

The Deep Seabed Hard Mineral Resources Act -- A Negative View

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I. INTRODUCTION

The purpose of this article is to state the case in opposition to enactment of the "Deep Seabed Hard Mineral Resources Act ("Act" hereinafter).¹ There are several other individuals and institutions

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1. S. 2801, 92d Cong., 1st Sess. (1971); H.R. 13904, 92d Cong., 2d Sess. (1972); H.R. 9 93d Cong., 1st Sess. (1973). All are identical in language. Hearings on H.R. 13904 were held on May 12, 16, and 25, 1972. See *Hearings on Deep Seabed Hard Mineral Resources (H.R. 13904) before the Subcomm. on Oceanography of the House. Comm. on Merchant Marine and Fisheries*, 92d Cong., 2d Sess. (1972) [hereinafter cited as *Hearings on H.R. 13904*]. A Hearing on S. 2801 was held on June 2, 1972. See *Hearings on S. 2801 before the Subcomm. on Minerals, Materials, and Fuels of the*

which share the views expressed herein on this proposed legislation,² but the majority of those previously testifying on the Act appear to favor its passage. Probably the most articulate spokesman in favor of the Act, John G. Laylin, has written the article which immediately precedes this one in this 1973 "Law of the Seas" issue of the *San Diego Law Review*.³ I am sure that Mr. Laylin will agree that although we both seek to apply high standards of scholarship to our research and writing, nonetheless our articles are essentially exercises in advocacy with the principal objective of enlightening the reader to both the issues and the conflicting opinions involved in the deep seabed mining problem. Our mutual intent is to give the reader a framework in which to reach his own conclusions about the optimal system for recovering seabed mineral resources.

In opposing present adoption of the Act, I do not do so on the basis that within its four corners it ill serves the interests of the marine mining industry—on the contrary, I shall assume that it well serves them since it was essentially a product of that industry. There have, however, been statements to the effect that the Act does not best serve the resource management interests of the United States as a whole⁴ and I find myself in substantial agreement with those views. However, I am limiting this critique to the broader perspective of the Act's potential effect on the current international

Senate Comm. on Interior and Insular Affairs 92d Cong., 2d Sess. (1972) [hereinafter cited as *Hearings on S. 2801*]. No action was taken by either subcommittee on the bills during the ninety-second session of Congress.

2. See, e.g., statement of Alan Cranston, United States Senator from California, in *Hearing on S. 2801* at 10; letter from Robert B. Krueger to the Subcommittee on Oceanography, House Committee on Merchant Marine and Fisheries, May 9, 1972, reprinted in *Hearings on H.R. 13904* at 192; statement of Wolfgang Friedmann, Professor of International Law, Columbia University, in *Hearings on H.R. 13904* at 167; statement of Samuel R. Levering on behalf of the Friends Committee on National Legislation, in *Hearings on H.R. 13904* at 183; and statement of John J. Logue, Director, World Order Research Institute, Villanova University, in *Hearings on H.R. 13904* at 149.

3. Laylin, *The Law to Govern Deepsea Mining Until Superseded by International Agreement*, 10 SAN. DIEGO L. REV. 425 (1973).

4. See, e.g., Supplemental Statement of Leigh S. Ratiner, Director for Ocean Resources, Department of the Interior, on behalf of the Inter-Agency Task Force on the Law of the Sea, before the Subcommittee on Oceanography of the House Committee on Merchant Marine and Fisheries, 93d Cong., 1st Sess. (March 1, 1973).

law of the sea negotiations, including the United States position on law of the sea issues, which goes beyond the industrial aspects of deep seabed mining. As a result of this broader analysis, I have concluded that the Act ought not to be adopted at this time—indeed, not until the Third United Nations Conference on the Law of the Sea⁵ has had an opportunity to fully consider the issue and to either (1) adopt an international regime governing mining of seabed minerals, in which case the need for the Act would disappear, or (2) fail to reach agreement thus leaving a void in conventional international law on the subject which might well be filled by a modified version of the Act.

II. ANALYSIS

My principal arguments against the present enactment of the Act are threefold: (1) it is inconsistent with this nation's present oceans policy; (2) it will probably have an adverse effect on the current law of the sea negotiations; and (3) it contravenes international expectations evidenced in the "principles" resolution of the General Assembly.⁶ All of these arguments are based essentially on what I believe to be inappropriate timing. As noted above, if the Third Conference succeeds there will be no need for the Act, yet if it fails the Act might be an appropriate vehicle. In the interim I think it inadvisable to impose the Act on the international efforts to seek an overall revision of the law of the sea because these negotiations involve ocean related issues other than marine mining as well as possessing broader implications for world public order.

A. *The Act is Not Consistent with Current United States Oceans Policy*

During the early stages of the current international law of the sea negotiations a number of alternative regimes were suggested for governing the exploitation of non-living resources from the seabed

5. In December, 1970, the United Nations General Assembly adopted resolution 2750C (XXV) calling for convocation of a Third United Nations Conference on the Law of the Sea [hereinafter cited as Third Conference] to be held sometime during 1973 unless postponed by the twenty-seventh session of the General Assembly on grounds of insufficient progress of preparatory work. The question of the regime to govern exploitation of non-living resources of the seabed beyond the limits of national jurisdiction is paramount on the agenda for the Third Conference. As a result of adoption of General Assembly Resolution 3029 (XXVII), a procedural meeting of the Third Conference is scheduled to take place concurrently with the 1973 meeting of the General Assembly, and the substantive conference is scheduled to begin in April-May, 1974, in Santiago, Chile.

