

Decolonization and International Law: Putting the Ocean on the Map

Surabhi Ranganathan

University Senior Lecturer, Deputy Director of the Lauterpacht
Centre for International Law, Faculty of Law, Lauterpacht Centre for
International Law, University of Cambridge, Cambridge, UK
sr496@cam.ac.uk

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Abstract

From the middle of the twentieth century onwards, the order of the ocean has changed as remarkably as that of land. Yet, developments in the law of the sea usually receive less prominent consideration in international or global histories of this period. In this short essay, I examine firstly the ways in which literatures in history and international law engage, or not, with the ordering of the ocean during, and due to, decolonization. Secondly, I suggest that the making of the law of the sea offers rich insights into the contingencies, currents, and counter-currents of the decolonization moment. Among other things it reveals fluid political geographies, epistemic churn, and alternative models for the extraction and distribution of natural resources. The flickerings and foreclosures of the various possibilities of the decolonization moment are well worth further study, especially as unsettling our understandings of oceanic lines becomes necessary in the present times.

Keywords

law of the sea – new international economic order – decolonization – maps – seabed mining – common heritage of mankind – UNCLOS III – BBNJ

1 Introduction

The United Nations' webpage on decolonization offers a snapshot of it by way of two maps.¹ On the first map, titled 'The World in 1945', swathes of blue indicating sovereign territories are contrasted with splashes of orange that indicate non-sovereign ones. The second map, 'The World Today', is mostly blue, with the orange all but vanished. The story told is clear and familiar: between 1945 and now, the political organization of the world has undergone radical change. Yet this change is not projected on to the sea, which remains unaltered across the two maps. Shaded parchment yellow – the colour of the 'map of nothing' that illustrated Lewis Carroll's literary-nonsensical *The Hunting of the Snark* (1876)² – the sea is depicted entirely without feature but for some dots marking islands, also changing colour from orange to blue. This representation is far from being an aberration. It is even common practice – the artefact of a European mapmaking tradition that emerged in the seventeenth century to replace sixteenth century practices.

Those practices had shown the ocean as a 'thoroughly three-dimensional space full of life and activity ... textured surfaces, identifiable marine creatures or exotic and forbidding monsters, and ships busily prosecuting maritime work'.³ By contrast, maps from the seventeenth century on rendered ocean space almost, if not quite, the 'perfect and absolute blank' caricatured by Carroll.⁴ Such maps made invisible the intensifying human activity and projections of power on the ocean. Enabling assertions of the sea as *indivisible* and *free*, they also disappeared from view the inequality of access to, and large-scale depredation of, its resources.⁵ The sea, configured in many western cultures especially as a disembedded space, outside society, was also emphasized as outside time itself: unchanging, 'impervious to people's actions'.⁶

Now, of course, we can no longer ignore that it is none of that. The news reminds us daily of the ocean's imbrications in our lives. There are its resources:

1 Available at: <https://www.un.org/en/sections/issues-depth/decolonization/> (last accessed on 25 October 2020).

2 Carroll, Lewis. *The Hunting of the Snark: An Agony in Eight Fits* (London: Macmillan, 1876).

3 Rozwadowski, Helen. *Vast Expanses: A History of the Oceans* (London: Reaktion Books, 2018), 82.

4 See also Steinberg, Philip. *The Social Construction of the Ocean* (Cambridge: Cambridge University Press, 2001), 113–116.

5 See also Hofmeyer, Isabel. 'The Conversation: Oceans as Empty Spaces? Redrafting Our Knowledge by Dropping the Colonial Lens' (6 September 2018), available at: <https://theconversation.com/oceans-as-empty-spaces-redrafting-our-knowledge-by-dropping-the-colonial-lens-102778> (last accessed on 25 October 2020).

6 Rozwadowski, *Vast Expanses* 2018 (n. 3), 151.

varied, if vanishing, fish species; tantalizing, if ecologically-destructive, oil and minerals; and new-to-hand microbes and marine genetic data.⁷ The ocean supplies the arteries of global exchange: ninety percent of world trade relies on shipping; ninety nine percent of communications on undersea cables. A UN factsheet tells us that the ocean-economy, 'which includes employment, ecosystem services provided by the ocean, and cultural services, is estimated at between US\$3–6 trillion/year.'⁸ The ocean is also our largest rubbish dump, the key shaper of climate and weather patterns and, in its threatened rise, of greatest threat to our dense coastal settlements. It is then further, and unsurprisingly for these very reasons, the locus of novel capitalist ventures.⁹

The absence of the ocean on maps of decolonization is particularly ironic for in these years the sea offered a fertile site for imagining the shape of the present, and possible futures. On the one hand, it was a new frontier, opened up via technological innovation and jurisdictional claims to solve anxieties of overpopulation, resource erosion and environmental degeneration on land. On the other hand, under the influence both of a long line of thought identifying it as the 'great and still remaining common of mankind',¹⁰ and of anti-colonial world-making, the ocean also encouraged experiments in collaborative and distributively-just exploitation of natural resources. Clashing as they were, both visions generated fresh understandings of the sea as 'territory that could be scouted, explored, mapped, colonised and connected to the land and its economies'.¹¹ Consequently, for all the many lines that were marked on land in the period, even more – and imaginatively conceived – lines were marked on the sea.

