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Deepsea's Adventures: Grotius Revisited - A Rejoinder

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Deepsea's Adventures: Grotius Revisited—A Rejoinder

Professor Gary Knight has taken exception to the conclusions of our previous article[1] on the subject matter and expounded his own personal philosophies on the creation of wealth and development which he implies to be the privilege of private citizens or corporations. We shall not pursue here this philosophical or political exchange but, instead, are constrained to expand on the legal issues previously raised and still pending at the UNLOS negotiations.

I. Basic Distinction

The multiple questions raised by the claim for exclusive mining rights by Deepsea Ventures, Inc. (hereinafter "Deepsea") may be examined from different perspectives: (i) those of the private mining industry; (ii) United States National Policy; and, (iii) public international law.

Both the motivation and purposes of private industry in the development of ocean mining are simple enough and require little elaboration. Qualified representatives of the industry have in nonambiguous terms stated their view together with their firm advocacy for United States unilateral action: "The venture should not only have the opportunity for profit making, but also, if it does an excellent job, it should have the opportunity to make an excellent profit."[2] Without disputing the legitimacy of this outlook, which is not different from that which guides any other business, its limited scope makes it, in our view, clearly insufficient for shaping public policy.

On the other hand, the considerations guiding United States policy, while not excluding the interests of private industry, are understandably based on the overall present and future economic needs of the country. From this perspective, the figures are startling: the United States presently imports 96 percent of its total

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[1] 9 INT'L LAW. 751-53 (1975).

[2] Marne A. Dubs, "Law and Policy in Mining the Ocean Floor: The Industrial Perspective," p. 62, Proceedings of the John Basset Moore Society of International Law Symposium and the ASIL Regional Meeting, Charlottesville, Virginia, November 16, 1974.

consumption of cobalt, 95 percent of its manganese, 75 percent of its nickel, and 19 percent of its copper. Moreover, the United States Department of the Interior estimates that by 1990 the United States could be self-sufficient in nickel, copper and cobalt and reduce its imports of manganese to 23 percent of its consumption, provided the private seabed mining industry is permitted to start with its operations immediately.[3]

The significance of the above figures was unquestionably behind the recommendation of the National Advisory Committee on Oceans and Atmosphere that "Legislation be enacted to encourage and regulate deep seabed mining by the United States private industry to the end that the minerals of the deep seabed will be available to decrease United States dependence on foreign sources and to increase world supply."[4]

Notwithstanding the above, it should be noted that, however valid the preceding considerations may be to the national interest and needs of the United states, they certainly are not different from those of other countries, particularly those which presently have to import 100 percent of their consumption of cobalt, manganese, nickel or copper and which would likewise welcome the development of alternative resources in order to decrease their foreign dependence. Regardless of how important these economic realities may be to individual countries, they definitely do not offer, on our view, a conclusive perspective for resolving one of the most important problems of public international law of modern times. We feel, then, that—whatever may be their merit in their respective fields—we must extricate from this analysis those considerations related to the interests of private industry or individual countries which, in our view, have no direct concern to the development of an equitable principle of law for the mineral resources of the high seas. We, instead, support the following statement of Ambassador John Norton Moore:

> The United States will go to the . . . Law of the Sea Conference prepared to negotiate a just and timely agreement, *an agreement which we feel not only will serve our national interests, but also will serve the interests of all mankind.* . . . Accordingly, we hope that all nations will keep before them the great preface of the Charter of the United Nations: That the Peoples of the United Nations will "establish conditions under which justice and respect for the obligations arising from treaties and other sources of international law can be maintained to promote social progress and better standards of life in larger freedom for all mankind."[5]

II. Deepsea's Claim and the LOS Negotiations

With little explanation we are asked to examine the problems raised by a

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[3]"Mining Rights in the Deep Seabed," Northcutt Ely, presentation before the American Mining Congress, San Francisco, California, p. 10.

[4]A Report to the President and Congress, June 30, 1975.

