Municipal Legislation for Exploitation of the Deep Seabed

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Abstract This study traces the evolution of municipal legislation for the deep seabed in the United States of America and the Federal Republic of Germany, and considers what the United States seeks to gain and what it may possibly lose through its recent enactment of the Deep Seabed Hard Mineral Resources Act. The study concludes that the Deep Seabed Hard Mineral Resources Act will ensure for the United States that the minerals of the deep seabed are (if they can be) available when needed, and will strengthen the negotiating position of the United States in UNCLOS III vis-à-vis a proposed seabed regime which it perceives as inefficient toward the development of manganese nodules, and unacceptable in the system of governance it promotes. Passage of the Act, it is concluded, will probably not result in a breakdown of the Law of the Sea negotiations. It is thought it will give rise to a legal challenge, the outcome of which is difficult to predict. Finally, it is asserted that political/economic opposition to the Act will be mitigated by the reasonableness of the Act, its provision for delayed implementation, and the desire of many nations to conclude a successful Law of the Sea Treaty.

Introduction

Thirteen years ago the United Nations began its efforts to formulate an international regime for exploitation of the deep seabed; such a regime
has yet to be agreed upon. For thirteen years no nation has independently undertaken or provided the investment climate necessary for exploitation of the deep seabed. This de facto moratorium on the part of the developed states has recently ended. On June 27, 1980, President Carter signed into law the Deep Seabed Hard Mineral Resources Act, P.L. 96-283. Shortly thereafter it was reported that a United States official conducted talks with West German officials as to the status of municipal deep seabed legislation. This article traces the evolution of municipal legislation for the deep seabed in the United States and the Federal Republic of Germany, and examines what the United States may gain and possibly lose through its enactment of the Deep Seabed Hard Mineral Resources Act.

The Evolution of Municipal Interim Legislation for the Deep Seabed

Creation of a Resource

On December 21, 1872, the 2300-ton vessel HMS Challenger left Britain on a global oceanographic cruise that would last three and a half years. The pioneering bottom samples of this expedition brought to the light of day a new phenomenon: manganese nodules. On the deep seabed at fantastic depths lay a new scientific curiosity. However, academic research concerning these nodules was virtually nonexistent until the mid 1950s. At that time several researchers such as E.D. Goldberg began to examine the chemical composition of nodules and to theorize upon the mechanism of their formation. Yet the transition of manganese nodules from an object of scientific curiosity to a valuable resource has often been credited to the vision and efforts of John L. Mero. It was Mero’s major statement in 1965, The Mineral Resources of the Sea, that placed before the world the immense potential value of manganese nodules:

Assuming that only 10% of the nodule deposits prove economic to mine, it can be seen that there are, in general, sufficient supplies of many metals in these sea-floor deposits to last for thousands of years at our present rates of consumption.
Formation of the U.S. Position Regarding a Legal Regime for the Deep Seabed

Concurrent with the growing awareness of the potential value of deep sea nodules was awareness of the need for a legal regime to ensure orderly exploitation. A basic issue till this day has been the degree of supranationality this legal regime should have. In 1955 George Scelle, then a member of the International Law Commission, made one of the first steps toward a supranational legal regime for the resources of the seabed when he proposed that an international agency be created within the United Nations to replace states as the granting authority for concessions to the continental shelf. The early 1960s heard many individuals and groups call upon states and the United Nations to formulate a legal regime for the deep seabed.

On the July 13, 1966, President Lyndon B. Johnson addressed the issue and provided the first allusion to the deep seabed resources being the "common heritage of mankind":

Under no circumstances must we ever allow the prospects of rich harvest and mineral wealth to create a new form of colonial competition among the maritime nations. We must be careful to avoid a race to grab and hold the lands under the high seas. We must ensure that the deep seas and the ocean bottom are, and remain, the legacy of all human beings.

However, it is Arvid Pardo's address to the United Nations in 1967 that is most often credited with initiating the international attempt to formulate a regime. Shortly after Ambassador Pardo's address, the United Nations General Assembly created "an Ad Hoc Committee to study the peaceful uses of the sea-bed and the ocean floor beyond national jurisdiction."

Arvid Pardo had proposed that the resources of the deep seabed should be designated as the common heritage of mankind and that an international agency should assume jurisdiction over the seabed as a "trustee" for all states. Congressional reaction to this movement was mixed. On the one hand, many members of Congress opposed any idea of vesting title to the seabed with the United Nations. It was argued that the United Nations was not mature enough to handle such a task. Others argued that the exploitability criteria of Article 1 of the 1958
Geneva Convention on the Continental Shelf already gave jurisdiction over the seabed to coastal states. Finally, many argued as almost a matter of basic political philosophy that private enterprise, not bureaucratic international centralized control, was the most efficient means to encourage development and promote international interests. On the other hand, Senator Claiborne Pell on September 29, 1967, and November 17, 1967, introduced two Senate resolutions calling for, inter alia, an agency within the United Nations to regulate exploitation of the deep seabed.

Which ocean policy would be in the best interests of the United States and the international community was clearly debatable. On January 9, 1967, President Johnson appointed the Stratton Commission pursuant to the Marine Resources and Engineering Development Act of 1966 to perform a comprehensive review of U.S. ocean policy.

