An Illusion of Camelot, the Validity of a Claim, and the Consequences of the Negotiations: The Great Nodule Spectacle

R. Sebastian Gibson

Follow this and additional works at: https://digital.sandiego.edu/sdlr

Part of the Law Commons

Recommended Citation
Available at: https://digital.sandiego.edu/sdlr/vol13/iss3/10

This Comments is brought to you for free and open access by the Law School Journals at Digital USD. It has been accepted for inclusion in San Diego Law Review by an authorized editor of Digital USD. For more information, please contact digital@sandiego.edu.

INTRODUCTION

In olden days, shortly before the black plague of Watergate spread across the land, the nations of the world met together at King Arthur's round table and, enchanted with the wonder of some magic rocks found to be growing all over the ocean floor, stared at a map of the world's oceans and spoke the magic words in unison, "Common Heritage of Mankind." But something went amiss. Perhaps the spell was wrong or perhaps not all the participants were awake. In any event, no lightning bolts struck, no music resounded through the halls of the United Nations, and no general feelings of good will and brotherhood swept over the nations' representatives. While some nations had visions of Camelot and world government, others thought only of the sea as a source of new power and wealth.

* The author would like to thank the following people for their invaluable help with this article: Professor E.D. Brown, University of Wales Institute of Science and Technology, Faculty of Law; Professor H. Gary Knight, Louisiana State University Law School; Professor William Lynch, University of San Diego School of Law; Professor S. Smith, University of Utrecht, Netherlands; and Dr. John Mero, President of Ocean Resources, Inc., La Jolla, California.
A decade before the concept of "common heritage" became com-
mon verbiage,¹ the mysterious words "manganese nodules" were
virtually unknown. When they began to arrive on the scene, some
called them black gold; others called them burned potatoes.² The
thought was the same—new riches. From this began the Great
Nodule Spectacle.

The spectacle all started quite harmlessly. Over one hundred
years ago some strange, stone-like objects were found by the
British in the Atlantic Ocean.³ But they did not sparkle. And
while they looked like potatoes, they were quite useless for fish
and chips. So the rocks were relegated to the shelves of some
museum. Some eighty years later when it began to appear there
might exist up to 1.5 trillion tons of these rocks, an unknown
graduate student at Berkeley was asked to examine one of these
rocks to see if it was good for anything. Although his findings
were favorable, they were ignored.⁴

Then after some years, politicians and governmental advisors
from developing countries took over the role of public relations
agents for the rocks and transformed their image from that of a
nuisance to a cornerstone of a new economic order. In the tradi-
tion of Camelot, they then donated, at least in principle, the
magnanimous gift of these rocks to the unknowing poor people of
the world. Finally, most of the studies of the actual economic
potential of manganese nodules were kept confidential in the hands
of the mining industries. The press and general public, on the other
hand, were left to make their own calculations and conclusions with
respect to the intrinsic worth of these rocks.

The result was this. Someone in the middle of the night, still
half-asleep, came to the conclusion that 1.5 trillion tons of nodules
worth 100 dollars per ton equalled 150 trillion dollars just waiting

¹. It subsequently became "common garbage," according to some writers
and industry leaders of a few countries.

². This was the Wall Street Journal's description of manganese nodules
mentioned by Senator Metcalf, in Hearings on Amendment No. 946 to S. 1134
Before the Subcomm. on Minerals, Materials and Fuels of the Senate Comm.

³. News release issued by Kennecott Copper Corporation, in id. at 796-56.

⁴. The findings of that student were that not only were deep-sea nod-
ules an apparently less expensive source of various industrially useful
metals, but that they were also highly advantageous from an ecological
standpoint. His findings, however, were greeted by the mining industry
with a "monumental and almost total lack of interest." Mero, The Great
Nodule Controversy, in LAW OF THE SEA: CARACAS AND BEYOND 343 (Pro-
ceedings of the Ninth Annual Conference of the Law of the Sea Institute,
1975).
for the first country with the right vacuum cleaner technology to
gather it up off the ocean floor. Developing countries, convinced
that these nodules could form the basis of a new economic order
in the world, pushed through the United Nations resolutions calling
for the establishment of an international regime (authority) to
regulate the exploitation of seabed resources. These resolutions
also declared the seabed and ocean floor to be the common heritage
of mankind. Today the negotiations for the establishment of this
seabed authority threaten the successful conclusion of a new law
of the sea treaty.

The revenue expected to be accumulated from deep-sea ex-
ploration of nodules, however, cannot merely be calculated by
multiplying the number of tons of nodules by the value of metal
per ton on the assumption that there will be a market for all the
metals that can be swept up from the ocean floor. The calculation
that there exists 150 trillion dollars worth of minerals just wait-
ing for the first country to come up with a big enough vacuum
cleaner that works under water fails to take into account the
extent of the market for the metals at any price and the cost of
extracting the minerals from the sea.

The gross value of the world land-based production of the metals
which can profitably be processed from manganese nodules in 1967
only amounted to slightly over 6 billion dollars. The profit from

5. See text accompanying notes 98 & 99 infra.
6. Testimony of the Under Secretary of State for Security Assistance,
Carlyle E. Maw, Special Representative of the President and Chief of the
United States Delegation to the Third United Nations Law of the Sea Con-
ference before the Senate Subcommittee on Mining, Materials and Fuels,
Oct. 29, 1975, accompanying letter from Pamela L. Smith, Department of
State, to Sebastian Gibson, Nov. 4, 1975.
7. See generally Newman, The Great Ocean Mining Race $200,000,
000,000 Beneath the Sea, in Hearings on Amendment No. 946 to S. 1134,
supra note 2, at 1328-31.
8. The four most abundant minerals in manganese nodules are man-
ganese, copper, nickel and cobalt. Manganese recovery, however, is likely
to be the most expensive stage of nodule processing. Cost estimates for
various methods of nodule processing indicate that production of manganese
oxide from nodules will not be competitive with land-based production of
manganese ore. Hence, most processes under consideration do not provide
9. LaQue, Prospects For and From Deep Ocean Mining, 5 MARINE TECH-
NOLOGY Soc'y J. 14 (1971). The total gross value of world production in
1967 for copper, nickel and cobalt (the only minerals likely to be processed

669
mining these minerals had to be considerably less. Even using high United Nations projections of world demand in 1980 for these minerals at 1974 prices, the gross value would still amount only to about 20 billion dollars. To arrive at the profits for the mining of these minerals from the sea, the cost of mining them must yet be subtracted.

Reducing even more the profit to be made from deep-sea mining is the fact that it is highly unlikely that such operations will totally displace the present land-based world market of these minerals. The profits to be shared by the mining companies with any international regime to be established will be even less if the international regime is controlled by the developing countries and takes measures to protect the present markets and economies of the countries which currently export these minerals.

If there are any profits left after the funds are expended to pay administration expenses of the seabed authority, they will be shared among the developing countries. Formerly the developing countries numbered 77 and their proposals put forward to the United Nations were recognized under the name, the Group of 77. Today, however, the Group of 77 numbers 105. Any percentage of the profits from seabed mining shared among these 105 States, even on an annual basis, will simply not go very far to help the poor people of the world. It is even more impossible that the profits to be shared from manganese nodules will do much to adjust the relative prosperity between developed and developing countries.

While manganese nodules may not do much to improve the prosperity of developing countries, they do provide a sufficient possibility of profits on a scale attractive to the mining industry.

from manganese nodules) in this article was estimated to be $6,000,965,000. This estimate is even higher than the estimate for total gross value of world production in 1968 of $5,663,400,000 found in U.N. Doc. A/AC.138/36 (1971).

10. Hearings on Amendment No. 946 to S. 1134, supra note 2, at 1132.
11. Id., at 1012.
12. Copper, 1980 need—12,147,692 short tons @ $0.68 per lb. = $8,120,652,861,120; nickel, 1980 need—1,232,000 short tons @ $1.62 per lb. = $3,991,680,000; cobalt, 1980 need—40,656 short tons @ $3.10 per lb. = $252,067,200. Total gross value is $20,764,608,320.
13. See Mero, supra note 4, at 348:
Even if we could magically produce a $100 billion plant to produce a $10 billion profit by stuffing 10 times the copper, nickel, cobalt, etc., down the world consumer’s throat that he is not swallowing, there still would not be sufficient funds in that $10 billion profit to carry the bureaucracy, which would surely spring up to administer the deep-sea mining operations if the world enterprise concept [the proposed International Regime] is used to produce metals therefrom.
14. LaQue, supra note 9, at 9. See Mero, supra note 4, at 349.
In the United States, three companies\textsuperscript{15} are actively preparing to mine the ocean bed, and a fourth is developing technology for deep-sea mining on a smaller and less expensive scale than the other companies.\textsuperscript{16} 

On November 14, 1974, one of these companies, Deepsea Ventures, Inc., filed with the Secretary of State a notice of discovery and a claim of exclusive mining rights to a deposit of manganese nodules lying on the seabed at a location incontrovertibly seaward of the limits of national jurisdiction and requested diplomatic protection and protection of their investment.\textsuperscript{17} Because of the failure of the third session of the United Nations Conference on Law of the Sea to achieve progress in Geneva in 1975, Deepsea's claim, based largely on international customary law, has assumed a new importance.

