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REVIEW ARTICLE

A Selection of Books Reflecting Perspectives in the Seabed Mining Debate: Part I*

L. F. E. GOLDIE†

KRONMILLER, THEODORE G., *THE LAWFULNESS OF DEEP SEABED MINING* (Foreword by Congressmen Murphy and Breaux), I and II, Vol I, pp. xix and 521, Vol. II, pp. 46 and iii. (both vols.) (Oceana Publications, New York, 1980) [hereinafter cited as KRONMILLER]

BARKENBUS, JACK N., *DEEP SEABED RESOURCES: POLITICS AND TECHNOLOGY*, pp. xiv and 191 (The Free Press, A Division of Macmillan Publishing Co., Inc., New York, 1979) [hereinafter cited as BARKENBUS]

LUARD, EVAN, *THE CONTROL OF THE SEA-BED: A NEW INTERNATIONAL ISSUE*, pp. 309 and x (Heinemann, London, 1974) [hereinafter cited as LUARD]

ALLEN, SCOTT, and CRAVEN, JOHN P., *ALTERNATIVES IN DEEPSEA MINING*, pp. viii and 110 (Law of the Sea Institute, University of Hawaii, Sea Grant Cooperative Report UNIH-SEAGRANT-CR-79-03, 1979) [hereinafter cited as ALLEN & CRAVEN]

KILDOW, JUDITH T., *DEEPSEA MINING*, pp. x and 251 (MIT Press, Cambridge, MA 1980) [hereinafter cited as KILDOW]

FRIEDHEIM, ROBERT L., *MANAGING OCEAN RESOURCES: A PRIMER*, pp. xii and 208 (Westview Press, Boulder, CO, 1979) [hereinafter cited as FRIEDHEIM].

I. The Issue of "Constitutionality" in Public International Law

One of the important debates, today, raising fundamental issues regarding the formulation of international law, and of what may be called "constitutionality" as a value in the relation of that law and those values to the community of nations and the society of man, has tended to focus upon deep seabed mining. This topic has become an important bone of contention, not so much, apparently, on account of any perceptions of its immediate intrinsic economic significance for the world's supply of industrially

*Part II will appear in the summer issue of *The International Lawyer*.

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essential resources, as on account of its symbolic character. Its symbolism lies, of course, in its consecration as a key issue in the controversy over the New International Economic Order and in the confrontation between "North" and "South" regarding the redistribution of wealth and power—the stated object of that New Order.

In the international arena, pseudoprescriptive exercises which lack appropriate communication, interaction, shared values and expectations impose excessive stresses on the mutual tolerances which exist at any given time to control community expectations of acceptable, or at least supportable, behavior in the community of states. When these mutual tolerances are exceeded, purported constitutive prescriptions fail to convince or to be credible. Furthermore, pressures to impose such prescriptions without establishing the essentials of common goals and values, mutual consent and shared perspectives and purposes, burden the international community and its law-making processes with stresses on its acceptability. This bodes ill for the effective future of other and, possibly, more valid developments. The need for the shared values, perspectives, purposes, and basic prescriptions in a legal order calls for that degree of common ground and predictability which the term "constitutionality" may validly denote in the international setting.¹

While the current law of resource winning in the commons of mankind is admittedly antiquated, it still has a claim on the necessary morality of obedience to law and should only be changed by what has just been stipulated to connote valid constitutional processes. Today there is widespread acceptance of an important prudential value of international law that sovereign states are, given the current turbulence of their relations, the bulwarks of their peoples' freedoms. In such an armed and violent world, freedom of a people's consent to new obligations which a political mood of the majority, or of the powerful, might otherwise cast upon it becomes a fundamental protection of the unarmed and underarmed. Impositions, furthermore, can only create the expectation of further violations of independence and security in the future, of possibly ever-increasing severity. Counsel, therefore, is offered against impatience. It is hoped that the development of knowledge, and especially of scientific knowledge, will not be stultified by suspicion. It is further hoped that its results will be widely shared, and that human dignity and welfare will become the watchword of regimes which could be created to share and enjoy the fruits of discoveries. While constitutionality and due process are important values which seem to have been lost sight of in the seabed mining debate, it also needs to be noted that at a more mundane level of prudential politics, many of the developed, industrialized

¹For an exposition of the theory of a world constitutive process influencing the foregoing statements, see Remarks of Myers McDougal, 64 *PROC. AM. SOC. INT'L L.* 56-57 (1970). For a thorough treatment of the topic see McDougal, Laswell & Reisman, *The World Constitutive Process of Authoritative Decision*, 1 *THE FUTURE OF THE INTERNATIONAL LEGAL ORDER* 70 (Black & Falk eds. 1969).

countries of the West have viewed it as lacking the immediacy and saliency of many other matters being negotiated at the Third United Nations Conference on the Law of the Sea. Thus, for example, Ambassador Aldrich has told us:

There is no question (in my mind) that thirty or fifty years from today the world, more specifically the industrialized world, will be heavily dependent upon minerals from the seabeds. Particular dependence will be on nickel, cobalt and manganese. The seabeds will always be a moderate or small producer in the world's copper supply. But, at that time, the industrialized countries will sorely need those resources. Today the need is not great. Part of the problem we face in arguing in the abstract the legal questions of states rights to mine manganese nodules, despite the opinion of the majority of voting members in the United Nations General Assembly, is that we lose focus of reality. That is, do we really need manganese nodules to supply our mineral needs? For example, if instead of manganese nodules we were talking about petroleum, I do not think we would be arguing the issue. Certainly, we would not be negotiating in a United Nations Conference about the subject.²

But this appraisal tends to underestimate the relevance, for future developments, both in Ocean Law and the Law of Outer Space, of the concepts being so hotly advocated and defensively contested at the present time in Committee I (Deep Seabed Mining) of the Third United Nations Conference on the Law of the Sea. For now the subjects of these negotiations are providing models for projected regimes to govern the resources of the Moon and Outer Space—for example, capturable meteorites and moon minerals.³ And here it may be well to note that the prospective feasibility and future benefits of mining the minerals to be found in Outer Space are not far-fetched imaginings. Indeed, mining these resources should be viewed, today, as no more outlandish than deep seabed mining appeared to be when Dr. John Mero wrote in one of his early pioneering books⁴ (in 1965) of the availability, as a source of needed resources, of manganese nodules and of the impending practicability of mining them.⁵ Today, for example, Professor O'Neill can persuasively write, in terms of a contemporary technology for mining on the Moon that:

In space our first mines will almost surely be on the Moon. Particularly on the lunar Farside, enormous quantities of materials could be removed without ill effects of any kind. It comes as a surprise to most people to learn how rich a

²Panel Comment on Goldie, *Customary International Law and Deep Seabed Mining*, Symposium, *Mining the Deep Seabed: A Range of Perspectives*, 6 SYRACUSE J. INT'L L. & COM. 173 at 197 (1979).

³For a demonstration of the "Precedential Effects of the Deep Seabed Regime" for the proposed international arrangements regarding the winning of minerals and fuels in Outer Space, see American Branch of the International Law Association, *Report of the Committee on the Law of the Sea (June 1980)*, PROCEEDINGS AND COMMITTEE REPORTS OF THE AMERICAN BRANCH OF THE INT'L L. A., 1979-1980 at 88, 126-28 (1980).

⁴MERO, *THE MINERAL RESOURCES OF THE SEA* (ELSEVIER OCEANOGRAPHY SERIES #1) (1965). See also MERO, *FINDING AND PROCESSING OF DEEP-SEA MANGANESE NODULES* (1959).

⁵*Id.* at 127-241.

source of industrial materials the Moon is: I believe that in the long run the Apollo Project, much criticized as it was during its lifetime, will be seen to have been of enormous value for its lunar prospecting function.⁶

And:

In order to rid ourselves of what Isaac Asimov calls our "planetary chauvinism" we should consider why the Moon, though it is necessary as a materials source, is less suitable than L5 as a site for industry and human habitation.⁷

It is possibly not surprising, since the United States appears to be developing a mining technology for materials and minerals in and on the Moon, and, possibly, for the capture of meteorites and their fuels, materials and minerals, in addition to its technology of deep seabed mining. Possibly it is thus not a coincidence that a potentially preclusive doctrine stemming from one interpretation of the popular slogan "the common heritage of mankind" (which has been the focus of a great deal of the debate at the Third United Nations Conference on the Law of the Sea) should have been extended to the draft United Nations Agreement Governing the Activities of States on the Moon and Other Celestial Bodies, 1979.⁸ In noting these parallel developments in negotiating a "new" Law of Outer Space with that advocated at the Third United Nations Conference on the Law of the Sea, one may observe that Article XI of the Moon Treaty provides, in part:

1. The moon and its natural resources are the common heritage of mankind, which finds its expression in the provisions of this Agreement and in particular, in paragraph 5 of this article.
2. The moon is not subject to national appropriation by any claim of sovereignty, by means of use or occupation, or by any other means.
3. Neither the surface nor the subsurface of the moon, nor any part thereof or natural resources in place, shall become property of any State, international inter-governmental or nongovernmental organization, national organization or nongovernmental entity or of any natural person. The placement of personnel, space vehicles, equipment facilities, stations and installations on or below the surface of the moon, including structures connected with their surface or subsurface, shall not create a right of ownership over the surface or the subsurface of the moon or any areas thereof. . . .

* * *

5. States Parties to this Agreement hereby undertake to establish an international regime, including appropriate procedures, to govern the exploitation of the natural resources of the moon as such exploitation is about to become feasible. This provision shall be implemented in accordance with Article XVIII of this Agreement.

When paragraphs 2, 3 and 5 are read together, this Article may, arguably, be seen to provide, in current law of the sea language, and in addition to

⁶O'NEILL, *THE HIGH FRONTIER* 58 (Bantam paperback 1978).

⁷*Id.* at 137. See also *id.* at 148-49. In particular O'Neill's remarks concerning the quantities of titanium and oxygen, *inter alia*, "locked into [the Moon's] soils and rocks and waiting to be used", at 59, should be noted. See also *id.* at 108, 136, 315-16.

⁸U.N.G.A. Res. 34/68, 34 U.N. GAOR Supp. No. 46 at 77, U.N. Doc. A/34/Supp. 46 (1980).

paragraph 1's enunciation of the "Common Heritage" principle, for a moratorium principle.

An insensitive scanning of some of the reviews which follow may tend to provoke a reflex comment that they have been written from an Adam Smith point of view ("every man for himself and the Devil take the hindmost," said the Elephant as he danced among the chickens") or a *Lotus Case*⁹ theory of international law ("what is not specifically prohibited is permitted"). Such a reaction would both misinterpret the basic conflict in the Law of the Sea negotiations and misunderstand this reviewer's concern.

With regard to the former, a common and perhaps too facile premise for expositions on the politics of deep seabed mining issues is that a basic controversy in the Third United Nations Conference on the Law of the Sea arises from the direct confrontation of selfish mining interests against international distributive justice. By contrast, this reviewer's observation is that the challenges which have so complicated that conference have arisen from the pitting of opposing blueprints of economic development, theories of legal order, and political ideologies. Thus, a confrontation certainly exists. But it is a collision about fundamentals, not superficial matters, nor of simple possessive greed. This more basic antithesis reflects this reviewer's concern. It demands a greater solicitude, than has been witnessed to date, for international fairness, validity, notice and what we may call "constitutionality," in the sense of due process, limitations on the excessive use of power and restraints on the abuse of rights. Currently, in international fora it is often possible to find valid and fundamentally important claims to self-determination, human dignity and welfare becoming interwoven with, and diverted by, a hue and cry after fabled villains and other chimera. The first of the books under review is Kronmiller's two volumes.¹⁰

II. Point: Counterpoint

A swelling chorus of voices intoning the theme that ocean mining is unlawful seems increasingly to be upwelling around the mining industry of the United States. We may randomly select four such voices (or groups of voices) from the multitude whose burden is the same. They may appear to read from different scores, but they render their notes in unison on this particular point. Following are some selections from the choir negating the claims of free opportunity:

⁹[1927] P.C.I.J. Series A. No. 10, 2 HUDSON WORLD COURT REPORTS 20 (1935).

¹⁰The first volume of Kronmiller's book consists of text, the second of tables of cases and treaties, a selected bibliography, a collection of documents and materials, and an index to volume I. The second volume is, in effect, largely an appendix to the first. In the sections which follow immediately and which largely concentrate on Kronmiller's work, citations to that author's first volume, which contains his arguments and thesis, will be by reference to page numbers only; reference to the second volume will show both volume and page number only.

1. *Ambassador T. T. B. Koh*, Permanent Representative of the Republic of Singapore to the United Nations:

I am prepared to concede the point that if such unilateral national legislation were enacted before 1970, it would be perfectly reasonable to argue that such legislation is consistent with existing international law, specifically, with the doctrine of high seas freedom. . . .¹¹

I must point out in this connection that the United States has always stood for the application of international law in relations between and amongst states. This is, for example, the position you have taken concerning the seizure of the U.S. Embassy and its diplomatic personnel in Iran. The United States would weaken its moral authority if it were to act in a manner which is perceived by the overwhelming majority of the international community as contrary to international law. This would be the case if the United States were to enact unilateral national legislation authorizing seabed mining.¹²

2. *The Group of Legal Experts on the Question of Unilateral Legislation*:¹³

The principles of law laid down in resolution 2749 (XXV) form the basis of any international regime applicable to the Area and its resources. . . .

Consequently, any unilateral act or mini-treaty is unlawful in that it violates these principles, for the legal regime, whether provisional or definitive, can only be established with the consent of the international community as the sole representative of mankind and in conformity with the system determined by the international community.

It should be stressed that no investor would have any legal guarantee for his investments in such activities, for he would likewise be subject to individual or collective action by the other States in defense of the common heritage of mankind, and no purported diplomatic protection would carry any legal weight whatsoever.¹⁴

¹¹Letter addressed to Congressman Bingham dated 20 November 1979, ref:800:612/5 at 1, copy held in this review's files. This letter was written with the object of expressing opposition to the enactment of deep seabed mining legislation by the Congress of the United States.

¹²*Id.* at 2.

¹³This group consisted of:

Chairman: Dr. Roberto Herrera Caceres (Honduras), Ambassador to Belgium, the Netherlands and the EEC.

Members: Professor Madjid Bencheikh (Algeria), Professor of Law; Professor Mohamed Bennouna (Morocco), Dean of the Faculty of Law, Rabat; Dr. Jorge Castaneda (Mexico), Ambassador, Member of the International Law Commission; Dr. S. P. Jagota (India), Ambassador, Under-Secretary and Legal Adviser to the Ministry of Foreign Affairs, Member of the International Law Commission; Dr. Julio Cesar Lupinacci (Uruguay), Under-Secretary, Ministry of Foreign Affairs; Mr. Biram Ndiaye (Senegal), Professor of Law, University of Dakar; Dr. Frank X. Njenga (Kenya), Under-Secretary, Member of the International Law Commission; Mr. C. Pinto (Sri Lanka), Ambassador to the Federal Republic of Germany, member of the International Law Commission; Mr. K. Rattray (Jamaica), Ambassador, Solicitor General, Attorney-General's Chambers; Dr. S. Sucharitkul (Thailand), Director General, Treaty and Legal Departments, Ministry of Foreign Affairs, member of the International Law Commission; Dr. Yasseen (United Arab Emirates), Counsellor, Permanent Mission at Geneva.