In 1968 the American Bar Association adopted a resolution which recommended that the regime sought should:

assure, inter alia, freedom of exploration by all nations on a nondiscriminatory basis, security of tenure to those engaged in producing the resources in compliance with such rules, encouragement to discover and develop these resources, and optimum use to the benefit of all peoples.

On October 6, 1968, the American Mining Congress adopted a development-oriented resolution stating:

Beyond the areas of national jurisdiction, deep ocean mining can proceed in a reasonably orderly fashion without benefit of new legal arrangements by recognizing that accepted principles of international law governing high seas activity extend to ocean mining. Even without formal treaties, reciprocity among the nations first engaged in such deep sea exploration and development in following certain common sense practices can establish a body of customary rules which other nations perforce will follow. Operating agreements among nations most interested in limited areas, conditioned on reciprocity and looking toward comparable multi-national agreements, may encourage early exploration and development of these confined areas and gain private experience, useful in working out the best regime for the deep ocean floor beyond national jurisdiction.

In January 1969, the Stratton Commission completed its work and published its recommendations in Our Nation and the Sea: A Plan for
National Action.\textsuperscript{18} The Commission's report recommended, inter alia, that pending agreement on an international regime for the deep seabed, legislation should be enacted to provide an interim regime for mining.\textsuperscript{19}

Throughout the remainder of 1969, a U.S. Executive branch interagency task force sought to formulate a U.S. position in the light of the Pell Resolutions, the report of the Stratton Commission, and public and private statements. The final position was set forth by President Nixon in his statement of May 23, 1970.\textsuperscript{20} The statement supported the need for a regime that is the product of international agreement and which regards the resources of the seabed as the common heritage of mankind:

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.\textsuperscript{21}

The statement envisioned international control and regulation as a part of the regime:

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 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.\textsuperscript{22}

Pending such an international agreement, the statement called for an interim regime:

Although I hope agreement on such steps can be reached quickly, the negotiation of such a complex treaty may take some time. I do not, however, believe it is either necessary or desirable to try to halt exploration and exploitation of the seabeds beyond a depth of 200 meters during the negotiating process. Accordingly, I call on other nations to join the United States in
an interim policy. I suggest that all permits for exploration and exploitation of the seabeds beyond 200 meters be issued subject to the international regime to be agreed upon.\textsuperscript{23}

The statement clearly favored international agreement rather than unilateral state action as the source of a regime for the deep seabed. In this sense, as far as the Executive Branch was concerned,\textsuperscript{24} the issue was not whether there should be international control, but rather to what degree should there be international control. The statement set forward two objectives for the executive branch: (a) negotiation of an international agreement for the deep seabed, and (b) enactment of domestic legislation for establishment of an interim regime.

As to the first objective, the Executive branch responded quickly, and in August 1970 the United States to the U.N. General Assembly Seabed Committee a basically development-oriented draft convention which proposed little supranationality over the seabed.\textsuperscript{25} In December 1970, the United Nations voted to convene in 1973 a conference on the law of the sea.\textsuperscript{26} From this point negotiations have settled on three primary issues: (1) the degree of supranationality of an International Seabed Authority, (2) the basic mining conditions, and (3) the organization and voting procedures of the Authority.\textsuperscript{27}

However, as to the second objective of establishing an interim regime, the Executive Branch made virtually no initiative. The language and intent of a U.N. General Assembly Moratorium Resolution, although only advisory and by no means unanimous, had directly opposed any interim regime.\textsuperscript{28} In June 1970, Deepsea Ventures Inc. called upon the United States to establish an interim regime.\textsuperscript{29} Although the draft convention proposed a regime favorable overall to the miners, the precise wording of the draft convention raised suspicion that deep seabed mining interests might be sacrificed so as to accomplish the Department of Defense's goal of stopping the then worrisome trend of "creeping jurisdiction."\textsuperscript{30} Faced with no proposals emerging from the Executive Branch, Congress took up the initiative as regards interim legislation.

\textbf{Development of Municipal Interim Legislation in the United States of America}\textsuperscript{31}

\textit{The 92d Congress (1971–72).} On November 2, 1971, Senator Lee Metcalf introduced in the 92d Congress, Senate Resolution 2801, the
Deep Seabed Mineral Resources Act.\textsuperscript{32} The bill had essentially been drafted by the American Mining Congress, a fact which Senator Metcalf made perfectly clear.\textsuperscript{33} Senator Metcalf later wrote that he did not believe that this bill would be enacted, but rather than he used the bill as a device to explore the issue of interim legislation.

I am not committed to this particular bill (S.1134) nor to any part of it. That was my position when I introduced S.2801; it is my position today. The purpose of the hearings is to expose this bill to the full debate which is needed to assess its strengths and weaknesses. . . .

The Congress is not taking precipitous action. We are inviting full and free debate on an important issue. We are too often guilty of being "a day late and a dollar short." I believe it is most timely that we examine this proposed legislation now. Let us expose it to close scrutiny so that if we determine that legislation is needed, we enact the best law possible. The surest way to avoid mistakes is to avoid waiting until the last minute and then under pressure, writing an ineffective or unwise law. . . .

