AMERICAN UNIVERSITY OF BEIRUT

DECOLONIZING THE UNCLOS? THE AREAS OF EXCLUSIVE ECONOMIC ZONES AND COMMON HERITAGE OF MANKIND UNDER REVIEW

by
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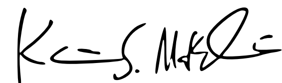

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ABSTRACT
OF THE THESIS OF

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Title: Decolonizing the UNCLOS? The Areas of Exclusive Economic Zones and Common Heritage of Mankind Under Review

This thesis aims to consider “unequal” developments regarding the territorial legal framework of the ocean in light of the exploitation of natural resources. The thesis examines the legal history of territorial and colonial aspects of the concepts of the Exclusive Economic Zones (EEZ) and Common Heritage of Mankind (CHM). It focuses on exploitation activities in the areas of EEZ and CHM by coastal and other states. The overarching questions are: might international maritime law prevent states from developing and how? How do countries from the Global North use international law to pursue their own economic and territorial goals?

In a first step, the thesis will outline theoretical concepts that lead from decolonization processes to the onset of the thinking of territory and the sea over the genealogy of international maritime law to deliberations of decolonizing the law. The thesis will then introduce the two central concepts it is scrutinizing, the Exclusive Economic Zones and the Common Heritage of Mankind as significant zones of territorialization in the sea nowadays. Subsequently, the thesis depicts France and the EU's current activities in utilizing their overseas departments’ EEZs and taking advantage of the EEZs of other states, and other countries’ shares to CHM, respectively. By depicting these cases, the thesis scrutinizes the genealogy of the concepts and their legal nature and how the legal provisions are adhered to in reality. Since the emergence of an international legal framework was crucial for developing states in the aftermath of decolonization, it is worthwhile to study the consequences of the framework and the outcome of the progress that was aspired to achieve.

EEZ and CHM are highlighted because they used to be common property until they were finally strongly regulated by the UNCLOS, an international legal instrument accepted by more than 160 states today. Since the UNCLOS was established after decolonization had set in, this thesis aims to examine whether and how the concepts of EEZ and CHM brought prosperity to developing states or if the international legal instrument was rather detrimental to progress of decolonized countries.

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ABBREVIATIONS

AALCC	Asian–African Legal Consultative Organization
Art	Article
CHM	Common Heritage of Mankind
CLCS	Commission on the Limits of the Continental Shelf
ECA	Econonic Commission for Africa
EEZ	Exclusive Economic Zone
ESEC	French Economic, Social and Environmental Council
EXTRAPLAC	Extension Raisonnée du Plateau Continental
FAO	Food and Agriculture Organization
ff	following
IFREMER	Institut Français de Recherche pour l'Exploitation de la Mer
ISA	International Seabed Authority
ITLOS	International Tribunal for the Law of the Sea
NIEO	New International Economic Order
NORI	Nauru Ocean Resources Inc
NSGT	Non-Self-Governing Territories
OCT/PTOM	Overseas Countries and Territories/ Association des pays et territoires d'outre-mer de l'Union européenne
p	page
PIFS	Pacific Islands Forum Secretariat
TOML	Tonga Offshore Mining Ltd
TWAIL	Third World Approach of International Law
UK	United Kingdom
UN	United Nations
UNCLOS	United Nations Convention on the Law of the Sea
UNCLOS I	United Nations Conference on the Law of the Sea I (1956-1958)
UNCLOS II	United Nations Conference on the Law of the Sea II (1960)
UNCLOS III	United Nations Conference on the Law of the Sea III (1973-1982)
UNGA	United Nations General Assembly
US	United States of America
USSR	Union of Soviet Socialist Republics

CHAPTER I

INTRODUCTION – WHY THE SEA MATTERS

"How inappropriate to call this planet Earth when it is quite clearly Ocean" prominent science-fiction author Arthur C. Clarke has once remarked (Lovelock, 1990, p. 102). The oceans dominate the world spatially, comprising about 72 percent of our planet's surface. The vast maritime spaces are of utmost importance for the global economy, as around 90 percent of global trade by volume is borne by sea[1] (Scheiber, 2013).

As the oceans are fundamental for life on earth in manifold ways, their vast extent and role in global trade only tell a part of the whole story. The oceans cycle 93 percent of CO2 in the atmosphere and produce 50 percent of the world's oxygen, therefore being the main driver in the global atmospheric system (Warner & Schofield, 2012, p. 1). Besides, the oceans serve essentially in carbon and heat sink and are vital to global nutrient cycling, representing a key repository and supporting biological diversity on a world scale, although the entire wealth of biodiversity remains mostly unknown (Skropeta, 2011, p. 221)

Coastal and marine environments support and sustain living resources, notably fisheries and aquaculture, which is estimated to be fundamental to the livelihoods of 10-12 percent of the world's population[2] (Schofield, 2016, p. 389). Besides, the oceans

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[1] United Nations Conference on Sustainable Development (UNCSD), Rio Ocean Declaration, Co-Chairs Statement of The Ocean Day at Rio+20, 16 June 2012, Annex II, 1, http://www.unesco.org/new/fileadmin/MULTIMEDIA/HQ/SC/pdf/pdf_Rio_Ocean_Declaration_2012.pdf (accessed June 25, 2021)

[2] For detailed information: Food and Agriculture Organization (FAO) The State of World Fisheries and Aquaculture 2014: Opportunities and Challenges, (Rome: FAO/United Nations, 2014) http://www.fao.org/3/i3720e/i3720e.pdf (accessed June 25, 2021)

offer more and more sources of energy. For example, it is estimated that 45 percent of the remaining recoverable conventional oil is located in offshore fields (International Energy Agency, 2013, p. 93)

Nevertheless, oceans are often regarded as featuring immense knowledge gaps and as under-researched versus the terrestrial space. The marginal research funds to ocean science have led humanity to know more about Mars than about the Earth's oceans (Intergovernmental Oceanographic Commission, 2019).

Historically, the high seas have been a place of the violence of slave trade, world wars, and the overall fundament for imperial and colonial structures (McKittrick & Woods, 2007). Many consider the oceans, particularly the high seas and the deep maritime zones, as the last planetary frontier. Western history shows that frontier is conquered through imperialism and resource-fueled global capitalism, processes that are informed through tools such as cartography (Fawcett, Havice, & Zalik, forthcoming, p. 2).

Given the above examples on the ocean's importance for trade and exploitation, this thesis will scrutinize these aspects under consideration of the legal genealogy and colonizing processes related to the respective maritime zones of occurrence according to the 1982 UN Convention on the Law of the Sea (UNCLOS). The "Exclusive Economic Zones" (EEZ) and the "Area", also known as "Common Heritage of Mankind" (CHM) are maritime zones that represent the major grounds for trade as well as living and non-living resource exploitation. Following their legal evolution, from once common grounds to more and more delimitated areas under economic jurisdiction, it is worth considering the law's impact on economic activities in these two zones. Both areas have been shaped in the period of decolonization and the general idea was to create

mechanisms that would lead to development and assimilation between countries. Therefore, it is worth studying the processes leading to the legal framework and the processes that continued afterwards, until this day.

CHAPTER II

METHODOLOGY

For my research I will combine primary sources (original legal texts, minutes of negotiations) and secondary sources (books, commentaries, papers, newspaper articles, online sources). For the research of this thesis, the sources, including legal texts (laws, agreements) and commentaries, will be introduced following a set of definitions and concepts on delimitation, territory, colonization and international law.

Considering technological advancements and the ever-growing strive for natural resources, be it oil and gas or deep seabed nodules and metals, and the resulting geopolitical and nationalist rivalries, the thesis will deal with the issue of how these occurrences can be interpreted in light of just distribution of resources and the existing legal framework. As the ocean has continuously been considered a space subject to division, it is further important to assess the territorial aspects of the maritime space regulations under the angle of colonialization and adjacent legal disciplines. The thesis will scrutinize two main oceanic spaces manifested by the UNCLOS during the period of decolonization in the 1970s and 1980s, the Exclusive Economic Zones (EEZ) and the deep seabed area, also considered as “Common Heritage of Mankind” (CHM), on their substance of relations to development, exploitation, and continuation of colonialism by Western and developed states, following these *research questions:*

- Are there provisions in the United Nations Convention of the Law of the Sea (UNCLOS) that states from the Global North can take advantage of in order to reach territorial and subsequently economic aspirations in exploiting natural

resources, overriding interests of states from the Global South and avoiding the creation of equality in terms of exploitation of maritime territory?

- How do certain provisions of the United Nations Convention of the Law of the Sea (UNCLOS) allow postcolonial states of the Global North reach territorial and economic aspirations in exploiting natural resources, and therefore override interests of the Global South and avoid or prevent equal exploitation of maritime territory?

CHAPTER III

THEORETICAL CONCEPTS FROM DECOLONIZATION TO TERRITORY TO THE 1982 UNCLOS AND BEYOND

For a better understanding of the thematic of the two maritime areas dealt with in this thesis, it is inevitable to deepen and explain beforehand certain concepts that have shaped the ideas behind these areas. These concepts nowadays are crucial for understanding resource exploitation at sea, and they influence the global governance of the oceans essentially. They are further vital for an analysis of the EEZ and CHM concept, which will be dealt with afterwards in this thesis.

The following sections deal with decolonization and its linkage to the sea. Further, historical background on territorialization of the sea is introduced, leading to a depiction of the genesis of the law of the sea that culminated in today's still effective legal framework of the UNCLOS. Finally, legal views from the Global South according to the TWAIL approach are introduced to broaden the picture of international law.

A. Decolonization at sea – an introduction

Considering the prevailing subject of this work, colonization at sea and adjacent maritime issues, further elaboration on the raised concepts is essential to understand the context in which colonization and territorialization at sea are embedded.

Annie Stilz broadly defines "colonialism as the involuntary rule of a dominant political, the metropole, over a distinct and subordinate society, the colony, across some

significant portion of its domestic and external affairs (Stilz, 2015, p. 1).[3] Colonialism is at its most fundamental level grounded on exploiting colonized peoples, territories, and resources (Butt, 2013). Thus, gaining new lands and natural resources was paramount to the colonial strategy. It furnished the colonial powers with wealth and allowed massive empires to flourish, providing raw materials and markets that fueled industrialization (Huggan & Tiffin, 2007).

In terms of maritime decolonization, author Houbert states that decolonization never included the surrender of Western power at sea. Rather, the withdrawal of control of the coastal areas (of Asia) increased Western interest in power at sea. Maritime hegemony meant that Western states could provide security to the newly established states in power in the former colonies. In case of failure of this "containment" strategy in Asian mainland, the powers at sea provided an alternative for these new powers. Because of this, islands regained strategic significance due to their locations amidst the sea routes. For the Western states, it was easier to keep direct control of islands than of the colonies on the mainland. Decolonization processes could lead to radical demeanor on the continents. However, this was not the case on the islands, as long as Western states' hegemony continued to be undisputed (Houbert, 1986, p. 147).

Islands in the sea were very vulnerable. Due to their dependency on economic exchange, they could also be conquered under Western sea power. In such a manner, France and Britain isolated islands long after the first wave of decolonization had set in (Houbert, 1986, p. 148).

Apparently, the ocean was considered a new frontier. Technological adjustments and jurisdictional claims were expected to solve anticipated problems of

[3] For similar definitions, see David Abernethy, The Dynamics of Global Dominance (New Haven: Yale University Press, 2000), 19-21 and Michael Doyle, Empires, (Ithaca: Cornell University Press, 1986), 12.

overpopulation, resource decline, and land-based environmental degradation. Due to the perception of the ocean as "great and still remaining common of mankind" and in light of anti-colonial world-making, the ocean encouraged experiments of natural resources. These deliberations created new understandings of the sea as "territory that could be scouted, explored, mapped, colonized and connected to the land and its economies" (Kaji-O'Grady & Raisbeck, 2005, pp. 443,445). For the many lines that were drawn on land maps in this period, even more lines were marked on the sea accordingly. These lines represent the developments of the law of the sea between 1945 and 1982, including the Truman Proclamation and the UNCLOS. Beyond that, these lines fragmented the ocean legally and conceptually (Ranganathan, 2020, pp. 1-2). Following the delimitations, the ocean was divided by zones and by depth, medium, and function. Moreover, interconnected maritime ecosystems were made visible as isolated sites of economic operations, many of them with an extractive feature (Ranganathan, 2019, p. 573).

In fact, what is described here is that decolonization from territory moved to colonization of islands and then to maritime territory. Following these deliberations, colonialism was just assigned to the oceans, away from land. As pointed out by Houbert, the maintenance of power at sea was fundamental to some. Besides, increasing maritime mapping and line-drawing signified the basis for territorial allocation and later resource exploitation.

The following section will deal in more detail with the fragmentation of the oceans, thus leading to mapping and influencing the law of territory. This part is crucial for comprehending the substantially increasing interest in territoriality as a strategy for controlling and dictating space (Agnew, 1994; Sassen, 2013).

B. Territory and international law – theoretical concepts

The history of maritime delimitation processes significantly influenced international law's relation with space. The practice of drawing maps contributed to international law development in a broader manner (Jones, 2016, p. 1). More importantly, drawing lines on maps is a crucial aspect of the practice of territory. There exist various definitions for the term territory: For Stuart Elden, territory is "a bounded space under the control of a group of people, usually a state" (Elden, 2013, p. 322). Joe Painter defines territory as "not an actual state space, but as the powerful, metaphysical effect of practices that make such spaces appear to exist" (Painter, 2010, p. 1090). Deleuze and Guattari describe how the traits of the sea as "the smooth" and "the striated" influence the beginning of mapping the sea after the year 1440, which was the year when Portuguese discoverers first used nautical charts (Lysen & Pisters, 2012, p. 1). The striation of the sea resulted from the navigation on open waters. The authors describe the sea as a smooth space par excellence. An area where the line constitutes a direction including the possibility of changes of trajectory due to the variability of the goal. Maritime striation was conducted in consequence of the technological achievements of astronomy (bearings) and geography (mapping). With the sea being the first space facing progressively strict striation, it also became the model for striation of other smooth spaces such as the desert and the air (Deleuze & Guattari, 1987, p. 478ff). Mapping includes meridians, parallels, longitudes, latitudes, and territories gridding the ocean, enabling us to calculate and measure distances. The emergence of maps is inextricably linked with the beginning of the great explorations, the expansion of European empires, and the transatlantic slave trade. Hence, the relations between the smooth, the striated and the political cannot be missed (Lysen & Pisters, 2012, p. 1).

