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Deep-Sea Mining

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INTERNATIONAL LAW ASSOCIATION

DEEP-SEA MINING

Monday, August 26, 1968

L.F.E. GOLDIE (United States Branch): Mr. Chairman, ladies and gentlemen, the Chairman of this Meeting, His Excellency the Ambassador of the Kingdom of Norway to Argentina, Mr. Finn Seyersted, the Chairman of the Deep-Sea Mining Committee, Professor D.H.N. Johnson, and the Rapporteur, Dr. L.J. Bouchez, have all stressed the urgency of our topic and the need to formulate a Resolution in time for presentation to the next (the 54th) Conference of the International Law Association. I strongly support this sense of urgency.

I

This Association has, since its foundation, participated honorably and effectively in the "progressive development of international law and its codification". Thus, long before the United Nations General Assembly was given this function, the International Law Association was called into being as a scientific group above the contest of sectional interests and as an entity whose deliberations would clarify problems both de lege lata (questions of legal analysis and codification) and de lege ferenda (questions of law reform and justice). At the present time few tasks can be more urgent than that of giving timely aid to the United Nations General Assembly's Ad Hoc Committee to Study the Peaceful Uses of the Sea-Bed and the Ocean Floor Beyond the Limits of National Jurisdiction. This calls for both clarification of the terminal points of national jurisdiction

(being also the commencing points of the ocean submarine areas to fall within the regime to be proposed) and the proposal of guidelines for the regime itself. Despite my own greater personal interest in the latter of these two important topics, and because of the limitation of time, I shall address myself merely to the former.

Let it be remembered that we are all offering our points of view in terms of what we are convinced are feasible blueprints, and so our whole topic is necessarily de lege ferenda. To propose the extension of any current regime, for example that of the continental shelf, into the deep oceans is to argue de lege ferenda as much as to propose an entirely new regime in those regions. To assert that such an extension is a matter de lege lata is merely to provide yet another classical example of a legal fiction. Let us remember that only too often legal fictions have been used to dupe the foolish, reassure the faint-hearted, and absolve the lazy from fulfilling their tasks.

II

At the outset, I must offer my very sincere congratulations to Mr. E.D. Brown, Rapporteur of the British Branch's Committee on Deep-Sea Mining, on the "Brown Report" and thank him for his evaluation of my publications. There are, however, some differences between us on my position. As the papers I have brought here for distribution (namely "The Contents of Davy Jones's Locker --A Proposed Regime for the Seabed and Subsoil", reprinted from 22 Rutgers Law Review 1 (1967); "Submarine Zones of Special Jurisdiction under the High Seas--Some Military Aspects", mimeograph copy from The Law of the Sea: The Future

of the Sea's Resources 100 (Alexander ed. 1968); and mimeograph copies of my "letter to the Editor" of Orbis, dated August 12, 1968) show, I do not subscribe to any theory which leaves an international initiative to entrepreneurs. Nor do I accept any application of the doctrine of occupation, or the Rule of Capture, as appropriate to the present topic. Rather, I hold the view that a system of international allocation is essential. Furthermore, the position I have discussed in the papers I have just indicated has been predicated on an assumption that the Great Powers will continue to disagree about the inspection provisions of proposed demilitarization, disarmament and arms control treaties. (It is clear, for example, that such elevations on the ocean bed as the Atlantic Ridge make the question of inspection in the deep ocean context a very different strategic kettle of fish from Antarctica.) I do plan, however, to offer, at a later date, alternative scenarios in terms of possible regimes of inspection within the context of possible arms control regimes. To me, however, the central political problem of effective arms inspection provisions lies in their inherent, if latent, supranational qualities: To be effective, an arms inspectorate requires powers to question private citizens directly and without the intervention of the host state authorities, and to examine installations, plans and documents independently of any governmental interposition.

III

As a preliminary point to my discussion in the rest of this Comment, I would like to indicate that, although I have tended to rely, in choosing my words, upon the traditional and perhaps esoteric language of the Anglo-American learning on

future interests, the basis of the distinction I have drawn is far from parochial. It is familiar to civil lawyers as part of their learning on conditional interests, for example, by way of permitted fideicommissary substitutions. Thus, language may change, but the logic remains the same. Since they reflect the universal human need to make provision against the uncertainties of life, the presence of conditional and contingent rights in legal systems, and their distinction from claims which do not depend upon the occurrence of any uncertain future event, should be viewed as being among the "general principles of law recognized by civilized nations." One topic of public international law to which this learning is clearly applicable is the exploitability test in Article 1 of the Continental Shelf Convention. Because that Article tells us that the coastal states' continental shelf rights to explore for and exploit resources may only be extended beyond the two hundred metre isobath upon the condition that those resources become exploitable, the operation of that test must inevitably remain contingent upon scientific and technological (and economic?) events, or, perhaps, capabilities.

