Enterprise would award one of these sites to the applicant and the other site to itself or qualified applicants from developing countries for fairness. This was known as a parallel-access system designed to have a more fair distribution of these resources. But the 1994 agreement eliminated this process based on the argument that it creates unfair competition against the private companies and is not compatible with free-market principles. Similar arguments were made for the

transfer of technology and know-how to the developing countries which were required under the original Convention but were rejected in 1994, as a violation of intellectual property rights. The production ceilings envisioned in the original Convention designed to limit the possible damaging effect that extraction from the "Area" might have on the developing country (often land producers of the same minerals) were also removed and seen, once again, as incompatible with competitive market dynamics. The 1982 Convention also had articles establishing a compensation mechanism (such as losing potential exports) for developing countries adversely affected by deep water extractions, but these funds and mechanisms failed to materialize. In sum, as 1982 UNCLOS was negotiated until 1994, ISA had to give up some of the significant powers/concerns over equitable distribution of resources in favor of free-market policies. The 1994 agreement has also shifted the power balance in favor of industrialized countries which have systematically objected to sharing technology, and economic assistance to developing countries.

To date, the ISA has granted around 25 exploration licenses. No exploitation licenses have been issued as yet. States wishing to explore an area of the sea must apply to the ISA for an exploration license, for which a fee of 500,000 US dollars is payable. Private companies can also apply for a license, subject to their application being sponsored by their home state. The sponsoring state provides guarantees that the company has sufficient financial and technical capability, and accepts liability for the company's activities. An exploration license is valid for 15 years and can be extended for another five years. Developing countries can also apply but they have to partner with a mining company that has a subsidiary in that country.

2. Dispute settlement mechanisms: Challenges of global governance of international waters

The 1982 Convention aimed to establish a due process for cases where the states or private actors have disagreements over maritime boundaries and when there are serious disputes over EEZs and/or continental shelves. If States cannot reach an agreement without a reasonable amount of time, they would then be expected to resort to dispute settlement procedures under the Law of the Sea Convention provided in Part 15 of the Convention. This includes non-compulsory dispute procedures and calls upon States to pursue negotiations, mediation, conciliation. If these avenues do not solve the dispute, Section 2 sets forth the compulsory dispute procedures which include the International Tribunal for the Law of the Sea (ITLOS) under Annex VI, the International Court of Justice (ICJ), the creation of an Arbitral Tribunal under Annex VII, and the creation of a Special Arbitral Tribunal formed as a panel of experts, not necessarily lawyers, to deal with a dispute arising out of a particular area (e.g. fisheries, marine environment, scientific research, navigation, etc.).

Despite these sophisticated and flexible legal venues of resolving such disputes, there is still quite an ambiguity in defining what constitutes an equitable solution to these disputes on the basis of international law. As is often the case, most states have avoided these due processes which reflect the limitations of

international law when it comes to issues of domestic/national jurisdiction. Furthermore, these dispute resolution mechanisms also trigger "free rider" problems where non-member states can both avoid the rules and regulations of the Authority ISA, for instance, and simply go ahead exploring deep waters without any licensing and permits. These free-riders can also navigate and accept the jurisdictions of tribunals of their own choosing based on prior appeals and national interests. Lack of sufficient sanctions in cases of violations, the problems associated with non-members constitute major implementation problems for both dispute resolution mechanisms regarding EEZs and continental shelves as well as deep-sea mining issues through ISA.

IV. Key Vocabulary

Territorial Sea: The territorial sea is a 12 nautical-mile zone/belt of coastal waters belonging to the coastal state. The state has jurisdiction over this territory and activities in this zone are governed by the laws and regulations of the coastal state. However, coastal states that have ratified the UNCLOS must ensure that their legislation aligns with the convention's provisions.

EEZ (Exclusive Economic Zone): The exclusive economic zone is the region that extends a distance of 200 nautical miles from the coastal baseline. It starts at the seaward edge of the territorial sea. Unlike the territorial sea, the EEZ is not a part of the sovereign territory of the coastal state. However, each sovereign state has the right to explore, exploit, and utilize the natural resources in this territory. Other nations may only exploit these resources with the consent of the coastal state. All nations must comply with the UNCLOS requirements while extracting natural resources from this zone.

Continental Shelf: A continental shelf is a portion of the continent submerged under shallow water known as the shelf-sea. It is a natural geological extension of the coastal state where the state has exclusive rights to exploit resources on or under the seabed such as oil, gas fields, minerals, and fish stocks present in this region. The continental shelf of a country may extend beyond its EEZ.

International Waters (High Seas): High-seas are the maritime zone after the aforementioned 200 nautical-mile limits. It is considered as international waters and no state may subject any part of this area to its sovereignty. The high seas are open to all states and are considered as the "common heritage of mankind". The International Seabed Authority (ISA), established by the UN, is responsible for managing the resources in and on the seabed while Regional Fisheries Management Organizations (RFMOs) regulates fishing in this area. Apart from oceans, international waters also include lakes, rivers, groundwaters, large marine ecosystems, regional seas, aquifers, and wetlands.