I suggest that S.1134 (identical to S.2801) is a first step in developing such an interim policy. It is not, I am sure, the final version that will emerge from the legislative process.\textsuperscript{34}

Exactly the same proposed legislation was introduced into the House of Representatives by Representative Thomas Downing on March 20, 1972, as H.R. 13904.\textsuperscript{35}

During this early stage of debate on interim legislation, the American Branch of the International Law Association voiced support:

Even if a Law of the Sea Conference is successful in 1973 or later in producing appropriate instruments on the subjects before it, it will be almost inevitably five to ten years before these can be brought into force. . . . At the same time, the world needs to seek out these resources. . . . This view suggests to us a need for interim arrangements. . . . One approach to this question which we believe to have merit is embodied in the concept of reciprocal legislation. . . . In our opinion, despite reservations on matters of detail, the proposed system would appear to have two advantages: it would provide for orderly development, and yet, . . . rest on a sound basis in existing law.\textsuperscript{36}

However, the bills on the other hand were attacked at the March, 1972, meeting of the U.N. Seabed Committee by Peru and Chile as contrary to international law.\textsuperscript{37}
The stated purpose of this first bill was:

...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.38

Basically the bill authorized the granting of 15-year licenses39 to 40,000 km² blocks40 of the seabed upon application and tender of a $5,000 fee.41 Minimum annual expenditures were required of license holders.42 Provision was made for recognition of licenses from other states with comparable regimes ("reciprocating states"),43 and an escrow fund was proposed to assist developing reciprocating states.44 Finally, provision was made to guarantee the investments of license holders against loss incurred due to U.S. agreement to an international regime, and to provide federal insurance for investments for any loss caused through the interference of any other person.45 These last provisions for investment protection were in response to industry claims that the large amount of risk capital necessary for development would not be forthcoming from banks unless the political risks above and beyond the substantial business risks were minimized.46

The bills were referred to committee where hearings were held. However, no action in committee on either bill was taken.

The 93d Congress (1973–74). Bills identical to those in the 92d Congress were introduced in the 93d Congress. S.2801 was reintroduced as S.1134 on March 8, 1973; H.R. 13904 was reintroduced as H.R. 9 on January 3, 1973.47 The Congress during this period continuously sought elaboration of the Executive Branch’s position on the proposed legislation; none was given.48 Rumors circulated that ocean mining interests were viewed by the Department of Defense as bargaining chips in the then upcoming Law of the Sea Conference.49 However, in March 1973 in a letter to Senator H. Jackson, Charles N. Brower (Acting Chairman of the newly created Interagency Task Force on the Law of the Sea) stated that the Administration would not request Congress to pass such legislation unless timely and successful completion of the work of the Law of the Sea Conference was not forthcoming. He went on to state that a treaty produced by a timely conference would be one ready for signature in 1975.50
Revised versions of these bills\textsuperscript{51} were introduced on January 23, 1974, as the second session of the 93d Congress convened. Although they were introduced as products of Congress, Barkenbus feels they do not differ substantially from the original American Mining Congress version.\textsuperscript{52} The revised bill made applications for exploration and commercial recovery separate, and prohibited commercial recovery prior to January 1, 1976 (thereby complementing the statement of Mr. Brower). The application fee was raised to $50,000 and the term of the lease was reduced. Finally, the escrow fund to aid developing reciprocating states was dropped. In the spring of 1974, the Administration in testimony reiterated its opposition to enactment of such legislation as it would, in their view, adversely affect international negotiations.\textsuperscript{53}

Faced with the inaction of Congress on S.1134 and the lengthy prospect of UNCLOS III negotiations, Deepsea Ventures Inc. on November 15, 1974, filed with the Secretary of State a "Notice of Discovery and Claim of Exclusive Mining Rights and Request for Diplomatic Protection and Protection of Investment."\textsuperscript{54} The U.S. Department of State replied to Deepsea Ventures stating:

The Department of State does not grant or recognize exclusive mining rights to the . . . [deep] seabed. . . . The position of the United States Government on deep ocean mining pending the outcome of the Law of the Sea Conference is that mining of the seabed beyond the limits of national jurisdiction may proceed as a freedom of the high seas under existing international law.\textsuperscript{55}

The Department of State's reply made no explicit remarks as to diplomatic protection or protection of investment. Testifying before Senator Metcalf on November 7, 1975, Deepsea Venture repeated that legislation was necessary to justify the necessary levels and risk of investments.\textsuperscript{56}

\textit{The 94th Congress (1975–76)}. Bills essentially similar to the previous one were introduced during the next session of Congress. Senator Metcalf introduced S.713 and Representative T. Downing introduced H.R. 1270 on January 14, 1975.\textsuperscript{57} Up to this point, Congressional initiative toward deep seabed mining had come primarily from Senator Metcalf and his staff; however, in the 94th Congress support emerged in
the House. Representative J. Murphy, Chairman of the House Merchant Marine and Fisheries Committee, and Representative J. Breaux, then Chairman of the Subcommittee on Oceanography within Representative Murphy’s committee, cosponsored H.R. 11879.58

During 1975, the Executive Branch faced with the prospect of a prolonged UNCLOS III, voiced possible support for municipal legislation. Secretary of State Henry Kissinger, speaking to the American Bar Association on August 11, 1975, stated that the United States desired a comprehensive Law of the Sea treaty but that it cannot indefinitely sacrifice its own interest in developing an assured supply of critical resources to an indefinitely prolonged negotiation.59

The Administration was recommended in the annual report of its National Advisory Committee on Oceans and Atmosphere (NACOA) to propose that legislation be enacted to encourage and regulate deep seabed mining by U.S. private industry to the end that the minerals of the deep seabed will be available to decrease U.S. dependence on foreign sources and to increase world supply.60

The Administration continued to urge deferral of legislation, however, even though the deadline set in the Administration’s March 1973 statement would clearly be eclipsed.61

Congress referred the proposed legislation to committee. On March 16, 1976, H.R. 11879 was reported favorably out of the Subcommittee on Oceanography of the House Merchant Marine and Fisheries Committee.62 On March 18, 1976, S.713 was reported favorably out of the Senate Committee on Interior and Insular Affairs.63 However, the Senate Commerce and Armed Services Committees gave no recommendation as to S.713 and the Senate Committee on Foreign Relations reported it unfavorably.64 H.R. 11879 and S.713 expired with the termination of the 94th Congress when they were tabled without action.