Besides, territory is a historical, geographical, political, and juridical concept, the latter being contrasted with land. Land and territory can be considered the same pair as smooth and striated, with territory summarizing practices over land that bind and control it. Elden relates the emergence of the concept of territory with the emerging explorations in the 15th century and finds first attempts of claims to land through calculation and cartography, rather than by occupation or discovery (Jones, 2016, p. 2). Steinberg points out that on land "points are fixed in space and mobile forces are external to those points", whereas the sea is in constant motion. This, in turn, does not mean that the sea has no identifiable places and natures but that these points are not "located" (Steinberg P. , 2011, p. 270).

Jones uses the concepts of "smooth" and "striated" to explain the organization of space in international law, in particular maritime space. Drawing abstract lines result in having material effects on territory. The author points out that serious violence can happen when the physical world fails to live up to the law's certainty, giving examples of the historical dispossession of a native people or the current European refugee crisis. The idea of the ocean being a flat, featureless and empty space shaped international law's concepts of space more generally (Jones, 2016, p. 3). According to Jones, in this context it is timely to understand that the sea has always been composed in an inconsistent manner: open and closed, free and controlled. The author points to the essential thought of the sea being free, the border open, and who the law historically shuts out, subjugates and excludes (Jones, 2016, p. 4).

The conflict between striated and smooth is illustrated very clearly in two critical moments in early modern international law by the Treaty of Tordesillas when Portugal and Spain agreed to split the world's ocean in two, and Hugo Grotius' "Mare

Liberum", demanding free trade for all nations (Jones, 2016, p. 4). Carl Schmitt highlights the advancements of navigation and measurement that besides the explorations led to "global linear thinking", meaning that as soon the world could be understood completely, it needed to be divided (Schmitt, 2003 (1950), p. 86). Although Schmitt's concepts are generally described as flawed (Jones, 2016, p. 5), it leads him to a set of interesting questions, among those pointing out to a link of "historical and structural relation between such spatial concepts of free sea, free trade, and free world economy, and the idea of a free space in which to pursue free competition and free exploitation" (Schmitt, 2003 (1950), p. 99). Jones claims that the free sea concept is fundamental at the beginning of international law and in the present. The principle of the freedom of the high seas and the freedom of navigation endure in the UNCLOS. These two dictions fall in the period when international law has been accused continuously of forming the world around imperialist and capitalist exploitation (Jones, 2016, pp. 5-6).

Apparently, there is a lot of elaboration on concepts relating to striation and the freedom of seas. But what is crucial is to understand that once mapping started, it was linked to an inherent order of inclusion or exclusion, that was subsequently carried out in legal texts.

The next part will describe in more detail the major legal texts and legal milestones of maritime law. Starting by the Age of Discovery, developments until the 20th century and the onset of codification and negotiations for a more comprehensive framework, the UNCLOS, are depicted.

C. On the modern law of the sea – historical developments

Regarding the development of the law of the sea, there have been two main driving forces whose consequences are both enshrined in the UNCLOS today. One of the driving forces has been the *territorial appropriation* of the seas. Over time, the territorial claims have varied greatly, from being reduced to a narrow belt of the sea near the coast to the most recent extension beyond the outer limits of the territorial sea. The other key driver in the development of the law of the sea has been *economic gains* by a functional rather than territorial access and the interest in securing strategic gains of naval powers in distant parts of the sea. Both of these concepts were promoted by the idea of the "freedom of the seas", initially conceptualized by Hugo Grotius in his "Mare Liberum" of 1609 (Vidas, 2016, p. 109)

During the Age of Discovery between the 15th and 17th century, sailing international waters for trade became a common business for countries like Spain, Portugal, the Netherlands, France, and England. One of the first legal works dealing with the law of the sea in history was the 1494 Treaty of Tordesillas between Spain and Portugal, that sought to divide the "New World" of the Americas (Steinberg P. E., 1999, p. 255). Dutch Hugo Grotius created another key piece with his famous work "Mare Liberum" in 1609. The central concept pointed out that the sea must be free because, by its nature, it cannot become occupied. Effectively, this meant that the sea is an international territory and open to all nations for trade. Mare Liberum became very famous and gained followers from many countries (Jones, 2016, p. 21).

Grotius idea was that *"The sea can in no way become the private property of any one, because nature not only allows but enjoins its common use.... Nature does not give a right to anybody to appropriate such things as may inoffensively be used by*

everybody and are inexhaustible, and therefore, sufficient for all" (Scharf, 2013, p. 108).

Grotius' oeuvre was followed by a rebuttal in 1635, "Mare Clausum", written by the Englishman John Selden. The Mare Clausum principle sought to ban other naval powers from the sea, depending on the entrance or accessibility of the sea to another country. Universal disputes and claims were high on the agenda and the dispute over the principles lasted over a century. Eventually, the principle of the freedom of the seas won as the predominant rule. It then applied without major restrictions until the first half of the 20th century (Marboe, 2013, p. 473f).

Until the beginning of the 20th century, the law of the sea was therefore based on several customary rules, because a codification had not yet been established. The customary rules mainly covered the recognition of two separate maritime zones, the territorial sea and the high seas. The territorial sea was considered a three-mile-strip[4] of sea, contiguous to the coast in which a coastal state could exercise sovereignty. On the high seas, the prevailing rule was the principle of freedom of all states, exerted by ships under their flags, with a few exceptions (International Ocean Institute Canada, 2018, p. 108).

Due to changes in global structures after World War I and the beginnings of multilateral international legal processes, it became necessary to invent precise definitions in addition to the already existing customary law of the sea. With the emerging idea of codifying the rules on the law of the sea, some attempts were made to create laws, eg on the territorial sea and piracy in 1929 and 1932, respectively. However, it was not yet considered to create a global comprehensive legal code of the

[4] The three-mile-rule relates to the distance that a cannon could shoot from the coast. Today, the three-mile-limit is chiefly obsolete, as it was replaced by the 12-mile-limit which is codified in the UNCLOS.

seas by that time. In 1945, the United States reached a pivotal point, as President Harry Truman declared that the resources on the continental shelf adjacent to the United States belonged to them. This also marked a radical deviation from the territorial sea's former main principles, the three-mile-rule and the high seas. But it was not only the US, also eg Latin American states were extending their territorial seas (Treves, 2015, p. 10).

However, the question of the sovereignty – of the territorial seas and beyond that limit – kept prevailing. The United Nations held sessions on the law of the sea (UNCLOS I in 1956-58 and UNCLOS II in 1960), but both negotiation rounds did not lead to a breakthrough. Following a UN General Assembly decision in 1970, a third conference was supposed to "deal with the establishment of an equitable international regime for the resources of the seabed and subsoil beyond the limits of national jurisdiction" and "a broad range of related issues" (UN General Assembly Res 2570C (XXV), 1970). The Third United Nations Conference on the Law of the Sea (UNCLOS III) was held in 11 sessions between 1973 and 1982 and finally resulted in the comprehensive legal framework of the UNCLOS. The convention was open for signature in 1982. Only after the condition of 60 ratifications was fulfilled, the UNCLOS came – as we shall also see in section V - rather late into force, in 1994. Today, more than 160 countries ratified the convention, to which the European Union is also a party. Notable exceptions are the United States, Israel, and Turkey (Churchill R. , 2015, p. 26).

With regards to the UNCLOS III negotiations, there will be more information in the sections on EEZ and CHM, as discussions of the framework were to a great extent involved in these concepts.

In light of the colonial idea of the territorialization of the sea, it is crucial to consider colonial aspects of the legal. Therefore, the subsequent section outlines decolonial approaches on international law and links between (de)colonization processes and the UNCLOS.

D. Looking closer: Decolonization of international laws and views from the Global South including aspects of the UNCLOS III negotiations

The notion of "decolonization of international law" is a concept that developed from post-colonial studies, a scholarship emerging especially in the period after World War II and the starting decolonization processes in the Global South. Post-colonial studies examined the character of international law, labeling it as twofold. First, it enabled European expansionism. Second, international law accompanied decolonization processes while at the same time supporting rising global inequalities. Sundhya Pahuja claims that imperialism is still a reality and that international law helped retain dependency (Pahuja, 2014, p. 4).

Several approaches are dealing with the decolonization of international law. One of these approaches is TWAIL or the Third World Approach to International Law (Taha, 2019, p. 1). TWAIL emerged in 1995 around a group of critical international legal scholars that have been seeking to depict how international law is continuously facilitating the exploitation of the Third World (Gathii, 2011, p. 28). An overall goal of TWAIL is attributing the notion of illegitimacy to the regime of international law. Besides, the attempt to create access for participation for the Third World in international law is another cornerstone of the concept. TWAIL further claims that international law, despite its universality and promise of global order and stability,

cannot be a just, equitable, and legitimate code of global governance for the Third World (Mutua, 2000, p. 31). As laid down by Mutua, TWAIL scholarship strives to facilitate these objectives by being anti-hierarchical, counter-hegemonic, careful of universal creeds and truths, as well as openly collaborating with other critical projects, such as critical race theory (Mutua, 2000, pp. 36-38). Nonetheless, TWAIL is not universally representative of Third World views and, at times, it is met with resistance (Fidler, 2003, p. 30). At the heart of TWAIL lies the unity "in opposition to the unjust global order" (Mutua, 2000, p. 36).

The Third Conference on the Law of the Sea took place between 1973 and 1982. As such, it fell right into the period after the decolonization of states between the 1940s and 1960s and the reorientation of the global order. It marked a significant opportunity for developing countries to influence the content of international law substantively, particularly re-drafting international trade law, and to include particular treatment for themselves. Developing countries came forward by proposing bolder concepts and perspectives beneficial for their side, but not only. The input of countries from the Global South was featured in the UNCLOS (Fidler, 2003, p. 44). Therefore, an important demand by TWAIL scholars, the possibility of participating in international law-making, can be seen as fulfilled.

Global South countries made substantive contributions. Among them have been the concepts around the "exclusive economic zones" (EEZ) and the high seas, including the subsoil, as "common heritage of mankind"[5] (CHM). These concepts have initially been put on the negotiation table by the Maltese ambassador Arvid Pardo. During the negotiations, it was essential to create "equal opportunity" scenarios so that both

[5] UNCLOS calls the (subsoil) area of the sea, that relates to the common heritage of mankind, "the Area".

developed and developing countries could benefit from the regulations (Fidler, 2003, p. 44f). In that sense, the new regimes on EEZ is considered an improvement for developing states, as they would not have been able to harvest these resources on a commercial scale in the open sea. (Fidler, 2003, p. 45) However, as we shall see later under chapter IV.c.4, the realities in Africa today are far off this promising new feature of EEZs.

Fidler argues that the Global South's contributions aimed at reshaping international law and the New International Economic Order (NIEO). They wanted to transform economic regulations between states with regards to trade and foreign direct investment. In a broader sense, they also aimed at creating provisions attaining substantial global tolerance (Fidler, 2003, p. 46).

Overall, it is crucial to grasp the politico-economic underpinnings and implications for the law of the sea. Author Ranganathan highlights a lack in literature and criticizes that although certain works deal with the ocean and development, they do not reach the stage of contemplation of the UNCLOS. She further laments the missing readings illuminating the political economy of the law of the sea. Here the author also points to the consideration of the contrast of open and closed seas and to note how other aspects such as pairs like freedom and enclosure, regimes of sovereignty and community have advanced the economic exploitation of the seas (Ranganathan, 2020, p. 4).

In this context, it is worth mentioning the position of land-locked states and the concept of EEZs during the UNCLOS III negotiations. As opposed to the land-locked states, coastal states welcomed the proposal of EEZs, especially developing countries. However, it was evident that land-locked states would lose a lot by introducing this new

concept, especially as two-thirds of them were underdeveloped. During UNCLOS III negotiations, the Czechoslovakian delegate noted that it is natural for land-locked countries, considering their exclusion from the exploitation of the ocean, to oppose the extension of territorial waters beyond acceptable limits and the idea of EEZ. Nevertheless, developing coastal states were vigorously in favor of the concept of EEZ. Another unsatisfied group were developed states who feared a limitation of their areas of activity worldwide. For this reason, the Soviet Union opposed the concept. Considering the loss that was received by land-locked states, the draft sought to invent "a compensatory system…within a regional framework". By that, it was meant that parts of the revenues should be paid into a fund to develop the land-locked countries of the same continent. Over time, the land-locked states gave up, keeping in mind that constant opposition could unintentionally lend a helping hand to the cause of neo-colonialism. Hence, they gradually softened their position and acknowledged the proposal for a right to participate in exploiting the resources. They further claimed for this idea to become part of UNCLOS. However, coastal states were willing to share living resources, but clearly denied access to non-living resources (Naghmi, 1980, pp. 37-40). Although there has been a compensation system in the UNCLOS, Section IV.d.4. on the African EEZ exploitation will show how this system finally turned out. In addition, section IV.c. will shed light on the USSR and their activities with fisheries in foreign EEZs.

Disputes over economic interests were frequent over the course of the UNCLOS III negotiations. The Global South sought to defend equality in exploitation and redistribution, while the Global North pursued the protection of free-market principles. Ranganathan points to a familiar and straightforward narrative. The North's attitude

became legible by referencing rational economic interests and domestic factors. On the contrary, the South was reduced to outdated information, naïve ideology, and worst, professional incompetence and poor comprehension (Ranganathan, 2020, p. 11). Section IV will show how the initial ideas behind EEZ did not lead to their expected result, as underdeveloped countries were not capable to deal with the circumstances and take advantage of their EEZs immediately.

To better understand the maritime areas under concern, the following section will briefly outline the maritime zoning according to the UNCLOS.

E. Delimitation of the sea – maritime zones under the 1982 UNCLOS

Prior to the UNCLOS regime, the sea was divided in the territorial sea and the high seas. The territorial sea was contiguous to the coast, the zone where a state could exercise sovereignty up to three miles. Beyond this area was the high seas, where the prevailing principle was the freedom of the seas. In this part, unregulated resource exploitation was allowed by any state.

The UNCLOS framework invented a more sophisticated extractive and territorial regime, dividing the sea into seven maritime zones. With regards to the resource exploitation at sea, the thesis focus' lies especially on the concepts of Exclusive Economic Zones (EEZ) and "the Area", a term defining the deep seabed, which is considered as the Common Heritage of Mankind (CHM).

