Sailing over the History of the International Law of the Sea

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Cyprus Issue Project Working Paper, No. 8
Introduction
The purpose of Working Paper No.7 was to cast light on the concept of ‘energy security’, explaining how energy is intrinsically linked to politics and the influence that the relatively recent discoveries in the Eastern Mediterranean region have exerted on the geopolitical realities of the Cyprus question. To “operationalize” this notion, we used two indicators: availability, meaning the information on the amount of natural gas reserves estimated and discovered in the Levant Basin and accessibility, which signals the interplay between legal, political and economic ‘constraints’ showing how energy supplies remain accessible to the assigned stakeholders in the region. Working Paper No.7 drew the readers’ attention to the first indicator.
Aim of Working Paper No. 8 is to explain how the legal piece of the second indicator comes into play. There is a need to lay the ground-rules and the theoretical legal constraints within which the stakeholders in the Eastern Mediterranean are assumed to pursue their interests. To rephrase, the main objective here is to **outline the official rules of the game by which the state-protagonists are supposed to abide**. To this effect, this paper will initially present the historical development of the international law of the sea. We will navigate the historical journey that concluded to the UN Convention on the Law of the Sea (UNCLOS III).
The Law of International Sea

In the aftermath of World War II, a significant number of states put forward claims to extend their authority, for a series of objectives, particularly resource-control over vast marine areas off their coasts\(^1\). The insertion of the exclusive economic zone (EEZ) as a notion, in the early 70s, came up as an outcome of this state practice and as an effort to reconcile it with the interests of the international community, such as the freedom of navigation.\(^2\) This piece, as indicated above, embarks upon the historical journey that led to the conceptual birth of the international law of the sea\(^3\). The rationale behind scrutinizing the historical background of international sea law is to grasp an understanding of the dynamics that are inherent in the notion of EEZ and how it mirrors a delicate effort to solve a diachronic *mare clausum/mare liberum* dilemma.

A. *Mare clausum Vs Mare liberum*

The modern states-system is historically and conceptually linked with the idea of the international rule of law. In a system whose units are supposed to serve no higher purpose than their own interests and which assumes the equality of those interests, the rule of law is portrayed as the sole thinkable principle of organization-“short of the *bellum omnium*”\(^4\). International law, more than any area of law, reflects the end-result of many at times conflicting interests; it

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\(^2\) The EEZ regime will be analyzed in Working Paper 9 Ibid.
\(^3\) The following working paper will elaborate on the exclusive economic zone (EEZ)

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constitutes the outcome of compromises and echoes the balance of power in the international system.

Bearing this in mind, international sea law, as a branch of international law, is not an exception. Aim of this part is to dig into the long-lasting conflicting interests that are mirrored in the international sea law. In doing so, the first question while entering this territory is to ask ourselves why states should negotiate a law of the sea at the first place. According to McDougal and Burke, two major scholars in the field, the law of the sea is “accredited” to balance:

a. The exclusive claims of coastal or flag states (e.g coastal fisheries or control of flag vessels on the high seas), meaning claims to use authority over an area or over specified activities which other states cannot share with claimant (state)\(^5\)

b. The inclusive (or general) claims of all states (e.g freedom of navigation or high seas fishing) meaning, “claims to use authority over an area or over specified activities which the claimant (state) can, by some accommodation, avoid physical interference in use, share with another”\(^6\).

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\(^6\)Ibid.
The first cluster of interests directs us to a sea, ocean or other navigable body of water under the jurisdiction of a state that is closed or not accessible to other states, aptly put, *mare clausum*. The second one captures the Grotian view of the seas, *mare liberum*, according to which “the sea is common to all, because it is so limitless that it cannot become a possession of anyone, and because it is adapted for the use of all, whether we consider it from the point of view of navigation or of fisheries.” This debate is reminiscent of the theory developed by Garret Hardin (1968) *The Tragedy of the Commons*, according to which individuals (states alike) acting independently and rationally according to their own self-interest, behave contrary to the best interests of the whole group, by depleting some common resource. In any case, the juridical controversies with respect to *mare clausum* and *mare liberum* are the seeds from which modern international law took its rise. The second view, highlighting the freedom of the seas had been for centuries established as the dominant doctrine of the sea law.

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7 The term is coined by John Selden whose work in 1635 reflected the most substantive response to the ideas of Grotius, seeking to assert the dominion of the crown of England in British seas as well as the longstanding state of practice of dominion over the oceans in general.