The 95th Congress (1977–78). Representative John Murphy introduced H.R. 3350, the Murphy/Breaux bill, on February 9, 1977.65 In response to criticism of H.R. 11879 in the previous session of Congress,
the Murphy/Breaux bill included several important changes. First, the investment insurance provision was eliminated, while the investment guarantee remained. H.R. 3350 contained a new requirement that the minerals recovered be processed in the United States or on U.S. vessels. Further, the new version of the bill classified the issuance of a license as a "major Federal action" thereby requiring under the National Environmental Act of 1969 an environment impact statement for each license. Further, H.R. 3350 carefully established its foundation in international law. Drawing upon work by Theodore Kronmiller, the bill claimed to rest on the doctrines of freedom of the high seas and reasonable regard between users and contained a disclaimer of sovereignty, sovereign rights, or ownership over the deep seabed.

Ambassador Elliot Richardson, recently appointed by the then new Carter Administration, testified before numerous committees of Congress in the spring of 1977, that pending a review of the U.S. position and the outcome of the sixth session of UNCLOS III, the Administration did not support the proposed legislation.

However, what the United States viewed as gross violations in the negotiating procedure of the sixth session of UNCLOS III caused Ambassador Richardson to recommend a "most serious and searching review of both the substance and procedure of the conference." Soon after this, Ambassador Richardson testified that U.S. interim legislation would be required whether there was a treaty or not. On August 5, 1977, Senator Metcalf introduced S.2053 in the Senate as a companion measure to H.R. 3350.

H.R. 3350 was initially referred jointly to the Merchant Marine and Fisheries Committee and the Committee on Interior and Insular Affairs; by November 7, 1977, it had been reported favorably out of both. However, in January, at the beginning of the second session, it was referred upon request to the Committee on International Relations which reported favorably upon it on February 16, 1978. Resolution of committee differences required referral to the Ways and Means Committee which reported an excise tax provision as a separate title to the bill on June 7, 1978. On June 8, 1978, the Rules Committee granted a rule for H.R. 3350. Two hours of general debate were held on July 24. Finally on July 26, after consideration of more than a dozen amendments, H.R. 3350 (in the form of a compromise measure H.R. 12988 which Rep-
resentative Breaux introduced on the day of the vote) was passed by a vote of 312 to 80. It was the first time the seabed legislation had passed a house of Congress. It is important to note that the bill as passed did not contain a provision for investment guarantees. The Treasury Department had continually opposed investment guarantees as an unwarranted form of subsidy to private industry. However, when the provision for investment guarantees was deleted, a "Declaration of Congressional Intent" was added to replace it. This declaration stated that U.S. negotiators would seek an UNCLOS III treaty that allowed ongoing mining efforts to reasonably continue their operations.

Hearings were held on S.2053 in September of 1977. However, only a few months later, Senator Metcalf passed away. Senator Metcalf's tragic death removed the force and momentum behind deep seabed legislation in the Senate. Eventually, although reported favorably by three committees, the bill never reached the Senate floor due to procedural and parliamentary problems. When the 95th Session of Congress adjourned, H.R. 3350 died. Several writers feel that the fact that Ambassador Richardson was in Europe rather than in the Senate to push S.2053 during those final days of Congress reflected the Administration's hesitant position on interim legislation at that time.

Several other proposals for deep seabed mining legislation were introduced in the 95th Congress. Of particular interest is H.R. 3652, the Ocean Mining Incentive Act. H.R. 3652 was introduced by Representative Donald M. Fraser, Chairman of the Subcommittee on International Organizations of the Committee on International Relations. The bill was intended as a compromise measure in which licensing would be provided only for prototype operations. Such a limited measure was thought by some to represent less of a hazard to the UNCLOS III negotiations.

The 96th Congress (1979–80). The bills that had come so close to passage in the 95th Congress were reintroduced with some alterations in the 96th Congress as S.493 and H.R. 2759. H.R. 2759 was reported favorably from the committees it was referred to on August 2 and 17, and on November 2, 1979. S.493 was reported favorably from the committees it was referred to on August 9, October 3 and 9, 1979. The Senate and the House of Representatives passed their respective bills,
and as noted above, President Carter signed the legislation into law on the June 27, 1980.80

Municipal Interim Legislation in West Germany and Other States

Although many other developed nations have interests in the resources of the deep seabed and have experienced frustrations similar to those of the United States as regards the seabed negotiations within UNCLOS III, the Federal Republic of Germany has progressed the furthest in implementing interim legislation. On June 22, 1977, the Bundestag of the Federal Republic of Germany passed a resolution stating:

