THE AREA OF THE INTERNATIONAL SEABED IN THE CONSTITUTION FOR THE OCEANS

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ABSTRACT

This paper focuses on the novelty of the Law of the Sea, which is the "Area". It is about a new underwater zone, beyond the continental shelf, institutionalized by the UNCLOS, which has been called by the doctrine ''Constitution for the Oceans''. The Area constitutes common heritage of Mankind and is administrated by the ad hoc legal person ''International Seabed Authority''. In recent years, a new trend occurred in relation to the way new applicants for plans of exploitation work exercise their option, relating to the provision of reserved parts of the Area. An alternative to the reserved areas regime was provided, allowing contractors to elect either a reserved area or to offer an equity interest in a future joint venture with the Enterprise, which is the competent company of the Authority. The Area remains problematic, given that the principle of the common heritage of mankind is vague and has been criticized by the doctrine as an announcement empty of content. There is no information available on the eventual risks and the management of the underwater cultural heritage of this zone, a case reminding of the archaeological zone.

Keywords: Archaeological zone; Area; Constitution for the Oceans; European Union; Enterprise; International Seabed; International Seabed Authority; Enterprise; Law of the Sea, 3G fundamental rights

INTRODUCTION

The modern international law of the sea emerged as a customary law in the 17th century. This development is attributed to the fact that maritime States expressed their interest to govern in the sea place. One of them was Venice, which had already managed to become the biggest place of commerce of the Christian West (Vergé – Franceschi). The first attempt to codify this branch took place through the four Geneva Conventions, signed in 1958.

This second attempt resulted in the United Nations Convention on the Law of the Sea (UNCLOS), concluded in 1982, which constitutes the first single code on the matter. Therefore, it is comparable to the formal Constitutions

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of the sovereign States, that is why the doctrine has called it "Constitution for the Oceans" (De Pooter). This text, as modified, includes all institutions of this branch, with the unique exception of a relatively new zone, of customary origin, the Exclusive Fisheries Zone or Exclusive Fishery Zone (EFZ). This zone secured increasingly wider support after the 1945 Truman Coastal Fisheries Proclamation (Molenaar, 2015). Well before the entry into force of the UNCLOS – probably by the early 1970s – a coastal State's entitlement to sovereign rights and jurisdiction for fisheries purposes within a 200-nautical mile (nm) EFZ had crystallized into customary international law.

The current paper focuses on a new zone, previewed in the Constitution for the Oceans. It is about the Area (of the International Seabed), being relevant inter alia to the abyss, which constitutes a key to the future mainly thanks to the metal deposits included (Duperron and Gaill).

We suppose that the Area exemplifies the movement of 3G fundamental rights, exemplified by the rights to the environment and to the world cultural heritage.

ZONES PRIOR AND RELATED TO THE AREA

The successful sample of the Geneva Conventions consisted in the continental shelf, which was consecrated as a new zone for research and exploitation of the national resources, such as oil. That Convention did not define the external limit of the zone as a something (definitely) fixed and so some countries of the Third World felt that some coastal countries could proceed to ocean sharing (Koukoumas, 2006).

Article 1 of the 1958 Geneva Convention on the High Seas defined the high seas as " all parts of the sea that are not included in the territorial sea or in the internal waters of a State". The prospect of exploitation of non-living resources of the deep seabed beyond continental shelves then triggered a debate on the desirability of a distinct regime for the deep seabed. Following the famous Pardo speech in 1967, the United Nations General Assembly took a number of steps which eventually established 'the Area' as a distinct maritime zone from the high seas at least as from 1970, through the Resolution 2749/XXV), of 17 December 1970 (Molenaar, 2015). On proposal of Malta, the General Assembly in that Resolution declared that the seabed which is found beyond the State jurisdiction constitutes "common *heritage of Mankind*". The novelty was obvious, given that for the first time in history a part of the international seabed is not submit to the diachronic regime of freedom of the High Seas whilst the waters continue to exemplify the zone of the High Seas. The central idea which prevailed in the negotiations for the adoption of the UNCLOS was that in the Area a delivery of the wealth would be realized among all States, in response to their needs. This democratic concept was inspired by the notion of solidarity in the international relations and by the legal institutionalization of mechanisms of joint action and fair redistribution of the Earth wealth.

