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Property Issues Relating to Deep-Seabed Mining in the Light of the United Convention on the Sea of 1982

Since ancient times, property has been regarded as one of the most significant legal concepts shaping the world. It constitutes an integral element of human rights and provides the basis for a functional, civilized society as well as human well-being. Property law not only settles the means and scope of property's use and gives the entitled defensive rights against infringements from outside. It also implies obligations arising out of the ownership of property.

Most of these provisions are governed by national bodies. Some subjects, though, require special regulations of proprietorship. Most commonly, these are either ones that touch upon the rights and existence of humankind, or are ones which are of vital interest to the international community. Precisely, they include either vast areas, not belonging to any state, such as Antarctica, space or environmental media, i.e. the atmosphere, the hydrosphere or the lithosphere.

The oceans are a vital element of the environmental media, since they cover more than 70% of the Earth. Extending from the water surface to their floors, they combine both the hydrosphere and the lithosphere. Not only are they the habitat to most existing species, but they also influence the climate and the geomorphology of our planet and, what is more, they are prerequisite for the ecosystems on land. Moreover, the oceans constitute an intricate world in itself, which reacts sensitively to influences from outside. Hence, the proper common use of the vast waters concerns nearly all terrestrial inhabitants. It should be, therefore, of vital political concern.

Unfortunately, the marks on the environmental media left by humans cannot be ignored. This is due to the fast pace of economic growth, commercialization and globalization as well as the huge global demographic increase. When it comes to the quality of water, the impact of ocean-going vehicles, platforms, aquacultures and industry is becoming increasingly destructive. The overall impact of climate change and overfishing

are also serious problems¹. There is, however, another threat to the oceans, which may even be the most dangerous – this is so-called deep seabed mining. Its targets are the largest mineral resource deposits in the world.

The first attempts to mine the sea beds were undertaken in the 1980s, but they were soon undermined by the immense costs incurred. Nowadays, however, the prices of raw materials have risen so high, that deep sea-bed mining has become profitable. Thus, rock-cutting submarine robots and drilling machines which mine manganese crusts, polymetallic nodules or diamonds, are no longer a mere technical experiment.

In spite of the economic benefits and the greater independency of the benefiting countries, deep seabed mining also triggers a number of negative consequences, no matter if they are of an environmental, economic or political nature. Firstly, it turns the seafloor and its nearby waters into a lifeless stone desert. The drilling, due to it causing floating sediment layers, impacts upon areas far away from the mining site. Thus, coral reefs may be covered with mud and die. Secondly, it makes land-mining countries with high exploitation costs less competitive, leading to a wider gap between rich and poor states. Thirdly, it leads to a power shift between those countries which have access to submarine mining sites and, consequently, also resources, and those which have none.

Because of these circumstances, deep seabed mining raises controversial legal questions regarding its conditions, its scope and control thereof. In order to answer these questions, however, it is necessary to determine the property rights to the ocean grounds.

Only in cases where a sea was wholly embedded in one state would there be no such uncertainties as to whom it belongs. But because of their enormous sizes, normally, oceans border a large number of countries. The question of proprietorship over the seas has been raised throughout the existence of humankind. Several examples from history illustrate different views on this issue, ranging from the egocentric to the compromising. The ancient Greeks, for instance, regarded the Mediterranean as their own sea, forbidding other peoples from using it. The Romans shared a similar approach, calling the Mediterranean *mare nostrum*. The Malaysians even called their nation land-water², because they claimed both of these areas for themselves. Great warriors, such as Alexander the Great, used the seas as a means to approach other nations in order to plunder or to invade them. In the second half of the fourth century, the Roman emperor Julian the Great evaluated an opposing idea, maintaining that each person had a natural right to use the seas. Furthermore, in the seventeenth century, the Dutch lawyer Hugo Grotius argued for a *mare liberum*, meaning the seas were *res communes*, so they could not belong

1 Vietnamese Ministry of Foreign Affairs, Ban Ki-Moon Calls for Full UNCLOS Implementation [online]. Biengioilanhtho [access: 2013-30-10]. Available at: <<http://biengioilanhtho.gov.vn/eng/banki-mooncallsforfullunclos-nd-eb260f4a.aspx>>.

2 T. Datin, *How Has the United Nations Convention on the Law of the Sea Fared?*, [at:] *12th Commonwealth Law Conference*, Kuala Lumpur 1999.

to any state³. His opponent, however, John Seldon, defended the older view, calling it *mare clausum*⁴.