If the difficulties that have arisen in respect of the elaboration of a sea bed regime should prove impossible to overcome, the German Bundestag will examine without undue delay whether, on the basis of reciprocity, there must be found alternative or interim settlements as have already been considered by some states. The further continuous development of sea bed mining technology by German enterprises and the investments already made therein must be safeguarded.81

In 1978 it was reported that in the Federal Republic of Germany, an ad hoc working group of the Parliament was preparing a single proposition for unilateral legislation from two drafts (one from the coalition parties SPD and FDP, and one from the opposition CDU).82 This single version, the “Bill and the Interim Regulation of Deep Sea Mining,” was introduced in the Bundestag on December 12, 1978. This writer in a related work has made a detailed comparison of American and West German deep seabed legislation. It was concluded that the two regimes were quite similar. The U.S. legislation was found to be more detailed and more explicitly committed to protection of the marine environment. A further major distinction was the presence of a cargo preference provision in the U.S. bill. However, it was thought to be likely that the resulting regimes would recognize each other as reciprocating states.83

Several other states have been reported either to be drafting or considering municipal deep seabed mining legislation. The states most often mentioned are France, Great Britain, Japan, Belgium, and the Netherlands.
Conclusions

In recent decades, advances in technology and increases in demand have provided the economic conditions whereby a scientific phenomenon of the deep seabed (manganese nodules) was transformed into an apparently valuable resource. This transformation also spawned a debate as to the nature of the legal regime to govern the exploitation of this resource. The United States was among the first to declare that the resource should be considered "the legacy of all human beings." In 1970, the United States Executive Branch declared its official position regarding a regime for the deep seabed:

a. The international community (not individual states) should formulate a legal regime for the deep seabed which regards the resources there as the common heritage of mankind and provides international machinery for governance of the regime.

b. Pending such international agreement, there should be an interim policy whereby exploration and exploitation may continue.

As to the first aspect of this statement, the text of the 1970 U.S. Draft Convention for the deep seabed reveals that although the United States sought an international regime it envisioned such a regime as having little supranationality (the registry approach). This perception coupled with Third World forces to be discussed later have led the UNCLOS III seabed negotiations to proceed at a painfully slow pace. The second aspect of this statement, although quite straightforward, was not implemented by the Executive Branch. Consideration of this lack of implementation and close study of the 1970 U.S. Draft Convention lead to the conclusion that interests within the U.S. Executive Branch felt that the "interim" interests of ocean miners were subordinate to overall U.S. interests in a comprehensive Law of the Sea Treaty the negotiation of which might be jeopardized by passage of interim legislation.

The U.S. Congress, first primarily under Senator Metcalf and later primarily under Representatives Murphy and Breaux, assumed the task of debating and developing legislation for a deep seabed interim regime. Proposed legislation has been introduced in Congress every year since 1971. Nine years of debate and hearings led to very developed legislation. S.2801, introduced in 1971, was 13 sections long and involved six
pages of text; S.493, introduced in 1979, on the other hand, is a lengthy detailed document whose provisions have been examined time and again. Over the years the proposed legislation evolved from the original industrially oriented draft to a document primarily concerned with national and international interests. In agreement with national policy aims, the law as enacted no longer contains explicit provisions for investment guarantees or investment insurance. Further, the Act seeks to establish an interim regime that provides for orderly development of the seabed. Detailed provisions provide for the protection of the marine environment, conservation of resources, and protection of life and property at sea. Finally, the Act recognizes both in a financial and legal sense that the resources of the deep seabed are the common heritage of mankind.

During this period of debate in Congress, the U.S. Executive increasingly questioned its reluctance toward support of such legislation, other nations considered or proposed municipal legislation, the need for minerals from the deep seabed increased, and opposition to any interim ("unilateral") deep seabed mining became a cause célèbre within the Group of 77. Congress thus found itself faced with the question of whether such legislation should be enacted. Many interests, often competing, swirled around this decision. To be balanced in the decision were both specific and symbolic interests of the United States, not only in the deep seabed and UNCLOS III, but also in the international community as a whole.

Factors Relevant to the Decision to Enact U.S. Deep Seabed Legislation

Whether the U.S. Congress should pass (and the U.S. President sign) legislation establishing an interim deep seabed regime was a complex question. The following sections examine briefly U.S. interests in the law of the seabed.

U.S. Interests in the Law of the Sea

United States interests in the Law of the Sea fall into two general categories: those that support general international aims and those of direct substantive value. 84
The general international interests U.S. in the Law of the Sea follow the general foreign policy aim of promoting world order and equity, and thus include:

a. The establishment of a comprehensive legal regime for the oceans that is widely accepted and clearly defined. The predictability of such a regime and the unification of national expectations which its wide acceptance would ensure, would promote international stability and aid prevention of conflict at sea.\(^{85}\)

b. The precedential value of a comprehensive Law of the Sea Treaty. The oceans are only one of many global issues (others include energy, arms control, space, the environment) which challenge the world. The failure or success of a comprehensive Law of the Sea treaty will be a precedent as to the wisdom of using either the framework of the United Nations or a comprehensive conference for the ordering of other global issues.

c. The precedential value of terms of a comprehensive Law of the Sea Treaty. If a comprehensive agreement is negotiated and the U.N. conference process is extended to other global issues, the political philosophy of the terms of such an oceans agreement will probably serve as precedent. For example, within the UNCLOS III negotiations, mandatory dispute settlement and mandatory technology transfer have often been viewed as terms that would be of substantial value as precedents.

