

Deepsea's Adventures: Grotius Revisited

Assuredly not even so farsighted a scholar as Ambassador Pardo¹ would have imagined the world upheaval provoked by the Deepsea Ventures, Inc. (hereinafter "the Company") claim of exclusive mining rights (hereinafter "the claim")² on the eastern Pacific Ocean some 1,300 kilometers off the coasts of Mexico. Amongst the virtues of this claim—which indeed are many—two seem outstanding: first, the transformation of a long debated yet until now almost entirely abstract legal issue on the exercise of rights over the resources of the seabed beyond national jurisdiction, into a real international problem of now very tangible proportions requiring—and, perhaps, offering—an immediate and definite solution; and, second, the claim's extraordinary timing, occurring just a few months before the Geneva Meeting of the United Nations Third World Conference on the Law of the Sea.³

Let us highlight some of the problems raised by the claim.

The Facts

The Company filed with the Secretary of State of the United States, on November 15, 1974, a Notice of Discovery and Claim of Exclusive Mining Rights and a Request for Diplomatic Protection and Protection of Investments. It stated the discovery and possession of a deposit of seabed manganese nodules covering 60,000 square kilometers for purposes of development and evaluation to be reduced to 30,000 square kilometers upon expiration of 15 years from the date of notice or commencement of commercial production, whichever occurs first. Exact description of the deposit is given, which is located beneath the high seas at depths ranging from 2,300 to 5,000 meters beyond 200 miles of the nearest island or continental margin. Commercial production is expected within

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¹ Ambassador Arvid Pardo, Permanent Representative of Malta to the United Nations.

² The text of the claim and the corresponding statement made by the U.S. Department of State and the response of the Canadian Government appear in Volume XIV, No. 1, January, 1975, [pages . . .] of *INTERNATIONAL LEGAL MATERIALS* of the American Society of International Law.

³ The Conference is scheduled from March 17 through May 10, 1975.

15 years and a description is given of the minerals to be recovered, which include copper, nickel, cobalt and manganese.

The Company asserts exclusive rights to develop, evaluate and mine the deposit and to take, use, and sell all nodules and metals derived therefrom. It requests all States, persons and other entities to respect these exclusive rights. However, it does not assert or ask the United States to assert a territorial claim to the seabed or subsoil underlying the deposit. Use of the overlying water column will be made to recover and transport the nodules. Disturbance of the seabed and subsoil underlying the deposit would be temporary though the Company does not intend to process at sea the nodules derived thereof. Request for diplomatic protection and protection of the integrity of the investment is demanded from the United States Government with respect to the exclusive rights described. Finally, it is stated that best efforts have been used to ascertain that there are no pipelines, cables, military installations or other activities constituting an exercise of the freedom of the high seas in the area encompassed by the deposit; nor any other claims covering the same deposit. More than 10 years of exploration and survey would have been undertaken and approximately US\$20,000,000 spent in these endeavors. Additional exploration and development would cost between US\$22,000,000 and US\$30,000,000. Copies of the claim were mailed to several United States public officials, the Secretary General of the United Nations, the Ambassadors of Australia, Belgium, Bulgaria, Canada, Czechoslovakia, France, Germany, Great Britain, Hungary, Japan, Poland, Soviet Union and various multinational corporations.

The Legal Brief Supporting the Claim⁴

The fundamental legal premise supporting the claim appears to be that a positive rule of international law exists which would permit the acquisition of exclusive rights to explore and exploit manganese nodules in the seabed beyond national jurisdiction. This conclusion presumes to be drawn from the practice of states, the 1958 Convention of the High Seas and the general principles of law recognized by civilized nations, taken together. Consistent with existing international law, the Company, although a private corporation, could acquire exclusive rights but would be dependent on the Department of State for diplomatic protection of these rights and the integrity of its investment. In consonance with principles of domestic mining law applicable to international law, the Company has given due public notice of its discovery and establishment of possession and future development of the deposit. The invoked positive rule of international law would derive from the orthodox sources described in Article 38, par. 1, of the Statute of the International Court of Justice:

⁴Legal Opinion from the Offices of Northcutt Ely, dated November 14, 1974, submitted to the Company and which for reasons of space is only summarized herein.

