

Development of the legal context for deep-sea mining in Azorean waters

1998/2004: The Proposal for the Extension of the Continental Shelf (EMEPC) was created by the Resolution of the Council of Ministers no. 9/2005, January 17, after the Interministerial Commission of the Continental Shelf which has guided the project between 1998 and 2004. The mandate of EMEPC was consecutively renewed by the Resolutions of the Council of Ministers no. 26/2006, March 14, no. 55/2007, April 4, no. 32/2009, April 16, and no. 3/2011, January 12, alongside with Decree-Law no. 7/2012, January 17 (article 34, point 4, subpoint h), and Decree-Law no. 18/2014, February 4 (article 2, point p). Currently, the EMEPC is governed by the Resolution of the Council of Ministers no. 84-A/2016, December 28.

2008: According to the Regional Secretary of the Sea, Science and Technology, the canadian firm Nautilus Inc submitted an application for prospection and exploration of minerals in six locations in the Azores Sea, which has expired due to the applicable legislation and regulation that classifies the Azores Marine Park (Ref).

2011: The Azores government adopts a regional decree that establishes the marine park of the Azores with several [Marine] Protected Areas (MPA). These protected areas include notably D. João de Castro bank, hydrothermal vent area Menez Gwen, hydrothermal vent area Lucky Strike, hydrothermal vent area Rainbow, Sedlo seamount, Altair seamount, Antialtair seamount and the Mid-Atlantic Ridge North of the Azores HighSeas (MARNA). Deep-sea mining and any extractive activities are explicitly prohibited in these areas (Regional Legislative Decree n.º 28/2011/A, of 11 November).

2012: Nautilus Minerals submits five requests for deep-sea mining prospecting and exploration (Verdelho, Aviso n.º 13446/2012 of 10th of October, Saldanha, Aviso n.º 13357/2012, 9 of October; Arinto, Aviso n.º 13358/2012 of 9th of October, Moreto, Aviso n.º 13359/2012; Famous, Aviso n.º 13360/2012) in areas surrounding or close to the protected areas included in the marine park of the Azores .

The Government of Azores adopts regional legislation about deep-sea mining: Regional Legislative Decree No. 21/2012/A, of 9 May. In 2014, this regional law was declared unconstitutional by the Portuguese Constitutional Court in the Acórdão No. 315/2014, of 1 April.

2013: The Galway Statement on Atlantic Ocean Cooperation is signed, launching a EU, Canada and USA research alliance. This cooperation of the northern Atlantic stretching until the Arctic, is intended to better coordinate data sharing, interoperability and coordination of observing infrastructures and seabed and benthic habitat mapping, while promoting sustainable management of resources.

The MIDAS project - Managing Impacts of Deep-sea Resource exploitation – is established as a multidisciplinary research programme investigating the environmental impacts of extraction of mineral and energy resources from the deep-sea environment. This included the exploitation of materials such as polymetallic sulphides, manganese nodules, cobalt-rich ferromanganese crusts, methane hydrates and the potential mining of rare earth elements. MIDAS was funded under the European Commission's Framework 7 initiative from November 2013 for a period of 3 years, and has recently completed its programme of research.

2014: The Blue Mining project - “Breakthrough Solutions for Mineral Extraction and Processing in Extreme Environments” is signed between the Fundacao da Faculdade de Ciencias da Universidade de Lisboa (FFCUL) and several international partners, both from academia and mining industries, with the aim of developing deep-sea mining solutions and strengthen access to raw materials at great depths. This project has an implementation commitment active until 31st January 2018.

The central government of Portugal realises the conflict between the Azores marine park and the Nautilus applications. The national parliament of Portugal approves a framework law on maritime spatial planning: Lei No. 17/2014, of 10 April. The Government of Azores reacted politically to this law because it reduces the competences of the Autonomous Regions especially concerning, first, the approval of the regional spatial plan with the location of uses and activities (there is only a national plan and the final approval is competence of the central government – Autonomous Regions can propose regional plans to be included in the national plan) and, second, limits the regional competences to the 200 nm limit. This means that the continental shelf beyond 200 nm is excluded.