Dr. Bouchez deserves our very sincere thanks and congratulations on the comprehensive Report he has just read to us. I find myself in almost entire agreement with the position he has outlined. On the other hand, I cannot agree with one proposal he has offered us. In his search to limit the subjective and contingent qualities of the "exploitability test" in Article 1 of the Continental Shelf Convention, Dr. Bouchez has suggested that only economically feasible exploitations should be viewed

as fulfilling that test's requirements for extending continental shelf rights. This restriction would, of course, prevent uneconomic but engineeringly feasible exploitations from being used to extend a coastal state's national jurisdiction. A Mohole in the deep ocean could not, under Dr. Bouchez's proposal, establish a coastal state's jurisdiction in terms of the exploitability test, or extend its sovereign rights out from the two hundred metre bathymetric contour line to its mid-ocean limit--as it might well do now. So far so good. But does this additional qualifying word "economically" really rid the exploitability test of its contingent and subjective qualities? On examination, the term "economically exploitable" reveals itself as having almost as overwhelmingly contingent features as does the exploitability test tout court. For what may be said to have been economically exploitable at Dr. Bouchez's selected point of time (or Critical Date?) may subsequently cases to be so--owing to overproduction, overcapitalization and/or wasteful marketing procedures. That is, in Dr. Bouchez's example, the accolade of "economically exploitable", which was valid at the "critical date", may well cease to be so after a time. Should, in such a case, the coastal state's jurisdiction be withdrawn concommittantly with the decline in economic exploitability?

By means of conjoining the two elements of limiting the exploitability to be relied upon to economic, in addition to technological criteria, and of freezing the scope of the test's operation to a given point in time, Dr. Bouchez has, at least to some extent, provided a means of eliminating some of the contingent and subjective aspects of the exploitability test and thereby restricted its availability

for chauvinistic extensions of a coastal state's jurisdiction by "uneconomic exploitations". Yet certain contingent qualities remain untouched. These arise from the uncertainty of the time and conditions of the potentially uneconomic operation in the future of currently economic exploitations.

IV

While the deep ocean sciences and engineering technologies advance, and markets fluctuate in response to production and need, the exploitability test must always have a contingent operation. Even the probability of a brilliant future for the human exploitation of the resources of the ocean bed and its subsoil cannot remove the contingent and uncertain qualities I have already adverted to. In contrast with that discussion, the Report by the American Branch's Committee on Deep Sea Mineral Resources proposes that coastal states jurisdiction should be recognized as extending to the 2500 metre isobath. This proposal is presented, not as a suggestion that a new regime is advocated which newly grants an enormous extension of the areas subject to the continental shelf rights of coastal states, but as an argument that Article 1 of the Continental Shelf Convention already provides the basis of this new demarcation. Since Article 1 defines the continental shelf in terms of depth as extending no further than the 200 metre bathymetric contour line, such an assertion may, at first blush, appear to be a grotesque travesty of the 1958 formulation. But the American Committee has not relied on the 1958 Geneva Conference's test in terms of depth to advance its own depth criterion. It has taken the exploitability test and argued that, in fact, this latter test is one which necessarily allocates sovereign rights, here and now, to coastal states over the seabed and subsoil of coastal regions to a depth of some eleven and a half times the depth provided for in the Convention. It also argues that the exploitability test cannot be used to justify possible coastal state claims over activities beyond the "toe" of the continental terraces. This argument purports to stand on two legs only (frequently a precarious

support!). First, there is a geological argument based on statements attributed to Dr. Pecora of the U.S. Geological Survey to the effect that there is so "marked [a] change of structure between the continental mass and the crust of the deep ocean basins" generally at depths between 2000 and 3000 metres (namely at the supposed foot or "toe" of the continental slopes) that it is only at this point that there is a "true" geological or topographical "boundary". Second, the American Branch's Committee on Deep Sea Mineral Resources argues that the "legislative [sic!] history" of the exploitability test, as now found in Article 1 of the Continental Shelf Convention, points to an intention on the part of the Article's framers of permitting the extension of coastal states' continental shelf rights to the foot of the terraces which support the geological continental shelf, but not beyond.

