# CONTROL, OWNERSHIP AND DEVELOPMENT OF MINERAL RESOUCES IN INTERNATIONAL LAW: THE UNITED NATIONS APPROACH.

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## Introduction

The question on whom the ownership, control and development of Mineral Resources lies has become a subject of debate among the nations. Consequently, the issue has assumed a controversial dimension in the nations concerned especially in the developing nations of the world.[1] It is against this background that the United Nations held several conferences on the law of the seas known as United Nation Conference on Law of the Sea[2] with the agenda of solving the problem of ownership, control and management of mineral resources. The immediate end result of these conferences is the Law of the Seas also known in some areas as LAW OF THE SEA TREATY (LOST)[3].

It is worthy of note however that the acts of ownership, control and development of mineral resources are exercised by prospecting, exploring and exploiting of the mineral resources. Also flowing from the above perspective is the fact that the ownership and control of mineral resources is a derivative of the law which can only prescribe and dictate the use and management of the resources. To this extent, the location of the right to explore and exploit the mineral resources is subject to the operation of law guiding same.

It is on the above that this paper will examine the ownership, control and development of mineral resources before the United Nations intervention, and the approach of United Nations to the ownership, control and development of mineral resources.

## Definition of Key Terms

'**Mineral**' is generally defined as a substance normally occurring naturally as part of the earth's crust; or dissolved or suspended in water, on or within the earth's crust; or that may be extracted from water, on or within the earth's crust.[4] It has also been defined as any valuable inert or lifeless substance formed or deposited in its present

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[1] Akin Oyebode, The Legal Framework of Exploration in Nigeria: A critics, (CDIIR 2001), p 52

[2] Hereinafter, UNCLOS

[3] The term LOST is commonly used by the critics of the UNCLOS. An example of such critic is United States which has not ratified the Convention.

[4] Section 6 of the Mineral Resources Act 1989, Queensland Consolidated Act published on http://www.austlii.edu.au/au/legis/qld/consol_act/mra1989200/56.html (accessed on 14/7/2008).

position through natural agencies alone, and which is found either in or upon the soil of the earth or in the rocks beneath the soil.[5]

However in Nigeria, mineral does not include oils but includes any metalliferous minerals, including antimony, arsenic, bismuth, cerium, copper, cobalt, columbium, chromium, cadmium, iron, lead, manganese, mercury, molybdenum, nickel, tantalum, tin, tungsten, zinc and all others of a similar nature to any of them with each other or with any other substance, excepting only those that occur in the form of precious minerals.[6]

**'Resources'** has been defined in the United Nations Convention on Law of the Seas[7] to mean –

(a) all solid, liquid or gaseous mineral resources *in situ* in the Area at or beneath the seabed, including Polymetallic nodules;

(b) when recovered from the Area are referred to as 'minerals.[8]

**'Control'** is defined as the power to exercise control or manage, direct, or oversee.[9] The word 'control' as used in connection with resources will therefore mean the ability to direct the use, exploration and exploitation of mineral resources such as, oil, gas, coal, timbers and other solid minerals.

In the jurisprudential view of Salmond, **'ownership'** is the guarantee or perception of the law.[10] While **'development'** is defined as the gradual growth of something, so that it becomes bigger or more advanced.[11]

## The Ownership, Control and Development of Mineral Resources before the United Nations intervention

Before the birth of the United Nations, the polity of states were polarized and divided into what could be described as the "Powerful" and the "Powerless" states. Then, the powerful states had firm grip over their protectorate states. Colonialism was still in vogue.