- a. International conventions, whether general or particular, establishing rules expressly recognized by contesting states;
- b. International custom, as evidence of a general practice accepted as law;
- c. The general principles of law recognized by civilized nations; . . .

A. *Customary Law; The Practice of States in Seabed Areas Beyond National Jurisdiction*

The argument goes that, prior to the Truman Declaration of 1945, no legal distinction existed between the continental shelf and the abyssal ocean floor; both areas were simply seabed beyond the limits of national jurisdiction. Consequently, there was one seabed regime covering both. State practice on the continental shelf beyond territorial waters prior to 1945 would thus be evidence of the law applicable to the deep seabed, since rules of law that developed from state practice on the continental shelf did not develop with reference to the seabed beyond national jurisdiction, which included the abyssal ocean floor.

The brief gives ample evidence that prior to 1945, amongst many others, Australia, England, Japan and Turkey acquired exclusive rights to exploit pearls, oysters, coral and sponges lying beyond their respective territorial waters. What title was claimed to acquire such exclusive rights? According to Professor Waldock,⁵ as cited in *United States v. Maine, et al.*⁶ “. . . claims to exclusive rights to the resources of the seabed at least beyond the territorial sea must be based on long enjoyment (prescription) or on actual exploitation (occupation).” Although the impression is given that the resources of the seabed were thus regarded as “res nullius” mention is also made of the fact that many authors looked upon these resources as “res communis,” like the high seas.

This problem is said to have disappeared with the Continental Shelf Doctrine under which resources which had been traditionally harvested from the seabed beyond national jurisdiction (sponges, pearls, etc.), became, in accordance with the new Doctrine, subject to the jurisdiction of the coastal state.

But what bearing does this have on the non-traditional resources of the seabed, such as the manganese nodules beyond national jurisdiction? Here Mr. Ely's brief states that these resources “were not commercially recoverable because of the state of deep water technology at the time.”⁷ It goes on to observe that technological conditions have changed, that several enterprises would now be actively engaged in exploring the abyssal ocean floor and that States have not found any international principle prohibiting them or their nationals from engaging in deep sea mining. Finally, it emphasizes the element of the importance of the States involved by citing Justice Lauterpacht:

⁵WALDOCK, THE LEGAL BASIS OF CLAIMS TO THE CONTINENTAL SHELF, 36 Grotius Society 115, 118 (1951) as cited in Northcutt Ely's opinion.

⁶REPORT OF THE SPECIAL MASTER 68-69, *United States v. Maine, et al.*, Sup. Ct. No. 35, Original, Oct. Term, 1973, as cited, note 5, above.

⁷*Id.* pages 21-22.

. . . assuming that we are confronted here with the creation of new international law by custom, what matters is not so much the number of states participating in its creation . . . as the relative importance in any particular sphere, of states inaugurating the change. In a matter closely related to the principle of freedom of the seas the conduct of the two principal maritime powers—such as Great Britain and the United States—is of special importance. . . .⁸

B. *Conventional Law and the Freedom of the Seas Doctrine*

The position of the argument with respect to conventional law centers on Article 2 of the Convention on the High Seas, dated April 29, 1958:

Art. 2. The high seas being open to all nations, no State may validly purport to subject any part of them to its sovereignty. Freedom of the high seas is exercised under the conditions laid down by these articles and by the other rules of international law. It comprises, *inter alia*, both for coastal and non-coastal States:

- (1) Freedom of navigation;
- (2) Freedom of fishing;
- (3) Freedom to lay submarine cables and pipelines;
- (4) Freedom to fly over the high seas.

