

CUSTOMARY INTERNATIONAL LAW AND DEEP SEABED MINING

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I am to speak today on Customary International Law and Deep Seabed Mining.¹ At the outset, perhaps a point should be made regarding the economic significance of the manganese nodules of the deep seabed. A number of congressional documents have been produced over the last decade purporting to present projections of the expected future world demand and supply of the minerals and materials to be found in those nodules. They predict either shortages of the supply of the relevant land-based minerals, or possibly unstable political conditions in the countries from whence they now come. They also predict that if the deep seabed mining of manganese nodules should come into commercial production, the effect would merely be one of stabilizing prices and preventing a sky-rocketing inflation of those prices which could, inevitably, threaten world stability.

I intend in this paper to stress current issues and questions involving the Third United Nations Conference on the Law of the Sea and to look at their effects.² But first of all, let us review the

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1. Goldie, *A General International Law Doctrine for Seabed Regimes*, *THE INT'L LAWYER* 796 (1973); Goldie, *The General International Law Regime of the Deep Ocean Floor*, 2 *BROOKLYN L. REV.* (1975); Burton, *Freedom of the Seas: International Law Applicable to Deep Seabed Mining Claims*, 29 *STAN. L. REV.* 1135 (1977).

2. For ten years the Third United Nations Conference on the Law of the Sea, and sessions of United Nations General Assembly Committees in preparatory meetings therefor (beginning with the *Ad Hoc* UN Seabed Committee in the summer of 1968), have been working to produce a "Constitution for the Oceans." Many of the nations of the world (totalling some 159, of which 149 are members of the United Nations) are represented. Thus we see a most complicated, radical and contentious lawmaking conference in which politics and economic considerations have consistently over-ridden the juridical.

Some, but not all, of the Sessions have produced documents called "Negotiating Texts" with various prefixes. (These are: the Informal Single Negotiating Text, 1975 (Third Session), Parts I, II and III of this text appear at the *Third United Nations Conference on the Law of the Sea Official Records*, Vol. 9, 137, UN Doc. A/CONF.62/WP.8 (1975); Part IV of the text appears at UNCLoS III Official Records, Vol. 5 at p. 111, UN Doc. A/CONF.62/WP.9 and Add.1; the Revised Single Negotiating Text, 1976, Fourth Session, appears as an UNCLoS III official document UN Doc.A/CONF.62/WP.8/Rev.1 (6 May 1976); and the Informal Composite Negotiating Text, UN Doc. A/CONF.62/WP.10 (15 July 1975). In addition to the foregoing, the United Nations Secretariat prepared, following the First (Caracas) Session, a "Main Trend" paper, UN Doc. A/CONF.62/C.2/WP.1. Despite its UN document number this "Main Trends" paper does not enjoy a similar status to that extended to the various "negotiating texts").

primordial principles of the customary international law of the sea as it has come to us from the days of Grotius—the 17th century. As we know, the advocates of the freedom of the seas (who triumphed) saw the high seas as common property. As with all common property such as a village well where each villager can draw his individual needs in the form of water from the well, or a common field where he can pasture his animals, the governing ideology prescribed that no state could enclose any part of the common sea. On the other hand, individuals were permitted to take resources of the sea which they could reduce to possession.³ This is reflected in Grotius' famous quotation 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

3. Under the right of capture—which requires that the person claiming ownership must have reduced the object to his physical possession and control—it could be argued that an ocean miner's 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. Moreover, there must be recognition of the equities of those who have invested time, effort and capital in their searches for hunting or preparations for the final apprehension of the target resource. See O. HOLMES, *THE COMMON LAW* 212 (35th printing 1943). 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.

4. H. GROTIUS, *FREEDOM OF THE SEAS* 29 (Magoffin trans. 1916).

The problem of proprietorship of goods taken from or subject to dominion in the commons is one of considerable complexity. The preliminary step is to distinguish the property, private law concept of moninion (dominium) from the public law one of *imperium*. Traditionally, international law has recognized the acquisition of private rights (e.g., ownership or *dominium*) over unowned *res nullui* and *feral natural*. Thus, for example Grotius recognized that 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 private proprietorship.

Grotius also pointed out that neither states nor individuals may assert dominion over the air and sea which are "common," or "public," but that 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." *Id.*

Imperium, or sovereignty, on the other hand relates to the public, or sovereign aspects

The argument that supported the advice Mr. Ely and I gave Deepsea Ventures⁵ several years ago was based on this hypothesis: namely, that the fisherman owns his fish. The manganese nodules which the H.M.S. Challenger took from the deep seabed over a hundred years ago in her scientific expedition were always held to belong to the British Government. What the H.M.S. Challenger did was to take goods from the common which, by reducing them to possession, became the property of the owner of the H.M.S. Challenger. But the governing rule of property, which I suggested in that notice, was not simply a possessory title to goods which had been apprehended. There is a very interesting piece of history which I looked into in as much detail as possible at the National Archives some years ago. An American citizen, a Mr. Longyear, established a coal mine on the Island of Spitsbergen. Not only was there an enterprising Yankee from Boston, but also a couple of Scots, a Norwegian, a Russian and later on a German, all digging for coal on Spitsbergen. The big difference between our Boston Yankee and the Europeans was that the Europeans sent their coal home, but our enterprising Yankee sold his coal to the highest bidder on the coal market in Europe.⁶

of acquisition, not the ownership or dominium, rights. Imperium is thus a jurisdictional, rather than a proprietary, concept of international law.