6. G.A. Res. 2749 (XXV) (1970).

and subsoil beyond the limits of national jurisdiction.⁷ Some suggested dividing the world ocean on an equidistance principle, thus creating "national lakes" and apportioning the entire seabed and its resources among a few coastal states.⁸ Others suggested vesting title to seabed resources in the United Nations, permitting that organization to govern their disposition.⁹ Both of these alternatives were rejected at an early date—the former because it was not politically acceptable to a sufficient number of nations, the latter because neither the United States nor the Soviet Union was interested in permitting the United Nations to secure independent sources of income.

A third view suggested that no policy decision be made at all but rather that the world should wait on industrial/political developments in the field—a sort of "invisible hand" approach.¹⁰

Two other alternatives remained under active consideration well into the deliberations which ultimately led to the development of a United States oceans policy.¹¹ One was the "flag nation" system, under which exploitation of seabed resources would be governed by the law of the nation in which the vessel or other platform was

7. For a sampling of various positions advocated, see Christy, *Alternative Regimes for Marine Resources Underlying the High Seas*, 1 NAT. RES. LAW. 63 (June 1968).

8. See Bernfeld, *Developing the Resources of the Sea—Security of Investment*, 2 INT'L LAW. 67 (1967) and 1 NAT. RES. LAW. 82 (Jan. 1968). For a map indicating how such a division of the world ocean might look, see the chart appended to *THE LAW OF THE SEA: THE FUTURE OF THE SEA'S RESOURCES* (Alexander ed. 1968).

9. See Creamer, *Title to the Deep Seabed: Prospects for the Future*, 9 HARV. INT'L L.J. 205 (1968); Eichelberger, *A Case for the Administration of Marine Resources Underlying the High Seas by the United Nations*, 1 NAT. RES. LAW. 85 (June, 1968).

10. See Wilkey, *The Deep Ocean: Its Potential Mineral Resources and Problems*, 3 INT'L LAW 31 (1968); Ely, *The Fashioning of a Regime to Govern the Development of Undersea Mineral Resources*, paper presented to the Workshop on Law as Related to Ocean Development Problems (George Washington University National Law Center, April 20, 1968).

11. In using the phrase "United States oceans policy" in this paper, I am referring only to (a) Presidential pronouncements, (b) draft treaty articles submitted by the United States, and (c) major statements made by members of the United States delegation to the United States Seabed Committee. There is room even within that limited framework, however, for differences of opinion concerning just what United States oceans policy is (or was) and there are even subject matter areas in which it seems doubtful we have a single unified policy at the present time. Accordingly, the representations of policy stated herein are purely my own interpretation of the above documents and statements and do not necessarily reflect the position of the United States Government.

registered.¹² Under this system there would be no international seabed authority, save perhaps for a registry office for the filing of claims. The other alternative was the creation by international agreement of a detailed set of rules governing exploration for and exploitation of seabed resources complete with an attendant international organization to allocate exploration and exploitation rights, receive and distribute revenues, and regulate resource extractive operations.

In May, 1970, the President of the United States expressed a preference for the latter alternative,¹³ and in August, 1970, the United States submitted to the United Nations Seabed Committee the "Draft United Nations Convention on the International Seabed Area"¹⁴ which elaborates on the President's proposal with provisions for an international oceans regime providing for participation by all nations. Based on these two documents, it is apparent that United States oceans policy with respect to the regime to govern exploitation of non-living resources of the seabed and subsoil beyond the limits of national jurisdiction contains at least the following elements:

(1) The regime should be the product of international agreement, not unilateral state action;¹⁵

12. For a discussion of the "flag nation" approach, see Ely, *American Policy Options in the Development of Undersea Mineral Resources*, 2 INT'L LAW. 215 222-223 (1968); Ely, *A Case for the Administration of Mineral Resources Underlying the High Seas by National Interests*, 1 NAT. RES. LAW. 78 (June, 1968).

13. Nixon, *United States Policy for the Seabed*, 62 DEP'T STATE BULL. 737 (1970), 9 INT'L. LEGAL MATERIALS 807 (1970). See also the statements of Elliot L. Richardson, Under Secretary of State, and John R. Stevenson, Legal Adviser of the Department of State, in *Hearings on Issues Related to Establishment of Seaward Boundary of United States Outer Continental Shelf before the Special Subcomm. on Outer Continental Shelf of the Senate Comm. on Interior and Insular Affairs*, 91st Cong., 2d Sess., pt. 2 (1970).

14. U.N. Doc. No. A/AC.138/25, 9 INT'L LEGAL MATERIALS 1046 (1970). For a detailed examination of the United States draft seabed treaty, see Knight, *The Draft United Nations Convention on the International Seabed Area: Background, Description and Some Preliminary Thoughts*, 8 SAN DIEGO L. REV. 259 (1971). See also Gerstle, *The UN and the Law of the Sea: Prospects for the United States Seabeds Treaty*, 8 SAN DIEGO L. REV. 573 (1971); Stone, *United States Draft Convention on the International Seabed Area*, 45 TUL. L. REV. 527 (1971); and Comment, *The Nixon Proposal for an International Seabed Authority*, 50 ORE. L. REV. 599 (1971).

15. President Nixon stated:

I am today proposing that all nations adopt as soon as possible a treaty under which they would renounce all national claims over the natural resources of the seabed beyond the point where the high seas reach a depth of 200 meters . . . and would agree to regard these resources as the common heritage of mankind. Nixon, *supra* note 13.