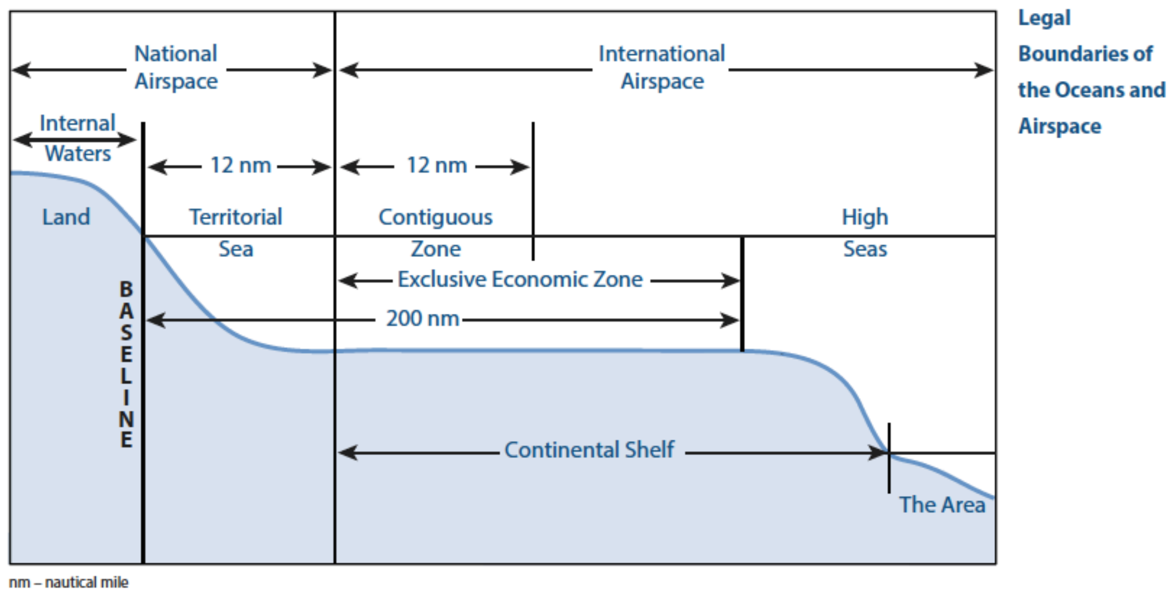

Figure 1 Legal boundaries according to the UNCLOS

Articles 55f UNCLOS define the *EEZ* as an area adjacent and beyond the territorial sea that shall not extend beyond 200 nautical miles from the baselines[6] from which the breadth of the territorial sea is measured. The specific legal regime for the EEZ within the UNCLOS will be reflected in more detail under section IV.

Another area that is essential for marine resource exploitation and contiguous to the EEZ is the *continental shelf*. According to Article 76 UNCLOS, the continental shelf of a coastal state comprises the seabed and subsoil of the submarine areas that extend beyond its territorial sea throughout the natural prolongation of its land territory to the outer edge of the continental margin, or to a distance of 200 nautical miles from the baselines from which the breadth of the territorial sea is measured where the outer edge of the continental margin does not extend up to that distance. Article 76 also

[6] The 1982 UNCLOS measures the zones of maritime jurisdiction starting from baselines along the coast. In this regard, it is worth emphasizing that maritime claims can only be pursued by coastal states, according to their sovereignty over land territory (Schofield, 2016, p. 393). This doctrine needs to be seen in light of the longstanding legal maxim that "the land dominates the sea" (Weil, 1989, p. 50).

foresees a special regimen for the delineation of outer limits on the continental shelf, which will be of interest under section IV on the example of France dealing with extensions of its overseas EEZs.

The provisions for the *high seas* in Part VII (Articles 86ff) of the UNCLOS comprise all parts of the sea that are not included in the exclusive economic zone, in the territorial sea or in the internal waters of a state, or in the archipelagic waters of an archipelagic state. Article 87 UNCLOS provides the freedom of the high seas, which means the high seas are open to all states, whether coastal or land-locked. Freedom of the high seas comprises, among other things, the freedom of navigation, the freedom of overflight, the freedom to lay submarine cables and pipelines, the freedom to construct artificial islands and other installations permitted under international law, the freedom of fishing, and the freedom of scientific research.

Article 1 (1) UNCLOS defines "*the Area*" as the seabed and ocean floor and subsoil thereof, beyond the limits of national jurisdiction. No state is allowed to claim or exercise sovereignty or sovereign rights over any part of the Area or its resources, nor shall any State or natural or juridical person appropriate any part thereof. No such claim or exercise of sovereignty or sovereign rights nor such appropriation shall be recognized. Further are all rights in the resources of the Area vested in mankind as a whole, on whose behalf the Authority shall act (Article 137 UNCLOS).

The following sections of the paper will describe in more detail the concepts of EEZ and CHM.

Having in mind the initial idea of a free sea as was discussed in this section, it is worth studying the two concepts during international law's evolution on maritime territory. Starting from a common space with access for all, maritime zones became

allocated according to economic principles. Indeed, the history of decolonization continued with ongoing colonization of the seas, at times regardless or appropriated to the legal framework, as we shall see in the subsequent sections.

CHAPTER IV

EXCLUSIVE ECONOMIC ZONES – COLONIAL IDEAS?

A. Genealogy – including UNCLOS negotiations

Preceding the UNCLOS and its legal framework for the Exclusive Economic Zones (EEZ), the US government under President Harry Truman on 28 September 1945 stipulated that "the natural resources of the subsoil and seabed of the continental shelf, beneath the high seas but contiguous to the coast of the United States as appertaining to the United States, are subject to its jurisdiction and control". This constituted a fundamental withdrawal from the existing approach. The two basic principles of the law of the sea used to be a narrow strip of coastal waters under the exclusive sovereignty of the coastal state in addition to an unregulated area outside the coastal waters, known as the high seas (Scharf, 2013, p. 107).

The Truman Proclamation has been the first important assertion of exclusive jurisdiction over marine resources beyond the territorial sea (Nandan, 1987). In fact, it tripled the resource claims of the US, thereby starting the race for sovereign expansion (DeLoughrey, 2015, p. 355).

However, although the Truman Proclamation "gave birth to the modern concept of the continental shelf" (Suarez, 2008, p. 25), long before 1945, coastal states claimed resources of the seabed and subsoil beyond the territorial sea (Suarez, 2008, p. 21). This so happened in Ceylon, Venezuela, Panama and France. These countries claimed jurisdiction over the oyster and pearl beds off their coasts. Besides, Tunisia asserted claims to sponge fishing grounds in its territorial waters. Nevertheless, these were considered to be unique historic claims and limited exceptions to the three-mile-limit

rather than cases setting a precedent (Buzan, 1976, p. 2). Still, the US was not the first country in modern times that laid claim over the continental shelf. In 1942, Venezuela and the United Kingdom signed the Treaty of Paria, following the Gulf of Paria that separated the seabed between Venezuela and British Trinidad (Buzan, 1976, p. 7). The term "continental shelf" is nowhere mentioned in the treaty. Rather, they made a *"reference to offshore installation for the drilling of petroleum and provisions assuring freedom of navigation".* Some consider this to be the first treaty on the continental shelf (Suarez, 2008, p. 89). Due to the general scramble of the war in that period, this precedence had little effect on the formation of customary international law (Buzan, 1976, p. 7).

As for the US' interests, the practical reason for the claim to use the contiguous continental shelf was offshore oil and technological advancements. These developments allowed an increasing number of coastal states and specialized companies the extraction of hydrocarbons and minerals from the seabed beyond the limit of three miles of the territorial waters. Besides, distant-water fishing was gaining ground (Campling & Colás, 2021, p. 193).

In 1947, Chile and Peru established maritime zones of 200 nm and therefore they can be considered the true parents of the exclusive economic zone.[7] Chile declared national "sovereignty over submarine areas, regardless of their size or depth, as well as over the adjacent seas extending as far as necessary to preserve, protect, maintain, and utilize natural resources and wealth". Further, they invented the demarcation of

[7] Chile: Presidential Declaration Concerning Continental Shelf of 23 June 1947, *El Mercurio,* Santiago de Chile, 29 June 1947.
Peru: Presidential Decree No. 781 of 1 August 1947, *El Peruano: Diario Oficial.* Vol. 107, No. 1983, 11 August 1947.

“protection zones for whaling and deep-sea fishery" to extend to 200 nautical miles off the Chilean coast (Nandan, 1987).

Another source states that spurred by the American resource enclosure of its continental shelf, coastal Latin American states in the early 1950s declared their exclusive right to exploit resources within 200 nautical miles of the high seas adjacent to territorial waters. An additional reason for Latin American states’ behavior was the reaffirmation of their national sovereignty in the aftermath of the Second World War. However, it was the Truman Proclamation that immediately set a precedent in customary international law and laid the foundation for the idea of an exclusive economic zone (EEZ) that later was formally adapted in the UNCLOS (Campling & Colás, 2021, p. 193)

Other parts of the world also continued the trend of extending territorial waters. Ten Arab states and emirates adopted unilateral declarations within a two-month period in 1949. Mutually, they declared sovereignty particularly over the petroleum resources on the continental shelf. Thus, there was consensus as early as 1949 on the principle of sovereignty over the natural resources on the continental shelf [8] (Nandan, 1987).

In 1952, the Santiago Declaration was the first legal instrument defining a 200-mile limit. It was signed by Chile, Ecuador and Peru with the aim to develop the resources of their coastal waters in the South Pacific. In 1970, the Montevideo and Lima Declarations solidified the position of Latin American states, which means that a majority of states had accepted a broadly-defined concept (Nandan, 1987).

[8] The dates of adoption of the declarations are as follows: Saudi Arabia, 28 May 1949; Bahrain, 5 June 1949; Qatar, 8 June 1949; Abu Dhabi. 10 June 1949: Kuwait, 12 June 1949; Dubai, 14 June 1949: Sharjah, 16 June 1949; Ras al Khaimah, 17 June 1949; Umm al Qaiwain. 20 June 1949; Ajman, 20 June 1949. (Dahak, D., 1986. Les Etats Arabes et le Droit de la Mer, Tome 1. Casablanca, Les Editions Maghrébines, p. 123 (In French) as cited in Nandan, 1987).

The Declaration of Santo Domingo of 1972 can be seen as an immediate precursor of the exclusive economic zone, since it focused on the concept of the "patrimonial sea". The patrimonial was distinguished from the territorial sea and already included distinctive features such as the coastal states' sovereign rights over renewable and non-renewable resources. As such, the predominant attention was put on economic domination (Nandan, 1987).

Besides the Latin American states' clear working progress on the subject matter, African and Asian states were contacted as a result of the Montevideo meeting. As a consequence, the Asian-African Legal Consultative Committee (AALCC) added the Law of the Sea to the agenda of its meeting in 1971 in Colombo, where it was concluded with a few exceptions only that any state could claim territorial waters within 12 miles of the appropriate baselines (Report of the Sub-Committee on the Law of the Sea by the Asian-African Consultative Committee, 18-27 January 1971, as cited in Nandan, 1987).

At the thirteenth Session of the AALCC in 1972, Kenya presented a working paper on "The Exclusive Economic Zone Concept". Its rationale was clearly stated as "the present regime of the high seas only benefits the developed countries (Report of The Thirteenth Session of the Asian-African Consultative Committee, 18-25 January 1972) as cited in Nandan, 1987).

Due to their advanced technologies, developed countries could engage in distant-water fishing wherever and whenever they wanted to. Meanwhile, developing countries often were unable to exploit the sea adjacent to their own coasts, not to mention waters in greater distance. Thus, developing countries tended to extend their territorial seas up to 200 nm in trying to compensate for their technological regression

(Nandan, 1987). Further international agreements debating the concept evolved, such as the Yaoundé Conclusions in 1972 and the Addis Ababa Declarations of 1973. Following its evolution, the concept of an economic zone related clearly to developing countries' origin, spreading from Latin America via the Caribbean to African states.

By the 1970s, in the context of decolonization and the Third World calling for a New International Economic Order, also the UN addressed the issue of EEZs and debates over ocean governance (Campling & Colás, 2021, p. 194).

Various sources strongly relate these developments linked to EEZs as neo-colonial behavior: DeLoughrey considers the re-zoning of the ocean post-1946 as *"the most dramatic change to global mapping since the post-World War II era of decolonization".* As such, the ocean has become a new space for territorialism and empire. (DeLoughrey, 2015, p. 355). Therefore, the ocean zones have been regarded as the paramount example for neo-colonial skirmish in the 20th century (Braverman & Johnson, 2020, p. 14)

As was shown clearly, a variety of developing and states were involved in developing the idea of a 200 nautical mile economic zone, in order to be able to regulate a specific area according economic needs and technical feasibility. Hence, the development of the EEZ regime cannot be regarded as a mere colonial instrument. Instead, the question is about the further access and ability for developing states to make use of their resources in a sustainable manner. This will be further explored in the case studies at the end of this section.

B. Main features of EEZs according to the UNCLOS

According to Armanet, the "mystical" 200 miles limit relates to a map in a magazine article discussing the Panama Declaration of 1939. In this article, the UK and the US agreed to establish a zone of neutrality and security covering the American continents. They aimed to prevent the resupplying of Axis ships in South American ports. On the map, the width of the neutrality zone away from the Chilean coast was around 200 miles. This turned into the basis for the 200 nm limit, although the ambition for the creation of the zone was economic (Nandan, 1987).

Within the 200 nautical miles comprising the EEZ, the coastal state has priority of access to living resources and the exclusive right of access to non-living resources. The coastal state is not required to claim this zone for it to come into existence explicitly; therefore, the EEZ possesses the same theoretical basis as the Continental Shelf Doctrine, though it lacks the geological justification of the "naturally appertaining" continental shelf (Bailey III, 1985, p. 1270).

In essence, the concept of EEZ aims "to secure for the coastal state the resources of sea, seabed and subsoil irrespective of variations in geographic or economic or ecological circumstances." Prior to the EEZ concept, the Continental Shelf Doctrine had foreseen limited mineral rights to the deep ocean floor to the continental shelf, the EEZ doctrine provides these rights within the 200 nautical miles of a states' coast (Bailey III, 1985, p. 1270)[9]

Bailey III describes the EEZ as a truly economic zone because it grants the coastal state varying rights to anything of economic value in this area. Besides the

[9] For further clarification, Bailey III: For example, since the Continental Shelf Doctrine only gives rights to the geological limit of the State's continental shelf, the EEZ doctrine gives every State in the New World with a Pacific coastline their rights to ocean resources that geology would deny them under the Continental Shelf Doctrine.

typically exploited living and mineral resources, the EEZ permits the coastal state the exclusive right to exploit nontraditional energy resources such as wind and ocean currents, wave motion, and thermal gradients. Nevertheless, Bailey III noted that technological and political impediments may prevent energy production from ever being a major economic resource of any EEZ. Still, states adjacent to these EEZs have exclusive rights to such forms of energy production that might provide local benefit to the coastal states (Bailey III, 1985, p. 1270f).