Even if a new law of the sea treaty is completed, it may take many years before it is approved by the various States, and even then it may not be subscribed to by a significant number of nations.\textsuperscript{18} In the event of a treaty having no binding force, claims such as Deepsea's supported by domestic legislation can be expected to be the order of the day.

Deepsea is the first company to request diplomatic protection from the United States government for a claim to exclusive rights to mine an area of the seabed of the high seas. If the United States government explicitly or implicitly gives protection to Deepsea's claim through domestic legislation, there will be a significant impact on international law and on the current law of the sea negotiations.

The purpose of this Comment is to determine the validity of

\textsuperscript{15} These companies are Deepsea Ventures, Inc., Summa Corp. and Kennecott Copper Corp.

\textsuperscript{16} This company is Ocean Resources, Inc.


\textsuperscript{18} E.D. BROWN, THE LEGAL REGIME OF HYDROSPACE 81 (1971).
Deepsea’s claim and any other such claim in international law, to analyze the interests involved in the United States Government’s policy toward deep-sea mining, and to reflect on the direction international law is headed with regard to mining in the high seas.

THE VALIDITY OF DEEPSEA’S CLAIM IN INTERNATIONAL LAW

One method of determining the legality of a situation or claim in international law is to use the sources to which the International Court of Justice would look in its determination of a dispute. Article 38(1) of the Statute of the International Court of Justice states that the Court, whose function is to decide such disputes as are submitted to it, shall, in accordance with international law, apply:

a. international conventions, whether general or particular, establishing rules recognized by the contesting states;
b. international custom, as evidence of a general practice accepted as law;
c. the general principles of law recognized by civilized nations;
d. subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.19

Adopting a similar approach in analyzing the validity of Deepsea’s claim, this Comment will look to international customary law, international conventions, writers, judicial decisions, State practice, United Nations General Assembly resolutions, and recent sessions of the Third United Nations Conference on the Law of the Sea.

Deepsea’s Claim

The claim filed with the Secretary of State by Deepsea is for exclusive mining rights to a deposit of manganese nodules on the ocean floor and is accompanied by a request for diplomatic protection and protection of its investment.20 The deposit is located on the seabed in the Pacific Ocean in water depths of 2,300 to 5,000 meters, more than 1,000 kilometers from the nearest island and more than 1,300 kilometers seaward of the edge of the nearest continental margin. It is beyond the limits of seabed jurisdiction claimed by any State, thus the overlying waters are incontrovertably high seas. Deepsea’s claim is to an area of approximately 60,000 square kilometers21 with the “exclusive rights to

20. See note 17 supra.
21. This rather large area, Deepsea asserts, is for purposes of development and evaluation and would be reduced by Deepsea to 30,000 square
develop, evaluate and mine the Deposit and to take, use, and sell all of the manganese nodules in, and the minerals derived, therefrom."

The cost of prospecting, exploration, design and testing efforts required to identify and evaluate the potential of the deposit has already been approximately 20 million dollars. Deepsea estimates the cost of its scheduled development and further exploration and evaluation of the deposit over the next three years will be between 22 and 30 million dollars. This does not include the costs of production mining equipment, ships, terminals, or processing plants. These latter costs are estimated to exceed 120 million dollars and are scheduled by Deepsea to commence at the end of the three-year period of further development and evaluation of the deposit now in progress.

Public notice of Deepsea's claim has been made through newspapers in the major countries of the world. In an effort to seek support and diplomatic protection from the United States government for its claim, Deepsea has also sent copies of the claim filed with the Department of State to various Senate committees and United States government officials. There are, however, many considerations involved in the State Department's decision whether to give support, one of which is the validity of Deepsea's claim under international law.

**International Customary Law Prior to the Continental Shelf Doctrine**

In determining the validity under international law of Deepsea's claim today, it is valuable to study the treatment of past claims

kilometers 15 years after the date notice was filed with the United States Secretary of State, or upon commencement of commercial production from the deposit, whichever occurs first. The claim also states that the general area of the deposit was identified in August of 1964 by the predecessor in interest of Deepsea, and that the deposit was discovered by Deepsea on August 31, 1969. Notice of Discovery, supra note 17, at 52.

22. Id. at 53.
23. Deepsea hopes to commence commercial production of the deposit within 15 years at an initial rate of approximately 1.35 million wet metric tons of manganese nodules per year, which rate may be expanded according to market conditions to as much as 4 million wet metric tons per year. The company intends to process the nodules at a land-based processing plant. Id. at 60, 62.
24. Id. at 63-65.
to the seabed prior to the date such areas were claimed to belong to the coastal State under the Continental Shelf Doctrine. Before the Doctrine of the Continental Shelf emerged as a positive rule of international law, the seabed beyond the limits of national jurisdiction embraced the abyssal ocean floor as well as the continental margin up to the seaward limit of the coastal State's territorial sea. Indeed, scientists were not even aware of the geomorphic difference between the continental shelf and deeper seabed areas until the late nineteenth century. It was not until the middle of the twentieth century that this geomorphic difference was recognized in international law, and a distinction was made between the continental shelf and the deeper submarine areas.\(^2\)

Prior to the emergence of the Doctrine of the Continental Shelf, national jurisdiction over the seabed generally extended only to the outer limit of the territorial sea. However, in some areas beyond the territorial sea a number of States acquired sovereignty or exclusive rights to seabed resources by exploiting the seabed in these areas and excluding other States from doing the same. Although there was some disagreement among writers as to whether the legal nature of the seabed beyond territorial waters was *res communis* or *res nullius*, there was no suggestion that the legal nature of the continental shelf, margin or rise was different than that of the rest of the ocean floor.\(^2\^6\)

It was not until advances in offshore petroleum technology made drilling beyond territorial waters feasible that States began to claim sovereign rights to vast areas of the continental shelf. These claims gave rise to the Doctrine of the Continental Shelf which extended national jurisdiction to include seabed areas beyond territorial waters that had previously been appropriated by exploitation and force.\(^2\^7\)

International law prior to the Doctrine of the Continental Shelf did not distinguish between the shelf and deeper parts of the seabed. It would thus appear that State practice on the continental shelf prior to the Doctrine, as well as State practice beyond the continental shelf, can be looked to as evidence of the law applicable to the seabed beyond the limits of national jurisdiction today.

An argument can be made, however, that when the Continental Shelf Doctrine was adopted, it was adopted under the condition, *inter alia*, that the right of the coastal State to appropriate

\(^2\) See 1 D.P. O'CONNELL, INTERNATIONAL LAW 571-72 (1965).
\(^2\) Id.
\(^2\) Id.
resources of the seabed for its exclusive use was limited to some distance from the coast. From this it might then be assumed that the nations who formulated the concept of the continental shelf must have intended that the resources of the area beyond would not be subject to exclusive appropriation.  

However, it is unlikely that such an intention can be assumed or is capable of ascertainment. Moreover, it is just as arguable that such a consequence does not logically follow from the emergence of the Continental Shelf Doctrine. Prior to the Doctrine, coastal States claiming jurisdiction and exclusive rights to seabed resources exhibited no signs of self-restraint in exploiting the seabed.  

Today, any belief that the coastal States' exclusive rights are limited to the marine resources on the continental shelf has fallen by the wayside as a consensus develops for the acceptance of a 200-mile exclusive economic zone. This zone, if adopted, will give exclusive rights to the coastal State of the marine resources of the seabed out to 200 nautical miles from the coast regardless of where the continental shelf ends.

Furthermore, article 2(2) of the 1958 Convention on the Continental Shelf specifically states: “The rights of the coastal State over the Continental Shelf do not depend on occupation, effective or notional, or any express proclamation.” Rather, the Continental Shelf Doctrine as interpreted by the International Court of Justice in the North Sea Continental Shelf Cases rests predominantly on a supposed right of the coastal State to the natural prolongation of its territory into the sea. It would seem, therefore, that the importance of past claims to the seabed of the high seas made on other grounds such as occupation are in no way affected by the Continental Shelf Doctrine. Indeed, the customary international law surrounding these past claims is applicable to Deepsea's claim today.

29. See text accompanying notes 33-34 infra.
32. In the North Sea Continental Shelf Cases, the International Court of
The rights exercised by States on the shelf were recognized long before the Doctrine of the Continental Shelf was ever considered. As early as 1758 the pearl fisheries of Bahrein and Ceylon were recognized as lawful property of those States. Prior to the emergence of the Continental Shelf Doctrine, numerous States exercised jurisdiction or exclusive rights over the seabed resources in waters beyond the limits of territorial jurisdiction.

**The Status of the Seabed Under the High Seas and the Basis for Its Appropriation**

The status of the seabed under the high seas is important in two respects. First, the basis of seabed appropriation is dependent upon the status of the seabed and the criteria for assessing the validity of claims. Second, the applicability of the 1958 Convention on the High Seas to seabed appropriation may also be dependent upon the seabed's status.