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.

It is contended that although the above Convention did not expressly provide for the exploitation of natural resources on the abyssal ocean floor, such exploitation would be indicated by: (i) the *travaux préparatoires* of the Convention which expressly considered such exploitation as a freedom "recognized by general principles of international law;" (ii) the position taken by the United States Department of State that the mining of manganese nodules is a legitimate exercise of the freedom of the sea doctrine articulated in that Convention.

The brief maintains that the freedom to explore or exploit the subsoil of the high seas was not included in Article 2 because it had ". . . not yet assumed sufficient practical importance to justify special regulation."⁹ The point is also made that the term *inter alia*, prior to the enumeration of the four listed freedoms and the phrase, "These freedoms and others which are recognized by the general principles of international law . . .," would indicate the existence of other freedoms of the high seas not listed in Article 2. Such other freedom would be the exploitation of the seabed and subsoil beyond national jurisdiction which would be "recognized by the general principles of international law."

⁸LAUTERPACHT, SOVEREIGNTY OVER SUBMARINE AREAS, 27 BRIT. Y.B. INT'L L. 376, 394 (1950), as cited in the brief.

⁹2 YEARBOOK OF THE INTERNATIONAL LAW COMMISSION 1955, at p.21, A/CN.4/Ser.A/1955 Add/.

C. General Principles: The Absence of a Prohibitory Rule

Citing various cases and a draft of the Statute of the Permanent Court of International Justice which gives as an example of "the general principles of law recognized by civilized nations" the maxim "that which is not forbidden is allowed,"¹⁰ the brief concludes that, in the absence of a rule prohibiting the exploitation of the seabed beyond national jurisdiction, such activity would, hence, be authorized by international law. The brief argues that the above conclusion is not in conflict with two Resolutions of the General Assembly of the United Nations, amongst other reasons, because neither would be binding on the United States or its nationals.

The United Nations Resolutions

The two United Nations Resolutions which, according to Mr. Ely, do not constitute binding international law are the Moratorium Resolution of 1969 (Resolution 2574 D)¹¹ which the United States voted against, and the Declaration of Principles, of December 1970 (Resolution 2749), on which the United States voted affirmatively.

The Moratorium Resolution¹²

The General Assembly, . . .

Declares that, pending the establishment of the aforementioned international regime:

- (a) States and persons, physical or juridical, are bound to refrain from activities of exploitation of the resources of the area of the sea-bed and ocean floor, and the subsoil thereof, beyond the limits of national jurisdiction;
- (b) No claim to any part of that area or its resources shall be recognized.

The position of the United States with regard to the Moratorium Resolution was stated by the then Legal Adviser of the Department of State, John Stevenson,¹³ in a letter addressed to the Chairman of the Committee of the Interior and Insular Affairs of the United States Senate on January 16, 1970, which includes the following paragraph:

The Resolution is recommendatory and not obligatory. The United States is, therefore, not legally bound by it. The United States is, however, required to give good faith consideration to the Resolution in determining its policies.

¹⁰League of Nations, Advisory Committee of Jurists, June 16, 1920, as cited by Mr. Ely.

¹¹SHIGERU ODA, *THE INTERNATIONAL LAW OF OCEAN DEVELOPMENT* p. 43, 1972.

¹²SHIGERU ODA, *id.*, only the substantive paragraph is included.

¹³INTERNATIONAL LEGAL MATERIALS, Volume IX, Number 4, July 1970, p. 832.