The introduction of the doctrine of EEZ had a radical impact on rights over marine resources. In 1984, for example, two years after the UNCLOS was open for signature, the United Nations Food and Agriculture Organisation (FAO) published an estimation that 90 percent of marine fish and shellfish were caught within the 200 nm zone (Schurman, 1998, p. 107). Similarly, 87 percent of the world's known submarine oil deposits were supposed to fall within the same area (Churchill & Lowe, 1999, p. 162).

After having outlined the background and basis on the concept of EEZ and its commercial exploitation, the following section shows how the first delimitations of EEZs had serious impact on global affairs, especially on the USSR and their fishery business. Subsequently, some current cases will examine how the legal framework of EEZ influences present economic relations and dependencies between states.

C. Impact of the first delimitations of economic zones – the case of the USSR

With the commencement of the UNCLOS III negotiations in 1973, both the United States and the Soviet Union realized that they had the common goal in an evolving legal maritime framework protecting their global naval and maritime interests,

since they have been the two preeminent naval powers. During the UNCLOS III negotiations, together with France, Japan and the United Kingdom, they formed the special interest group of the "Great Maritime Powers" with the aim of ensuring freedom of shipping and navigation (Koh & Jayakumar, 1985, pp. 79-80 as cited in Beckman & Davenport, 2012, p. 4).

Due to the start of the new regime of the oceans in the 1970s, the USSR negotiated various fishery agreements with developing countries in Africa. According to author Black, these agreements lay the foundation not only for fishery access, but also for future opportunities that may become part of the USSR's foreign policy. The new EEZ regime had a crucial impact on distant water fishing fleets. Especially the USSR had been strongly affected, since resources it had exploited freely beforehand were now "under ownership" of coastal states (Black III, 1983, p. 163f).

A regime change to EEZ as envisioned by UNCLOS III implied not only the utilization of fishery stocks but also the establishment of policies for conservation of living resources, the opportunity to gain basic marine research, exploit mineral resources and many more. However, at that time, only a few developing countries were capable to take full advantage of their new economic zones. There was a lack especially in institutional structures and sufficient fishery technical and scientific expertise. Despite their fishery development ambitions, many coastal developing states concluded that they should enable other countries to access stocks that remained underutilized. Hence, short-term bilateral agreements were convenient. Following an analysis of the USSR agreements with various African states, benefits were in physical access, intercultural familiarity and economic ties. The author remarks that there exist further protocols defining parameters and specifics of the cooperation and the agreements. Such

protocols would give a better understanding of the Soviet policy. However, they are generally unavailable to the public (Black III, 1983, p. 165ff).

Besides the above-mentioned Soviet benefits, there have been possible intelligence advantages resulting from fishery cooperation. It is described that all forms of access enable increased possibilities for expanded surveillance of military and economic activities in the area. Therefore, it was no coincidence that fishery cooperation has been cultivated in countries with strategic locations, close to international shipping lanes. The USSR was known to involve its fishing fleet and land-based missions in order to report military and commercial vessel activities of other nations. Such a task was simplified by area access and presence under the agreements between the USSR and African states[10] (Black III, 1983, p. 170).

Moreover, the Soviet Union increased their support in arms and training in countries with socialist orientation to facilitate their independence from former colonies. Also, increased fisheries and military cooperation with African states were in unison with Soviet goals to increase food security, their interest in export earnings of arms sales and a destabilization of Western influence in the region. Angola and Mozambique were not only two of the most important fishing areas but also two of the largest imports of weapons by the USSR at that time (Grey, 1984 as cited in Österblom & Folke, 2015, p. 6).

It is reported that USSR expansion already in the 1950s and 1960s was characterized by open access to unused resources and a lack of governance. Besides, increasing competition with US fisheries together with the Cold War fears of espionage

[10] Soviet fishery cooperation agreements existed with Mozambique, Somalia, PDR Yemen, Equatorial Guinea, Canary Islands (Spain), Senegal, Mauritius, Ghana, Egypt.

led to a decrease of Soviet fishing activities in fishing grounds close to the US (Österblom & Folke, 2015, p. 5).

D. European undertakings in faraway EEZs – a paradoxon?

The following section outlines how certain Western states are actively involved in far-off EEZs and scrutinizes colonial content in the usage of EEZs, if a certain "overcoming" of well-defined legal striation of the ocean is still possible. Details of the usage of the legal frameworks, as well as cooperation with the local population, possible environmental concerns and many more are included. The section will especially outline France's and the EU's activities in oversea EEZs due to recent developments and an exacerbated scramble for territory, as well as possible sites of exploitation.

1. Introduction to the EU's and France's global maritime territorial activities

Gaudot and Dubuquoy state that the "old" colonial past is now being revived by new territories and resources to conquer. The authors point out that, rather unobserved, the sea has become the new frontier in the globalized competition for fossil energy which has been traditionally carried out on land.[11] France has become the state with the second-largest EEZ globally, following the United States. The French claim 11 million km2 as their exclusive economic zones, an area of which 95% are overseas. Like the UK, France owes the large proportion of their EEZs from territories listed by the UN as decolonized (Gaudot & Dubuquoy, 2016).

[11] A third of world hydrocarbon production is now offshore, taken from the sea bed. 78% of Total's fossil hydrocarbon production is offshore, of which 30% is deep offshore (at a depth of over 1,000 meters).

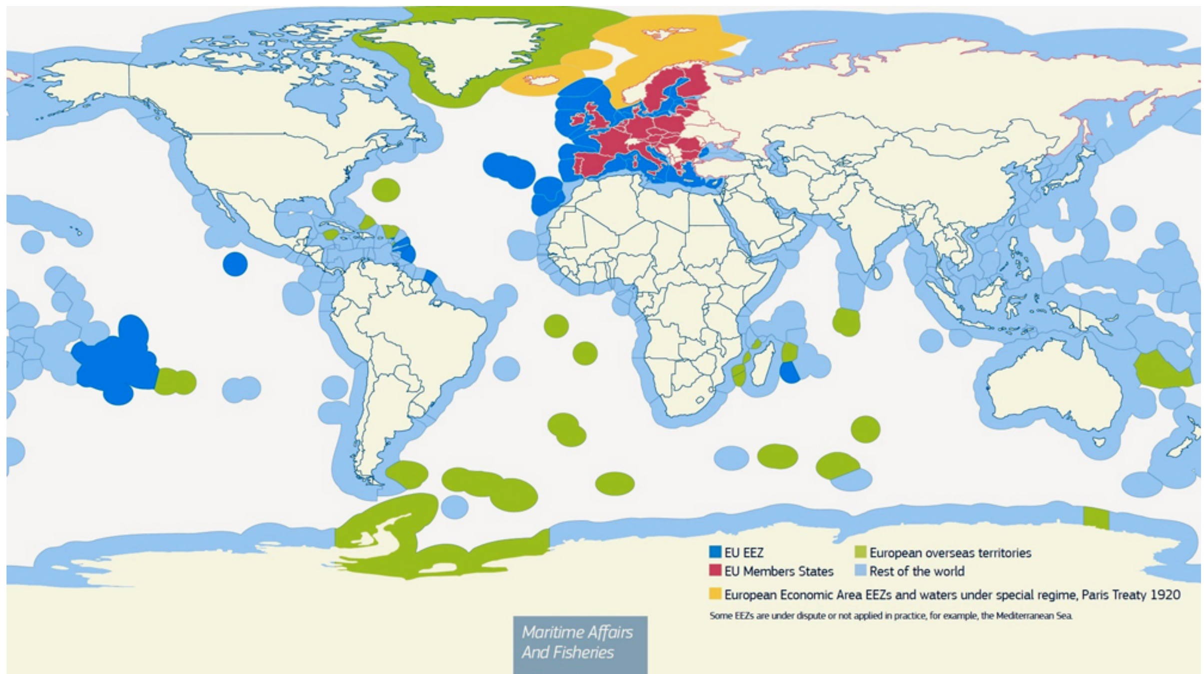

Figure 2 European EEZs

Europe is a relatively small continent. However, from the view of the sea, it suddenly regained the status of the great global continent once defined by its colonial empires (Gaudot & Dubuquoy, 2016). Considering the EU as a whole, it has the largest EEZ in the world, amounting to 22 million km2, including the European Overseas Territories (Marine Spatial Planning Programme).

Gaudot and Dubuquoy further mention the French program EXTRAPLAC (Extension Raisonnée du Plateau Continental) which will be dealt with in the following section. This project is led by IFREMER, the French Research Institute for Exploitation of the Sea, orchestrating the French conquests, as the authors put it. Recently, an area of 500,000 km2 has been claimed,[12] created by public money and oil companies (Gaudot & Dubuquoy, 2016). According to Professor Klare, old nationalist reflexes incite new

[12] France has been authorized to extend its continental shelf in respect of La Réunion, Saint-Paul and Amsterdam islands. For more information: Gouvernement français, France’s underwater area is extending by more than 150,000 km2, June 11, 2020, https://www.gouvernement.fr/en/france-s-underwater-area-is-extending-by-more-than-150000-km2 (accessed June 25, 2021)

forms of naval battles. Referring to various disputes, including the Eastern Mediterranean, the UK, and the Falkland Islands, aggravated nationalism is combined with an insatiable aspiration towards energy resources. This quest leads to a sturdy ambition to take them. Professor Klare points out that instead of regarding points of contention as a systematic problem that needs a specific strategy for resolution, the great powers have had the tendency to side with their respective allies (Gaudot & Dubuquoy, 2016).

The subsequent section will introduce parts of France's great maritime policy and its ambitions on the extension of its continental shelves based on an official policy document, to showcase some deliberations of the great maritime ambitions that France is pursuing.

2. *Behind the curtain of France's great ambitions: EXTRAPLAC and IFREMER*

Under the title of "Extension of the Continental Shelf beyond 200 nautical miles: an asset for France", the Opinion of the Economic, Social and Environmental Council on a report on behalf of the Delegation for Overseas Territories, was published in 2013.[13] This work, published in the Official Journal of the French Republic, is an extensive document comprising over 170 pages. It deals with the French maritime plans on the extension of the continental shelves in their overseas EEZs. In the summary of the opinion, it is stated that

[13] Economic, Social and Environmental Council (ESEC), The extension of the continental shelf beyond 200 nautical miles: an asset for France, September 10, 2013, https://www.lecese.fr/en/publications/extension-continental-shelf-beyond-200-nautical-miles-asset-france-0 (accessed June 25, 2021)

The issue of the extension of the French continental shelf is totally foreign to public opinion, unknown in political circles and generally absent from seminars and conferences on the sea, as well as in debates on the maritime policy of our country. Except for some specialists and a very narrow sphere of public figures in charge of the execution of the national EXTRAPLAC (the Reasonable Extension of the Continental Shelf) programme aimed at the extension of the French continental shelf beyond 200 nautical miles, this issue has been overlooked.

By expanding its continental shelves, France underlines having possibilities to extend its sovereign rights on the natural resources of the seabed and subsoil over an additional 2 million km2 approximately and subsequently acquiring sovereign rights for exploration and exploitation of natural resources in these areas, as well as increasing its geostrategic power (Official Journal of the French Republic, 2013, p. 7).

France considers the access to potential wealth, enumerating hydrocarbons, hydrothermal sulphides, cobalt crusts, polymetallic nodules, natural hydrogen, and biological resources as a considerable asset, if this contributes to a new model of sustainable development, particularly in their Overseas Territories. The document further relates to Article 76, which gives coastal states the possibility to extend their continental shelf seawards the 200 nautical miles limit. This specification led France to implement the EXTRAPLAC program (Official Journal of the French Republic, 2013, p. 7)

As the paper puts it, for the "completion of the conquest of the extended continental shelf and to implement a truly maritime policy in accordance with the

responsibilities and obligations of France", the French Economic, Social and Environmental Council (ESEC) formulated a list of recommendations.

On the part of finalizing the EXTRAPLAC program, among other things, the ESEC recommends to identify and secure funding for the completion of the program, as well as resolving diplomatic problems preventing the Caledonian case from being processed. The ESEC recommends that the French Department of Foreign Affairs intensify negotiations with Vanuatu, which earlier had objected French sovereignty on the Matthew and Hunter islands, in order to enable the Commission on the Limits of the Continental Shelf (CLCS) to provide their recommendations on the French submission concerning New Caledonia.

The ESEC further recommends publishing the outer limits of the continental shelf to be effective against third countries, thus confirming the sovereign rights of France over the natural resources of the seabed and subsoil of this expanded continental shelf. In more detail, the ESEC recommends intensification of their diplomatic relations with the countries in question to finalize all of the delimitation agreements necessary for the definitive conclusion of the submissions to the CLCS.

Another recommendation goes to the strengthening of the means of the Commission on the Limits of the Continental Shelf. In this regard, the ESEC recommends that France pleads for a remarkable strengthening of the budgetary and human resources of the Commission on the Limits of the Continental Shelf, to enable the Commission to respond efficiently and within acceptable time frames on submitted cases. France also seeks to establish a legal framework for exploration and exploitation activities of the deep seabed, thereby highlighting the opportunity to become a leading experimenting country in this field, serving as a model in protecting the marine

environment. Various other recommendations deal with the integration of ultramarine territories for their further maritime policy and the knowing of resources and marine ecosystems (Official Journal of the French Republic, 2013, pp. 7-12)

Altogether, France has a truly sophisticated and perfected program on its plans of maritime extension. It is also interesting to read their summary of opinion where they clearly highlight how unknown their plans for continental shelf expansion and strive for natural resources are.

The following sections will dive deeper into more practically related cases and show French activities in the Pacific, also explaining the cases on New Caledonia and Vanuatu, which have also been mentioned as part of recommendations for the intended extension of continental shelves.

3. *France and the Blue Pacific: a big winner on the level of EEZ?*

France has been considered one of the most considerable colonial powers in the world. However, it has been able to "keep" some of its overseas dependencies, including the three island states of New Caledonia, French Polynesia, and Wallis and Futuna. Recently, these states have been attempting to become part of the Pacific Islands Forum,[14] an international organization that usually only takes in fully-fledged states. Some conflicts have arisen on the legal status of these island states in which it is worth to consider the French role. Under the agenda of the "Blue Pacific" by the 48th Pacific Islands Forum held in Samoa in 2017, Pacific island nations have been placing increased priority on the oceans, especially with regards to climate change, maritime

[14] The Pacific Islands Forum is an inter-governmental organization with the aim to enhance cooperation between states and territories of the Pacific Ocean, including the formation of a trade coalition and peacekeeping operations. See https://www.forumsec.org

security, fisheries and ocean biodiversity. It is debatable what the Blue Pacific agenda means for the forum countries' engagement with France, as France controls a vast domain at sea in the region (Maclellan, France and the Blue Pacific, 2018, p. 427). Officially, France constantly claims "shared sovereignty" with their Pacific colonies in the 21st century. Nevertheless, France holds control over defense, foreign affairs, currency, the judiciary and maritime boundaries (Maclellan, 2018).

