PATRIOTS FOR EUROPE FOUNDATION

Legal Perspectives and European Challenges for Mineral Resource Exploration and Exploitation in the Pacific: New Caledonia, French Polynesia, Wallis and Futuna and Clipperton

SUMMARY & RECOMMENDATIONS

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SUMMARY

The continental shelf is an area that encompasses the soil and subsoil of seabeds close to coasts. After World War II, it began to arouse the interest of States because of its rich resources, which had become essential for the efforts to build back post-war societies.

Its legal regime, which is very unique in international law, was fashioned so as to establish an exclusive and preferential right for the coastal State, allowing that State to access, benefit from and protect the natural resources (mainly hydrocarbons and mineral resources) of the seabeds close to its coasts. That is how the concept of 'sovereign rights' was developed. It is neither entirely an expression of sovereignty, since it is limited to the exploration and exploitation of natural resources, nor entirely an expression of a simple exclusive right, since it incorporates the dimension of the monopoly of the State through the concept of 'sovereignty'. The Geneva Convention on the continental shelf of 1958, which was the first international framework to cover the continental shelf regime, was however not largely implemented due to the challenges relating to the geographical definition of the continental shelf.

For its part, the UN Convention on the Law of the Sea (UNCLOS) brought in a geographical redefinition of the continental shelf area based on a new type of negotiation bringing together developed nations and newly independent ones. While the sovereign rights of exploration and exploitation were kept unchanged, the geographic extent of the continental shelf was considerably enlarged, offering the benefit of rights over a fixed geographical distance to all coastal States (up to 200 nautical miles, regardless of the geological reality of the seabeds) and entitling States that could demonstrate the natural extension of their land territory over their seabeds[1] to extend the outer limits of their shelf to a maximum of about 350 nautical miles.

Along with that enlargement of the geographical extent of the continental shelf, another legal regime was created and established as part of the UNCLOS: that of the exclusive economic zone ("EEZ"). Often better known than the continental shelf - or even mixed up with it - this regime, which chiefly addresses the establishment of the exclusive and preferential rights of the coastal State over its biological resources, has the particularity of being geographically superimposed onto that of the continental shelf. On that geographical superimposition, the sovereign rights of the coastal State are superimposed in addition. Indeed, as part of an EEZ, the coastal State has extended sovereign rights, including over the exploration and exploitation of non-biological resources (therefore similar to those established as part of the continental shelf regime) and biological resources, and over the conservation and management of biological and non-biological resources. There is thus some 'duplication', which does not raise any problems if there is only one managing entity (the coastal State). But if competence is distributed between the coastal State (France in this case) and an overseas territory, that distribution may be complex to

[1] The definition of the outer limits of the continental shelf beyond 200 nautical miles is subject to compliance with a number of scientific criteria that can demonstrate the natural extension of the territory over the part beyond 200 nautical miles.

implement, especially when considerations foreign to the implementation come into the picture, particularly the organisation between local customary law and French law.

A study of the distribution of competence between the French State and four Pacific Ocean territories (New Caledonia, French Polynesia, Wallis and Futuna and Clipperton) shows the great heterogeneity of legal statuses and the way in which competence is distributed. Some similarities can however be brought out:

i) In the four territories studied, the French State has not transferred its sovereign rights to the continental shelf. For three of them, it has filed applications for extending the shelf.

ii) In New Caledonia and French Polynesia, the French State has transferred to these territories the sovereign rights of the EEZ, thus allowing the 'cohabitation' of rights in the space of 200 nautical miles between the French State (continental shelf) and the relevant territory (New Caledonia or French Polynesia for the EEZ).

iii) Regarding Wallis and Futuna and Clipperton, in spite of a different legal status, the State has retained sovereignty, control and complete jurisdiction over its marine space in these territories.

In addition to this geographical distribution of competence, distribution by domains has been applied. Generally speaking, the French State remains competent in all sovereign domains, which means that instruments applicable to the domains of defence, policing and security (people and infrastructure) could also apply in the geographical space of competence of the territories.

From the point of view of activity development, the geographical superimposition of competence between the EEZ and the continental shelf - in New Caledonia and French Polynesia - necessarily leads to a reciprocal limitation of the exercise of sovereign rights. In that respect, regarding the exercise of sovereign rights to exploration and exploitation on the continental shelf in particular, a moratorium on the exploitation of mineral resources in the EEZ has been set up by French Polynesia. A moratorium on the exploration and exploitation of the same resources in the EEZ is being examined in New Caledonia, and another is under preparation in Wallis and Futuna.