I will take the argument based on Dr. Pecora's empirical work in the science of ocean geology first. This gives rise to three criticisms. First, the Report glosses over the great difference in both depth and lateral extent between the 2000 and 3000 metre isobaths, both of which provide the American Branch's Report with its empirical points of reference. In addition, there cannot be much congruence with geological realities when the toe of the continental slopes is equated with the 2500 metre bathymetric contour line since, in fact, that toe might be anywhere, on the Report's own showing, between the 2000 and 3000 metre isobaths (a lawyer's compromise between geological facts?). Third, the Report of the United Nations Secretary General to the Economic and Social Council on the Resources of the Sea, Part One: Mineral Resources of the Sea Beyond the Continental Shelf, U.N. Document E/4409/Add.1 (mimeo., 19 February 1968) gives us a very different picture of the continental terraces and of the floor of the abyss. At page 5, we are told that the continental slopes extend "from the outer edge of the continental shelf to the abyssal ocean floor." Then there is the further statement:

> This abyss or ocean floor appears to be a rolling plain from 3,300 to about 5,500 metres below the surface of the sea....

The mean depth of the superjacent waters is 3800 metres.

It is not for me, or perhaps any of us here, to seek to judge between Dr. Pecora's work and this Report by the Secretary General of the United Nations. I have the greatest respect for the pronouncements of both of these eminent authorities. But when geologists and geographers do not appear to be unanimous on matters of their empirical science, surely we lawyers should hesitate to rush into the game of drawing geological boundary lines at such crushing abyssal depths as 2500 metres, and perhaps beyond. In such regions, the ratification of a "territorial imperative" seems to be without practical meaning.

The second main issue which the American Branch's Report raises is its argument from a purported "legislative history" of Article 1 of the Continental Shelf Convention. Supporting its contention that the proper boundary line lies at the 2500 metre isobath, the Report carries an Appendix which presents its own review of the "background and negotiations leading to the execution of [the] 1958 Geneva Convention on the Continental Shelf" to establish that the exploitability test permits the definition of the "Continental Shelf" in Article 1 "[to] encompass...the 'continental margin'". The confusion of terms necessary to this proposed interpretation should be contrasted with the geographical definitions proposed by the International Hydrographic Bureau, Monaco and accepted by international lawyers in general, the International Law Commission and this Association. See 31 International Hydrographic Review 97 (May 1954). The purported outline of the travaux preparatoires in the Appendix to the Report under discussion should be contrasted with that presented by Mr. E.D. Brown in the Brown Report of the British Branch's Committee on Deep-Sea Mining and with the "Legislative History of Article 1 of the Continental Shelf Convention" offered in the study prepared by the United Nations Secretariat entitled Legal Aspects of the Question of the Reservation Exclusively for Peaceful Purposes of the Sea-Bed and the Ocean Floor, and the Subsoil Thereof, Underlying the High Seas Beyond the Limits of Present National Jurisdiction and the Use

of their Resources in the Interests of Mankind, Part I, Definition of the sea-bed and the ocean floor and the subsoil thereof underlying the high seas beyond the limits of present national jurisdiction at 7-12 U.N. Document A/AC 135/19 (mimeo., 21 June 1968).

There is one key to the discrepancy between the "legislative history" provided by the American Branch's Report on the one hand, and those in the Brown Report and in A/AC. 135/19 on the other. The first of these three reviews entirely ignores the contingent quality of the exploitability test. By contrast with the clear words of Article 1, the American Branch's Committee interprets Article 1 as might a sanguine beneficiary (perhaps one similarly placed to the "hero" of Kind Hearts and Coronets?) interpret a contingent remainder in his favor. The hidden assumption of the Appendix under discussion is not that there is, here and now, "a present capacity to vest in possession" but simply a firm expectation that the interest will become vested in the not too distant future; this being erroneously viewed as a sufficient condition to bring the benefit into the claimant's hands.