d. Resolution of global inequities that are chronic and endemic. In particular, resolution of the economic gulf between the developed and the developing world: the North and the South.\(^{86}\)

Direct substantive interests of the United States in the Law of the Sea include:

a. Establishment of a rational management system for the living resources of the sea which ensures both conservation and full utilization.

b. Protection of the marine environment via a legal regime which details realistic and enforceable standards.

c. Acquisition of scientific knowledge under a legal regime which imposes minimum restrictions upon conduct.\(^{87}\)

d. A legal regime which protects U.S. naval and commercial navigational requirements above, upon, and below the oceans.

e. Coastal state jurisdiction over the seabed resources of its continental margin.
f. Assured and nondiscriminatory access to the mineral resources of the deep seabed under international machinery which imposes reasonable conditions and regards such resources as the common heritage of mankind.

These specific ocean interests do not have to be, and historically have not been, the subject of one treaty. However UNCLOS III is attempting to address all these topics and because of this and the fact that nations have different interests, the emerging treaty text has the aspect of a package deal. It has been the task of U.S. negotiators in UNCLOS III to negotiate a comprehensive treaty which maximizes U.S. interests. It is the task of the Senate and the Executive Branch to consider whether the benefits gained from ratification of such a comprehensive treaty justifies U.S. interests traded off so as to secure the final "package deal."

**What the United States Sought to Gain**

Ideally it is in U.S. interests to negotiate a comprehensive Law of the Sea treaty which inter alia assures nondiscriminatory access to the deep seabed. In addition, the United States has continually stated that pending such an agreement there should be an interim policy that permits further development of the deep seabed. As noted previously, the Group of 77 vigorously opposes a development-oriented interim policy; in fact, they support a no-development interim policy. It was the possibility of strong opposition to deep seabed legislation that forced examination of what the United States may lose and gain vis-à-vis its interests in the Law of the Sea. Several arguments were put forward as to why legislation for an interim regime was needed.88

First, it is argued that the minerals of the deep seabed will be vital to the United States in the future. Thus considering the prolonged nature of the negotiations thus far and the fact that any comprehensive treaty will take years to come into force, it is vital that development of the technology for exploitation of the seabed should continue. Therefore legislation was necessary because although the United States asserted that deep seabed mining was a freedom of the high seas, the risk capital necessary for development was not forthcoming without a stable investment climate provided by legislation.

This argument is predicated on the assertion that the United States will need the minerals from the seabed. Certainly the immediate mining
of deep seabed minerals will aid the U.S. balance of payments situation and strengthen domestic industry. Whether copper, cobalt, nickel, and manganese are minerals that could become foreign export policy weapons against the United States or simply become scarce open to question. Following the rise of OPEC in 1973, there was speculation and fear that other commodity cartels might be formed. At that time Chile, Peru, Zambia, and Zaire, which controlled 80 percent of copper exports, organized the Inter-governmental Council of Copper Exporting Countries (CIPEC). Also particularly distressing to developed countries was Article 5 of the U.N. Charter of Economic Rights and Duties of States which states:

All states have the right to associate in organizations of primary commodity producers in order to develop their national economies, to achieve stable financing for their development and, in pursuance of their aims, to assist in the promotion of sustained growth of the world economy, in particular accelerating the development of developing countries. Correspondingly all states have the duty to respect that right by refraining from applying economic and political measures that would limit it.99

Several studies have examined whether effective cartels could be formed about the minerals found in manganese nodules; other studies have projected future supplies of these minerals.90 The most recent study was conducted by the U.S. Department of Commerce in 1979; its conclusions are quoted here in extenso:

- An examination of available demand forecasts and past consumption patterns indicates that reserves of copper, cobalt, manganese, and nickel are adequate to the end of the century, assuming no barriers, constraints or disruptions in the market;
- Resources of copper in the U.S. and resources of nickel in Canada, Australia, and New Caledonia may be further developed, but supplies of cobalt and manganese are likely to come from less stable areas of the world because of the low quality of these ores elsewhere;
- Recycling and substitution could help meet world demand for copper if one of the major sources of supply—Chile, Zaire, Zambia—were unable to market either ore or processed metal;
• U.S. nickel supply is chiefly drawn from Canada, Australia, and New Caledonia, all of which are regarded as highly reliable. Several developing nations could provide supplementary supplies should the need arise;

• Supplies of cobalt, because it is produced as a byproduct of nickel and copper, can only be increased with an increase in demand for those two other metals. Zaire and Zambia currently account for 70 percent of the non-communist supply, but should both these sources be lost, rising prices could bring about recycling and substitution as supplements to other primary sources in order to meet essential defense and civilian needs;

• Manganese is principally found in Brazil, Gabon, Australia, South Africa, India and the Soviet Union. As the century draws to an end, South Africa and the Soviet Union will account for the majority of production. These sources cannot be regarded as dependable, and there is no substitute or possibility of recycling manganese;

• Conditions for effective cartels or unilateral trade restrictions for any of the four metals are considered limited, and supply disruptions are more likely to occur as a result of political decisions or other socioeconomic factors;

• Seabed mining will be critical to national security as a source of manganese about the year 2000 for the reasons cited above. Although the U.S. economy could sustain the loss of cobalt supplies from Zaire for up to a year, prolonged denial of that major source of cobalt would make the seabed an important source of the metal for general economic growth. Cobalt from other sources is considered adequate to meet national security requirements.