In a parallel way, in 1980 the two "archaeological countries", Greece and Italy, along with Capo Verde, Malta (which had the initiative for the institutionalization of the Area, as already signalized) Portugal, Tunisia and Yugoslavia, proposed the creation of a cultural heritage zone that could not extend beyond 200 nautical miles from the baselines, from which the breadth of the territorial sea is measured. However, this maximalist zone, which would correspond to the zone of the continental shelf (at least as this zone was defined in the UNCLOS), was turned down, due to the reactions of other countries that are not classified among the "archeological

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countries", such as the USA, the UK and the Netherlands. The initial concept consisted in the extension of the jurisdiction of the coastal State on the archaeological objects that are found in the continental shelf or in the novelty introduced by the Constitution for the Oceans, the Exclusive Economic Zone (EEZ) (Alexopoulos and Fournaraki, 2015). Finally, a compromise occurred, and the contiguous zone acquired a new version, an "anonymous" specific version of the contiguous zone. It is about the archaeological zone, which is rather insufficient to prevent antiquities looting in the international seabed, off the Area (Nis, 2015). Given that the contiguous zone (with or without the specific status of the archaeological zone) cannot extend beyond the 24 nautical miles from the baselines, from which the breadth of the territorial sea is measured, it results that relatively near the shores there may be an extended underwater informal archaeological museum, exempted from any national jurisdiction (Maniatis, 2010).

From 2/1/2009, date of activation of the UNESCO Convention on the Protection of Underwater Cultural Heritage, the States Parties may take advantage of the model of international cooperation for the archaeological sites laying beyond the territorial sea, mainly in the continental shelf. This is the case for the "archaeological countries", such as Italy, which ratified the Convention on 8/1/2010, and Egypt, which made the same thing in delay, on 30/08/2017. However, the Convention has been ratified by a very limited number of countries, to date, and the doctrine tends to consider both the contiguous zone and the archaeological one as rather anachronistic. As far as Italy is concerned, article 94 of the 2004 Code on cultural goods and on landscape refers to a zone of the sea, which has some common points with the doctrinal approach to the archaeological zone. This article has been characterized as an anticipation of the law ratifying the UNESCO Convention, by imposing the application of the Annex of the Convention for all historical and archaeological objects found in the seabed backdrops extended till the 12th nautical mile from the external limit of the territorial sea (Ferretti, 2016). It is quite impressive that the Italian legislator avoided not only the term "archaeological zone" but also the official one "contiguous zone" (for this already consecrated zone). So, it is obvious that the vagueness and the embarrassment in the matter of the archaeological zone prevail, in both the international level and the national one. Italy proceeded to a unilateral and spontaneous motion to apply the normativity of the Annex, many years before the Convention came into force. However, this is not a unique case, as various States adopted the odd practice of the spontaneous application of this Convention, prior to its ratification!

In the initial version of the UNCLOS, an area of the seabed beyond the EEZ, was called Area and characterized as "common heritage of Mankind". Nevertheless, when the Convention was concluded in 1982, some industrial States shared the point of view that the global approach taken to the question of the international seabed was marked by features of transnational monopoly interventionism in contradiction to the principles of free competition. Besides, they supported the opinion that the organizational structure previewed by the Convention gave to the majority such rights that there was no guarantee of the protection of the investing industrial States. With the leading intervention of the USA, an attempt was made to modify the relevant part XI of the Convention, which is titled "The Area". The amendment of the Convention was achieved through the 1994 New York Agreement and formally constitutes a complement of the initial Convention. However, even with the new regulations, the announcement (which has been to date empty of content, according to the criticism of the doctrine) that the Area constitutes common heritage of Mankind (in virtue of article 136 of the UNCLOS) was not

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ceased (Roukounas, 2006). In a similar way, the prevision on the fair distribution of benefices coming from the exploitation, to all the countries (particularly to the developing ones), independently to their geographical position remains valid.