Opinions of writers and United Nations Conference delegates have been divided concerning the status of the seabed under the high seas. A few authorities in the past have taken the view that the surface of the seabed beyond the waters of territorial jurisdiction has the same legal status as the high seas. Under this view the seabed is merely the bottom of the sea and its use is free to any State. Exclusive rights would be obtainable, if at all, only through the acquiescence of all the other States. Other writers have consid-

---

Justice stated that the Truman Proclamation of 1945 was the “starting point” of the Continental Shelf Doctrine. While the Truman Proclamation of 1945 was not the first instrument to declare rights over continental shelf areas, the court felt it had a special status. Similarly, the report of the Special Master in *United States v. Maine*, concluded that a new rule of international law was initiated by the Truman Proclamation. The court felt it had a special status. Similarly, the report of the Special Master, *United States v. Maine* at 79-80, No. 35 (U.S. Oct. 1973). This Comment, therefore, will consider State practice on the continental shelf prior to the date of the Truman Proclamation.


34. Some of these States included Algeria (coral), Australia (pearl), the Bahamas (sponge), British Honduras (sponge), Ceylon (chank and pearl), Cuba (sponge), England (oyster), Egypt (sponge), France (oyster), Greece (sponge), Ireland (oyster), Italy (coral), Japan (coral), Libya (sponge), Mexico (pearl), Panama (pearl), the Persian Gulf States (pearl), the Philippines (pearl), Sicily (coral), Tunisia (coral and sponge), Turkey (sponge) and Venezuela (pearl). Testimony of the Honorable Phillip C. Jessup, in Report of the Special Master, *United States v. Maine* at 173-230, No. 35 (U.S. Oct. 1973).

ered the seabed not merely as part of the sea, but as territory covered by the sea, and thus res nullius. These writers argued that sovereignty can be acquired over the seabed, as it may be over land, by 'effective occupation' without the acquiescence of other States and subject only to no unreasonable interference in the free use of the high seas above.

The rationale for keeping the oceans free from occupation by any State is that the oceans are an international highway which connects distant lands and secures freedom of communication and commercial intercourse between States separated by the sea. There is no reason for extending this freedom of the open sea to the subsoil beneath its bed. While most legal writers have long assumed that sovereignty or exclusive rights with respect to areas of the seabed of the high seas are capable of acquisition, they have been plagued by what should be the criteria in determining whether such rights have indeed been acquired.

Oppenheim recognized that while immemorial usage was often present in these cases, it was not required in order to make valid the claims to exclusive seabed rights beyond the limits of national jurisdiction. Instead he found it more in accord with State practice to recognize that "as a matter of law, a State may by strictly local occupation acquire sovereignty and property in the


38. O'Connell, Sedentary Fisheries and the Australian Continental Shelf, 49 Am. J. Int'l Law 185 (1955). Oppenheim argued as well that there was a distinct difference between the law applicable to the seabed of the open sea and the subsoil beneath it on the one hand, and the waters of the open sea on the other.

There has been a tendency in the past to assume that the surface of the bed upon which the open sea rests must be likened in legal condition to the waters of the open sea themselves. But when regard is had to the arguments which brought about the abandonment of the former claims to occupy the water of the open sea, and the argument that the freedom of the waters of the open sea is essential to the freedom of intercourse between States (the main practical reason), it must be conceded that these reasons do not apply to the surface of the sea-bed or to its subsoil. L. Oppenheim, International Law § 287bb, at 628 (8th ed. H. Lauterpacht 1962).
surface of the sea-bed” so long as that in doing so there was no interference with freedom of navigation.39

Professor Waldock concluded that once exclusive rights to seabed resources were recognized by the international community as valid in law, they belonged to the claimant States by reason of their actual enjoyment of the areas and particular claims to exclusive jurisdiction.40 In agreement, the Special Master in United States v. Maine held Professor Waldock’s conclusion to be an accurate summation of international law on the subject.41

In cases where exclusive State rights in sedentary fisheries have been recognized, the existence of long usage is best viewed as an evidentiary factor justifying the appropriation, and not as the basis itself.42 At the same time, there has been present in all these cases an element of effective usage, and on this basis other writers have found “occupation” to be the legal basis for such rights.

More recently, a number of writers,43 have adopted a more logical approach to this rather sterile dispute over “an awkward corner of international law that has tended hitherto perhaps to remain too near to its private law origins.”44 Speaking of historical consolidation of title, Professor de Visscher writes:

Proven long use, which is its foundation, merely represents a complex of interests and relations which in themselves have the effect of attaching a territory or an expanse of sea to a given state. It is these interests and relations, varying from one case to another, and not the passage of a fixed term, unknown in any event to international law, that are taken into direct account by the Judge to decide in concreto on the existence or nonexistence of a consolidation by historic titles.45

Along these same lines, Professor Schwarzenberger has commented: “The more absolute a title becomes, the more apparent becomes the multiplicity of its roots. In its movement from relativity to absolute validity, it undergoes a process of historical consolidation.”46

A realistic approach to the subject must also recognize that the

39. L. OppenheIm, International Law 575-76 (7th ed. 1948).
40. Waldock, supra note 37, at 118.
42. 1 D.P. O’Connell, International Law 516-17 (2d ed. 1970).
43. See, e.g., E.D. Brown, supra note 18, at 83-85.
two most important and basic elements in establishing title were power and indifference. In the few cases where indifference to claims of submarine areas was not involved, power to exclude challengers made these claims effective. The use of force today, however, would be allowable only in the most extreme circumstances, such as in self-defense to protect goods or territory already acquired.

As Professor Brown has stated, “the search for the correct basis of submarine titles in either ‘occupation’ or ‘prescription’ seems rather futile.” It is more rational to recognize that in the acquisition of exclusive rights to submarine areas today, effective control along with acts of acquiescence, recognition, and lack of protest together constitute the “complex of interests and relations” which will give credence to claims. Thus as a practical matter, the acquiescence by the international community to a claim such as that of Deepsea’s is of paramount importance. Where there is protest instead of acquiescence by the international community, such a claim must fail.

Effective Occupation

International judicial decisions have held that in the acquisition of sovereignty over land, occupation of the territory must be effective under international standards. Deepsea’s claim is for exclusive rights to the resources of the seabed and subsoil; it is not to sovereignty. Whether the same standards and case precedents relating to sovereignty are equally applicable to claims of exclusive rights cannot be stated with any assurance. Therefore, caution must be taken in applying the international decisions to Deepsea’s claim.

47. A factor which allowed exercise of this power was the fact that all such claims to sedentary fisheries were made by the coastal State in each case. The question thus arises whether these exclusive rights were acquired on the basis of that reason, or on some other legal basis. Waldock wrote on this point: “It is true that such claims to resources of the sea-bed or subsoil were made only by coastal States but they were justified as acts of occupation, not as the natural rights of coastal States.” Waldock, supra note 37, at 118. Contra Biggs, Deepsea’s Adventures: Grotius Revisited, 9 Int’l Law. 271, 278 (1975).
49. E.D. Brown, supra note 18, at 84.
50. Id.
The degree of occupation required to constitute an effective occupation giving territorial sovereignty over an area has been held to vary with the susceptibility of the area to occupation. Furthermore, in instances where States acquired sovereign or exclusive rights to sedentary fisheries in seabed areas beyond national jurisdiction, there was very little physical occupation of the seabed and minimal protection of the deposits against other States. Nevertheless, titles to the deposits were generally recognized in international law as belonging to the State exercising exclusive rights over the deposit.

Under these variable international standards, Deepsea might satisfy the criteria for effective occupation. Indeed, the activities

51. There are three leading international decisions which show the degree of occupation required to constitute an effective occupation giving territorial sovereignty. The Island of Palmas Case, 2 U.N. Rep. Int'l Arb. Awards 829 (1928), Hague Court Reports 2d (Scott) 83 (Perm. Ct. Arb. 1928) involved a dispute between the United States and the Netherlands over title to Palmas, an island between the Philippines and the Dutch East Indies. By agreement, the United States and the Netherlands submitted the dispute to the Permanent Court of Arbitration. The arbitrator held that the control exercised by the Dutch East India Company was a sufficient exercise of State authority to vest title to Palmas in the Netherlands. Observing the degree of authority which had been required in other cases to establish sovereignty, the arbitrator concluded that the authority required to be exercised may vary with the nature of the area in question.

The Clipperton Island Arbitration, 2 U.N. Rep. Int'l Arb. Awards 1105 (1949), 26 Am. J. Int'l Law 390 (1932) involved a dispute between France and Mexico over an uninhabited coral reef off the coast of Mexico in the Pacific Ocean. King Victor Emanuel III of Italy, acting as arbitrator, held that two acts done by French authorities over a 39-year period—a naval reconnaissance and the granting of a concession to exploit guano—were sufficient in this case to constitute effective occupation and give title to the island to France. The arbitrator established a flexible test to determine “occupation.” By this test, occupation giving title is accomplished when the occupying State reduces the territory to its possession and takes steps to exercise exclusive authority. In ordinary cases, a legal authority must be established and respected in the territory. Where, however, the territory is uninhabited from the first moment the occupying State makes its appearance there, possession and occupation is accomplished.