It was however the claim of these Colonial powers (while trying to legitimize their presence and authorities over the satellite states) that they have (colonialists) brought

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[5] *Black's Law Dictionary*, 6th ed. p.994
[6] Mineral and Mining Act, Cap. M12, Laws of the Federation of Nigeria 2004, section 2.
[7] Hereafter called UNCLOS
[8] see UNCLOS, Article 133
[9] See B.A Gardner, (ed), *Black's Law Dictionary*, 8th ed. (West publishing co, 1990) p.356.
[10] Glanville Williams, *Learning the Law*, 10th ed. (1947)
[11] *Longman Dictionary of Contemporary English*, 3rd ed., (Pearson Education Ltd, London: 1995) p. 370

development and progress to the dependent and underdeveloped colonies.[12] Quoting the covenant of the League of Nations and later the United Nations Charter, the colonial powers considered it to be part of their 'sacred trust' to 'promote the utmost interest and well-being of the inhabitants of these territories', who were not yet able to stand by themselves under the strenuous conditions of the modern world. They also argued that the exploitation of the mineral resources was not only a right but even a duty on them.[13]

A French writer, Sarraut, elaborated on this idea when he wrote that nature has distributed unequally across our planet a wealth and variety of raw materials; and while she has located in this continental extremity which is called Europe, the inventive genius of the white races and the technical expertise with which to exploit natural resources, she has concentrated the most abundant reserves of these materials in Africa, tropical Asia and equatorial Oceania, towards which the developed countries in their need to live and to create, are directing impetus and their drive...[14]

Consequently, the colonial rulers exploited and exported the mineral resources within their colonies at the expense of the local population. In the case of mineral resources, the processing of the resources mined in colonized territories often took place in the metropolitan states.[15]

It is therefore glaring now that the 'scramble for Africa' of the 19th century, which culminated into the famous Berlin Conference (1884-1885) was driven by super profits expected to be gained from the various mineral wealth abound in the continent.[16] Thus, one of the major objectives of the imperialists in seizing colonies was to plunder their natural resources.

Between the mid-20th century and the end of 20th century (1945-1997) the decolonization and decline of colonialism had virtually been completed.[17] During this period, virtually all the colonies had been liberated. However, in spite of the political independence, the newly independent countries had yet to achieve technological and economic independence.[18] In most cases, their natural and mineral resources were still under the firm control of foreign companies or Trans-national corporations.

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[12] 'Common features of colonialism', published by the Government of Tibet in Exile on www.tibet.com/Humanrights/Unpo/chap5.html accessed on 13/7/2008

[13] Ibid.

[14] Ibid.

[15] Ibid.

[16] *"Colonialism in Africa"* published by Unite the Union on www.amicustheunion.org/default.aspx (2007) accessed on 13/7/2008

[17] www.en.wikipedia.org/wiki/British_Empire#Decolonisation_and_decline_.281945.E2.80.931997

[18] A.T. Ademola, *U.N. Approach to the Ownership and Control of Natural Resources: A Critical Analysis* (Being a seminar paper presented at Obafemi Awolowo University Ile-Ife in September 2007) p.3



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However, as the years go by, the developing countries, as these colonies are usually dubbed, began to struggle for economic sovereignty. These outcries attracted the attention of the United Nations[19]. It should be noted that prior to the U.N. intervention on the question of ownership of mineral resources, there was no clearly defined global position on the subject. While the developed countries had used their economic and technological advancement to explore and exploit natural resources within their area of jurisdiction, the developing countries were heavily plundered by the agents of the developed countries particularly the Trans-national corporations. This period, prior to the United Nations intervention, was known as the era of traditional concession under which the state grants rights over vast expanse of territory for a long duration, for exploration and exploitation purpose with little or no financial benefits.[20]

These concessions were the classical contractual framework in which Transnational corporations operated in the extractive industry sector namely; petroleum, metalliferous minerals, timber etc. in the developing countries during this era. These concessional rights were not just over particular minerals but also to extract minerals found in the entire concession areas yet no royalty was paid to the local authorities, because what they gave out as royalty was a provision for the payment of a paltry percentage of 3-5 percent of the declared profits of the corporation.[21]

However before the advent of the Law of the Sea, the prevailing rules concerning the control, ownership and development of mineral resources was the 'Freedom of the Seas' concept, which dated back to the 17th century.[22] Under this concept national rights were limited to a specified belt of water extending from nations' coastlines, usually three nautical miles, according to the "Cannon Shot" rule developed by a Dutch jurist Cornelius Bynkershoek.[23] All waters beyond national boundaries were considered international waters free to all nations, but belonging to none of them. This is also known as the *mare liberum*[24] principle promulgated by Grotius.[25]