The 1970 Declaration of Principles¹⁴

The General Assembly . . . [s]olemnly declares that:

1. 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.
2. The area shall not be subject to appropriation by any means by States or persons, natural or juridical, and no State shall claim or exercise sovereignty or sovereign rights over any part thereof.
3. No State or person, natural or juridical, shall claim, exercise or acquire rights with respect to the area or its resources incompatible with the international regime to be established and the principles of this Declaration.
4. All activities regarding the exploration and exploitation of the resources of the area and other related activities shall be governed by the international regime to be established.
5. The area shall be open to use exclusively for peaceful purposes by all States, whether coastal or landlocked, without discrimination, in accordance with the international regime to be established.
6. States shall act in the area in accordance with the applicable principles and rules of international law, including the Charter of the United Nations and the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations, adopted by the General Assembly on 24 October 1970, in the interests of maintaining international peace and security and promoting international co-operation and mutual understanding.

The Position of the United States Department of State on the Deepsea Ventures Claim

In its official statement on the claim asserted by Deepsea Ventures,¹⁵ the Department of State announced that

[it] does not grant or recognize exclusive mining rights to the mineral resources of an area of the seabed beyond the limits of national jurisdiction.

The appropriate means for the development of the law of the sea is the Third United Nations Conference on Law of the Sea and not unilateral claims. The United States supports the achievement of a widely acceptable and comprehensive law of the sea treaty in 1975 that would include a regime and machinery for the exploration for and exploitation of the mineral resources of the deep seabed beyond the limits of national jurisdiction.

The position of the United States Government on deep ocean mining pending the outcome of the Law of the Sea Conference is that the mining of the seabed beyond the limits of national jurisdiction may proceed as a freedom of the high seas under existing international law.

This statement should be contrasted with the attitude expressed in the last paragraph of the letter which the Legal Adviser (Stevenson) addressed on

¹⁴SHIGERU ODA, *id.*, page 44. For reasons of space only the first 6 articles are transcribed.

¹⁵INTERNATIONAL LEGAL MATERIALS, Volume XIV-No. 1, Jan. 1975.

January 16, 1970, to the United States Senate, and to which reference has already been made:¹⁶

The Department does not anticipate any efforts to discourage United States nationals from continuing with their current exploration plans. In the event that United States nationals should desire to engage in commercial exploitation prior to the establishment of an internationally agreed regime, we would seek to assure that their activities are conducted in accordance with relevant principles of international law, including the freedom of the seas and that the integrity of their investment receives the due protection in any subsequent international agreement.

Comments

It would be frivolous to proffer routine legal analysis when we are confronted with a situation that challenges thirty years of efforts to regulate the activities of four-fifths of this planet earth. What is truly startling is that the world community is expected to acquiesce obligingly to the claim on the basis of the doctrine of the freedom of the seas! It seems preposterous that the revolution initiated with the Truman Declaration of 1945, the effect of which was precisely to restrict that doctrine, should now, in 1975, retrogress to an exaggerated form of that principle. Such wishful thinking not only ignores the present realities of the law of the sea but also the existence of a Third World Revolution. Within this context, to rest the justification of the claim on the argument that the United States imports 71 percent, 92 percent and 93 percent of the respective nickel, cobalt and manganese it consumes would not prove so convincing to developing countries which have to export those same minerals in order to feed their people. The fact is that in today's world international law is being made by 150 countries and not by private corporations or individual states; in short, Justice Lauterpacht's opinion that Great Britain and the U.S. could together create international law in certain areas is a little out of fashion these days.¹⁷

Perhaps Senator Metcalf¹⁸ said it in better words:

Those nations which have the capacity to lay submarine cables, do oceanographic research, and mine the deep ocean floor benefit from the freedom of the seas doctrine. Those nations without marine technology do not benefit.

When one understands that there are dozens of nations which have never benefited from the freedom of the seas doctrine, one can understand the motivation behind their growing demands for greater participation. What is proclaimed by some to be equal freedom for all nations on the high seas has become in fact unequal freedom.

It is not surprising that, according to the claim, copies of the same were mailed to the embassies of most industrialized countries and several corporations, but not one to those of the developing world.

¹⁶*Id.*

¹⁷*Id.* See page 8.

¹⁸SENATOR LEE METCALF, CONGRESSIONAL RECORD, March 10, 1971.