The Legal Status of Eastern Greenland Case, P.C.I.J., ser. A/B, No. 53 (1933), 3 Hudson World Court Rpts. 148 (1938) involved a dispute between Denmark and Norway over unsettled areas of Greenland. The case arose from Denmark's request of the Permanent Court of International Justice to declare unlawful Norway's proclaimed right to certain parts of Eastern Greenland in 1931. The court held that, given the arctic and inaccessible character of the unsettled parts of Greenland, the display of Danish authority over settled areas, the intention of Denmark to act as a sovereign over all areas, and an assurance by a Norwegian Foreign Minister that Danish sovereignty would meet with no difficulties on the part of Norway, Denmark's claim to the unsettled areas was sufficiently supported. The court's rationale was that, particularly in thinly populated or unsettled countries, very little is required in the way of actual exercise of sovereign rights, provided that another State cannot make a superior claim.
of a sole nodule-recovery ship, exploration and evaluation of the deposit, reasonable diligence in exploiting the deposit and an intention to exercise its rights over the claimed area, reasonable in size, might be held to constitute an effective occupation in light of the inaccessible character of the territory. Again, however, it must be recognized that effective occupation without the acquiescence of the international community would not be sufficient in itself to give exclusive rights to the occupier.

Rights of Private Corporations and Individuals Under International Law

Even if it is found that the seabed could be effectively occupied under international standards, there remains the question of whether a private corporation such as Deepsea, apart from its sovereign State, can acquire exclusive rights to natural resources in seabed areas beyond national jurisdiction. In the past, international law adopted a strict orthodox rule that only States were subjects of international law, and were capable of acquiring international rights.

Whoever ill-treats a citizen indirectly injures the State, which must protect that citizen. The sovereign of the injured citizen must avenge the deed and, if possible, force the aggressor to give full satisfaction or punish him, since otherwise the citizen will not obtain the chief end of civil society, which is protection.52

In many international tribunal cases involving injuries to persons, the tribunals have given recognition to the orthodox theory but have treated the injury in question as essentially an injury to the individual rather than as an injury to the sovereign.53

Although awards by international tribunals for injuries to persons invariably have been justified on the grounds that the injury was to the person's State, the amounts of awards always have been determined on the basis of the amount of damage suffered by the person. As Philip C. Jessup has observed, if injury to the person's State were the true basis of damages, "the measure

52. E. VATTEL, supra note 33, at 136.
53. See, e.g., Administrative Decision V of the Mixed Claims Commission (United States and Germany 1924), in ADMINISTRATIVE DECISIONS AND OPINIONS OF A GENERAL NATURE AND OPINIONS IN INDIVIDUAL LUSITANIA CLAIMS AND OTHER CASES TO JUNE 30, 1925, at 192 (1925).
of damages to be paid for an injury would vary with the importance of the role played by the injured individual in the life of the State of which he is a citizen. In practice, international tribunals have not considered the importance of the individual to his State to be a relevant factor in computing awards.

There is considerable evidence in both practice and theory that the international legal personality of the individual is becoming recognized. The fact that an individual or corporation usually lacks procedural capacity to assert rights before most international tribunals does not signify that he is not a subject of the law or that the rights in question are vested exclusively in the individual's State which possesses the capacity to bring suit. In national courts, for instance, it has long been recognized that individuals and corporations may enforce international legal rights.

Perhaps partly because the individual in most States has no legal right under the domestic law to compel his foreign office to press his claim in an international forum, the trend of modern developments of international law is the granting of procedural capacity to individuals for the protection of certain well-defined rights.

Recognition of individuals as subjects of international law has been furthered in the United Nations, and even more so in Europe. The Charter of the United Nations declared the determination of the peoples of the United Nations to reaffirm their faith in human rights. On December 10, 1948, the General Assembly adopted the Universal Declaration of Human Rights. The meaning and intent of this document is clear. It spells out the human rights that are considered fundamental and then provides that everyone has the right to an effective remedy by his national tribunals for acts violating the fundamental rights granted him by constitution or by law.

In Europe, the Declaration was quickly implemented. On November 4, 1950, the Council of Europe adopted the European

---

58. Id. at 463.
59. M. Sorensen, supra note 56, at 266. This trend has been noted by numerous legal scholars. The proposition that individuals are subjects of international law, and as such have international rights and duties, has formed the basis for numerous legal books. See, e.g., P. Jessup, A Modern Law of Nations (2d ed. 1968).
Convention for the Protection of Human Rights and Fundamental Freedoms. This Convention includes within its provisions most of the human rights declared by the United Nations to be fundamental and creates machinery for their enforcement, a Commission of Human Rights and a Court of Human Rights.61

One of the significant features of the Convention is that it affords an opportunity, albeit limited, for an individual person to seek redress. He may make petition, through the Council of Europe, to the Commission, if the party State against whom he petitions has recognized the competence of the Commission to receive such petitions. Thereafter an individual cannot take his case to the court, but the Commission can do so for him.62

While the trend is to recognize the procedural capacity of the individual to the protection of certain well-defined rights in international law, it is still the general rule today that an individual or corporation of the United States must rely on the Department of State to enforce its rights and claims against other nations. However, this trend toward the recognition of individual rights in international law does lend authority to the view generally that the individual, and perhaps the corporation as well, does have rights and duties in international law. Whether one of these rights is the right to claim exclusive rights with regard to territory not within the jurisdiction of any State must be determined by looking to State practice.

State Practice

One example where the United States State Department has afforded protection to the claim of a private United States com-

61. Id. at 13.
62. Id. The Common Market has also furthered individual rights in international law. The European Communities Treaties for the Common Market provide a Court of Justice with the jurisdiction to quash any measure taken by the Communities' Council of Ministers or the European Commission which is shown to have been ultra vires. The Court also has jurisdiction to quash any measure which constitutes an infringement of the procedural rules of the Treaty or of any rule of law relating to its application or misuse of its powers. This jurisdiction to quash can be invoked by any natural or legal person if the decision is of a direct and individual concern to him, as well as by the Council, Commission or any member State. Further, under articles 175 and 215, it would appear that an aggrieved person, should he be successful, would be able to obtain monetary compensation along with the quashing of the illegal measure. Id. at 23.
pany to natural resources beyond national jurisdiction is in the case of Spitzbergen Island. In this instance, when the American company acquired rights on Spitzbergen, the island was considered by all the States with interests in the island to be terra nullius, i.e., not subject to the jurisdiction of any State.63

The history of Spitzbergen goes back to the late 16th and early 17th centuries when English and Dutch whalers discovered the archipelago and main island of Spitzbergen, and established extensive summer settlements there. In 1614, King James I of England proclaimed the main island to be annexed to England and named it King James his Newland.64 The Dutch contested this claim. In later years after the fishery for whales ceased, the two States' territorial pretensions were not pressed, but to their claims were added those of the Danish, Russian, German and Norwegian. Ultimately the claims led to a diplomatic standoff. However, each country was prepared to accept the status of the archipelago to be terra nullius, provided all other interested parties did the same.65

The United States expressed a special interest in the islands, due to the business interests of the Arctic Coal Company, a Boston enterprise. In 1906, the Arctic Coal Company had purchased from a Norwegian company a coal-bearing tract on which the Norwegian company had filed a claim with both the Norwegian Foreign Office and Department of the Interior. Three other tracts were purchased by officers of the Arctic Coal Company and were worked by the company. The same year, the Arctic Coal Company filed with the State Department a claim of exclusive rights to all coal within these tracts. Importantly, Norway, like Russia, the United States and other interested States, did not press territorial claims, but agreed that the archipelago was terra nullius.66

In the decade before World War I, Norway attempted to raise support, through diplomatic activity, for a regime recognizing the archipelago's status as no man's land, but giving Russia, Norway and Sweden a more powerful voice in the islands' administration. However, after World War I, the nine interested States decided to recognize Norwegian sovereignty over the islands, in the 1920 Treaty of Paris. The treaty also recognized and preserved the estab-

64. Id. at 505.
65. Id. at 506.
66. Id. at 507.
lished rights of citizens of the signatory states to exploit their coal and other mineral holdings on Spitzbergen. These rights were also recognized in the years and decades before the Treaty was signed.\(^6\)

The State Department accepted the Arctic Coal Company's registration of their claim with the United States as conferring the titles claimed through possession, posting notices, active working and registration. The United States government also protected this claim in its policy statements and letters to the Norwegian authorities. This position by the United States was emphasized by President Taft in his message to the Congress of December 7, 1909. With respect to an invitation to participate in the establishing of an international regime to govern Spitzbergen, he stated that the United States had accepted the invitation "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."\(^6\)

The 1920 Treaty of Paris offered to the interested States a means by which they were able to quitclaim their title interests in the islands to Norway, while reserving inviolate the properties and rights which their citizens antecedently enjoyed. This Treaty and the entire Spitzbergen episode provide a useful precedent of protection by the United States government of international rights acquired by a United States corporation in a terra nullius.

The State Department also afforded protection of claims by United States companies to natural resources on Guano Islands which, at the time, were not within the national jurisdiction of any State. In 1856, Congress passed the Guano Islands Act,\(^6\) which provides that whenever a United States citizen discovers a nonoccupied island which has on it a deposit of guano (sea-bird manure) the island may, at the discretion of the President be considered as appertaining to the United States.\(^7\) The discoverer may in turn be allowed to possess at the pleasure of Congress, the exclusive right of occupying the island for the purpose of obtaining guano.\(^7\)

The exclusive right to exploit the deposits of guano on islands

\(^6\) Id. at 506-07.  
\(^6\) Annual Message of the President to Congress, 7 December 1909, 9 FOREIGN RELATIONS OF THE UNITED STATES 9, 13 (1914).  
\(^6\) Id. § 1411.  
\(^7\) Id. § 1414.
subject to the Act was based on the discovery of the actual guano deposit on the island. However, the procedure by which the discoverer perfected his right to exploit the guano was based on discovery of the island. After discovery, notice was to be given by the discoverer to the Department of State describing the location of the island, showing that possession of the island was taken in the name of the United States, and furnishing evidence that the island was not in the possession or occupation of any other government or citizens of any other government.