These lines, representing the development of the law of the sea between 1945 and 1982 – the years of adoption respectively of the Truman Proclamations,¹² and the UN Convention on the Law of the Sea (LOSC) – fragmented the ocean, legally and conceptually. They divided the ocean not only by zone, but also by depth, medium and function, and selectively visibilised its interconnected

7 Roberts, Callum. *The Unnatural History of the Sea* (London: Gaia, 2007) offers a succinct, if already dated account.

8 UN Ocean Conference 2017. 'Factsheet: People and Oceans'. 2017, available at: <https://www.un.org/sustainabledevelopment/wp-content/uploads/2017/05/Ocean-fact-sheet-package.pdf> (last accessed on 25 October 2020).

9 See, e.g. www.seasteading.org/ (last accessed on 25 October 2020).

10 Locke, John. *Second Treatise of Government* (1689), para. 30.

11 Kaji-O'Grady, Sandra and Peter Raisbeck. 'Prototype Cities in the Sea'. *Journal of Architecture* 10(4) (2005), 443–461, 443, 445, doi: 10.1080/13602360500285641.

12 Proclamation 2668 on Coastal Fisheries in Certain Areas of the High Seas, 28 September 1945, Washington, D.C.; Proclamation 2667 on the Natural Resources of the Subsoil and Sea Bed of the Continental Shelf, 28 September 1945, Washington, D.C.

ecosystems as isolated sites of economic activity – much of it extractive in character.¹³ This essay directs attention to their making, both for how that illuminates the decolonization moment, and because *un*making them, even in part, is a pressing challenge.

The essay is organized as follows. First, it explores the ways in which literatures in history and law alert us, or not, to the presence and effect of these lines. In other words, I examine whether and how these literatures fill in our physical and conceptual maps of the ocean. Secondly, with the understanding that the law of the sea consolidated an extractive imaginary of the ocean – and of global prosperity more generally – the making of this law nevertheless offers insights into the contingencies and counter-currents of the decolonization moment. Among other things it reveals fluid political geographies, alternative models *within* extractivism, and divergent understandings of epistemic community. Their flickering and foreclosures are well worth further study. For, thirdly, I suggest that unsettling our understandings of oceanic lines is necessary in the present times.

2 The Ocean in Law and History

Let us start with the treatments of the ocean in historical work. In recent years, the writing of ocean histories has ‘accelerated’, including a small number of works which examine the operations of capitalism and imperialism in and on (in addition to *across*) the sea.¹⁴ In a majority of works described as oceanic history, the focus is on the littoral – ports, coasts, departures and arrivals – and occasionally the sea surface.¹⁵ A very few engage with ocean as textured by depths, winds, tides, currents, life and ecosystems;¹⁶ as striated by law;¹⁷ or

13 For elaboration, see Ranganathan, Surabhi. ‘Ocean Floor Grab: International Law and the Making of an Extractive Imaginary’. *European Journal of International Law* 30(2) (2019), 573–600, 573, doi:10.1093/ejil/chz027.

14 Sivasundaram, Sujit, Alison Bashford and David Armitage. ‘Introduction’, in *Oceanic Histories*, eds. David Armitage, Alison Bashford and Sujit Sivasundaram (Cambridge: Cambridge University Press, 2018) 1–27, 1; O’Hara, Glen. “‘The Sea is Swinging into View’: Modern British Maritime History in a Globalised World”. *English Historical Review* 124(510) (2009), 1109–1134, 1109, doi: 10.1093/ehr/cep274.

15 Steinberg, Philip. ‘Of other Seas: Metaphors and Materialities in Maritime Regions’. *Atlantic Studies* 10(2) (2013), 156–169, 156, doi: 10.1080/14788810.2013.785192.

16 A gap now being repaired by environmental histories: Svasundaram/Bashford/Armitage, ‘Introduction’ 2018 (n. 14), 13–15.

17 See, e.g., Benton, Lauren. *A Search for Sovereignty: Law and Geography in European Empires 1400–1900* (Cambridge: Cambridge University Press, 2010), 104; Braverman, Irus

with changes in these over time. As Renisa Mawani points out, even where the oceans are the ‘primary subjects of analysis, they are often identified as distinct and/or exceptional sites of inquiry ... rather than transnational or global history.’¹⁸

This absence of the ocean is especially prominent in histories of the twentieth century. Otherwise excellent, indeed essential, works, which we might expect would include the ocean in their analysis, have little to say about it. Timothy Mitchell’s field-defining *Carbon Democracy* (2011), for example, calling attention to the materialities of oil production and distribution, does not discuss the implications of much oil being located offshore, on continental shelves; it offers a few more insights into the effects produced by transoceanic shipping.¹⁹ Mark Mazower’s deft *Governing the World* (2012), a panoptic account of political and legal developments in this period, makes one reference each to the law of the sea negotiations and LOSC.²⁰ Odd Arne Westad’s magisterial *Cold War: A World History* (2017) has scattered mentions of naval action and key ports.²¹ This is not to diminish the significance of these works, but simply to note that, to their enormous readership across and beyond academia, they – like the UN map of decolonization – offer sparse clues as to how the events and developments they describe on land might have connections with, roots in, and implications for, the sea. It is only elsewhere in that handful of works that frame their accounts around the ocean. These works – historian of science Helen Rozwadowski’s wide-ranging and delightful *Vast Expanses* (2018);²² geographer Philip Steinberg’s *The Social Construction of the Ocean* (2001), linking the ocean to the transitions in capitalism;²³ and, perhaps most strikingly, Carl Schmitt’s ‘world-historical meditation’ *Land and Sea*²⁴ – remind us that global history, for all the modes in which we might tell it, is in

and Elizabeth R. Johnson, eds. *Blue Legalities: The Life and Laws of the Sea* (Durham: Duke University Press, 2020).