(2) Some form of international organization should be developed to regulate seabed exploitation activities;¹⁶ and

(3) Adequate provisions should be included within the framework of such an international agreement and organization to establish or ensure (a) protection of the marine environment, (b) a system of peaceful, compulsory disputes settlement, (c) integrity of investment, (d) revenue sharing, bearing in mind the special needs of developing nations, and (e) maintenance of multiple use of the ocean environment.¹⁷

In December, 1970, the United Nations General Assembly adopted a resolution calling for convocation of the Third United Nations Conference on the Law of the Sea to be held sometime during 1973 unless postponed by the 1972 regular session of the General Assembly on the grounds of insufficient progress of preparatory work.¹⁸ At the 1972 General Assembly session it was decided to convene a procedural session of the Third Conference in 1973, concurrent with that winter's session of the General Assembly, and to initiate the substantive portion of the Third Conference in Santiago, Chile, in April-May, 1974.¹⁹ The United Nations Committee on the

The United States draft seabed treaty (note 14 *supra*) is, of course, the specific international agreement which the United States proposed for adoption at the Third Conference.

16. The President's statement of May 23, 1970 (note 13 *supra*) also provides that:

The treaty should establish an international regime for the exploitation of seabed resources beyond this limit [the 200 meter isobath] . . . [A]greed international machinery would authorize and regulate exploration and use of seabed resources beyond the continental margins.

The draft seabed treaty (note 14 *supra*) contains elaborate provisions for an "International Seabed Resources Authority" (arts. 31-65) and equally detailed articles on the system of resource disposition (*passim*; apps. A, B, and C).

17. The President's statement of May 23, 1970 (*supra* note 13) included the following language:

The regime should provide for the collection of substantial mineral royalties to be used for international community purposes, particularly economic assistance to developing countries. It should also establish general rules to prevent unreasonable interference with other uses of the ocean, to protect the ocean from pollution, to assure the integrity of the investment necessary for such exploitation, and to provide for peaceful and compulsory settlement of disputes.

The draft seabed treaty also contains provisions on all of these points.

18. G.A. Res. 2750C (XXV) (1970).

19. G.A. Res. 3029 (XXVII) (1972).

Peaceful Uses of the Sea-Bed and the Ocean Floor Beyond the Limits of National Jurisdiction²⁰ has been charged with responsibility for preparatory work for the Third Conference and has been considering the United States and other seabed regime proposals at its semi-annual meetings which are now scheduled to continue through 1973.²¹

Thus, the Administration has pursued an active and vigorous policy of internal deliberation and international negotiation which it hopes will lead to international agreements governing the extraction of seabed resources.

As noted above, there has been introduced in the Ninety-third Congress the Deep Seabed Hard Mineral Resources Act, H.R. 9. This bill would create, by reciprocal domestic legislation, a system flag nation jurisdiction over hard mineral mining activities on the seabed beyond the limits of national jurisdiction. In fairness, it should be noted that some have argued that the Act does not constitute a "flag nation" approach at all.²² In my view, however, "flag nation" means simply that the only law governing operations on the high seas is that of the state whose flag the vessel or platform flies, and this is clearly the intent of the Act for it does not establish any *international* legal system to govern deep seabed mining but rather relies exclusively on reciprocal *domestic* legislation.²³ Obviously, such a flag nation system provides benefits only for technologically advanced nations which have or can rapidly develop a marine mining capability, and, in effect, constitutes an appropriation of deep seabed hard minerals by those very few nations. It would foreclose participation in the establishment of rules and operating regulations by other nations.

20. [Hereinafter cited as Seabed Committee]. The Seabed Committee was established by U.N. General Assembly Resolution 2467A (XXIII) (1968). It consisted originally of 42 members, but was expanded to 86 in December, 1972 [G.A. Res. 2750C (XXV) (1970), oper. para. 5] and to 91 in December, 1971 [G.A. Res. 2881 (XXVI) (1971), oper. para. 3].

21. Through G.A. Res. 3029 (XXVII) (1972) the General Assembly requested the Seabed Committee:

[I] the discharge of its mandate in accordance with resolution 2750C (XXV), to hold two further sessions in 1973, one of five weeks in New York . . . and the other of eight weeks at Geneva . . . with a view to completing its preparatory work, and to submit a report with recommendations to the General Assembly at its twenty-eighth session.

22. See, e.g., Letter of John G. Laylin to the Subcomm. on Oceanography, May 26, 1972, reprinted in *Hearings on H.R. 13904* at 195, 196 [hereinafter cited as Laylin letter].

23. See the discussion of the flag nation principle in Christy, *supra* note 7, at 72-74; see also Letter of H. Gary Knight to the Subcomm. on Oceanography, May 29, 1972, reprinted in *Hearings on H.R. 13904* at 198 [hereinafter cited as Knight letter].

This effect of a "freedom of the high seas" doctrine (which is the underlying premise of the flag nation system proposed in the Act)²⁴ was aptly described by United States Senator Lee Metcalf:

Those nations which have the capacity to lay submarine cables, do oceanographic research, and mine the deep ocean floor benefit from the freedom-of-the-seas doctrine. Those nations without marine technology do not benefit.

When one understands that there are dozens of nations which have never benefitted from the freedom-of-the-seas doctrine, one can understand the motivation behind their growing demands for greater participation. What is proclaimed by some to be equal freedom for all nations on the high seas has become in fact unequal freedom.²⁵

On several counts, then, the approach of the Act is fundamentally inconsistent with United States oceans policy.

