

DEVELOPMENT OF COMMON HERITAGE OF MANKIND AND INTERGENERATIONAL EQUITY*

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ABSTRACT:

THE ARTICLE ANALYSIS THE CONCEPT OF COMMON HERITAGE OF MANKIND AND THE LINK WITH THE THEORY OF INTERGENERATION EQUITY. FIRST, IT PRESENTS THE CONCEPT OF COMMON HERITAGE OF MANKIND BY REFERRING TO THE AREA OF INTERNATIONAL SUBMARINE TERRITORIES AND THE PROBLEM OF MINING EXPLOITATION OF THE AREA.IT THEN PRESENTS SOME ASPECS OF THE CONCEPT OF INTERGENERATIONAL EQUITY IN CONNECTION WITH ENVIRONMENTAL PROTECTION. THESE AND OTHER ASPECTS ARE REVIEWED IN DETAIL.

KEY WORDS: COMMON HERITAGE OF MANKIND, INTERGENERATIONAL EQUITY, ENVIRONMENT PROTECTION, MINING EXPLOITATION OF THE AREA

INTRODUCTION

At world level there are concerns relating to the problem of global resources, which begin to be more and more limited. The population increase, and in the same time with it the increase of the need for more resources (food, energy, minerals etc.) have created an enormous pressure on the ecosystems at global level.

The issues relating to air and water pollution, hazardous waste, depreciation of ozone layer, or climate changes, reached international spread, fact that generated a series of concerns related to environmental protection, and raising awareness on the fact that pollution can no longer be stopped by political borders.

The concept of common heritage of mankind has been slightly used in practice. Its analysis is beneficial to be made in relation to 1982 Convention. Part XI of the Convention has been initially structured taking into account the interests of developed countries. Since the beginning, the concept of common heritage of mankind has been viewed differently by developed countries and countries in course of development.

DEVELOPMENT OF COMMON HERITAGE OF MANKIND

This concept has been introduced in two Conventions: 1982 Convention and 1979 Agreement governing the states' activity on the Moon and celestial bodies (Treaty relating to the Moon). These treaties have attached to the concept of common heritage of mankind four key attributes: non-appropriation, international management (by the 1982 Convention, the

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International Authority of Submarine Territories was set up, and in the Treaty relating to the Moon is provided only the setup of an international regime only when the exploitation will become feasible), common benefits and its use in the peaceful purpose².

The main stake was the mining exploitation of the areas of the international of the submarine territories (hereby, the area). The developed states objected in relation to the centralization of this area, as they interpreted the implementation of the concept of common heritage of mankind as an extension to the concept of the free sea up to the area and therefore the free access to mining exploitation on the sea bottom to be valid for all the states, equally and based on granting an exploitation license. This regime was to be imposed applicable only for mineral exploitation in the area, but not in case of other activities such as transportation and treatment. According to the developed countries from the area, it would grant the protection of property rights for the technology used. The benefits of these activities would take the form of a share of profit from the mining operation granted to each party with the license right for the exploitation, but only in the conditions established by financial institutions such as World Bank³.

On the other hand, the states in course of development regard the concept of common heritage of mankind in the sense that the area and the resources of sea-bed are common and indivisible, and exploitation must be made collectively by a mechanism of an organization belonging to all states, that would supervise the activities and distribute benefits to all states, taking into account their needs. Thus, states in course of development should participate to decision making equally to all other states⁴.

Provisions related to environmental damages caused by the mining exploitation of sea bottom we may found in the 1982 Convention part XI related to mining exploitation of the international area of submarine territories and XII related to maritime environment. Article 5 of part XI provides all necessary measures must be taken in case of the mining exploitation of the area in order to protect efficiently the marine environment from damaging effects that might occur as result of such activities. Article 209 of part XII provides that states must adopt norms, regulations and international procedures to protect the marine environment from such activities. The states are responsible for the environmental damages in these areas, caused by national operators (mining companies) only in the measure in which they fail to set up an internal plan of norms and regulations in accordance to the provisions of the convention. Article 22 of Annex III of UN Convention relating to the sea right establishes that an operator is responsible from the civil point of view for any damage caused by an illegal activity during the mining exploitation.

The increase of the requirements and of the prices at global level, as well as development of mining technologies led to increase of interest to exploit in commercial scope the minerals from the area. The International Authority of Submarine Territories⁵ adopted recently, in this sense, regulations relating to exploring and exploiting marine minerals, especially of poly-metallic nodules.⁶

The Regulation relating to prospection and exploitation of poly-metallic nodules from the area, developed according to provisions of 1982 Convention, was approved by General

²Malgosia A. Fitzmaurice, *International Protection of the Environment*, (Leiden /Boston ,Collected Courses of the Hague Academy of International Law, Volume: 293, Brill | Nijhoff, Leiden |, 2001) 154

³M.A.Fitzmaurice, *International Protection of the Environment*,(Leiden /Boston Collected Courses of the Hague Academy of International Law, Volume: 293, Brill | Nijhoff, 2001) 154

⁴M.A.Fitzmaurice, *International Protection of the Environment*,(Leiden /Boston ,Collected Courses of the Hague Academy of International Law, Volume: 293, Brill | Nijhoff, Leiden |, 2001) 154

⁵www.isa.org.jm

⁶Aline Jaeckel, *An Environmental Management Strategy for the International Seabed Authority? The Legal Basis*, (Leiden ,The International Journal of Marine and Coastal Law 30 (2015), Brill NIJHOFF,), 93-119

Assembly of International Authority of Submarine Territories on the 13th of July 2000. This regulation provides surprisingly a detailed and strong regime relating to environmental protection and provides the possibility to carry out studies, environmental assessments, as a fast answer to incidents causing severe damages to the marine environment, the notification of the Authority in case of severe damages and its possibility to take emergency measures. Also, it provides the responsibility of its operators towards damages caused to marine environment and actions undertaken by them, both during the mining exploitation and after finalizing the exploitation, and their obligation to take all emergency measures in case of damages.