2015: Blue Atlantis, Innovative Mining of Marine Mineral Resources – A European Pilot Mining Test in the Atlantic on Tools, Facilities, Operations and Concepts is signed by 45 partners from 8 European countries with the aim of planning experimental Deep Sea Mining tests on fields of hydrothermal vents and seafloor around the Azores Archipelago. This project was signed by various portuguese entities, such as: Fundacao da Faculdade de Ciencias da Universidade de Lisboa (FFCUL); ISR - Institute for Systems and Robotics and CERENA - Center for Natural Resources and the Environment at Instituto Superior Técnico; Laboratório Nacional de Energia e Geologia (LNEG); SPCN - Sociedade Portuguesa de Ciências Naturais; EDM - Empresa de Desenvolvimento Mineiro, S.A; Estrutura de Missão para a Extensão da Plataforma Continental (EMEPC); IDL- Instituto Dom Luiz; IMAR - Instituto do Mar; FEUP – Faculdade de Engenharia da Universidade do Porto; Instituto Português do Mar e da Atmosfera (IPMA); Universidade de Aveiro; University of Evora/Hercules Laboratory. This project combining as well the participation of Nautilus Minerals and other mining and drilling companies from Europe plans to secure raw materials and rare earths for European industry, while promoting leadership in advanced deep-sea technologies will be further enhanced on a global scale. This project has an implementation commitment active until 31 March, 2020.

2015: The central government of Portugal approves Decree-law No. 38/2015, of 12 March, and the national parliament of Portugal approves the framework law No. 54/2015, of 22 June.

Decreto-Lei No. 38/2015 develops the framework regime embedded in Law No. 17/2014 and expands the central authority. Especially, it reiterates the limits expressed above and expressly establishes that, after the entry into force of Decree-Law No. 38/2015, any new MPA approved by the regional governments until the 200 nm limit necessitates previous consent by the central government (Art. 38(4)). According to this, the central government needs to be consulted and the decision is binding for the regions. The continental shelf beyond 200 nm is now exclusively under the competence of the central government. Furthermore, with respect to MPAs approved by the regional governments (including those in the continental shelf beyond 200 nm) before the entry into force of Decree-Law No. 38/2015, the central Government has now authority to not include (totally or partially) or exclude the MPAs from the national spatial plan, which means not recognise their existence and the associated management measures (Art. 104(3)(4)).

The Government of Azores reacts to Decree-Law No. 38/2015 with a request before the Portuguese Constitutional Court. However, the Court did not declare Decree-Law No. 38/2015 unconstitutional (Acórdão No. 136/2016, of 29 February). When the Portuguese government changed, the new Prime Minister António Costa (November 2015), with a new Minister for the Sea, Ana Paula Vitorino, the immediate reaction of the regional government was to start political contacts in order to revise Law No. 17/2014 and Decree-Law No. 38/2015, through a law approved initially by the national parliament, circumventing by this approach the decision of the Constitutional Court. However, it seems that there were no further developments on this matter, and it is not clear whether this has any connection with the fact that the former Azorean Regional Secretary for the Sea was by then the new Director of the General Directorate for the Ocean Policy (DGPM, central Government).

Law 54/2015: A framework law for mining is adopted which establishes the framework regime applicable to prospecting, exploration and exploitation of geological resources in Portugal, whether in land or in the sea. The law is very poor from the point of view of the environmental protection before, during and after activities take place. In accordance with the Political and Administrative Statute of the Autonomous Region of Azores, Art. 65(3) of the law sets out that the contracts for prospecting, exploration or exploitation of minerals in Azorean waters until 200 nm need to be approved signed by both the central and regional and the central governments, otherwise the licences cannot be granted.