18 Mawani, Renisa. *Across Oceans of Law: The Komagata Maru and Jurisdiction in the Time of Empire* (Durham: Duke University Press, 2018), 13.

19 Mitchell, Timothy. *Carbon Democracy: Political Power in the Age of Oil* (London: Verso, 2011).

20 Mazower, Mark. *Governing the World: The History of an Idea* (London: Allen Lane, 2012).

21 Westad, Odd Arne. *The Cold War: A World History* (London: Allen Lane, 2017). For one oceanic account of the cold war, see Craven, John P. *The Silent War: The Cold War beneath the Sea* (New York: Touchstone, 2001).

22 Rozwadowski, *Vast Expanses* 2018 (n. 3).

23 Steinberg, *Social Construction* 2001 (n. 4).

24 Schmitt, Carl. *Land and Sea: A World-Historical Meditation* (Candor: Telos, 2015 [1942, rev. 1954/1981]).

fundamental ways, a history of encounters with, on, and through, the ocean.²⁵ Yet, of them, only Steinberg engages, to a degree, with legal ordering, that is with the tracing of oceanic lines in the period since 1945.

The ocean has enjoyed greater prominence in international law literature, with various aspects of the 'law of the sea' being the subject of rigorous doctrinal work. This prominence correlates with the flurry of law-making – *line*-making – activity. Between 1945 and 1982, there were concluded, apart from LOSC, approximately 50 multilateral treaties, including the four 1958 Geneva Conventions on the Law of the Sea;²⁶ regional instruments, bilateral treaties, non-binding declarations, and memoranda of understanding. Since 1982 there have been further developments in the law, including two 'Implementing Agreements' to LOSC (a third is currently under negotiation),²⁷ various instruments of bilateral, regional or general application, and a growing body of case law emanating from the International Court of Justice, the International Tribunal for the Law of the Sea (ITLOS) and arbitral tribunals. There has thus been much to explain and assess as regards particular rules and their relationships to each other, and legal scholars have responded to a very high standard.

However, this literature does not offer as much by way of historicising these rules, or teasing out their politico-economic underpinnings and implications for the sea. Nor does the law of the sea, or the sea itself, find much discussion in broader accounts of the international law of this period. There are telling exceptions: Wilhelm Grewe's *Epochs of International Law* (1984) devotes a section of the discussion of each of his six identified epochs to developments concerning the 'law and dominion of the sea'.²⁸ R. P. Anand's *Origin and Development of the Law of the Sea* (1983) presents the histories of the law of the sea and international law as intertwined, even co-constituted; with developments in the economic and political imaginations of the sea, and consequently its law, being part of, and context for, broader international legal developments.²⁹ However, even in these works, LOSC itself receives foreshortened consideration. Grewe's

25 On this point, see also Jones, Henry. 'Lines in the Ocean: Thinking with the Sea about Territory and International Law'. *London Review of International Law* 4(2) (2016), 307–343, 307, doi: 10.1093/lril/lrw012.

26 Based on the table of treaties in Tanaka, Yoshifumi. *The International Law of the Sea* (Cambridge: Cambridge University Press, 2nd ed. 2015).

27 Agreement relating to Part XI of LOSC, 1994; UN Fish Stocks Agreement, 1995.

28 Grewe, Wilhelm. *The Epochs of International Law* (Berlin: De Gruyter, 2000 [1984]).

29 Anand, Ram P. *Origin and Development of the Law of the Sea: History of International Law Revisited* (Leiden: Martinus Nijhoff, 1983).

account of post-1945 developments is in the character of an overview; Anand's wraps up before the treaty negotiations concluded.

In fact, there has been little critical work on the law of the sea and the changes wrought on the ocean in the decolonization context. At most, subsequent legal writings might identify LOSC as shaped by contestations between developed and developing states. They might – usually if already taking a sea focus – especially locate the protracted negotiations over the common heritage of mankind (CHM) concept and the deep seabed regime that it underpins as illustrating the South-North 'battle for international law' that became part of the movement for a new international economic order (NIEO) in the 1970s.³⁰ But this barely scratches the surface. We do not often hear how, or in what respects, the struggles over the seabed played out in relation to NIEO advances and disappointments elsewhere, or where the seabed sat in relation to other objectives. We hear even less about the ways in which operative frameworks of, and contestations over, knowledge might have shaped material understandings of the ocean. Equally rare are efforts that assess received impressions of the ways in which perceptions of decolonization's material challenges and opportunities may have intersected with the ideological dimensions of the legal battle over the seabed. Particular actors, interventions and developments are seldom placed in specific context; and how several contingencies might have come together to forge consensus over specific regimes is given little attention.

If thick descriptions are lacking, so are readings that illuminate the political economy of the law of the sea. Again, a kind of answer is given – LOSC was dubbed 'the revenge of John Selden', for permitting extensions of national jurisdiction well beyond the narrow limits Grotius had conceded as acceptable.³¹ Echoing this understanding, the literature explains the law of the sea as a negotiation between the jurisdictional aspirations of coastal states and other claimants to the ocean's commons. Fair enough, but not a sufficient analysis either of the law's determinants, or of its consequences. In analysing the law of the sea it is worth moving beyond the open seas/ closed seas binary to note how

30 The phrase is from Dann, Philipp and Jochen von Bernstorff, eds. *The Battle for International Law: South-North Perspectives on the Decolonization Era* (Oxford: Oxford University Press, 2019). Works not written with a sea focus often omit mention of the contestations in this area. A key example is the otherwise excellent Humanity symposium: Gilman, Nils, ed. 'Toward a History of the New International Economic Order'. *Humanity* 6(1) (2015), 1–233.