After the 1970s, Australia and New Zealand, besides other Forum members, started criticizing France's colonial policy in the Pacific. France was considered an obstacle to the general strategic position of the West in the pacific back then, as they worried about island nations to deepen ties with the Soviet Union[15] (Maclellan, France and the Blue Pacific, 2018, p. 427).

The Australian shift came along with a desire by island states to exceed old colonial boundaries and engage more with non-self-governing territories (NSGTs) in the region. In 2004 it was agreed upon to "encourage closer contacts with non-sovereign pacific territories, through progressively guaranteeing them observer status at leaders' meetings and associated meetings of the Forum Officials Committee. New criteria for participation should be developed, grounded in the region's interests" (PIFS, 2004). New Caledonia in 1999 and French Polynesia in 2004 gained observer status at the Pacific Islands Forum, where both have been upgraded to "associate members" at the 2006 Forum meeting. Wallis and Futuna gained observer status in 2006, and currently, France aims to upgrade their status to associate membership (Maclellan, Asia & the Pacific Policy Society, 2018, p. 427).

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[15] There was particular concern over French support for the secessionist movement in Santo (1979–1980), designed to impede the New Hebrides' path to independence; the 1985 Rainbow Warrior affair; France's militarization of New Caledonia in the mid-1980s; and French nuclear testing at Moruroa and Fangataufa atolls until January 1996 (Maclellan & Chesneaux, 1998).

Governments in Australia and New Zealand have continuously supported the integration as part of a strategy to reinforce French presence in the region (Carroll & Ell, 2017, p. 11). Moreover, Pacific island states have been re-engaging with France by way of bilateral and multilateral agreements. This process continues under French President Emmanuel Macron, presenting himself as master of climate and ocean policy. France's technical expertise in areas such as reef ecology delivers benefits for Forum countries but also serves its own strategic interests (Maclellan, Asia & the Pacific Policy Society, 2018, p. 427).

These policy changes coincided with major geopolitical changes in the region, increasing influence from countries such as China, Indonesia, and India, the so-called "non-traditional partners" (Maclellan, 2015). French officials are keen to highlight their power in security and stability in the region, thus reaffirming French sovereignty over the Pacific dependencies (Maclellan, Asia & the Pacific Policy Society, 2018, p. 427). When in 2016 the decision has been made to include two NSGTs – New Caledonia and French Polynesia – as full members, which happened to be a serious change, it was no surprise that a series of diplomatic challenges for Forum island nations came up. This highlights a significant contrast to the original motive of supporting decolonization for the remaining islands under colonial rule, which was the main idea of the foundation of the organization in 1971 by independent and sovereign states (Maclellan, 2018, p. 428). Maclellan further makes clear that most French metropolitan citizens have limited awareness of their countries' overseas activities. As such, benefitting of the maintenance of colonialism plays a disproportionate role in French institutions. The Overseas Ministry bureaucracy and the French military benefit from highly remunerated employment in warmer climates, local business elites benefit from import/export

monopolies as well as transnational corporations involved in resource exploitation next to a number of government and private research organizations. Most officials in Paris still believe that the costs of maintaining a colonial empire must be taken for granted and accepted (Maclellan, 2018, p. 429).

A 2014 report from the Overseas Commission of the French Senate noted:

> *The exercise of our sovereignty over these vast stretches and the international competition we face are certainly a difficult cost to bear in this period of crisis. But this is an investment for the future, an historic opportunity for growth and expansion. France, with its overseas territories on the front rank, must seize this opportunity and bet on the blue economy.* (Senate, Rapport d'information Fait au Nom de la Délégation Sénatoriale à l'outre-mer, sur la Zone Économique Exclusive des Outre-mer: Quels Enjeux?, 2014, p. 13)

For France, with its widely distributed colonial empire, the UNCLOS offers significant advantages. While Metropolitan France has a surface of an EEZ of only 340,290 km2, its overseas dependencies add 11 million km2 of EEZ altogether. According to a French Senate report on "Maritimisation", without the overseas territories in the Pacific, Caribbean, Indian and Atlantic Oceans, the French EEZ would rank only 45th instead of 2nd in the world (Senate, 2011-2012). This sentiment was echoed in another Senate report (2014) on the significance of the French maritime zone as a member of the UN Security Council:

> *Thanks to its overseas possessions, France is one of the countries affected - indeed the most affected - by this revolution in sharing the oceans. Its EEZ is in fact the second-largest behind that of the United States and beyond this, the most diverse. Present in both hemispheres and at all points of the compass, the French EEZ is the only one on which the sun never sets.* (Senate, 2014, p. 13)

Of the total of 11 million km2 of overseas EEZ, more than 7 million km2 are situated in the Pacific. The EEZ of French Polynesia amounts to around 5 million km2,

New Caledonia adds 1.7 million km2 and Wallis and Futuna further 300,000 km2 (United Nations, 2018). Even the uninhabited Clipperton Island, which is situated near the extensive seabed sources of the Clipperton-Clarion zone, has a larger EEZ than metropolitan France. As more and more countries tend towards the “blue economy”, French policy-makers very well know about the economic importance of the EEZs’ resources: fish, seabed minerals, deep sea oil and gas reserves, the biological diversity of reefs (Maclellan, 2018, p. 429).

While visiting Tahiti in 2016, then French President François Hollande reassured how significant French control of the Pacific EEZ would be:

> *We have to protect the EEZ. We have to ensure our presence so that no one can come to exploit the EEZ without our consent or authorization. It’s our common heritage - it’s yours, it’s ours and we share it. So we must ensure that other people can’t interfere with part of our territory* (Hollande, 2016).

Besides the importance of the geopolitical role, the economic part of the EEZ is a further significant aspect for France and the EU, according to the French Senate:

> *These are spaces which involve both the reaffirmation of the role of France’s overseas territories, but also the place of France and Europe in global governance in the 21st century ... the 11 million km2 of EEZ and their potential resources pose an opportunity both for France and for Europe in the economic competition on the international stage. Furthermore, by their specific characteristics, France’s overseas possessions bring Europe an opportunity for opening unequalled in the world.* (Senate, 2014, p. 13)

Concerning the legal standing of France’s overseas dependencies, a further complication for the Pacific Islands Forum arises as all three hold a different legal and constitutional status within the French republic. As documented by decolonization expert Carlyle Corbin, it is for example critical that France can override French

Polynesia's autonomy (Corbin, 2013). This is confirmed by Semir Al-Wardi of the University of French Polynesia. According to him, French Polynesia has autonomy but not full legislative power nor complete control of its international relations (Lacroux, 2017). In contrast, former French ambassador for the Pacific Hadelin de la Tour du Pin has mentioned that control over defense and foreign policy is not a significant issue:

> *New Caledonia today, through its organic law, has 98 percent of the powers of a sovereign state. What it lacks in reality is the powers of sovereignty: defense, currency, foreign affairs. If you look at the members of the Pacific Islands Forum, many of them have neither their own money (the Marshall Islands uses the US dollar), nor their own defense (the Marshall Islands relies on the US forces while the Cook Islands are defended by New Zealand), nor their own effective diplomacy, as they lack embassies around the world. [de la Tour du Pin H 2013, unpublished data, interview]* (Maclellan, France and the Blue Pacific, 2018, pp. 433-434)

The lack of international standing further restrains engagements as equal partners with other states or the adoption of key international treaties on oceans and climate. Moreover, the agency to implement agreements in the Pacific Islands Forum is also dependent on authorization by the French state (Morin, 2020, p. 434).

As the Brexit vote created uncertainty over the UK's future role as a gateway for Commonwealth islands to the EU, relations with the EU are increasingly developing. Secretary of State Lecornu said in an interview:

> *Brexit will create something new in the Pacific. France, which is a large Pacific nation, will henceforth be the only member nation of the European Union in the region. The three overseas collectivities French Polynesia, New Caledonia and Wallis and Futuna - the pays et territoires d'outre-mer (PTOM) as we call them - are the incarnation of Europe in this part of the world after Brexit. [Lecornu, 2017, interview]*

France presents its Pacific dependencies as an opening to the Pacific for EU partners. At the same time, Paris tells the Forum members that its three dependencies in the Pacific represent a gateway into Europe. Nevertheless, it is unclear how the membership of French Polynesia and New Caledonia in the EU's network of Overseas Countries and Territories (OCT/PTOM) offers a possibility for sovereign island states to engage with Europe. The author raises the question why independent states should channel their bi- and multilateral relations with the EU through the EU's OCT Group. Besides, there is already a regular dialogue between the European Commission and the Pacific Islands Forum Secretariat, EU representatives visit the annual Forum Dialogue and some further bilateral activities. Hence, the added value coming from the OCT mechanism is unclear (Maclellan, 2018, p. 436).

France has long claimed the EU-Pacific connection for its own strategic purposes, being a major contributor of the European Development Fund (providing 19 percent of its budget). France has openly used EU procedures in the Pacific for its own good, as then Oversea Minister George Pau-Langevin told the Senate in 2014:

> *The French government has been particularly active in European institutions within the framework of the new programming of EDF funds for the period 2014–20, in order to obtain the maximum support for the economic development of our EEZs.* (Pau-Langevin, 2014)

In the 21st century, maritime resource exploitation will become a major battlefield due to France's control over the sovereignty of Pacific EEZs. Independence movements in French Polynesia and New Caledonia actively pursue their rights over marine resources under international law, a tension rising for the Blue Pacific policy within the Forum.

Richard Ariihau Tuheiava, Former Senator for French Polynesia, told the UN Special Committee on Decolonisation:

> *We have continually emphasized the critical nature of the resource question as a core issue for our future development. Whether or not these resources are considered in Paris to be "strategic" is irrelevant to the applicability of international legal decisions which place the ownership of natural resources with the people of the non-self-governing territories.* (Tuheiava, 2017)

Subsequent resolutions of the UN General Assembly have emphasized the rights of colonized peoples to their natural resources, on land and in the sea:

> *Any administering power that deprives the colonial people of Non-Self-Governing Territories of the exercise of their legitimate rights over their natural resources ... violates the solemn obligations it has assumed under the Charter of the United Nations.16*

Resolution III of the UNCLOS reassures people's rights living in NSGTs. Other documents, such as the resolutions of the UN Special Committee on Decolonisation in its 2017 statement commits to "the inalienable rights of the people of French Polynesia to the ownership, control and disposal of their natural resources, including marine resources and undersea minerals".

Richard Tuheiava told the UN Special Committee in June 2017:

> *Although the current French organic law allows for the administrative "competencies" of management and exploration of the natural resources to be monitored by our local elected Government, Provision 2 § 2 of UNCLOS appears to acknowledge that full right of sovereignty over our EEZ remains with France as the State party. Provision 2 § 2 of UNCLOS also extends the right of sovereignty of the administering Power over the undersea and seabed resources, as well as the aerial zone above our EEZ.* (Tuheiava, 2017)

[16] UNGA Resolutions 48/46 of 10 December 1992; 49/40 of 9 December 1994; Resolution 67/126 of 18 December 2012.

Currently, France is developing exploration investment initiatives in cooperation with other Forum member states. Australia and France have worked on common projects searching for potential offshore oil and gas. Another example is Geoscience Australia that has worked with French research companies to find deep seabed hydrocarbons between Queensland and the New Caledonian basin, bringing evidence of potential deep-sea oil resources in the Capel and Faust basins to light. An additional expedition has been between the French Research Institute for Ocean Exploitation (IFREMER) and the French corporation Technip, exploring rare earth off Wallis and Futuna by way of a joint public-private venture (Senate, 2014)

The French Polynesia's statute of autonomy under Article 14 (9) stipulates that the French State, and not the Government of French Polynesia, controls a range of legal powers related to the maritime policy (Corbin, 2013).

Author Maclellan finally points to the wide range potential cooperation areas in the Pacific between anglophone and francophone nations in the region. Yet, the integration of NSGTs into an organization of independent and sovereign nations brings up new problems for Pacific regionalism. France clearly has its own strategic interests in the region and its enhanced partnership with Australia, the largest Forum member, raises questions over the priority to self-determination for France's colonies (Maclellan, France and the Blue Pacific, 2018, p. 439).

Fijian statesman Kaliopate Tavola asked

> *Will the incorporation of France in Pacific regionalism mark the death of decolonisation efforts? Or will it signify a historic change in the approach to decolonisation? (…)* (Pareti, 2017)

Following up on the last quotation, it is certainly interesting how the Pacific Islands Forum deals with the admission of non-self-governing members considering

their policy of decolonization of Pacific island states. For France, the EEZ regime offers territorial and economic advantages that they are keen to pursue, as various official statements proof. The French justify their position and upkeeping of Pacific relations also as beneficial to the EU.

Besides France's huge Pacific EEZ ambitions, the case of the EU and African EEZs is another one of interest in light of resource exploitation and colonial ambitions. The African EEZ belongs to the biggest around the world. However, the gains from the exploitation of African EEZs to African states are intriguingly small. The following section will examine the African EEZ case and shed light on the question why Africa cannot use its EEZs as efficiently as one would expect according to the legal frameworks.

4. *Fisheries in Africa and its EEZs – serving which purpose?*

With the possibility of establishing Exclusive Economic Zones, African states should theoretically have been enabled to gain wealth from resources in their territories and bring significant benefits to their populations. Small-scale fishing is a considerable source of income in coastal areas for the fishermen and those employed in the sector, especially women. As a result, states on the African continent should have enhanced food security for their people (Morin, 2020, p. 3). In this context, it is essential to mention that fish consumption is lowest in Africa. A 2012 report devoted to fisheries by the United Nations General Assembly indicates the uneven distribution of per capita fish consumption, whereas the report averages about 29 kg/year per capita of fish

consumption in industrialized countries, but only 9.1 kg/year in Africa[17] (Morin, 2020, p. 3).

However, African states did not enhance food security via this channel. Small-scale coastal fishing mainly takes place in the territorial sea. Resources in the EEZs are primarily exploited by vessels flying flags of third countries, mostly from other continents, such as Europe, East Asia, and Russia. In the following, catches are frequently exported straight to these countries (Morin, 2020, p. 3).