So much for the present writer's general reaction to the rationale of the claim. Let us turn now to the more specific legal arguments relied upon to sustain Deepsea Venture's case.

A. *The Continental Shelf Argument*

It is submitted that comparing the extraction of sponges and oysters to the exploitation of manganese nodules overly taxes that analogy. Prior to the Truman Declaration, those rights recognized on sponges and the like were exclusively granted to the corresponding coastal states but *never to the first discoverer*. What the Continental Shelf Convention did in 1958 and what was ratified by the International Court of Justice in the North Sea case¹⁹ was to accept the exploitation of such resources *by the coastal state* because the shelf was considered as an extension of its territory. Just how pertinent is this to the question of resources totally unknown at that time or before and which rest outside the jurisdictional territory of any state? Moreover, the 1958 Convention on the Continental Shelf established a dual criterion for measuring its extension: (a) up to a depth of 200 meters; or (b) beyond that limit, to where the depths of the superjacent waters admitted exploitation. The reason for limiting the depth to 200 meters was because scientific evidence at that time could not conceive of exploitations at larger depths.

There is therefore no possible legal nexus between what the Continental Shelf Convention did concerning the exploitation of resources in accordance with the 200 meter technology of 1958, and exploitation with today's technology of manganese nodules at depths of over 4,000 meters.

B. *The Convention of the High Seas Argument*

The claimant's argument here seems elusive because we are asked to concur that when the Convention referred to freedoms other than those enumerated in Article 2 and "recognized by the general principles of international law" it referred to the freedom to exploit the seabed resources beyond national jurisdiction. However, the brief is unable to point to the general principle of international law accepted in 1958 specifically permitting such exploitation. Instead, it asserts exactly the reverse by elaborating on the maxim that the *absence of a prohibitory rule* would permit the undertaking of such activities under international law. If we are to believe the latter, we cannot accept the former. If there ever was an affirmative principle of international law implied in the 1958 Convention under which the exploitation of seabed resources other than sponges or pearls could be undertaken, the failure to clearly state that principle cannot be transformed into a maxim that can then, by omission, constitute a rule of international law.

¹⁹I.C.J. REPORTS, 1969, p. 31.

C. The Absence of a Prohibitory Rule Argument

The world has changed since the time of the League of Nations and the fact is that, whether we like it or not, the 1969 Moratorium Resolution was approved by 62 nations and the 1970 Declaration of Principles (hereinafter "the Declaration") was approved by 102 nations including the United States. Even if we accept the proposition that neither Resolution is binding or enforceable, nor constitutes a source of *Conventional* International Law, we strongly dispute the assertion that they are meaningless and can be blatantly ignored as is contended in the brief. Moreover, we submit that both Resolutions constitute, at the least, some evidence of that general consensus essential to the existence of a customary rule of the law of nations as the International Court of Justice. If this were not so—and restricting our query solely to the Declaration—what other value could such an affirmative vote of 102 countries possess? The fact that for the first time in history 102 countries agreed on the principles of international law that would regulate the exploration and exploitation of the seabed and its resources may be taken as neutralizing any tacit implication on the same subject by the Conventions of the High Seas or the Continental Shelf.

The 1970 Declaration of Principles

It has been said that the Declaration would only come into effect with the establishment of the future international regime referred to in its provisions and, also, that it would only refer to the seabed, ocean floor and subsoil thereof but not to its resources. Both arguments seem to ignore Article 3:

3. No State or person, natural or juridical, shall claim, exercise or acquire rights with respect to the area *or its resources* incompatible with the international regime to be established *and the principles of this Declaration*. (emphasis added)

Amongst the principles of the Declaration referred to by Article 3 above are Articles 1 and 2:

1. 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.
2. The area shall not be subject to appropriation by any means by States or persons, natural or juridical, and no State shall claim or exercise sovereignty or sovereign rights over any part thereof.