31 Logue, John. 'The Revenge of John Selden: The Draft Convention on the Law of the Sea in Light of Hugo Grotius's *Mare Liberum*'. *Grotiana* 3 (1982), 27–56, doi: 10.1163/187607582X00042.

freedom *and* enclosure, regimes of sovereignty *and* community developed in this period, have advanced the economic exploitation of the oceans; distributing great benefits to a few and great costs – including ecological costs – to many. And, with winners and losers not configured solely on coastal/flag or developed/developing state lines. Along with this examination of the law's outcomes, it is also worth revisiting its process; moving beyond the ascription of stable preferences to different categories of states to examine how and why they took and justified particular stances, and their differing successes in writing those positions into the law.

While the formation and effects of much 'post-colonial' international law is ripe for examination – and receiving it³² – the ocean stands out as both important and surprisingly overlooked. This must count as a missed opportunity. For, to quote Grewe's closing words:

Like a burning-mirror, [LOSC negotiations] concentrated all of the problems, tendencies and antinomies of international law in the second half of the twentieth century.³³

I try and make good on this assertion below, by suggesting how the ocean – itself so overlooked in the UN map of decolonization – might furnish us with richly textured maps of the political and economic imaginaries of the moment.

3 Reading Decolonization through the Making of the Law of the Sea

So, what are these maps of the moment that are furnished by the ocean and the development of its law? While my account will be brief, it will indicate some respects in which we might plot decolonization's contingencies and counter-currents, *and* their foreclosures, by reference to the making of the law of the sea. I will discuss in turn the alternative political geographies, economic imaginaries, and epistemic approaches that were highlighted in the process.

32 Notable works include Linarelli, John, Margot E. Salomon and Muthucumaraswamy Sornarajah. *The Misery of International Law* (Oxford: Oxford University Press, 2018); Orford, Anne. 'Food Security, Free Trade, and the Battle for the State'. *Journal of International Law and International Relations* 11(2) (2015), 1–67, 1; Pahuja, Sundhya. *Decolonizing International Law* (Cambridge: Cambridge University Press, 2014); Anghie, Antony. *Imperialism, Sovereignty and the Making of International Law* (Cambridge: Cambridge University Press, 2005).

33 Grewe, *Epochs* 2000 (n. 28), 692.

3.1 *Political Geographies*

Usually, when we talk about decolonization's political geographies, we refer to the ways in which these took shape on land: re-organization of empires into states; innumerable and ongoing territorial conflicts that emerged from this process; and the embrace by postcolonial states of shared political identities – the third world, developing countries, and the Global South. Together, these already make for a complicated map; but let us consider now how the sea extended, and ruptured these geographies.

In the first place, debates over where state boundaries would lie were not only had vis-à-vis land. The question of boundaries on the sea was also a fraught, and juris-generative, one. In relation to the land, for all their discontents there existed reference points: imperial administrative lines, the *uti possedetis* principle, the *usque ad coelum* maxim, and established bases of proving territorial title, which could help resolve a state's limits. In relation to the sea, there were only novel and disputed claims: that sovereignty could extend up to 200 miles, or conversely that it ended at 3 (or 6 or 12) miles; that its manifestations must be uniform, or conversely that different bundles of rights could apply in different areas; that areas might be divided not just by distance from the coast, but also by depth and medium; that measurements might be had not only from the physical coastline but also from other kinds of baselines; and that neighbours might apportion areas not solely on principles of mathematical equality, but also on equitable considerations – such as their need for the particular resources.

Unfettered by precedent, these claims entailed acts of imagination. In making them, states not only seized upon new – and sometimes artificial or arbitrary – criteria for identifying their own 'natural' boundaries;³⁴ they also came to discover that geopolitical imaginaries of conflict and association founded on land could be subverted by the sea. The making of the law of the sea thus occasionally disrupted other solidarities and enmities, or facilitated the establishment of new ones, with ripple effects upon other issues and forums. The best account of this is William Wertenbaker's two-part essay of 1983, which traced 'the regularity with which ideological postures and alliances foundered on geographical realities':³⁵

34 See, e.g., Ranganathan, 'Ocean Floor Grab' 2019 (n. 13), 586–591 (continental shelf); Prescott, Victor and Clive Schofield. *The Maritime Political Boundaries of the World* (Leiden: Brill, 2nd ed. 2005), 167–181 (archipelagic waters).

35 Wertenbaker, William. 'A Reporter at Large: Law of the Sea – I & II'. *The New Yorker* (1 August 1983), 38, and (8 August 1983), 56.

[H]ostile countries were forced into alliances by common interests, and traditional allies found themselves opposed on many issues.... In the matter of fishing off foreign coasts, the Soviet Union and South Korea generally saw eye to eye. The interests of Israel, Iraq, and Algeria on the question of passage through straits were so similar that every Arab attempt at a formula that would exclude Israel from the Strait of Tiran also could be applied to Iraq and the Persian Gulf, and was thus opposed by Iraq. Castro's Cuba, which exports nickel ore, and Chile, a right-wing dictatorship that exports copper, took similar positions on production limits on seafloor mining. The United States and the Soviet Union were in agreement on freedom of navigation ...³⁶

And there was more. Britain and Iceland became embroiled in cod wars. Fiji and Indonesia were intermittently joined by the Philippines and Mauritius in arguing for the concept of archipelagic waters – giving them jurisdiction over large areas – but their definition excluded claims both by continental states possessing offshore archipelagos, such as India, Ecuador and China, and farther-scattered island groups such as Kiribati and Tuvalu. Fifty three states forged common cause as ‘land-locked or geographically disadvantaged states’, opposing extensive claims of national jurisdiction. And in a particularly telling example of political solidarity thrown into disarray by the ocean, India seemingly could not decide on its seaward limit. On the one hand, it supported Latin American demands for a 200-mile distance limit to national jurisdiction over the seabed.³⁷ On the other hand, it joined the ‘marginers’, a bloc of (mostly) western states including United States, United Kingdom, Australia, New Zealand and Canada, claiming areas up to even 600 miles.