Industrial fishing vessels registered in an African coastal state and operating in the adjacent EEZs are often owned by "joint enterprises". These are companies that are registered in the responsible coastal state but are indeed controlled by foreign shipowners. This is not a unique phenomenon but rather concerns several hundred vessels. Many are controlled by European interests, especially by Spain, Italy and France, as well as by China, Korea, Russia etc. (Lamine Niasse & Seck, 2011) In the "Opinion of the European Economic and Social Committee on Joint enterprises in the fisheries sector: current state of play and future prospects" it is also described how the EU encouraged the formation of these joint enterprises until the early 2000s. In the following, it exported vessels from the over-capacitated EU fleet to African host countries. At the same time, these vessels supplied European markets as a priority.[18] The author further points to the lack of indication in recent literature that there is a

[17] For further information see United Nations General Assembly "Interim Report of the Special Rapporteur on the Right to Food", A/67/268, 8 August 2012

[18] See further: EUROPEAN ECONOMIC AND SOCIAL COMMITTEE, "Opinion of the European Economic and Social Committee Joint enterprises in the Community fisheries sector - current and future situation", OJ C 65, 17 March 2006 (https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2006:065:0046:0049:EN:PDF) (accessed June 25, 2021)

movement towards an Africanization of these foreign-controlled vessels (Morin, 2020, p. 3).

Despite large EEZs around the African continent, the states and their populations do not seem to gain from the marine resources. There is evidently a distinction made between the quality of species fished, and it is obvious that shipowners of distant fishing countries and their respective consumers benefit from high-value species such as tuna or shrimps. The lower-value species, like small pelagic fish which are important in feeding the African populations (for example sardinella in North-West Africa), have been increasingly fished in the last ten years to being processed into fishmeal and for exportation to aquacultures, especially to China. Author Morin also points to the competition between local small-scale fishers as opposed to the industrial fleet, which is also reflected in conflict situations in the territorial sea or in nearby EEZs. The industrial fishing fleet often comes close to the coast, including in the territorial sea, even when prohibited. Prosecutions rarely happen due to the weak surveillance means of African coastal states (Morin, 2020, p. 3f).

The following part will scrutinize how it is possible that no African state has a sufficiently developed fishing sector in order to prevent their governments from allowing foreign fleets to come in and take the fish from their EEZ. How is it possible that African states have not better taken advantage of their EEZs where they dispose of sovereign rights over marine resources? (Morin, 2020, p. 4)

For this purpose, it is worth studying the provisions of the UNCLOS (in its Part V) on EEZs on the African example. Article 56 (a) UNCLOS contains the provision dealing with the sovereign rights of a state in its EEZ, stipulating that the coastal state has sovereign rights for the purpose of exploring and exploiting, conserving and

managing the natural resources, whether living or non-living, of the waters superjacent to the seabed and of the seabed and its subsoil, (…) of the zone.

However, Article 56 (b) clarifies that these sovereign rights do not correspond to total sovereignty, as the article adds that “the coastal state shall take due regard to the rights and duties of other states” in exercising these rights.

Article 61 UNCLOS further grants the coastal state the right to fix the allowable catch in its EEZ, and among other matters, considering the economic needs of coastal fishing communities and the particular requirements of developing states (Morin, 2020, p. 5).

Legally, the coastal state does not have complete freedom to set the allowable catch. After considering scientific data and the obligation to avoid overexploitation, the coastal state must, according to Article 62, set the objective of promoting the “optimum utilization” of resources. It must first determine its own capacity to exploit and then, if that capacity is less than the entire allowable catch in accordance with the objective of optimum exploitation, “it shall, through agreements or other arrangements [...] give other states access to the surplus of allowable catch.” It is added that the coastal state will have “particular regard to the provisions of Articles 69 and 70, especially in relation to developing states mentioned therein”, concerning land-locked and geographically disadvantaged states, respectively. Finally, it is specified that the coastal state must also take into account “the need to minimize economic dislocation in states whose nationals have habitually fished in the zone or which have made substantial efforts in research and identification of stocks.” Article 62, in combination with 69 and 70 UNCLOS, is particularly relevant for the African continent since many states are land-locked, and others have narrow coastlines and are hence “geographically

disadvantaged". As mentioned above, Article 62 (3) UNCLOS states that the coastal state shall particularly consider Articles 69 and 70, especially regarding developing states. Both Articles 69 and 70 refer to land-locked and geographically disadvantaged states, that "shall have the right to participate, on an equitable basis, in the exploitation of an appropriate part of the surplus of the living resources of the exclusive economic zones of coastal states of the same sub-region or region, taking into account the relevant economic and geographical circumstances of all the states concerned" (Morin, 2020, p. 5).

As stated in Article 62, the conditions for the participation of third states in exploiting the resources of the coastal state need to be arranged. Where the fishing capacity of a coastal state is limited, i.e. where the "surplus" is in practice almost non-existent, "equitable arrangements on a bilateral, sub-regional or regional basis" must be concluded by that coastal state with land-locked or geographically disadvantaged states in the same region or sub-region so that they can nonetheless participate in the exploitation of the living resources in this EEZ (Morin, 2020, p. 6).

As a result, it is evident that the sovereign rights of coastal states with regards to the exploitation of their EEZs are highly regulated. Although it is up to the coastal states to set the permissible volume of catches, they must encourage optimal exploitation of the resources and consider the recognized rights of other states, especially land-locked or geographically disadvantaged states.

On a related note, these provisions are reminding of the spirit of UNCLOS III and Maltese Ambassador Arvid Pardo's speech in 1967, where he expressed deep concern about the appropriation of vast marine areas by states, and the requirement to rebuild the law of the sea on new foundations, especially considering the riches of the

sea as the "common heritage of mankind" which should be beneficial to all (Morin, 2020, p. 6).

Far from Arvid Pardo's ideas, the UNCLOS III conference concluded with a substantial expansion of coastal states' rights. Moreover, the provisions in favor of land-locked or geographically disadvantaged states have never been rendered into practice. Author Morin points to the misleading wording of Articles 69 and 70 due to the substantial evolution of the position of major maritime states during the UNCLOS III negotiations. Initially, the major maritime states were opposed to expanding the rights of coastal states because they wished for the areas beyond the territorial seas to stay areas of the high seas. As such, they behaved as allies of the land-locked or geographically disadvantaged states in an objective manner. Nevertheless, they changed opinions once it became clear that a consensus within the conference was in reach on the recognition of the sovereign rights of coastal states in their EEZs for the exploration of resources in return for the absence of any impact on the regime of navigation in the EEZ, which would still be that of the high seas, and for the acceptance of the specific regime on the right of transit through straits. In the end, these maritime states, which mostly disposed of significant coastal zone, gained on both sides; they would secure new rights with EEZs, and the regime of freedom of navigation was still preserved (Morin, 2020, p. 6).

Finally, land-locked and geographically disadvantaged states have had to submit to provisions which at first glance seemed very favorable to them, but have no real operational value.[19] However, if these states wished to intervene with coastal states, their means of pressure would be insignificant. Article 297 paragraph 3 (a) of the

[19] The wording „shall" makes clear the peremptory value of these obligations (Morin, 2020, p. 7).

UNCLOS stipulates that, with regards to fisheries, the coastal state is not obliged to accept the submission to a compulsory settlement procedure before an international court or tribunal of "a dispute relating to its sovereign rights with respect to the living resources in the exclusive economic zone or their exercise, including its discretionary powers for determining the allowable catch, its harvesting capacity, the allocation of surpluses to other States and the terms and conditions established in its conservation and management laws and regulations." As there is no possibility of referring the matter to an international court or tribunal that could make a binding decision, the only legal means available would be a conciliation procedure according to Part XV section 1 UNCLOS.

In any case, the coastal state concerned would have to agree to the initiation of a conciliation procedure and subsequently accept the recommendations of the conciliation mission (Morin, 2020, p. 7).

In reality, the rights enshrined in Articles 69 and 70 UNCLOS have not been translated into practice. Despite some African coastal states in the 1980s had shown openness towards these provisions, the cooperation did not continue.[20] On the contrary, the presence of fishing vessels from other continents like Asia and Europe is highly significant, especially from the EU (Morin, 2020, p. 7f). Here it is important that the money is used appropriately and does not enter into a corruption circuit (Morin, 2020,

[20] See CARROZ, Jean and SAVINI, Michel, « Les accords de pêche conclus par les Etats africains riverains de l'Atlantique », Annuaire français de droit international, Paris, vol. 29, 1983, pp. 674-709. See in particular p. 682, note 25, where the authors, senior officials at FAO, cite two examples: The first, that of the member countries of the Economic Community of West Africa, where a convention was under negotiation, the capital of which would have been subscribed by three land-locked States (Mali, Niger and Upper Volta) and three coastal States (Ivory Coast, Mauritania and Senegal). The second, that of the Gulf of Guinea States (Benin, Ivory Coast, Ghana, Nigeria and Togo), where negotiations were also under way between these States, two of which are geographically disadvantaged because of their very narrow coastlines (Benin and Togo). But these projects do not seem to have led to anything concrete, even temporarily.

p. 10). Since the early 2000s, the Coalition for Fair Fisheries Arrangements has advocated that the EU should stop paying a share of the fees for EU vessels gaining ground to developing countries as this is an unfair subsidy and the industry should be responsible for the costs of commercial arrangements. To this end, the European Court of Auditor inspected how these funds are managed in their report "Are the Fisheries Partnership Agreements Well Managed by the Commission?"[21], highlighting many problems. The ECA raised concerns about the fund's impact, problems in transparency and accountability, and a lack of coordination with other sources of development assistance (Panossian, 2016).

Concluding the case on African EEZs and their primary beneficiaries, author Morin notes that despite the uncontested existence of economic constraints, there is no justification that after having become independent for the most part in the 1960s and having gained sovereign rights in their EEZs in the 1980s and 1990s, African states apparently do not want to decrease foreign presence in their waters at the dawn of the 2020s. For the author, it is as if the EEZs of African states had become economic colonies of distant fishing states. As such, it is hardly acceptable that the income from the trade-offs over the fishing rights seem to benefit the state apparatus only and is not used to improve the continent's food security (Morin, 2020, p. 24).

[21]see European Commission, Sustainable fisheries partnership agreements (SFPAs), https://ec.europa.eu/fisheries/cfp/international/agreements_en and European Court of Auditors, Are the Fisheries Partnership Agreements well managed by the Commission?, 2015, https://www.eca.europa.eu/Lists/ECADocuments/SR15_11/SR_FISHERIES_EN.pdf (accessed June 25, 2021).

5. Conclusion on examples of the usage of EEZs

The mentioned examples on different usages of EEZs around the world impressively show that an EEZ does not automatically "belong" merely to its coastal state. France appears to be genuinely attached to its overseas dependencies and pursues strongly to keep them as is. In light of the research questions of this thesis, France continued to keep islands under its dependency long after decolonization had set in as was mentioned on *page 13* by author Houbert. Considering the strong statements by French politicians, including the one by former French President Nicolas Sarkozy, it is evident that France pursues dominance over the sea to exercise and project its power. Following Sundhya Pahuja's claim, imperialism seems to be a reality still, and by international law, France is enabled to perpetuate its sovereignty over far away EEZs. Moreover, the concept of extension of the continental shelves offers states the possibility of vast surplus areas of influence.

CHAPTER V

COMMON HERITAGE OF MANKIND – COMMON HERITAGE FOR MANKIND?

A. A genealogy of discoveries of seabed resources

The seabed and the occurrence of its mineral resources led to an international legal battle that unfolded during the decolonization era. Prior to the UNCLOS, there have only been a few provisions regarding the deep seabed. The 1958 Continental Shelf Convention contained provisions of the shallow seabed being under national jurisdiction. These norms were defined vaguely by criteria of adjacency and exploitability. The 1958 High Seas Convention only referred to the seabed regarding the freedom to lay cables and pipelines (1958 Convention on Continental Shelf). With the UNCLOS regime, the seabed was defined as "the Area", lying beyond the limits of national jurisdictions and prohibiting all exercise of sovereignty or sovereign rights according to Article 1 (1) UNCLOS.

The possibilities of usage of the deep seabed suddenly changed at a high pace, as the idea of drilling the deep seabed gained momentum in the United States. The reason behind this was, on the one hand, improvements in oil and mineral drilling technologies, and on the other hand, the rising demand for metals. The findings of manganese nodules gained huge attraction. In the 19th century, an expedition had collected samples and gave an account about their polymetallic content, manganese, copper, cobalt, and nickel (John Murray, 1891, p. 341). However, as large-scale exploitation of the nodules was, back then, impossible, they were forgotten. The Scripps Institution of Oceanography in 1959 rediscovered the rich deposits of manganese nodules, excavating and

photographing the ocean floor and finally gaining huge attention (Ranganathan, 2019a, p. 35). Further works were carried out: the commissioning of a study on the possibility of mining the nodules on a commercial scale, the publishing of books and studies catalyzing the development of deep-seabed mining, bringing up exciting estimations about it as a highly profitable business (Glasby, 2002, p. 161). These publications concurred with other factors that made maritime studies famous in the 1960s, leading to an increase in the possibilities of using the ocean in various ways. With its untapped reserves of food and minerals, the ocean was considered the cure-all for newly rising problems like population explosion and food scarcity. Back then, visions of human habitation in the sea were frequently flourishing, besides marine farming and nodule mining (Ranganathan, 2019b, p. 36).

B. The process during the UNCLOS III negotiations

These deliberations incited discussions on the law that should govern the process of deep seabed mining. Clarity on the legal framework was undoubtedly needed, as companies planned to make fixed capital investments into mining sites and creating mining equipment (Steinberg P. E., 2011, p. 187f). Within this context, the concept of the common heritage of mankind was discussed. States began contemplating on what terms jurisdiction could be established over this area of the ocean (Ranganathan, 2019b, p. 36).

The deep seabed discussion during the UNCLOS III negotiations accelerated in 1967 when the Maltese delegation argued that above all, the UN should develop the use of seabed resources as capital for poorer states. However, Maltese Ambassador Arvid Pardo, the main supporter of the concept of CHM, was well aware of the possibility that

economic and strategic interests would cause detrimental outcomes once technologically advanced countries approached the seabed. He stated that a competitive battle was already underway and that it would even surpass "in magnitude and implication the colonial scramble for territory in Asia and Africa" (UN General Assembly, 1967). Pardo strongly advocated for a legal framework that would permit exploitation under international license for the benefit of mankind as a whole. The goal was to share financial revenues from commercial exploitation among countries, with a clear preference to poorer countries. This agreement would establish an autonomous international agency to manage it (UN General Assembly, 1967).

Developed states hoped that there would be a smaller committee dealing with the issue to reconcile multiple domestic interests in the seabed use. Among these interests were corporate interests preferring broad zones of national jurisdiction over the seabed and interests of non-governmental bodies (UK National Archives, 10/232–235).