¹⁴Letter dated 23 April 1979 from the Group of Legal Experts (*see, supra*, note 13) on the Question of Unilateral Legislation addressed to the chairman of the Group of 77 annexed to the letter dated 24 April 1979 from the chairman of the Group of 77 addressed to the chairman of the Third United Nations Conference on the Law of the Sea, Geneva, eighth session, 19

3. *Some Soviet-Bloc Spokesmen*:

a. *Ambassador Goerner* (German Democratic Republic):

The adoption of such measures [i.e., unilateral measures to exploit deep seabed mining resources] could not be justified by invoking the principle of the freedom of the high seas and would run counter to international law.¹⁵

b. *Ambassador Witek* (Poland):

They [i.e., the unilateral measures referred to in (a) above] would run counter to the principle of the common heritage of mankind, the principle of international co-operation, and the Declaration of Principles Governing the Sea-Bed and Ocean Floor, and the Subsoil thereof, beyond the Limits of National Jurisdiction . . . and would have no legal basis. . . .¹⁶

c. *Ambassador Kozyrev* (Union of Soviet Socialist Republics):

States and persons, physical or judicial, were 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 All the foregoing made it clear that initiatives such as those contemplated by certain countries were unacceptable and contrary to prevailing moral and political, if not legal, norms in the field under consideration.¹⁷

4. *Ambassador J. Alan Beesley, Q.C.*, (Canada) in the debate, on Monday, July 28, 1980 on the United States of America's enactment of the Deep Seabed Hard Minerals Resources Act¹⁸ at the Third United Nations Conference on the Law of the Sea, Ninth Resumed Session:

I wish to make quite clear what our position is, Mr. President. We regret this legislation. We deplore it. We consider it unnecessary, undesirable, unjustifiable and untimely. We consider it contrary to the concept of the common heritage of mankind, a concept quite possibly the greatest of any principle or ideal which will emerge from this Conference. We consider that it violates the fundamental principle, of which my Delegation had a large part in the establishment, to which the Conference is dedicated, namely the principle of consensus. We do not accept the validity of the arguments advanced in support of such legislation. We do not understand the rationale for the legislation, coming as it does so close to the end of this Conference, and we say this with the greatest of understanding for the country which has passed this legislation. We share the deep concern expressed

March to 27 April 1979 at 6, UN Doc. A/CONF./ 62/77, (mimeo) (25 April 1979), 9 UNCLOS III O.R. 8th Sess., Geneva 19 March - 27 April 1979 at 80 (Sales No. E. 80. V. 6. 1980). [hereinafter referred to as Manifesto]. See also Asian-African Legal Consultative Committee, *Study on the Revised Single Negotiating Texts*, 17th Sess. (Kuala Lumpur 1976), where the following statement received agreement:

The only way which this concept [i.e., the status of the hard mineral resources of the deep ocean floor beyond the territorial jurisdiction of any state as "the common heritage of mankind"] can be translated into practice would be to treat the resources of the area as being under the joint undivided ownership of all nations. . . . If this is so, then the activities in the area have necessarily to be under [the] effective control of the international authority acting on behalf of the entire international community and activities by individual States or their nationals cannot be permitted except when doing so on behalf of the authority.

¹⁵Third United Nations Conference on the Law of the Sea, Summary Record of the 109th Plenary Meeting at 22, U.N. Doc. A/CONF. 62/SR. 109 (mimeo. 25 Sept. 1978).

¹⁶*Id.* at 22-23.

¹⁷*Id.* at 12-13.

¹⁸30 U.S.C. 1401, 94 Stat. 553 (1980).

by speakers representing the vast majority of humanity, certainly the vast majority of delegations represented at this Conference. We find particularly disturbing the provision referred to by the Distinguished Representative of India, including for example provisions 118, 201, 202 and 203. What we find particularly objectionable is that the Conference appears to be being told what to do on certain questions such as protection of investments. Surely there is a better approach and it's the one that the USA delegation above all has always followed—the attempt to negotiate in good faith to achieve equitable compromises.

Well, we are all here to negotiate in good faith and not on the basis of a dictat of a pre-judgment of the results specifically designed to override the outcome of our deliberations if they don't happen to agree with the preconditions laid down.¹⁹

In counterpoint to this chorus of denial, Kronmiller seems almost a lone voice. The burden of his refrain is not only that seabed mining, even when conducted by free enterprise, is lawful, but that actions taken against mining vessels on the high seas, no matter what the pretext might be, would themselves be unlawful and an outrage of the lawful freedom of others to use the seas for their legitimate occasions. His conclusion is:

Thus, under international law, it is permissible for a State or private enterprise unilaterally to appropriate the resources of the seabed and subsoil beyond the limits of national jurisdiction. Deep seabed mining is clearly within the principle of the freedom of the seas and is consistent with rules of customary international law and relevant conventional law. All States are under a duty to respect the lawful exercise of the freedom to explore and exploit the resources of the deep seabed and subsoil.

To this it should be added that, in international law, there is no reason why this activity may not be supported by domestic legislation which does not purport to claim sovereignty or sovereign rights over, or ownership of, areas of the deep seabed and subsoil or otherwise to exclude nationals of nonconsenting States.²⁰

In reaching this conclusion Kronmiller first adumbrates the political and economic issues of deep seabed mining which underpinned the later chapters in his book. He then takes up the foundation questions regarding the juridical status of the seabed and subsoil beyond the limits of national jurisdiction—the time-honored discussions in terms of: (i) characterizing the seabed as *res communis* or *res nullius*; and (ii) whether the seabed and subsoil of the deep ocean floor is subject to a different regime from that of the water and air column above. Disposing of these preliminary issues, he then turns the reader's attention to the core issues beginning with the status, in public international law, of the United Nations General Assembly's *Deep Seabed Mining Moratorium Resolution*²¹ of 15 December 1969, and of the "common heritage of mankind" clause of Article 1 of the General Assem-

¹⁹Statement in Plenary Debate on USA Unilateral Seabed Mining Legislation, Monday, July 28, 1980, at 1-2 (verbatim record taken from official LOS conference tape, mimeo).

²⁰P. 521.

²¹G.A. Res. 2574D(XXIV) 24 U.N. GAOR Supp. No. 30 at 11, U.N. Doc. A/7630 (1969) [hereinafter cited as the Moratorium Resolution]. The operative part of this Resolution states that the General Assembly of the United Nations:

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

bly's *Declaration of Principles Governing the Sea-Bed and Subsoil Thereof, Beyond the Limits of National Jurisdiction* of 17 December 1970.²² Having concluded that deep seabed mining fell under the regime of the high seas he then discriminately reviews its lawfulness in terms of that regime.

Before turning to the more specific review of Kronmiller's book, a final preliminary point should be stressed. The present debate on the lawfulness of deep seabed mining requires answers to two questions. These are not parallel, but sequential. The first relates to the right to take and appropriate manganese nodules. That is, can a miner acquire a marketable title to the nodules he has actually brought up from the deep seabed and placed under his hand? Then, even if this right has been established in his favor, may he, as a technological and economic prerequisite of his exercise of his right of capturing the nodules, establish an exclusive mining right to an equitably sized tract? At this point an important distinction must be drawn. Many critics of the American legislation and of the Notice of Claim filed by Deep Sea Ventures with the Department of State,²³ assert that the claim to mine exclusively an equitable tract is an assertion of territoriality. It is not. It is a usufructuary claim, a claim analogous to that of a *profit à prendre* in the Anglo-American common law. Thus, this reviewer and his colleagues advising Deep Sea Ventures stressed, in the Notice of Claim that:

Deepsea [Ventures, Inc.] asserts the exclusive rights to develop, evaluate, and mine the Deposit and to take, use, and sell all of the manganese nodules in, and the minerals and metals derived, therefrom. It is proceeding with appropriate

(a) States and persons, physical or juridical, are bound to refrain from all 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.

²²G.A. Res. 2749 (XXV), 25 U.N. GAOR Supp. No. 28 at 24, U.N. Doc. A/8028 (1970) [hereinafter cited as the Declaration of Principles]. That article stated:

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.

²³Notice of Discovery and Claim of Exclusive Rights, and request for Diplomatic Protection and Protection of Investment, by Deepsea Ventures Inc., dated November 14, 1974. This document, which was addressed to Hon. Henry A. Kissinger, then the United States Secretary of State, stated, *inter alia* that:

Deepsea has been advised by Counsel, whose names appear at the end hereof, that it has validly established the exclusive rights asserted in this Claim under existing international law as evidenced by the practice of States, the 1958 Convention on the High Seas, and general rules of law recognized by civilized nations.

Deepsea asserts the exclusive rights to develop, evaluate and mine the Deposit and to take, use and sell all of the manganese nodules in, and the minerals and metals derived therefrom. It is proceeding with appropriate diligence to do so, and requests and requires States, persons and all other commercial or political entities to respect the exclusive rights asserted herein. Deepsea does not assert, or ask the United States of America to assert, a territorial claim to the seabed or subsoil underlying the Deposit. Use of the overlying water column, as a freedom of the high seas, will be made to the extent necessary to recover and transport the manganese nodules of the Deposit.

14 INT'L LEGAL MATERIALS at 53 (filed Nov. 15, 1974) (175); See also Goldie, *Mining Rights and the General International Law Regime of the Deep Ocean Floor*, 2 BROOKLYN J. INT'L L. 21, at 49 (1975).

diligence to do so, and requests and requires States, persons, and all other commercial or political entities to respect the exclusive rights asserted herein. Deep-sea [Ventures, Inc.] does not assert, or ask the United States of America to assert, a territorial claim to the seabed or subsoil underlying the Deposit.²⁴

Without the protection of that exclusive mining right the investment remains unattractive. The threat of the "free rider" would effectively inhibit, if not completely preclude, confident investment in deep ocean mining. If the discovering miner were denied the protection of an exclusive right to mine an equitably sized tract, the free rider could lawfully take advantage of the miner's discovery and, without contributing to the very large investment involved therein, begin harvesting the resource. This second issue raises far more complex and challenging questions than does the first, as the press release of the Department of State which, while not constituting a formal reply to the Deep Sea Ventures' Notice of Claim, was intended to be responsive to it. That release stated, in part:

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. If necessary, the Department of State will consider providing such diplomatic protection for deep seabed mining as would be provided for other high seas uses. However, high seas freedoms do not include exclusive rights to the exploration or exploitation of the natural resources of the area.²⁵

This statement indicates that the Department of State, while recognizing the customary international law title of a deep sea miner over the nodules captured by him and actually brought into his gathering-mining system, does not recognize any customary international law-conferred authority enabling it to protect a United States deep seabed miner from the inroads of foreign free riders who work the same seabed mining area, or "tract," and gather a harvest which the discoverer might rightfully regard as his own.

III. The Main Topics Discussed

A. *Political Developments and the Economic Context*

In the context of this opening chapter Kronmiller pointed to the significance of nianganese nodules which "could satisfy the global demand for

²⁴14 INT'L LEGAL MATERIALS 50 at 53.

²⁵ROVINE, DIGEST OF UNITED STATES PRACTICE IN INTERNATIONAL LAW 1974 at 342-43 (1975). This press release had been preceded by a "press guidance" which stated, in part, that:

The Department of State does not grant or recognize exclusive mining rights to the mineral resources of an area of the seabed beyond the limits of national jurisdiction.

Document accompanying letter dated November 21, 1974 to Mr. John Flipse, President, Deep Sea Ventures, Inc., from Bernard H. Oxman, Assistant Legal Adviser for Oceans, Environment and Scientific Affairs, Department of State (Dep't of State File L/OES).

certain metals for hundreds of years."²⁶ These metals include nickel, cobalt, manganese and copper. All of them are of increasing importance for high technology needs and their land-based production may be subject to political and economic instability or blackmail, or both simultaneously. As the United States deep seabed mining industry has fashioned a technology to win, at economically feasible costs, these resources, so, as Kronmiller argues, a number of developing nations are seeking to increase their stake in the potential benefits from these technological and organizational advances. In themselves Kronmiller finds such claims not unjustified. His objections are to the ideological prescriptions which are asserted and which have the goal of operating preclusively on the United States mining enterprises. Briefly such states' arguments are that international law had been changed as a result of the Moratorium²⁷ and Declaration of Principles²⁸ Resolutions and through its continuing its evolution toward the "New International Economic Order"²⁹—the stated objective of which is "the transference of wealth and power to the countries of the developing world."³⁰ A result of this change has been to have effectively invalidated the underlying property and contractual institutions, doctrines, rules and concepts upon which private deep seabed mining enterprises base the legality, probably effectiveness and validity of their predictions, engagements, actions and transactions. In this context, Article 29 of the United Nations Charter of the Economic Rights and Duties of States should be noted. It summarizes the attitude of the Group of 77³¹ toward the hard mineral

²⁶P. 13. at 14, Kronmiller summarized the results of a number of surveys in the following terms:

Based upon projections from general surveys, it appears that the Pacific Ocean contains approximately 1.5 trillion tons of manganese nodules at the present time, to which 10 million tons are added each year by chemical and biological processes.

²⁷G.A. Res. 2749, 25 U.N. GAOR Supp. No. 28 at 24, U.N. Doc. A/8028 (1970), 10 INT'L LEGAL MATERIALS 220 (1971).

²⁸G.A. Res. 2574D, 24 U.N. GAOR Supp. No. 30 at 11, U.N. Doc. A/7630 (1969), 9 INT'L LEGAL MATERIALS 419 at 422 (1970).

²⁹See, e.g., United Nations Charter of the Economic Rights and Duties of States, G.A. Res. 3281 (XXIX), 29 U.N. GAOR, Supp. No. 31 at 50, U.N. Doc. A/9631 (1974). See also (1) International Development Strategy for the Second United Nations Development Decade, G.A. Res. 2626 (XXV), 25 U.N. GAOR Supp. No. 28 at 39, U.N. Doc. A/8028 (1970); (2) Declaration on the Establishment of a New International Economic Order, G.A. Res. 3201 (S-VI), S-6 U.N. GAOR, Supp. No. 1 at 3, U.N. Doc. A/9559 (1974); (3) Programme of Action on the Establishment of a New International Economic Order, G.A. Res. 3202 (S-VI), S-6 U.N. GAOR, Supp. No. 1 at 5, U.N. Doc. A/9559 (1974); (4) Development and International Economic Co-operation, G.A. Res. 3362 (S-VII), S-7 U.N. GAOR Supp. No. 1 at 3, U.N. Doc. A/10301 (1975); Preparation for an International Development Strategy for the Third United Nations Development Decade, GA Res. 33/193 (XXXIII), 33 U.N. GAOR, Supp. No. 45 at 121, U.N. Doc. A/33/45 (1979). See also G.A. Res. 32/174 (XXXII), 32 U.N. GAOR, Supp. No. 45 at 107, U.N. Doc. A/32/45 (1977).

³⁰See, e.g., MEAGHER, AN INTERNATIONAL REDISTRIBUTION OF WEALTH AND POWER: A STUDY OF THE CHARTER OF ECONOMIC RIGHTS AND DUTIES OF STATES *passim* (1979), and the documents therein cited and presented.