First, it is United States policy to establish the seabed regime through international agreements, while the Act relies on domestic legislation. Granted, the supporters of the Act speak in terms of a system of reciprocal domestic legislation, but the approach is still national as opposed to international because the Act itself would not be the product of international negotiations in which the different national interests could be expressed and accommodated but rather the product of a single industry as modified by the United States Congress (which pattern would then be emulated by other nations on, if the reciprocity is to be effective, a "take it or leave it" basis). There would thus be no meaningful participation by members of the international community in establishing operational rules under the Act.

Second, it is the United States policy to establish international machinery to govern seabed operations beyond limits of national jurisdiction. The Act would utilize no international agency, relying instead solely on national laws and institutions to allocate resources and settle disputes.

24. The principle of the freedom of the high seas as embodied in Article 2 of the Convention on the High Seas, done April 29, 1958, [1962] 13 U.S.T. 2312, T.I.A.S. No. 5200, 450 U.N.T.S. 82, in force Sept. 30, 1962, is that "[t]he high seas being open to all nations, no State may validly purport to subject any part of them to its sovereignty." Absent any jurisdiction based on territory, the only remaining basis for jurisdiction on the high seas is on a vessel registration basis, thus the relationship between the concept of freedom of the high seas and the flag nation principle of jurisdiction.

25. Lee Metcalf, *Report on the Outer Continental Shelf*, 117 CONG. REC. 5758-59 (1971).

Third, and with respect to the five elements set forth by President Nixon,²⁶ the Act does not adequately (or in some cases, at all) meet the policy objectives there set forth. For instance, it is exceptionally weak in terms of protection of the marine environment and contains no system at all (save for the implicit diplomatic negotiation) for peaceful, compulsory disputes settlement. Since the Act is not part of an overall law of the sea agreement, it does not adequately handle the problem of multiple uses of the marine environment nor does it establish a meaningful system for revenue sharing (reliance is placed instead on the traditional format of Congressionally approved foreign aid).

In view of these basic inconsistencies, I believe that the Act should be shelved pending the Administration's attempt to secure the objectives it seeks, at least through conclusion of the Third Conference. If in fact the marine mining industry feels that the Administration's law of the sea policy is an inferior one, then the better approach would seem to be to attempt to alter that policy within the executive branch framework available therefor, and not to thwart that policy by urging inconsistent congressional action.²⁷ There is an element of futility in the latter approach anyway, since ultimately (barring an override of a presidential veto) the President will have the last say on whether such a bill becomes law. It seems unlikely that the President would sign such a bill if he wished to maintain the Administration's existing oceans policy.

B. The Act's Adoption Would Have an Adverse Effect on Current Law of the Sea Negotiations

As already noted, this nation is currently involved in complex negotiations on law of the sea issues leading to the Third Conference. The negotiation process is extremely difficult because of the existence of a very wide range of ocean-related issues and a very large number of countries and special interests. The adoption at this time of a bill constituting a unilateral act with respect to ocean resources by the United States could have a highly prejudicial effect upon the conduct of these negotiations.

First, the adoption of the Act, with its unilateral nature and appropriative coloration, might well break down any remaining

26. See text accompanying note 17, *supra*.

27. In fact, the marine mining industry has been taking both avenues, arguing against Administration policy through the Hard Minerals Subcommittee of the Advisory Committee on the Law of the Sea (U.S. Government Inter-Agency Law of the Sea Task Force). As evidenced by the Government's recent testimony on H.R. 9 (see note 33, *infra*), that effort was unsuccessful.

barriers to extension of 200 mile (and more) exclusive economic resource zones by developing nations. True, the Act itself makes no specific claim of appropriation with respect to seabed resources, but one must examine fact as well as form. In fact, the single underlying justification for the Act is the need for sufficient security of tenure by the mining companies to satisfy their respective boards of directors or lending institutions concerning the safety of the economic investment being made. If the Act did not in fact assure exclusive rights to seabed resources with appropriate legal safeguards of that exclusive tenure, it would not serve that stated objective. Thus, in fact, the Act does appropriate to the exclusive use of the license holder certain designated seabed areas.²⁸ What many commentators, including me, fear is that all of the developing countries whose maritime territorial ambitions the United States has been holding at bay with the promise of an overall law of the settlement would react to the Act by saying, in effect, that since the developed nations had seized those things of value to them in the oceans the developing nations were therefore entitled to seize those things of value to them, namely exclusive resource jurisdiction in 200 miles of adjacent coastal waters and seabed. Such a course of action and reaction would leave little for the "common heritage of mankind."

The so-called "economic resource zone" concept, in which coastal states would exercise preferential or exclusive rights with respect to all living and non-living marine resources, is extremely popular at the present time among developing countries and may well be one of the outcomes of the Third Conference.²⁹ Nonetheless, and consistent with its current policy, the United States continues to strive for a meaningful international content to resource extractive activities in the ocean. Were the effect of adoption of the Act to be to encourage unilateral assertions of resource jurisdiction by

28. For pro and con arguments on this issue, see the Laylin letter, *supra* note 22, and the Knight letter, *supra* note 23.

