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A General International Law Doctrine for Seabed Régimes[†]

I. Introduction

A. Perspective

One of the major weaknesses of the *United States Draft for a United Nations Convention for a Seabed Régime*,¹ results from its draftsmen's assumption that it would be universal and would exclude the possibility of alternative régimes co-existing with it. While its silence on the status and rights of non-participants may not be surprising, its apparent assumption that states not parties to it could be bound by its terms would not appear to be in the best interests either of the régime or of its promoting nation, the United States.² Its general acceptance might well involve types of exten-

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[†]This article is based on a memorandum of law for Deepsea Ventures Inc., a subsidiary of Tenneco Corp. Notwithstanding that provenance, the thoughts herein have a sturdy independence.

¹United States Working Paper, *Draft United Nations Convention on the International Seabed Area*, tabled Aug. 3, 1970, United Nations General Assembly Committee on the Peaceful Uses of the Seabed and Ocean floor Beyond National Jurisdiction, U.N. Doc. A/AC.138/25; see REPORT OF THE COMMITTEE ON THE PEACEFUL USES OF THE SEABED AND OCEAN FLOOR BEYOND THE LIMITS OF NATIONAL JURISDICTION, 25 U.N. GAOR, Supp. 21 at 130, U.N. Doc. A/8021 (1970) [hereinafter cited as "U.S. Draft"].

²For a criticism of the U.S. Draft from this standpoint see Jennings, *The United States Draft Treaty on the International Seabed Area—Basic Principles*, 20 INT'L & COMP. L.Q. 433 (1971) [hereinafter cited as "Jennings"]. Note *id.* at 453, in which the author concludes his criticism of the U.S. Draft, after pointing out that its "paper universality" is of "doubtful pedigree" in the following terms:

There is surely more hope for an international régime that third States can, and indeed must, live with, or rather live alongside, than for one that third states, which to exploit what the present law regards as their exclusive resources, are almost compelled to defy; for in such a context it is by no means clear that the novel international régime would prove the stronger.

The thrust of the article which follows is to investigate the contours of such a régime which would govern the relations of states, with respect to deep seabed resources, both anterior to the coming into being of the proposed treaty régime. It would also govern, after that point of time, the relations of states living "alongside" the treaty régime, both among themselves and with the states participating in that régime.

sive coercive action not permitted under contemporary international law in order to obtain the compliance of non-signatory states.

These assumptions, underlying the United States draft, become all the more unpalatable when we may have legitimate doubts as to whether a requisite two-thirds majority could be mustered behind its terms, or behind the terms of any general-law-of-the-sea convention, by 1974. Furthermore even if the proposed 1974 conference did produce a convention, years would still pass, as we know from the time lag after the 1958 Geneva Convention on the Law of the Sea, before it could formally come into force.

Accordingly, there is a need to put various proposals for régimes into perspective, and to view them against the background of the present general international law governing deep seabed mining activities, not only because this may well provide the basis for an interim régime, but also because it would determine the contours of possible international régimes which could come into existence in the absence of an international constituent convention, or even in the absence of international régimes arising out of the interactions of reciprocating domestic régimes—for example that contemplated in the proposed *Deep Seabed Hard Minerals Resources Act*.³

B. Outline

At the present time, customary international law does provide for the lawful taking of nodules on the beds of the high seas. While the high seas are common to all nations and cannot be appropriated by anyone or any nation, the wealth they contain can become the object of proprietorship. This distinction is illustrated by the following quotation by Grotius from Plautus:

[W]hen the slave says: "The sea is certainly common to all persons," the fisherman agrees; but when the slave adds: "Then what is found in the common sea is common property," he rightly objects, saying: "But what my net and hooks have taken, is absolutely my own."⁴

Grotius also pointed out that while states and individuals are not permitted to assert dominion over the air and sea which are "common," or "public," such masterless things as wild animals, fish and birds may be reduced to possession "[f]or if any one seizes those things and assumes possession of them, they can become the objects of private ownership."⁵

³S. 2801, 92d Cong. 2d Sess., H.R. 13904, 92d Cong. 2d Sess., now S. 1134, 93d Cong. 1st Sess., H.R. 9, 93d Cong. 1st Sess.

⁴GROTIUS, *FREEDOM OF THE SEAS*, 29 (McGoffin transl. Carnegie Endowment for International Peace 1916) [hereinafter cited as "GROTIUS"].

⁵Id.

On an analogy with the traditional Grotian examples of fish and game, individuals have also been considered as lawfully taking ambergris, sponges, pearl oysters and pearls, chanks, *bêche-de-mer* and goods from abandoned wrecks, and many other ownerless items of food or wealth, on the sea floor, when these have been found and possessed in areas beyond the limits of the jurisdiction of any nation. When the scientists aboard HMS *Challenger* took from the seabed and possessed, on behalf of the expedition, the first manganese nodules ever found by man, their right so to do was not questioned. Had it been, the justification of their appropriations would have been in terms of their right to take and own unowned goods in the high seas which are capable of being possessed.

At that time, today's commentators' distinctions between a taking of resources for purposes of "scientific research" or "exploration" from one for purposes of "exploitation," were not recognized. (One may, further, parenthetically question the propriety of this contemporary lumping of "scientific research" with "exploitation" in the context of seabed matters, when a great effort is being made, by the proponents of the freedom of scientific research, to distinguish them.)

It is interesting to note that the traditional Grotian theory for justifying the appropriation of goods in international law which has just been outlined is not the only one to be found in diplomatic practice. The history of mining on Spitzbergen before the Treaty of Paris of 1920, in which the participating states withdrew their individual, inchoate claims to the Archipelago and quitclaimed these to Norway, subject to the retention of rights on behalf of their nationals and to the further limitation of Norwegian sovereignty in important respects, is most illuminating. It shows that all interested countries based their diplomatic postures on the assumption that their nationals did not merely have title under general international law to coals which they had severed from the ground and had brought under their physical control, but also to the unsevered and untouched coal measures lying in the ground within the mining tracts which the miners had located and worked, and of which they had given public notification and had recorded in appropriate ways.

While the Grotian theory of appropriation is well known, that discerning the international legal recognition of exclusive rights to mining tracts has not received its due recognition—probably because the evidence of the state practice in which it is reflected, and which presumes its validity, has long remained buried in archival collections. Accordingly, this paper will examine the international legal implications of the diplomatic vindication of the appropriation of mining tracts on Spitzbergen when that Archipelago was a *terra nullius*. It will also touch on contemporary doctrines govern-

ing the acquisition of possession, to the extent that such a discussion becomes necessary for the development of the argument that there are alternative customary international law doctrines to those generally stated by the text writers and which stem from Hugo Grotius' reliance on a crude notion of capture as the basis of possessory rights.

II. International Law and Rights of Possession

International law has developed only hazy concepts of possessory rights. On the other hand, the doctrine of occupation serves to justify the acquisition of masterless territory by states, so that extensive tracts may be taken through acts which are not felt throughout the whole region, while on the other, that same doctrine is usually cited to limiting the taking of fish or animals only to those things which have been reduced to the taker's complete control.

Thus, in the *Status of Eastern Greenland case*,⁶ the Permanent Court of International Justice recognized that in thinly populated and in uninhabited areas, very little in the nature of possessory control may be required. In that case Danish acts of sovereignty which had mainly been performed in the western and southern regions of Greenland were held to have been sufficient to have excluded Norway's claim from the northeastern coastal area of that vast plateau of ice.

By contrast with this extensive view of occupation when dealing with states' claims to acquire territory, the same doctrine, when applied to animals, fish or such inanimate objects as jewels, treasures or wrecks, has generally been held to have a far stricter requirement of effectiveness. It has, indeed, turned on the notion of capture as Grotius' quotation from Plautus, to which reference has been made, illustrates.

If a régime were established to govern the exploitation of the seabed hard mineral resources along the lines of the primitive concept of capture which Grotius, some three and a half centuries ago, thought adequate to protect the rights of fishermen, there would be a free-for-all on the seabed, which would be most counterproductive for world welfare and world peace. While it would appear that five companies are currently interested in mining seabed resources, they could engage in races for choice sites and in attempts to exhaust them, before their discovery from competitors.^{6a}

⁶1933 P.C.I.J. Ser. A/B No. 53. See also, *Clipperton Island Arbitration*, 26 AM. J. INT'L L. 390 (1932); and *Palmas Island Arbitration*, 2 U.N.R.I.A.A. 829 (1928).

^{6a}Three United States corporations are currently interested in mining hard minerals from the floor of the deep ocean, namely Tenneco Corporation, the Kennecott Copper Corporation, and Hughes Tool Company. One German and one Japanese company are in the process of formation, the latter with the generous support of very extensive government

Such an uncontrolled state of affairs would bring in its train the further undesirable effects of over-capitalization and cause wild market fluctuations, and affect the world market price of the relevant hard minerals, not only with respect to the ocean floor resource, but with respect to land-based resources as well. Briefly, the problems and disasters of the West Texas oil fields of the early twenties, could be repeated in terms of affected hard minerals.