All of which results in an unprecedented situation. With these measures for the management and protection of resources applicable within 200 nautical miles, the French State will not be able to exercise its sovereign rights to exploration and exploitation in that same space without violating the sovereign rights of New Caledonia and French Polynesia (in Wallis and Futuna, the moratorium plan reflects a conflict of sovereignty over the seabeds). On the other hand, the French State will face fewer restrictions in the extended continental shelf, but restrictions will remain in view of the high level of protection of marine areas and biodiversity, and the lack of knowledge about resources and ecosystems.

Besides, France is no stranger to the concept of a moratorium on deep sea mining, since it has come out in favour of such a measure relating to areas outside its national jurisdiction. Despite political statements indicating the willingness of the present government to declare a moratorium on the French continental shelf, nothing has been enacted to date to turn those political

statements into legally binding commitments. There is also some uncertainty about the intentions, and it is not easy to say if such a project will ever materialise, in view of the different strategic French plans for the continental shelf that have been published to date. Lastly, and surprisingly, the French State appears to neglect the matter of the biological resources of the continental shelf (sedentary resources, potentially very rich in genetic resources) and focuses solely on the question of exploiting the mineral resources of deep seas. Sedentary biological resources, particularly genetic resources, could however also be explored and exploited, with fewer environmental risks, and make direct contributions to overseas territories, local communities and indigenous peoples as part of the Nagoya Protocol (convention on biological diversity).

For its part, European Union law does not 'automatically' apply to overseas countries and territories. The relations between the European Union and these territories are mainly managed through an association agreement, for the sharing of European values and goals, and through support for these territories through a regularly revised roadmap. This "*à la carte"* association is based on the principles of common respective competence, which may imply a tripartite relationship between the European Union, the relevant territory and the member State to which it is attached. Setting aside some areas where EU law applies directly, particularly plant protection products, banking or finance, it thus appears at first sight that EU law does not affect these territories, which enjoy a special status, reflecting the principle of self-determination of peoples and a decolonisation process that has been initiated to varying degrees in the OCTs.

The reality is quite different, and far more complex than one might think. Firstly, because the distribution of competence between the European Union and the member State is based on *ratione materiae* competence. Secondly, because the distribution of competence between the member State and the territory in question is based on a dual mechanism, that of *ratione materiae* and *ratione loci*. When applied to marine environments, themselves regulated by law based on the same competence mechanism, in some cases there is a competence overlap between the French State and the overseas territory, allowing the application of European Union law, directly or indirectly.

Such application is direct when the member State - France in our case - has *ratione loci* competence (on its continental shelf). Consequently, all activities connected to its exclusive sovereign rights are approached as if they were taking place in metropolitan territory. For its part, the indirect application of European Union law relates to cases where EU law is transposed into French law, and application is extended to overseas territories, as part of their respective competence. For example, that means that EU law on maritime security, transposed into the laws of France, could apply in a geographical area that comes under the competence of an overseas territory (EEZ).

The entanglement of these legal instruments is of interest in order to understand the (geo)strategic significance of seabeds. Indeed, the issue of regulating the exploration and exploitation of mineral resources of seabeds is particularly complex, as it covers several domains, some of which are excluded from EU competence (that is so of mining), whilst others are shared (for instance environmental matters or energy).

Besides the European Union has been stating its commitment to an ambitious implementation of the precautionary principle for several years (as part of the treaty on the functioning of the European Union) and to the ecosystemic approach (particularly under the BBNJ Agreement adopted recently). In recent years, the European Union has taken up a clearer and stronger position in favour of a moratorium on exploration and exploitation, both in areas beyond national jurisdiction and also within national jurisdiction (EEZ and continental shelf). Even though EU law has put in place innovative instruments for the management and conservation of marine environments, to date these are not well adapted to the challenges and risks of exploration and exploitation activities, particularly when it comes to overseas territories. That lack of adaptation of instruments can also be found on the level of the French State, and of the overseas territories; in some cases, there is a need for clarifying the distribution of competence, particularly as regards the definition of the content of the concept of 'strategic raw materials' and 'substances useful for research and work in nuclear energy'.

Therefore, the complex entanglement of competence must not conceal the main difficulty, that of the inappropriateness of the legal framework of the EU, the State and overseas territories to regulate these activities, if only those of exploration. The current legal framework of the Pacific region, particularly advanced in terms of soft law as a result of the many regional frameworks applicable to the exploration and exploitation of mineral resources, does not to date provide any binding regional framework, with ever greater division between neighbouring States as regards the interpretation of the common regional interest and the development of these activities in the short or medium term.