³¹This is the name standardly given to the caucus of developing countries operating on bases of what they perceive to be their common interest in voting in the various institutions of the United Nations family. The designation itself would now appear to be a rather quaint anach-

resources of the deep ocean floor, and toward deep seabed mining by the American mining industry and its partners, in the following terms:

The sea-bed and ocean floor and the subsoil thereof, beyond the limits of national jurisdiction, as well as the resources of the area, are the common heritage of mankind. On the basis of the principles adopted by the General Assembly in resolution 2749 (XXV) of 17 December 1970, all States shall ensure that the exploration of the area and exploitation of its resources are carried out exclusively for peaceful purposes and that the benefits derived therefrom are shared equitably by all States, taking into account the particular interests and needs of developing countries; an international regime applying to the area and its resources and including appropriate international machinery to give effect to its provisions shall be established by an international treaty of a universal character, generally agreed upon.³²

This thesis has been reflected in an intervention, as a panelist, by Mr. Roy Lee as a spokesman for the developing countries at a Symposium held on "Mining the Deep Seabed: A Range of Perspectives."³³ He said, regarding the 1970 General Assembly Declaration of Principles Governing the Sea-Bed and Ocean Floor and the Subsoil Thereof, Beyond the Limits of National Jurisdiction:³⁴

This declaration was unanimously adopted with only fourteen Eastern European countries abstaining. The United States and all other industrial countries voted for the declaration. Since 1970, the Eastern European countries have reversed their position and now endorse the declaration. This is clearly manifested in their last statement at the seventh resumed session of the Law of the Sea Conference. At that session, the chairman of the Group of Seventy-Seven made a statement proclaiming the illegality of any unilateral legislation action for seabed mining, and, subsequent to his statement, supporting statements were made by China, Russia, Poland, the German Democratic Republic, Sweden, Norway, Finland, the Netherlands, New Zealand and Australia. It can therefore be seen that since 1970, there has been a universal [*sic*] consensus on the legal position of the seabed regime as indicated by the voting in the most representative organ of the international community.³⁵

B. *The Juridical Status of the Seabed*

The significance of determining whether, under traditional rules, of international law, the status of the bed of the ocean as either *res communis* or *res nullius* lies in the different doctrines governing acquisition. Title to a *res communis* can only be gained by acquisitive prescription—possession adverse to the world community. On the other hand a *res nullius* can be appropriated by a possessing act—the bringing of the *res* under the hand,

ronism, since the number of caucus members has swollen from the original 77 to over 121 (at this reviewer's last count). The number is still growing.

³² See, *supra*, note 29.

³³ 6 SYRACUSE J. INT'L L. & COM. 173 (1979).

³⁴ See, *supra*, note 22.

³⁵ Panel Comment on Goldie, *Customary International Law and Deep Seabed Mining, Symposium, Mining the Deep Seabed: A Range of Perspective*, 6 SYRACUSE J. INT'L L. & COM. 194 (1979) (footnotes omitted).

the control, of the possessor who, at the same time, evinces intention and will to exercise that possession. While international tribunals have taken a benign view of instances of occupation,³⁶ the establishment of rights against the world community has usually been viewed as demanding a far more rigorous proof. Thus, for example, it has, at least in past centuries, been easier to establish title to uninhabited and unclaimed tracts of territory (e.g., Eastern Greenland or Clipperton Island) than to prove the acquisition of a historic bay.³⁷

The debate on the status of the seabed beyond the limits of state jurisdiction has been premised on the view that while the high seas themselves are *res communis* the subsoil of those seas is *res nullius*, since it has always been the object of occupation by means of galleries and extending seaward from the shore.³⁸ The issue, then, becomes a matter of settling the status of the seabed as partaking of either the high seas (and is, accordingly, *res communis*) or subsoil of the oceans (and so *res nullius* and capable of ownership by right of capture merely).

A former distinguished representative of the international lawyers who argue that the seabed, as distinct from its subsoil, should be seen as assimilated to the regime of the high seas was the late Admiral Mouton, who wrote:

The sea-bed, the infinitely thin boundary between two media, is not a thing susceptible of occupation because we cannot consume it or effectively occupy it. We do not make a difference in legal status between the surface of the sea and the deeper layers of the sea. The surface of the sea is the top boundary of the sea, and the sea-bed the bottom boundary. We should not make a difference in legal status there either.³⁹

This thesis may be contrasted with those international lawyers, represented here by the late Sir Hersch Lauterpacht, who argued that the seabed is susceptible of occupation. Thus Lauterpacht (generally a very strong champion of the paramountcy of the freedom of the seas) wrote:

Although it is traditional to base some of these cases [i.e., cases of the control of sedentary fisheries prior to the evolution of the customary norms of the continen-

³⁶See, e.g., (1) The Island of Palmas Case (United States v. Netherlands), 22 AM. J. INT'L L. 867 (1928); (2) The Clipperton Island Case (France v. Mexico), 26 AM. J. INT'L L. 390 (1932); Legal Status of Eastern Greenland, [1933] P.C.I.J., Ser. A/B, No. 53, 3 WORLD COURT REPORTS 151 (M. Hudson ed. 1938). See also Waldock, *Disputed Sovereignty in the Falkland Islands Dependencies*, 25 BRIT. Y.B. INT'L L. 311 at 314-18 (1948).

³⁷See, e.g., United States v. California, 381 U.S. 139 (1965); Direct U.S. Cable v. Anglo-American Telegraph Co., L.R. 2 App. Cas. 394 (1877). Johnson, *Acquisitive Prescription in International Law*, 27 BRIT. Y.B. INT'L L. 332 (1950).

³⁸This position was even accepted by Gidel, a champion of the *res communis* school of thought. See, e.g., GIDEL, *DROIT INTERNATIONAL PUBLIC DE LA MER* (3 vols. 1932). See especially vol. 1, *id.*, at 510. See also MATEESCO, *VERS UN NOUVEAU DROIT INTERNATIONAL DE LA MER* 75-88 (1950) [hereinafter cited as MATEESCO]; Mouton, *The Continental Shelf*, 35 RECUEIL DE L'ACADEMIE DE DROIT INTERNATIONAL DE LA HAYE 347 at 426-28 (1954-1) [hereinafter cited as Mouton, *Hague Lectures*]; MOUTON, *THE CONTINENTAL SHELF* 290 (19521) [hereinafter cited as MOUTON, *SHELF*].

³⁹Mouton, *Hague Lectures* 452.

tal shelf] on the ground of prescription, it is not inconsistent with principle, and is more in accord with practice, to recognize that, as a matter of law, a State may acquire, for sedentary fisheries and for other purposes, sovereignty and property in the surface of the sea-bed, provided that in so doing it in no way interferes with freedom of navigation and with the breeding of free-swimming fish. This is a case in which the requirement of effectiveness of occupation must be interpreted by reference to the reason of the thing. . . .⁴⁰

Finally, Weslake,⁴¹ Hurst,⁴² and Feith⁴³ have all expressed the view that the seabed should be regarded as falling under the regime of the subsoil and can be acquired by the simple act of occupation.⁴⁴ In agreeing with this latter group Kronmiller concludes his discussion of this debate by observing that the "*res communis* theory, as applied to the seabed . . . has not been supported by State practice, at least until recently . . . nor by the majority of scholars."⁴⁵ This observation has important seeds for the future development of the author's thesis, and, indeed, is reflected in the concluding paragraph of Chapter II where Kronmiller writes (in part):

Thus, under the rubric of either *res communis* or *res nullius*, seabed resources beyond the juridical continental shelf may lawfully be appropriated by any State or private enterprise. Under the *res communis* theory, however, such appropriation may not be carried out on the basis of a State claim to exclusive rights, unless consolidated by acquiescence or confirmed by prescription, and to these exceptions little significance can be attributed in the present milieu.⁴⁶

C. The Legal Force of the Moratorium Resolution and of the Declaration of Principles

The two Resolutions of the United Nations General Assembly referred to in the heading of this part of the discussion have formed the basis of the attacks made both on claims of enterprises to mine for deep seabed hard minerals and on proposals by states to enact domestic reciprocating legislation to regulate and give protection of investment to their miners' opera-

⁴⁰ I LAUTERPACHT, OPPENHEIM'S INTERNATIONAL LAW (PEACE) 628-29 (8th ed. 2nd impression 1957). See also (1) Hurst, *Whose Is the Bed of the Sea?*, 4 BRIT. Y.B. INT'L L. 34 (1923-24); (2) Francois (Rapporteur for the International Law Commission), Second Report on the High Seas, U.N. Doc. A/CN.4/42 (mimeo, 10 April 1951). At 62 of A/CN.4/42, Francois wrote: "Beds where sedentary fishing is carried on have thus been regarded hitherto by littoral states as being occupied and constituting property"; (3) FAUCHILLE, 1 Pt. 2, TRAITE DE DROIT INTERNATIONAL PUBLIC 19-20 (1925).

⁴¹ See, e.g., WESTLAKE, 1 INTERNATIONAL LAW 187-88 (1910).

⁴² Hurst, *Whose Is the Bed of the Sea?* 4 BRIT. Y.B. INT'L L. 43 (1923-24). See also SMITH, GREAT BRITAIN AND THE LAW OF NATIONS 122 (1935).

⁴³ Feith, *Rights to the Seabed and Its Subsoil: The Importance of the "Continental Shelf" Theory for the Exploration of Submarine Regions*, REPORT OF THE FORTY-THIRD CONFERENCE ON THE INTERNATIONAL LAW ASSOCIATION, BRUSSELS at 5 (1948). See also MATEESCO, VERS UN NOUVEAU DROIT INTERNATIONAL DE LA MER 72 (1950).

⁴⁴ See I LAUTERPACHT, OPPENHEIM'S INTERNATIONAL LAW 628-29 (8th ed. 1955). In the seventh edition of this (Peace) work, (vol. 1 at 576), the further requirement that the occupation must be "strictly local" was stated. This "strictly local" qualification was dropped in the eighth edition.

⁴⁵ P. 204.

⁴⁶ P. 206.

tions. Thus, for example, the "Group of Legal Experts"⁴⁷ stated in their "Manifesto":

The principles set out in resolution 2749 (XXV) [Declaration of Principles Governing the Sea-Bed and the Ocean Floor, and the Subsoil Thereof, Beyond the Limits of National Jurisdiction] are legally binding principles which were proclaimed in this Declaration and upheld by the affirmative vote of 108 States. It should be added that a number of the few States (14) which abstained on that occasion, although without formulating any objection, subsequently expressed, either explicitly or implicitly, their support for those principles, as did other States members of the international community, thus recognizing by their attitude the force of international custom as expressed in Resolution 2749.

This custom has given rise to new general principles of public international law which are the basis or legal foundation of any substantive norms regulating the exploration of the area of the sea-bed and the ocean floor and the subsoil thereof and the exploitation of their resources.⁴⁸

After a very thorough review of both the Declaration of Principles and of the Moratorium Resolution in terms of the emergence of the thesis that seabed hard minerals beyond the territorial jurisdiction of any state are the "common heritage of mankind," Kronmiller argues that while acceptance of the formula, as such, is widespread, if not universal, it remains, at least for the present, without specific content or applicability. Indeed, it is arguable that the phrase may also indicate the rights that "all states should have access to the exploration and exploitation of the minerals of the ocean floor,"⁴⁹ and that this will hold until the present customary law regime is replaced by a universally accepted treaty. (Exceptions to the current customary regime may come into being, as amongst the parties, through more particular treaty regimes, the transnational operations of appropriately drafted domestic legislation creative of reciprocating regimes, and that to be proposed to the participating states by the still currently negotiating Third United Nations Conference on the Law of the Sea. Short of universal acceptance, this last would necessarily remain a special treaty regime operating only among the parties to it.⁵⁰) This last point, although obvious, only too frequently appears to be forgotten one, in large part, perhaps, to the enthusiastic rhetoric of those who wish to establish a new universal regime ousting the present customary law system and especially the free-

⁴⁷See, *supra*, note 14.

⁴⁸Manifesto, *supra* note 14, at 4.

⁴⁹REPORT OF THE INTERNATIONAL LAW ASSOCIATION, 54TH CONFERENCE (THE HAGUE), Aug. 23-29, 1970 at 824 [hereinafter referred to as 1970 I.L.A. REPORT]. Indeed Kronmiller, at 238-39, points out that this is an example of actions taken "not only within the UN, but also outside it, to affirm and to give content to the notion of the common heritage of mankind." He argues that this exemplifies, and testifies to the historical fact that the "common heritage existed independently of the General Principles Resolution." *Id.* at 239.

⁵⁰On this issue, which has become, only too facilely blurred in debate, see the important discussion by Jennings, *The United States Draft Treaty on the International Seabed Area: Basic Principles*, 20 INT'L & COMP. L.Q. 433, especially at 435-36 (1970) [hereinafter cited as Jennings].

dom of the high seas and the rights, liberties and privileges flowing therefrom.

The book under review further supports its thesis that the Declaration of Principles does not constitute instant international law by pointing out that it must be read in light of both the explanations of votes given to the First Committee of the General Assembly and, quoting Professor Jennings, states, "seen in the light of these explanations the Declaration assumes a very different aspect from that reflected in the mere text of it."⁵¹ Indeed, far from having the legislative effect which, for example, the "Group of Legal Experts" claim for it in their Manifesto,⁵² the Declaration of Principles has not received either a universal *opinio juris* or the general support in state practice by the states most significantly interested or directly affected. And it must be emphasized that both of these two necessary conditions must be met before the regime contemplated in the Declaration of Principles can lawfully be said to have replaced the positive norms and established rights and privileges here and now guaranteed by the freedom of the seas. On this issue of the importance of practice, in addition to declarations evidencing *opinio juris sive necessitatis* the International Court of Justice spoke unequivocally in the *North Sea Continental Shelf Cases*⁵³ where it stated that:

Not only must the acts concerned amount to a settled practice, but they must also be such, or be carried out in such a way, as to evidence a belief that this practice is rendered obligatory by the existence of a rule of law requiring it.⁵⁴

It should be noted, furthermore, that the Court rejected an argument that a principle of "equidistance" (Article 6 of the Continental Shelf Convention⁵⁵) had become crystallized into a customary rule of international law through a combination of definitional refinement in the successive drafts of the International Law Commission and the adoption of the Continental Shelf Convention by the 1958 United Nations Conference on the Law of the Sea.⁵⁶ It based this rejection on the ground of a lack of uniformity of state practice in this regard in the past and the probability of an equal lack of uniformity in the future through the permissibility of making reservations with respect to Article 6 (and the other articles apart from Articles 1-3).⁵⁷

The *North Sea Continental Shelf Cases*, however, now provide only a rather early milestone on the road to an increasing acknowledgment of the role of the General Assembly, conferences called by it, and its subsidiary

⁵¹P. 246, quoting Jennings, *supra* note 50, at 439.

⁵²See, *supra* notes 14 and 48 and the textual materials accompanying them.

⁵³[1969] I.C.J. 3.

⁵⁴*Id.* at 44. See also statements to a similar effect in (i) The Asylum Case [1950] I.C.J. 266, 277; (ii) The Lotus Case [1927] P.C.I.J., ser. A, No. 10 at 28.

⁵⁵Done April 29, 1958 [1964] 1 U.S.T. 471, T.I.A.S. No. 5578 at 4, 499 U.N.T.S. 311, 312, 316 (effective June 10, 1964).

⁵⁶[1969] I.C.J. 3 at 38.

⁵⁷[1969] I.C.J. 3 at 38-39.

organs, in the formation of international law. (Space does not permit an analysis of the classification of that law—i.e., as custom, general principles of international law, etc.) Apart from areas where the General Assembly is recognized as having a special competence, for example, in the regulation of its subsidiary organs or of the Secretariat or over the territory of Namibia,⁵⁸ its Resolutions may be consulted as indicating trends in opinion and, further, as betokening legal developments.