5. In 1974 I participated in the drafting of, and signed, together with Northcutt Ely, Esq., as counsel, a *Notice 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 the Honorable 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 underlying 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 MAT'LS. 51 (filed Nov. 15, 1974) (1975); See also Goldie, *Mining Rights and the General International Law Regime of the Deep Ocean Floor*, 2 BROOKLYN J. INT'L 21, at 49 (1975).

6. In 1973 I published a study of what I perceived to have been, at that time, the received and established principles, reflected both in the fascinating legal institutions developed governing mining claims on Spitsbergen when the island group had the legal status of *terra nullius*

One very interesting fact was established in Spitsbergen. This archipelago had been discovered very late in the 16th century by the British or very early in the 17th century by the Dutch. When King James became king of England as well as Scotland he called Spitsbergen "King James' New Found Land." The Dutch, however, contested his ownership. The rivalry between the British and the Dutch arose out of sealing and whaling—hunting for the furs and oil. Subsequently, the Russians and the City of Bremen developed claims. The claims of the latter were taken up by the German Empire in the 19th century when that state became a successor to the free city of Bremen. In addition to those countries, claims of territorial sovereignty over Spitsbergen were pressed by the Danes and, after their independence in 1905, the Norwegians. By the late 19th century, when a number of miners were digging for coal on Spitsbergen, the territory had been known for 300 years, and nobody had successfully exercised any undisputed sovereignty over it. But what all the people used to do in this masterless territory, including Mr. Longyear, our American precedent, was this: they would mark out an area and stake out a mining claim, which they would call a tract. They would then file their claim to their tract with the foreign office of their country.⁷ Everyone did it. Thus it became a common practice that "miners' rights" could be established in no man's land—that is, exclusive rights to mine established "tracts."

Then, the next step is even more interesting. After Norway got her independence from Sweden, Norway wished to revive the ancient claim of the Viking Kings to all the islands in the North Atlantic including Spitsbergen. And so, they started to call conferences to decide the future of the Archipelago. In 1909 President Taft told the Congress that the United States was not interested in estab-

("masterless land") and what appeared to me to be the confirming evidence of the practice of "miner's right" as "a general principle of law recognized by civilized nations"—a contemporary equivalent of the pragmatically perceived *jus gentium* underlying the *Edictum Perpetuum* of the classical Roman Praetor Peregrinus. See Goldie, *A General International Law Doctrine for Seabed Regimes*, 7 *THE INT'L LAWYER* 796 (1973).

7. 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 the 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 Spitsbergen has already attracted adventurers, and complications are bound to ensue owing to attempts to jump claims.

Shepstone. *Coal and Iron from the Arctic*, 121 *SCIENTIFIC AMERICAN* 362 at 376 (Oct. 11, 1919).

lishing any territorial claims on Spitsbergen, 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 1909.⁸ The position which this speech reflected has been criticized on the ground that to talk of property rights which have become vested in a territory which has no sovereign is wrong, indeed impossible.⁹

This just shows how strongly the ghost, or rather the juridical theory, of John Austin and the 19th century positivists still haunts us. As one who sides with President (and later Chief Justice) Taft, I feel the opposing view is simply an unquestioning acceptance of a positivistic theory of law.¹⁰ 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 fa-

8. 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 Spitsbergen, 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 XIII (1914 ed.)

9. In these circumstances a real right, in the common acceptance of the term, cannot exist in Spitsbergen. 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 Spitsbergen could not, therefore exist. All persons cannot be excluded. Only those persons could be excluded whose governments have conferred upon the insular government the right to exclude them. Exclusive use and occupancy is lacking, and so land in Spitsbergen 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 Spitsbergen as their common agent be excluded from the occupancy and use of land unless specifically privileged to do so, the effect could be similiar 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 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).

10. For a general definition of positivism, see R. DWORKIN, *TAKING RIGHTS SERIOUSLY*, 17 (1978).

mous speech in *Alice Through the Looking Glass*.¹¹ Other writers have taken other views. Such views are not only reflected in President Taft's State of the Union Address,¹² 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 17th century.¹³ This of course is very much like 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.¹⁴ 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 19th century positivists.¹⁵

11. L. CARROLL, *THROUGH THE LOOKING GLASS* (1871).

12. See note 8 *supra*.

13. 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 the 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 here, is, by the labor that removes it out of that common state nature left it in, made his property who takes that pains about it.

J. LOCKE, *SECOND TREATISE OF GOVERNMENT* 30, reprinted in J. LOCKE, *TWO TREATISES OF GOVERNMENT* 135-136 (1956).

14. 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. Every cost and benefit associated with social interdependencies is a potential externality. 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 *AMERICAN ECONOMIC REVIEW* 347 at 348 (1967).

15. 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

The practical men who established, and bought and sold, and made money out of their mining tracts on Spitsbergen took a different view of their rights from that of the positivists. They were guided by the utility of internalizing the externalities of taking coal from 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 their governments will speak to his."

"If their governments refuse to speak or if his neglects the representations of theirs 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."¹⁶

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.

Having talked about the traditional customary law issues, I would now like to point out that customary law is always subject to change. The Third United Nations Conference on the Law of the Sea (UNCLOS III) has developed the "Economic Zone." It is possible to argue that the combination of a general acceptance of a principle in the Third United Nations Conference on the Law of the Sea as mirrored in the various negotiating texts, plus an increasingly

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?) 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.