It is obvious that the principles of Articles 1 and 2 became effective at the time of their approval and were not contingent on the establishment of any future international regime. It would follow, then, that a claim for exclusive mining rights over manganese nodules in the seabed beyond national jurisdiction would be incompatible with the principles of Articles 1 and 2 and would, hence, clearly violate Article 3 of the Declaration.

The Common Heritage of Mankind Concept²⁰

Since much has already been written on this subject, we shall limit ourselves to two comments: The first is that the general acceptance of the concept terminates theoretical debate on whether the resources of the seabed constituted "res nullius" subject to occupation or prescription, or were "res communis" like the high seas. This, of course, would render all the proceedings instituted by the Company under domestic mining law and relative to discovery, possession and the like, something of a futile gesture. A second issue, on the meaning of "heritage," raises difficulties, but it becomes clearer when one reads the following statement by Ambassador Stevenson:²¹

. . . We of course continued to state—and we were supported in this by a number of other countries—that *common heritage does not mean common property*. (emphasis added)

A curious thing is that the Spanish text of the Resolution uses the word "*patrimonio*," the French text, "*patrimoine*." According to Black's *Law Dictionary*, both "heritage" and "patrimony" are Civil Law concepts, but very different indeed from one another. The point is that the Spanish and French words relate to the concept of property which Ambassador Stevenson rejects. This explains, perhaps, the strong divergence existent between countries with regard to the interpretation of this provision of the Declaration.

The Position of the U.S.

We have already quoted the position of the United States Government with regard to the claim and related matters. We are troubled by the difficulty in finding consistency to this policy and because of it, the Company's request for Diplomatic Protection and Protection of Investment does not appear unreasonable.

Professor Gary Knight²² has referred to the basic alternatives considered while shaping United States policy:

One was the "flag nation" system under which exploitation of seabed resources would be governed by the law of the nation in which the vessel or other platform was registered. Under this system there would be no international seabed authority, save perhaps for a registry office for the filing of claims. The other alternative was the creation by international agreement of a detailed set of rules governing exploitation of seabed resources complete with an attendant international organization to allocate

²⁰From Article 1 of the Declaration.

²¹Ambassador John Stevenson, Hearing before Committee on Merchant Marine and Fisheries, Sept. 26, 1972, CONGRESSIONAL RECORD, p. 242.

²²Statement before H. R. Committee of Merchant Marine and Fisheries, May 1972, hearings on H. R. 13904, p. 58.

exploration and exploitation rights, receive and distribute revenues, and regulate resource extractive operations.

As the United States has abandoned the "flag nation" alternative and has chosen the international regulation system referred to by Professor Knight, its "laissez-faire" reaction to the Company's claim is surprising; the more so if one considers that even under the "flag nation" concept obligations exist between claimant and Government. Here, if for no other than parochial reasons, the Government should have at least demanded the "environmental impact statement" required from ordinary citizens under domestic law.

But our reservations go further than that: we fear that mere tolerance may spur a new "gold rush" for the exploitation of the seabed and destroy the possibilities of reaching agreement in Geneva or elsewhere. Such eventuality would confirm the worst omens ever forecast and bring more chaos and eventual anarchy to the oceans. There is a fundamental incompatibility in tolerating individual exploitation of the seabed resources—however transitory—with the efforts to establish international legal machinery thereon. The unfortunate consequences of such duality would give credit to the assumption that the real interest of the United States would not be in international regulation but in the indefinite maintenance of the present state of things. Yet, how else are we to interpret a statement which denies recognition to exclusive mining rights in the resources of the seabed beyond national jurisdiction and, at the same time, asserts that mining of those same resources may proceed in accordance with international law? Perhaps there is a sophisticated procedure by which seabed resources may be taken, used, transported, processed and sold without establishing exclusive rights over the same. If that is the case, we can be sure that Deep Sea Ventures, Inc. is not aware of it.