38/2015: The Portuguese constitution establishes that for economic activities the management competences (decisions on which economic activities can take place in the sea around the Azores) are shared by the Portuguese central and Azorean regional governments, and that the decisions need to be taken together as well as the signing of the licences, otherwise these cannot be granted. The constitution also establishes that the Azores have full competence to adopt the environmental legislation they want. However, in 2015 the central government adopts decree 38/2015, which is the Portuguese maritime spatial planning decree, and it diminishes the Azorean environmental competences to decisions within 200nm, excluding the continental shelf. This means that from 2015 on, any MPA approved by the regional government (beyond 200 nm) needs to also be approved by the central government. As well, MPAs approved by the regional government before 2015, can be declassified by the central government at any point.

2016: The Azorean regional government regards the maritime spatial planning decree (regulation 38/2015) unconstitutional and asks the Constitutional court for a ruling on it. In 2016 the Constitutional court decides that the law (38/2015) is in line with the constitution, confirming that both for economic and environmental decisions the Azorean government is dependent of the central government and vice versa. The Portuguese Constitutional Court decides (Acórdão No. 136/2016) that Decree-Law No. 38/2015 is in line with the Constitution, confirming that both for economic and environmental decisions the Azorean government is dependent of the central government.

Besides political contacts with the central Government (Prime Minister and Minister of the Sea) after November 2015 (time when the new Government was formed), the Government of Azores reacted to the decision of the Portuguese Constitutional Court approving an expansion of the Azorean marine park adopted in 2011 (Regional Legislative Decree No. 13/2016/A, of 19 July). This reaction was also a response to the hegemonic initiatives taken by Directorate-General for Natural Resources, Safety and Maritime Services (“Direcção Geral de Recursos Naturais, Segurança e Serviços Marítimos” in Portuguese, DGRM) namely, by the proposal of a new Decree-Law setting the Portuguese network of

MPAs apparently neglecting the regional environmental competences.

The Azorean government reacts to the 2015 maritime spatial planning Decree–Law by approving an expansion of the Azorean marine park adopted in 2011, encompassing all areas for which Nautilus submitted a request for exploration (Regional Legislative Decree n.º 13/2016/A), keeping the prohibition of mineral extraction in the protected areas within the park. The main protected areas within the Azores marine park (in particular, Lucky Strike, Menez Gwen, Rainbow and Saldanha) are also approved by the European Commission as Sites of Conservation Interest Community Importance, as part of Natura 2000.. The protected areas Menez Gwen, Lucky Strike Rainbow and Saldanha are also OSPAR marine protected areas. The Rainbow field is on the national list of proposals for Sites of Community Importance Conservation Interest, but not yet approved by the Commission and declassification can be faced with the interpretation of the European Court of Justice expressed in the judgement *Bund Naturschutz in Bayern et al./Freistaat Bayern*, decision of 14 September 2006, Case C-244/05, Col. I-8445, para. 41, 44 and 46.

2016/7: The central government challenges, before the Portuguese Constitutional Court, the regional decision to enlarge the Azores marine park ((Regional Legislative Decree n.º 13/2016/A) because it was unilaterally adopted by the Azores without approval of the central government under Decree-Law No. 38/2015 the regional government is no longer competent to designate MPAs in the continental shelf beyond 200 nm. The Constitutional court has not yet taken a decision. As far as we know, the central government was not consulted with respect to the enlargement of the park inside 200 nm.

2017: On the 13th of July 2017 the European Union, Brazil and South Africa signed the Belém Statement, an agreement for research and innovation in the Atlantic Ocean. The statement was signed at the Belém Tower by Carlos Moedas, Commissioner for Research, Science and Innovation, Gilberto Kassab, Minister of State for Science, Technology, Innovations and Communications of Brazil and Naledi Pandor, Minister of Science and Technology of South Africa, during the New Era of Blue Enlightenment Conference that promoted the Azorean archipelago as a geostrategic point for Atlantic studies convergence, while advertising its hydrothermal seabed resources.