For example, in the *Western Sahara* case⁵⁹ the International Court of Justice concluded that the right of self-determination for non-self-governing territories had become a norm of international law. In reaching the conclusion it first looked to Article 1, paragraph 2 of the United Nations Charter which based the United Nations' purpose of developing friendly relations among nations "on respect for the principle of equal rights and self-determination of peoples. . . ."⁶⁰ It then looked to the General Assembly's Declaration on the Granting of Independence to Colonial Countries and Peoples of 14 December 1960,⁶¹ and subsequent resolutions and declarations on this topic. In the *Fisheries Jurisdiction* case⁶² the Court looked, similarly, to conferences called by the General Assembly to underpin, in part, the concept of the "preferential rights of the coastal State in a special situation. . . ."⁶³ But here the Court also had recourse to a considerable and supporting state practice to reinforce its thesis.⁶⁴ Again, we find a plenitude of state practice, quite aside from speaking and voting in the General Assembly on the decolonization resolutions. Indeed there would appear to have been a veritable race of imperial divestiture between those who spoke and voted and the former colonial states who rapidly transferred the powers of government to the peoples over whom they had once ruled. The almost universal divestiture of colonial power was also an important, if barely mentioned, element underpinning the Court's perspective in the *Western Sahara* case.⁶⁵ It, indeed, reflected the decisive state practice so essential for establishing the existence of a rule of customary international

⁵⁸ See, Advisory Opinion on the Legal Consequences for States of the Continued Presence of South Africa in Namibia (South-West Africa) Notwithstanding Security Council Resolution 276 (1970), [1971] I.C.J. 16 [hereinafter referred to as *The Namibia Case*].

⁵⁹ *Western Sahara*, Advisory Opinion [1975] I.C.J. 12.

⁶⁰ See also *The Namibia Case* at 31.

⁶¹ U.N.G.A. Res. 1514 (XV), 15 U.N. GAOR Supp. No. 16 at 66, U.N. Doc. A/4684 (1961).

⁶² *Fisheries Jurisdiction* (United Kingdom v. Iceland), Merits [1974] I.C.J. 3. For an early, discriminating and seminal view of the status, in international law, of Resolutions of the General Assembly, see Judge Lauterpacht in *South-West Africa—Voting Procedure*, Advisory Opinion of June 7, 1955 [1955] I.C.J. 67 at 115.

⁶³ *Fisheries Jurisdiction* (United Kingdom v. Iceland), Merits [1974] I.C.J. 3 at 26.

⁶⁴ Note, for example, the Court's comment, "State practice on the subject of fisheries reveals an increasing and widespread acceptance of the concept of preferential rights for coastal States, particularly in favor of countries or territories in a situation of special dependence on coastal fisheries," *id.* at 26. In reviewing "state practice" the Court looked, not only to resolutions and declarations at conferences, but also agreements and arrangements in the North-East Atlantic and North-East Arctic. *Id.* at 26.

⁶⁵ [1975] I.C.J. 12 at 29-35.

law. In addition we should not lose sight of the fact that the resolutions, like the divestures, were merely spelling out the modalities and carrying into fruition the obligations which states had assumed under the United Nations Charter and consented to in adhering to that basic text.

In this context, then, the essential quality of consent in terms of assenting votes, practical performance, and participation remains an essential element. The stage has not been reached whereby parliamentary diplomacy can be used as a tool in the hands of large majorities of states in the General Assembly and at conferences to impose repugnant obligations on dissenting minorities, especially when such impositions effectively exclude the minorities' inputs into the prescriptive arena.⁶⁶ Nor may those majorities use their numbers to divest minorities' interests of meaningfulness.

In addition to these considerations this reviewer has offered elsewhere an argument more specifically relevant to the issue of the status of the Declaration of Principles in terms of its failure to have crystallized into customary international law. It is as follows:

Have these resolutions (i.e., the Moratorium Resolution and the Declaration of Principles) crystallized into law? And would such a law make illegal any form of deep seabed mining beyond national jurisdiction outside the regime to be devised at UNCLOS III?

At the San Francisco Conference of 1945 which drafted the Charter of the United Nations, a proposal was made which would have given the General Assembly power to declare international law. This was firmly rejected. But what would then be the status of such Resolutions as those containing the declarations of the "common heritage"? There are two levels of effectiveness to be considered. First, resolutions of this kind, of themselves, cannot be self-executing. They are not legislation with immediately obligating effects. Some resolutions, however, such as that on decolonization, through both the widespread support they received and the speedy implementation of their goals in the practice of states, especially in practice of the former colonizing states, have become recognized as *customary* international law. On the other hand, when implementation by universal or near universal state practice is lacking, the relevant resolutions have merely the quality of the "policy directives" of say, the Irish and Indian Constitutions.

But such "policy directives" are not entirely ineffective. They do at least impose duties of respect and recognition by virtue of their moral force. A state acting against their terms should thoroughly consider its compelling reasons for so acting, especially if, while some states choose to ignore that directive, others are building up a state practice in its support. So far, there has been little, if any, state practice implementing the "common heritage" principle.

There is a further consideration. Where states act, even if in order to implement a General Assembly Resolution, in a manner which invades the existing rights of other states and involves breaches of international law, further grave issues are raised. Today, for example, the seizure of a foreign flag ship, without lawful justification (that is, without the justification of a treaty or a customary international law right or privilege so to act), is a breach of the customary inter-

⁶⁶On the important notion of the "prescriptive arena" in the formation of international obligations, see McDougal, Laswell, and Reisman, *The World Constitutive Process of Authoritative Division*, 1 *THE FUTURE OF THE INTERNATIONAL LEGAL ORDER* 73 (Black & Falk eds. 1969).

national law of the sea. It also involves a breach of the United Nations Charter (including Article 2, paragraph 4).⁶⁷ While, traditionally, customary international law could once have been created through acts which were originally unlawful if acquiesced to for a sufficiently long period and on a sufficiently wide basis, it is doubtful whether the world community would today accept a legal principle based on acts in defiance of the United Nations Charter. It is to be doubted, furthermore, if the essential ingredient of *acquiescence* would be forthcoming. It should be noted, therefore, that a state practice seeking to implement the "common heritage" principles should not itself be steeped in initial illegality. This may well leave the establishment of that principle to the consent of the states concerned in a universal or nearly universal convention rather than through the high-handed unilateral and illegal acts of states seeking, through confrontation tactics, to establish what they claim (and mistakenly claim, it is insisted) to be a state practice leading to the creation of a proposed rule of customary international law.

It seems to me, therefore, that here and now we are in a situation of *stasis*. On the one hand, there is an imminent possibility of change; on the other, there is no body of law prohibiting deep seabed mining. Furthermore, many of the acts which might be taken to prevent such mining could themselves constitute serious breaches of international law—for example, infringement of the rights of the flag nation of a mining ship, breaches of the "rules of the road," and illegal searches and seizures.⁶⁸

In agreement with the above Kronmiller points out that the Western developed countries and Japan on the one hand, and the Group of 77 and the Soviet bloc on the other, "maintain diametrically opposed positions concerning the lawfulness of deep seabed mining under the present regime of the high seas."⁶⁹

While disagreement rages over the lawfulness of deep seabed mining, Kronmiller perceives two points on which there is, broadly, agreement between all three ideological groupings or "camps." The first such central idea is that the international community as a whole must benefit from the exploitation of the resources of the deep seabed and subsoil beyond national jurisdiction. This applies equally to a future, possible, universal conventional regime, and to the customary international law regime now in existence, notwithstanding the disagreement on whether or not a moratorium has now been imposed on seabed mining under the current regime of the oceans. The second essential matter on which Kronmiller perceives a fairly general agreement, but not necessarily a universal acceptance, is a precept that states may not claim or exercise sovereignty, or sovereign

⁶⁷Article 2, paragraph 4 states: "All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations."

It seems strange to this reviewer that the "Group of Legal Experts" would advocate (*see, supra*, text accompanying notes 14, 47 and 48) and a senior representative of the United States (*see, infra* text accompanying note 88) would justify, an argument, and put forward as a premise, supporting, or at least sympathizing with, conduct constituting such a palpable breach of the Charter of the United Nations.

⁶⁸Goldie, *Customary International law and Deep Seabed Mining Symposium, Mining the Deep Seabed: A Range of Perspectives* 6 SYRACUSE J. INT'L L. & COM. 173 at 180-82 (1979).

⁶⁹P. 340.

rights, over the seabed and subsoil of the deep ocean floor beyond the limits of national jurisdiction.⁷⁰

A further point of interest in this chapter of the book under review is Kronmiller's view that even if, for the vast majority of states, namely the Group of 77 and the Soviet bloc, the common heritage of mankind now operates as a norm of prohibition against their engaging in deep seabed mining, it still would not be effective to deny "the United States, Belgium, the United Kingdom, France, the Federal Republic of Germany, and Japan, *inter alia*"⁷¹ their rights under the doctrine of the freedom of the high seas to engage in deep seabed mining. These states have consistently maintained their view that the common heritage of mankind will have legal force and prohibitory effect only after its detailed, institutional modalities and its denotations, in terms of specific, cogent rules and administration, have been operationally established under an acceptable Law of the Sea Treaty.

In concluding this part of the current debate we should perceive that, when we are really confronted by an argument asserting that the resources of the seabed beyond the limits of national jurisdiction constitute "the common heritage of mankind" is now part of international law we are also faced by arguments about the meaning of the word "law." While the phrase has been accepted as a legal value, a program of development, still, the constitutive processes of international law have not yet operated to abridge a previous right, let alone revoke it. Thus, while all agree on the community interest in seabed nodules, and the need to develop prescriptive rules rendering that interest effective, only an extremist militant, or a pawky humorist, can equvalate the taking of manganese nodules to the classically prohibited acts on the high seas regarded as crimes *jure gentium*, namely, piracy, the slave trade, and war crimes.

The significance of the meaning of the word "law" to the above debate is that there are those jurists who invest the term with an extensive meaning and include underlying values, policies and goals. In contradistinction to this notion of "law" in its broadest sense there are "the more limited legal" connotations of the word. In this latter view law is only constituted by prescriptive rules capable of guiding choices and conduct. Here legal values and policies are classified as "principles of legislation" or "metalegal" rather than as "law" pure and simple. The latter meaning is the one generally to be preferred, and is the more professionally accurate and meaningful. The thesis that the "common heritage of mankind" doctrine constitutes positive law, here and now, confuses *lex ferenda* with *lex lata*. The proponents of this confusion may find such an argument to be a two-edged sword which could turn in their hands.

⁷⁰For a discussion of these two "essential matters" (upon which Kronmiller perceives "broad" and the other "fairly general" agreement), see pp. 340-44.

⁷¹P. 343.

If the taking of nodules is as vile an act as the slave trade or piracy why is there no legal turpitude in killing such intelligent, peaceable and important fellow mammals as whales, porpoises and seals?

D. "Peremptory Norms" and the
Declaration of Principles

Developing from the discussion of the status of the "common heritage of mankind" doctrine and the Moratorium Resolution as instant customary international law, there is a further point advocated by the representatives of the more militant members of the Group of 77. The argument begins with the proposition, itself of very doubtful legal validity, that paragraph 1 of the General Assembly's Declaration of Principles has dedicated the hard minerals of the deep seabeds to the world community's use as a whole and effectively denies private access, except by permission of the representatives of "all the peoples of the world."⁷² Seeking to give further juridical point to this idea of dedication is the additional claim that the doctrine of "common heritage of mankind" in the seabeds enjoys the special status of being *jus cogens*—that is, constitutes a peremptory norm.⁷³

While Kronmiller indicates an awareness of this increasingly touchy question,⁷⁴ he does not highlight it to the degree which this reviewer would have like to see. While the claim that the Declaration of Principles is instant prohibitory international law may attack the rights of individuals to engage in deep seabed mining and the authority of states to legislate regimes governing such activities, the claim that it reflects an emerged and established peremptory norm goes much further. That second assertion would add that any agreement, bilateral or multilateral, allowing access to mining by privately owned or state owned enterprises would *ipso facto* be void and without any protective force or validity. It also raises, at least as a question, and possibly even as an assertion, a very important second corollary, namely, that so to designate the "common heritage" principle may well reflect an intention to characterize seabed mining, when conducted outside the "regime to be established," as a crime which, like piracy, constitutes an offense *jure gentium*. This reviewer will now briefly adumbrate the kind of argument he would like to have seen spelled out at length in the

⁷² See, e.g., Galindo Pohl (El Salvador), U.N. Doc. A/C.1/PV. 1781 at 3 (1970).

⁷³ See, e.g., Mr. Zegers (Chile), U.N. Doc. A/C.1/PV. 1775 at 2 (1970), where he said, *inter alia*:

Legally, we might contend that it is an indivisible property with fruits that can be divided. But politically and economically speaking, it means that all states, coastal or landlocked, will participate in the administration of the sea-bed beyond national jurisdiction and in the benefits derived from that region.

See also the representatives of Guyana, Peru, Venezuela, Malaysia, Libya, Nigeria, Yugoslavia and Brazil *et al.* U.N. Docs. A/C.1/PV. 1788 at 2, 10, 13 (1970); A/C.1/PV. 1786 at 2 (1970); A/C.1/PV. 1780 at 2, 3 (1970); A/C.1/PV. 1784 at 7 (1970); and A/C.1/PV. 1777 at 11 (1970).

⁷⁴ See p. 263 n.506; p. 301 n.558. See also pp. 326 and 333-34 (for a survey of some cognate issues).

book under review to meet the advocacy of those who claim that the "common heritage" principle is, here and now, a norm with *jus cogens* effect.

Generally speaking, the doctrine stating that certain rules of international law are so fundamental that they cannot be abridged by treaty, the original concept of *jus cogens* or peremptory norms, finds its roots in Article 53 of the Vienna Convention on the Law of Treaties which states:

A treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law. For the purposes of the present Convention, a peremptory norm of general international law is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.⁷⁵

Since the concept of *jus cogens* thus enunciated was originally perceived as providing for the avoidance of treaties conflicting with the norms indicated in Article 53, and hence not unlike the function of certain public policy rules in the Anglo-American common law of contracts, a legitimate question arises. How did this rule for avoiding agreements become a rule of prohibition of conduct other, possibly, than the conduct involved with treaty making? Does it create rights *in rem*?

In draft Article 18, paragraph 2 of the International Law Commission's Draft Articles on State Responsibility⁷⁶ we find the following reference to peremptory norms in context, not of rules governing the nullification of contracts, but of exculpation from state responsibility for a wrongful act. That draft paragraph states:

However, an act of the State which, at the time when it was performed, was not in conformity with what was required of it by an international obligation in force for that State, ceases to be considered an internationally wrongful act if, subsequently, such an act has become compulsory by virtue of a peremptory norm of general international law.⁷⁷

The International Law Commission's Rapporteur on State Responsibility, Professor Roberto Ago, as Judge Ago of the International Court of Justice then was, explained both his reference to peremptory norms and the intentment of this paragraph by reference to a number of examples, of which the following two will suffice (the former envisaging the exculpation from a treaty obligation, the latter relating to a duty of conduct):

[I]t is not inconceivable that an international tribunal might now be called upon to settle a dispute concerning the international responsibility of a state which,

⁷⁵Opened for signature at Vienna, May 23, 1969, entered into force 27 January 1980, MULTILATERAL TREATIES IN RESPECT OF WHICH THE SECRETARY-GENERAL PERFORMS DEPOSITORY FUNCTIONS 597, U.N. Doc. ST/LEG/SER. D/13 (Sales No.: E.80.V.10 (1980)). In addition, it has been widely argued that the Treaty codifies the relevant principles of the customary international law of treaties and, hence, reflects principles bindings on states who have not deposited their ratifications.