[5]*Id.* Proceedings of the John Basset Moore Society of International Law Symposium, pp. 87-88. (Emphasis supplied)

unilateral claim of exclusive mining rights in the high seas against a blazing scenario of inflamed rhetoric and confrontation, with Ambassador Moynihan and Deepsea on one side and the developing nations on the other. Although no fruitful purpose would be served by perpetuating this emotional approach, a few comments are in order: First, the record shows that Deepsea's claim was officially rejected by Canada (December 6, 1974), the United Kingdom (January 20, 1975) and Australia (March 18, 1975),[6] which are not exactly developing countries. The other is that the balance of power in today's world is different from that which prevailed at the time of the Congress of Vienna, the League of Nations, or the Conference of San Francisco. The law which emerges from the LOS negotiations will have to reflect this reality—however imperfect—or else there will be no law. Failure to recognize this changing reality would lead us to that dreaded chaos announced by Ambassador Moore "in which even great power prevails at great cost."[7]

III. Res Nullius or Common Heritage?

As if unburying Grotius were not enough, we are now being dragged to old Rome in search of a legal justification for Deepsea's action. Res nullius in 1976? Well, the record of official United States policy would not support this sophistication: On July 13, 1966, President Johnson stated: "Under no circumstances . . . must we ever allow the prospects of rich harvest and mineral wealth to create a new form of colonial competition among the maritime nations. We must be careful to avoid a race to grab and to hold the lands under the high seas. We must ensure that the deep seas and ocean bottoms are, and remain the legacy of all human beings."[8] On August 30, 1968, the United States voted for the Report of the Ad Hoc Committee of the United Nations established by General Assembly Resolution 2340, of December 18, 1967, which stated that the exploration and use of the sea-bed and ocean floor and the subsoil thereof and the exploitation of their resources should be carried out for the benefit and in the interest of mankind.[9] On December 21, 1968, the United States voted for General Assembly Resolution 2467 A which stated the conviction that the exploitation of the sea-bed and ocean floor and the subsoil thereof should be carried out for the benefit of mankind as a whole taking into account the special interests and needs of the developing countries.[10] On May 23, 1970, a statement by President Nixon proposed that all nations adopt as soon as possible a treaty under which they would renounce all national claims over the natural resources of the seabed

[6]International Legal Materials, January and May 1975, pp. 67, 795-96.
[7]*Hearings Before the National Ocean Policy Study of the Committee on Commerce,* U.S. Senate, June 3, 1975, p. 9.
[8]Quoted from Gary Knight, "The Law of the Sea," Documents and Notes, 1969, p. 462.
[9]Gary Knight, *id.*, p. 469.
[10]Shigeru Oda, THE INTERNATIONAL LAW OF THE SEA, Basic Documents, Leiden, 1972, p. 35.

beyond the point where the high seas reach a depth of 200 meters and would agree to regard these resources as the common heritage of mankind.[11] On August 3, 1970, the United States submitted before the United Nations Seabed Committee a draft which stated that the International Seabed Area as defined therein shall be the common heritage of mankind.[12] Finally, on December 17, 1970, the United States voted for Regulation 2749 of the General Assembly, (Declaration of Principles) which:

> Recognizing that the existing legal regime of the high seas does not provide substantive rules for regulating the exploitation of the aforesaid area and exploitation of its resources,

declared that:

> No State or person, natural or juridical, shall claim, exercise or acquire rights with respect to the area or its resources incompatible with . . . the principles of this Declaration.[13]

Among the principles approved was Article 1 which provided:

> The sea-bed and ocean floor, and the subsoil thereof, beyond the limits of national jurisdiction (hereinafter referred to as the area) as well as *the resources of the area, are the common heritage of mankind.*[14]

If, by virtue of the above, it became the official United States position that the resources of the sea-bed and ocean floor and of the subsoil thereof, beyond the limits of national jurisdiction "*are* the common heritage of mankind" and that no State or person, natural or juridical, may claim, exercise or acquire rights with respect to those resources, with what authority can it be asserted that these same resources *are* recognized by international law as "res nullius" subject to exploitation by any citizen?

We are aware of the technicalities expressed with regard to the United Nations Resolutions in the sense that they are only "advisory," "declaratory" or "recommendatory" and, therefore, not binding. However, this last contention has been cogently disputed by several authors[15] which affirm that agreements or resolutions—different from treaties—which evidence the formal consent of States, constitute valid principles of international law. With great precision Professor Castañeda has stated: "The recognition and formal expression of a customary rule or a general principle of law by the General Assembly constitutes a *juris et de jure* presumption that such a rule or principle is a part of positive international law, that is to say, a legal assumption or fiction that does not allow proof to the contrary, and in the face of which an opposing individual position