Two centuries ago, Fearne in his great book on Contingent Remainders taught our profession that the elementary fallacy in evaluating interests which depend upon a contingent future event is to look to the supposed "certainty" of that event occurring rather than to assurances of present capacities and incapacities to take effective action should the operative facts occur. That is the very fallacy of the Report of the American Branch's discussion of the exploitability test.

My point regarding the propensity of states, as well as writers, to overlook, fallaciously, the contingent qualities of the exploitability test can be illustrated by distinguishing between the two utilizations of that test which provide Australia and the United States respectively with claimed authority to assert continental shelf jurisdiction beyond the two hundred metre isobath. The areas covered by the leases which the United States has granted in the

Santa Barbara Channel and elsewhere off the Pacific Coast beyond the two hundred metre isobath will either be abandoned as unexploitable or brought within the scope of the Outer Continental Shelf Lands Act by having become exploitable. Thus, the effective jurisdiction of the United States has not been extended to presently unexploitable submarine areas in the hope of their future exploitability. By contrast, the Petroleum (Submerged Lands) Act 1967-1968 (and the compact it implements) of the Commonwealth of Australia seeks, as the Second Reading speech of the Minister for National Development clearly underlines, to operate upon the expectation of future exploitabilities rather than what is exploitable here and now. Once again, we see a parallel with the sanguine heir who seeks to have his possible future windfall treated as a present and vested proprietary right. Nothing the Commonwealth Parliament can enact will provide a substitute for the facts of science and technology. A legislative fiat purporting to extend Australia's continental shelf on the basis of future possible exploitabilities cannot add one resource or one zone to what is now permitted on the basis of the contemporary standards of exploitability.

V

My criticism of the Report submitted by the American Branch's Committee on Deep Sea Mineral Resources has so far concentrated on the proposal that the exploitability test be "interpreted" so as to extend the outer limit of coastal states' continental shelves to the 2500 metre isobath. In keeping with the self-denying resolution I indicated at the outset, I have not reviewed the Committee's rejection of a United Nations licensing system and "any other international organization to administer an international licensing system". Nor have I made any appraisal of its proposal of an "international commission" to draft a convention creating an international agency with duties of recording and publishing "notices by sovereign nations of their intent to occupy and explore stated areas of the sea-bed exclusively for mineral production" and of

formulating "norms of conduct" to govern the recognition and use of the zones so occupied. A few very brief comments might now be in place. Since the Committee's proposed regime is intended to operate only at depths greater than 2500 metres, it would appear to have little contemporary significance. As a blueprint, moreover, it leaves out of account the essential element of allocation procedures. Does this omission signify a regression to the snatch and squat mentality of the age of colonialism? The only concession the proposal would appear to make to contemporary thought is the establishment of an international agency (a pseudo agency?); but this is one whose function would merely be to receive, record and publish notices of the faits accomplis of the "sovereign nations".

VI

My own position on the issue of the outer limits of States' exclusive competence over the sea-bed is that the boundary set by the two hundred metre bathymetric contour line in Article 1 of the Continental Shelf Convention should not be extended, and the exploitability test should be deleted. There should, however, be a saving clause for those rights which have become vested by actual exploitations beyond the two hundred metre isobath by reason of having been carried out prior to a prescribed cut-off date.

To the test of depth there should be added, as Dr. Bouchez has indicated, an additional criterion in terms of distance from the shore line in justice to States like Chile, Ecuador and Peru which lack, to all intents and purposes, a viable continental shelf. This should, I suggest, be dependent upon such variables as area, population and length of coastline, rather than in terms of a gross distance from the baselines of the coastal state's territorial waters. But such a criterion should not be capable of being used to support arguments that the region so included also embraces the superincumbent water on superambient air.

In closing, I would like to remind this Meeting that the predecessor of the Deep-Sea Mining Committee's present Chairman, the late Dr. Mouton (as the Netherlands representative at the 1958 Conference on the Law of the Sea at Geneva), jointly with Miss Gutteridge (as the United Kingdom representative), proposed that, rather than include the exploitability test in Article 1 of the Continental Shelf Convention, the shelf's legal outer limit should be extended to the 550 metre bathymetric contour line. Since then a considerable number of viable proposals have been put forward for a regime governing deep-sea mining in terms of inclusive claims. Accordingly there seems little, if any, need to extend the regime of the continental shelf out as far as the 550 metre bathymetric contour line, let alone out to the abyssal depths beyond.

L.F.E. Goldie
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