It is also to add that some of the industrial States that were endowed with the suitable technical infrastructure and did not sign the UNCLOS in 1982, such as the USA, the Soviet Union, France, the UK, Japan, India and Italy, proceeded to two ambivalent acts. On the one hand, they adopted national law on the research and the exploitation of the seabed in concrete points of the ocean seabed, in obvious contradiction to the previsions of the initial version of the UNCLOS. On the other hand, they created consortiums of multinational companies that inaugurated the research in sections of the seabed of the Area. With the Resolution II, which was incorporated to UNCLOS, it is previewed that the States or companies that have proceeded to preliminary activities in the Area, would have the right to an authorization from the competent organ (which then was the Preparatory Committee). Therefore seven "pioneer investors" (USA, India, France, Japan, Soviet Union, China, South Korea) and relevant organizations were listed.

THE APPLICATION OF THE UNCLOS ON THE AREA

For the research and the exploitation of the Area has been activated the International Seabed Authority, being a legal person under the international law. There is also the Enterprise, a separate legal person regulated by article 170 of the UNCLOS, which carries out activities in the Area directly, pursuant to article 153, par. 2(a) of the Convention, as well as the transporting, processing and marketing of minerals recovered from the Area. According to Article 153 par. 2,

"Activities in the Area shall be carried out as prescribed in paragraph 3:

(a) by the Enterprise, and

(b) in association with the Authority by States Parties, or state enterprises or natural or juridical persons which possess the nationality of States Parties or are effectively controlled by them or their nationals, when sponsored by such States, or any group of the foregoing which meets the requirements provided in this Part and in Annex III" ...

After the 1994 Agreement, the companies that were already in action in the Area have been incorporated to the "Parallel System", namely they act with the approval of the International Seabed Authority, till the activation of the new system. However, it is previewed that the new system of the Area would be operational for the first time not earlier than 2015. Even then, it would be assessed whether the research and the exploitation of the mineral wealth contained in the ocean floor are value for money or not (Roukounas, 2006).

In recent years, a new trend occurs in relation to the way new applicants for plans of exploitation work exercise their option relating to the provision of reserved areas in the Area (International Seabed Authority Legal and Technical Commission, 2016). An alternative to the reserved areas regime was provided, allowing contractors to elect either a reserved area or to offer an equity interest in a future joint venture with the Enterprise. Since then, both Brazil and Japan (in relation to crusts), and China, Germany, India and the Russian Federation (in relation to sulphides) have all opted to offer an equity interest in a joint venture arrangement with the Enterprise in lieu of providing a reserved area. Increased adoption of the joint venture option could result in a considerable decrease in the amount of reserved areas available for future generations, thus having direct implications on the parallel

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system. Alternatively, the joint venture option raises real questions relating to the modalities and operationalization of the Enterprise. Another legitimate but nevertheless new way of doing business that has recently been observed relates to the practice of selective use of reserved areas. For instance, the recent application by China Minmetals Corporation (sponsored by China) was divided into 8 blocks, selected from five different reserved areas.

Besides, the UNCLOS has a quite vague normativity on archaeological and historical objects, found in the Area and considers them as common heritage of mankind. It is also to add that there is no available information on this crucial issue, for instance in the 2017 final report on the periodic review of the International Seabed Authority pursuant to article 154 of the United Nations Convention on the Law of the Sea, there is no recommendation on the underwater cultural heritage whilst there is an overdose on the exploitation of natural resources of the Area (International Seabed Authority Assembly, 2017).