⁷⁶Report of the International Law Commission on the Work of its Twenty-Eighth Session, 3 May-23 July 1976, 31 U.N. GAOR Supp. No. 10 at 174 and 206, U.N. Doc. A/31/10 (1976) [hereinafter cited as A/31/10].

⁷⁷*Id.*

being bound by a treaty to deliver arms to another state, had refused to fulfil its obligation, knowing that the arms were to be used for the perpetration of aggression or genocide or for maintaining by force a policy of *apartheid*, and had done so before the rules of *jus cogens* outlawing genocide and aggression had been established, thus making refusal not only lawful, but obligatory. Similarly, if it were accepted that, as some maintain, a peremptory rule is in process of formation, which requires states to give assistance to a people struggling to free itself from foreign domination, it would be impossible to continue to treat as internationally wrongful assistance rendered under those conditions at a time when the right to self-determination was not yet recognized and such assistance constituted internationally wrongful interference in the domestic affairs of the country against which the struggle was directed.⁷⁸

Again, in his draft Article 19, which projected state criminal responsibility to the international community as a whole for certain acts, the Rapporteur saw the doctrine of *jus cogens* performing a key role quite apart from treaties and contractual relations. In this context the Rapporteur envisaged a situation where a member state of the international community had the privilege, and indeed the duty, to take preventive and/or punitive action against a state perpetrating the breach of an international rule which is held to be peremptory. In support of his thesis to the effect that peremptory norms could proscribe conduct outside the field of international agreements and in terms of general duties of behavior, the Rapporteur cited the *Case Concerning the Barcelona Traction, Light and Power Company Limited (Second Phase)*⁷⁹ where the International Court of Justice stated that:

In particular, an essential distinction should be drawn between the obligations of a state towards the international community as a whole, and those arising vis-à-vis another state in the field of diplomatic protection. By their very nature the former are the concern of all states. In view of the importance of the rights involved, all states can be held to have a legal interest in their protection; they are obligations *erga omnes*. . . .

Such obligations derive, for example, in contemporary international law, from the outlawing of acts of aggression, and of genocide, as also from the principles and rules concerning the basic rights of the human person, including protection from slavery and racial discrimination. Some of the corresponding rights of protection have entered into the body of general international law (*Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, Advisory Opinion, I.C.J. Reports, 1951, p. 23*); others are conferred by international instruments of a universal or quasi-universal character.

Obligations the performance of which is the subject of diplomatic protection are not the same category. It cannot be held, when one such obligation in particular is in question, in a specific case, that all states have a legal interest in its observance.⁸⁰

While the International Law Commission's Rapporteur cited the examples of apartheid, slavery, genocide, the waging of wars of aggression and "a serious breach of essential importance for safeguarding the right of self-

⁷⁸*Id.* at 216-17.

⁷⁹[1970] I.C.J. 3.

⁸⁰*Id.* at 32.

determination of peoples, such as that prohibiting the establishment or maintenance by force of colonial domination,"⁸¹ it is also clear that his list is not a closed one. Indeed the free development of many additions to Judge Ago's list would appear to have the promise of a bright future. For example, such an additional item was asserted by Libyan Arab Republic (albeit unsuccessfully) in the *Arbitration Between the Libyan Arab Republic and the California Asiatic Oil Company and the Texaco Overseas Petroleum Company*.⁸² The Libyan Arab Republic argued that the United Nations General Assembly's Resolutions on Permanent Sovereignty over Natural Resources⁸³ constitute peremptory norms (norms *jure cogens*), that is they provide "a supreme principle justifying nationalization in every case."⁸⁴ Libya was also quoted as saying, in its memorandum of 26 July 1974:

Nationalization is an act related to the sovereignty of the state. This fact has been recognized by the consecutive Resolutions of the United Nations on the sovereignty of states over their natural resources, the last being Resolution No. 3171 of the United Nations General Assembly adopted on December 13, 1973, as well as paragraph (4/E) of Resolution No. 3201 (S. VI) adopted on 1 May, 1974. The said Resolutions confirm that every state maintains complete right to exercise full sovereignty over its natural resources and recognize Nationalization as being a legitimate and internationally recognized method to ensure the sovereignty of the state upon such resources. Nationalization, being related to the sovereignty of the state, is not subject to foreign jurisdiction. Provisions of the International Law do not permit a dispute with a state to be referred to any Jurisdiction other than its national Jurisdiction. In affirmance of this principle, Resolutions of the General Assembly provide that any dispute related to Nationalization or its consequences should be settled in accordance with provisions of domestic law of the state.⁸⁵

This may not now suggest, however, that the Libyan argument contains a potential for saying that the espousal of claims on behalf of persons or enterprises whose properties have been expropriated could come to be viewed as an international crime.⁸⁶ Rather, it seeks to tell us that the sovereign power of nationalizing property cannot be contracted away, and that clauses providing for arbitration and compensation may be subsequently rescinded unilaterally by the nationalizing State, without recourse to an international forum or reference to international law. It may be asked, however, how the Libyan assertion, in the *California Asiatic Arbitration*, bears upon Judge Ago's open-ended list of acts for which responsibility is

⁸¹Draft Article 19.3(b) of the International Law Commission's Draft Articles on State Responsibility in International Law, A/31/10 at 175 and 226.

⁸²See *Award on the Merits*, 7 INT'L LEGAL MATERIALS 1 (1978); see also *Lalive, Un grand arbitrage pétrolier entre un Gouvernement et deux sociétés privées étrangères*, 104 JOURNAL DU DROIT INTERNATIONAL 319, appendix at 350-89 (1977).

⁸³G.A. Res. 3201 (S-VI), S-6 U.N. GAOR, Supp. No. 1 at 3, U.N. Doc. A/9559 (1974).

⁸⁴*Award on the Merits*, 17 INT'L LEGAL MATERIALS at 26 (1978), 104 JOURNAL DU DROIT INTERNATIONAL 319 at 373.

⁸⁵*Award on the Merits* at 101-102, 17 INT'L LEGAL MATERIALS at 26 (1978), 104 JOURNAL DU DROIT INTERNATIONAL 319, 374-75.

⁸⁶See Report of the International Law Commission on the Work of Its Twenty-Eighth Session (3 May-23 July 1976), UNITED NATIONS GENERAL ASSEMBLY OFFICIAL RECORDS, 31st Sess., Supp. No. 10 at 288-90, U.N. Doc. A/31/10 (1976).

owed *erga omnes*, and which thus constitute crimes to which the label *jus cogens* applies in its nontreaty setting. This arises, first, from the thesis that the United Nations General Assembly's Resolutions on Permanent Sovereignty over Natural Resources⁸⁷ constitute indestructible legal bulwarks against the implementation of agreements which may be perceived as abridging nations' fundamental rights to determine their own destinies. Second, this leads to the proposition if such agreements are to be vindicated by the assertion of countervailing rights (for example, those based on the integrity of concessions and contracts) they are to be viewed as denials of the "right of self-determination of peoples." Hence such claims may be characterized, under the *jus cogens* thesis, as wrongful acts for which the state espousing the integrity of a citizen's contract against an expropriation may be held responsible *erga omnes*. Does such reasoning as the foregoing provide a parallel in the context of the alleged right (and indeed duty?) of each and every state to protect the common heritage of mankind? Are all states to be entitled, in breach of American and other countries' miners' freedom of the high seas, in Ambassador Aldrich's phrase, to "take action against pirate vessels on the high seas, 'robbing the common heritage?'"⁸⁸ Indeed, one may ask whether this last comment was made in terms of a perception that such seizures would be premised on the idea of the common heritage constituting *jus cogens* and on the view that such a premise would condone uses of force on the high seas which would otherwise constitute unlawful interferences with the jurisdiction of flag states and, indeed, a breach of Article 2(4) of the United Nations Charter.

Be that as it may, in the *California Asiatic Arbitration* the Arbitrator's appraisal of the legal impact of the General Assembly's Resolutions on Permanent Sovereignty over Natural Resources, as invoked by Libya, provides a perceptive and succinct analysis of the status, here and now, of a *jus cogens* argument, as well as one relating to the status of resolutions of the United Nations General Assembly. Professor René-Jean Dupuy said:

As this Tribunal has already indicated, the legal value of the resolutions which are relevant to the present case can be determined on the basis of circumstances under which they were adopted and by analysis of the principles which they state:

With respect to the first point, the absence of any binding force of the resolutions of the General Assembly of the United Nations implies that such resolu-

⁸⁷ See, *supra*, note 29 and the United Nations General Assembly Resolutions and Declarations cited thereat.

⁸⁸ See Ambassador Aldrich's Panel Comment of Goldie, *Customary International Law and Deep Seabed Mining, Symposium, Mining the Deep Seabed: A Range of Perspectives*, 6 SYRACUSE J. INT'L L. & COM. 173 at 196 (1979), where he said:

We cannot exclude the possibility of state action against seabed mining vessels. Nor can we exclude the possibility that such state action would be pursuant to what purported to be an authorization from the United Nations General Assembly to take action against "pirate vessels on the high seas, robbing the common heritage." This is not inconceivable.

(Ambassador George Aldrich was, at the time this statement originally was published, a United States ambassador and the Deputy Representative of the President of the United States at the Third United Nations Conference on the Law of the Sea).

tions must be accepted by the members of the United Nations in order to be legally binding. In this respect, the Tribunal notes that only Resolution 1803 (XVII) of 14 December 1962 was supported by a majority of member states representing all of the various groups. By contrast, the other Resolutions mentioned above, and in particular those referred to in the Libyan Memorandum, were supported by a majority of states but not by any of the developed countries with market economies which carry on the largest part of international trade.

With respect to the second point, to wit, the appraisal of the legal value on the basis of the principles stated, it appears essential to this Tribunal to distinguish between those provisions stating the existence of a right on which the generality of the states has expressed agreement and those provisions introducing new principles which were rejected by certain representative groups of states and having nothing more than a *de lege ferenda* value only in the eyes of the states which have adopted them; as far as the others are concerned, the rejection of these same principles implies that they consider them as being *contra legem*.⁸⁹

And Professor Virally has reinforced this appraisal of the Charter of the Economic Rights and Duties in the following observation:

It is therefore clear that the Charter is not a first step to codification and progressive development of international law, within the meaning of Article 13, para. 1(a) of the Charter of the United Nations, that is to say an instrument purporting to formulate in writing the rules of customary law and intended to better adjust its content to the requirements of international relations. The persisting difference of opinions in respect to some of its articles prevented reaching this goal and it is healthy that people have become aware of this.⁹⁰

We must now add to Professor Virally's observation the further thought from this Arbitration, namely that the unanimous or near-unanimous conviction which promotes what may have achieved acceptance as a rule of customary international law (and hence modifiable by treaty) into a peremptory norm cannot be achieved without the overwhelming evidences of the fixed belief of mankind in the necessity, moral compulsion and categorical prescriptiveness of such a rule and, furthermore, without incontrovertible evidence of its foundation in a universal public philosophy and in a belief of right action ecumenically embraced throughout the world's major ideologies.

While Ago's theory of peremptory norms in the field of state responsibility other than treaties is not widely supported amongst Western governments and publicists, it is strongly supported in the Soviet bloc⁹¹ and among the representatives of the more militant members of the Group of 77.⁹² Among the latter group are those who see in Ago's second and more extended meaning of *jus cogens* the means of stigmatizing the implementa-

⁸⁹ *Award on the Merits* at 111-12; INT'L LEGAL MATERIALS at 30 (1980) 104 JOURNAL DU DROIT INTERNATIONAL 319 at 378-79.

⁹⁰ Virally, *La Charte des Droits et Devoirs Economiques des Etats*, "Notes de Lecture," 20 ANNUAIRE FRANÇAIS DE DROIT INTERNATIONAL 57 at 59 (1974).

⁹¹ TUNKIN, THEORY OF INTERNATIONAL LAW 381-85 (Butler, W., transl. 1974).

⁹² See, *supra*, note 73.

tion of the United States' technological developments in seabed mining as a crime *erga omnes* and, hence, as "piratical."⁹³

Indeed at the Ninth Session (Second Part) of the Third United Nations Conference on the Law of the Sea, held in Geneva July-August, 1980 the representative of Chile made an informal proposal that the common heritage concept constitutes a peremptory norm. The Chile proposal was as follows:

Jus cogens

The States Parties to the present Convention accept and recognize on behalf of the international community as a whole that the provision relating to the common heritage of mankind set out in article 136 is a peremptory norm of general international law from which no derogation is permitted and which, consequently, can be modified only by a subsequent norm of general international law having the same character.⁹⁴

As a number of delegates asserted either resistance to,⁹⁵ or a failure to understand,⁹⁶ this proposal, a modified proposal which the President of the Conference considered to have achieved consensus, was put forward. That clause which *pro tem* became paragraph 6 of Article 305 of the Informal Composite Negotiating Text Revision 2, was as follows:

The States Parties to this Convention agree that there can be no amendments to the basic principle relating to the common heritage of mankind set forth in article 136 and they shall not be party to any agreement in derogation thereof.⁹⁷

Article 136 of the Negotiating Text, to which this paragraph makes reference, provides the Area and its resources are the common heritage of mankind.⁹⁸

This formula was finally consolidated at the resumed ninth session, Geneva 28 July-29 August, 1980 in that session's Draft Convention on the Law of the Sea (Informal Text)⁹⁹ it was incorporated in Article 311, paragraph 6 and was finally written in the following terms:

The States Parties to this Convention agree that there can be no amendments to the basic principle relating to the common heritage of mankind set forth in article 136 and that they shall not be party to any agreement in derogation thereof.¹⁰⁰

⁹³See, *supra*, note 88, & accompanying text.

⁹⁴Informal Proposal GP/9 dated 5 August 1980. See also Report of the President of the Third United Nations Conference on the Law of the Sea on the Work of the Informal Plenary on General Provisions at 2-3 (paragraph 3), U.N. Doc. A/CONF. 62/L.58 (mimeo, 22 August 1980).

⁹⁵The Western European countries and Japan spoke emphatically against this proposal. The Soviet Union said that no treaty exists which creates a peremptory norm, except for the Charter of the United Nations, and that such a proposal was outside the competence of the Conference.

⁹⁶For example, the delegation of the United States of America.

⁹⁷Third United Nations Conference on the Law of the Sea, Informal Composite Negotiating Text/Provisions 2 at 76, U.N. Doc. A/CONF. 62 /WP. 10/Rev. 2 (mimeo, 11 April 1980).

⁹⁸Report of the President of the Third United Nations Conference on the Law of the Sea on the Work of the Informal Plenary on General Provisions at 3, U.N. Doc. A/CONF. 62/L. 58 (mimeo, 22 August 1980).

⁹⁹U.N. Doc. A/CONF. 62/WP. 10/Rev. 3/Add. 1 (mimeo, 23 August 1980).

¹⁰⁰*Id.* at 122.

It may be asked, reading these two provisions together, what the new paragraph achieves. Starting from the premise that parties accepting it intend that it should not be entirely meaningless then, clearly, it means more than a promise not to be in breach of Article 136 for this would merely make the paragraph redundant.

It should be noted, moreover, that Article 136 says nothing substantive about "common heritage." Accordingly, it is at least arguable, and no doubt will be argued by supporters of the *jus cogens* thesis, that the express incorporation of Article 136 into the above "compromise" paragraph necessarily carries with it the implication that it should be interpreted in light of Article 137 which states:

1. No State shall claim or exercise sovereignty or sovereign rights over any part of the Area or its resources, nor shall any State or natural or juridical person, appropriate any part thereof. No such claim or exercise of sovereignty or sovereign rights, nor such appropriation shall be recognized.
2. All rights in the resources of the Area are vested in mankind as a whole, on whose behalf the Authority shall act. These resources are not subject to alienation. The minerals derived from the Area, however, may only be alienated in accordance with this Part and the rules and regulations adopted thereunder.
3. No State or natural or juridical person shall claim, acquire or exercise rights with respect to the minerals of the Area except in accordance with the provisions of this Part. Otherwise, no such claim, acquisition or exercise of such rights shall be recognized.