This principle remained in force till the 20th century when some nations expressed their desire to extend their national claims, that is, to include mineral resources, to protect fish stocks, and provide the means to enforce pollution controls.[26] This prompted the League of Nations to call a 1930 conference at The Hague, but no agreement was

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[19] Hereafter in some other parts of this paper referred to as the UN.
[20] Ibid, p.4
[21] Ibid, p.6
[22] See: www.en.wikipedia.org/wiki/Law_of_the_sea_Treaty (accessed on 11/7/2008)
[23] Ibid.
[24] This literally means 'the open sea'.
[25] Ibid, see also Tunku Dato' Dr. Sofiah Jewa, 'How has the United Nations Convention on the Law of the Sea Fared?' (being a paper presented at the 12th Commonwealth Law Conference at Kuala Lumpur in September 1998) available at http://community.middlebury.edu accessed on 2 June 2008.
[26] Ibid

reached.[27] Thus, using the Customary International Law principle of a nation's right to protect its natural resources, President Truman in 1945 extended United States of America control over all the natural resources of its Continental Shelf.[28] On 28 September 1945, he made the following astounding proclamations:

> *WHEREAS it is the view of the Government of the United States that the exercise of jurisdiction over the natural resources of the subsoil and sea bed of the continental shelf by the contiguous nation is reasonable and just, since the effectiveness of measures to utilise or conserve these resources would be contingent upon cooperation and protection from the shore, since the continental shelf may be regarded as an extension of the land-mass of the coastal nation and thus naturally appurtenant to it, since these resources frequently form a seaward extension of a pool or deposit lying within the territory, and since self-protection compels the coastal nation to keep close watch over activities off its shores which are of the nature necessary for utilisation of these resources;*
>
> *NOW, THEREFORE, I, HARRY S. TRUMAN, President of the United States of America, do hereby proclaim the following policy of the United States of America with respect to the natural resources of the subsoil and sea bed of the continental shelf.*
>
> *Having concern for the urgency of conserving and prudently utilising its natural resources, the Government of 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.*[29] *In cases where the continental shelf extends to the shores of another State, or is shared with an adjacent State, the boundary shall be determined by the United States and the State concerned in accordance with equitable principles. The character as high seas of the waters above the continental shelf and the right to their*

[27] ibid

[28] see also Tunku Datin Dr. Sofiah Jewa, 'How has the United Nations Convention on the Law of the Sea fared?' (being a paper presented at the 12th Commonwealth Law Conference at Kuala Lumpur in September 1999) available at http://community.middlebury.edu accessed on 2 June 2009.

[29] We supplied the underline for emphasis.

*free and unimpeded navigation are in no way thus affected...*[30]

Other nations quickly followed suit. Between 1946 and 1950; Argentina, Chile, Peru, and Ecuador[31] extended their rights to a distance of 200 nautical miles to cover their Humboldt Current fishing grounds. Other nations extended their territorial seas to 12 nautical miles.[32]

By 1967, only 25 nations still used the old 3 mile limit while 66 nations had set a 12-mile territorial limit and eight had set a 200-miles limit. As of July 24, 2007, only a handful of countries still use the 3-miles limit, these are, Jordan, Palau, and Singapore.[33] That limit is also used in certain Australian islands, an area of Belize, some Japanese straits, certain areas of Papua, New Guinea, and a few UK dependencies, such as Anguilla.[34]

However, since the 1950s, the United Nations has attempted to convince the nations of the world to agree to a set of rules that would govern the Law of the Sea. This led to the first United Nations Conference on the Law of the Sea. This conference marked the beginning of the United Nations' interference over the control, development and ownership of mineral resources, as it gave birth to the various laws, rules and treaties that loosen the grip of the super powers over the resources of the less powerful countries.

**United Nations Approach to Ownership, Control and Development of Mineral Resources**

The United Nations is a forum in which states freely assert their foreign policies, their own orientation on the great problems facing contemporary mankind.[35] The principles of the rights of the people and nations to permanent sovereignty over their mineral resources had received international recognition in various United Nations General Assembly Resolutions.