The study goes on to conclude that:

A prudent minerals policy requires that the metals be available to the market in advance of the need for them and certainly no later than the end of the century. Given the long lead time required to bring a mining site into production, decisions should be made by industry so that development can occur on the time schedule indicated.⁹¹

CIPEC failed to form a copper cartel, and as concluded above, it is thought quite unlikely that effective cartels could be formed for the
primary minerals of manganese nodules.\textsuperscript{92} It is the possibility of dwindling supplies of the minerals found in manganese nodules, particularly manganese, that is of concern to the United States today. Assuming that the present UNCLOS III negotiating text was found to be acceptable to all parties, drafting of preambular and final clauses, and final signing of the treaty, would probably be accomplished by 1982. Considering the scope of the treaty, it is quite likely that a large number of ratifications will be required for its entry into force, a process which with IMNO conventions has taken 5 to 7 years. Finally once established, the International Seabed Authority (ISA) may require time before actual commencement of operations. Therefore it is quite possible that without municipal legislation, the two decades available to prepare for the projected shortfall of manganese could be reduced to one before even prototype operations would commence under the ISA.

A second argument in favor of deep seabed legislation was that such legislation was needed so that when deep seabed mining is performed as a freedom of the high seas it will be done with due regard to the marine environment, conservation, and to the status of deep seabed resources as the common heritage of mankind. This argument is interesting because its assumptions are contrary to those of the first argument. Here legislation is needed to regulate the conduct of ocean miners operating under the freedom of the high seas doctrine. In the first argument it was asserted that legislation was necessary to provide an investment climate prerequisite for commencement of operations under the freedom of the high seas doctrine. Considering the cautious approach of the ocean mining industry and its financial backers thus far, it appears that the reasoning of the first argument more closely approximated the reality of the situation.

In the past it had been argued that deep seabed legislation was needed to protect the technological lead of U.S. industry. However, as Barkenbus pointed out, "no explanation is ever given for why there need be any 'race' to the deep seabed—particularly in light of the abundance of first generation sites. . . ."\textsuperscript{93}

Professor Darman advances two further arguments as to why such legislation was necessary.\textsuperscript{94} First, he felt legislation was necessary to protect the negotiating position of the United States within UNCLOS III. After repeated threats that such legislation would be passed and the seeming closeness with which it was almost passed in the 95th Con-
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gress, failure to pass such legislation in the 96th Congress would have seriously eroded the U.S. bargaining position. Secondly, he felt that passage of such legislation would serve to protect the legal position of the United States should it in the end not wish to ratify a treaty emerging from UNCLOS III.

Serious consideration of support for deep seabed legislation must also recognize the influence of wider underlying attitudes. In particular, there is a growing view that the present UNCLOS III negotiating text is not in the best interest of the United States. Further, it is felt that a treaty based upon the present negotiating text will not be ratified by the United States Senate. Hitherto it has been thought that failure of the UNCLOS III negotiations would entail disastrous consequences for U.S. interests. This value attached to the coming into force of a comprehensive treaty has in recent years become increasingly challenged.95

In the first place, it is often felt that the economics of the proposed UNCLOS III seabed regime are inordinately inefficient. Dr. Eckert, an economist, in his recent book *The Enclosure of Ocean Resources*, advanced the general thesis that as ocean resources have become relatively scarcer in recent decades, it is economically wise and appropriate that property systems should develop for them. Eckert’s one exception to this thesis is the resources of the deep seabed, which he believes, due to their abundance, should, in an economic sense, be regarded as a common resource, as fish once were. He concludes, “the development of property systems to govern their [nodules] allocation would probably cost more than they would be worth.”96 The UNCLOS III proposals for a vast international machinery for an industry not even tested appear to many inappropriate and make the deep seabed parable of Representative Hanna in 1967 still relevant:

I remember there was an old Pennsylvania Dutch recipe for wild turkey which very much impressed me because at the top of the recipe it says:

‘First get the Turkey’

It seems to me that if you are talking about stuffing it and seasoning it and cooking it, when you haven’t even got it, you’ve missed the very first important line of the recipe.97

Not only is the proposed ISA seen by some as inefficient and inappropriate, it is also seen as a device of land-based mineral producing
countries which hope to avert development of the deep seabed. Leigh Ratiner, commenting on this perception, wrote:

As long as the negotiations continue, these mineral producing countries will benefit from the investment uncertainty created. . . . And if the negotiations result in a treaty like the one now pending before the Conference, this deterrent to ocean mining will have been memorialized.98

Deep seabed mining by no means possesses a surefire developed technology. Estimates of the economics of deep seabed mining involve many speculations as to the costs of recovery from a seabed two to four miles down or the costs of processing the nodules once recovered.99 Leigh Ratiner concludes that the additional economic costs and political risks involved with mining under an ISA may lead to the ironic situation of an elaborate ISA with no miners:

The problem is best explained by the old adage—"you can lead a horse to water, but you can't make him drink." Indeed no matter how thirsty the horse may be, if he is certain the water is poisoned, he may take his chances in finding another trough. There are many other attractive investment opportunities for the mining industry.100