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[11]Shigeru Oda, *id.*, p. 343.
[12]*Id.*, p. 73 UN Doc. A/AC 138/25.
[13]*ID.*, p. 44.
[14]*Id.* (Emphasis supplied)
[15]Jorge Castañeda, Legal Effects of United Nations Resolutions, Columbia University Press, 1969, p. 172; Edmundo Vargas, America Latina y el Derecho del Mar, Mexico, 1973, p. 106.

therefore lacks legal efficacy."[16]

Notwithstanding the weight of the above opinion, we shall assume, for the sake of argument, the General Assembly Resolutions do not create international law binding upon all members of the United Nations whether they voted for such resolutions or not.[17] Even under this assumption, it would appear inconceivable that support could be granted to actions totally adverse to both the text and spirit of such Resolutions from the same countries which voted affirmatively for them, particularly when, in the case of those United Nation Resolutions which the United States has voted against (Moratorium Resolution), the State Department through Ambassador Stevenson has asserted that they must be given "good faith consideration."[18]

Whichever is the right interpretation of the concept "common heritage of mankind," it, most likely, is the opposite of "res nullius." This last concept was developed by the Romans in their property law and applied to those things belonging to nobody either because they had been abandoned (res derelicta) or never been incorporated to private ownership, as in the case of wild birds, fish or animals. The act by which a person acquired ownership of a "res nullius" was "occupation." In common law countries occupation is utilized to describe the manner by which a person can legally obtain ownership of a mining deposit and, in most cases, this ownership is granted to the first discoverer. However, the theory of res nullius and occupation in domestic mining law within the Western Hemisphere is not universal, there being several important countries which regulate the matter differently.

But the main question is, how can a principle of domestic mining law developed in the past by one particular country and for one specific purpose be converted into a principle of international law applicable to all countries and for a completely different undertaking?

With due respect to the prominent scholars who have devoted time and effort searching for that missing link which would enable private individuals to develop the hard minerals of the deep sea-bed under the protective umbrella of international law, the sad truth is, in our opinion, that there is no justifiable formulation for such approach.

It certainly is not easy in the nineteen seventies to find legal precedents in someway related to a technology totally unknown in the fifties or early sixties. However, the following cases have been cited: Palmas,[19] Clipperton[20] and Eastern

[16]Jorge Castañeda, *supra* note 15.

[17]Editor's Note: This assumption, in fact, is the view shared by the present legal counsel of the Secretary-General of the United Nations.

[18]*Hearings on S. 2801—Subcommittee on Minerals, Materials and Fuels of the Senate Committee on Interior and Insular Affairs*, 2nd Session, 1972, pp. 74-75.

[19]See William W. Bishop, Jr. International Law, Cases and Materials, Little, Brown and Co., 1962, p. 345.

[20]*Id.*, p. 352.

Greenland.[21] All refer to territorial disputes between sovereign states stretching out from the 19th century and resolved in 1928 (Palmas), 1932 (Clipperton) and 1933 (Eastern Greenland). The law emerging from these cases referred to land—not resources—and to sovereign States—not individuals. Their relation to the exploitation of mineral resources by individuals is, therefore, zero.

Professor Goldie has unfrozen the Spitzbergen case related to a territorial dispute stretching out for several centuries and resolved by the Treaty of Paris, February 9, 1920.[22] Its relevance would be in that the Treaty "recognized and preserved the established rights of citizens of the signatory countries to exploit their coal and other mineral holdings and to fish in Spitzbergen waters."[23] It should be noted that: (i) once again this is a land dispute between States; (ii) the recognition of private citizens' rights referred to therein is a typical compromise in a land settlement dispute with no significance to general international law; and, (iii) the private rights to coal and other mineral holdings and to fish continued to be exercised in accordance to the domestic laws of Norway (whose sovereignty was recognized by the Treaty) and not in accordance to any principle of international law.

Finally, there is the contention that recognition of rights over pearls, sponges, oysters and the like, prior to the Convention of the Continental Shelf, would evidence the existence of a principle applicable to present ocean mining.[24] However, those rights were granted to coastal States as a recognition of the extension of their territories (as was later confirmed by the Convention), *but never to the first discoverer.* The clear conclusion is, then, that the mineral resources of the high seas have not been recognized under any known principle of international law as "res nullius" susceptible of occupation by the first discoverer but have been declared by the United States and 107 other nations to be the common heritage of mankind and, as such, not susceptible to acquisition or exploitation by states or persons, natural or juridical.