Such an argument, would be based on a thesis that there is a necessary implication to the effect that Article 136 is only understandable in light of Article 137, since Article 136, standing alone, does not spell out the meaning, the modalities, and the scope of the "common heritage" concept. This could only be countered by something like a bald assertion to the effect that paragraph 6 expressly incorporates Article 136 and only 136, and that the rule of interpretation *inclusio unius exclusio est ulterius* applies. But this type of traditional argumentation has many traits of weakness. It relies on legal dogmatics. Furthermore, as Professor McDougal has pointed out, in treaty interpretation every traditional rule or interpretation or construction may also be countered by its contrary proposition and the choice of an applicable rule of interpretation depends on such metalegal considerations as the intention of the parties and the purpose of the agreement.¹⁰¹

¹⁰¹ McDougal, *Vienna Conference on the Law of Treaties: Statement to Committee of the Whole, April 19, 1968*, 62 AM. J. INT'L L. 1021, 1023 (1968), quoting LORD McNAIR, *LAW OF TREATIES* 372 (1961). See also McDougal, *supra* at 1024 where he again quoted Lord McNair (*LAW OF TREATIES*) at 366 as follows:

This so-called rule of interpretation, like others is merely a starting point, a *prima facie* guide, and cannot be allowed to obstruct the essential quest in the application of treaties, namely, the search for the *real* intention of the contracting parties in the language used by them (author's emphasis).

See also McDougal, *THE INTERPRETATION OF AGREEMENTS AND WORLD PUBLIC ORDER passim* (1967). See also STONE, *LEGAL CONTROL OF INTERNATIONAL CONFLICT* 226 (1954) where he wrote (with regard to the interpretation of key (the "veto") provisions of the United Nations Charter):

Second, the reference to, indeed the invocation of, the word "derogation" in the "compromise" paragraph 6 is redolent of the special case of principles having the authority of *jus cogens* under Article 53 of the Vienna Convention on the Law of Treaties.¹⁰² If this compromise provision had, indeed, been fairly drafted so as to effectively reflect the Western European and other states' opposition to the Chilean proposal, it might well have omitted a term so fundamentally reminiscent of *jus cogens* and the categorical peremptoriness of the regime which that term invokes.

Third, in his *Explanatory Memorandum of the Conference*¹⁰³ the President of the Conference wrote:

The other item dealt with under General Provisions was the concept of *jus cogens* on which a compromise was accepted. . . . It was agreed that it be incorporated as a new paragraph 6 of Article 311 of the Final Clauses on relations to other conventions and international agreements.¹⁰⁴

This explicit characterization of Article 311, paragraph 6, as endowing the common heritage principle with the authority of *jus cogens* surely embeds in concrete the idea that agreement to this clause invalidates mini-treaties and even permits the characterization of deep seabed mining outside the "regime to be established" as an international crime.

In light of these considerations it is regretfully suggested that should the United States negotiate a treaty (a "mini-treaty") with states, such as France and the Federal Republic of Germany for example, of whom the former is actively considering the enactment of similar domestic legislation to the United States' recently enacted seabed mining law and the latter has already done so, it would be arguable that even if the mini-treaty were to assert a recognition and respect for the common heritage principle, it would still be vulnerable to attack, not only diplomatically and in such international fora as the General Assembly of the United Nations, but domestically by the mini-treaty's opponents as illegal, invalid and contrary to provisions accepted by the states at the Third United Nations Conference on the Law of the Sea. Thus, the new "compromise" paragraph 6 of the latest text's Article 311 would, inevitably, expose the United States and the countries with which it was negotiating to charges of bad faith toward the Conference and of committing a breach of the spirit and intention of Article 18 of the Vienna Convention on the Law of Treaties which provides that:

*Obligation not to defeat the object and
purpose of a treaty prior to its entry into force*

These competing starting points might, of course, yield opposite results on a particular matter if both were simultaneously applied to it [T]he effect of the competition of starting points is merely that the choice between them is determined by politics, not by law.

See also (for a similar discussion of statutory interpretation) STONE, LEGAL SYSTEM AND LAWYERS' REASONING 288-98 (1964).

¹⁰² See, *supra*, note 75 & accompanying text.

¹⁰³ U.N. Doc. A/CONF.62/WP. 10/Rev. 3 at xix (mimeo. 28 August 1898).

¹⁰⁴ *Ibid.* at xxi.

A State is obliged to refrain from acts which would defeat the object and purpose of a treaty when:

- (a) it has signed the treaty or has exchanged instruments constituting the treaty subject to ratification, acceptance or approval, until it shall have made its intention clear not to become a party to the treaty; or
- (b) it has expressed its consent to be bound by the treaty, pending the entry into force of the treaty and provided that such entry into force is not unduly delayed.¹⁰⁵

E. The Lawfulness of Deep Seabed Mining under Customary Law and the 1958 Geneva Conventions on the Law of the Sea

The section of the book under review dealing with the above-captioned topic begins with a detailed study of the translation of the customary international law norms into the relevant multilateral conventions which the 1958 United Nations Conference on the Law of the Sea produced at Geneva. Taking as his starting point for this section of the book the proposition that these conventions "did little more than cast the traditional pattern of the international law of the sea into an authoritative form, consecrate several emerging doctrines. . . as existing law, and introduce some reforms,"¹⁰⁶ Kronmiller observes that, unlike the Third United Nations Conference on the Law of the Sea, the 1958 Conference (the first of the series; the second, in 1960 was brief and barren of lasting effectiveness) was largely technical in nature. The drafting of the four conventions it successfully produced was also largely free of the ideological confrontations and demands which have complicated negotiations and delayed the drafting of generally satisfactory formulae at the present (the Third) Conference. The fact that the International Law Commission's drafts dominated the first conference reflects the great change that has occurred to the ideological coloring of the law of the sea in the intervening few years (1958-1967), (this latter year being the date of the first forerunner of the Third United Nations Conference on the Law of the Sea, namely, the United Nations General Assembly's *Ad Hoc* Committee to study the Peaceful Uses of the Sea-Bed and Ocean Floor Beyond the Limits of National Jurisdiction¹⁰⁷).

Passing from the history of the 1958 conventions, the book under review then takes up the thesis of "Reasonableness as the General Criterion of Lawfulness."¹⁰⁸ The criterion of reasonableness as providing a basis for supporting the legality of a use which may operate to limit other uses tem-

¹⁰⁵ See, *supra* note 75.

¹⁰⁶ P. 358, quoting Goldie, *The Management of Ocean Resources Regime for Structuring the Maritime Environment* (THE FUTURE OF THE MARITIME ENVIRONMENT), 4 THE FUTURE OF THE INTERNATIONAL LEGAL ORDER 155 at 175-76 (Black & Falk eds. 1972).

¹⁰⁷ This *ad hoc* committee was established under U.N. General Assembly Resolution A/RES/2340 (XXII).

¹⁰⁸ Pp. 388-408.

porarily, or with regard to an area relevant to that activity, is reviewed, first, in terms of the debate, prior to the 1958 Conference on the lawfulness of nuclear testing and the engaging in military training exercises on the high seas.¹⁰⁹ In addition, that standard was examined in terms of more general issues and in light of the notion that reasonableness indicates that reciprocal or shared interests demand mutual restraint.¹¹⁰ The International Law Commission's discussions of whether "reasonableness" or "adversely affect" was the appropriate criterion for legality were also perceptively summarized.

Kronmiller's discussion of Article 2 of the 1958 Geneva Convention on the High Seas, and especially the use of the phrase *inter alia* in the chapeau of that Article appeared rather to belabor the point. Neither the International Law Commission nor the Conference seriously considered that, in listing four freedoms they were precluding others, for example, the freedom of scientific research on the high seas. But out of the discussion of the open-endedness of the list of freedoms in Article 2 Kronmiller developed the more crucial argument that uses of the sea which were unknown, or at least unexercised, in 1958 were not unlawful merely because they were not contemplated, let alone not enumerated, in the drafting of, or discussions leading to, Article 2. The open-endedness of the list and the generality of the freedom of the seas per se, readily permit new activities to be brought within the scope of that freedom. The denotations may extend; the connotation remains the same.

In sum Kronmiller argued that: (1) uses of the sea are not unlawful merely because they may have adverse effects upon the exercise of other uses since the standard of reasonableness—the prohibition merely of unjustifiable interference—governs; (2) the list of lawful uses is not closed ("does not constitute a closed set")¹¹¹ hence the freedom of the seas is an evolving doctrine permitting new technologically oriented activities; and (3) there is no hierarchy of lawful uses, permitting one use precludes another. Hence deep seabed mining is not unlawful under the key provisions of the 1958 Geneva High Seas and Continental Shelf Conventions. Nor is it contrary to the general principles of international law and the rules of customary law merely because it is a nascent use of the seas which may have some adverse impact on established uses.

¹⁰⁹In this context McDougal's teaching played a dominant role. See (1) McDougal & Schlei, *Hydrogen Bomb Tests in Perspective: Lawful Measures for Security*, 64 YALE L.J. 648 (1955), reprinted in McDougal & Associates, *STUDIES IN WORLD PUBLIC ORDER* 763 (1960); (2) McDougal, *The Hydrogen Bomb Tests and the International Law of the Sea*, 49 AM. J. INT'L L. 356 (1955). Many other publicists were, of course, also cited in the context of the discussion of the standard of reasonableness.

¹¹⁰McDougal & Burke, *THE PUBLIC ORDER OF THE OCEANS* 87 (1962).

¹¹¹P. 449.

*F. Analogies with Other Selected Lawful**Exercises of the Freedom of the High Seas*

The book under review engages in a survey of uses of the high seas which, like the taking of manganese nodules, involve: (1) ownership resulting from the capture of the denizens of the seas; (2) the exercise of high seas freedoms; (3) the permissible use of the sea which may constitute a not unreasonable interference with other uses; and (4) the jurisdiction of the flag state over the vessels on the high seas engaging in the activity under review and offered as an analogy. The analogies which are presented as showing some, or all, of these features are: (1) fishing; (2) laying and maintaining submarine cables; (3) marine scientific research; (4) use of the seabed for certain military purposes; (5) ocean dumping, including the disposal of certain radioactive wastes; (6) gunnery and bombing practice; and (7) large scale naval exercises. The relevance and effectiveness of each of these activities will be reviewed in turn.

1. FISHING

The parallels Kronmiller finds between high seas fishing and the mining of manganese nodules are to be found in the acquisition of ownership of individual items through capture, without any exclusive claim to a particular area or to the resources found in the area. In addition, he argues that fisheries derived from exclusive rights based on occupation or prescription (presumably sedentary or historic fisheries) "may be analogized to deep seabed mining undertaken subject to a similar legal claim."¹¹² Third, because large fishing fleets may effectively, but lawfully, exclude, or at least hamper, other equally privileged uses of the sea at the times and locations of their operations, the test of what may be unjustifiable interference in this context is flexible and dependent on the reasonableness of the claim and of the possible counterclaims, given the concrete situations in which they arise. This analogy would seem to support the right of the miner to capture and, in physically occupying ocean space, reasonably interfere with other lawful uses of the high seas. Fishing as an analogy would appear, however, to be deficient in one very important particular. While it may provide a legal parallel to the right of capture of nodules it says nothing to the more difficult set of issues connected with the miners' felt economic and technological need for exclusive rights to mine a tract of reasonable size, unless the rather glancing references to occupation and prescription in the contexts of sedentary and other historic fisheries are intended to fill this need. In this reviewer's opinion, the drawing of an analogy between deep seabed mining and fisheries in the book under review does not achieve this second goal; but it may not have been intended to do so.

¹¹²P. 1. The author, however, notes the legal pitfalls existing in such an approach. *See, especially*, pp. 176-201.

This reviewer would like to add a further caution to Kronmiller's use of fisheries in support of the lawfulness of deep seabed mining. True it is that both claim a common protection and validation of title to captured resources under the doctrine of the freedom of the seas. But, fisheries treated as a legal analogue to deep seabed mining may, under certain conditions at least prove a "false friend" (also known as a "tricky twin" or a "slovenly twin") to adopt a parallel from the study of languages.¹¹³

The present international customary law regime of high seas fisheries came into being some three and a half centuries ago under very different technological and economic conditions from those which now prevail. It came into being, moreover, under the prevailing political pressures and philosophical theories germane to the evolution of modern Western Europe, especially those deriving from the Anglo-Dutch rivalries over the North Sea fishery, and English and Dutch denials of Spanish and Portuguese pretensions. It also derived from the then prevailing theories of natural law, of the relation of Man and Nature and of the conditions necessary for the creation of property rights. In the early and middle years of the seventeenth century, fishing technology and investment had not reached a level whereby the "free rider" had become such a problem that the possibility of his reaping the benefits of the discovery of a fish stock would render the discoverer's investment in the search and exploration valueless. By contrast, this is, today, the major fear of investors in deep seabed hard mineral mining.

Because, at the present stage of the development of the industry, when many ocean-going fishing fleets have a large and sophisticated investment in the discovery of fish stocks (by means of spotter planes, sonar, radar and radio), one might argue that, if the world's ocean fishing fraternity had the opportunity of doing the doctrine of the freedom of the seas over, it might well argue for at least some degree of a discoverer's exclusive right to exploit a newly discovered fish stock. It is, clearly, the legal privileges that the present-day customary international law of fisheries gives to free riders that make high seas fisheries a "false friend" of deep seabed mining.

2. LAYING AND MAINTAINING SUBMARINE

CABLES AND PIPELINES

Kronmiller perceives, and in this reviewer's opinion, perceived correctly, important analogies between seabed mining and cable and pipeline laying and upkeep.

Here too, however, as in fishing, there are important differences. Cables and pipelines involve a permanent (or semipermanent) but not necessarily exclusive physical occupation of an area of the seabed. In some cases the water column, too, may be preempted for a considerable period. On the other hand, cables and pipelines may overlay each other, and other uses of

¹¹³See, e.g., CONCISE OXFORD FRENCH DICTIONARY at ix (1956).

the sea may, and do, take place nearby. Again, the laying and maintenance of cables and pipelines has no need to find any marketable title to a product in the physical fact of the capture of the item processed or sold—this last being a common feature of fishing on the high seas and mining under them. Be these differences as they may, the functional similarities of cable and pipeline laying and maintenance with deep seabed mining, and the reliance of both upon the freedom of the seas as assuring the privilege and protecting its exercise from unjustifiable interference, testify strong similarities between the two activities. Furthermore, the traditional acceptance of cable laying gives impressive support to the author's claim that deep seabed mining, despite its nascency, should receive a favorable reception.