After the first United Nations Conference on the Law of the Sea, which was held in Geneva 1958, which led to the codification of four treaties[36] that dealt with some areas

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[30] Proclamation No. 2667, 10 Fed. Reg. 12303; 40 AJIL (1946), Suppl., 45

[31] Other nations that towed the American path include United Kingdom (as affecting offshore claims to certain overseas possessions including North Borneo (now Sabah) and Sarawak), Saudi Arabia, Iran, Pakistan, India, the Philippines, Australia, Bulgaria, Israel, Egypt and Iraq.

[32] Ibid

[33] http://www.un.org/Dept/los/LEGISLATIONANDTREATIES/PDFFILES/tables_summary_of_claims.pdf (accessed on 11 July 2008).

[34] http://www.en.wikipedia.org/wiki/law_of_the_sea_Treaty accessed on 11 July 2008

[35] Ademola. A. T: United Nations Approach to the Ownership, and Control of National Resources, being Seminar paper presented at Obafemi Awolowo University, Ile Ife, 2004.

[36] These treaties include: (a) Convention on the Territorial Sea and Contiguous Zone, entered into force: 10 September 1964 (b) Convention on the Continental Shelf, entry into force: 10 June 1964 (c)

of the law of the sea, the Third United Nations Conference on the Law of the Sea began its work in 1970. The conference laboured for more than 10 years on a comprehensive treaty that would codify international law concerning all aspect of the Sea.

On 10th December, 1982, 117 nations signed the United Nations Convention on the Law of the Sea, in Montego Bay, Jamaica.[37] The Convention was not signed by the United States, the United Kingdom, and twenty-eight other nations, because of objections to provisions for seabed mining, which they believe would inhibit commercial development.[38] The Convention, which came into effect on November 16, 1994, described the minerals on the ocean floor beneath the high seas as "the common heritage of Mankind". Thus the exploration of Minerals there from would be governed by global rather than national authority. Production ceilings have been set to prevent economic harm to land–based producers of the same minerals. The United States and some other countries objected to this provision. There were several negotiations with the United States and those other nations to resolve this issue, which formed one of the serious obstacles to universal acceptance of the Treaty.[39] A 1994 agreement amended the mining provisions, which led the United States to submit the treaty to the United States Senate for ratification.[40] It is remarkable to note that a major change under the Convention is its granting of exclusive rights to fish and marine life in waters extending to 200 nautical miles from shore. The Convention further provides that every nation that has a Continental Shelf is granted exclusive rights to explore and exploit the oil, gas, and other resources in the shelf up to 200 miles from shore and more under specified circumstances.[41]

It merits mentioning that from the above provisions of the UNCLOS, it can be safely stated that the fishing and mineral extraction within the continental zones are entirely within the control of the coastal nations. Thus, in 20th Century, coastal nations progressively widened their claims over offshore waters, especially in the face of competition from foreign fishing fleets and in anticipation of the rich oil, gas, and other mineral found on the continental shelf.[42]

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Convention on the High Seas, entry into force: entry into force: 30 September 1962 (d) Convention on Fishing and Conservation of Living Resources of the High Seas, entry into force: 20 March 1966. See generally www.en.wikipedia.org/wiki/Law-of-the-sea-Treaty (accessed on 11 July 2008).

[37] See: www.en.wikipedia.org/wiki/Law-of-the-sea-Treaty. accessed on 11 July 2008. see also: www.un.org/Depts/Los/Convention-agreements/convention-overview-convention.htm accessed on 11 July 2008.

[38] Ibid.

[39] Citizens for Global Solutions, 'Myths and Facts about UNCLOS' available at http://oldsite.globalsolutions.org/programs/health_environment/facts_reports/unclos_myths.html accessed on 2 June 2009.

[40] Ibid.

[41] See UNCLOS, Article 77 (1) and (2). See also www.imo.org/dynamic/mainframe.asp accessed on 7 July 2008.