Secondly, the acceptance of a primitive right of capture could put titles to minerals won from the floor of the deep ocean in jeopardy, since some states may consider one corporation to be the finder, and hence the "true owner," of minerals placed in commerce, while other states may recognize a prior right to those minerals as enuring to some other enterprise, leading to a situation of irreconcilable contradictions.

It is not necessary, at the present time, to accept Grotius's theory of possession, nor the "free-for-all" régime to which it gives rise. Possessory rights to deepsea floor minerals could be seen as stemming from another theory of possession. This might be viewed, possibly, as a rejection, in terms of general international law, of the limited notion of the acquisition of possessory rights which the Grotian theory requires, or alternatively, as a special customary view of possessory rights over minerals *in situ* governing the mining industry in the absence of state, national or international legislation.

Should the latter view prevail, the special customary régime would then operate to exclude Grotius's principle of possession for purposes of mining hard minerals from deep ocean floors, although it would still be held to prevail in all other aspects of the general international law governing the acquisition of moveable property.

A. A Re-examination of Possession

In discussions of gaining possession, as distinct from establishing continuance in possession,⁷ international law and domestic law systems have tended to focus, possibly unduly, on the relation of the possessor with a single item rather than with a collection or group. This, in turn, has led to the development of theses stressing the need for a specific, immediate and active control by the possessor over the object possessed.⁸

financing. *Metals Week* writes of a total figure of a "\$227 million semi-public venture to pursue deep-ocean mining and processing of manganese nodules . . ." See *id.*, Jan. 15, 1973 at 9, and, *id.*, June 11, 1973 at 2.

⁷For this distinction see HOLMES, *THE COMMON LAW* 215-16, 235 (35th Printing 1943) [hereinafter cited as "HOLMES"].

⁸*Id.*, 216-19, 239, 245. See, for two common law examples (one English and the other from New York), *Young v. Hitchens*, 6 Q.B. 606, 115 Eng. Rep. 228 (1844) (notwithstanding

A re-examination of some of the cases from the Anglo-American common law, which have long agitated differences among lawyers, may illustrate, in terms of familiar subject matter, the misleading effects of that focus and of that stress.

A note of caution, which may not be necessary, should be sounded *ex abundantia cautela*. The cases of the common law on possession are not discussed because of any pretended international authority that may be imputed to them. On the other hand, they do illustrate universal problems. Furthermore, Mr. Justice Holmes tells us that while the "[t]heory of possession has fallen into the hands of the philosophers,"⁹ he claims for the common law "that it is important to show that a far more developed, more rational and mightier body of law than the Roman, gives no sanction to either premise, or conclusion as held by Kant and his successors."¹⁰

Finally, we may follow the practice of jurisprudential writers when dealing with possession, of drawing on philosophers, civilians and common law sources without discrimination, except insofar as this may be demanded by the development of argument and the clarification of definitions.

We may now ask whether the focus of attention on the possession of a specific object and on the need for the direct exercise of power over that object is, indeed, called for by the cases usually cited in support. The well-known cases of *Young v. Hitchens* and *Pierson v. Post*, have already been adverted to.¹¹ It should be noted that counsel for the plaintiff in the former case argued that, in the whaling industry for example, appropriation was considered to be complete when "fairly proceeding towards accomplishment." At that point, the possessor's intent is clear and his control so manifest as to be entitled to protection.

The Queen's Bench, however, relegated this thesis to situations in which special customs govern. And this has become conventional wisdom. But is that wisdom congruent with the explanations usually offered for reconciling *Bridges v. Hawkesworth*¹² with *McAvoy v. Medina*?¹³ In the former case a

a verdict the other way, the Court of Queen's Bench decided that when pilchards were almost entirely surrounded by a net, with an opening occupied by boats stationed there to prevent the fish from escaping they were not reduced to possession as against a stranger who rowed through the opening and caught them with his own net); *Pierson v. Post*, 3 Cal. R. 175 (N.Y. 1805) (action does not lie against a defendant who shot and killed, in full view of the plaintiff, a fox being pursued by the plaintiff, who had originally started and chased it); *Buster v. Newkirk*, 20 Johns. Cas. 75 (N.Y. 1822) (when plaintiff had wounded and chased a deer—discontinuing the hunt at nightfall, the next day he resumed the hunt to find defendant had killed and appropriated the wounded deer, *Pierson v. Post*, *supra*, was held to govern).

⁹HOLMES, 206.

¹⁰*Id.*, 210.

¹¹*Supra*, note 8.

¹²1 L.J.Q.B. 75 (1851).

¹³11 Allen (Mass.) 548 (1886).

customer in a shop who, before the shop-keeper knew of it, picked up a pocket-book which had been dropped onto the floor of the public part of the shop by another customer, could keep it as against the shop-keeper. In the latter, a barber was held to have a better possessory right than the finder to a pocket-book which had been left on the barber's table.

The usual explanation offered is "a distinction between things voluntarily placed on a table and things dropped onto the floor"¹⁴ on the basis that the former indicates "an implied request to the shopkeeper to guard it."¹⁵ *Kincaid v. Eaton*¹⁶ was a suit for a reward offered by the owner of a pocket-book. The claimant had found it on a desk installed by a bank for the use of its customers and located in the banking chamber outside the teller's counter. Holding that the case did not involve the finding of a lost article, the court said that "the occupants of the banking house, and not the plaintiff, were the proper depositaries of an article so left."¹⁷

Holmes suggests that, possibly, since the bank was a proper depositary of the article, the decision can be explained as only deciding "that the pocket-book was not lost within the condition of the offer."¹⁸

A number of cases show how possession can be gained, recognized and protected when the lawful possessor's attention is not focused on the object. While it may be true that in such cases as *Elwes v. Brigg Gas Co.*¹⁹ and *South Staffordshire Water Co. v. Sharman*,²⁰ the landowners' success in repelling the claims of finders when the articles in contention were embedded in the soil of the land, may be ascribed to a difference between the standards for protecting the continuance of possession from those which have to be satisfied for its acquisition, there are other cases in which an entity with a special, ambient, interest is seen as having some special or quasi-possessory claim.

Thus in *Hibbert v. McKiernan*²¹ a golf club was said to have a "special property" in golf balls lost by players which excluded any claim to them by a finder. It may be tempting to explain this case, which is clearly distinguishable from both the *Elwes* and the *Sharman* cases, on the grounds of the balls remaining on the surface of the land, the relative recentness of the loss, or the presumed relation of the club to the players (these being its members or their guests) on the basis of policy. Kocourek offered this type of an explanation when he suggested that the matter

¹⁴HOLMES, 222.

¹⁵*Id.*

¹⁶98 Mass. 139.

¹⁷11 Allen.

¹⁸HOLMES, 223.

¹⁹33 Ch. D. 562 (1886) (a prehistoric boat embedded in the soil).

²⁰[1896] 2 Q.B. 44 (two rings buried in the mud of a pool).

²¹[1948] 1 All. E.R. 860, [1948] 2 K.B. 142.

is, in the last analysis, simply a question of policy, which unfortunately is heavily obscured by a wholly irrelevant discussion of possession.²²

Tempting as the charms of such resorts as this to touchstone of "policy" may be, it is to be feared that they merely darken counsel. The word "policy" itself becomes meaningless as a legal concept. For after we have said that policy determined the cases we still need to show what that policy is. If an answer to that question is given we have at least a clue to the legal values and the legal principles involved. If, on the other hand, we merely shrug our shoulders and say that we should not attempt to verbalize any reconciliation of these cases in analytical terms, because "policy" dictated their individual holdings, we are faced by a frank explanation that the decisions reflect "palm-tree justice" rather than legal principles.

The submission here is not that an individualizing policy of determining each case on whatever merits judges and juries may feel to be inherent in each situation provides the premise of judgment, but rather that lawyers and writers have overlooked other important factors. For example, the explanation of the golf club's "special property" in *Hibbert v. McKiernan* may lie in the special relation of the players (as members or guests), and the club. Again, the special relation of banker and customer may well provide the explanation of *Kincaid v. Eaton*.

The slogan "special custom of the industry," has permitted courts to argue that cases falling outside the narrow limits usually envisioned for the acquisition of possession, should be distinguished from those which they consider to reflect the necessary principles of possession in general.²³ On the other hand, such a principle cannot be invoked to explain *Hibbert v. McKiernan*. And it would be less than satisfactory to assert, with Professors Dias and Hughes, that it merely reflects "the clear sentiment that dishonesty should not go unpunished."²⁴

Rather it points to the unsatisfactory restrictions of traditional theory and, going beyond *McAvoy v. Medina* and *Kincaid v. Eaton*, asserts that possession can be recognized as existing in a person who shows the intention and will to act as the possessor, and also some exercise or display of such rights.²⁵ The more liberal scope of possessory rights in the position stressed here emphasizes a more inclusive rule than that to be found in the expressions of conventional wisdom. But it is necessary also to recall

²²KOCOUREK, JURAL RELATIONS 389.