The decision to annex a guano island and/or recognize the exclusive exploitation rights of its discoverer was within the discretion of the State Department, acting on the President's behalf. Effective occupation of the island in question and possession of the guano deposit, and the absence of superior claims by contesting States, appear to have been the primary factors in the State Department's determination of whether to grant diplomatic protection.

On the basis of this precedent as well as that of Spitzbergen, it can be argued that at least under United States law, and perhaps in international law as well if there is to be found similar precedent in the domestic law of other States, a private company such as Deepsea has the right to claim in the name of the United States exclusive rights to or title in land territory not the subject of national jurisdiction by another State. At the discretion of Congress, the claimant company may then be given exclusive rights to the resources of the territory.

International Convention Law

It is not sufficient to analyze the validity of Deepsea's claim merely under international customary law. International convention law should, where relevant, also be applied to the claim.

72. Id. § 1411.
73. Id. § 1412.
75. The Department of State defended the claims of United States nationals to guano deposits on the following islands: Aves Island (against Venezuela), Christmas Island (against Great Britain), the Lobos Island (against Peru), the Mongos and Los Islands (against Venezuela), Navassa Island (against Haiti), Quito Sereno Island (against Columbia) and the Serrano Keys (against Great Britain). The Department of State declined to espouse the claims of United States nationals with respect to other islands where it considered a foreign government's claim to be superior. For a detailed description of United States' practice with respect to the Guano Islands Act, see 1 J. Moore, INTERNATIONAL LAW DIGEST 556-80 (1906).
As already demonstrated, the general opinion of legal writers is that the status of the seabed is *res nullius* and thus different from the *res communis* status of the high seas. As *res nullius*, the seabed is not part of the sea, but is territory merely covered by the sea and thus capable of acquisition. If it is true that the status of the seabed is different from the high seas, it is arguable that the 1958 Convention on the High Seas does not apply to the seabed and subsoil under the high seas.

However, the Convention on the High Seas was drafted by the International Law Commission, which was established by the United Nations General Assembly in 1947 for the purpose of codifying existing international customary law. Therefore, in determining the applicability of this Convention to the seabed, it should be taken into account the extent to which the high seas have been considered in international customary law as encompassing the seabed and subsoil regardless of their *res communis* or *res nullius* status. The concern of the drafters of this Convention with seabed mining as a possible freedom of the high seas under international customary law would suggest that the High Seas Convention should be considered in the analysis of the legal validity of Deepsea's claim to exclusive rights with respect to an area of the seabed.

In interpreting article two, which is concerned with the freedoms of the high seas, it should also be considered to what extent exploitation of the high seas was considered to be a freedom of the high seas prior to the Convention. While the Convention on its own force is binding on all nations which have ratified it or accepted it, the specific provisions of the Convention are also binding on all nations to the extent they are recognized as embodying the customary law of the high seas.

Article two of the Convention of the High Seas (1958) states:

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

---

76. *See* text accompanying notes 35-38 *supra*.

77. Article 1 states that the Convention deals only with “all parts of the sea that are not included in the territorial sea or in the internal waters of a State.”

78. *See* text accompanying notes 79-81 *infra*. 
(1) Freedom of navigation;
(2) Freedom of fishing;
(3) Freedom to lay submarine cables and pipelines;
(4) Freedom to fly over the high seas.

These freedoms, and others which are recognized by the general principles of international law, shall be exercised by all States with reasonable regard to the interests of other States in their exercise of the freedom of the high seas.

Although freedom to exploit the seabed beneath the high sea is not specifically mentioned in article two, the insertion of the term "inter alia" prior to the enumeration of the four listed freedoms, and the phrase, "[t]hese freedoms, and others which are recognized by the general principles of international law . . . ," indicate that there are additional freedoms of the high seas not specifically enumerated in article two. In the records of the International Law Commission, there is evidence that the Commission did in fact consider exploitation of the seabed and subsoil beyond national jurisdiction to be one of these additional freedoms.\footnote{79} In the commentary on its draft of article 27, which became article two of the High Seas Convention, the International Law Commission indicated that the "list of freedoms of the high seas contained in this article is not restrictive," and recognized that freedom of the high seas includes the "freedom to explore or exploit the subsoil of the high seas."\footnote{80} The commentary explained that the reason the Commission did not make specific mention of the freedom to explore or exploit the subsoil of the high seas was that "apart from the case of the exploitation or exploration of the soil or subsoil of a continental shelf . . . exploitation (of the high seas soil or subsoil) had not yet assumed sufficient practical importance to justify special regulation."\footnote{81} Thus, while the Convention on the High Seas does not expressly state that exploitation of the seabed and subsoil of the high seas is a freedom of the high seas, the open textured language of article two and the travaux preparatoires to the Convention suggest that if there were any other freedoms in international customary law which were included in the article's codification of the existing law, this is likely to be one of them.

Assuming that the freedom to explore or exploit the seabed and subsoil is an article two freedom of the high seas "recognized by the general principles of international law," the question must be

\footnote{81} Id.
answered whether it would not be inconsistent with this freedom to claim exclusive rights to areas of the seabed and subsoil in order to exercise this freedom. Put another way, does the freedom to exploit the seabed include the power to exclude others from exercising their freedom in a certain area?

Article two states that no State may validly purport to subject any part of the high seas to its sovereignty. While Deepsea is not claiming sovereignty over the area, the claim to exclusive rights might be considered to be sufficiently analogous to a claim of sovereignty to fall within the realm of exclusivity the article prohibits.

While the Department of State has repeatedly reaffirmed the rights of Americans under existing international law to explore and exploit the seabed of the ocean floor beyond the national jurisdiction of any State, it has only encouraged deep-sea mining to proceed under the doctrine of freedom of the high seas. Mindful of the negotiations in progress for a new law of the sea treaty, the United States has not yet suggested that this freedom includes the right to claim exclusive rights to areas of the seabed.

The position of the State Department with respect to deep ocean mining was most recently stated by Under Secretary of State, Carlyle E. Maw, Special Representative of the President and Chief of the United States Delegation to the Third United Nations Law of the Sea Conference. In testimony before the Senate Subcommittee on Minerals, Materials and Fuels on October 29, 1975, Mr. Maw stated:

I wish to reiterate our position that there is no impediment under existing international law to any nation or individual undertaking deep seabed mining, provided that mining operations are undertaken with reasonable regard to the interests of others in their exercise of high seas freedoms. We encourage private investors to

82. See, e.g., Letter from John R. Stevenson, Legal Advisor, Dep’t of State, to Senator Lee Metcalf, Jan. 16, 1970, in Hearings on Issues Related to Establishment of Seaward Boundary of United States Outer Continental Shelf Before the Special Subcomm. on the Outer Continental Shelf of the Senate Comm. on Interior and Insular Affairs, 91st Cong., 1st & 2d Sess., at 210 (1970); Testimony of John Norton Moore, Counselor on International Law for the State Dep’t, in 1973 Hearings on S. 1134, supra note 63, at 247: “It is certainly the position of the United States that the mining of the deep seabed is a high-seas freedom and I think that would be a freedom today under international law . . . .”
develop their technology and to begin mining when they are ready.83

Nevertheless, the State Department's statement with respect to the claim of Deepsea refuses recognition of the claim, although it again stresses the importance of the freedom of the high seas doctrine.

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

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

The position of the United States Government on deep ocean mining pending the outcome of the Law of the Sea Conference is that the mining of the seabed beyond the limits of national jurisdiction may proceed as a freedom of the high seas under existing international law.84

Article two of the 1958 High Seas Convention states that the freedoms of the high seas “shall be exercised by all states with reasonable regard to the interests of other states.” Therefore, the question which arises is whether it would be a reasonable use of the high seas to claim exclusive rights to areas of the high seas for deep-sea mining.85

To facilitate the interpretation of article two, a theory of reasonable use of the high seas has been developed in international law. This theory was first developed in an article defending United States nuclear testing in the Pacific Ocean as a reasonable use of the high seas.86 McDougal and Schlei, the authors of the article, analyzed the range of unilateral claims which have been honored by the international community. They found that if a claimant

83. Testimony, supra note 6, at 4.
84. Notice of Discovery, supra note 17, at 66.
85. The discussion of the International Law Commission surrounding the adoption of article two of the Convention on the High Seas sheds some light on what the Commission felt to be a reasonable use of the high seas. The discussion shows it was the general view that no State has the right to “utilize the high seas in a manner which unreasonably prevents other States from enjoying that freedom.” However, even fishing to some extent prevents other States from enjoying the freedom to fish in the same area, yet this was not considered to be unreasonable. [1956] 2 Y.B. INT’L L. COMM’N 10, U.N. Doc. A/CN.4/Ser. A/1956/Add. 1 (1957).
asserted the "least possible degree of authority" needed to accomplish the purpose, limited the claim both in area and in duration to the minimum consistent with the purpose, chose an area that was of "relatively slight importance" to international trade and fishing, and the claim was for a "purpose much honored by world prescription," the claim had much in favor of its being recognized.\textsuperscript{87}

The theory of reasonable use, which developed from this article, is that if the use proposed by a nation is reasonable and acquiesced to by the international community, it is valid under international law.\textsuperscript{88} It is the international community which is the final judge of the reasonableness of the claim. But in its determination, the community shall consider the factors involved in the claim and urged by the claimant State as justification for its claim.\textsuperscript{89} In the \textit{Norwegian Fisheries Case},\textsuperscript{90} for example, the international community in considering Norway's claim to straight baselines and later, Iceland's claim to extended fishing rights, considered the economic dependence of the populations on the fishing grounds.