29. For a typical draft treaty proposal on the subject see Draft Articles on Exclusive Economic Zone Concept (Presented by Kenya), U.N. Doc. No. A/AC.138/SC.II/L.10 (7 August 1972). Almost all of the economic resource zone proposals submitted to date fail to include the five elements referred to by President Nixon in his May 23, 1970 statement (*supra* note 13) which elements were restated as essential elements of United States oceans policy on August 10, 1972, by the head of the Nation's delegation to the Seabed Committee.

other nations to extensive maritime areas, then the objectives of United States policy in imposing certain international standards on such zones would be greatly imperiled. Two hundred mile resource zones without guarantees for freedom of navigation and international standards concerning dispute settlement, revenue sharing, conflict of uses, protection of the marine environment, and integrity of investment, would be unacceptable to the United States, while zones encompassing such considerations would clearly further our national objectives in the ocean. In my view, our nation's efforts to secure a meaningful international regime could be thwarted if the effect of the Act were to precipitate of unilateral claims whose ultimate effect would be to foreclose the possibility of reaching international agreement on many vital ocean issues.

Second, and for the same reasons stated above, such unilateral claims could have a prejudicial effect on national defense interests. The Department of Defense ("DOD") has made clear that maintaining maximum naval mobility is a vital element of our national security system. DOD has succeeded in having adopted as part of our current national oceans policy the internationalization rather than the nationalization of seabed resources in order to protect against the phenomenon called "creeping jurisdiction" in which national jurisdiction for limited purposes supposedly tends to ripen into territorial sea jurisdiction. DOD also fostered the presentation by the United States delegation to the United Nations Seabed Committee of draft articles providing for free transit through international straits, a change from the old regime of "innocent passage."³⁰ If extensive unilateral claims of jurisdiction over ocean space by developing nations were to follow enactment of the Act, DOD's interests in maximum naval mobility and passage through straits could be seriously compromised.

Third, and finally, the effect of adoption of a flag nation system for the deep ocean floor and the generation of national claims to ocean space areas nearer shore would mean that a meaningful international organization to govern activities in ocean space would be unlikely, thus frustrating achievement of several long range foreign policy objectives of the United States such as compulsory disputes settlement, reduction of conflict potential, and foreign aid.

30. Draft Articles on the Breadth of the Territorial Sea, Straits, and Fisheries Submitted to Sub-Committee II by the United States of America, U.N. Doc. No. A/AC.138/SC.II/L.4 (1971). For a more extensive analysis of the straits passage problem, see Knight, *The 1971 United States Proposals of the Breadth of the Territorial Sea and Passage Through International Straights*, 51 ORE. L. REV. 759, 769-785 (1972).

Concern has been expressed by proponents of the Act that certain developing countries are opposed to the recovery of deep seabed mineral resources by anybody. These nations are purportedly motivated by a desire to limit competition with respect to their upland and offshore mineral resources. Accordingly, it is argued, many developing countries—including some petroleum exporting countries—will obstruct and frustrate efforts in the Seabed Committee and at the Third Conference to adopt an international regime which would facilitate the exploitation of seabed mineral resources. It is therefore concluded by these individuals that the interminable delay we can expect as the result of this posture will adversely prejudice national interests in the development of marine mining technology and the recovery of needed mineral resources.

I cannot find fault with the logic of such an argument, but I believe one of the underlying assumptions—the potential adverse impact on prices—is not completely valid. Several studies have been published concerning the economic implications of development of seabed mineral resources. Among these is a report prepared by the Secretary General of the United Nations titled *Possible Impact of Sea-Bed Mineral Production in the Area Beyond National Jurisdiction on World Markets, With Special Reference to the Problems of Developing Countries: A Preliminary Assessment*.³¹ This report concludes that there would not likely be any significant adverse economic impact from the production of manganese nodules and other seabed minerals. Similar conclusions were reached by the United States Government in its study entitled *Economic Implications of Seabed Mineral Resource Development*.³² Thus, the facts indicate that the fears of these developing countries about maintaining market prices for their mineral exports are probably unfounded. Once the data in these studies is understood by the affected nations, I doubt seriously whether their hesitancy over supporting an international regime to facilitate the mining of deep-sea mineral will continue. On the other hand, enactment of the Act would, as noted above, likely have the effect

31. U.N. Doc. No. A/AC.138/36 (28 May 1971); see also the supplemental Additional Notes on the Possible Economic Implications of Mineral Production from the International Sea-Bed Area, U.N. Doc. No. A/AC.138/73 (12 May 1972).

32. July 6, 1971.

of promoting national claims to ocean space and adversely affecting the chances for international agreement on the use of ocean space.

C. *The Act Would Be Contrary to International Expectations Expressed in General Assembly Resolution 2749.*

In December, 1970, the United Nations General Assembly adopted resolution 2749 which provides, among other things, 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 juridical, 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.

4. All activities regarding exploration and exploitation of the resources of the area and other related activities shall be governed by the international regime to be established.

. . .

7. The exploration of the area and the exploitation of its resources shall be carried out for the benefit of mankind as a whole, irrespective of the geographical location of States, whether landlocked or coastal, and taking into particular consideration the interests and needs of the developing countries.³³

This resolution was adopted by a vote of 108 in favor, none against, and 14 abstentions. The United States voted in favor of the resolution.