²³See, e.g. *Young v. Hitchens*, 6 Q.B. 606, 115 Eng. Rep. 228 (1844).

²⁴DIAS & HUGHES, JURISPRUDENCE 328 (1957).

²⁵This is an adaptation of the requirement, laid down by the Permanent Court of International Justice in the *Legal Status of Eastern Greenland Case*, which asserted that a state claiming territorial possession must show "the intention and will to act as sovereign and some exercise or display of such sovereignty". [1933] PCIJ Ser. A/B. No. 53 at 46.

Holmes' apt illustration. "If," he wrote, "there were only one other man in the world, and he were safe under lock and key, the person having the key would not possess the swallows that flew over the prison."

B. Miners' Rights

In the landmark case of *Jennison v. Kirk*,²⁶ Mr. Justice Field, a lawyer from California to whom the mining jurisprudence of that state and her neighbors was familiar, defined the rights of the miners to appropriate their discoveries. He said:

In every district which [the miners] occupied they framed certain rules for their government, by which the extent of ground they could severally hold for mining was designated, their possessory right to such ground secured and enforced, and contests between them either avoided or determined. These rules bore a marked similarity, varying in the several districts only according to the extent and character of the mines; distinct provisions being made for different kinds of mining, and mining in drifts or tunnels. They all recognized discovery, followed by appropriation, as the foundation of the possessor's title, and development by working as the condition of its retention. And they were so framed as to secure all comers, within practicable limits, absolute equality of right and privilege in working the mines. Nothing but such equality would have been tolerated by the miners, who were emphatically the law-makers, as respects mining, upon the public lands in the State. The first appropriator was everywhere held to have, within certain well-defined limits, a better right than others to the claims taken up; and in all controversies, except as against the government, he was regarded as the original owner, for whom title was to be traced.²⁷

This is an apt description of the rights of miners as they might appear to a Californian who may possibly be nonconversant with the practices and legal expectations of the European immigrants in the California gold fields. The rights of miners which these communities evolved did not spring, as many observers believe, fully articulated and "developed," from the turbulent mining districts. They have a long and unbroken history which can travel back to the Middle Ages, if not earlier.²⁸ These customs, for ex-

²⁶98 U.S. 453 (1878).

²⁷98 U.S. 453, 458 (1878). See also *Argonaut Mining Co. v. Kennedy Mining and Milling Co.*, 131 Cal. 15, 63 Pac. 148, 150 (1900), *aff'd* 189 U.S. 1 (1903), in which the Supreme Court of California tells us:

Some regulations as to mining claims sprung into existence naturally, in fact necessarily. First, so far as possible, each person was given a specified portion of the ground, which he could mine. Secondly, the allotment to each was so limited that there should be no monopoly. So far as possible, all should have an equal chance. The right of the first possessor was preferred, but no matter was considered more important than the limitation upon the extent of the claims. And, thirdly, as a corollary from these two cardinal rules, the third follows: That each claimant shall mark plainly upon the surface of the earth the boundaries of his claim, that others may locate claims without interfering with him. . . .

²⁸1 AMERICAN LAW OF MINING 2-6 (The Rocky Mountains Law Foundation ed. 1971) [hereinafter cited as "AMERICAN LAW OF MINING"].

ample, have been long recognized as part of the Anglo-American common law,²⁹ as well as of other legal systems. Thus the *American Law of Mining* tells us:

The strong influence of the common law on our mining law is apparent in many areas. The customs of the Derbyshire miners, as noted above, resemble the way in which we mark off lode locations, our exclusive surface rights of locators and even to some extent our approach to extralateral rights. We have been greatly influenced by the *ad coelum* theory in our cases dealing with subsurface and extralateral rights of locators. Our general attitude toward free-mining under the federal legislation of 1866 and 1872 has an ancient heritage in both the Germanic and English law.³⁰

The common law principles which were manifest in the practices of the mining districts were later enacted into state and federal legislation establishing both the continuity and necessity of the ancient principles they embodied. The first legislation affecting the rights acquired in the California gold districts and recorded by the camp recorders³¹ was a provision which was drafted by Stephen J. Field, and inserted in the California Civil Practice Act in 1851. It provided:

In actions representing "mining claims", proof shall be admitted of the customs, usages, or regulations established and in force at the bar, or diggings, embracing such claim; and such customs, usages or regulations, when not in conflict with the constitution and laws of this State, shall govern the decision of the action.³²

Between 1848 and 1866 similar laws were passed in other western states, and in 1866 the Congress enacted the Act Granting the Right to Way Ditch and Canal Owners over the Public Lands and for Other Purposes. Despite its title it has been characterized as "the first lode location law."³³ Its Section 9 provides the classic miner's rights "grandfather clause":

That whenever, by priority of possession, rights to the use of water for mining, agricultural, manufacturing, or other purposes, have vested and accrued, and the same are recognized and acknowledged by the local customs, laws, and the decisions of courts, the possessors and owners of such vested rights shall be maintained and protected in the same; and the right of way for construction of ditches and canals for the purposes aforesaid is hereby acknowledged and confirmed: *Provided, however*, that whenever, after the passage of this act, any person or persons shall, in the construction of any ditch or canal, injure or damage the possession of any settler on the public domain, the party committing such injury or damage shall be liable to the party injured for such injury or damage.³⁴

²⁹See Traynor J., in *Ames v. Empire Star Mines Co.*, 17 Cal. 2d 213, 110 P. 2d 13, 16, *cert. den.*, 314 U.S. 651 (1941).

³⁰AMERICAN LAW OF MINING 5 (footnotes omitted).

³¹See, e.g., *Id.*, 23.

³²California General Laws 1850-61, §5552.

³³AMERICAN LAW OF MINING 29.

³⁴14 Stat. 251 (1866).

In *Jennison v. Kirk*, Mr. Justice Field, for the Supreme Court of the United States, affirmed that the policy of the Act was to confirm titles acquired under miners' rights. He said:

In no provision of the act was any intention manifested to interfere with the possessory rights previously acquired, or which might be afterwards acquired; the intention expressed was to secure them by a patent from the government.³⁵

Since the 1866 Act and down to the present, mining legislation in the United States has, where vested rights have been acquired before the statute's enactment, included a grandfather clause preserving such rights. A recent example has been provided by Section 4(a) of the Geothermal Steam Act of 1970.³⁶ This consistent practice of enacting "grandfather clauses" to protect prior-acquired vested mining rights, reflects a continuing and uniform legislative policy which recognizes the validity and the equity, as well as the necessity, of those rights. In addition to confirming the miners' rights, these enactments operate as declaratory legislation affirming the common law principles giving rise to the customs of the mining districts and underpinning the rights which those districts recognized.

In addition to the long history in many countries, of the institution of miner's rights, whenever alternative régimes had broken down, or had failed to come into existence, this institution appears to have sprung spontaneously into existence. The early history of the goldfields of South Africa and Australia, the miners in the Sierra Nevada of California and in the Yukon of Alaska all testify to the universality and necessity of this institution's provenance.^{36 a}

This proposition is illustrated by the way in which the mining rights that

³⁵98 U.S. 453, 459 (1878). See also Traynor J., in *Ames v. Empire Star Mines Co.*, 17 Cal. 2d 213, 110 P. 2d 13, 16, *cert. den.* 314 U.S. 651 (1941).

³⁶84 Stat. 1566, 30 U.S.C. §§1001 *et seq.* (1970). The legislative history of this provision tells us that:

This committee is of the opinion that those individuals who pioneered during the early years to develop geothermal steam under then existing law established equitable claims and should have a priority under any new legislation. S. 368, as amended, provides such a priority.

^{36 a}The following list of cases testifies to the general recognition of the miners' right, customs of the mining districts and mining camps of the American West (and in addition to those of the Sierra Nevada) by the courts of 1849 to 1866, or relating to the period before 1866 (the year of the enactment of the first federal "grandfather clause" protecting the established rights of the miners. An Act Granting the Right of Way to Ditch and Canal Owners over Public Lands and for Other Purposes of 1966, ch. 262, §2, 9, 14 Stat. 251):

Federal Cases

Sparrow v. Strong, 70 U.S. (3 Wall.) 97 (1865); *Jennison v. Kirk*, 98 U.S. 453 (1878); *Glacier Mountain Silver Mining Co. v. Willis*, 127 U.S. 471 (1888).