[42] 'Myths and Facts about UNCLOS'

The UNCLOS further provides for the specific legal regime of the exclusive economic zone which is an area beyond and adjacent to the territorial sea, under which the rights and freedoms of other states are governed by relevant provisions of this convention.[43]

The UNCLOS provides thus: In the exclusive economic zone, the coastal state has:

> (a) Sovereign rights for the purpose of exploring and exploiting, conserving and managing the natural resources, whether living or non-living.....[44]

Therefore, the coastal states have sovereignty to ownership, control and management of natural resources of which mineral resources is one.

**Objections to the UNCLOS**

The UNCLOS was conceived in 1982 by the United Nations as a method for governing activities on, over, and beneath the ocean's surface. It focuses primarily on navigational and transit issues. It contains provisions on the regulation of deepsea mining and the redistribution of wealth to underdeveloped countries – as well as sections regarding marine trade, pollution, research, and dispute resolution. As laudable as this convention is, the United States objected to its application and refused to sign the convention, and it only referred to it as the Law of the Sea Treaty (LOST). The US objection was contained in the declaration of the then president, Ronald Reagan, in his Statement on Oceans Policy.

***Reagan's Statements on Oceans Policy***[45]

a. Former President Reagan's first objection to the Treaty was based on the Principle of the "Common Heritage of Mankind," which dictates that oceanic resources that are buried in the seabed should be shared among all mankind and cannot be claimed by any one nation or people.
b. Secondly, former President Reagan believed that the Treaty would restrict the world's supply of minerals and would jeopardize the mineral sales of landlocked developing nations.
c. The third objection was that mandatory dispute resolution as provided in the convention would restrict autonomy that was hitherto claimed by the United States when it refused to submit to the International Criminal Court.

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[43] UNCLOS, Article 55
[44] Ibid, Article 56(1) (a)
[45] Carrie E. Donovanat, 'The Law of the Sea Treaty', Heritage Foundation Leadership for America (2004) available at www.heritage.org/Research/InternationalOrganisations/LOST.cfm accessed on 7 November 2008.



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It should be noted that the U.S objection is premised on the fact that the treaty is unfavourable to America's economy and security.[46] The U.S. felt that the provisions of the treaty were not free-market friendly and were designed to favour the economics systems of the communist states. The U.S also felt that the provisions might result in International Seabed Authority becoming a bloated and expensive bureaucracy due to a combination of large revenues and insufficient control over what the revenues could be used for.[47] The objection also raises concern that the treaty will undermine US sovereignty, will become a backdoor for environmental activists and that the US does not need the Convention to guarantee navigation rights.[48]

It merits mentioning that from 1983 to 1994; the United States accepted all but part XIof the convention as Customary International Law, in attempting to establish an alternative regime for exploitation of the minerals of the Deep Seabed licenses were granted to four international consortia.[49]

In 1990, consultations were held between the signatories and non-signatories (including the United States) to the 1982 UNCLOS over the possibility of modifying the Convention to allow the industrialized countries to join the Convention. The resulting 1994 Agreement on implementation was adopted as a binding International Convention. It mandated that key articles, including those on a limitation of Seabed production and mandatory technological transfer, would not be applied; that the United States, if it became a member, would be guaranteed a seat on the council of the International Seabed Authority, and finally, that voting would be done in groups, with each group able to block decision, on substantive matters. The 1994 Agreement also established a finance committee that would originate the financial decisions of the Authority, to which the largest donor, would automatically be members and which decision, would be made by consensus.[50]

Interestingly, there is still a vigorous opposition in the United States over the ratification of the treaty, with criticism coming mainly from political conservatives who consider involvement in some International organizations and treaties as detrimental to U.S. national interest. A group of Republican Senators, led by Jim Inhofe of Oklahoma blocked American ratification of the convention, claiming that it would infringe on U.S sovereignty.[51] However, President Bush's administration and majority of the United States Senate during his regime favored ratification of the Convention. In addition,

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[46] Ibid.
[47] http://en.wikipedia.org/wiki/Law_of_the_Sea_Treaty accessed on 11 July 2008.
[48] Baker Spring, Steven Groves and Brett D. Schaefer, 'The Top Five Reason why Conservatives should oppose the UN Convention on the Law of the Sea', The Heritage Foundation for Leadership America (2007) available at www.heritage.org accessed on 2 June 2009.
[49] Ibid.
[50] Ibid.
[51] http://en.wikipedia.org/wiki/Law_of_the_Sea_Treaty op. cit.