Although it is true that General Assembly resolutions do not constitute binding legal obligations, nonetheless such resolutions do, when adopted by such overwhelming majorities as was the case with Resolution 2749, represent the expectations of the international community and thus create political and moral norms which should not be dismissed lightly.³⁴ The legal regime proposed by

33. G.A. Res. 2749 (XXV) (1970).

34. It has been suggested that Resolution 2749 was ultimately adopted only to break an impasse with the understanding that there was not a true consensus on the major issues involved. Thus, this argument proceeds, the unanimity evidenced by the 108-0-14 vote is misleading. This may or may not be the case—it certainly would be worthwhile to engage in a study of the circumstances surrounding adoption of that resolution—but in any event the plain language of the document clearly imparts the expectation that international rather than national solutions to seabed mining problems are to be favored, and it is essentially on that basis that I argue the incompatibility of the Act and Resolution 2749.

the Act contradicts each of the major premises of Resolution 2749 quoted above.

For example, paragraph 2 of Resolution 2749 states that the area "shall not be subject to appropriation *by any means*," (emphasis added) the latter wording clearly covering de facto claims or appropriations regardless of the form in which they are couched. (I have already alluded to the form-fact dichotomy of the Act in Part II.B *supra*). Paragraph 3 is even more explicit in prohibiting acquisition of rights other than in accordance with the international regime to be established. Certainly the Act creates rights in the seabed area, but it is not possible to say at this time whether they are compatible with the international regime to be established. However, viewing the principles resolution in its entirety, there are some obvious discrepancies between the regime proposed by the Act and those basic components of an international seabed regime envisioned by the resolution.

Further, the lip service paid to revenue sharing by the Act does not carry forward the objective of paragraph 7 of Resolution 2749 which calls for seabed activities to be "carried out for the benefit of mankind as a whole . . . taking into particular consideration the interests and needs of the developing countries." The Act serves the marine mining industries of technologically advanced nations, not mankind as a whole.

III. CONCLUSION

As indicated above, the principal issue in consideration of the Act is one of timing. The long range objectives of the Act are laudable—exploitation of needed mineral resources and preservation of the technological lead of the United States in recovery and beneficiation techniques. The only real question is whether we take unilateral action *now* or attempt for another two years (through the 1974-1975 Third Conference) to secure international agreements on the subject. I have stated the case above for allowing our Government to continue its negotiating efforts and believe that that is the best course both for our Nation and the international community.

IV. POSTSCRIPT

As this article was being completed, the United States Govern-

ment (which had in 1972 avoided taking a firm position for or against the Act), in testimony before the Subcommittee on Oceanography of the House Committee on Merchant Marine and Fisheries, took a position quite similar to that set forth in this article.³⁵ I hasten to add that the expression of my own views probably had little or nothing to do with the Government's decision. Nonetheless, the Administration has pleaded with Congress to give it until the conclusion of the Third Conference (but no later than 1975) to work out an acceptable international seabed regime. That position is subject to review, however, and should insufficient progress be made toward convening of the Third Conference, or should that Conference fail to produce the requisite agreement, the Administration has indicated its support for an approach such as that taken in the Act (although members of the Inter-Agency Law of the Sea Task Force are working on their own version of a seabed mining bill).

If Congress heeds the advice of the Administration on this point, then we will have the opportunity to see if the international community has reached a sufficient stage of sophistication to adopt an international seabed regime, or whether it will take a step backward in international law and relations by resorting to unilateral activities in the ocean.

35. See Statement of Charles N. Brower, Acting Legal Advisor, Department of State, and Acting Chairman, Inter-Agency Task Force on the Law of the Sea, before the Subcomm. on Oceanography of the House Comm. on Merchant Marine and Fisheries, 93d Cong., 1st Sess., March 1, 1973; and Supplemental Statement by Leigh S. Ratiner, note 4 *supra*.

APPENDIX A

[The text of H.R. 9 (and S. 1134), 93d Cong., 1st Sess. (1973) [S. 2801 and H.R. 13904 in the 92d Cong.] which is the subject of the preceding articles by Msrs. Laylin and Knight, is reprinted below for the reader's use.—Ed.]

93D CONGRESS
1ST SESSION

H.R. 9

IN THE HOUSE OF REPRESENTATIVES

JANUARY 3, 1973

A BILL

To provide the Secretary of the Interior with authority to promote the conservation and orderly development of the hard mineral resources of the deep seabed, pending adoption of an international regime therefor.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the "Deep Seabed Hard Mineral Resources Act".

DEFINITIONS

SEC. 2. When used in this Act—

- (a) "Secretary" means the Secretary of the Interior;
- (b) "deep seabed" means the seabed and subsoil vertically lying seaward and outside the Continental Shelf of the United States and the Continental Shelves of foreign states, as defined in the 1958 Convention on the Continental Shelf;
- (c) "block" means an area of the deep seabed having four boundary lines which are lines of longitude and latitude, the width of which may not be less than one-sixth the length and shall include either of two types of blocks: (i) "surface blocks" comprising not more than forty thousand square kilometers and extending downward from the seabed surface to a depth of ten meters; (ii) "subsurface blocks" comprising not more than five hundred square kilometers and extending from ten meters below the seabed surface downward without limitation;
- (d) "hard mineral" means any mineral, metalliferous mud, or other nonliving substance other than oil, gas, hydrocarbons, and any other substance which both naturally occurs and is normally recovered in liquid or gaseous form;
- (e) "development" means any operation of exploration and exploitation, other than prospecting, having the purpose of discovery, recovery, or delivery of hard minerals from the deep seabed;
- (f) "prospecting" means any operation conducted for the purpose of making geophysical or geochemical measurements, bottom sampling, or

comparable activities so long as such operation is carried on in a manner that does not significantly alter the surface or subsurface of the deep seabed;

(g) "commercial recovery" means recovery of hard minerals at a substantial rate of production (without regard to profit or loss) for the primary purpose of marketing or commercial use and does not include recovery for any other purpose such as sampling, experimenting in recovery methods, or testing equipment or plant for recovery of hard minerals;

(h) "person" means any government or unit thereof and any juridical or natural person;

(i) "reciprocating state" means any foreign state designated by the President as a state having legislation or state practice or agreements with the United States which establish an interim policy and practice comparable to that of the United States under this Act;

(j) "international registry clearinghouse" shall mean a recording agency or organization designated by the President in cooperation with reciprocating states.