Arizona

Rush v. French, 1 Ariz. 99, 25 Pac. 816 (1874); *Johnson v. McLaughlin*, 1 Ariz. 493, 4 Pac. 130 (1884); *Watervale Mining Co. v. Leach*, 4 Ariz. 34, 33 Pac. 418 (1893).

came into existence in the Western States of the United States, at times antecedent to the relevant state and federal legislation, were confirmed in the grandfather clauses of those statutes. They were valid from their inception and not from the enactment of the grandfather clauses because: (i) the common law underpinned and incorporated into the decisional process the relevant and reasonable anteriorly existing practices of the mining camps which were not inconsistent with existing law; (ii) the grandfather clauses in state and federal legislation pointed to the anterior customary rules to those rights, and gave any needed validation to the customary rules out of which those rights were molded; and (iii) the uniformity of miner's rights concepts and their universal distribution throughout the world of the common law, wherever surface lands remained unalienated, points to a general customary rule of common law governing the opening and working of mines whereby no subsequent surface landowner might lawfully claim rights which limit those traditionally known as miner's rights—provided the miner observes his obligation of due diligence.

C. Spitzbergen—Mining Claims on a Terra Nullius

In the preceding section the legal attributes of the Californian and Rocky Mountain States' miners' rights were shown to be more than mere fabrication of special local requirements, arising under the exigencies of frontier life and attuned to the evanescent conditions of the times and places of early mining and prospecting in the West. They have been established in the mainstream of the common law. They have, however, been overlooked, possibly because text writers have found them to be embarrassing to their theories, or have dismissed them as falling within a specialization of legal study and practice. This has had the effect of permitting the subjectivities of the study and the economies of the classroom to impose a straightjacket on reality.

In this Section, the rise of similar practices to those of the American

California

Irwin v. Phillips, 5 Cal. 140 (1855); *English v. Johnson*, 17 Cal. 107 (1860); *Prosser v. Parks*, 18 Cal. 47 (1861); *Gore v. McBrayer*, 18 Cal. 582 (1861); *Morton v. Solambo Copper Mining Co.*, 26 Cal. 527 (1864); *St. John v. Kidd*, 26 Cal. 263 (1864); *Table Mountain Tunnel Co. v. Stanahan*, 31 Cal. 387 (1866).

Colorado

Consolidated Republican Mountain Mining v. Lebanon Mining Co., 9 Colo. 343, 12 Pac. 212 (1886).

Montana

King v. Edwards, 1 Mont. 235 (1870).

Nevada

Mallett v. Uncle Sam Gold & Silver Mining Co., 1 Nev. 188 (1865); *Oreamuno v. Uncle Sam Gold & Silver Mining Co.*, 1 Nev. 215 (1865); *Smith v. North American Mining Co.*, 1 Nev. 423 (1865); *Golden Fleece Gold & Silver Mining Co. v. Cable Consolidated Gold & Silver Mining Co.*, 12 Nev. 312 (1877).

West in international law on the *terra nullius* of Spitzbergen will be appraised. This will point up a more universal equity and necessity which calls for the recognition of those rights, which are too frequently associated only with the mining camps of the West in the middle years of the last century. The archipelago and main island of Spitzbergen provide the setting. These islands had been discovered (and were used) by English and Dutch whalers in the late 16th and early 17th centuries. They established extensive summer settlements there.

In 1614 King James I of England proclaimed the main island's annexation and named it King James his Newland.³⁷ The Dutch contested this claim. After the bay fishery there for whales had ceased, the two states' territorial pretensions there remained, but were not pressed. In later years, Danish, Russian, German and Norwegian claims were added and a diplomatic standoff ensued. Each country was prepared to accept the archipelago's status as *terra nullius*, provided all the other interested parties did likewise.

The United States also expressed a special interest in the islands. This was not territorial, however, but to assure adequate protection for the business interests of the Arctic Coal Company, a Boston enterprise with extensive coal mines on Spitzbergen. In the decade prior to World War I Norway engaged in intense diplomatic activity in support of a régime which recognized the archipelago's status as no man's land but purported to give Russia, Norway and Sweden a special standing in the islands' administration.

The various drafts for a Convention were criticized on the grounds that the convention would establish, in effect, a recognition of the joint sovereignty of the three countries. There were ancillary grounds of criticism. These related to the judiciary, the right to tax, and the protection of the property rights of enterprises already exploiting mineral resources (especially coal) there.³⁸

After World War I, nine states recognized, in the Treaty of Paris of 1920,³⁹ Norwegian sovereignty over the islands. The treaty also recog-

³⁷M. CONWAY, *NO MAN'S LAND* 65 (1906).

³⁸On the history of the various North Sea states' claims to the islands of the Spitzbergen Archipelago, and of their economic activities in the area (especially fishing and whaling in Spitzbergen's offshore waters), see FULTON, *THE SOVEREIGNTY OF THE SEA* 112, 181-85, 193-94, 198-200, 527 (1911); Nielsen, *The Solution of the Spitzbergen Question*, 14 AM. J. INT'L L. 232 (1920) [hereinafter cited as "Nielsen"]; Lansing, *A Unique International Problem*, 11 AM. J. INT'L L. 763 (1917); Shepstone, *Coal and Iron from the Arctic*, 121 SCIENTIFIC AMERICAN 362, 376 (1919) [hereinafter cited as "Shepstone"].

³⁹*Signed* Feb. 9, 1920, 43 Stat. 1892, T.S. 686, 2 L.N.T.S. 7, 18 AM. J. INT'L L. SUPP. 199 (1924). The nine signatory states were: United States, Great Britain, France, Italy, Japan, Denmark, the Netherlands, Norway and Sweden. Russia protested against this agreement, as she had not been consulted despite the historic claims she entertained towards the Archi-

nized and preserved the established rights of citizens of the signatory countries, to exploit their coal and other mineral holdings and to fish in Spitzbergen waters.⁴⁰ What is of interest, from the point of view of this paper, is the provenance and recognition of those rights in the years and decades before the Treaty was signed, when British, American, Norwegian, Swedish and Russian coal companies operated there under the wardship of their own Foreign Offices. A brief outline of the history of the Arctic Coal Company's activities and the State Department's espousal of its claims follows.

The Arctic Coal Company was incorporated under the laws of West Virginia. It conducted its business from Boston. It worked four tracts of coal-bearing ground on Spitzbergen, the first, the "Advent Bay Tract," was purchased from one Ludwig Sollberg and the Trondhjem-Spitzbergen Kulcompagnie, a Norwegian concern, in 1906. Sollberg and the Trondhjem-Spitzbergen Kulcompagnie had recorded their claims in 1900 with both the Norwegian Foreign Office and Department of the Interior.⁴¹ (It should be noted that Norway, like Russia and Sweden—and other interested states including the United States—did not, at that time, press any territorial claim, but agreed that the archipelago was a *terra nullius*.^{41 a)}

The remaining three tracts had been acquired by Messrs Ayer and Longyear, who were the incorporators of the Arctic Coal Company, and respectively, its President and Secretary, and were worked by the company. The total area which the company worked, under a claim of ex-

pelago. In 1924, however, she informed the Norwegian Government that she would recognize Norway's sovereignty over Spitzbergen. Letter from the Norwegian Minister (Bryn) to the Secretary of State, March 20, 1924, [1924] 1 FOR. REL. U.S. 1 (1939).

⁴⁰Treaty of Paris of 1920, *supra* note 39, arts 2, 6, 7 and annex. See also Nielsen, 232, 234.

⁴¹See letter from the Arctic Coal Company (by Messrs Ayer and Longyear) to Secretary of State Knox, Dec. 27, 1909, 346 Numerical File 1906-1910, Case #3746, Record Group 59, Department of State. See also letter from Arctic Coal Co., to Secretary of State Bryan, May 25, 1914, #950d.00.270, 4 Decimal File, Subnumbers 251-335c, Record Group 59, Department of State.

^{41a}See letter from Norwegian Department of Foreign Affairs to Fasting, May 11, 1904, "Exhibit B" attached to letter from Messrs Ayer and Longyear to Secretary of State Root, March 10, 1906, [1906] Department of State, Miscellaneous Letters, March 1906 Pts II & III, Record Group 59, Department of State; Instructions by Secretary of State Bryan to Collier and Schmederman regarding the "forthcoming International Conference on Spitzbergen to be held at Christiana", May 23, 1914, transaction #850d.00/271a, 4 Decimal File, Case #850d.00, Subnumbers 251-335c, Record Group 59, Department of State [hereinafter cited as "Instructions"]. But note Telegram from Secretary of State Bryan to the American Delegation at the Christiana Conference, July 3, 1914, transaction #850d.00/313, 4 Decimal File, Case #850d.00, Subnumbers 251-335c, Record Group 59, Department of State:

If complete recognition of existing American interests could be obtained, together with absolute guarantees against excessive taxation, unfair exactions and burdensome labor and contract laws the simplest and probably most expedient plan would be to abandon the principle of *Terra Nullius* and allow Norway to annex the Islands.

clusive title to the coal in place, was in excess of 475 square miles.⁴² The claimants asserted their title on the basis of the "registration" of their "titles" with the Department of State⁴³ and the Department's acceptance of that registration as conferring the titles claimed through possession, posting of notices, active working and registration.⁴⁴

Any prospecting or mining by Norwegian or other foreign interests on those tracts was characterized as "trespassing." The United States Government espoused this claim in a number of letters to the Norwegian authorities.⁴⁵ This position was emphasized by a passage in President Taft's Message to the Congress of December 7, 1909. He said, with respect to the United States' acceptance of an invitation to participate in the proposed international conference at Christiana to establish an international régime to govern Spitzbergen:

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 questions 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.⁴⁶

The President's reference to "interests . . . already vested" is distinguishable from the discredited "vested rights" theory in conflict of laws. It is a term, not of theoretical explanation, but of legal ascription. It sets the conditions of the way private individuals have in the past acquired rights in sea areas, and territories outside the jurisdiction of recognized international persons. The rights become "vested" or "acquired" under general international law and, as such, they are opposable to a state which

⁴²See correspondence in last footnote, and letter from N. Wilson (attorney for the Arctic Coal Co., and Messrs Ayer and Longyear) to Secretary of State Bryan, May 25, 1914, at 3, 4 Decimal File, Case #850d.00, Subnumbers 251-335c, Record Group 59, Department of State.