Finally, the freedom of the seas doctrine was adopted. First, states only had rights and jurisdiction over a narrow band of water along their coasts. Almost a century later, the cannon-shot rule was invented⁵. It determined a nation's sovereignty as reaching as far as a projectile could be fired from a cannon, which was about 3 nautical miles. This principle, though, lost its acceptance, when technological advances allowed ships to travel further and for longer, thus increasing their output of fishing. Other achievements of the XIXth century included oil platforms and deep seabed mining.

In modern times, both the need for the freedom of the seas and the will to benefit solely from the biggest possible ocean area shape the outline of international maritime law. This can be attributed to the division of the seas into different maritime zones, stretching from the coast parallel to its line. The closer such a zone is, the more sovereignty the coastal state has over it. Thus, nowadays, states have special rights to vaster areas than under the cannon-shot doctrine. However, some states that have not signed the Convention, do not follow the zoning, thus, laying claim to even more extensive parts of the ocean floors. For instance, the USA generally accepts the UNCLOS, except the restrictions relating to deep seabed mining, such as the extensions of the zones and the cooperation with the international community⁶.

According to article 2 of the United Nation Convention on the Law of the Sea (Hereinafter: UNCLOS) of 1982 – also called *the Constitution for the oceans*⁷ a coastal state has sovereignty over its Territorial Waters, restricted only by some provisions for innocent passage. With regard to the Exclusive Economic Zone, article 56 UNCLOS prescribes that each coastal state has sovereign rights to managing living and none-living resources encountered there. Besides, it has jurisdiction over some marine constructional facilities, scientific research, protection and preservation. These powers may extend until the end of the Continental Shelf, if such a thing exists. Moreover, article 81 UNCLOS provides the coastal state with the sole authority over drilling on the Continental Shelf. There are, however, some exemptions to the state's authority over maritime zones. In New Zealand, for instance, the Maori have traditionally owned the foreshores and the sea beds, using

3 C. Thompson, *International Law of the Sea/Seed: Public Domain Versus Private Commodity*, "Natural Resources Journal", vol. 44, 2004, p. 843.

4 T. Datin, *op. cit.*

5 T. Datin, *op. cit.*

6 National Ocean Service, *The Exclusive Economic Zone is the Zone where the U.S. and Other Coastal Nations Have Jurisdiction Over Natural Resources* [online]. NOAA's National Ocean Service [access: 2013-30-10]. Available at: <http://oceanservice.noaa.gov/facts/eez.html>.

7 Vietnamese Ministry of Foreign Affairs, *Ban Ki-Moon Calls for Full UNCLOS Implementation* [online]. Biengioilanhtho [access: 2013-30-10]. Available at: <http://biengioilanhtho.gov.vn/eng/banki-mooncallsforfullunclos-nd-eb260f4a.aspx>.

them for battles, sea weed plantations, canoeing and fishing⁸. Similarly, certain Papuan tribes claim the seabed for themselves, referring to customary law.

The seas extending beyond those zones belong to the so called Area, which almost equates to the High Seas and is regarded as the common heritage of mankind⁹. This means that, in order to undertake mining activities there, the interested state must apply for a license at the seat of the governing organisation in Jamaica. Today, 163 states are members of the Convention¹⁰, comprising the biggest part of the world. However, a large number of states can also require the making of many compromises, which hinders fulfillment of the aims of a multilateral treaty. What is more, the USA, an important global player as well as a coastal and mining state, has not ratified the treaty.

As the high seas' minerals are also the common heritage of mankind, the question is whether, how and by whom they should be exploited. Due to the high prices of submarine mining machines and unequal allocations of intellectual resources, developing countries neither can afford to buy the necessary mining tools nor are they able to develop them by themselves. This leads to a situation in which the rich countries enrich themselves even more by engaging in deep sea-bed mining, while the poor countries remain excluded. However, the UNCLOS was also meant to balance these unequal opportunities. According to article 274 of the Convention, richer states were intended to cooperate with both poorer states and the Enterprise – an organ of the International Seabed Authority, which was established to manage the extraction and sale of seabed minerals. The cooperation should either take the form of offering training and sharing knowledge of how to construct submarine mining machines, or selling and leasing them at low prices. Nevertheless, as time has passed, the effectiveness of the convention has been watered down. On the one hand, innovative countries refused to co-operate, claiming their intellectual property rights. On the other hand, the Enterprise – the once important operating arm of the Authority – stopped being financed by the UNCLOS member states and hence, it is much less powerful than it should be. As the trustee of mankind, the Enterprise shall have the entitlement to minerals, as stated in Annex IV, article 12 of the Statute of the Enterprise. It should also sell its products on a non-discriminatory and non-political basis and what is more, it shall refrain from non-commercial discounts. Thus, states not having the possibility to mine themselves, are not able to purchase low price minerals.