Of course the making of the law of the sea was also a site of reinforcement of the associative geographies of South and North. From the late 1960s on, LOSC negotiations provided an occasion for the third world to transform their protestations of solidarity and pursuit of NIEO into concrete demands and policy positions. And, as the literature notes, the seabed regime and CHM principle were issues on which these states achieved common ground, and through which they sought to illustrate a new kind of political economy. Meanwhile, first world states, with cooperation from the USSR, contested their most radical demands (more below). But, the ways in which South and North associations

36 Wertebaker, ‘Law of the Sea – I’ 1983 (n. 35), 49–50.

37 Correspondence between John Blair (Shell) and David A. Campbell (Foreign Office) (1971), FCO 76/328, UK National Archives.

were tested by, or maintained against, the pulls to alternative geographical self-definitions exerted by the sea deserves greater scrutiny.

3.2 *Economic Imaginaries*

A lot might be said about the economic imaginaries that flourished with respect to and *because of* the sea in the decolonization era. As noted above, the ocean was conceived both as a frontier, with scrambles for control over area and resources; and as testing ground for new experiments in international cooperation. Both conceptions were extractive. Although LOSC negotiations included questions of sustainability and protection of the marine environment, no doubt was cast on the view of the ocean as a storehouse of resources that could ease the limits to economic growth. We can see this view at work in one of the major speeches on the idea of cooperative exploitation at the UN General Assembly. The Maltese Ambassador, Arvid Pardo, advocated the designation of the seabed as CHM on a heady account of its riches:

[M]anganese nodules of the Pacific Ocean ... contain 43 billion tons of aluminium equivalent to reserves for 20,000 years at the 1960 world rate of consumption as compared to known land reserves for 100 years; 358 billion tons of manganese equivalent to reserves for 400,000 years as compared to known land reserves of only 100 years; 7.9 billion tons of copper equivalent to reserves for 6,000 years as compared to only 40 years for land ...³⁸

The nodules were only part of the narrative. Also featured were billions of barrels of oil, trillions of cubic feet of natural gas and quadrillions of tonnes of oozes and clays, still awaiting exploitation; the expansion of world fisheries and vast potential for farming and fish husbandry; and fish protein concentrate, that could provide 'adequate animal protein to meet daily requirements of one child at less than 1 cent of US money'.³⁹ Pardo relayed assured if techno-optimistic projections of the future – all food, apart from luxury products like fruit, would be grown in the oceans; dolphins acting as sheepdogs and air bubble curtains would protect fish ranges; and colonies of aquanauts would live in the depths.

38 UNGA, First Committee Debate, UN Docs A/C.1/PV.1515–1516, 1 November 1967, para. 26.

39 *Ibid.*, para. 33.

At different points, both fishing and oil and gas extraction had provided occasion for contemplation of alternative models of exploitation.⁴⁰ But the deep seabed was the site of the most sustained effort in this respect. Pardo's suggestion that its mining could be administered via an international regime took root. Perhaps it was his warning that there would otherwise be an unseemly race amongst states 'with the requisite technical competence ... to grab the seabed, surpassing in magnitude and in its implication last century's colonial scramble for territory in Asia and Africa'.⁴¹ But also, in any case, industrialized states were not keen to initiate such a race. An international regime could at once facilitate mining by guaranteeing secure tenure over mining sites and demonstrate their commitment to post-colonial economic ordering. For their part, third world states shared industrialised states' view of the seabed as a resource to be exploited. In their embrace of CHM as a catalyst for economic redistribution, they offered no profound recognition of it as also encapsulating ecological concerns or equity vis-à-vis future generations.

But though sharing an extractive imaginary, they offered an alternative model that not only pressed more egalitarian mining arrangements, but potentially also presented fewer threats to the marine environment. They wanted all exploitation to be undertaken by – or in joint ventures with – an international body, the 'Enterprise'.⁴² The Enterprise would operate a monopoly over mining, receiving the necessary financial and technological input from industrialised states, and overseen by an international authority at which all states were equally represented. The revenue generated would be shared among all states, with special consideration to developing and less developed ones. Such a regime suited third world political and economic aims in various respects. It was a chance to participate actively in a nascent industrial activity; third world states would be partners rather than just recipients of revenue. It was an opportunity also to have equal say in the administration of a major resource and vast area of the world. A monopoly operation could also be coordinated with land-based producers such as Chile, to ensure that it did not undercut their interests; seabed minerals would be recovered at rates and prices that filled supply gaps and generated good revenue for distribution. In sum, mining via the Enterprise represented third world states' best chance for reconciling individual and common interests. Industrialised states rejected these suggestions

40 See, e.g., 'Draft Ocean Space Treaty', submitted by Malta, UN Doc. A/AC.138/53, 23 August 1971 (fisheries); Draft Convention on the International Seabed Area, submitted by United States, UN Doc. A/AC.138/25, 3 August 1970 (oil and gas).