Article 16 of annex III, para. 16.1 provides that the operator is obliged to hold insurance policy against possible damages caused to the marine environment.⁷

Taking into account the increased interest in the exploiting activities in the area, it is a great challenge for the International Authority of Submarine Territories to elaborate a system adapted to the protection of marine environment.

THE THEORY OF INTERGENERATIONAL EQUITY

The intergenerational equity is a sophisticated concept both pro and against. The concept has its roots in the book *A Theory of Justice* of John Rawls⁸, where he supports the idea of correctness and justice and takes into account the social and economic rights of the least privileged segment of the society. Also, he supports that all generations have mutual obligations, with no exception, including the present generation.

There is sustained also the doctrine that equity between generations has been influenced in a great extent by the development of the international environmental law.⁹ This fact is obvious if we look at the Stockholm Statement (principles 1 and 2), where the future of present and future generations is in the first plane. Also, the interest for future generations may be found in UN Convention relating to climate changes or in the Convention relating to protection and utilization of water cross-border flows and lakes.

The issue of protecting interests of future generations has been analyzed in the arbitration relating to seals in the Bering Sea, where the concept of trust that represents fundament of the doctrine of equity between generations was used in a convincing manner¹⁰.

The central element of the theory of equity between generations may be found also in the book of E. Brown-Weiss - „Intergenerational Equity: A Legal Framework for Global Environmental Change”¹¹, where it is stated: „the theory of equity between the generations sustains that we, human species, hold the national environment of the planet in common, with all members of our species: past generations, present generations and future generations. In the same time, we are the beneficiaries of the right to use and benefit of it. All generations are equal. There are no generations to be more cherished or favored. The basic concept is to see mankind as a partnership between all generations. Each generation must not transmit the

⁷Louise Angelique de la Fayette, *International liability for damage to the environment in Reasearch Handbook on International Environmental Law*, (UK Ed. By Malgosia Fitzmaurice, David M. Ong, Panos Merkouris, MPG Books Groupe, 2010).347

⁸J. Rawls, *A Theory of Justice*, Oxford, (Clarendon Press, 1972)

⁹M.F. Fitzmaurice, *International Protection of the Environment*,(Leiden /Boston ,Collected Courses of the Hague Academy of International Law, Volume: 293, Brill | Nijhoff, Leiden |, 2001) 187

¹⁰M.F. Fitzmaurice, *International Protection of the Environment*,(Leiden /Boston ,Collected Courses of the Hague Academy of International Law, Volume: 293, Brill | Nijhoff, Leiden |, 2001) 187

¹¹E. Brown-Weiss - *Intergenerational Equity: A Legal Framework for Global Environmental Change*, in *Environmental Change and the Environmental Law. New Challenge and Dimension*, (Tokyo, United Nations University Press, 1992) 394

planet in less good conditions than those in which it received it and must ensure access to its resources and benefits.”

There are more criticisms in the doctrine in Brown-Weiss's doctrine, some considering it as “much too unrealistic”¹² Only the protection of environmental interests of the present generation is difficult to protect because of a weak international system of protection and a weak political will. At present, it is quite difficult that interests of future generations are protected and the recourse to courts of law in this sense is not convincing. The representation of unborn generations raises a series of legal issues, mainly in what regards the legal basis for such an interest or problem of *locus standi* in representing the interests of future generations. It was stated that in what regards the quality of *locus standi* of present generations, in quality of administrators of these interests, these could still come from the concept of *action popularis* or following the obligations *erga omnes*¹³.

CONCLUSION

In the light of the recent progress relating to the exploitation of the area, the exploitation stage is imminent and therefore the need to adopt a framework regulation for the mining exploitation in the area appears, also important being underlying obligations that the Authority has in the field of environmental protection. Taking into account the gap regarding the regulation of marine diversity in the areas outside states' jurisdiction, the urgent protection of biodiversity by an institutional and legal framework is imposed, including by the involvement by the Authority.

The theory of intergenerational equity has been greatly influenced by the development of the international environmental law. Although in the last decade, the international community manifested a special concern for the issues of environmental protection, the following issue is raised *to what extent are the interests of future generations taken into account in the present discussions regarding the responsibility and the compensations, and in the assessment of damages in case of a prejudice.*¹⁴

¹²A.E.Boyle, Review of the Book of Brown-Weiss, *International and Comparative Law Quarterly*, Vol. 40 (1991) 230

¹³ M.F. Fitzmaurice, *International Protection of the Environment*,(Leiden /Boston ,Collected Courses of the Hague Academy of International Law, Volume: 293, Brill | Nijhoff, Leiden |, 2001) 192

¹⁴M.F. Fitzmaurice, *International Protection of the Environment*,(Leiden /Boston ,Collected Courses of the Hague Academy of International Law, Volume: 293, Brill | Nijhoff, Leiden |, 2001) 202

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