3. MARINE SCIENTIFIC RESEARCH

Starting with the premise that, clearly, marine scientific research is a traditional exercise of the freedom of the high seas and is lawful, Kronmiller argues for the lawfulness of seabed mining on the basis of perceived similarities between these two activities. These he finds in the following operational analogies: (1) research ships often navigate like mining vessels; and (2) they frequently launch equipment into the depths of the ocean, including locations in and through the deep seabed muds. In addition the writer observes that the environmental impacts of the two activities are not dissimilar. He writes: "[i]nherently, scientific research vessels discharge no fewer pollutants incident to normal navigation than do seabed mining vessels."¹¹⁴ Finally, the parallelism of this traditional exercise of the freedom of the high seas and seabed mining lies in the facts that neither entails a *de facto* or *de jure* closure of the high seas, nor occasion great harm to the living resources of the ocean; unlike certain other permitted uses of the ocean under customary law—he gives nuclear testing as an example.¹¹⁵ Kronmiller concludes this section of his presentation with the observation that:

It cannot reasonably be maintained that marine scientific research is a lawful use of the seas, in principle, but that deep seabed mining is not. Moreover, as is the case in law with respect to such research, the lawfulness of deep seabed mining could be called into question if closures of large ocean areas to foreign use or large-scale damage to resources were involved or if the activity were otherwise unreasonable.¹¹⁶

¹¹⁴P. 495.

¹¹⁵This is the example Kronmiller gives, *see* p. 499. This reviewer feels that certain other uses, for example, the massive fishing operations on the high seas by the fleets of certain states which tend to destroy stocks completely and are often designated "mining", and yet fall within the traditional freedom of the high seas to fish, might have been a more felicitous choice for an example of the author's quite valid and apposite analogy drawn from nuclear weapons testing on the free high seas. This reviewer believes that nuclear weapons testing in the atmosphere, under customary international law and apart from the Test Ban Treaty, is now in a twilight zone of permissibility and is limited by the rule of reasonableness.

¹¹⁶P. 500.

4. USE OF THE SEABED FOR CERTAIN MILITARY PURPOSES

Kronmiller cites the Treaty on the Prohibition of the Emplacement of Nuclear Weapons and Other Weapons of Mass Destruction on the Seabed and Ocean Floor and in the Subsoil Thereof,¹¹⁷ which is now in force,¹¹⁸ as testifying, through its negotiating history and the felt need for its existence, to an exercise of the freedom of the seas which would be lawful but for that treaty's binding character. He also points to the fact that attempts by a number of states to effect a total ban on military uses of the seabed were defeated in the negotiations for this Treaty. He argues that this confirms an implication that, without the convention regime, the placement of the prohibited weapons would be permissible under the doctrine of the freedom of the high seas.¹¹⁹ The need for the Treaty also creates a further implication in Kronmiller's view. He argues, consistently with the United States position, that military uses of the bed of the high seas which are not within the Treaty's prohibitions (for example, the emplacement of submarine detection systems on the seabed) remain permissible under the freedom of the high seas. Kronmiller would appear to present this exercise of the freedom of the high seas, and those which follow, as being permitted under customary international law, but as less "reasonable" or more likely, in terms of the facts, to constitute "unjustifiable interferences" with other uses than the, comparatively speaking, harmless and less preemptive exercise of the freedom of the high seas.

5. OCEAN DUMPING, INCLUDING THE DISPOSAL OF RADIOACTIVE WASTES

Communities have consistently and traditionally used the sea as a sink. So to abuse and pollute ocean waters would seem to be a time-honored exercise of the freedom of the seas. Accordingly, Kronmiller observes that the present majority "... view is clearly that the disposal of wastes by dumping is a lawful use of the high seas, subject only to treaty obligations not reflecting customary law."¹²⁰ The author tells us that he selected the disposal of radioactive waste as an analogy justifying the mining of the sea-

¹¹⁷Done at Washington, London and Moscow, 11 February 1971, 23 U.S.T. 701, T.I.A.S. No. 7337.

¹¹⁸As of January 1, 1979, 64 states had ratified the treaty which had come into force on May 18, 1972. *Treaties in Force* 331 (1979).

¹¹⁹P. 502. Kronmiller also points to important parties' understandings in this regard in the statements of the President of the United States and of the representatives of the United Kingdom and the United States at the signing ceremony in Washington. See *Treaty Banning Emplacement of Nuclear Weapons on the Seabed Signed by 62 Nations in Washington*, 64 DEPT OF STATE BULL. 288 (1971).

¹²⁰P. 503. At note 956, *id.*, Kronmiller reminds us that a Czechoslovakian proposal at the 1958 Conference to ban disposal of wastes was defeated. See U.N. Doc. A/CONF.13/C.2/L. 118 (1958). The Conference did pass the following resolution:

POLLUTION OF THE HIGH SEAS
BY RADIOACTIVE MATERIALS

bed of the high seas because of its environmentally harmful and its preemptive character as far as other uses go, through the possibility of the leakage of toxic wastes. Clearly, the toxic wastes so disposed of involve something more closely approaching an "unjustifiable interference" with other legitimate uses of the high seas, let alone their seabed, than does ocean mining.

6. GUNNERY AND BOMBING PRACTICE

Kronmiller argues that gunnery and bombing practice, long range missile testing and large scale naval exercises on the high seas have long been regarded as lawful, "when carried out with reasonable regard to other ocean activities."¹²¹ Hence, so he argues, "if such hazardous uses of the sea involving *de facto* though not *de jure*, exclusively over wide areas are lawful, the permissibility of deep seabed mining cannot be reasonably disputed."¹²²

7. ARTIFICIAL INSTALLATIONS

The preemptive character of these structures which "often involve interference with other ocean activities" is noted and an argument on the basis of the comparative utilities or disutilities of the activity stated to be lawful, vis-à-vis deep seabed mining is employed, as in the preceding examples, to justify deep seabed mining in terms of the latter's less preemptive character.

8. CONCLUSIONS AND COMMENTS REGARDING THE SELECTED ANALOGIES

The logic of Kronmiller's position in citing examples of uses of the high seas which have qualities of temporarily preempting, for greater or lesser

*Resolution Adopted on the Report of the Second Committee, relating to
Article 25 of the Convention on the High Seas*

The United Nations Conference on the Law of the Sea,

Recognizing the need for international action in the field of disposal of radioactive wastes in the sea,

Taking into account action which has been proposed by various national and international bodies and studies which have been published on the subject,

Noting that the International Commission on Radiological Protection has made recommendations regarding the maximum permissible concentration of radioisotopes in the human body and the maximum permissible concentration in the air and water,

Recommends that the International Atomic Energy Agency, in consultation with existing groups and established organs having acknowledged competence in the field of radiological protection, should pursue whatever studies and take whatever action is necessary to assist States in controlling the discharge or release of radioactive materials to the sea, in promulgating standards, and in drawing up internationally acceptable regulations to prevent pollution of the sea by radioactive materials in amounts which would adversely affect man and his marine resources.

10th Plenary Meeting, 23 April 1958

2 UNITED NATIONS CONFERENCE ON THE LAW OF THE SEA, PLENARY MEETINGS AT 143-44, U.N. DOC. A/CONF. 13/L. 56 (1958).

¹²¹P. 506.

¹²²*Id.*

periods of time, high seas areas would appear to be that of arguing by example. He also validly demonstrates that the list of permitted maritime activities based on the freedom of the high seas is not, in general, closed. This formulation does, however, leave the sympathetic reader with a nagging doubt as to the conclusiveness of the argument that the open list of such freedoms, therefore, includes, of necessity, deep seabed mining. Indeed, a comment on Kronmiller's presentation is that he does not clearly formulate what is, surely, his thesis, namely that the freedom of the high seas is a comprehensive premise for all lawful exercises, namely all those which are not prohibited by custom or treaty,¹²³ or which do not "unjustifiably interfere"¹²⁴ with other uses. The specific lawful uses he draws upon are then not independent liberties each having precise boundaries strictly limited by the permitted activity and contained in an open-ended list. They are simply selected denotative examples of the general freedom. Unfortunately, Kronmiller, in stressing the reasoning by analogy approach, and by not at least equally stressing the parallel and/or alternative deductive form of argument, leaves this reviewer with a sense that his argument could have been more persuasive by stressing the global and general view of the freedom of the seas as the premise of all activities which are neither expressly prohibited nor constitute unjustifiable interferences with other uses.

IV. A Collateral Issue

Now that President Carter has signed the Deep Seabed Hard Minerals Resources Act¹²⁵ into law, and that the German Federal Parliament has now enacted a similar statute, Kronmiller's discussion of the lawfulness, in public international law, of such legislation takes on a new and central importance.

Despite the author's significant professional role in the drafting, passage through Congress, and signing of the Act, the discussion of this topic appears almost as a postscript. This, one may presume, may be owing to the fact that, when the book was written, domestic legislative solutions by interested states were at a relatively uncertain stage of development, and the very fact that he was participating in the process may well have caused Kronmiller to feel that to say more could have risked prejudicing the outcome of the legislative effort to which he was, personally and professionally, committed.

Starting with the premise that a state may legislate to bind its own citi-

¹²³See, e.g., *The S.S. Lotus* [1927] P.C.I.J., ser. A., No. 10, *WORLD COURT REPORTS* 20 (M. Hudson ed. 1935).

¹²⁴An alternative use of "unjustifiable interference" either as a negation of a privilege or as its affirmation subject to an obligation to compensate for all harms attributed to its lawful exercise, see, *infra*, § IV.C. and especially the textual material and discussion accompanying note 141.

¹²⁵30 U.S.C. 1401, 94 Stat. 553 (1980).

zens to a "site-specific"¹²⁶ deep seabed mining statute, Kronmiller observes that a mutual regime could be established by the reciprocal domestic legislation of a number of states which, under reciprocal grants of jurisdiction over each others' citizens, could create a regime for the safeguarding of deep-ocean seabed mine sites without reference to the development of general international law concepts of protection. While it may be agreed that, among the states participating in such a reciprocal regime, a legal shield could be assured against free riders who are the citizens or enterprises of those participating states, such a regime is unable to guarantee protection against other free riders hailing from third states. Such a theory would merely, therefore, enable free riders to engage in corporate registrations in such nonparticipating countries and in registering their mining ships under flags of convenience—the conveniences in question being those provided by any, and every, state which dextrously stays out of any reciprocal regime which is formed. For such a regime would necessarily be special to the participating states only. It could not, without universal adhesion, become a general regime binding all states. Thus the weakness of the blueprint in the book under review is that of the circuitry of most, if not all, bootstrap operations. Furthermore, any regime predicated on the thesis it propounds would ensure its own defeat by leaving third states free, under general international law, to license deep seabed miners to amble freely into the unprotected (but thoroughly researched and surveyed) preserves of miners coming from states participating in the special regime. The free riders need only establish their privilege by wearing the colors of some nonparticipating state and so scoop the benefits of the first miner's labors. A more general regime, capable of a better protection of investment in expensive surveys and site-specific technological development is needed if this new legislation is to be economically, as well as legally, effective. Indeed one of the basic themes of this review is to stress the need to argue for a substantive rule under customary international law protecting equitably sized and administered mining tracts, and thus to justify domestic legislation as a regulation of citizens enjoying the customary liberties given under the general freedom of the high seas.

Until a more cogent legal pediment for establishing the validity of seabed mining legislation is offered, this reviewer would like, with all modesty, to propose his own theory of the reception of the doctrine of an exclusive usufruct in equitably sized mining tracts by international law, historically justified by virtue of the "Spitzbergen Analogy," and analytically legitimated by virtue of the widespread acceptance in the mining laws of many countries of the practice of miners' rights. It thus constitutes a valid and effective principle of international law by virtue of both custom and Article 38.1(c)

¹²⁶Kronmiller, at p. 508, defines "site-specific" as follows:

[E]ach operation for technical reasons is, and must be, tailored to a single site. Moreover, a condition of economic viability is the assurance that the operator will be able to exhaust his mine site without interference by a competing operator.

of the Statute of the International Court of Justice (i.e., the source of international law, or rubric, denominated "the general principles of law recognized by civilized nations").¹²⁷

V. Conclusion

Full agreement between a reviewer and the author of the book under review is most unusual—to say the least. Be that as it may, in general this reviewer does agree with the book's purpose and its evaluation of both the customary international law of deep seabed mining beyond the jurisdiction of coastal states and the contemporary conditions necessary for demonstrating legal change, apart from the multilateral conventions, to customary international law brought about by expressions of states' opinions and intentions in international organizations. On the other hand, there are points of disagreement which will be adumbrated in the following paragraphs.

A. *The Problem of Exclusive Mining Tracts*

This reviewer feels that the book fell short, in a few segments, of its promise in that the author was perhaps overly hesitant with regard to some topics—for example, the free rider problem. This was equally true of his approach to the question of generally accepted norms regarding original ownership through possession, and the development of a thesis for demonstrating the existence, here and now, of the international legal pediment of the mining tracts which can be allocated under the Deep Seabed Hard Minerals Mining Act, 1980. In this regard, it is suggested, a chain of reasoning framed broadly on similar lines to this reviewer's miners' rights thesis, which is based on the Spitzbergen Analogy, the common practice of pioneer mining communities, and widespread legislation incorporating this approach, might well have provided an adequate premise for amplifying Kronmiller's theme in terms of "general principles of law recognized by civilized nations" (Article 38.1.c. of the Statute of the International Court of Justice). Alternatively, perhaps, the deployment and demonstration of an alternative theory which might, possibly, have been based on "the equity of the thing," whereby seabed miners could be shown as entitled to take reasonably sized deep seabed mining tracts,¹²⁸ would have, in this reviewer's eyes at least, rounded out and completed the book's purpose. Furthermore,

¹²⁷ See Goldie, *A General International Law Doctrine for Seabed Regimes*, 7 INT'L LAW. 796, 804-12 (1973), and *Mining Rights and the General International Law Regime of the Deep Ocean Floor*, 2 BROOKLYN J. INT'L L. 1, 6-32 (1975). For a recent United States domestic law (Admiralty) case taking a similar view of the acquisition of possessory rights to that advanced here, see *Treasure Salvors, Inc. v. Unidentified Wrecked and Abandoned Sailing Vessel*, 640 F.2d 560 (5th Cir. 1981). In this case the appellate court affirmed an injunction prohibiting "free rider" defendants from interfering with the plaintiff's operation, and from removing treasure from an abandoned wrecked ship found by the plaintiff and being actively exploited by him.

¹²⁸ See, *supra*, note 106 & accompanying text.

an argument (in addition to those usually referred to under the rubric of "miners' rights"), and developing from the Spitzbergen Analogy, could have been deployed to answer the critics of the use of that analogy and who argue that property rights cannot exist without a sovereign.¹²⁹ Such an argument could have been framed, in some such terms as the following:

As one who sides with President (and later Chief Justice) Taft,¹³⁰ I feel the opposing view is simply an unquestioning acceptance of a positivistic theory of law.¹³¹ It is true that in the freshman property books we tend to be told that "property" is something that the law of the state says is "property"—rather like Humpty Dumpty's famous speech in *Alice Through the Looking Glass*.¹³² Other

¹²⁹See, e.g., Burton, *Freedom of the Seas: International Law Applicable to Deep Seabed Mining Claims*, 29 STANFORD L. REV. 1135, 1145-47, 1156-59 (1977). This reviewer is preparing a response to the criticisms of the "Spitzbergen Analogy" in this and other commentaries.

¹³⁰Who said to the United States Congress in 1909, regarding a Norwegian proposal for a conference to settle the future of Spitzbergen (then a *terra nullius*), that the United States had no interest in establishing any territorial claims on Spitzbergen, but expressed the determination to attend the conference so as to protect rights "already vested" of American citizens to mining tracts in the area. He did this in a State of the Union Address to Congress in 1909 where he also said:

The Department of State, in view of proofs filed with it in 1906, showing American possession, occupation and working of certain coal-bearing lands in Spitzbergen, accepted the invitation under the reservation above stated [*i.e.*, the question of altering the status of the islands as countries belonging to no particular state and as equally open to the citizens and subjects of all states should not be raised] and under the further reservation that all interests in those islands *already vested* should be protected and that there should be equality of opportunity for the future.