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various special interests including scientific and international legal scholars and ministry and environmentalist groups have also expressed support.[52]

**Prospecting, Exploration and Exploitation of Minerals**

By the provision of UNCLOS,[53] the prospector shall be allowed and encouraged by the authority (coastal state) to exploit and explore mineral resources after satisfying the conditions of complying with the provision of UNCLOS. The UNCLOS provides that

> Title to minerals shall pass upon discovery in accordance with this convention[54].

It further provides that: The Authority shall encourage prospecting in the Area[55]

The prospecting shall be conducted only after the Authority has received a satisfactory written undertaking that the proposed prospector will comply with the convention and the relevant rules, regulations and procedures of the Authority concerning cooperation in the training programmes referred to in articles 143 and 144 and the protection of the marine environment.[56]

It is remarkable that although the UNCLOS encourages prospecting, however, it does not confer on the prospector any rights with respect to mineral resources, but it may recover a reasonable quantity of minerals to be used for testing. The UNCLOS provides that:

> Prospecting shall not confer on the prospector any rights with respect to resources. A Prospecter may, however, recover a reasonable, quantity of minerals to be used for testing.[57]

Note further that even though the UNCLOS encourages prospecting, this is however realizable subject to the designing of a plan of work and its final approval by the coastal authority.

The UNCLOS provides that:

> Exploration and exploitation shall be carried out in areas specified in plans of work referred to in article 153, paragraph 3 and approved by the authority in accordance

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[52] Ibid.
[53] Annex III, stating the Basic Conditions of Prospecting, exploration and Exploitation.
[54] UNCLOS, Article 1, Annex III
[55] Ibid, Article 2(1) (a) , Annex III.
[56] Ibid, Article 2(1) (b)
[57] Ibid, Article 2 (2)

> with this convention and the relevant rules, regulations and procedures of the Authority.[35]

It further provides that: Every approved plan of work shall:

> Confer on the operator, in accordance with the rules, regulations and procedures of the Authority, the exclusive right to explore for and exploit the specified categories of resources in the area covered by the plan of work. If, however, the applicant presents for approval a plan of work covering only the stage of exploration or the stage of exploitation, the approval plan of work shall centre such exclusive right with respect to that stage only.[36]

From the above provision of UNCLOS, the Coastal States have the exclusive right to explore and exploit mineral resources. However, such exclusive right can be transferred to prospecting states subject to satisfying the conditions laid down under Annex III of the UNCLOS.

**Conclusion**

The issue of control, management and development of mineral resources before the intervention of United Nations has no clear picture as to the law regulating the exploration and exploitation of mineral resources. Before the UN intervention, the powerful states were in total control of the exploration and exploitation of the mineral resources of the least developed states with the excuse that they were under a duty to use the proceeds to develop the least developed states.

The situation changed with the advent of the UNCLOS in 1982, the new regime regulating the control, management and development of mineral resources came into force with the aim of settling the controversies surrounding the control, management and development of mineral resources. The UNCLOS in its provision places the full control, management and development of mineral resources on the coastal states whether developed or not. The UNCLOS further encourage coastal states to allow prospecting in their area. It should however be noted that the prospector shall not have any exclusive right in the mineral resources exploited or explored.

Similarly, however, it should be noted that even though the United Nations made a drastic measure to see that the Coastal state is controlling its mineral resources, much still needed to be done as the UNCLOS can not meet the test of modern day technological advancement relating to exploitation and exploration of mineral resources.

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[35] Ibid. Article 3 Annex III

[36] Ibid. Article 4 (c)

In the light of the above, the United Nations should look into the dichotomy of the 1994 agreement and the UNCLOS with a view to harmonizing them into one whole document. This will enable other countries which may be willing to be signatories to the Convention have a holistic comprehension of the Convention. Moreover, it is high time that the United Nations call for another conference to overhaul the existing 1982 UNCLOS to accommodate modern technological trends that have emerged since its inception.



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