Developing countries favored the possibility of seabed resources being used for their benefit, seconding Pardo's proposal. However, they were not unilaterally enthusiastic about all implications of CHM. Some of them were concerned about the ramification that the largest portion of the seabed would fall within the international jurisdiction. On the contrary, they were keen on expansive zones of national jurisdiction (UN General Assembly, 1967). As a result, the 1967 session of the UNGA established a Seabed Committee (the later International Seabed Authority - ISA) with the goal to specify precise mechanisms for the regulation of seabed mining (Assembly, 17 December 1970). However, the Seabed Committee revealed the major rifts in the opposition between developed and developing countries.

Developed states made clear that a regime should be modeled on the principle of the freedom of the high seas. Following their view, the seabed should remain a common space, open to economic activities of all countries. An international body should only function as a registry of mining sites, though they were willing to consider it a body empowered to issue mining licenses and distribute the fee to developing states. However, developing states wanted more. They wanted an international body with the jurisdiction to conduct all mining activities, sharing profits among all states, with special regard to the needs of developing states. This was their demand for feeling recognized equally, as active participants in the regime. What is more, by excluding national or private mining in favor of an international authority, seabed resources would have been recovered at a sustainable rate (Ranganathan, 2019, pp. 40-42).

Developing states had concerns about such a parallel system led by an international body, the so-called "Enterprise". They worried that the Enterprise would not be competitive with regards to the private or public mining companies of developed states. Thus, they pushed for certain privileges in the use of the seabed. The focus of the negotiations shifted to five issues. The first of them was access to technology. Developing states asked developed states to provide technology to the Enterprise. However, developed states were only willing to share access to technology at standard market prices, without granting extra support or financial relief. The second issue turned around the claims on sites, the third about financial support to the Enterprise and the International Seabed Authority. There was also a major concern about the type of resources, as the minerals contained in manganese nodules were also available on developing countries' lands. Therefore, they feared an adverse impact on their land-based production of minerals, demanding production quotas, which were strongly

opposed by developed countries. Moreover, developing countries were worried about the ISA's structure in decision making. They would have obviously formed a numerical majority in such a body. On the contrary, developed states pushed for a smaller council, a forum in which they would have greater proportionate representation (Ranganathan, 2019, pp. 42-43).

There have been two procedural decisions taken during the UNCLOS III sessions that worsened the battle between developed and developing countries. These were the condition that all decisions were taken by consensus, and that the treaty would be negotiated as a package deal, with the only option to accept it or reject it as a whole. The expectation was that this would facilitate the adoption of a seabed regime that all states would accept. Finally, the seabed regime became the basis for the rejection of the UNCLOS by several developed states (Oda, 1977, p. 125).

C. How was the UNCLOS concluded – 1994 Implementation Agreement

What turned out to be a bright idea, namely the expanded conception of the seabed as the common heritage of mankind, was somehow detrimental to certain countries' interests. A group named the Reciprocating States Regime ("RSR"), comprising of the United States, the United Kingdom, France, Italy, the Netherlands, Belgium, Germany, and Japan, was formed (Ranganathan, 2014, pp. 149-150). The skepticism of especially these countries, but also the Soviet Union, was the reason why UNCLOS did not enter into force for over a decade, in parts because developed countries opposed to the CHM principle. (Fidler, 2003, p. 55).

Considering the perspective of the developed states, the outcome written down in the UNCLOS was regrettable. They resented the complex bureaucracy that the

developing countries had managed to build in realizing their aims, while for them, it had been clear that the economic promise of seabed riches had been exaggerated. As a result, many Western developed states worked hard to alter the seabed regime of the UNCLOS (Ranganathan, 2014, p. 44).

Finally, they presented the "1994 Implementation Agreement".[22] This new regime prioritized commercial aspects of seabed mining. It reduced the CHM regime of the UNCLOS to a few provisions on revenue sharing. Western scholars described the changes as an "excellent example of adapting international law to new circumstances" (Sohn, pp. 704-705). Ranganathan criticizes Sohn for his statement where he hails the changes without thinking of this being an undermining (Ranganathan, 2020, p. 12). Other developing states' scholars presented them as "mutilation" of the CHM ideal (Anand, 2004, p. 180/196). Overall, the monopoly model would have supported more equitable mining arrangements, and it would have been closer to the "environmentalism of the poor", which means the extraction within the assessment of the distribution of costs, needs, and benefits (Ranganathan, 2020, p. 8).

Since the initial flush of excitement about the material gains from the manganese nodules had quickly receded, it is often noted that the battle was mainly about the law and the establishment of a legal precedent. In this regard, the nodules were only a pretext, and the regime itself was the prize as the potential example for other regimes on natural resources. To some extent, the normative - or as some stated, the ideological - dimension took over the battle's material dimension. Doubts about the feasibility of seabed mining and their rentability rose already prior to the commencement of UNCLOS III. Although Western states were hesitant to communicate this to developing

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[22] Agreement relating to the implementation of part XI of the United Nations Convention on the Law of the Sea of 10 December 1981

states, they instated on the framework that was finally implemented in the 1994 Implementation Agreement. However, developing states' continuous belief in material prospects of seabed mining relied on near-term prospects on revenues (Ranganathan, 2019b, p. 46).

The following section will shed light on the proceedings of the management of deep seabed mining with time. Further, in the case of Nauru as a developing state, it is showcased how chances of equal opportunity in terms of exploration can be circumvented.

D. After completion of the UNCLOS – bodies established, work processes taken up

The regime of CHM was created based on the assumption that deep seabed mining would become a reality well before the end of the 20th century – an assumption that has proven far too optimistic (Tuerk, 2017, p. 280). The International Seabed Authority, seated in Kingston, Jamaica, is an autonomous international organization established with the entry into force of the UNCLOS in 1994 and to which all parties to the convention are ipso facto members (Art 156 UNCLOS). By the end of 2018, the ISA has concluded 29 15-year exploration contracts with private enterprises, state enterprises and consortia. Among them are for example the governments of India and Korea, German, British, French, Chinese and Russian companies and also enterprises from some island states such as Tonga, Kiribati and Nauru (International Seabed Authority, 2019).

The "Mining Code", as the whole comprehensive set of rules regarding exploration and exploitation of the seabed is called, is still underway. A recent scientific

opinion by the University of Hawaii warns about an understudied ocean floor, while it is evident that digging the seabed must have consequences. Moreover, the mining sites are in international waters where accountability is cloudy, and with little oversight (Delbert, 2020).

Environmental impacts might only be the beginning of controversies should commercial ocean floor mining take place, as the financial proceeds are not clear yet. Concerns are raised, as the UNCLOS does not entail detailed rules on sharing and it will be a political question for the states to address (International Seabed Authority under pressure over deep-sea mining impacts, 2019). However, the CHM requires the development of measures for adequate protection of the marine environment, whereas the ISA is responsible for adopting relevant rules and regulations to this end. The ISA has been active and adopted regulations and recommendations following state of the art in environmental governance.[23] However, with regards to "better" exploitation, the question as to whether the seabed should be mined at all is relevant and deserves greater prominence. Scientists point out the severe harms such as the loss of marine biodiversity, which may be caused by seabed mining. There is an immense community criticizing seabed mining and warning of its likely detrimental effects[24] (Ranganathan, 2019a, p. 596f).

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[23] See for example Jaeckel, "The Implementation of the Precautionary Approach by the International Seabed Authority", ISA Discussion Paper no. 5, March 2017, https://isa.org.jm/files/documents/EN/Pubs/DPs/DP5.pdf (accessed June 25, 2021)

[24] See, e.g., Niner et al., 'Deep-Sea Mining with No Net Loss of Biodiversity: An Impossible Aim', 5 Frontiers in Marine Science (2018) 1; Van Dover et al., 'Biodiversity Loss from Deep Sea Mining', 10 Nature Geoscience (2017) 464; Jones et al., 'Biological Responses to Disturbance from Simulated Deep-Sea Polymetallic Nodule Mining', 12 PLoS One (2017) 1; Levin et al., 'Defining "Serious Harm" to the Marine Environment in the Context of Deep-Seabed Mining', 74 Marine Policy (2016) 245. One work explicitly raising the question is Kim, 'Should Deep Seabed Mining Be Allowed?', 82 Marine Policy (2017) 134.

E. A colonial race for deep sea resources and what it means for humanity

On the launch of the UK Seabed Resources/International Seabed Authority project in 2013, back then UK Prime Minister David Cameron expressed his opinion on the seabed mining industry, as quoted in the Financial Times, 24 March 2013,

> *"We are involved in a global race where we have to compete with the fast-growing economies of the south and east of the world ... We want to make sure we get every opportunity out of this"* (Zalik, 2018, p. 333).

The "Area" is a symbolic resource frontier, as its marine habitat is at the edge of human understanding. Concerning its governance regime, the Area is standing at the beginning of its ecological protection. Although at the same time, the industry strives for a rapid roll-out of a mining code. Geopolitical tensions throughout the 20th century have marked research activities in the Area. There has been direct involvement of global arms and oil industries in technological development and data gathering. Activities have also included state militaries, navies, and public and private intelligence agencies (Doel, 2003) (MacKenzie & Spinardi, 1988) (Oreskes, 2003) (Reidy & Rozwadowski, 2014).

Deep seabed mining data and technology shaped competition among private and state firms, despite the principle of technology transfer foreseen in the UNCLOS. As a result, the US and Russian militaries, besides oil industry-military joint ventures, such as Lockheed Martin and Shell Oil, have played significant roles in research and development (Zalik, 2018, p. 343f).

Tensions on the deep seabed governance arise partly from competing approaches to maritime law, with the deep seabed being represented as null versus common property. In that sense, space is protected for mighty "first movers" in the

international state system to shape the de facto governance in their interests. The notion of “terra nullius” or no man’s land could allow free access for those who lay claim to areas beyond state jurisdiction, whereas “common property” implies that these zones are already under a collective sphere of influence. Despite the principle of common heritage of mankind, the diverging approaches have allowed contractors to effectively encompass nominally collective property in the Area (Zalik, 2018, p. 344). Basically, the UNCLOS comprised the concept of the deep seabed belonging to humankind as common heritage. Although the UNCLOS negotiations and the principle of CHM mandated equity and redistribution, the 1994 Implementing Agreement on part XI of the UNCLOS altered this part in favor of “market principles”.[25] Besides, the Implementing Agreement adopted voting procedures that weakened the weight of votes by states from the Global South by preventing majority rule (Oxman, 1994).[26] Zalik points to the tension between mandated redistributive and neoliberal governance of the deep seabed, which is apparent in current negotiations at the ISA and, as is argued, forms a significant gap in the regulation of the ocean floor and its ecology (Zalik, 2018, p. 344).

Starting in 2001 and continuing increasingly over the past decade, the ISA has granted exploration contracts to firms that are sponsored by certain UNCLOS member

[25] see UNGA, A/RES/48/263, August 17, 1994 https://documents-dds-ny.un.org/doc/UNDOC/GEN/N94/332/98/PDF/N9433298.pdf?OpenElement, page 2, *(…) Recognizing that political and economic changes, including in particular a growing reliance on market principles, have necessitated the re-evaluation of some aspects of the regime for the Area and its resources, (…) (accessed June 25, 2021).*

[26] The power of the so-called chambers or regional-interest-based caucuses under the Implementing Agreement gives an effective veto to industrialised states who would not hold the balance of power via simple majority. The Agreement provides under Section 3.5. Decision-Making that “decisions on questions of substance, except where the Convention provides for decisions by consensus in the Council, shall be taken by a two-thirds majority of members present and voting, provided that such decisions are not opposed by a majority in any one of the chambers. Any three states in either four-member chamber may therefore block a substantive decision for which consensus is not required.” (Oxman 1994, p.690, citing a statement by the US President’s special representative to the US House Foreign Affairs Committee, 1982.)

states. Besides a rise in demand for rare-earth minerals, the current interest in deep seabed mining lies in the deep seas' isolation from social conflicts that have complicated extractive operations on land (Zalik, 2018, p. 344). Until this day, no exploitation contracts have been granted for any part of the Area, nor has a regulatory regime been finalized. However, firms and states with exploration contracts are pushing for their establishment. The ISA's Legal and Technical Commission has set July 2020 as the adoption date for exploitation regulations (ISBA23/C/13, 2017).

In her article, Zalik raises three arguments. First, the pressure on implementing an ISA deep seabed exploitation regime needs to be understood geopolitically. This is the outcome of a neo-mercantilistic drive by states and affiliated fractions of capital to allege possibly valuable resources perceived as globally scarce. The whole process promotes the development of new industrial technologies and opens new markets for deep seabed minerals. Private companies having exploratory contracts in the Area seek exploitation contracts for building their own as well as their state sponsors' reserves. Notwithstanding the argument that the deep seabed is "outside" of social conflict.[27] However, the dynamics at the ISA illustrate struggles between North and South that have portrayed international environmental governance (Bernstein, 2001) since the acceleration of anti-colonial movements (Zalik, 2018, p. 344). As a second and related point, Zalik mentions the state and private industrial conglomerates participating in research and exploration since the Cold War, including affiliates such as Lockheed Martin. These seek to implement an exploitation regime due to the absence of a substantial ecological and fiscal regulation. Finally, Zalik highlights the ambiguity

[27] According to Zalik, seabed mining in particular states' Exclusive Economic Zones has led to ample social conflicts in places such as Papua New Guinea and Namibia. See further the work of the Deep Sea Mining Campaign: http://www.deepseaminingoutofourdepth.org (accessed June 25, 2021)

surrounding property claims in the Area, since a common property approach prevails, yet pre-existing investor claims are protected and private knowledge is guarded against transparent science and technology. While contractors as such are obligated to share information and protect the common heritage, Zalik points out that firm and industry presentations emphasize financial requirements that undermine these obligations (Zalik, 2018, p. 345).

The following section will deal with the practical case of Nauru and show how Western states approach territory under common heritage of mankind by using companies to gain mining licenses through state affiliation.

F. The curious case of Nauru - fair distribution of deep seabed mining ahead?

Author Feichtner criticizes how small states with the help of international law are expanding in deep sea mining and become global players of "extraterritorial landgrabs". This case study illustrates how Nauru, a small island state in the Pacific Ocean, through its sovereignty, facilitates private enterprises' exploitation rights, thus perverting the redistributive ambitions that once have motivated the negotiations of the UNCLOS. At the same time, it is unclear if its own population will obtain concrete gains from the exploitation (Feichtner, 2019a, p. 255).

Nauru has a long history of mining which started with phosphate mining in the 1910s when it was still a German protectorate. After it gained independence in 1968, for a brief period, it was the richest state in the world. Only decades later, the country was highly indebted, mainly due to bad investments (Feichtner, 2019a, p. 257).