Deep-Sea: The deep-sea regions are the dark layers of the ocean that are around 800 meters. However, on some continental shelves and coasts, the transition from land to deep-sea is abrupt such that a depth of 800 meters is reached within the EEZ on the nation (the coast of Japan is a perfect example).

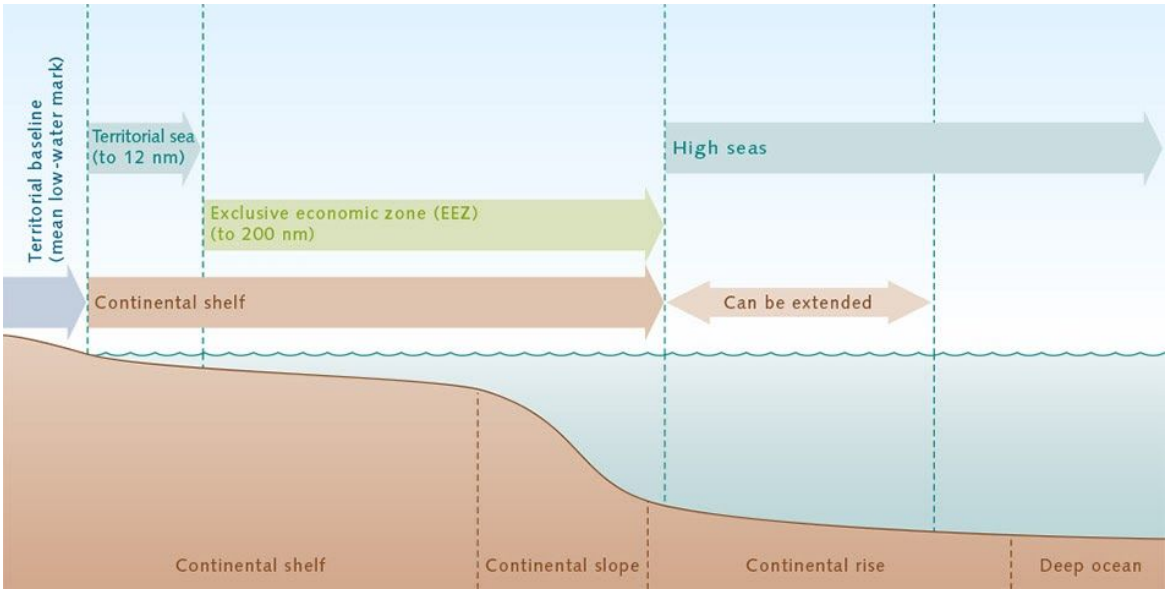

Figure 1: A visual depiction of the territorial sea, EEZ, continental shelf, and high seas/international waters.

(International Commitments - World Ocean Review)

V. Important Events & Chronology

Date (Day/Month/Year)	Event
1945	The United States extended its control over all natural resources, including gas, minerals and oil, within its continental shelf challenging the freedom-of-the-seas-doctrine.
October 1946	Argentina claimed its shelf and the epicontinental sea above it.
1960s	Countries extended natural resource exploration (especially oil) further away from land and deeper into the bedrock of continental margins causing dispute and exploiting oceans.
1 November 1967	Arvid Pardo, the UN Ambassador of Malta, delivered a speech to the United Nations General Assembly claiming that “the seabed and the ocean floor beyond the limits of natural jurisdiction is a common heritage of mankind.” Thus, he argued that the exploitation of resources in these areas should benefit all countries regardless of proximity or coastal contact.

1973	The Third UN Conference on the law of seas was convened in New York aiming to form an inclusive global treaty for the oceans.
1982	Nine years later, the United Nations Convention on the Law of Seas (UNCLOS) was adopted. During this extensive period of nine years, 160 sovereign states discussed and negotiated the articles in the convention eventually making substantial changes to the initial treaty. Many western developed countries were against some of the initial convention articles particularly the ones that deal with "the legal system that governs the common property resources of the deep seabed area."
1985	In a case between Libyan Arab Jamahiriya and Malta concerning the continental shelf, the ICJ enforced UNCLOS's provisions.
16 November 1994	The United Nations Convention on the Law of Seas entered into force.
November 1997	The UN and ISA (International Seabed Authority) reached an agreement.
November 2015	As of this date, 167 states and the EU (European Union) have signed and ratified the convention.

VI. Past Resolutions and Treaties

UNCLOS (United Nations Convention of the Law of Sea)

With 320 articles, 17 parts, and 9 annexes, the UNCLOS is the most extensive and comprehensive international treaty created on this issue. It came into operation on the 16th of November 1982 despite being proposed 9 years before 1973. The convention deals with aspects of ocean space such as delimitation, marine scientific research, settlement of disputes, economic and commercial activities, environmental control, and transfer of technology. In order to regulate and control fishing, research, and commercial operations in oceans, the UNCLOS has created 3 new institutions, namely the ITLOS, ISA, and CLCS (Commission on the Limits of Continental Shelf). Even though UNCLOS has more than 160 member parties, the US has not ratified the convention because of its disagreement about Part XI of the convention. UNCLOS, still today, remains one of the most prominent nautical laws that safeguard marine resources and act as a foundation for resolving nautical territorial disputes.