16. It should be clear that the participants in the Spitsbergen 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.

widespread state practice reflecting the consensus which led to the formulation of the doctrine in those tests, can come to constitute law. In this way more and more countries, including our own United States, are putting into effect a "law" of the economic zone. The process is one which today arises from the interaction of conferences and state practice, whereby legal change can come about more rapidly than it ever has in the past. We need to realize that indeed the Law of the Sea Conference now going on is not merely or even primarily today a codification conference. It is also an institution seeking to establish law reform and legal change. It is more of a political and economic conference than simply a legal one. It is also involved with institution building—the creation of new institutions—and is guided by the need to resolve problems of economic redistribution. These are very important additional factors in the contemporary formation of customary international law. One question of great interest is: When and how far can we say that customary international law is changing, is about to change, or has started to change?

Today, perhaps, we may see the impending emergence of a new dimension in the law of deep seabed mining. In Article 29 of the United Nations Charter of the Economic Rights and Duties of States (1974), Resolution of the General Assembly 3281 (XXIX), there is a declaration that "the seabed 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."¹⁷ This reiterates the "common heritage" declaration of the earlier General Assembly's Resolution (namely 2749 (XXV) of 17 December 1970) on the regime of the resources of deep seabed.¹⁸

Have these resolutions 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,¹⁹ 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-

17. G.A. Res. 3281, 31 U.N. GAOR, (Supp. 31) 50 U.N. Doc. A/9631 (1974).

18. G.A. Res. 2749, 1 U.N. GAOR, (Supp. 27-28) 24 (1970).

19. The Charter entered into force (for the United States as well on 24 Oct. 1945).

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 flagship, without lawful justification (that is, without the justification of a treaty, customary international law, right or privilege so to act), is a breach of the customary international law of the sea. It also involves a breach of the United Nations Charter (including Article 2, paragraph 4).²⁰ 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" principle 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

20. Article 2, paragraph 4 states: "All members shall give the United Nations every assistance in any action it takes in accordance with the present Charter, and shall refrain from giving assistance to any state against which the United Nations is taking preventive or enforcement action."

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 purposed 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.

Now, very briefly, I would like to run down the alternatives for possible blueprints of a seabed authority. They are, as they seem to me, to turn on the issues of the authority of the agent or the trustee of mankind for its “common heritage” (when and if this becomes an accepted legal concept either through treaty or community practice despite its obvious conceptual difficulties). There are several forms for seabed authority. First, there is the model that was favored originally and probably still is favored (with some regrets) by the United States. Its function is to simply license private entrepreneurs and state enterprises. It would merely issue licenses for exclusive mining rights in fixed areas or tracts to either the state owned public corporations or the private enterprise (depending on the economic organization of the country of the applicant). That applicant would then work the seabed area. This model (that of the straight licensing authority), however, seems to me to be dead as far as the Third United Conference on the Law of the Sea is concerned. Second, there is the opposite of this model; namely, that of Operating Authority. This would concentrate prospecting, mining, transportation, processing, and distribution of seabed mining resources (particularly the manganese nodules) in the Authority. Third, there is a compromise plan—an Operating Authority subcontracting its management contracts, servicing contracts, and the like to enterprises, which would carry out, under their contracts, the various essential tasks involved in seabed mining. Finally, there is the position that western countries and the United States are now supporting. Today it is called the Parallel System. The Parallel System combines all three of the above. The Authority may subcontract if necessary, or operate on its own, and where the Authority does not engage in operations, exclusive mining tracts may be reserved for enterprises engaging in seabed mining under the licensing concept.

PANEL DISCUSSION

MR. HULL: At this point we will have a panel discussion and to the extent there are questions from the audience we will try to entertain those also.

AMBASSADOR ALDRICH: Fred, I want to ask you whether you see a distinction between a property interest or title to recover nodules from the seabed and a property interest giving an exclusive right to exploit an area of the seabed. At the time your claim was submitted in 1974, I was advising Dr. Kissinger. It seemed to me that there was a considerable distinction between one's right to the nodules that he pulls up from the sea and one's right to stake out an area of the high seas for his exclusive use in mining. We certainly would have had problems if someone had staked out a fishing area and claimed exclusive right to catch all the fish within that area. Your case seems to have greater force if you rely on the title to the nodules rather than the exclusive right to mine the area.

PROF. GOLDIE: Thank you, George. Of course there is a distinction between the title to the nodules already captured and those that remain to be found. Today a large portion of my presentation related to the issue of possessory rights and title to captured, "apprehended," nodules because I have been surprised to see that those rights are being criticized in the journals. In my view the answer to the first part of your question is covered by the traditional and general principles of finders' rights and of possession.¹ The second half of your question is much more difficult to answer. It is fairly easy to think of a "climbing boy" who finds a jewel while climbing in a chimney being able to keep it as against the interest of his master the chimney sweep.² Similarly, we would not challenge the ownership by a soldier of a diamond ring he found in a window frame.³ These situations come within the realm of the rights of finders to possess that which they have already brought under their hand. The problem, however, of extending this concept of finding to a seabed tract is a difficult one. Perhaps Mike Ely and I did force the issue a little bit, but I am not unhappy with the case we established.

The starting point is, of course, the universal theory of miners' rights. It is a general principal of law recognized by civilized nations

1. For a discussion of finder's rights, see C. SMITH & R. BOYER, *SURVEY OF THE LAW OF PROPERTY* 456 (2d ed. 1971).

2. *Armory v. Delamire*, [1722] K.B. 1 Strange 505.