B. The Hague Conference in 1930

Nonetheless, during the 20th century the *mare clausum* paradigm had become subject to certain amendments. The formation of the League of Nations that followed the conclusion of World War I paved the way for new initiatives aiming at the codification (placing existing rules in writing) and progressive development (negotiating new rules) of international sea law. These initiatives led to a decision of the Assembly of the League to request the appointment of a Committee of Experts assigned to design a treaty on international sea law.

In 1930 the League of Nations convened the Hague Codification Conference, attended by 44 states\(^\text{10}\). In this meeting, however, the attendants did not manage to strike a deal and therefore, no treaty was adopted. Although a majority of the attendants was leaning towards the idea of sovereignty over the territory, no consensus was reached on the regime of the territorial sea, especially on its breadth and its relationship with an adjacent contiguous zone\(^\text{11}\). Despite the failure of this conference, the division of the sea into the territorial sea and the high seas, with an overlapping contiguous zone, had been generally accepted as a customary law and state practice continued to develop\(^\text{12}\).

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\(^{10}\) Rothwell D. & Stephens T. (2010); 4

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C. UNCLOS I & UNCLOS II

Following World War II, the growing awareness of the importance of offshore resources led an increasing number of states to demonstrate their claims to extend their authority for a series of objectives over vast marine areas off their coasts\textsuperscript{13}. The initiative towards this direction with a profound impact upon the sea law was taken by the US. As a matter of irony, the US, one of the staunchest supporters of the 3 nautical miles territorial sea doctrine, was the protagonist in opening an era of extensive maritime claims\textsuperscript{14}. President Truman issued in 1945 Proclamation 2667 “with Respect to the Natural Resources of the Subsoil and Sea-Bed of the Continental Shelf”, the catalytic effect of which was due to the rapid developments in the exploitation techniques of the sea-bed and fisheries. According to this proclamation, “the United States regards the natural resources of the subsoil and sea bed of the continental shelf beneath the high seas but contiguous to the coasts of the United States as appertaining to the United States, subject to its jurisdiction and control.”\textsuperscript{15}

Taking these developments into consideration, codification of the law of the sea became an imperative need, and the UN International Law Commission (ILC) started producing draft articles on the topic- draft articles that could be crystallized into treaties. The ILC worked on the


\textsuperscript{14} Ibid. p. 2

\textsuperscript{15} “United States Presidential Proclamation No. 2667 (28.9.1945) “Policy of the United States With Respect to the Natural Resources of the Subsoil and Sea Bed of the Continental Shelf”

http://www.presidency.ucsb.edu/ws/?pid=12332

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issue from 1949 to 1956 and generated its ‘Articles Concerning the Law of the Sea’ for the 8th session of the United Nations General Assembly\textsuperscript{16}. These articles formed the basis for negotiations in Geneva in 1958 where the First United Nations Conference on the Law of the Sea (UNCLOS I) was held. This conference resulted in the conclusion of four, relatively short conventions:

\begin{enumerate}
\item on the Territorial Sea and Contiguous Zone
\item on the Continental Shelf
\item on the High Seas
\item on Fishing and Conservation of the Living Resources of the High Seas\textsuperscript{17}
\end{enumerate}

Additionally, the 86 attendant states agreed upon an Optional Protocol of Signature regarding the Compulsory Settlement of Disputes arising out of the Law of the Sea Conventions\textsuperscript{18}. Despite the contribution of this conference in codifying existing customary international law and giving significant content in the treaty law to the regime of the territorial sea, this agreement left an important issue unresolved: it failed to indicate the breadth of the territorial sea.

\textsuperscript{16}Douglas Guilfoyle (2011) “Video Presentation: Law of the Sea Introduction and Overview” \textit{UCL Laws Centre for Law and Environment}

\textsuperscript{17}Ibid.

\textsuperscript{18}Rothwell& Stephens (2010), p. 6-7
A Second United Nations Conference on the Law of the Sea (UNCLOS II) was convened in Geneva two years later, in 1960. The main purpose of this conference was help the contributing parts come out from the deadlock on the pending issue, the breadth of the territorial sea. The conference, which lasted six weeks, was divided into two groups, those favoring a 6nm territorial sea and those favoring a 12nm territorial sea. A proposal put forward by the US and Canada, calling for a 6 mile territorial sea and 6 mile contiguous zone (6+6) failed to achieve the necessary two thirds support by a single vote\(^{19}\).