Law of Transboundary Aquifers

This law was submitted by the UN General Assembly and adopted by the International Law Commission in 2008. Aquifers are considered to be a type of international water and in order to resolve disputes regarding the preservation and use of such territories, the Law of Transboundary Aquifers was created. This resolution defines multiple factors relevant to the equitable use of such ecosystems and lists certain obligations that the states must comply with in order to utilize these aquifers.

VII. Failed Solution Attempts

UNCLOS and its implementing arm ISA have set valuable standards and guidelines for deepwater mining exploration and expect both the countries and companies to follow strict guidelines on environmental safety and maritime conservation. If an applicant is causing significant environmental damage during exploration for instance, ISA has the right not to renew its license or deny exploitation rights for the future. Since ISA has not yet issued any exploitation licenses, it is adopting a precautionary approach for further use.

However, despite these legal limits, and internationally recognized environmental guidelines, coastal states do not always comply if these oil, gas, and natural resources are within their national jurisdiction (in their own EEZ or continental shelf). National laws are not always harmonized with UNCLOS standards particularly when it comes to environmental protection which has already created major environmental disasters such as the DeepWater Horizons disaster off the Gulf of Mexico in 2010 resulting in nearly 5 million barrels of oil spill, the largest of such disasters to date. Even if the national environmental laws are harmonized with UNCLOS, they are not often effectively implemented which raises serious concerns over maritime resource preservation and the right balance between mining and environmental concerns. Once such disasters occur, existing international law is not sufficiently binding in terms of payment of compensations of affected parties (neighboring countries suffering from water pollution for instance) and often rely on bilateral and diplomatic pressures and negotiations

Though it is rare for such detailed regulations and environmental standards to emerge *before* exploitation of deepwater mineral resources (such as manganese, sulfides in blocks, cobalt crusts begin through ISA) environmentalists are gravely concerned that ISA's small institutional and financial capacity (with only 40 permanent staff in Kingston Jamaica) will not be enough to ensure sufficient protection. The case of the environmental protection of the Clarion-Clipperton Zone (CCZ) in the Pacific where billions of tonnes of manganese nodules extend across an area the size of Europe, indicates that declaring protection zones for preserving natural habitats may prove rather difficult as countries continuously request exemptions. Though exemptions can be revoked only as an extreme measure according to UNCLOS, they

are often used to extend exclusive mining rights beyond the continental shelf and EEZs. Russia, for instance, has requested exemptions claiming the 40 percent of the Arctic seabed as its own continental shelf with the argument that undersea Arctic mountains originate in Russian EEZs. The “convenient” interpretations and appropriations of the UNCLOS exemptions create significant loopholes.

(https://worldoceanreview.com/en/wor-3/environment-and-law/international-commitments/p. 128).

VIII. Possible Solutions

It is important to make sure UNCLOS principles are widely accepted and ratified by all the member countries. Although 167 countries and the EU have ratified the 1982 Convention, the fact that major countries with serious continental shelf and EEZ disputes have failed to do so undermines the effectiveness of the treaty and the related organizations. Hence, the inclusion of all relevant parties and taking relevant measures for full membership is crucial. Despite the fact that there are detailed guidelines and standards established in UNCLOS, the non-binding character of the treaty is one of its major shortcomings. The small capacity of ISA signifies serious limitations on how these rules and regulations are safeguarded. That is why it is important to increase the institutional and financial capacity of ISA. There are also serious loopholes and ambiguities embedded in the existing convention. Though one of its kind in terms of comprehensiveness, the negotiations have watered down the effect of the treaty particularly in terms of fair distribution of maritime resources among developed and developing countries. That is why, in order to ensure a more equitable distribution of costs and benefits of deep-water resources, firmer standards in technology sharing, production guidelines, and economic assistance have to be established. One possible solution, for instance, is to establish royalty mechanisms, where companies and countries exploring these natural resources will have to make certain payments to ISA for more equitable sharing. Finally, there are still serious conflicts regarding the maritime boundaries among coastal states that are likely to create both political, economic, and environmental disasters. Despite the fact that there are numerous dispute resolution mechanisms in the international systems, they have proven ineffective due to the usual limitations of the international law and issues of domestic jurisdictions. That is why further clarifications and definitions are needed to reduce the number of disputes.

IX. Useful Links

- The link to the world ocean review website for additional explanation of keywords, concepts, UNCLOS, and organizations (such as the ISA): https://worldoceanreview.com/en/wor-3/environment-and-law/international-commitments/
- The link to the world ocean review website for additional explanation of keywords, concepts, UNCLOS, and organizations (such as the ISA): https://www.isa.org.jm/about-isa
- The link to ISA's website for more information about the organization and its mission: https://www.itlos.org/en/the-tribunal/
- The link to ITLOS' website for more information about the tribunal and its jurisdictions: https://www.un.org/depts/los/convention_agreements/convention_historical_perspective.htm#The%20United%20Nations

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