3. *Hannah v. Peel*, [1945] 1 K.B. 509.

fitting within the frame of Article 38 paragraph c of the Statute of the International Court of Justice.⁴ The application thereof in the Spitsbergen Analogy⁵ gives added force to the proposition that perhaps the traditional law of finders had not been studied adequately from the point of view of the nature or the extent of what is found. No one questions the result in the case of the found jewel, the lost bank notes, the Viking ship under the pond or the burial mound and so on. But when it comes to something more extensive, difficulties ensue as to the nature of the object of the finder's rights. Nevertheless, miners' rights have been widely recognized. Finders' rights to groups of things are also present in some special transnational customs as reflected in the salvage cases of the *Tubantia*,⁶ *Gironia*,⁷ and the *Santa Maria de la Rosa*⁸ or in Galapagos whale fisheries.⁹ In a world of scepticism in which we find ourselves, the burden of proof has been very heavy to carry and many are only too happy to promote the belief that it has not been discharged. From your perspective, the advice you gave Secretary Kissinger nullifying the claim did not, arguably, deny a specifically sanctioned right. However, it would not have been wrong, under the law, to have been more sympathetic to Deepsea Ventures'¹⁰ position as well. In my view, moreover, it was mistaken to look for an affirmation of the right. All that was necessary was the lack of prohibition plus the Spitsbergen and other analogies.

In response, George, to your question drawing upon the traditional international law of fisheries, I would like to make the following brief adumbration of a response to a complex question. First, I must stress that, when it comes to comparing seabed mining rights with fishing, there are some very important distinctions. The taking of fishing involves the total habitat of the fish, that is the whole water column, with its multifarious uses, needs and resources.

4. I.C.J. Stat. art. 38, reprinted in, S. ROSENER, DOCUMENTS ON THE INTERNATIONAL COURT OF JUSTICE 77 (1974).

5. For a comprehensive discussion of the Spitsbergen analogy, see Goldie, *Mining Rights and the General International Law Regime of the Deep Ocean Floor*, 2 BROOKLYN J. INT'L L. 1, 19 (1975).

6. [1924] P. 78.

7. See *News and Notes*, 1 INT'L J. ARCHAEOLOGY & UNDERWATER EXPLORATION 224 (1972). (This case is an unreported case in the trial section of the Supreme Court of Belfast, Northern Ireland). See also *Morris v. Lyonesse Salvage Co. (The Association v. The Romney)*, [1970] 2 Lloyd's List L. R. 59 (Adm. 1970).

8. [1953] 1 W.L.R. 246 (Aden Sup. Ct. 1953).

9. [1951] I.C.J. 116.

10. See note 5 *supra* at 50.

Seabed mining, on the other hand, envisages the exploitation of a single resource existing only on the seabed and mainly in the desert area of the ocean. This takes place in an environment approaching an almost two-dimensional situation. It does not, furthermore, involve the exclusion of many valid uses of the sea as a spatial resource. Nodules are simply not present to enter into any competition for priorities.

Secondly, the international law of fisheries to which you make reference is the result of very special political pressures, as well as philosophical theories, germane to the evolution of Western Europe, especially those deriving from the Anglo-Dutch rivalries regarding the North Sea fishery and from theories of natural law, of the relation of Man and Nature, and of the conditions necessary for the creation of property rights.

Finally, I note a touch of irony in your question. After all, what is the United States' very limited acceptance of the Economic Zone? Surely, the United States has agreed internationally, as it has legislated domestically, to the exclusive right of catching fish in the area in question—an area, may I remind you, of far greater extent than any which I have proposed as a "reasonable" area for claiming an exclusive right to deep seabed mining.

MR. HERMAN: I am interested in the comments that Professor Goldie made with respect to the development of customary international law in the area of the use of the seas. I agree with him to the extent it is possible to say that there may not be any law which prevents individuals from mining the seabed. I am not convinced of that, but that is a possible result from his statements and from my own point of view. Certainly there is nothing that specifically sanctions it. I would like to emphasize that point. It is difficult to say that customary law of the sea or notions of freedom of the high seas admits to the right to mine the seabed. While it may, I think any state that puts its eggs in that basket is asking for trouble.

The notion of freedom of the high seas rests on the concept that the high seas are *res communis* (common land). *Res communis* means that the sea is common property which belongs to all and cannot be appropriated by anyone in an exclusive manner. The concept of *res nullius* or no man's land, which is applied in the Spitsbergen case, allows states to make claims to no man's land. In the Spitsbergen analogy, which I find difficult to draw, is a question of conflicting national claims to sovereignty by states and nationals pursuing activities in a situation where those sovereignty claims have not been resolved. If the freedom of the high seas is founded

on the concept of *res communis*, it would appear that no state can purport to exercise any measure of exclusivity in that particular area. It is certain that no person can purport to exercise any exclusive rights or exclusive claims in that particular area. That, I think, is the fundamental flaw in the Deepsea Ventures claim. It was purporting to appropriate to its own possession an area which, even if it could be characterized as *res nullius*, could only be appropriated by states themselves. But I tend to think that it is very difficult to characterize the seas as *res nullius* since to do so would immediately admit of the possibility of exclusive claims by states themselves to areas of the seas or the seabed. What Ambassador Aldrich has said about the likely illegality of persons or states appropriating exclusive fisheries to their own use in an area which is legally common property, I think, applies with equal force in the case of seabed nodules. Moreover, if you look at the history of the development of the freedom of the high seas, the primary focus was initially on freedom of transit and communication.¹¹ This runs through the commentary on the law of prize and booty by Grotius.¹² The secondary use of the seas was for fishing purposes. You can take the fish, but you cannot take all the fish. You can simply use the oceans to take some of the fish. To go beyond that and try to apply these notions which developed in respect of the water column to the seabed would be to extend the notion of freedom of the high seas, as it is known in customary international law, beyond permissible limits.