⁴³See letter from N. Wilson to Secretary of State Root, March 10, 1906, and accompanying documents, [1906] Department of State, Miscellaneous Letters, March 1906, Pts II & III, Record Group 59, Department of State.

⁴⁴Letter from Robert Bacon, Acting Secretary, Department of State to Messrs Ayer and Longyear, c/o N. Wilson, March 14, 1906, 288 Domestic Letters 526, Record Group 59, Department of State.

⁴⁵See, *e.g.*, letter from United States Legation, Christiana to Norwegian Foreign Minister Christopherson, July 30, 1909, and reply thereto, August 11, 1909, American Legation in Spitzbergen Correspondence 1909, 1908, 1909, Record Group 59, Department of State; letter from Secretary of State Knox to Swenson, American Minister, Christiana, July 17, 1912, and attachments, American Legation, Christiana, Spitzbergen Correspondence, Feb. 29, 1912-Dec. 21, 1914, Record Group 84, Department of State; and Instructions, *supra* note 41a, at 2-3.

⁴⁶*Annual Message of the President to Congress 7 December 1909*, [1909] FOR. RELS. OF THE U.S. IX at XIII (1914).

later comes to exercise jurisdiction with respect to the area of those rights' provenance.

D. "Acquired Rights"⁴⁷

The Treaty of Paris of 1920⁴⁸ provides a prime example of the protection of rights acquired in a *terra nullius*. This was a treaty by which other interested states quitclaimed their interests in the islands to Norway, reserving inviolate, however, the properties and rights which their citizens had antecedently enjoyed. For the future, they also stipulated equality of access and treatment for their citizens. Since the treaty should properly be regarded as in the nature of a quitclaim, Norway could only receive what the signatories then gave. This opens the question of whether the archipelago's continental shelf now falls within Norway's sovereign rights. Clearly, if the Powers then gave up to Norway what they then considered as within their lawful claims, the *Abu Dhabi Award*⁴⁹ would require the decision that the 1920 grant contained in the Treaty of Paris would not extend to rights not then in existence, but which evolved subsequently.

Since the agreement was merely a quitclaim, in favor of Norway, of the rights the other signatories did not reserve, those which they did reserve on behalf of themselves, their citizens or subjects cannot be regarded as being created or validated by the treaty. They necessarily existed, as President Taft's Message⁵⁰ amply demonstrates, antecedently to the Convention and were preserved and protected by it. The United States Government held to this opinion most pertinaciously.

It viewed the rights which Arctic Coal Company had acquired in Spitzbergen as having been sufficiently established for them to be the subject of an international arbitration as to the boundaries of American enterprise's holdings with those of a Norwegian citizen, one Hjorth.⁵¹ Furthermore, the position of the United States was that opening coal mines within the Arctic Coal Company's tract and the tracts belonging to Messrs Ayer and Long-

⁴⁷See, for a discussion of this concept, Goldie, *The Oceans' Resources and International Law—Possible Developments in Regional Fisheries Management*, 8 COLUMBIA J. TRANS-NAT'L L. 1, 25-28 (1969) [hereinafter cited as "Goldie, *Fisheries Management*"] and Goldie, *Sedentary Fisheries and Article 2(4) of the Convention on the Continental Shelf—A Plea for a Separate Régime*, 63 AM. J. INT'L L. 86, 93-95 (1969) [hereinafter cited as "Goldie, *Sedentary Fisheries*"].

⁴⁸See, *supra*, footnote 39.

⁴⁹1 INT'L & COMP. L.Q.247 (1952).

⁵⁰See, *supra*, note 46 and accompanying text.

⁵¹See, e.g., letter from Peirce (U.S. Minister to Norway) to Norwegian Minister of Foreign Affairs Irgens, April 30, 1910, 2 American Legation in Christiana, Spitzbergen Correspondence, 1910, Record Group 59, Department of State; *Note Verbale* from Department of State to Norwegian Foreign Minister, Jan. 13, 1911, Case #850d.00/154, 2 American Legation in Christiana, Spitzbergen Correspondence, Record Group 84, Department of State.

year, and the removal of boundary markers therefrom, were tantamount to "trespasses"⁵²—despite the technical common law connotation of the term. Finally, in the negotiations for establishing a régime governing Spitzbergen, the United States asserted:

[T]he Government of the United States finds that for the present it cannot give its adherence to any convention for the government or administration of order in Spitzbergen which, while pronouncing upon the validity of claims to land in Spitzbergen, does not recognize the indisputable validity of the claims of its citizens as recorded in the Department of State at Washington.⁵³

E. Miners' Right—Special Custom or General Rule?

The concepts of possession have come down to us from three main sources whose waters are now mingled: the civil law, the philosophers and the common law. The general belief that all these have in common the notion that the taking of movable goods (or chattels) requires the apprehension of the thing, has been challenged specifically. Secondly, when land or territory is possessed, the whole tract may become the possessor's when only part is taken—provided that part may give the means of controlling the whole. The contradictory themes of possession when traditionally applied to goods in contrast to its application to land, would appear not only to be an inaccurate summary of the law, but also to have no justification in principle.

The history of miners' rights in the West of the United States, in Canada, Australia, South Africa and other countries of major nineteenth century immigration, point to a wider utility of the concept of possession than that traditionally associated with it. Similarly, developments in Spitzbergen underscore the universality and necessity of recognizing that possession of a mineral tract can be obtained by opening and working a part of it. By analogy, it can reasonably be argued that when an ocean bed resource of hard minerals has been developed and is being worked, the developing enterprise establishes, by that activity, a valid claim of right to an area equivalent to a tract on dry land, which provides an equitable return and no more, in terms of technological and economic feasibility, but which is not so extensive as to create a monopoly.⁵⁴

⁵²This technical common law term arises in the U.S. diplomatic correspondence. See letter from Peirce to Secretary of State Knox, July 30, 1909 and Diplomatic Protest of same date from U.S. Legation to Minister of Foreign Affairs, Transaction #3746, 346 Numerical File, Record Group 59, Department of State.

⁵³*Note Verbale* from Secretary of State to Norwegian Minister, Jan. 14, 1911, 2 American Legation in Christiana, Spitzbergen Correspondence, 1910, Record Group 84, Department of State.

⁵⁴See, *supra*, footnote 27, authorities cited therein, and the accompanying text.

F. Method of Claim

The procedure which the Arctic Coal Company followed in recording its claims to the tracts of coalbearing lands in Spitzbergen with the Department of State^{54a} was not unique to this country's practice, but was followed by all the states whose nationals claimed to exercise rights over mineral tracts in the archipelago. This is testified to, for example, by the fact that the Arctic Coal Company's title to its Advent Bay Tract ("Tract No. 1") stemmed from its purchase from Trondhjem-Spitzbergen Kulcompagnie, a Norwegian enterprise.^{54b}

The title that company showed to the purchaser was the recordation of its claim with the Norwegian Ministry of Foreign Affairs. The sale was also recorded with that Department.^{54c} The British practice was reported to be similar. Thus Shepstone tells us that:

The question of titles to land is most important. So far the practice has been for a mining company, on taking land, to erect notices to that effect, and to notify their own Foreign Office, where the claim is registered, if no previous claim invalidates it. This notification constitutes the real title-deed, and the British Foreign Office several years ago promised British mining companies that their claims would be safeguarded. All land titles of the two British companies named above are perfectly valid and beyond dispute. The same is true of the Norwegian, Swedish, and Russian estates. But Spitzbergen has already attracted adventurers, and complications are bound to ensue owing to attempts to jump claims.^{54d}

All the sources which have been studied, common law, civil law and international law, indicate the acceptance of the traditional rule of *qui prior est tempore potior est jure* (he who is first in time is first in right). They also reflect the requirement of a public and recorded announcement or declaration of the claim, as well as due diligence in the working of its ore body, and an equitable limitation as to the area to prevent monopoly.