41 UN Doc A/C.1/PV.1515, *supra* note 38, at para 91.

42 This idea was introduced by Latin American States, UN Doc. A/AC.138/49, 4 August 1971.

as fanciful. They did not want an Enterprise, considered that price and rate of recovery should be determined by commercial principles, and that the proposed authority should function solely as a registry of mining operations, albeit with powers to distribute revenue. In other words, while willing to embrace designating the deep seabed as CHM, they wanted the mining regime to cleave to the principle of the freedom of the seas.

The United States proposed a 'parallel system' to resolve this opposition of views, in which both the Enterprise and state or private corporations could conduct mining. It offered certain inducements to win third world support: subsidies to the Enterprise to enable it to survive competition with corporations;⁴³ production controls and compensation to protect land-based producers. It also inflated the economic prospects: Secretary of State Henry Kissinger emphasized that there were 'more than 100 valuable sites on which operations could be conducted at present, and consequently ... enough scope for exploitation by States and corporations as well as the Enterprise.'⁴⁴ This even though in a previous meeting the secretive 'Group of Five' – the United States, the United Kingdom, France, Japan and the Union of Soviet Socialist Republics – had concluded that given the seabed's dense mineral concentrations, the economics would not support multiple mining operations; moreover seabed mining would generate insignificant revenues for distribution.⁴⁵ Having obtained the parallel system, industrialized states worked to roll back the concessions on which it had been secured; then the Reagan Administration rejected an already reduced CHM regime, and the United States refused to sign LOSC, pressing other western states to follow suit. A long battle of attrition culminated in an 'Implementing Agreement' that rewrote the original regime, placing seabed mining squarely on commercial footing and postponing the establishment of the Enterprise to the time when it could operate without subsidy. The parity in administration sought by the third world was also undermined: decision-making power shifted from an assembly of all states to a smaller council in which industrialised states had an effective veto.

In any case, from the perspective of a genuine alternative to a competitive model, the battle was lost when the third world accepted the parallel system. While this is not the occasion to delve into how the idea of a monopoly

43 This was 'offering to pay for private profits with public funds', since public funds would have paid for the subsidies while private corporations would have enjoyed the right to mine. See Feichtner, Isabel. 'Sharing the Riches of the Sea: The Redistributive and Fiscal Dimension of Deep Seabed Exploitation'. *European Journal of International Law* 30(2) (2019), 601–633, 601, 616, doi:10.1093/ejil/chz022.

44 Meeting with Kenyan officials, 13 August 1976, KL/14/1, Kenya National Archives.

45 Report on five-power meeting, 12 February 1973, FCO 76/733, UK National Archives.

Enterprise came about, nor into all the ways in which it might have shaped contemporary political economy, we might at least note the different marks it would have made upon the ocean. Under the competitive model, the International Seabed Authority (ISA) has issued thirty exploration licenses to various mining corporations, covering a large area in the Pacific and smaller areas in the Indian and Atlantic oceans. While the full impact of seabed mining, including its Earth-systemic effects, is still not known, it is clear that the effects, including biodiversity loss and pollution of the water column, will spread much beyond even the large areas mined.⁴⁶ The consequences of operations at multiple sites will be of unimaginable scale. While it is hard to champion any model of seabed mining, the monopoly model would have supported fewer operations. Inscripting also more equitable mining arrangements, it was closer to what is described as the 'environmentalism of the poor':⁴⁷ that is, embedding extraction within an overall assessment of the distribution of needs, costs and benefits.

It is also possible that, entailing higher costs and fewer profits for industrialised states, the monopoly model might have led to the abandonment of seabed mining altogether. Interest in the activity was declining even through the progress of LOSC negotiations, owing to new mineral strikes on land, stalling by Canada (a first world mineral exporter) and, importantly, the emergence of a transnational economic law that facilitated industrialised states' access to raw materials in the third world.⁴⁸ It was the competitive model – with the pressure it creates to be first in the field – joined to expectations of future demand that could eventually (with sufficient technology) be more cheaply satisfied via oceanic minerals that kept corporations in the business of seeking exploration contracts. Now, the ISA is at work on exploitation regulations, which it looks to adopt imminently, paving the way for mining to begin.

With no prospect of a return to it now, the monopoly model, like once-contemplated models for oil and gas and fisheries, had offered a variation within an extractive imaginary. It provided an opportunity to privilege cooperative exploitation and economic redistribution above principles of market

46 E.g. Niner, Holly J., Jeff A. Ardron, Elva G. Escobar, Matthew Gianni, Aline Jaeckel, Daniel O. B. Jones, Lisa A. Levin, Craig R. Smith, Torsten Thiele, Phillip J. Turner, Cindy L. Van Dover, Les Watling and Kristina M. Gjerde. 'Deep-Sea Mining with No Net Loss of Biodiversity: An Impossible Aim'. *Frontiers in Marine Science* 5(53) (2018), 1–12, 1, doi: 10.3389/fmars.2018.00053.

47 See Mickelson, Karen. 'South, North, International Environmental Law and International Environmental Lawyers'. *Yearbook of International Environmental Law* 11 (2000), 52–81, 52, doi: 10.1093/yiel/11.1.52.

48 On the last, see Feichtner, 'Riches of the Sea' 2019 (n. 43), 610.

competition. The trajectory of its abandonment – from a monopoly to a parallel system, to reduced subsidies for the Enterprise, and thereafter to a complete undoing – offers a neat microcosm of the foreclosure of such visions more generally.