Besides commercial seabed mining, Nauru is taking other initiatives to reap economic gain from its sovereignty. After its phosphate deposits had been exhausted,

Nauru established attractive conditions for financial institutions in tax evasion for their clients and offered Nauruan citizenships, passports and detaining refugees in exchange for financial support from the Australian government. Being a sovereign state, Nauru can act as sponsoring state to mining enterprises and offer deep seabed exploitation rights by the ISA, once a mining code has been enacted. Nauru is undoubtedly an attractive sponsoring state because under its donorship, mining companies may obtain access to areas reserved for exploitation by developing states. Feichtner argues that based on these changes, some countries, previously opposing became a party to the UNCLOS (Feichtner, 2019a, p. 260).

In April 2008, Nauru Ocean Resources Inc. (NORI) applied for exploration in the deep seabed of the Clarion Clipperton Zone to the ISA (Nauru Ocean Resources Inc., 2008). NORI then was a wholly-owned subsidiary of the Canadian corporation Nautilus Minerals Inc., applying under Nauruan sponsorship. Article 9 (1) of UNCLOS Annex III gives priority to the Enterprise to decide on exploration activities. However, this provision is not operational at the moment due to changes introduced by the 1994 Implementation Agreement. In place of the Enterprise, the ISA Secretariat is responsible for its functions (Feichtner, 2019a, p. 260). Sponsorship by Nauru as a developing state made NORI eligible for exploration rights which the ISA has approved in 2011. The application for an exploration license was made together with the German Federal Institute for Geosciences and Natural Resources, Yuzhmorgeologyia and the Interoceanmetal Joint Organization following the parallel system[28]. In 2008, Tonga

[28] The parallel system requires an application for an exploration contract to include information for two sites capable of allowing two mining operations. While the applicant receives one site, the other site becomes a reserved area held by the ISA. The minerals of a reserved area can then be explored and exploited by the Enterprise or a developing State without the costs and efforts associated with locating a potential mine site. UNCLOS, annex III articles 8, 9; 1994 Implementing Agreement, annex section 1(10). See German Federal Ministry for the Environment, Nature Conservation and Nuclear Safety,

Offshore Mining Limited (TOML), another subsidiary of Nautilus Minerals Inc., applied for exploration rights in the Clarion Clipperton Zone. Tonga sponsored the application and its application also concerned an area reserved under the parallel system. Similarly, the Pacific states Kiribati and the Cook Islands have sponsored two further applications (Feichtner, 2019a, p. 261).

Nauru's status as a developing state facilitates NORI's access to exploration (and exploitation) rights, it does not evoke responsibilities on Nauru as a sponsoring state. An advisory opinion of the International Tribunal for the Law of the Sea (ITLOS) clarified that both developed and developing states have the same obligations acting as sponsoring states, including due diligence obligations. Where developing states face difficulties, they may receive the necessary assistance. (Seabed Disputes Chamber, ITLOS, 2011)

Since 2011, the EU assists in deep sea mineral projects, and helped to draft Nauru's International Seabed Minerals Act. As a result, NORI not only gains through the sponsorship of Nauru, but also benefits indirectly from development aid by the EU aimed at enabling Nauru to meet its responsibilities as sponsoring state (Feichtner, 2019a, pp. 261-262).

The policy handbook of the UN Economic Commission for Africa on Africa's Blue Economy mentions Nauru as a case study for development. However, it is silent about the exact benefits to be derived by Nauru from entering the deep seabed mining economy.[29] Traditionally, resource rich poor states used resource extraction as a means

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Ecological safeguards for deep seabed mining. Final Report, 2019 https://www.umweltbundesamt.de/sites/default/files/medien/1410/publikationen/2019-07-11_texte_113-2019_deep-seabed-mining.pdf (accessed June 25, 2021).

[29] The UN Economic Commission for Africa, Africa's blue economy: a policy handbook, 2016, p. 57, https://repository.uneca.org/ds2/stream/?#/documents/b7cadbdd-00c4-59e7-84fb-fafcbd10c57d/page/73 (accessed June 25, 2021)

for government revenue. However, by now, the prospects of Nauru gaining significant fiscal benefits from deep seabed mining seem low. Nauru's International Seabed Minerals Act stipulates a sponsorship application fee of USD 15,000 as well as an annual administration fee of USD 20,000. This is minimal compared to the application fee of USD 500,000 that the ISA collects[30] (Feichtner, 2019a, p. 269f).

Another problem for revenue collection for Nauru arises from NORI's ownership structure. When NORI first applied for an exploration contract in 2008, it was fully owned by a Canadian subsidiary. In order to dispel monopolization concerns in the Council of the ISA, as the parent company Nautilus Minerals Inc. was also behind a company sponsored by Tonga, it transformed its ownership structures and inserted two public foundations in Nauru, the Nauru Education and Training Foundation and the Nauru Health and Environment Foundation. However, the promise of immediate benefits to citizens of Nauru was only of short duration and NORI is again wholly owned by a Canadian company, Deep Green Resources Inc. Consequently, Nauru can gain advantage of NORI's profits only by way of taxation or through payments provided by its International Seabed Minerals Act (Feichtner, 2019a, p. 270).

As generating significant government revenues for Nauru is unlikely, the UN Economic Commission for Africa policy handbook points to another explanation for Nauru's engagement in deep seabed mining. It is stressed that Nauru promotes sustainability in mining, invoking benefits for its population, and for humanity as a

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According to the World Bank, while potential revenue may be sizable (referring to seabed mining within national jurisdiction) it cautions that risks and costs were still unclear and might be significant. The World Bank, Pacific Possible, 2017, http://documents1.worldbank.org/curated/en/168951503668157320/pdf/ACS22308-PUBLIC-P154324-ADD-SERIES-PPFullReportFINALscreen.pdf (accessed June 25, 2021).

[30] For the application fee for a license for polymetallic nodules exploration see ISA, Regulations on Prospecting and Exploration for Polymetallic Nodules in the Area (as amended), ISBA/19/C/17 (22 July 2013), Regulation 19, paragraph 1, https://isa.org.jm/files/files/documents/isba-19c-17_0.pdf (accessed June 25, 2021).

whole. According to Feichtner, the argumentative change from benefits for a concrete community to benefits for the whole of humanity is a phenomenon that can also be seen observed in current deliberations on the mining code for the deep seabed, which has to provide equitable shares of the resources according to Article 140 (2) UNCLOS. (Feichtner, 2019b) After all, to justify deep seabed mining referring to benefits for the whole of humankind conceals important distribution questions. In the case of Nauru, this concerns questions of cost and benefits between NORI, and the population and government of Nauru (Feichtner, 2019a, p. 270).

Finally, what sounds like noble aims of international law turns out to provide the basis for extraterritorial landgrab. The tiny state of Nauru becomes an active promoter of these landgrabs within the framework of international law. While the once promising regime of turning the oceans into a source of redistributive income to remedy global inequality, today it is apparent that economic growth remains the guiding star for governmental economic policy (Feichtner, 2019a, p. 272)

On a final note, the author offers three features of global political economy on the case study of Nauru: first, international law's impact in the expansion in expending political economies of resource extraction; second, the perversion of redistributive objectives; and third, the crucial role of states in facilitating private value extraction. The example of Nauru clearly shows how international law joins the very structures that create situations of overexploitation and unequal distribution that it is then called upon to fix (Feichtner, 2019a, p. 273)

G. Conclusion on the principle of common heritage of mankind

Far from the once noble thought of the CHM being a "res communis" area, for which Arvid Pardo called for an international regime to govern the deep seabed and

distribute the profits to the poorest countries, the concept was changed by the 1994 Implementing Agreement to a market-based concept fully compatible with private economic activity (Shackelford, 2008, p. 119).

In light of the research question on the possibility of UNCLOS provisions that are advantageous economically for the North, it is necessary to observe the law-making process of the UNCLOS regime. In the timeline of decolonization, UNCLOS III negotiations and the strive for a New International Economic Order, it was a great success for developing countries to partake in the Area following a universally set regime and to benefit from technical knowledge by developed countries. However, as this was a result developed countries clearly had not wished for, the regime was overruled by the 1994 Implementation Agreement that changed the priorly negotiated processes according to their needs. The provision to transfer technical know-how fell. Besides, the parallel system for the issuing of exploration and exploitation licenses now helps to drag in developing countries via a system of economic priorities in using third countries being sponsor states for foreign companies, as can be clearly seen on the case on Nauru.

However, since the initial regulation negotiated in UNCLOS III was changed according to capitalist states' needs and on economic deliberations more than on the thought of decreasing inequality and supporting development, a question on the equality of arms arises considering the negotiation processes. Can the original negotiations be considered "fair", once the Maltese delegation raised the truly significant concerns on just distribution, notwithstanding the exploitability of resources, if they, soon after, are abandoned towards an economically more appealing solution? In that sense, the legal

framework convincingly serves as a tool to reach economic and territorially superior aspirations by developed countries.

CHAPTER VI

A DISCUSSION ON THE EXPLOITATION OF THE COMMONS IN EEZ AND CHM – WHAT ABOUT THE FUTURE OF OUR OCEANS?

The claims on maritime territory culminating in the UNCLOS resulted in "forty percent or more of ocean space" becoming subject to claims of national jurisdiction. This figure is based on the universal establishment of Exclusive Economic Zones only, assuming claims up to 200 nm, and thus excluding claims over the extended continental shelf. On the other hand, the UNCLOS limited access to areas beyond national jurisdiction, placing the deep seabed under the exclusive management of the International Seabed Authority (ISA) who administers exploration and exploitation of the minerals. As a result, the seabed passed from an area governed by the principle of freedom to one embedded within national or international regimes (Ranganathan, 2019a, p. 575f). As such, the territorialization of the sea went through unclaimed territory to claims by states and international consortia of states.

In light of my research questions and quoting author Ranganathan "that increasing concerns about the health of the oceans tend to pinpoint international law as purely the source of solutions to these concerns, ignoring that it may have also contributed to the problem" (Ranganathan, 2019a, p. 576), it is worth to examine the extent of the UNCLOS being a colonial legal instrument supporting economic interests rather than equal development and independency.

Under this premise, it is of value to compare the origins of the two concepts of EEZ and CHM and their evolution. Following the concepts of section III of the thesis, the legal history shows that developing states, especially from Latin America and

Africa, had great interest in delimiting economic zones to compensate for their technological regression. EEZs allowed them to extract resources and especially fish with a priority contrary to technologically advanced, developed states. The UNCLOS provided a very sophisticated system for sharing resources with geographically disadvantaged and landlocked states, which did not come into existence. Rather, coastal states made opportunistic agreements, for example with the USSR in the Cold War and later with European and Asian states.

On the other hand, the CHM principle was without an actual linkage generated out of the idea of a place being common property to all countries over the world. The assumption of neo-colonial background is subtle, since the term common heritage of mankind provides a huge cover without obvious lines and delimitations visible on maps. In fact, a central colonial element, the economic exploitation and overreaching is not yet showing precise results, as seabed mining did not yet become commercial. However, the ongoing process, which has been on track for decades, already demands a legal framework, research and investment in technologies. These requirements already reveal the separation between states that can afford these expeditions and those who cannot. For example, taking the amount of fees for the access to exploration between Nauru and the ISA into account – as a reminder, Nauru charges between USD 15,000 and 20,000 and the ISA USD 500,000 for their application fee (Feichtner, 2019a, p. 269f) – makes apparent the inequality on the levels of development, power, knowledge, and governance.

Although the discussions on the principle of CHM have been rather theoretical since deep seabed mining was out of reach for the last decades due to a lack of available technologies, according to the mining industry, it may become a reality in the years to

come as a result of big advancements (Heffernan, 2019). Ongoing strive for economic growth, especially in the field of green technology, stands behind the increasing intent in mining more metals, as they are needed for example in electric cars' batteries, smartphones, or for storing wind and solar energy (Hallgren & Hansson, 2021, p. 1f). Nevertheless, projects in the name of "blue growth" are highly contradictory with regards to how the ISA defines a system that should be fair and equitable, while at the same time giving out permits to exploit certain parts of the sea for the advantage of a few (Feichtner, 2019b). Shackelford points out that today's CHM regimes are at odds with the goal of CHM, since private enterprises, representing developed nations, expose the ongoing strength of territorial sovereignty, thus contradicting the principle of CHM. Moreover, the author mentions EEZs being another example of how technologically advanced states can impact the international commons, eg by allowing the passage of foreign vessels or the construction of submarine pipes by foreign states (Shackelford, 2008). The recent developments on these issues certainly make the concept of CHM questionable.

Another question that needs to be raised in light of exploitation and development is the one about the future of our oceans.

Concepts such as "blue growth" or "blue economy" have become entrenched in policy discussions about the future of the oceans (Ertör & Hadjimichael, 2020, p. 1) The term "blue growth" resonates with the principle of "green growth", a concept that basically argues that the economy can grow without negatively impacting the planet's sustainability. Especially the EU and Africa have developed agendas on how to sustainably use ocean resources for economic purposes (Ertör & Hadjimichael, 2020, p. 2). However, Carver argues that the lack of a common definition enables manipulation

by different actors depending on their interests (Carver, 2020, p. 135). Despite these rising trends, a critical discussion emerged on the limitations and consequences of the economic growth fixation on the oceans (Ertör & Hadjimichael, 2020, p. 3). European environmental NGOs published a joint position paper titled "Limits to Blue Growth" expressing their concerns such as the health of oceans, the uncertainty of blue growth activities' impact on the oceans, including deep seabed mining, aquaculture, coastal and cruise tourism among others, and the limits to growth on ensuring sustainability simultaneously, among others (Joint NGO Position Paper, 2012).

Critical counter movements, so-called "blue degrowth" campaigns, point to all the injustices and inequalities that occur in marine spaces such as the displacement of coastal and fishing communities (Mills, 2018; Pictou, 2018), the seizure of their aquatic resources (Barbesgaard, 2018), and privatizations of the seas and coastlines (Clausen & Clark, 2005). Thus, the blue degrowth concept aims at a common participatory societal vision towards the oceans, including small-scale production and local cooperation as opposed to a capitalist increase of exploitation, production and consumption set up by neoliberal marine policies (Ertör & Hadjimichael, 2020, p. 5). However, degrowth is a term strongly criticized by the Global South, as understandably, it is not appealing to someone who has grown up in a slum with poor education and sanitation. Nevertheless, Rodriguez-Labajos et al. offer a variety of associated ideas, such as re-commoning and nature-centered perspectives (Rodríguez-Labajos, et al., 2019, p. 177).

Considering the huge exploitative feature of both the areas of EEZ and CHM, its prevailing gains mostly for developed countries, and the unknown future of the oceans, it is striking that even slowing down economic processes due to ecologic reasons would be detrimental for underdeveloped countries. It would mean another frontier in

development for countries from the Global South on the basis of saving the planet due to the anthropocentric reasons that have caused the maritime downfall.

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