Annual Message of the President to Congress, Dec. 7, 1909 (1909) For. Rels, U.S. IX, at cxiii (1914 ed.).

¹³¹For a general definition of legal positivism as a theory for determining questions of the validity of rights, see DWORKIN, *TAKING RIGHTS SERIOUSLY* 17 (1978). For an application of this theory to the question of rights on Spitzbergen while that archipelago remained a *terra nullius* see the following comment by Lansing:

In these circumstances a real right, in the common acceptance of the term, cannot exist in Spitzbergen. Restriction upon the use and occupancy of land [there] must depend not on the government's having control over the *land* used or occupied, but upon control over the *persons* who might freely occupy and use it if not restrained in their acts. The result of control in both cases would be almost, if not quite, identical, although the exercise of control would arise from principles entirely different. The essential feature of ownership is the exclusion of all others from the use and enjoyment of the thing owned. This is equally true of personal and real property. Ownership in the case of land in Spitzbergen could not, therefore exist. All persons cannot be excluded. Only those persons could be excluded whose governments have conferred upon the insular government to the right to exclude them. Exclusive use and occupancy is lacking, and so land in Spitzbergen cannot, in the true sense, be owned.

If, however, the governments of the world should with substantial unanimity agree that their respective nationals might by direction of the government formed by them for Spitzbergen as their common agent be excluded from the occupancy and use of land unless specially privileged to do so, the effect could be similar to that resulting from ownership, although it would lack the permanency of the right based on territorial sovereignty, for it would be liable to the invasion of nationals of a Power which had not conferred any portion of its political sovereignty upon the government established. In the case of ownership, the right of exclusion is complete and is derived from exclusive control of the land; in the case of the right acquired in Spitzbergen, the right of exclusion would be incomplete and would be derived from the delegated power to control persons of certain nationalities who might otherwise enter upon the land.

Lansing, *A Unique International Problem*, 11 AM. J. INT'L L. 763, at 769 (1917).

¹³²CARROLL, *THROUGH THE LOOKING GLASS* (1871).

writers have taken other views. Such views are not only reflected in President Taft's State of the Union Address,¹³³ but also in the Treaty of Paris of 1919 in which the signatory powers recognized Norwegian sovereignty over the Archipelago, but preserved all rights which had been "acquired" while the islands were without a sovereign. Again, an alternative view of property was reflected in the writings of John Locke who wrote in the late seventeenth century.¹³⁴ [His views were] very much like a modern economic theory regarding property. For example, Professor Demsetz tells us that when a resource becomes scarce, sufficiently scarce to require the internalization of externalities, there is motivation for viewing it as property and thus excluding others, usually by some kind of implicit or explicit arrangement.¹³⁵ Locke and Demsetz are not very far apart. But their language games are very different from that of the followers of John Austin and the nineteenth-century positivists.¹³⁶

In a similar vein the practical men who established and bought and sold, and made money out of, their mining tracts on Spitzbergen took a different view of their rights from that of legal positivists who dogmatically insisted that rights to own and dispose of property can only exist where a sovereign is present to confer them. The miners of Spitzbergen, in asserting their own claims and reciprocally their neighbors', were guided by the utility of inter-

¹³³ See note 128 *supra*.

¹³⁴ Earlier than Austin, John Locke (whose views helped frame the ideas of the American Revolution) took the view that property rights antedated the state and resulted from the combination of "nature" and "labor." He wrote, in his *Second Treatise of Civil Government*:

Thus this law of reason makes the deer that Indian's who hath killed it . . . And amongst those who are counted the civilized part of mankind who have made and multiplied positive laws to determine property, this original law of Nature, for the beginning of property in what was before common, still takes place, and by virtue thereof what fish any one catches in the ocean, that great and still remaining common of mankind; or what ambergris any one takes up there, is, by the labor that removes it out of that common state Nature left it in, made his property who takes that pain about it.

LOCKE, *SECOND TREATISE OF GOVERNMENT* at 30, reprinted in LOCKE, *TWO TREATISES OF GOVERNMENT* 135-36 (1956).

¹³⁵ An economist, Harold Demsetz, has offered a view of property differing from both Lansing's and Locke's. He writes:

A primary function of property rights is that of guiding incentives to achieve a greater internalization of externalities. One condition is necessary to make costs and benefits externalities. The cost of a transaction in the rights between the parties (internalization) must exceed the gains from internalization. In general, transacting cost can be large relative to gains because of "natural" difficulties in trading or they can be largely because of legal reasons. In a lawful society the prohibition of voluntary negotiations makes the cost of transacting infinite. Some costs and benefits are not taken into account by users of resources whenever externalities exist, but allowing transactions increases the degree to which internalization takes place.

Demsetz, *Towards a Theory of Property Rights*, 57 AM. ECON. REV. 347 at 348 (1967).

¹³⁶ The question of determining the existence of property rights depends on the definition of property, and of the legal order establishing that definition, a language game. If a person stipulates an Austinian definition of property he will deny the existence of property outside the existence of the Austinian order—the sovereign state as the premise of laws. But the conclusion is tautologous: it is inherent in the premise if he accepts some other definition, for example, that of Demsetz, the sovereign state may not be essential. What Demsetz perceives as necessary is a social (political? contractual?) arrangement whereby property rights can arise "when it becomes economic for those affected by externalities to internalize benefits and costs." *Id.* at 354. These can arise in a societal organization that knows no sovereign common to all the participants.

nalizing the externalities of taking coal from equitably and economically sized tracts. Accordingly, before 1920 they established a regime whose basic agreement ("social contract") may be summarized as follows:

"This is my tract because I am working it."

"That is your tract because everybody is working theirs the way you and I are working our separate tracts."

"That other has no tract, he is stealing."

"If he operates outside the regime then our governments will speak to his."

"If our governments refuse to speak, or if his neglects the representations of our governments, will the game be at an end?"

"That is a matter of choice, every legal order can be put to an end by agreement or be violently overthrown."¹³⁷

The power of a legal order to enforce or protect rights may be a social necessity, but it is not a legal or logical necessity. The legal order itself is, after all, the arrangement whereby rights can be created or distributed. The question of enforcement is simply not one of validity, but one of effectiveness.¹³⁸

To this reviewer's mind Kronmiller sought to find his justification, not on a principled premise such as that indicated, or some other pediment upon which a theory, not only of a right to own manganese nodules actually taken from the seabed and reduced to possession, but also of the right to mine, exclusively, a reasonably sized tract, can be grounded. Instead, he reasons from analogies which may, in themselves, appear cogent, but which fail to affirm, positively the logical justification, and the justice, of mining manganese nodules on the deep ocean floor as constituting a denotative application of the general freedom of the high seas. Nor did he argue both the legality and notice of establishing rights to exclusive mining tracts.

B. The United States' Negotiating Posture and Its Juridical Consequences

A discussion of the political and economic framework, especially those parts of it which involve the interactions of the Group of 77 and the Soviet bloc on the one hand, and the "Western and Other" geographical group on the other, might well have invited some discussion of theory of negotiation, for example, that of Professor Roger Fisher's theory of the "Yessable Prop-

¹³⁷It should be clear that the participants in the Spitzbergen mining activities did much more than play a language game peculiar and limited only to that archipelago prior to the Treaty of Paris's signature in 1920. They provided an example. Moreover, that had, and still has, sufficient economic validity and utility in terms of the internalization of externalities, and had a normative content, to constitute a precedent which is available for articulating a regime governing deep seabed mining for the present day—subject only to contradictory developments in customary international law.

¹³⁸Goldie, *Customary International Law and Deep Seabed Mining, Symposium Mining the Deep Seabed: A Range of Perspectives*, 6 SYRACUSE J. OF INT'L L. & COM. 173, 177-79 (1979).

osition."¹³⁹ Can such a proposition be found which could satisfy all sides? A brief outline of that sort of discussion now can be put forward. (By a "yessable proposition"—which he did not clearly define—Professor Fisher would appear to have meant a concrete proposal which would at least minimally satisfy the offeror while inducing his opponent to abandon his opposition and accept the offer.)

Indeed, an analysis of the history of the *United States Draft for a United Nations Convention on the International Seabed Area* (Aug. 3, 1970)¹⁴⁰ illustrates some of the difficulties involved with the Fisher Prescription. In that draft document the United States, in effect, made an offer which, at the time, was thought, by its sponsors, to be highly "yessable" by the Group of 77. No doubt, had the American diplomacy been different, it might well have been "yessed." But, since the package then put forward was seen by the Soviet bloc and the Group of 77 merely as America's "first bid," it was given a barely polite reception. It was seen as inviting forceful or "claiming" tactics (in the boxers' parlance). So now, sadly, that well meaning draft is a dead letter.¹⁴¹

The result of the mode of the presentation, and the advocacy, of this generous, honest, and potentially effective document has had a further deleterious result. In the negotiations at the Third United Nations Conference on the Law of the Sea, the United States has been forced into a defensive, even a self-justificatory, if not self-deprecatory, posture ever since its draft was first unveiled, as if that offer were a dishonest claim to preempt the world's resources on behalf only of its own nationals, rather than a proposal for an organization which was intended to develop a sharing of wealth, an organ of international cooperation, a considerable augmentation of developmental aid and a needed enhancement of the revenues of the United Nations, at the expense of diminishing the economic advantages of its own nationals and enterprises. Indeed the fate of this testimony of American goodwill poignantly and concretely illustrates Dr. Herman Kahn's criticism of Professor Fisher's book, where the former said, in part:

In those situations in which there is not sufficient mutual interest to strike an acceptable bargain, the net thrust of Mr. Fisher's insights is likely to give excessive and rather effective ammunition to those urging concession and compromise. That is, in many ways Mr. Fisher's recommendations can be used to generate psychological pressures, arguments, and even misleadingly seductive and seemingly neutral observations that are actually recommendations for making concessions and compromises—or even more important, creating the conditions for such concession and compromise. For this reason politicians, the humanists, idealists, utopians and the amateur citizens are going to find this book more sweep-

¹³⁹FISHER, *INTERNATIONAL CONFLICT FOR BEGINNERS* (1969). Chapter II is entitled "Give Them a Yesable Proposition."

¹⁴⁰INT'L LEGAL MATERIALS 1046 (1970) [hereinafter cited as the United States Draft].

¹⁴¹For Cassandra-like forebodings in this regard, see Goldie, *The United States Draft for a United Nations Convention on the International Seabed Area—A "Polite Conversation," Proceedings on the American Society of International Law at Its Sixty-Fifth Annual Meeting*, 65 AM. J. INT'L L. 123 (1971).

ingly persuasive than many of the ideologically committed or even some of the relatively hard-headed and tough-minded (in the William James sense) bargainers.¹⁴²

In following up this perceptive comment, it may be observed, the experiences of the Western and Other Group in the Third United Nations Conference on the Law of the Sea can be represented by a development from the sketch on the dust jacket of Fisher's book. He shows two fencers, one in the lunge, the other in the *en garde*, posture. The former's attention is deflected by a carrot on the latter's rapier. (The yessable proposition?) But what if our lunging duellist remembers elementary economics lessons about "satisfaction deferred"? If he does not allow himself to be tempted or deflected by one carrot, how many more may be the reward of aggressive (if un-prep school) behavior?¹⁴³ In fact, the Fisher Prescription has provided a way of losing, not gaining, diplomatic goals, by heightening expectations and placing a premium, in fact, although not in intention, on encouraging those who claim to try "upping the ante." The "yessable proposition" can thus be seen as creating dilemmas for the original offeror. It has also provided a potent means of straining international friendships, through misunderstandings and the making of future claims, as the Law of the Sea negotiations also testify. A discussion in Kronmiller's book of the postures, tactics, and interaction of claims in terms of some such theory as Professor Fisher's, and of its weaknesses, may well have helped to lay bare, and help resolve, some of the more intractable problems of the Third United Nations Conference on the Law of the Sea, and especially those of Committee I (Deep Seabed Mining).

C. Property and Liability, the Question of "Unjustifiable Interference"

Another topic which would have merited discussion is that of "unjustifiable interference," not merely in terms of validating property rights, but also of liability and social responsibility. Some activities are still permissible, even if possibly, or potentially, harmful. Those who engage in them are called upon to bear the cost of any losses which may eventuate from their operations. This reviewer feels that an examination of the relevant principles of strict liability would have helped to strengthen the argument for the lawfulness of deep seabed mining by meeting arguments that have been made in terms of liability in general and environmental impacts in particular. If some mythical ("Luddite"?) status quo is not to be retained at all

¹⁴²FISHER, *INTERNATIONAL CONFLICT FOR BEGINNERS* (1969), reviewed, H. Kahn, N.Y. Times, Nov. 9, 1969, § 7 (book reviews) at 72-73.

¹⁴³In large part it was the expectations that the diplomatic scenario for the presentation of the United States Draft that led to this reviewer's skepticism back in 1971. See Goldie, *The United States Draft for a United Nations Convention on the International Seabed Area—A Polite Conversation*, 65 AM. J. INT'L L. (Proceedings of the Seventy-Fifth Annual Meeting of the American Society of International Law) 123-33 (1971).

costs, then preventing the development of an industry would merely be counterproductive. But, were it permitted to operate and possibly cause harm, it could thereupon be called strictly to account to pay, in terms of absolute liability, for any injuries it occasioned by its operations. This is, after all, an accepted principle of domestic law, and has been clearly enunciated in the following passage by Professor John G. Fleming.

On its most prosaic level the problem may be illustrated by an oil-drilling incident in which the operator decided to "blow-out" a well and proceeded to do so in accordance with established procedures. These, however, were in no way proof against unknown and harmful substances being belched from the bowels of the earth, including the arsenic that was spewed over neighbouring pastures. Here the operator had resolved the invidious choice facing him by subordinating the interests of others to his own. The chances of something deleterious coming up might have been comparatively small though clearly recognized, and the more perplexing because they were irreducible by anything short of not proceeding with the blow-out. Yet the latter was a necessary and accustomed procedure in oil drilling—an industry of paramount economic importance which it would not be justifiable to impede for less than absolutely compelling reasons. To say that the operator's choice was negligent would imply that for him to proceed would be unlawful and could be enjoined by injunction. It is precisely to resolve this dilemma that the law may say to him: "What you propose to do is not prohibited and we therefore cannot stop you. Yet if you proceed, you must be prepared to foot the bill should anything go wrong, as you hope it will not though well aware that it might."¹⁴⁴

When the production of a mineral or material enhances world welfare by preventing prices from spiralling through monopolistic and cartel practices, should not similar policies inform the development of international values and law to those indicated by Professor Fleming as existing in the Anglo-American common law? Some such line of argument, this reviewer respectfully suggests, may well have been worth pursuing.

D. Epilogue

The immediately preceding paragraphs of this review may seem rather ungenerous, possibly even outside the canons of reviewmanship, in that they are not so much concerned with the book that has been written as that which the reviewer would, obviously, have liked to have seen written. To make some amends for that apparent unfairness, he now closes with the thought that, if King Neptune, or the world's consumers of increasingly potentially scarce minerals, or their producers (other than those who are counting upon present politics to create future scarcities and hence future opportunities for cartelization) were to give a prestigious prize for the best book written on the international legal and institutional problems of deep seabed mining, this reviewer would urge, as strenuously as he is able, the outstanding worthiness of such an award to the meritorious integrity and the honest scholarship of Theodore Kronmiller's book.

¹⁴⁴FLEMING, *AN INTRODUCTION TO THE LAW OF TORTS* 158-59 (1967).