PROF. GOLDIE: Mr. Herman, I would just like to make two fairly empirical points regarding your comments. First, with regard to your view that the Deepsea Ventures claim was seeking to assert some kind of exclusive territorial claim in terms of using the seabed as an extensive resource, the notice of claim said:

Deepsea [Ventures, Inc.] asserts the exclusive rights to develop, evaluate, and mine the Deposit and take, use, and sell all 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 [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.¹³

11. See generally I. BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 207 (1966).

12. For a brief description of this famous work and a summary of where it has been translated into English, see G. GLAHN, LAW AMONG NATIONS 40 (3d ed. 1976).

13. See note 5 *supra*, at 50-1.

When we were drafting this notice of claim we were very concerned to draw the distinction between *profits à prendre* and any assertion of territorial *res corporales* claims—the distinction being the conveyancers' one between incorporeal and corporeal hereditaments.

Secondly, I cannot agree with your historical evaluation of the Spitsbergen situation. The various miners were not seen by the governments of that time as the carriers of state territorial claims. During that period of the late 1880's, it was common knowledge that the occupation of previously unoccupied territory could not be conducted by settlement, as the *Jan Mayen Island*¹⁴ case tells us. Rather, it could be conducted only by acts of sovereignty as the Permanent Court of International Justice told us in the *Status of Eastern Greenland*¹⁵ case, with its twin requirements of the "intention and will to act as sovereign and some actual exercise or display of such authority." There was neither any effective "intention or will" nor "display of such authority" over Spitsbergen before Norway took over the sovereignty of the Archipelago under the Treaty of Paris of 1920. Although case law did not, at that time, exist with regard to Spitsbergen, the theory had already been enunciated that the fact of an American, a Britisher, or a Dutchman digging coal was totally irrelevant as far as the contest of competing sovereigns was concerned. Furthermore, the only countries that actively desired to appropriate Spitsbergen at the time of which we are speaking (1890-1920) were the ones that are still quarreling about it today. They are Norway and Russia. The problem faced by the other countries was that no country wanted to see anyone else exercise full territorial sovereignty over the island. An analogy can be drawn with a dog with a bone that it does not want to chew but regarding which it still drives other dogs away. This was the governmental situation, as I interpreted it, on Spitsbergen at that time. Indeed, President Taft in his message to Congress¹⁶ said that the United States was only interested in protecting the vested rights of American citizens who were engaged in commercial activities on the Island. I just mention this because if we take the Austinian approach, then we necessarily have to look for a government. If a fellow carried a passport to Spitsbergen at that time, we would be tempted

14. *Jacobsen v. Norwegian Government*, [1933] Ann. Dig. 109 (No. 42) (Sup. Ct., Norway 1933).

15. [1933] P.C.I.J., ser. A/B, No. 53.

16. Annual Message of the President to Congress, December 7, 1909, [1909] For. Rels. U.S. IX, at xiii (1914 ed.).

to say, "Aha, you see. He carried a passport." But it might have just been an identity card as far as he was concerned, or he may have forgotten to drop it out of his pocket. We have this propensity to give much weight to slight details because of the way we read the law. We have successfully learned to make a conscious effort to find a legal order without an Austinian sovereign, without a policeman at the crossroads. But the errors connected with Austinian analysis clearly still stultify international legal analysis, unfortunately.

CONGRESSMAN MCCLOSKEY: Professor Goldie, it is always intriguing to a politician when a large mining company seeks to legitimize its operations by hiring a distinguished law professor from a famous university. And I am also somewhat amused that the law professor sits next to a distinguished representative of the Peoples Republic of China whose leader once mentioned that legal rights come out of the barrel of a gun.

I would like to pose to you the question as to whether or not the Spitsbergen example, to which you refer, has not been materially changed by the adoption in 1970 by the United Nations General Assembly of the resolution,¹⁷ in which the United States participated, that the resources of the deep seabed are the common heritage of mankind. In the claim that you filed, you indicated that Deepsea Ventures was not attempting to exert a claim over an area of the seabed. That incidentally is reflected in section 101¹⁸ of the bill that was passed by the House last year in which we said that by enactment of this act, the United States does not thereby assert sovereignty, sovereign or exclusive rights over, or the ownership of, any area of the deep seabed. In that connection, we have recently seen at least two examples where citizens of the world have sought to restrain the exercise of navigation. I refer to the case in New Zealand where the New Zealanders sent a fleet of sail boats to prevent a United States nuclear cruiser from entering Wellington Harbor because of the deep feelings they had against nuclear power. They wanted to keep nuclear power, and any evidence of nuclear power, out of their portion of the world. More recently, a second example is Greenpeace, where United States citizens tried to interpose their small ships between Russian whaling vessels and the resources of the high seas. Whales, we all recognize, customarily

17. The Declarations of Principles, G.A. Res. 2749 (25, U.N. GAOR, Supp. (No.28) 24, U.N. Doc. A/8097 (1970).

18. Deep Seabed Hard Minerals Resource Act, H.R. Rep. No. 3350, 95th Cong., 2d Sess. (1977).

have been subject to capture by ships of various nations. Now, should the United States enact a law which permits United States citizens to explore for minerals in given areas of the South Pacific, for example, where we have told the inhabitants of the islands rather firmly that, while we have the right to protect our 200 mile zone and fish within that 200 mile zone, they do not have the right to prevent our tuna fishermen from going into the 200 mile zones of their respective countries to take tuna since we deem tuna to be migratory prey, can we not then expect that any American unilaterally granted license to harvest the resources in the deep seabed is not going to be met by a fleet of individuals seeking to frustrate the harvesting of those deep seabed minerals. And if a deep seabed mining ship, for example, was frustrated in carrying out its operations under a U.S. license, what would be that ship's and that company's legal rights with respect to those who sought to interpose?