If there is just one cake for a group of individuals, who want to appease their appetite, everyone will try to get the biggest possible piece, until nothing is left. This is not unrea-

8 Information Briefing Service for Members of the Parliament, *The Foreshore and Seabed – Maori Customary Rights and Some Legal Issues* [online]. New Zealand Parliament [access: 2013-30-10]. Available at: <<http://www.parliament.nz/resource/0000000409>>.

9 C. Thompson, *op. cit.*, p. 841.

10 Vietnamese Ministry of Foreign Affairs, *Ban Ki-Moon Calls for Full UNCLOS Implementation* [online]. Biengioilanhtho [access: 2013-30-10]. Available at: <http://biengioilanhtho.gov.vn/eng/banki-mooncallsforfullunclos-nd-eb260f4a.aspx>.

sonable, since if someone refrains from eating, the others will take everything from him. The same happens with the oceans. Although they seem vast, no impact is comparable to that of the large numbers of humans inhabiting and ruling the planet. A different situation arises if the cake is in the hands of just one entity. There is no risk of loss, so why is it unnecessary to consume everything at once? In this situation, it is more reasonable to use only as much as is necessary, keeping the rest for the future. The question is whether the idea of private property can be transferred to the relationship between the seas and states. Even if a country possesses particular property rights with regard to certain maritime zones, this is national property rather than private property. Mining and oil producer lobbies as well as the state's economic, social and political interests, or simple forms of corruption, do have strong influences on the government's political line. Such indifferent attitudes towards their own environments are not even uncommon for several countries, if the undertakings produce enough profit. So far, giving states too many rights to vast marine areas poses an even greater risk of destroying what is meant to be the common heritage of mankind.

The International Seabed Authority should be the solution for an optimal management of marine resources. However, its members are states which have their own interests, powers and also political influences. What is more, the International Seabed Authority is also interested in doing lucrative deals with member states, first, because they can donate money to the Enterprise and, second, because the Enterprise has to transfer to them its gains from the fixed costs of every mining license plus those earned by joint ventures between the Enterprise and the states. It is also worth mentioning that the UNCLOS focuses on the regulation of polymetallic nodules, omitting other meaningful oceanic extractions, such as those of petroleum. Keeping in mind that the ocean has almost as many resources as those on land, these provisions seem insufficient.

Fortunately, Article 287 establishes legal protection of marine disputes, obliging acceding member states to choose one or more of the enumerated courts, should a conflict arise. However, until now, there has been no single case concerning deep seabed mining.

Who is thinking about the oceans? Comparing their protection and preservation to that of the forests, the latter gain much more attention. If they are in a bad condition, they are reforested. Firefighting planes save trees from fires. Wild animals are bred, in order to be set free and to populate the woodlands. But forests are much easier to deal with than the undiscovered depths of the oceans. Furthermore, as the common heritage of mankind, they are actually not treated as such, in comparison to other things that fall under this category.

In conclusion, mining of the high seas is a double-edged sword. It offers a lot of exploitation opportunities, which may enable further economic growth as well as the necessary support for the rising human population. However, although the UNCLOS was meant to protect developing states, they have practically no chance of becoming

involved in mining and profiting from it. Because the oceans are regarded as a bonanza, the actions of different agents that could infringe marine integrity need to be regulated. Due to the huge extent of the High Seas, the remoteness of the deep sea bed and the fact that the oceans are the common property of all, nobody fears overexploitation. But the essence of having property should not only be its exploitation, but also obligations arising out of it. UNCLOS provides coastal states with extensive rights to use their marine zones. The International Seabed Authority has certain controlling and administrative powers, when it comes to the scope and place of exploitation. But the lack of knowledge about the oceans and the lack of regulations regarding the protection and enhancement of the oceans, seems to be alarming.

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SUMMARY

Property issues relating to deep-seabed mining in the light of the United Convention on the Sea of 1982

The study aims at the evaluation of the right to property in the context of the deep-seabed mining. The author present deep-seabed mining in the light of the United Convention on the Sea of 1982 focusing on the lack of knowledge about the oceans and the lack of regulations regarding the protection and enhancement of the oceans.

KEYWORDS: right to property, deep-seabed mining, United Convention on the Sea of 1982