IV. The Search for a Principle

For those who advocate exploitation of the mineral resources of the high seas by private individuals the long sought principle that would authorize such exploitation would have to declare that it is amongst the freedoms of the oceans recognized by existing international law. However, the 1958 Convention of the High Seas, which specifically regulated this matter, provides substantial evidence precisely against this possibility. Article 2, after enumerating the different

[21] *Id.*, p. 355.
[22] L.F.E. Goldie, A General International Law Doctrine for Seabed Regimes, Int'l Lawyer, October, 1973, p. 796.
[23] *Id.*, p. 809.
[24] See 9 INT'L LAW. 271.

freedoms (navigation, fishing, laying submarine cables and pipelines and overflying the high seas) states that "these freedoms, and others which are recognized by the general principles of international law, shall be exercised *by all States* with reasonable regard to the interests of other States in their exercise of the freedom of the high seas" (emphasis added).[25]

One serious caveat is, of course, that the Convention refers to the exercise of such freedoms by States and not by individuals like Deepsea.

But there is more.

A distinguished expert, Mr. John G. Laylin[26] has elaborated that one of the freedoms not listed but recognized by the Convention would be the right to explore and exploit the mineral resources of the seabed beyond state jurisdiction. His interpretation is based in the Report of the International Law Commission which drafted the final text of the Convention.[27] However, our reading of the pertinent paragraphs of this Report is different from his: Paragraph 5 reads:

> *Any freedom that is to be exercised in the interests of all entitled to enjoy it, must be regulated* (emphasis added).

In conjunction with the above, Paragraph 2 states:

> The Commission has not made specific mention of the freedom to explore or exploit the subsoil of the high seas. It considered that apart from the case of the exploitation or exploration of the soil or subsoil of a continental shelf—a case dealt with separately in Section III below—*such exploitation had not yet assumed sufficient practical importance to justify special regulation* (emphasis added).

It follows, then, that the only exploration or exploitation of the subsoil conceived by the Commission was that of the subsoil of the continental shelf (regulated by the Convention thereon and which only envisaged exploration and exploitation up to depths of 200 meters). Moreover, it provided that special regulation was a mandatory requisite for the exercise of the freedoms of the oceans. Hence, if the exploration and exploitation of the subsoil of the high seas was not deemed to be of sufficient importance as to be regulated, then its exercise became not only inconceivable but, also, legally impossible. The obvious conclusion, then, is that the opinion of the International Law Commission and that of the countries which approved the 1958 Convention of the High Seas was that there was no existing principle of international law authorizing deep ocean mining of the seabed beyond the limits of national jurisdiction. We can add that the first serious attempt by the international community to regulate this matter occurred in 1970 with the approval by 108 countries of the principle of the common heritage of mankind the regulation of which is the main purpose, amongst others, of the still pending LOS negotiations.

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[25]Shigeru Oda, *id.*, p. 9.

[26]14 COLUM. J. INT'L L. 42 (1975).

[27]YEARBOOK OF THE INTERNATIONAL LAW COMMISSION, Vol. II, 1956, Report to the General Assembly, Document A/3159, p. 278.

V. Unilateral Action?

Having demonstrated, we submit, that no existing principle of international law would authorize deep seabed ocean mining beyond the limits of national jurisdiction, it is our conviction that to achieve a successful LOS negotiation the resulting international agreement must meet the interests of all the nations concerned, developed and developing. In this context we welcome the firm leadership exerted by the United States Executive which has until now successfully prevented the enactment of unilateral actions that would seriously disrupt the possibilities of achieving such agreement. It is fairly clear that—as opposed to the unilateral extension of the fisheries jurisdiction of the coastal State up to 200 miles, in which virtual consensus exists in the world community—unilateral action in deep sea-bed mining would provoke world upheaval and uncertainty of every sort. What is more, such action would be clearly illegal and easily challenged at the International Court of Justice.[28]

We, therefore, agree fully with the following policy statement of the Secretary of State:

> We prefer a generally acceptable international agreement that provides a stable legal environment *before* deep sea-bed mining actually begins. The responsibility for achieving an agreement before actual exploitation begins is shared by all nations.[29]

[28]For an analysis of the existing alternatives, see James C. Orr, "The Economic Effects of Deep Ocean Mineral Mining and the Implications to the U.S. Policy," p. 38, Ocean Policy Project, The Johns Hopkins University, Occasional Paper Series No. 4.

[29]Speech of the Secretary of State before the American Bar Association Annual Convention, August 11, 1975, Montreal, Canada.