Where a prima facie case can be made that the use is reasonable for both national interest and economic necessity, it is arguable that the burden shifts to those who would oppose such a claim to show that it is patently unreasonable, or unlawful.\textsuperscript{91} What the mining industry must show to establish a prima facie case is an economic analysis showing that the mining simply cannot take place (at least under free enterprise concepts) unless exclusivity of tenure is secured. In short, a company such as Deepsea, must demonstrate that in order to free the risk capital, exclusivity is absolutely required. If that can be shown, then it can be argued that exclusivity is part of the reasonable use being made of the high seas.

\textsuperscript{87} Id. at 661-74, 686.

\textsuperscript{88} Cases and legislation which support this finding include Church v. Hubbart, 6 U.S. (2 Cranch) 187 (1804), in which the United States Supreme Court, using a criterion of reasonableness, accepted the notion that nations may exercise jurisdiction beyond the territorial waters in order to prevent the violation of customs laws; the Hovering Acts of Great Britain also asserted the same right. H.A. Smith, \textit{The Law and Custom of the Sea} 27 (1950). The U.S. Anti-Smuggling Act of 1935, 19 U.S.C. § 1701 (1952), also asserted the right of the United States to exercise jurisdiction beyond the territorial waters to prevent violation of United States' customs laws.

\textsuperscript{89} McDougal & Schlei, supra note 86, at 660-61.


\textsuperscript{91} H.A. Smith, \textit{The Law and Custom of the Sea} 29 (1950).
for the purpose of mining deep seabed mineral resources under the freedom of the seas doctrine and the theory of reasonable use of the high seas. However, the legal validity of that claim would still seem to rest with the reaction of the international community and whether the claim is recognized in the customary international law process.92

There would seem to be sufficient facts available to present a prima facie case for the reasonableness of exclusivity of tenure. Apart from exclusive rights there is only intra-industry discipline to insure that the returns from exploration accrue to the discoverer. While industry leaders93 suggest that this discipline is strong, if it were not, one company could wait until another had done the needed exploration and then, having avoided these costs, move in on the deposit and operate in the same locale. Moreover, the tendency to mine as fast as possible and to mine only patches of high-grade minerals would be aggravated by the need to reap the benefits of mining before another firm obtained them.94

There are aspects of deep-sea mining which make critical the need for strong intra-industry discipline, if not exclusive rights as well, to make investment secure and to make private insurance available to the miner if government insurance is not.

There are fifteen or so factors or characteristics of a deposit of manganese nodules which have a bearing on the economics of mining the deposit . . . . Before any mining operation ensues, therefore, the miner will explore the ocean for several deposits, study those that appear to be capable of yielding the most profit and design his mining system with those nodules in mind. Before he starts to build his mining system, then, the miner will have a substantial capital investment in the deposit . . . .95

While there may be a prima facie case for the need of exclusivity of tenure, in international convention law as in international customary law, the final judge of the reasonableness and legality of Deepsea's claim rests with the international community. To date there have been four responses to Deepsea's claim. All four have rejected the claim.96 It can be expected that the Group of 77 de-

92. Letter from Professor H. Gary Knight to R. Sebastian Gibson, Sept. 29, 1975.
93. Interview with Dr. J. Mero, President of Ocean Resources, Inc., in La Jolla, California, Sept. 17, 1975.
96. The four responses to Deepsea's claim have been from the United...
developing countries which have pressed hard for an international regime with complete authority over the seabed will not recognize Deepsea's claim either. Because of this absence of support for Deepsea's claim of exclusive rights, the claim must fail under international law. Deepsea may exploit manganese nodules in the high seas under international customary law and as a freedom of the high seas without the acquiescence of the international community. However, it will require the support of the other States to make a valid claim to exclusive rights of exploitation to an area of the seabed.

**FACTORS AFFECTING UNITED STATES GOVERNMENT POLICY TOWARD DEEP-SEA MINING**

*The Common Heritage of Mankind Concept*

In 1969 and 1970, an important resolution and an even more important declaration were passed in the United Nations General Assembly. The legal effect of these two instruments is critical to the formulation of United States government policy toward deep-sea mining and hence recognition of Deepsea's claim.

The 1969 Moratorium Resolution provides that States and persons are bound to refrain from all activities of exploitation of the seabed and subsoil beyond the limits of national jurisdiction. The United States, as well as most developed countries, voted against the resolution and is not bound by it.

However, in 1970, the General Assembly passed the Declaration of Principles Governing the Sea-Bed and Ocean Floor without a dissenting vote. This Declaration proclaims the resources of the seabed and subsoil of the ocean floor beyond the limits of national jurisdiction to be the common heritage of mankind.

States, see text accompanying note 84 supra; Canada, 14 INT'L LEGAL MATERIALS 67 (1975); Australia, id. at 795, and Great Britain, id. at 796.


99. The Declaration of Principles provides in part:
The binding effect of these resolutions on the United States can be determined by a close study of the provisions of articles ten through fourteen and article 55 of the Charter of the United Nations. These articles merely confer on the General Assembly the power to pass recommendatory resolutions. Because the General Assembly is not vested with a general legislative power, its resolutions, such as the 1969 Moratorium Resolution, and its Declarations, such as the 1970 Declaration of Principles, cannot legally bind its members, except where the resolutions concern minor internal "housekeeping" matters such as rules of procedure and the budget.\textsuperscript{100}

Despite well-established views on the recommendatory effect of General Assembly resolutions (or declarations), there has been suggested in international law a theory of instantaneous, international customary law.\textsuperscript{101}

Traditionally, two elements have been considered to be required in international customary law: 1) a usage of the law by the States (known as the usage element) and 2) the \textit{opinio juris} of States that there is such a rule and that it must be obeyed. Professor Cheng, however, found that international law requires only one single constitutive element, namely, the \textit{opinio juris} of the States. The rationale of arguing \textit{opinio juris} to be the essence of international customary law is that the rules of international law ultimately rest on the consent of States.\textsuperscript{102}

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

1. The sea-bed and ocean floor, and the subsoil thereof, beyond the limits of national jurisdiction (hereinafter referred to as the area), as well as the resources of the area, are the common heritage of mankind.

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

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


\textsuperscript{101} This theory was set forth in an article by Professor Bin Cheng in which he analyzed whether the United Nations Resolutions on Outer Space could be considered instant international customary law. Cheng, United Nations Resolutions on Outer Space: Instant International Customary Law?, 5 INDIAN J. INT'L L. 23 (1965).

\textsuperscript{102} Id. at 37.
The Asylum Case and the Right of Passage Case have shown that it is possible for such opinio juris to exist among a limited number of States or even between only two States. Thus, it follows that there is no reason why an opinio juris communis may not arise in a very short period of time or even instantaneously among all of the Members of the United Nations who declare their opinio juris communis in a resolution or declaration.

In his article, Professor Cheng stated that while a resolution of the General Assembly is without binding force, it can provide strong evidence that the law which it states is a rule of customary international law among the States voting for it. Where the vote is unanimous as was the vote for the 1970 Declaration of Principles (except for 14 abstentions), this would appear to create an almost irrefutable presumption that the Declaration reflects a rule of international customary law. If such an instrument instantaneously creates a rule of customary international law, nations cannot by later changing their minds, individually opt out of the customary rule with any effect on their obligation until a majority of the States do likewise. However, it is clear that for such an instrument to have the legal effect of international customary law, the States must have considered themselves bound by the rule when they voted for it.

In determining the binding effect of such a declaration as the 1970 Declaration of Principles, much depends on the level of abstraction at which the Declaration is formulated. As a general rule, it may be stated that precise and unambiguous provisions are more likely to create international law than highly abstract or general propositions. Unfortunately, it is at this latter level of high abstraction that many of the Declaration’s principles were

---

103. [1950] I.C.J. 266.
105. Cheng, supra note 101, at 37.