3.3 *Epistemic Churn*

The law of the sea also offers a microcosm of the opening and foreclosure of international law's rulemaking protocols. During the decolonization period, debates about international law were not only had on substance – what the rules should say – but also on how they should be formed, on what basis, and with whose participation. Accounts of this period have already commented on third world states' (unsuccessful) effort to elevate the General Assembly to a key law-making theatre.⁴⁹ Here, let us see how another forum – the multilateral treaty conference – gave expression to the epistemic churn on law-making.

There were three major UN Conferences on the Law of the Sea: UNCLOS I in 1958, which adopted the four Geneva Conventions; UNCLOS II convened without outcome in 1960; and UNCLOS III from 1973 to 1982, which adopted LOSC. The quick succession from the first to the third (already called for in the late 1960s) speaks to the debate on international law-making in the decolonization period. In some respects, even UNCLOS I had signalled some epistemic openness: its inauguration embodied the recognition that the law of the sea would have to be updated in view of new claims; it was mandated to take account 'not only of the legal, but also of the technical, biological, economic and political aspects';⁵⁰ and enjoyed the participation of 86 states. Nevertheless, its proceedings were based on texts drafted by the International Law Commission (ILC), an expert body of conservative outlook, whose approach, albeit innovative in accommodating states' interests that conformed to a conventional political economy, could not entertain more radical suggestions.⁵¹ Moreover, the proceedings were dominated by western states, whereas third world states

49 Anghie, Antony. 'Legal Aspects of the New International Economic Order'. *Humanity* 6(1) (2015), 145–158, 145, 149.

50 GA Res 1105 (XI), 21 February 1957.

51 I cannot offer a detailed class analysis of the ILC here, but perhaps a single anecdote might indicate how such a body, while a site of greater formal inclusion (lawyers from Brazil, Cuba, Taiwan, Syria, Mexico, India and Bolivia participated in drafting the law of the sea texts alongside US, USSR and six European lawyers, with J. P. A. François of Netherlands as Special Rapporteur) did not reflect a genuine epistemic opening: A suggestion by Shuhsi Hsu of Taiwan that the exploitation of continental shelf resources be entrusted to the international community and carried out jointly – prefiguring later CHM models – went without response, François simply reporting that 'the other members considered that there were insurmountable difficulties in the way of such internationalisation. Report of

could not overcome 'their numerous weaknesses, conflicting interests, divisions and vulnerabilities'.⁵² The four Geneva Conventions that resulted were, as Tullio Treves sums up, 'an expression of the "traditional law of the sea"'. Unsurprisingly then, 'notwithstanding their intrinsic legal quality, they were soon seen by a majority of the States as obsolete'.⁵³ The failure of UNCLOS II, convened to resolve outstanding issues such as the breadth of the territorial seas and fishery limits, was a manifestation of this dissatisfaction with the traditional law and with law-making processes.

UNCLOS III was – or meant to be – a meeting of a different order. In size, with approximately 150 states participating, it outstripped any foregoing negotiation. Third world states not only came in great numbers, but 'determined to play an active, indeed aggressive, role in the formulation of a new law'; recent institutional developments, particularly the formation of the Group of 77, giving lift to their confidence.⁵⁴ They held key positions in the conference structure and at the preceding UN Seabed Committee (1968–1973). Among others, Hamilton Shirley Amerasinghe of Sri Lanka was President (succeeded, upon his death, by Tommy Koh of Singapore), Paul Engo of Cameroon and Andres Aguilar of Venezuela were chairs of two of the committees, with Alexander Yankov of Bulgaria chairing the third. Kenneth Rattray of Jamaica was the Rapporteur General. Most significantly, the negotiations were not based on drafts prepared by the ILC or any other expert forum: it was the committee chairs who were tasked with drawing up the negotiating texts based on consultations with participating states. With that, and the early agreement that LOSC would be negotiated as a 'package deal' with states making trade-offs to ensure an agreement of overall acceptability, the process was intended to privilege political decision above technical expertise.⁵⁵ Groups of NGOs were also present throughout to aid delegates with guidance on policy, scientific, economic and legal matters.⁵⁶ Compared to its predecessors, UNCLOS III appeared epistemically open – a forum for unmaking traditional processes and justifications, as

the ILC on Its Second Session to the UN General Assembly, UN Doc. A/1316, reprinted in 2 ILC Yearbook (1950), 364, at 384, para. 198.

52 Anand, *Origin and Development of the Law of the Sea* 1983 (n. 29), 185.

53 Treves, Tullio. '1958 Geneva Conventions on the Law of the Sea'. (29 April 1958), available at: <http://legal.un.org/avl/ha/gclos/gclos.html> (last accessed on 25 October 2020).

54 Anand, *Law of the Sea* 1983 (n. 29), 209–210.

55 See also Guilfoyle, Douglas. 'Oceans Governance, The UN Convention on the Law of the Sea and Its Implementing Agreements'. (2 April 2019), available at: <http://dx.doi.org/10.2139/ssrn.3378909> (last accessed on 25 October 2020).

56 On the role of NGOs, see Levering, Ralph and Miriam Levering. *Citizen Action for Global Change: The Neptune Group and the Law of the Sea* (New York: Syracuse University Press, 1999).

much as making new rules; a microcosm, as third world states thought, 'of the possibilities the future held and the inauguration of a new era in international relations.'⁵⁷

And yet, this new style conference was overtaken by older patterns. To begin with, the quest for 'effective' negotiations resulted in frequent resort to closed-door meetings of restrictive membership.⁵⁸ In his quasi-ethnography of the United States' engagement with seabed negotiations at UNCLOS III, Markus Schmidt reports the comment of a US delegate, that 'nothing was ever publicly debated in Committee One [the seabed committee] which had not been previously choreographed behind closed doors.'⁵⁹ Though at odds with the idea of an open, participatory negotiation, it is perhaps unsurprising that such a conference should break up into smaller groups; Schmidt argues that there is 'nothing wrong with "secret" or restricted groups as long as everyone knew they *existed* and a representative number of delegates was kept informed about what went on in them.'⁶⁰ The question, however, is who was doing the choreographing and whether various constituencies were kept included or informed. And here it is interesting to study accounts such as Schmidt's.⁶¹ These reveal attempts to control proceedings by the North and the South on the one hand, but also a gradual falling away of genuine epistemic contestation from the South, and its falling into line with the underlying assumptions of the existing political economy.