In England, for example, the requirement of publicity was anciently satisfied by recordation in the stannaries courts of Cornwall and Devonshire, and in the Great Court of Barmote of Derbyshire. In the American West, and before the advent of state or federal legislation, a mining camp

^{54a} See, letter from N. Wilson to Secretary of State Bryan, March 10, 1914, and attachments including descriptions of tracts possessed by the claimants [1906], Department of State, Miscellaneous Letters, March 1906, Parts II & III, Record Group 59, Department of State, and letter of acknowledgement from Acting Secretary of State Bacon to Messrs Ayer and Longyear c/o N. Wilson, March 14, 1906 recognizing the "possession and ownership" of the coalbearing lands in them, 288 Domestic Letters 526 (Feb.-March, 1906), Record Group 59, Department of State. See also, *supra*, notes 43, 44 and 46, and accompanying textual matters.

^{54b} See letter from Messrs Ayer and Longyear to Secretary of State Root, March 1, 1906 at 2-3, 4 Decimal Files Case #850d.00, Subnumbers 251-335c, Record Group 59, Department of State.

^{54c} *Id.*

^{54d} Shepstone, *supra* note 38, at 376.

recorder, usually an official elected by the miners themselves, maintained public records of the claims and of transactions affecting them.^{54e} Subsequent state and federal legislation continues the requirement of publicity by providing registration procedures and requiring that claims should be registered.

Be these statutory procedures as they may, clearly they reflect an antecedent and underlying common law requirement which continues in effect where the statutory facilities do not operate. It is therefore necessary to devise a procedure which will adequately satisfy the duty to give due and adequate notice of an enterprise's claim where the statutes of the United States (and other countries) do not provide the appropriate procedures for giving the necessary notoriety to the claim. Finally, the practice of all interested countries with respect to their nationals' holdings in Spitzbergen prior to 1920, evidenced a practice pointing to similar principles in international law.^{54f}

For an American enterprise, the traditional common law prescription of publicity could be more than adequately satisfied by the recording of a Deed Poll containing the essential information and claims at an appropriate county recording office. Copies of this recorded document could well be served on both the Department of State and the Department of the Interior. The deed should be accompanied by such necessary informational documents as maps, affidavits as to working, surveys, fixes defining the location of notices, buoys and mineral samples as would constitute a clear definition of the tracts claimed.

The information and claims set out in the Deed Poll or annexed thereto, should also be advertised in a summary manner in the legal columns of the leading metropolitan newspapers of the United States and other countries, with present or projected deep sea mining enterprises. These advertisements should include a description of the mining area the subject of the claim, an announcement of the enterprise's intention to work the area, and notification of the fact of recordation, its date and location.

Publication in terms of this proposal would satisfy three fundamental policy requirements of mining law: (i) establishment of priority in time and therefore priority in right; (ii) protection of the equities of the claim owner

^{54e}AMERICAN LAW OF MINING 23.

^{54f}For the method of proving these titles so that they became binding upon the Norwegian Government after the entry into force of the Treaty of Paris of 1920, see Annex to the Treaty. It should be noted that the tasks of "the Commissioner" appointed under the treaty, and of the "Tribunal" which was to be brought into being in the event of disputed or rejected titles, were not to clothe inchoate claims with legal validity, but to transform the former titles, which had been valid in international law under the *terra nullius* régime of Spitzbergen, into equally valid titles which became, by the disposition of the treaty, effective in the domestic law of Norway, and binding upon that Kingdom as the new sovereign of the islands.

against conflicting equities; and (iii) places any adverse claimant on notice of the recording enterprise's right, and calls on him to take prompt legal action to vindicate his adverse claim or to be held guilty of *laches*.

III. The Relevance of Custom and "General Principles"

If some may doubt, despite the widespread acceptance throughout the world of mining right concepts, not only in domestic law relations but under such international régimes as that on Spitzbergen prior to the Treaty of Paris in 1920, that the legal principles put forward in the preceding section may not be immediately applicable to the seabed, at least they must agree that there is, in general international law, the potentiality for such a mining régime. Deriving from both the Spitzbergen precedent and the general principles just outlined, that régime could emerge as a special seabed custom with great rapidity. In addition to the observations already made, the following considerations are relevant to the speedy emergence of a customary seabed régime along the lines indicated in Section II:

(1) In *The Scotia*^{54g} the United States Supreme Court established that length of time is not an element in the formulation of a rule of customary international law, but that recent practice and the acceptance thereof as a claim of right or duty (as the case may be), by the major interested states is sufficient.^{54h}

(2) The general world community interest calls for the mining of manganese nodules, on the basis which precludes the possibility of similar bitter feelings and controversies emerging, as those engendered by the contemporary free-for-all in high seas fisheries. Hence, rather than promote the anarchy which would follow the application of the traditional freedom of the high seas, a special custom of deepsea mining should be discerned as emerging whereby the right of capture is mitigated by the recognition that rights can enure over the resource to be taken while that resource is still on the sea floor.

This would not be a unique exception to the generally understood principle of the right of capture, which requires that the person claiming ownership must have reduced the object to his physical possession and control. Such mitigations of the narrow right of capture familiarly understood in the context of fisheries, were developed in the Greenland and

^{54g} 81 U.S. (14 Wall.) 170 (1871).

^{54h} The acceptance of recent practice reflecting a claim of right as customary international law, has been confirmed by the International Court of Justice in the North Sea Continental Shelf Cases, [1969] ICJ 3, 24.

Galapagos whale fisheries.⁵⁴ⁱ These are, finally, supportive of both the prevention of violence and the recognition of the equities of those who have invested time, effort and capital in their searches and hunting, and preparations for the final apprehension of the target resource.

(3) Article 38 paragraph 1.c of its Statute calls on the International Court of Justice to apply "the general principles of law recognized by civilized nations" as a source of international law. The system, compendiously described as "mining rights," whether found on Spitzbergen before 1920, or in California, Australia or South Africa, whereby a miner, on discovering a mineral lode or deposit, has been shown, in the discussion in the preceding sections to qualify, in terms of equity, acceptance, widespread provenance and utility, as international law under this rubric.

VI. "Moratorium" and "Common Heritage"

A criticism of the arguments I have just outlined, based on any suppositions of the legal impact of the Moratorium Resolution,^{54j} must fail. The former Legal Adviser of the State Department, Mr. John R. Stevenson, during his term of office, said on a number of public occasions that the Moratorium Resolution is not legally binding on the United States. Although he did concede that it should be given "good faith consideration,"⁵⁵ this must be seen as dependent also on the good faith of the states promoting it, in accepting an international régime in a timely way. Two and a half years have now elapsed and no treaty régime is in sight. This is a

⁵⁴ⁱA Note on the Law of Possession and the Right of Capture: Under the right of capture it could be argued that an ocean miner can only claim to have legal possession and title to nodules when he has reduced them to his exclusive physical custody and control, *i.e.*, only when he has caught them in his gathering equipment. This is an unnecessarily restrictive view. Nor is it relevant to the exigencies of the mining of manganese nodules from the ocean floor since its main ocean law provenance has been in terms of fin fisheries. This restrictive view has not been applied in other fisheries in which the practicalities and the need for public order have dictated a recognition of symbolic, without actual possession—for example the special whale fishery customs of Greenland and Galapagos. (See HOLMES, *supra* note 7, at 212). In the context of deep ocean mining, the taking of the first nodule from the claimed ore body in an equitably acceptable and determinate area, should be deemed to establish possession over all the nodules within that area. The taking of the first sample nodule should be viewed as a symbolic taking of possession of all the nodules which it represents as a sample, since the enterprise has, from that moment on, a clear intention of taking all the others in the claimed area, plus the technological power to reduce them to its physical control by means of the knowledge it gains from the sample, and the procedures of collection and processing which that sample calls for.

^{54j}G.A. Res. 2574 D, 24 U.N. GAOR Supp. 30 at 11, U.N. Doc. A/7630 (1969).

⁵⁵Letter from John R. Stevenson, Chairman Interagency Law of the Sea Task Force, and Legal Adviser, Department of State, to Senator Henry M. Jackson, May 19, 1972, *Hearings on S. 2801 ("Development of Hard Mineral Resources of the Deep Seabed") Before the Subcommittee on Minerals, Materials and Fuels of the Senate Committee on Interior and Insular Affairs*, 92d Cong. 2d Sess. at 74-75 (1972).

period which permits us all to question the good faith of the Moratorium Resolution's promoters.

Second, the General Assembly's mandate to the Seabed Committee included the injunction to promote the exploitation of the resources of the seabed. The Moratorium Resolution, unless it is treated as a brief interim measure, negates that mandate. In such a contradictory posture of the two resolutions, the mandate should prevail, since it was the more widely supported,⁵⁶ was seen as a constitutive measure, and is in terms of the enhancement of world welfare; while the Moratorium Resolution negates that welfare in favor of a few states the prices of whose mineral production it seeks to support artificially against competitive alternatives.