There is, however, no reason why a General Assembly resolution should not provide the vehicle through which binding obligations are created . . . . It is always a question of interpreting the intent of the States concerned in accordance with the criteria of good faith and reasonableness. Id.
107. Id. at 6.
formulated. Moreover, the fact that 14 States abstained and that many others made statements on the unbinding effect of the Declaration gives caution to attributing to it any law-creating effect.\textsuperscript{108}

Mr. Amerasinghe, Chairman of the 1973 Seabed Committee said in a speech to the United Nations General Assembly, "'[t]he Declaration cannot claim the binding force of a treaty internationally negotiated and accepted . . . .'\textsuperscript{109} When the Soviet delegation announced it would abstain from the vote on the Declaration in the First Committee, it stressed that "naturally, approval by the General Assembly of this draft cannot impose legal consequences on States since such decisions are merely of a recommendatory character."\textsuperscript{110}

The majority of those States voting in favor of the Declaration were of the same mind in limiting the significance of the Declaration. The United Kingdom delegation, for example, expressed two general reservations. The first was that the Declaration, like any other resolution of the General Assembly, would have in itself no binding force. The second reservation was that the Declaration must be interpreted as a whole, and that as a whole it has no dispositive effect until there is agreement on an international regime.\textsuperscript{111}

\textsuperscript{108} Id.
\textsuperscript{111} U.N. Doc. A/C.1/PV.1799, at 5 (1970). Mr. Galindo Pohl (El Salvador), who played an important part in the preparatory work preceding the adoption of the Declaration, also confirmed that in the informal negotiations prior to the adoption of the final compromise text, the Declaration was clearly understood as not providing a provisional regime pending the conclusion of a definitive conventional regime. He added, however, that "those who support it must obviously be deemed to be prepared to abide by its content in good faith and to ensure that the regime will be consistent with those principles." U.N. Doc. A/C.1/PV.1781, at 11-12 (1970). Because of the ambiguity of the Declaration, such an obligation has little significance.

What appears to be an accurate description of the general attitude toward the Declaration's obligations was given by Sir Laurence McIntyre (Australia) when he espoused his country's understanding of the principles as "general guidelines for the establishment of a regime for the sea-bed and as an earnest desire of the great majority of members to have a regime; but we would not see them as having any binding or mandatory effect upon States in the meantime." U.N. Doc. A/C.1/PV.1777, at 27 (1970).

\textit{See also} Brown, \textit{supra} note 106, at 7, quoting similar statements by \textit{inter alia}, Canada ("balanced and comprehensive enough to serve as the foundation and framework for an international regime"); Norway (the principles "are indications . . . of the rules and the provisions of international law . . . . To make them applicable and enforceable . . . we shall later have to hammer out detailed legal provisions."); and Peru ("only a basis
The key phrase involved, "the common heritage of mankind," was considered by many States to be without any clear judicial significance. Nevertheless, the concept was felt to represent a "moral and political complex of great value."

The most reasonable conclusion from an exhaustive study of the Declaration and comments made by various State spokesmen and delegates would be that the concept of the common heritage of mankind is not a legal principle. Rather, it embraces a moral commitment by the international community to attempt to create in good faith an international regime for the regulation of seabed resources beyond the limits of national jurisdiction.

The United States State Department's position with respect to the effect of the 1970 Declaration of Principles upon deep seabed exploitation was explained by the Honorable John Norton Moore in his legal capacity as Chairman, National Security Council Interagency Task Force on Law of the Sea, as follows:

While we support the U.N. General Assembly's unanimous declaration that the seabed beyond the limits of national jurisdiction is the common heritage of mankind, we believe neither that title to the deep seabed or its resources is held by the world community, nor that title to any area of the deep seabed or its resources belongs to any state.

It can be concluded that the United States is not legally bound by the Declaration of Principles to prevent Deepsea or any other company from continuing with its exploration or exploitation plans. However, there are many other considerations involved in the formulation of United States policy toward deep-sea mining and the decision whether to give explicit support to mining operations through domestic legislation.

National Security and Domestic Considerations

Because of the national security interests at stake in the law of the sea negotiations, the United States State Department is

for the preparation of a regime and must not be interpreted as an interim regime.


113. See Brown, supra note 106, at 18.

114. Hearings on Amendment No. 946 to S. 1134, supra note 2, at 989. See also id. at 994.
hesitant to support any claim such as that of Deepsea's or to pass any legislation on seabed mining which may endanger the success of the negotiations. The importance of naval mobility to the effectiveness of the deterrent power of the United States' nuclear-armed submarine fleet and surface vessels places the interest of freedom of movement in the oceans high on the United States' list of priorities in its formulation of policy toward seabed mining.\textsuperscript{115} Hence, one finds that the position of the Department of Defense (whose interests lie purely in national defense) is that it is perfectly willing to allow the developing countries to have total control of seabed mining if that is the price necessary for securing agreement on unrestricted passage through international straits and limitations on the control by coastal States in the exclusive economic zone concept being negotiated.\textsuperscript{116}

However, there lies a further national security interest in ensuring that the United States will continue to have adequate sources of all strategic minerals.\textsuperscript{117} Consequently, in view of the power which is being so effectively wielded by the developing oil nations of the Middle East, it is not in the best interests of the United States to have complete control of the seabed in an international authority which could restrict United States access to the abundant supply of minerals on the ocean floor. Therein lies a major consideration behind United States policy today to seek the creation of an international regime which will guarantee nondiscriminatory access to the resources of the seabed beyond the limits of national jurisdiction.

United States import figures show that of the four most common minerals found in manganese nodules, the United States imports 95 percent of its manganese, 98 percent of its cobalt, 74 percent of its nickel and 18 percent of its copper.\textsuperscript{118} Studies of the countries which export these minerals indicate that some of them indeed have the potential for the development of unfavorable attitudes with respect to the exporting of their minerals to the United States.\textsuperscript{119} This is particularly true in the case of the Council of

\begin{itemize}
\item \textsuperscript{115} E.D. Brown, \textit{supra} note 18, at 108-09.
\item \textsuperscript{116} Letter from Professor H. Gary Knight to R. Sebastian Gibson, Oct. 22, 1975.
\item \textsuperscript{117} See \textit{Hearings on Amendment No. 946 to S. 1134, supra} note 2, at 800, 815, 818.
\item \textsuperscript{118} Statement of Dr. Robert A. Kilmarx, \textit{in id.} at 892, 896. The major foreign sources for these minerals are manganese: Brazil, Gabon, South Africa, and Zaire; cobalt: Zaire, Belgium, Luxembourg, Finland, Canada, and Norway; nickel: Canada and Norway; copper: Peru, and Chile. \textit{Id.} at 794.
\item \textsuperscript{119} See statement of Dr. Kilmarx, \textit{id.}, at 907, 912.
\end{itemize}
Copper Exporting Countries (CIPEC) which controls over 80 percent of the world exports of copper. While the United States has in the past had sufficient domestic supplies of copper to satisfy its needs, the Department of Interior projects that in 1985, copper consumption in the United States will increase by about 1,400,000 tons, requiring a large increase in the percentage of copper the United States presently imports.

The United States must also consider the interests of national mineral companies such as Deepsea which have developed the technology to exploit a new source of these minerals and hence make the United States less dependent on mineral imports. The predominant interest of mining companies is in seeing that their investments in deep-sea mining operations are made secure either through an international regime or domestic legislation which will provide an orderly administration of seabed mining and protect their claims.

If an international regime is established, these companies would not wish the regime to have the power to limit particular States to particular areas of the ocean floor or the power to limit the size of a particular State's holding, for example, by setting a cumulative total limit on the holdings of companies registered in one State. Nor would companies wish the seabed authority to protect the export market of underdeveloped States producing specific metals by limiting, for example, the annual production of that metal from deep-sea mining operations.

Companies of the United States are also concerned with protecting the technological lead they hold over foreign mining companies. In light of the slow rate of progress in the Law of

120. See Hearings on Amendment No. 946 to S. 1134, supra note 2, at 800, 804.
121. Id. at 796.
123. E.D. Brown, supra note 18, at 108.

There are three patented methods being experimented with today for mining nodules: continuous path dredging, fixed area dredging and continuous line bucket dredging.
the Sea negotiations for the creation of an international regime, Congress has recognized the desire of mining companies to begin mining operations and has drafted legislation\textsuperscript{125} which would allow such operations to begin and regulate seabed exploitation by United States companies.

Whether such legislation will be enacted depends much on whether the State Department and the President feel such legislation can be implemented in a manner which does not put the United States in the position of preempting the law of the sea treaty negotiations.\textsuperscript{126} It also depends upon an evaluation of the progress of the negotiations to date, and upon the progress that is made at the third session of the United Nations Conference in New York.

**THE LAW OF THE SEA NEGOTIATIONS**

The second substantive session of the Third United Nations Conference on the Law of the Sea held in Geneva from March 17 to May 9, 1975, achieved little progress in the negotiations for the creation of an international regime to regulate the seabed and sub-

---


\textsuperscript{126} Testimony, supra note 6, at 6.
soil of the ocean floor. Agreement was reached to hold a third substantive session of eight weeks in New York; this session is scheduled to commence at the end of March, 1976. It was also recommended that the General Assembly provide for an additional substantive session in the summer of 1976 if the upcoming conference so decides.127

It was not until the Geneva session appeared to be headed toward failure that the chairmen of the three main committees were requested to prepare separate texts for an Informal Single Negotiating Text128 to aid negotiations in the interim period between conferences.129 However, the utility of the three parts within the Negotiating Text for this purpose varies considerably, reflecting the different extent to which the respective authors adhered to the Conference President's admonition to “take account of the formal and informal discussions held so far.”130

Part one of the Informal Single Negotiating Text which is concerned with the regime and machinery for the seabed beyond national jurisdiction, is completely imbalanced in favor of the developing countries. It states the proposals of the Group of 77 but fails to reflect either the proposals or the interests of the United States and other developed countries. As Senator Metcalf has commented,

"[f]rom the point of view of the United States, the kindest words I've heard about Part One of the text is that it is an “unmitigated disaster . . . .”"