Lastly, the European Union (EU), which is a party of the Constitution for the Oceans, has recently decided to support the Area, although it does not make an explicit use of this term. For the next long-term EU budget 2021-2027, the Commission proposed in June 2018 6.14 billion euros under a simpler, more flexible fund for European fisheries and the maritime economy (European Commission, 2018). For the first time, it will contribute to strengthening international ocean governance for safer, cleaner, more secure, and sustainably managed seas and oceans. The maritime fund will enable investment in new maritime markets, technologies and services, such as ocean energy and marine biotechnology. In the context of the United Nations' 2030 Agenda for Sustainable Development, the EU has also committed at international level to make seas and oceans safer, more secure, cleaner and more sustainably managed. The new European Maritime and Fisheries Fund will support these commitments for better international governance.

CONCLUSION

The paper hypothesis has been fully confirmed as the Area is an "invention" of the era of the so-called solidarity rights or 3G rights, with the emblematic mobility of Malta whilst Italy has enacted the most important role in the matter of underwater cultural heritage, particularly as far as monuments found in the continental shelf are concerned. The fundamental rights of the third generation consist in legal guarantees in favour of people, or more generally, in favour of the Mankind itself. For instance, there is a special care on the re-distribution of common wealth whilst a specialized legal person, the International Seabed Authority, in which participate ipso facto all States Parties of the UNCLOS, takes care of the archaeological and historical objects of the Area for the interest of mankind. This legal person representing humankind is endowed with an Enterprise and controls the research and exploitation of mineral resources, which can only serve peaceful scopes. However, the legal and operational experiment of the Area remains problematic for various reasons. For instance, the notion of the Area as common heritage of mankind is rather vague and has been criticized by the doctrine as an announcement empty of content. There is no available information on the status and the eventual risks of the cultural heritage found in the Area!

The Law of the Sea has been recently enriched by underwater novelties, such as the normativity on the archaeological zone, the Exclusive Economic Zone and the Area. However, at least as far as the archaeological

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zone and the Area are concerned, they are marked by crucial problems that compromise the prestige of this branch of law.

REFERENCES

Alexopoulos, A, and Fournaraki, N. (2015), International Regulations – Maritime Policy and Law of the Sea, Eugenidou Foundation, Athens (in Greek).
Duperron S, Gaill F., "La clé du futur réside dans les abysses", La Vie - Le Monde, hors-série, pp. 166-169.
De Pooter, H., "Une Constitution de l'ONU pour les océans", La Vie - Le Monde, hors-série, pp. 144-145.
European Commission (2018), EU budget: Commission proposes a new fund to invest in the maritime economy and support fishing communities, http://europa.eu/rapid/press-release_IP-18-4104_en.htm.
Ferreti, A. (2016), Manuale di diritto dei beni culturali e del paesaggio, Gruppo Editoriale Simone.
International Seabed Authority Assembly (2017), Letter dated 3 February 2017 from the Chair of the Committee established by the Assembly to carry out a periodic review of the international regime of the Area pursuant to article 154 of the United Nations Convention on the Law of the Sea to the Secretary – General of the International Seabed Authority.
International Seabed Authority Legal and Technical Commission (2016). Issues related to the sponsorship of contracts for exploration in the Area, monopolization, effective control and related matters. 21 June.
Maniatis, A. (2010), Archeological on-the-field research and museums. A supplementary education in Cultural Law. Ant. N. Sakkoulas Editions Athens – Komotini (in Greek).
Molenaar, E. (2015), "New Maritime Zones and the Law of the Sea", Jurisdiction over Ships – Post-UNCLOS Developments in the Law of the Sea, Vol.80, pp. 249-259.
Nie, B. (2015), "On the International Legal Protection of Underwater Cultural Heritage", China Oceans Law Review, Vol. 2., pp.300-323.
Roukounas, E. (2006), International Law Second Issue The state and the territory – The law of the sea, Ant. N. Sakkoulas Publishers (in Greek).
Vergé – Franceschi, M., "Gênes et Venise souveraines maritimes", La Vie - Le Monde, hors-série, pp. 42-43.

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