And yet, the common interest could gradually clear away these difficulties. Indeed, the implementation of the precautionary principle (or precautionary approach, depending on the legal instrument) requires the existence of baseline environmental data to measure the impact of activities. In accordance with their international obligations, regardless of the parties in power, States are equal in the implementation of this principle and could therefore find a common interest for a regionally applicable strategy that is meant to be consistent and effective. Besides, the BBNJ Agreement, which enjoys strong EU support, sets up obligations that have an effect on activities carried out under national jurisdiction, and in some cases, requires the performance of environmental impact assessments that go beyond borders and add to each other. That means that environmental data and information are of crucial importance while planning and implementing activities, particularly exploration and exploitation, within the national jurisdiction.

In that regard, the European Union, France and a number of States in the Pacific region, particularly New Caledonia and French Polynesia, have stressed the inadequate scientific knowledge of seabeds, which affects the planning of activities and of the marine environment as a whole. Many Pacific States, particularly the three OCTs, similarly emphasise the importance of traditional knowledge and cultural rights over these marine ecosystems. That scientific and traditional knowledge of these seabeds must cover the entire chain of players (public and private), and the services and technologies used to collect, analyse and use the data and information for the purposes of planning the marine environment. With its commitment under association agreements with the OCTs and also as a long-standing partner of the Pacific region, the European Union thus has a role to play in order to support such research and innovation, in accordance with

its goals for the international governance of oceans and its strategy in the region. However, such a commitment would make it necessary to have a more precise roadmap of the resources to be deployed in Oceania in order to consolidate the role of the EU in the face of competition from other large players, particularly the US and China. In that regard, an understanding of the projection of its law and values in the region through the French OCTs could enable it to fine-tune its action, particularly in view of its support for the implementation of the BBNJ Agreement, and would require the development of implementation tools that are capable of taking up the challenges encountered in the Pacific region.

RECOMMENDATIONS

- ***European Union member States are not legally bound by European moratoriums, and exploration and exploitation activities can therefore develop within their territories or under their jurisdiction or control. In view of the international obligations of the European Union, particularly the precautionary principle which is part of the treaty on the functioning of the European Union, there is a need to strengthen EU law in order to regulate the exploration and exploitation of mineral resources.*** Such regulation encompasses issues relating to maritime security of exploration and exploitation operations, regulation of unmanned marine vehicles, infrastructure safety, environmental safety and also the environmental, social, cultural and economic impact of these activities.

- To that end, because of the multidisciplinary nature of the management of marine spaces in international law, involving a variety of complementary branches of that law (law of the sea, environmental law, international trade law, investment law, intellectual property law, human rights etc.), ***there is a need to map these seabed activities and carry out a more complete study of the implementation of international law in EU law and the transposition of EU law into the laws of member States, so as to bring out the synergies or inconsistencies between the different international and European frameworks. Further, the study should not just focus on the exploration and exploitation of mineral resources, but should also incorporate the issues of biological and genetic resources, which are very present in Pacific seabeds, and any potential usage conflicts.*** The study could guide changes in the law and the development of European policies for the regulation of exploration and exploitation of seabeds, in accordance with the international obligations of the European Union.

- Because of the many commitments of the European Union in the Pacific region and the complexity of marine issues (environmental, climatic, security and cooperation), ***a more precise roadmap of EU action in the Oceania region needs to be developed***.

- Based on its experience and know-how of marine observation (space and *in situ* technologies), the sharing of environmental and modelling data (Copernicus Marine Service and development of the Ocean Digital Twin), ***the European Union could acquire a position as a special partner in the Pacific region.*** *In particular,* ***through the OCTs studied and their association agreement, Clipperton and the regional cooperation organisations in place, the EU could support (scientific marine) research and innovation in seabeds under national jurisdiction. That would both strengthen its presence and influence in the region and also indirectly support the implementation of the BBNJ Agreement, while giving the studied territories and the region the benefit of the knowledge required to plan and manage marine spaces.***

- Based on its experience and know-how of regional cooperation and governance, ***the European Union could support the implementation in the Pacific region of instruments for the application of international law (products, services, technology), particularly the***

law of the sea and the BBNJ Agreement, through a variety of actions (technology transfer, education, external action, innovation partnerships). In accordance with the precautionary principle, which is at the core of the legal corpus of the European Union, there is a need to collect more data and information about the marine environment in order to better manage it in line with its specificities, and to plan and develop activities that comply with sustainable development goals. Such collection of data and information must be accompanied by an ***in-depth approach to the modalities of access to and sharing of the data, particularly those relating to seabeds, the responsibility of players (public and private) and the modalities of governance for ocean data to be put in place***. Such an approach would ensure that the collection and use of ocean data are in accordance with the needs of States, particularly as regards defence and security issues, and the expectations of local communities and indigenous peoples of the Pacific region, at the same time addressing the commercial interests of the private sector involved in the activities.