During previous hearings, we have talked about brackets (the language about which there was a question) and alternative texts in treaty drafts. As I read the single text, the brackets are gone. The alternative texts are gone. The interests of the United States are gone.

129. For a more complete history of the drafting of Part I of the Informal Single Negotiating Text, see Statement of Leigh S. Ratiner, Administrator, Ocean Mining Administration, Department of the Interior, in Hearings on Status Report, supra note 127, at 1190-91.
130. Statement of John R. Stevenson in id. at 1171.
My problem is that I've read the single text. The single text may not be a negotiated document. But it is a measure of sorts of the effectiveness of our negotiators in getting our point of view prominently displayed before the Conference. It would appear that we're in bad trouble.\textsuperscript{131}

Indeed, it is highly questionable whether part one of the Text can even serve as a basis for negotiations.\textsuperscript{132}

There have been three main points in the negotiations for an international seabed authority in which there have been no signs of progress in the past, nor any signs of progress for the future. First, the developing countries as a group hold intransigent views on the question of whether the International Seabed Authority should be empowered to exploit the whole of the ocean floor to the exclusion of States and private companies. They have stated in negotiations that the Authority must have this power. The United States has said it should not have this power.\textsuperscript{133} Second, the developing countries hold with almost equal vigor the view that decisions on the actions of the Authority must be made under the procedure of a one-nation, one-vote assembly. Because the developing countries far outnumber the developed countries, the United States cannot agree to this approach.\textsuperscript{134} Third, the developing countries insist that if the Authority contracts with a State or private company to exploit the seabed, the Authority must be almost entirely free to dictate the terms and conditions of contract, particularly those relating to the transfer of technology and profits. The United States refuses to agree to this view as well.\textsuperscript{135} These three points are the absolute minimum the developing countries believe they must achieve to insure their control over the raw materials of the seabed.\textsuperscript{136} These are also likely to cause failure of the negotiations.

The United States has repeatedly committed itself to seeking an authority which assures guaranteed nondiscriminatory access under reasonable conditions to the ocean's seabed minerals. If the Authority has the power to restrict the number of areas available for commercial development and to select among applicants seeking to mine the seabed, the United States cannot support the Authority.\textsuperscript{137}

\begin{itemize}
  \item[131.] Statement of Senator Lee Metcalf, Chairman of the Senate Subcommittee on Minerals, Materials and Fuels, in \textit{id.} at 1162-63.
  \item[132.] See statement of John R. Stevenson, in \textit{id.} at 1171.
  \item[133.] Statement of Leigh S. Ratiner, in \textit{id.} at 1182.
  \item[134.] \textit{Id.}
  \item[135.] \textit{Id.}
  \item[136.] \textit{Id.}
  \item[137.] See statement of Hon. John Norton Moore, in \textit{id.} at 1177.
\end{itemize}
The stalemate of the negotiations is basically the result of two diverse views. On the one hand, industrialized nations, acutely aware of their growing dependence on imports of raw material supplies, feel they cannot be expected to agree to surrender their rights of access to an abundant supply of minerals in an area comprising two-thirds of the Earth's surface, to a system in which an international authority could limit or exclude their access. The developing countries, on the other hand, wish to secure their share of this area which has been proclaimed to be the common heritage of mankind, so they may improve their economic well-being.\textsuperscript{138}

While part one of the Text does not represent the negotiations which have taken place so far, it does represent a step toward failure in the negotiations. The inability to make significant progress in the negotiations for the creation of a seabed regime in the last year has greatly increased the likelihood that nations will begin to make unilateral claims of 200-mile fishing rights and deep-sea mining rights to protect their own interests.\textsuperscript{139}

A good example of this is the case of the United States. On October 9, 1975, by a vote of 208 to 101, the House of Representatives passed the Marine Fisheries Conservation Act\textsuperscript{140} which extends America's fisheries jurisdiction to 200 miles from the coast.\textsuperscript{141} It is likely that the Senate will soon pass a similar bill\textsuperscript{142} by a majority in excess of two to one also. Passage and signature of the 200-mile fishing bill would be a great boost to the proponents of the Deep Seabed Hard Mineral Resources Bill\textsuperscript{143} and might prompt the bill's adoption.\textsuperscript{144}

At the same time, informal negotiations were held before the Law of the Sea Conference in New York,\textsuperscript{145} and the United States is con-


\textsuperscript{140} H.R. 200, 94th Cong., 2d Sess. (1975).


\textsuperscript{142} S. 961, 94th Cong., 1st Sess. (1975).

\textsuperscript{143} S. 713, 94th Cong., 1st Sess. (1975).

\textsuperscript{144} Krueger, supra note 141.

\textsuperscript{145} Testimony, supra note 6, at 3.
tinuing to make concessions to the demands of the developing countries. For example, in a speech\textsuperscript{146} before the American Bar Association Annual Convention in Montreal on August 11, 1975, Secretary of State, Henry Kissinger, stated that the United States is willing to adopt a mixed system of jurisdiction which would allow for exploitation both by the international agency itself and by States or companies operating pursuant to licenses granted by the seabed authority.\textsuperscript{147} However, it is doubtful that such concessions will do much to offset the harm to the negotiations caused by unilateral claims such as that of the United States to jurisdiction over a 200-mile fishing zone. In the case of deep-sea mining, there has been so little progress in the negotiations, interim legislation seems inevitable.

**CONCLUSION**

If the negotiations fail or if the oceans treaty is concluded but not subscribed to by a sufficient number of States to make the convention representative of international customary law, deep-sea mining will develop under international customary law and the domestic legislation passed by States. The free-market economic system operating under international customary law would probably give greater benefits in terms of long-term economic stability, and cheaper sources of minerals than would be gained in profits from an international regime restricting seabed exploitation.\textsuperscript{148}

\textsuperscript{146} Speech by Secretary of State Henry A. Kissinger before the American Bar Association Annual Convention, Montreal, Canada, Dep't of State Release No. 408 (Aug. 11, 1975).

\textsuperscript{147} Id. at 4. Secretary Kissinger stated in part: The United States has devoted much thought and consideration to this issue. We offer the following proposals:

An international organization should be created to set rules for deep seabed mining.

This international organization must preserve the rights of all countries and their citizens directly to exploit deep seabed resources.

It should also insure fair adjudication of conflicting interests and security of investment.

Countries and their enterprises mining deep seabed resources should pay an agreed portion of their revenues to the international organization, to be used for the benefit of developing countries.

The management of the organization and its voting procedures must reflect and balance the interests of the participating states. The organization should not have the power to control prices or production rates.

If these essential U.S. interests are guaranteed, we can agree that this organization will also have the right to conduct mining operations on behalf of the international community primarily for the benefit of developing countries.

\textsuperscript{148} See generally letter, supra note 116.
However, it would be better for all concerned if the same open access environment for deep-sea mining could be agreed upon in a comprehensive oceans treaty with provisions to cover other disputed areas in law of the sea as well. One must not lose sight of what is at stake in the negotiations for the treaty. There exists today the opportunity to create a treaty which could prevent disputes over the continental shelf, fishing rights and deep-sea mining, and act as a cornerstone in the legal and political development of the world community.

In times when numerous nations face widespread famine and malnutrition, fish have become an increasingly vital source of food. Unless competitive practices are soon harmonized and fish harvesting managed within certain limits, the world faces the prospect of mounting conflict for this important source of protein.\textsuperscript{149}

In a world of vast ideological differences between nations holding the greatest destructive power in the history of mankind, the need for cooperation rather than confrontation has never been stronger. This can be learned from a story told by the Honorable John Norton Moore, Chairman of the National Security Council Interagency Task Force on the Law of the Sea:

The fundamental choice between conflict and co-operation is, I think, brought home dramatically by the story of the young lady and the young man who approach each other from different directions at a traffic light. They stop, the lady rolls down the window, leans out and shouts at him, "Pig." He is much taken aback by this, rolls down his window and shouts, "Cow." The light turns green, he proceeds around the next curve, and runs into a large pig which is squarely in the middle of the road (laughter). The moral, of course, is that co-operation is preferable to confrontation.\textsuperscript{150}

\textsuperscript{149} Speech, supra note 146, at 3.


Dr. Pinto has stated the case for cooperation in this way:

There is no government among us so cynical and so corrupt that it does not strive genuinely, but within the limits imposed by history and social forces, to achieve the best for its people. Negotiators on the law of the sea, whether from the developed or the developing countries, will be doing just that in the months ahead. The efforts to reconcile the demands of the developed with those of the developing countries, and individual or group interests with those of the community, will take all the statesmanship of which our rep-
The politics of ideological confrontation and strident nationalism must not be allowed to become pervasive, or broad and humane international agreement will grow ever more elusive and unilateral actions will dominate. Whither then of the Great Nodule Spectacle? In an environment of widening chaos, the stronger may survive and be heard to prosper temporarily. But the weaker may despair and the human spirit will suffer.

R. SEBASTIAN GIBSON

resentatives are capable. Nothing will be achieved by treating the developing countries as incompetent, feckless eternal mendicants; as little will be accomplished by treating the developed countries as power-hungry imperialists whose every action must arouse suspic- cian [sic]. For let us make no mistake, the one group can no longer ignore the other, and it will take both to make the system—any system—work. It is only through goodwill and patience on both sides and a genuine understanding of each other’s problems that we can hope to succeed. Pinto, supra note 138, at 13.