PROF. GOLDIE: That is one of the best hypotheticals I have ever heard.

CONGRESSMAN McCLOSKEY: I do not think it is a hypothetical. If we license and if we continue this kind of unilateral operation, we can expect Fiji Islanders, New Zealanders, and perhaps the Chinese to properly attempt to inhibit our operations as we have seen United States citizens seek to inhibit the Russian whaling operations. The question is very simple: What are the legal rights of the mining companies?

PROF. GOLDIE: I question the adverb "properly." But even that is not the real question. After all, when King Hussan of Morocco sent the great number of poor people into the Western Sahara, he knew this was contrary to the legal rights of Spain and even to the legal rights, at least according to Algeria, of the inhabitants of the territory. But it is very hard when unarmed people interpose their vulnerable bodies between an enterprise or a government and the legalities of the situation. You have to look at the humanistic elements which, I think, are totally dichotomous with the legal ones.

CONGRESSMAN McCLOSKEY: In other words, there is no legal right you can define.

PROF. GOLDIE: The legal rights I think are clear.

CONGRESSMAN McCLOSKEY: But if the legal rights are clear, what are they?

PROF. GOLDIE: The legal rights are that you can proceed with your operation.

CONGRESSMAN McCLOSKEY: Do these rights include ramming the other ship?

PROF. GOLDIE: If they do not obey the rule of the road I would think so. The only instruction I think need be legally given is to comply with the rule of the road.

CONGRESSMAN McCLOSKEY: Does the rule of the road permit a ship steaming in a straight direction to continue that course if another ship crosses its bow?

PROF. GOLDIE: Steam always gives way to sail under the traditional rules.

CONGRESSMAN McCLOSKEY: In other words, the sailing ship that is anchored across the bow of the slowly steaming mining ship has the right to stay there and the mining ship must alter course. But the technology of mining operations, as I understand it, requires a steaming mining ship to pursue a straight course since it is dragging something five miles below it across the surface of the under sea. So what are the rights of three sailing schooners who have stationed themselves across the bow of the slowly steaming mining ship? Who has to give way?

MR. YOUNG: There are also provisions in the rules of the road that require others to yield the right of way if you are displaying the proper signals that you are engaged in certain underwater operations.¹⁹ I think these provisions also apply to other things besides trawling. If you are indicating an operation by appropriate signals, then you have the right to proceed.

PROF. GOLDIE: A preliminary point should be emphasised. While Mr. McCloskey is correct in asserting that whales may be taken without limit as to number, size or species under *customary* international law, the Convention For the Regulation of Whaling of 1946²⁰ and its successor agreements, to which both the Soviet Union and Japan are parties, limit what may be taken in both respects. Much of the anger, according to the news media, among the supporters of the Greenpeace caper is that the whaling activities with which the Greenpeace supporters interfere, are said to be contrary to the whaling conventions. No similar convention, and no customary international law rules, currently exist whereby the mining of manganese nodules is limited to quotas and sizes of these mineral lumps. Furthermore, the sympathy factors which Greenpeace evokes in the case of threatened species of cetaceans have no similar

19. The International Rules of the Road are codified in 33 U.S.C. § 142, et seq. (1976).

20. 16 U.S.C. § 916 (1976).

pull upon the heartstrings when applied to manganese nodules. In the case of these inanimate denizens of the seabed, political interest would appear to focus rather heavily on protecting existing suppliers of nickel, cobalt, tin and manganese, or by expressing personal dislikes of corporate enterprises. The suppliers of the foregoing commodities in Canada, South Africa and the Soviet Union seem especially vulnerable.

I would now like to turn to the more specific aspects of Mr. McCloskey's question. My answer which follows like Mr. McCloskey's question, assumes as given something which may not be true of a mining ship proceeding on her mining operations, namely that she is tracking in the direction in which she is heading. Given this premise, my answer will then turn upon the applicable "rules of the road" to be observed by ships on the highseas—the International Rules. There are two such sets of rules which are immediately relevant. The first tells us that a powered ship gives way to sail.²¹ Thus, if the interposing vessels were sailing (and not powered) ships they would be privileged. This would entail their maintaining their course and speed which they may not be prepared to do. (The Greenpeace interferences seem more to be the darting of small boats about in the track of the whaling vessels.) The second applicable rule of the road provides that vessels engaging in specified activities, including "underwater operations" (e.g. seabed mining), and showing the appropriate shapes by day and lights by night, are the "stand-on" vessels under the new (1977) US Coast Guard Navigation Rules—International (CG-169)—known as the privileged vessels under the old rules and other vessels, which may be on collision courses or on courses that are close to collision courses, with them, whether powered or driven by sail, must take the avoiding action. The stand-on vessels, under these circumstances, not only have the right, but also the duty, of maintaining their course and speed by day or by night.²²

Should the situation become one of *in extremis* a further set of problems may arise, especially for the interfering (blockading) yachtsmen. But there is one basic principle for somebody advising a Greenpeace—type of caper to remember, namely that the vessel which invokes the *in extremis* rule must establish that the emergency in which she finds herself is not the result of her own fault. In the hypothetical situation Mr. McCloskey has envisaged, the

21. See note 19 *supra*.

22. *Id.*

emergency situation would have intentionally been created by the yachtsmen deliberately blocking the path of the privileged ship. In light of the relevant rules of the road, a lawyer is bound by the ethics of his profession to advise persons against taking action which is in breach of the law and against knowingly exposing themselves to the hazard of death.²³ Furthermore, Mr. McCloskey's question does not seem to raise the moral issues which one usually connects, or even may possibly connect, with civil disobedience.²⁴

Finally, with regards to the incident in Wellington Harbor, I have always felt that my former fellow citizens in Australia and New Zealand are every bit as hypocritical as we Americans. They also have nuclear power stations on land so I could never understand why there was such a fuss.