Thus in such accounts of UNCLOS III (I focus here on Schmidt) we firstly see the complexities and difficulties attending the negotiations. Both North and South made attempts to seize control of the proceedings, including by resort to secrecy: if the US co-led a secretive 'Brazil group' in advance of the adoption of one iteration of the negotiating text, excluding such third world 'radicals' as India and Algeria, those states found means of privately influencing the development of the next iteration; and both sides resented such practices

57 Chimni, Bhupinder S. 'International Law Scholarship in Postcolonial India: Coping with Dualism'. *Leiden Journal of International Law* 23(1) (2010), 23–51, 23, 38, doi:10.1017/S092215650999032X.

58 Schmidt, Markus. *Common Heritage or Common Burden?: The United States Position on the Development of a Regime for Deep Sea-bed Mining in the Law of the Sea Convention* (Oxford: Clarendon Press, 1989), 115.

59 Ibid.

60 Ibid.

61 Others include, Levering, *Citizen Action for Global Change* 1999 (n. 56); Miles, Edward. *Global Ocean Politics: The Decision Process at the Third United Nations Conference on the Law of the Sea, 1973–1982* (Leiden: Martinus Nijhoff, 1998).

by the other.⁶² Both sides had politico-economic programmes to defend – for the South, equality in exploitation, and redistribution; for the North protection of free-market principles. At points both sides suffered from informational asymmetries – the North ill-informed by its industry, the South by the statements and actions of the North that led them to overestimate the material prospects of seabed mining. Both sides prolonged the negotiations, and at times both pressed for the addition of (what would be later seen as excessive) detail into the treaty text.

But then we also see emerging alongside a simpler, rather familiar narrative which cast the above factors as the damaging attributes of the *South's* engagement alone. The North's stances were made legible, contextualised by reference to rational economic interests and domestic factors. The South's were reduced either to naïve ideology, out-of-date information, or worse: professional incompetence, poor comprehension, and desires for self-aggrandizement. The recouping of some Southern figures from such accounts – the 'moderates', praised as pragmatic, consultative, and good leaders, for their ability to grasp existing politico-economic fundamentals – is as telling as the characterization of the more recalcitrant Engo, chair of Committee One. Engo appears as a cordially disliked figure, presented as not up to the job for efforts to reinstate radical G77 positions (though from time to time the radicals criticize him for accommodating Northern preferences), power-hungry when seeking to wrest back control from informal leaders whom he is side-lined for, and driven by personal jealousy more than principle.⁶³ These are not Schmidt's prejudices that I describe; rather what his interview-based method reveals about how things were understood by delegates at UNCLOS III.

At the start of UNCLOS III there was some genuine epistemic openness, particularly as regards the shape of the CHM regime: the recognition that the economy of mining was not a matter of *discovery* but *construction*; accounts of the value of seabed resources need not be reduced to free-market prices; competition and commercial viability were not the only measures of efficiency; and a regime could be built on political judgment rather than technical decision.⁶⁴ All this eroded under the press of neoliberal capitalist logic. Dreams of redistribution gave way before assertions of commercial viability and the need to incentivize corporations; MIT economists were roped in to create workable financial arrangements; and diplomatic competence became about

62 The term 'radicals' and, below, 'moderates' are not my own; they were employed by commentators at the time.

63 See, e.g., Schmidt, *Common Heritage or Common Burden* 1989 (n. 58), 113–114, 121–122, 134–35; Levering, *Citizen Action for Global Change* 1999 (n. 56), 64–66.

64 Feichtner offers a fine critique of the 'economy as subject to discovery' approach: Feichtner, 'Sharing the Riches of the Sea' 2019 (n. 43), 624–628.

it is useless and counterproductive to argue that an *a priori* condition for deep-sea mining is an existential debate about whether it should be permitted to go ahead or not. The international community passed that point already many years ago.⁶⁹

There is a surprising absence of history at these forums. Much is made of LOSC's constitutional quality, but little recalled of the moment in which it was drafted. LOSC was a recognition that the previous law of the sea – including the immediately previous Geneva Conventions – would not do; it was itself significantly changed as regards its seabed regime after its adoption, with no thought of this being an undermining.⁷⁰ It gave expression to influential understandings of the ocean, but its regimes were built on the silencing of other possibilities: other geographies, other economic imaginaries and indeed other epistemic understandings. It is by recollecting all this that we might come to see it not as a fixed law that cannot be undermined, but the temporary victory of a contested position. A product of its context, changeable in ours.

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69 Lodge, Michael and Philomene Verlaan. 'Deep Sea Mining: International and Regulatory Challenges and Responses'. *Elements* 14(5) (2018), 331–336, 331, 336

70 It was hailed, rather, as an 'excellent example of adapting international law to new circumstances: Sohn, Louis. 'International Law Implications of the 1994 Agreement'. *American Journal of International Law* 88(4) (1994), 696–705, 696, 704–5, doi: 10.2307/2204137.

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