Third, one of that Resolution's promoters has recently conceded, in a statement for which no ascription can be given, that the Moratorium Resolution was intentionally and specifically directed against the private enterprise interests of the United States and other private enterprises of developed countries. It was framed to have a "chilling effect" on investors. It is not in the interests of the United States to have the economic efficiency of its investment market distorted by intervention from the outside by political maneuvers of this kind. This may be underscored by President Nixon's statement that:

I do not, however, believe that it is either necessary or desirable to try to halt exploration and exploitation of the sea-beds beyond a depth of 200 metres during the negotiating period.

Accordingly, I call on all other nations to join the United States in an interim policy. . . . The régime should accordingly include due protection for the integrity of investments made in the interim period.^{56a}

For the three reasons just adumbrated, it would be counter-productive to American interests to see this Resolution as available for the stultification of either the development of customary norms in the area or the application of the general principles of law recognized by civilized nations.

An oral criticism of both the *Deep Seabed Hard Minerals Resources Act*,⁵⁷ and the position outlined in this paper, has been offered by a friend of this writer who took up a devil's advocate role. He argued the characterization, in Article 1 of the United Nations 1970 *Declaration of Principles*

^{56(a)} The vote on the Resolution establishing the seabed committee was: For, 111; Against, 0; Abstaining, 7; Absent, 0. (b) The vote on the Moratorium Resolution was: For, 62; Against, 28; Abstaining, 28; Absent, 8. None of the major maritime states voted in favor of the Moratorium Resolution. This voting pattern negates the possibility of any claim that a consensus exists such as that called for by such writers as Falk, Higgins and Onuf, who seek to find a law indicating force in some of the resolutions of the United Nations General Assembly.

^{56a} Statement by President Nixon on the Oceans Policy of the United States, 23 May 1970, U.N. Doc. A/AC.138/22, 9 INT'L LEG. MATERIALS 807, 808 (1970).

⁵⁷ See, *supra*, note 3.

Governing the Sea-Bed and the Subsoil Thereof, Beyond the Limits of National Jurisdiction,⁵⁸ of the seabed and subsoil beyond national jurisdiction and their resources, as "the common heritage of mankind" would give a legal basis for a foreign country to deny titles to minerals won from the seabed and to goods manufactured from seabed resources, coming into its jurisdiction in the flow of international commerce.

He further suggested that the recent litigation in Paris regarding Chilean copper,⁵⁹ or the older case of *The Rose Marie*,⁶⁰ was available as a telling precedent. The government which viewed the winning of seabed minerals independently of an international régime as a wrongful taking of property constituting part of the common heritage, could seek a judgment in its own courts declaring that the importer had no title and sequestrating the goods.⁶¹ Such a characterization of seabed resources reflects a misunderstanding of a number of legal principles.

This position, in effect, equates the common-heritage-of-mankind clause with the Moratorium Resolution—in that both are seen as providing the premise of an argument precluding any seabed activity *dehors* an international régime. Thus it would appear to be contrary to the policy of the United States which has already been indicated.⁶² Finally, had the interpretation now proposed been given to the common heritage clause, the voting support it enjoyed, along with the other clauses of the Declaration of Principles would not have been forthcoming.

It would have succeeded only in gaining the same voting support as that given to the Moratorium Resolution.⁶³ Hence there can be no question of this interpretation creeping under the umbrella of the support given to the Declaration and qualifying the policy of the Moratorium Resolution as "instant international law."⁶⁴

The second main argument against treating the common-heritage clause

⁵⁸G.A. Res. 2749, 25 U.N. GAOR Supp. ____ at ____, U.N. Doc. A/8097 (1970), 10 INT'L LEG. MATS 220 (1971).

⁵⁹Tribunal Decision of Chilean Copper Corporation' Plea of Sovereign Immunity in Third Party Attachment, 12 INT'L LEGAL MATS 182 (1973).

⁶⁰[1953] 1 Weekly L.R. 246 (Aden Sup. Ct. 1953).

⁶¹The discussion did not take up the further situation of whether *any* property within the jurisdiction and belonging to an "offending" enterprise engaged in the winning of deepsea floor resources, could be used as the target for such litigation. This would be a possibility, however, provided that the mining activity itself could be validly held to be an unlawful taking of the resources.

⁶²See, *supra*, footnotes 55 and 56a and accompanying textual material of both footnotes.

⁶³For a contrast of the voting support given to each of these two Resolutions see, *supra*, note 56.

⁶⁴Bin Cheng, *United Nations Resolution on Outer Space: "Instant" International Customary Law?* 5 INDIAN J. INT'L L. 23 (1965). For the relevance of voting support for the United Nations General Assembly resolutions to the formation of international law see Goldie, *The North Sea Continental Shelf Cases—A Ray of Hope for the International Court?* 16 N.Y.L. FORUM 325, 342-49 (1970), and the authors therein cited as participants in the debate.

as establishing enforceable prohibitions, begins by pointing out that to equate it with a rule characterizing the mineral resources of the seabed as an estate held in common by all humanity. It follows from such a characterization of the seabed, according to the thesis which the devil's advocate then posed, that no one country, nor enterprise, could help themselves to any part of the deep seabed's hard mineral resources without the consent of all peoples, or their duly appointed representatives—namely the authorities or organs constituted under the treaty régime empowered to license states and/or enterprises.

To assert this entitlement is to assume that the word "humanity" in the clause indicates no more than the people now living. It also assumes that "humanity" is to be viewed only as organized by states, so that only the states of the world, acting in common, can create the régime which, as a sort of delegate, authorizes the use of the seabed's resources. This argument thus transmutes the slogan "common heritage of mankind" into the legal concept of "property in common of the states now existing" (or "the property in common of the states existing at date of the treaty régime's coming into force"—or "... date of signature"?). One caution lawyers, diplomats and statesmen should observe is to avoid trying to treat "layman's language" as if it were formulated in terms of technical legal concepts—especially when that layman's language is a political slogan.

On the other hand, the phrase "common heritage of mankind"—a layman's formula if ever there was one—should be given the greatest respect. While it should not, indeed cannot, be viewed as a prescription, it can be accepted as an important hortatory message, a kind of "policy directive"—to draw an analogy with the policy directives in the Irish and Indian constitutions. Like those provisions, it expresses fundamental values, but like them too, it requires further implementation. It cannot be seriously claimed that the "heritage-of-mankind" clause is a self-executing instrument creating, without further implementing agreements, titles, prohibitions and rights.

Conceding, for the moment, the thesis that the phrase "common heritage of mankind" prescribes the worldwide, or humanity-wide, common ownership of seabed mineral resources, it should be pointed out that the state action against the United States enterprise which was hypothesized would still not be justifiable under international law. For such action to be lawful there would have to be a legal rule requiring that (assuming the words "common heritage of mankind" have created a joint property in the seabed minerals), without the prior agreement of all the joint owners, no individual joint owner can exercise his individual rights to the property he jointly owns with all the others.

There is no such rule applicable in any situation remotely relevant to the one under discussion. Certainly there is not one which would qualify as a "general principle of law recognized by civilized nations" under Article 38.1.c of the Statute of the International Court of Justice. The argument based on the supposed existence of such a rule is simply not consistent with the theories of concurrent interests in the jurisdictions of the common law and the civil law. (True, there was a rule in old pre-classical Roman Law which provided that one owner of a number-holding land in common, could not build on the common property without the consent (or non-prohibition) of all the others.)

The modern common law is well expressed as follows in *American Law of Property*, an authoritative treatise (footnotes omitted):

There are many American cases that agree with the English cases in the view that an individual co-tenant may develop and operate mines, quarries, and oil wells without being liable for waste. It has also held that a co-tenant may cut and sell timber, if such operations have the same relation to the reasonable use and enjoyment of property as they would have in the case of a sole owner in fee.⁶⁵

Where a co-tenant opens new mines or oil wells, or cuts new forests, beyond his share, he should be "merely held to a duty to account for the net profits received from such operations, less the expenses thereof."⁶⁶ Roman Law may not have developed its concepts regarding interests in common to the same level of sophistication as did the common law. On the other hand, contemporary civil law jurisdictions are evolving similar results as those long brought about in the Anglo-American system.

International law, too, has its concepts and precedents. It is not arguable that the "common-heritage-of-mankind" clause creates an international law condominium in the resources of the deepsea bed. This could only be done by a dispositive treaty having a similar effect in international law to a deed of conveyance in domestic law. It would require the formal signature of all states to such an important quitclaim. But even if, granting the unlikely event, the clause were to have a dispositive effect, the devil's advocate position that no state or enterprise could take seabed minerals beyond the limits of national jurisdiction, because they belonged to all would still be incorrect.

International law shows examples of joint use of territory in terms of: (1) separate exercise of joint sovereignty; (2) joint exercise of separate sovereignty; (3) joint exercise of joint sovereignty.⁶⁷ But even this last, for example the Anglo-French *Condominium* over the New Hebrides, left

⁶⁵2 AMERICAN LAW OF PROPERTY 64-65 (Casner ed. 1952).

⁶⁶*Id.*, 65-66.