CONGRESSMAN McCLOSKEY: The fuss is occasioned because citizens in those countries, like in the United States, do not necessarily agree with their governmental policies.

PROF. GOLDIE: They still switch the lights on at home.

CONGRESSMAN McCLOSKEY: I am not aware of any action by either the Australian or New Zealand governments to deter those who sought to inhibit the arrival of the United States nuclear cruiser. Nor am I aware of any action by the United States government to stop Greenpeace people from inhibiting the whaling by the Russian whaling fleet. And that particular example, I think, is precise with respect to what the citizens of foreign countries might do to a government licensed mining ship from the United States.

PROF. GOLDIE: This is a very interesting hypothetical and, as formulated by the Hon. Mr. McCloskey, it raises important issues of civil disobedience and, so it seems to me, risks that civil disobedience may occur at sea which do not arise on land. At sea the call of necessity is more stark and primitively selective. Should we paint the devil on the wall and say we cannot do anything because somebody else might make us look like unkind people?

CONGRESSMAN McCLOSKEY: The problem that is faced by the United States Congress right now is that we are asked to enact this legislation because if we do not do so mining companies will not have a favorable investment climate within which to spend the \$500 to \$700 million each that is required to continue with the development of this technology and to proceed with deep seabed mining. If

23. See *e.g.*, Code of Professional Responsibility DR 7-102(A)(8) (1976).

24. For a full discussion of civil disobedience, see R. DWORKIN, *TAKING RIGHTS SERIOUSLY* 206 (1978).

the lack of a license is an inhibiting factor to the proceedings of deep seabed mining companies, conceivably the bankers who finance them might not want to go ahead if they were advised that their investment could not be realized because individuals, acting within their legal rights, could reasonably be expected to effectively block mining operations.

PROF. GOLDIE: I really think that Mr. McCloskey's hypothetical should never be permitted to happen. Lives will inevitably be put at risk. But if it does, I think that there are rules of the road which could mean that whatever ensuing tragedies might occur would be as ineffective as those portrayed in "*Darkness at Noon*," "1984" and "1985."

CONGRESSMAN McCLOSKEY: I only want to say that as lawyers we have an obligation not to try to predict what will happen, but to advise our clients before they make their investments of the worst possible case that could happen.

PROF. GOLDIE: But here is an important ethical point. A lawyer should never advise either criminal activity or activity which predictably would be the target of an injunction. Also, a lawyer who invites a client to put his life at risk is carrying a far weightier burden of conscience than a general who risks the lives of the troops under his command. An ethical distinction is the imperative here.

MR. LEE: Congressman McCloskey earlier asked Professor Goldie whether the customary law has been changed because of the United Nations resolution.²⁵ I feel duty bound to get back to this issue. I think that one of the very basic issues that presents itself is whether there have been any changes in traditional customary law since 1967. I was very pleased to hear that Professor Goldie believes there might be some changes. He gave the example of economic zone practice. With respect to seabed mining, I think that we ought to look at the 1970 General Assembly Declaration of Principles Governing the Sea-Bed and the Ocean Floor and the Subsoil Thereof, beyond the Limits of National Jurisdiction.²⁶ This declaration covers fifteen basic principles which state in essence that the seabed and the ocean floor beyond national jurisdiction as well as the resources of the seabed are the common heritage of mankind and that the seabed shall not be subject to appropriation by any means, by states or persons, natural or juridical, and no state shall claim sovereignty or sovereign rights over any part of the ocean floor. The

25. See note 17 *supra*.

26. *Id.*

declaration further states that the exploration and exploitation of resources of the seabed and other related activities shall be governed by the international regime to be established. Moreover, the exploration of the seabed and the exploitation of its resources shall be carried out for the benefit of mankind as a whole. Finally, the declaration calls for the establishment of an international regime, to give effect to the provisions, by an international treaty of a universal character generally agreed upon.

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.²⁷ At that session, the chairman of the Group of Seventy-seven made a statement proclaiming the illegality of any unilateral legislative action for seabed mining,²⁸ 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.²⁹ It can therefore be seen that since 1970, there has been a universal consensus on the legal position of the seabed regime as indicated by the voting in the most representative organ of the international community.

We all recognize and accept that the United Nations is not a legislative body and cannot pass any binding resolutions. But we also accept as international lawyers that the resolutions from the General Assembly are a form of international law. They are recognized as such within article 38 of the statute of the International Court of Justice.³⁰ I would like to ask Professor Goldie whether or not enough evidence exists, since 1970, to enable us to ascertain the status of international law with respect to the seabed regime. My personal view is that a customary law has already emerged in light of the practice over the last seven years. I was a bit disturbed that

27. The Conference was held in Caracas. Particular attention was focused on the question of the system of exploration and exploitation of the seabed beyond the limits of national jurisdiction. For an analysis of the Conference, see Adede, *The System for Exploitation of the "Common Heritage of Mankind" at the Caracas Conference*, 69 AM. J. INT'L L. 31 (1975).

28. The Group of Seventy-seven is a coalition of developing states now numbering over 100, which come primarily from Latin America, Africa and Asia. Although the Group of Seventy-seven is by no means a solid block of states, it has exhibited a large degree of unity on matters discussed in the seabed negotiations. See *id.*

29. U.N. Doc. A/Conf. 62/Bur/Sr 41 (Aug. 30, 1978).

30. See note 4 *supra*.

Professor Goldie's excellent summary did not cover the more recent developments since 1970.