SECRETARY'S POWERS; REQUIREMENT OF LICENSE

SEC. 3. The Secretary shall administer the provisions of this Act and may prescribe such regulations as are necessary to its execution. No person subject to the jurisdiction of the United States shall directly or indirectly develop any portion of the deep seabed except as authorized by license issued pursuant to this Act or by a reciprocating state. Nothing in this Act or any regulation prescribed thereunder shall preclude, or impose any restriction upon, scientific research or prospecting by any person of any portion of the deep seabed not subject to an outstanding license issued under this Act or by any reciprocating state, or shall require any applicant for a license or any licensee to divulge any information which could prejudice its commercial position.

EXCLUSIVE LICENSES; LIMITATIONS AND CONDITIONS

SEC. 4. (a) The Secretary shall issue licenses pursuant to section 5, recognizing rights, which shall be exclusive as against all persons subject to the jurisdiction of the United States or of any reciprocating state, to develop the block designated in such license, as follows: (1) as to each surface block, the rights shall extend to manganese-oxide nodules and all other hard minerals at the surface of the deep seabed or located vertically below to a depth not exceeding ten meters; (ii) as to each subsurface block, the rights shall extend to all hard minerals located more than ten meters beneath the surface of the deep seabed.

(a) Where a subsurface block leased to one person is adjacent to a surface block leased to a different person, the licensee of the subsurface block shall have the right to penetrate the surface block and the Secretary shall prescribe regulations to prevent undue interference by one with the other, giving reasonable priority to the first licensee. No license shall preclude scientific research by any person in licensed areas where such activities do not interfere with development by the licensees.

(c) Every license issued under this Act shall remain in force for fifteen years and, where commercial recovery of hard minerals has been achieved from a licensed block within fifteen years, such license shall remain in force so long as commercial recovery from the block continues. The Secretary shall prescribe, as conditions for every license issued pursuant to this Act, minimum annual expenditures as specified in section 7, and requirements to protect the environment, prevent unreasonable interference

with other ocean uses, and promote arbitral settlement of disputes. Where circumstances beyond the control of a licensee impair its ability to develop any portion of the deep seabed held under such license, the term of the license and the dates for complying with any other license condition shall be extended for an equal length of time.

LICENSING PROCEDURES; CLEARINGHOUSE

SEC. 5. (a) A license as specified in section 4 shall be issued by the Secretary to the first qualified person who makes written application and tenders a fee of \$5,000 for the block specified in the application, except for portions of the deep seabed excluded from licensing pursuant to section 6. A person shall be deemed qualified for a license under this Act if and only if that person is a citizen of the United States, or a corporation or other juridical entity organized under the laws of the United States, its States, territories, or possessions, and meets such technical and financial requirements as the Secretary may prescribe in order to assure effective and orderly development of the licensed portion.

(b) The Secretary shall act upon each license application within sixty days of its filing, and if the license is not issued or is issued for less than the entire portion of the deep seabed sought in the application, the Secretary shall in announcing his action to the applicant state reasons in writing for declining to issue the license for the entire portion sought. The Secretary shall, and the applicant or licensee may, notify within fourteen days the international registry clearinghouse of the filing or withdrawal of an application for a license under this Act, the issuance, denial, expiration, surrender, transfer, or revocation of such license, or the relinquishment of any licensed portion of the deep seabed.

(c) The function of the international registry clearinghouse shall consist solely of keeping records of notices of applications for licenses, the issuance, denial, transfer, or termination of licenses, and the relinquishment of licensed portions of the deep seabed. Its records shall be available for public inspection during the business hours of every working day. Pending designation of such clearinghouse, notice to the Secretary shall constitute notice to the international registry clearinghouse within the meaning of this Act.

AREAS WITHDRAWN FROM LICENSING; DENSITY LIMITATIONS

SEC. 6. (a) No license shall be issued under this Act for any portion of the deep seabed (i) which has been relinquished by the applicant under license issued by any State within the prior three years; (ii) which is subject either to a prior application for a license or an outstanding license under this Act or from a reciprocating State: *Provided*, That notice thereof has been received by the international registry clearinghouse within fourteen days of such application or license; (iii) which if licensed would result in the applicant holding under licenses issued by any State or States more than 30 per centum of that area of the deep seabed which is within any circle with a diameter of one thousand two hundred and fifty kilometers where the licensed area consists of surface blocks and one hundred twenty-five kilometers where the licensed area consists of subsurface blocks; or (iv) which if licensed would result in the United States licensing more than 30 per centum of such area.

(b) No license shall be issued or transferred under this Act, and no person subject to the jurisdiction of the United States shall have any substantial interest in any license issued by any State, which would result in any person directly or indirectly holding, controlling, or having any substantial interest in licenses for any portion of the deep seabed licensed by any State which that person could not hold directly under this Act because of the limitations of items (i) and (iii).