⁶⁷1 OPPENHEIM, INTERNATIONAL LAW 453-55 (8th ed. Lauterpacht 1955).

each state with separate sovereignty over its own citizens. Examples of the joint exercise of joint sovereignty do exist. Perhaps the best known was the original four power control of Berlin. But this again, had to be specifically provided for by treaty.

The frustrations which ensued led to a new régime by which three parties individually contributed their shares of the joint powers to a new (three-power) joint effort and the fourth, through its delegates in East Germany, individually exercises its share of its joint authority in East Berlin. The paralyzing effect of that particular effort to exercise joint sovereignty jointly, is to be found in Peter Ustinov's wickedly humorous play "The Love of Four Colonels."

The formula "common heritage of mankind" in paragraph 1 of the 1970 Declaration thus cannot justify the prevention of states from individually exercising their common property rights. If a government did manage, through action in its courts, to bring about the sequestration envisaged, its conduct would be contrary to international law. It could, accordingly, be held accountable to states which espoused the claims of their citizens arising out of such proceedings on the ground that it had been, under the pretence of enforcing international law, engaged in a sequestration of property on the basis of a misrepresentation of what international law permits.

This would be "a confiscation . . . by an act of state in violation of the principles of international law."⁶⁸ Hence the conduct envisaged as a reprisal for an enterprises taking of seabed minerals could attract litigation brought against the intervening government within the jurisdiction here in the United States to the extent permitted by the doctrine of sovereign immunity, the "Hickenlooper (Sabbatino) Amendment"⁶⁹ and *First National City Bank v. Banco Nacional de Cuba*.⁷⁰ Such a reaction might well be copied in other consumer countries providing the major markets for mineral raw materials around the world. Hence the step envisaged by the devil's advocate could be turned against the intervening state and become a nightmarish enactment of the "Sorcerer's Apprentice" in political rather than musical terms.

V. Domestic United States Enterprises and Deepsea Mineral Exploitation

The discussion so far has been predicated on the international legal

⁶⁸This phrase is taken from the "Sabbatino Amendment" (or "Hickenlooper Amendment"), Foreign Assistance Act of 1965 §301(d)(2). 22 U.S.C.A. §2370(e)(2).

⁶⁹22 U.S.C.A. §2370(e)(2). *Supra*, footnote 68.

⁷⁰406 U.S. 759 (1972).

relations of deepsea mineral exploitations by enterprises operating under the laws of different states. It is also necessary to indicate briefly the relations of two or more American enterprises. Should a United States competitor seek to interpose a claim to work within an equitably determined seabed area, already being worked by an American enterprise which first engaged in developmental or production activities under a valid claim of right, then the entity first establishing its possession would be entitled to have its rights vindicated under United States law, against the enterprise which was second in possession and, hence, second in right. United States law would govern the relations of both, despite the fact that location of their dispute was beyond the territory of this country.

A. Values Involved

In the domestic legal order, as in the international, the basic values of laws governing the winning resources are the protection of the environment, the maximization of the material goods to be gained from placing resources in commerce, and assuring public order. These values necessarily call for the encouragement of the discovery of new resources, and the creation of incentives to work effectively to win those already discovered. The traditional "miners' rights" custom, which has prevailed wherever the common law has governed mining under lands unalienated as to the surface,⁷¹ and in the absence of a statute, provides that each miner is entitled to the exclusive right to mine an area of such dimensions that he has the capability of exploiting it over a period of time, and yet one which does not unreasonably monopolize or engross the whole resource to the exclusion of other participants.

B. Common Law Basis

Research and analysis of the legislative histories of federal and state laws containing "grandfather clauses," protecting mining claims indicate the recognition of rights which were created anterior to the statutes' enactment and therefore under the common law.⁷² It is conceded that these rights may not have found, in their inception, their creation in the decisional laws of federal and state courts so much as in the customs of the mining communities. These customs did not spring, fully articulated and developed, out of the turbulent mining communities of California. They have a long and unbroken history in English and Germanic mining customs, and in

⁷¹For a discussion of the common law underpinnings of miner's right see §11B *infra*.

⁷²See, Field J., in *Jennison v. Kirk*, 98 U.S. 453, 457-61 (1878). See also Traynor J., in *Ames v. Empire Star Mines Co.*, 17 Cal. 2d 213, 110 P. 2d 13, 16, *cert. den.* 314 U.S. 651 (1941).

the common law, which can be traced back to the medieval period, if not earlier.

C. The Extra-Territorial Operation of the Common Law

Insofar as it may be applicable, the common law governs United States citizens and enterprises whenever they are beyond the jurisdiction of the United States, especially when they are not subject to the jurisdiction of any other country. When mining on the high seas, United States citizens and enterprises are governed by the laws of the United States and by the common law of their state of citizenship (or of the United States if such is applicable) on three bases: (i) if the ships engaged in the mining enterprise are American flag ships, then the laws of the United States govern by virtue of the flag; (ii) when operating in an area not subject to the sovereignty of any state, the personal law of the individual governs his conduct—an illustration of this was provided by the operations of the Boston mining corporation which won coal from Spitzbergen (at that time a masterless territory) in the first decade of this century;⁷³ and (iii) wherever people subject to the common law have worked together in an area not governed by the law of any other state their relations have been governed by the common law. A statement by Chief Justice Field on this point is singularly apposite. He said:

[S]o when American citizens emigrate into territory which is unoccupied by civilized man, and commence the formation of a new government, they are equally considered as carrying with them so much of the same common law, in its modified and improved condition under the influence of modern civilization and republican principles, as is suited to their new condition and wants.⁷⁴

This paper has already demonstrated that the common law included and established the principle of miner's rights wherever there is no statute regulating this right. Should the mining activities of two American mining enterprises confront one another on the seabed (an area having neither a government nor a body of civil law), the common law including that of miner's rights governs this confrontation over claims to resources to be mined.

⁷³See *supra*, §IIC.

⁷⁴Norris v. Harris, 15 Cal. 226 (1860). See also 1 BLACKSTONE COMMENTARIES ON THE LAWS OF ENGLAND, Intro., §4, at 107 (T. Colley ed. 1871); Cooper v. Stuart, 14 App. Cas. 286 (1889); Delohery v. Permanent Trustee Co., 2 Commonwealth L. Rep. (Australia) 345 (1905); Mitchell v. Scales, 5 Commonwealth L. Rep. (Australia) 405 (1907); Blankard v. Galdy, Salk. 411 (1672); Forbes v. Cochran, 2 B. & C. 488 (1824); Catterall v. Catterall, 1 Rob. Ecc. 581 (1847); Kielly v. Carson, 4 Mores Privy Council 84 (1842). M. RADIN, ANGLO-AMERICAN LEGAL HISTORY 274 (1936). This proposition is standardly reflected in the Reception Statutes of the several states, see e.g., N.Y. CONST., Art. 1, §14 (McKinney 1970).

Finally, it is commonly understood that international law is part of the common law.⁷⁵ Hence the arguments set forth in that context in Sections II B-E above are, *ceteris paribus*, also applicable here.

VI. Conclusion

Independently of Congress's enactment of the *Deep Seabed Hard Minerals Resources Act*, enterprises may prove and develop mining tracts on the deep seabed, of a reasonable size. Translating "reasonable" into factual claims would depend on a number of criteria including the nature of the resources to be won and their distribution, equitable considerations of other claims to win the same resource, and what could be considered as within the scope of a possessory intent and control on the part of the enterprise. These rights are not subject to impairment through any disparagements advanced under the United Nations Assembly's 1969 Moratorium Resolution or 1970 Declaration of Legal Principles.

Deep seabed mining claims should be recorded by filing with the Foreign Office of a claimant's country of nationality, all documents necessary to show title. These should include a Deed Poll announcing to the world the recording enterprise's claim, a surveyor or navigator's description of the tract in terms of fixes, bearings and distances, evidence of possession and of continued active exploitation of the resource, an intent to assert exclusive rights to exploit the mineral resources of the tract, and testimony that the enterprise was "first in time."

These specific acts reflect the good faith intention of giving adequate notice of the making of a claim, in the absence of relevant and applicable statutes and treaties. The purpose is to give the most practical available means of effectively publicizing an enterprise's claim, thereby putting all interested parties on notice, either actual or constructive (*i.e.*, the notice was there and available to the world, had any adverse claimant but taken reasonable steps to inform himself of the facts).

⁷⁵*Triquet and others v. Bath*, 3 Burr. 1478 (1764); *Barbuit's Case*, Cas. t. Talb. 280 (1735); *West Rand Central Gold Mining Co. v. The King* [1905] 2 K.B. 391; *Mortensen v. Peters* [1906] 8 Sess. Cas. (5th Ser.) 93; *Paquette Habana* 175 U.S. 677 (1900); *Talbot v. Janson*, 3 Dall. 133 (1795); *Ware v. Hylton*, 3 Call. 199 (1795); *The Rapid*, 8 Cranch 155 (1818); *Peters v. McKay*, 195 Ore. 412, 238 P. 2d 225 (1952).