**D. UNCLOS III**

The failure of UNCLOS II did not impede the development of state practice in the 1960s. It became rather readily apparent that whatever consensus did exist concerning key aspects of the Geneva Conventions was not going to prevent some states from asserting distinctive maritime claims\(^{20}\). Before reading into UNCLOS III, we should bear in mind that the period between UNCLOS II (1960) and UNCLOS III (1973-1982) was featured by certain developments that would play a crucial role in the design and crystallization of the upcoming sea law treaty:

-decolonization : the landscape of the international society had rapidly changed since the 1950s and 1960s with the “(re-)birth” of many newly independent states. Many other nations became actual or potentially direct users of the oceans than at the time of the first postwar Law of the Sea

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\(^{19}\) Guilfoyle (2011)

\(^{20}\) Rothwell & Stephens (2010); 10
Conference\textsuperscript{21}. Back then 86 nations had participated in the two conferences; by the 1970s the number of nation states had increased by 50\%, with the final numbers at the last substantive sessions in 1982 totaling 151. With such a large number of states present, a different political dynamic than at UNCLOS I and II was unfolding. Amid the conference, the ‘Group of 77’ came out as a particularly significant negotiating bloc with the capacity to promote initiatives that were particularly bringing perspectives of the developing countries into the spotlight\textsuperscript{22}.

Furthermore and given that the level of acceptance of the Geneva Conventions was not high among these states, the latter, either unilaterally or by bilateral agreements, developed their own practice with respect to claims to fishing zones. Many of these claims were to 12 nm fishery zones or ‘exclusive fishing zones (EFZ). It is to be noted that there were also more extensive claims to offshore areas up to 50, 100, 200 and 400 nm.

- the regime of the seabed: the 1958 Geneva Conventions had not sought to address the deep seabed due to the then states’ incapacity to engage in deep exploitation and to lay submarine cables and pipelines over the seabed of the High Seas. However, technological developments opened the window for exploration and exploitation of the seabed\textsuperscript{23}. Large parts of the deep seabed, beyond national jurisdiction, are covered by polymetallic nodules rich in valuable

\textsuperscript{21}McDougal&Burke (1987); xxvii
\textsuperscript{22}Rothwell&Stephens (2010); 10
\textsuperscript{23}Rothwell&Stephens (2010); 11
materials (nickel, cobalt etc.). At the time, new estimates of the quantity of polymetallic nodules on the abyssal plane or deep seabed plus new technology would be a ‘gold rush’ of deep sea mining. However, the arising question was whether all this wealth should go only to developed states that had the necessary technology at their disposal to perform drilling activities to the detriment of the developing countries.\(^{24}\)

Considering the conflicting interests between developing and developed countries, any new agreement would require long-lasting and difficult negotiations. Malta’s Ambassador to the United Nations, Arvid Pardo, called for "an effective international regime over the seabed and the ocean floor beyond a clearly defined national jurisdiction". In his words "it is the only alternative by which we can hope to avoid the escalating tension that will be inevitable if the present situation is allowed to continue".\(^{25}\) He set forth a “package deal” as a new comprehensive law of the sea. Package deal was identified as a convention to which parties could not insert any reservations: that is to accept all of it or none of it. This treaty was coupled with consensus decision-making procedures reflecting a finely balanced set of trade-offs between different interest groups. The outcome of this extensive groundwork, which lasted almost a decade (1973-1982), was a comprehensive convention, UNCLOS III. This treaty was framed by Ambassador

\(^{24}\) Douglas Guilfoyle

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Tommy Koh as a ‘constitution for the oceans’. It is extremely detailed, including 320 articles, 9 annexes and 2 implementing agreements.
E. Provisions of UNCLOS III - The maritime zones

This convention, which replaced the four 1958 conventions, was opened for signature on 10 December 1982 in Montego Bay, and entered into force on 16 November 1994 after its ratification by the 60th state, Guyana. As of January 2015, 166 countries and the European Union have joined the Convention. The four states which voted against its adoption back in 1982 and are not still parties to it are among others Israel, Turkey, USA and Venezuela. It should be underlined that certain provisions of UNCLOS III have acquired customary international law status.

UNCLOS III divides the marine space that is within the limits of national jurisdiction into several zones, illustrated in Figure 1:

a. the territorial sea (up to 12nm from the baselines)

b. the contiguous zone (up to an additional 12nm)

c. the EEZ (up to 200nm)

d. the continental shelf (up to 200nm or 350 nm under certain conditions).

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26 As regards Turkey, the following working paper will explain why.


28 UNCLOS III Art. 5 “Except where otherwise provided in this Convention, the normal baseline for measuring the breadth of the territorial sea is the low-water line along the coast as marked on large-scale charts officially recognized by the coastal State”.

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The following working paper will exclusively focus on the EEZ regime and on how the Republic of Cyprus and Turkey have applied or seek to apply the related provisions in the Eastern Mediterranean region.