MINIMUM ANNUAL EXPENDITURES

SEC. 7. It shall be a condition of each license issued under this Act that the licensee make or cause to be made minimum expenditures for development of each licensed block in the following amounts per block until commercial recovery from such block is first achieved:

| Year | Amount per year |
|----------------|-----------------|
| 1 _____ | \$100,000 |
| 2 to 5 _____ | 200,000 |
| 6 to 10 _____ | 350,000 |
| 11 to 15 _____ | 700,000 |

Expenditures for offsite operations, facilities, or equipment shall be included in computing required minimum expenditures where such offsite expenditures are directly related to development of the licensed block or blocks. Expenditures in any year in excess of the required minimum may be credited to later years by the licensee.

RELINQUISHMENT; TRANSFER OR LOSS OF LICENSE

SEC. 8. (a) Within ten years of the date any block is licensed under this Act and not later than the start of commercial recovery from such block, the licensee shall by written notice to the Secretary relinquish 75 per centum of such block measured laterally. The relinquishment shall be such that the unrelinquished area conforms to the shape of a block as defined under section 2(c). The licensee shall select the area of the block to be relinquished and as many as four contiguous blocks of the same type held by the licensee may be treated as a single unit for purposes of selecting the 75 per centum to be relinquished.

(b) Any license issued under this Act may be surrendered at will and, on written consent of the Secretary, transferred to any person who qualifies under section 5(a) and is not precluded from holding such license by section 6(b). Such license may be revoked for willful, substantial failure to comply with this Act, any regulation prescribed thereunder, or any license condition, in a proceeding in an appropriate United States district court: *Provided*, That the Secretary has first given the licensee written notice of such violation and the licensee has failed to remedy the violation within a reasonable period of time.

ESCROW FUND

SEC. 9. A fund shall be established for assistance, as Congress may hereafter direct, to developing reciprocating States. The United States shall deposit in this fund each year an amount equivalent to —* per centum of all license fees collected during that year by the United States pursuant to section 5(a) and an amount equivalent to —* per centum of all income tax revenues derived by the United States which are directly attributable to recovery of hard minerals from the deep seabed pursuant to licenses issued under this Act: *Provided*, That the amount deposited by the United States per license issued and per unrelinquished square kilometer under

license shall not exceed the amount contributed for assistance to developing reciprocating States by other licensing reciprocating States (except developing States) per license issued by them and per unrelinquished square kilometer licensed by them. For the purposes of this section, "developing reciprocating State" means a reciprocating State designated by the President, taking into consideration per capital gross national product and other appropriate criteria.

* An appropriate amount to be determined by the Congress.

INVESTMENT PROTECTION

SEC. 10. (a) Licenses issued under this Act may be made subject to any international regime for development of the deep seabed hereafter agreed to by the United States: *Provided*, That such regime fully recognizes and protects the exclusive rights of each licensee to develop the licensed block for the term of the license: *And provided further*, That the United States fully reimburses the licensee for any loss of investment or increased costs of the licensee incurred within forty years after issuance of the license due to requirements or limitations imposed by the regime more burdensome than those of this Act. The United States shall bear any payment of whatever kind required of the licensee under the international regime. The Secretary shall determine in the first instance the amount owing on all claims for reimbursement under this subsection.

(b) On annual payment by any licensee of a premium of \$——* per \$1,000 of insured risk of loss, the United States shall guarantee to reimburse the licensee for any loss caused through any interference by any other person (whether or not violative of international law) with development by the licensee pursuant to the license and from any loss caused by recovery by any person not authorized by the licensee of hard minerals from any block subject to such a license. The Secretary shall determine in the first instance the amount owing on all claims for reimbursement under this subsection.

* A suitable premium to be determined by the Congress.

NONDISCRIMINATORY TREATMENT

SEC. 11. All hard minerals recovered from the deep seabed under a license issued pursuant to this Act shall be deemed to have been recovered within the United States for purposes of the import and tax laws and regulations of the United States and such laws and regulations shall be administered so that there shall be no discrimination between hard minerals recovered from the deep seabed and comparable hard minerals recovered within the United States.

PENALTIES; RIGHTS OF ACTION

SEC. 12. (a) Any person subject to the jurisdiction of the United States may be enjoined from directly or indirectly violating this Act or any regulations prescribed thereunder, interfering with development pursuant to any license issued under this Act or by any reciprocating state, or removing without authority of the licensee any hard minerals from any block

subject to such a license. Any such person who directly or indirectly commits such violation, interference, or removal, shall be liable to any person injured thereby for actual damages. Any such willful violation, interference, or removal by such person shall be a misdemeanor punishable by up to six months' imprisonment, a fine of \$2,000, or both.

(b) The United States district courts shall have original jurisdiction to enforce subsection (a) and to revoke licenses under section 8(b), and such actions may be initiated in any judicial district where the defendant resides or may be found. Any regulation prescribed by the Secretary under this Act, any issuance, denial, or condition of a license under this Act by the Secretary, any consent or refusal of consent by the Secretary to the transfer of such license, and any determination of the Secretary allowing or disallowing reimbursement under section 10, shall be subject to judicial review on petition of any interested person in accordance with chapter 158 of title 28 of the United States Code.

ENACTMENT DATE; SEPARABILITY

Sec. 13. This Act shall take effect on the date of its enactment. If any provision of this Act or any application thereof is held invalid, the validity of the remainder of the Act or of any other application shall not be affected thereby.