PROF. GOLDIE: In response to Mr. McCloskey, let me repeat my view that he is using the argument of civil disobedience in terms of the rights of those who disobey. This is what the Moroccans did. I would not advise a client that he should not invest in the X or the Y corporation because it may become the target of civil disobedience. If that were the case, I suppose we should advise against buying stock in Niagara Mohawk while it continues to invest in nuclear power stations.

With regard to Roy Lee's question, my own perception is that the Moratorium Resolution³¹ had such a large opposition and such a large number of abstaining votes that it cannot be regarded as reflecting state practice until very positive acts are taken. With regard to the Declaration of Principles³² there were fourteen abstentions. In addition, I conclude that the state practice is not sufficiently widespread and the custom sufficiently strong to establish his point. The analogies we usually draw upon involve unanimous General Assembly resolutions to demonstrate *opinio juris*. In addition, there is, usually an insistence upon positive, affirmative action by the states to establish the essential element of *factum*, of practice, in the formation of customary international law. This type of action has not been taken with respect to deep seabed mining. But this latter, especially, is an issue of fact. I would respect Mr. Lee's appraisal to the contrary that the declarations of which he spoke and the votes taken are themselves effective. But they do not constitute the essential element of *factum* of state practice. Where are the state laws and the acts and positive interactions of states, the claims and counterclaims, assertions and acquiescence which are as essential to the implementation of the Declarations which, in themselves, let me repeat, have only the quality of the *opinio juris* element. And I must add an important point. When a state seeks to change customary international law, its implementing practice necessarily begins by being in breach of existing international law, and that unlawful practice can only become eventually legitimated by agreement, deference, acquiescence or lack of timely protest—as we were told in the *Anglo-Norwegian Fisheries Case*.³³ Accordingly, it is clearly premature for anyone to say now, in February 1979, that the

31. G.A.Res. 2574 D, 24 U.N. GAOR, Supp. (No.30), U.N. Doc. A/7630 (1969).

32. See note 17 *supra*.

33. [1951] I.C.J. 116.

Moratorium Resolution and the General Assembly's Declaration of Principles have changed the law and reflect the current international law of the sea. This would effectively turn the General Assembly into a full-blown legislature, a capability proposed at San Francisco in 1945 and decisively rejected by the Conference.

AMBASSADOR ALDRICH: In the same debate in the United Nations Conference on the Law of the Sea last September that Roy Lee referred to, Elliot Richardson also made a statement to the contrary effect.³⁴ Lest there be any misunderstanding, I want to make it clear that it is our view that the resolution of 1970 does not have a legal effect. We made that clear at the time we voted for that resolution. The substantive meaning to be given to the phrase "the common heritage of mankind," remains to be given and it would have to be given by the law of the sea treaty. In the absence of agreement in the treaty, we do not think it has any meaning. I would also point out that in 1969 there was another resolution calling for a moratorium on the exploration and exploitation of seabed resources³⁵ which we voted against. You have to keep that in mind in interpreting the 1970 resolution. But I think there are a couple of other factors that we ought to keep in mind as we talk about the subject. For example, we must consider other hypothetical alternatives in addition to the one that Congressman McCloskey posed. 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.

PROF. GOLDIE: What about a General Assembly reference to the International Court of Justice for an Advisory Opinion?

34. Statement by Ambassador at Large Elliot L. Richardson, Plenary, Sept. 13, 1978: Specific allegations have been made here concerning the incompatibility of national legislation with United Nations General Assembly Resolution 2574 D (XXIV) and 2749 (XXV). With respect to the former, the so-called "Moratorium Resolution," I would first note that, while 62 states voted in favor, the United States and 27 other states voted against, and 28 additional states abstained. Clearly, the resolution cannot be said to have commanded overwhelming support. Moreover, the United States Representative was explicit in his explanation of his government's negative vote: "The prohibition which the draft resolution contains is without binding legal effect; that is the case with almost any General Assembly Resolution, and it is certainly the case for any General Assembly Resolution purporting to proscribe standards of conduct for States in the oceans."

See note 27 *supra*.

35. See notes 31 and 35 *supra*.

AMBASSADOR ALDRICH: The possibility exists that there would be, before this happened, a decision of the International Court of Justice that would take a clear position on the issues. The other thing that I thought was relevant that really has not been mentioned is that we must consider the importance of the resources in question. Professor Goldie referred, in general terms, to the world's potential needs for some of the metals. I think the key word here is potential. 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. Today there is the possibility of petroleum on the outer edges of the continental shelf, beyond what states claim is the 200 mile exclusive economic zone under the treaty. Therefore, all the states with broad continental margins, thinking that they might have petroleum out beyond the 200 mile zone, are absolutely insistent in this conference that coastal state jurisdiction over those resources must extend as far as there are any resources. That is the other big unresolved issue in the conference in addition to seabed mining. There is no question that there will not be a treaty to which those states are a party if petroleum resources are going to be left to the tender mercies of an international seabed authority. Therefore, I suggest that the present state of affairs is a negotiation about a potentially very valuable resource in the future. Now, our need for the resource is not an immediate, pressing one, and that naturally will be seen as reducing to some extent the force of our argument. But viewing the law as dynamic as well as relating to the facts and the perceived needs of the time, I think that in the future when this issue reappears it may also look very different from a legal point of view.

MR. HULL: I think that it is quite clear that although we are

talking about deep seabed mining, and about the manganese, copper, cobalt and nickel that is contained in these nodules, we are also talking about a good deal more, as Congressman McCloskey's hypothetical so clearly pointed out.