Professor Darman distinguishes between the UNCLOS III proposals for the mining of manganese nodules and what he perceives as the fundamental issue for the United States, "a set of precedents with respect to systems of governance." In this vein, there exists a feeling within the United States that its administration has gone too far in attempting to appease the Third World. In August 1975, Secretary of State Kissinger proposed the "parallel system" whereby exploitation would be by both the ISA's Enterprise and licensed states or businesses. This concession has come under the criticism of *nemo debet esse judex in propria causa* (no man should be the judge in his own case) implying that the ISA would naturally favor its Enterprise.101 Provisions for rigid production control and mandatory technology transfer have been severely criticized.102 Further, Representative Breaux sees the institutional character of the ISA, where control is based on a numerical majority of states rather than upon "global producer-consumer, importer-exporter relationships," as being a dangerous precedent for
international organization and as having a dangerous influence upon international commodity arrangements. Representative Breaux goes on to write:

It is difficult, if not impossible, to reconcile the creation of such precedents with fundamental U.S. political, economic, and strategic interests and free market principles. It is doubtful that the Senate would agree to a treaty which would have such consequences.103

The structural similarity of the proposed ISA to the United Nations has focused U.S. frustrations with the United Nations upon the ISA. These frustrations are a powerful influence behind U.S. opposition to the present UNCLOS III negotiating text. These frustrations were depicted in an article by then Ambassador Moynihan and which is, as quoted by Northcutt Ely, reproduced below:

"These days the United Nations often takes on the appearance of an international court with the Third World pressing the charges and conducting the trial."

Mr. Moynihan goes on:

"Clearly at some level—we all but started the United Nations—there has been a massive failure of American diplomacy."

He speaks of the:

"... blind acquiescence and even agreement of the United States which kept endorsing principles for whose logical outcome it was wholly unprepared and with which it could never actually go along."

This is his crusher, which would be a fitting epitaph for the American Law of the Sea negotiating process:

"In Washington, three decades of habit and incentive have created patterns of appeasement so profound as to seem wholly normal. Delegations to international conferences return from devastating defeats proclaiming victory. . . ."

Perhaps it is time to take (then) Ambassador Moynihan’s advice,

"What then does the United States do? The United States goes into opposition."

104

This perception that the no-treaty alternative may be acceptable or even desirable, defused objections to the passage of municipal deep seabed legislation. However, it must be noted that opposition to the
negotiating text as it presently stands does not entail a basic shift in the U.S. goals away from a comprehensive treaty. While formerly it was felt that a comprehensive treaty was vital to U.S. interests, particularly in the area of commercial and naval navigation, it has lately been asserted that the central substantive ocean interests of the United States might be satisfied independently of UNCLOS III in either international customary law or other mini-treaty arrangements between states.\textsuperscript{105} Thus, although the United States feels it can accept the no-treaty alternative, it continues to recognize the immense value of a widely accepted comprehensive treaty which provides a clear declaration of the rights and duties of states in using resources.

In conclusion, beyond obvious economic interests, the United States regards the mineral regime of the deep seabed as a resource and a precedent important to its future. Municipal legislation at this time, it is felt, will ensure that the minerals of the deep seabed are available when needed, and will strengthen the negotiating position of the United States in UNCLOS III vis-à-vis a proposed seabed regime which it perceives as inefficient toward the development of manganese nodules, and unacceptable in the system of governance it promotes.

\textbf{Possible Costs of Enacting Deep Seabed Legislation}

The benefits that the United States might gain from its passage of deep seabed legislation must be balanced against what it may lose:

\textit{A. The Collapse of the UNCLOS III Negotiations}. This potential cost was for many years the primary deterrent to the enactment of deep seabed legislation. It is still a potential cost of great concern to the United States. However, as noted above, the no-treaty alternative has in recent years become considered by many as acceptable and is to some desirable. Further, Professor Charney points out that to think the negotiations will easily fail reveals a lack of awareness of their importance to the developing nations.\textsuperscript{106} First of all, many developing nations seek to use UNCLOS III to limit the actions of others or legitimize their own. Secondly, the developing nations have an interest in playing some role in the development of the seabed. Thirdly, the Group of 77 have an interest in demonstrating the viability of the U.N. comprehensive negotiations approach in which their influence is maximized. Finally,
one must not fail to consider the ego involvement of many long-term delegates and the U.N. itself who will wish to avoid the total collapse of UNCLOS III. One suggestion made to avoid any possibility of impact on UNCLOS III has been to divorce the deep seabed negotiations from the main body of talks. However, overall opinion appears to believe that such a break of linkage in issues would not be possible.

B. A Legal Challenge. It is likely that from enactment of deep seabed legislation, actions will be brought under public international law questioning the legality of such a U.S. interim deep seabed regime. The U.N. General Assembly may request an advisory opinion from the International Court of Justice on the matter. Individual states may attempt bringing suit against the United States in the International Court of Justice; however, there will be the questions of whether the United States will accept the jurisdiction of the Court and whether the state bringing suit had standing before the Court. Professor E.D. Brown, arguing the latter point in a mock trial memorial, wrote:

This being the true nature of the concept of the common heritage of mankind, the international community of States or "mankind" (however that vague term is defined) has no legal title to the resources in question which could be protected by an action before the Court. Moreover, even if the international community did have such a title, Nweo [a hypothetical nation] would have no legal interest as a self-appointed representative of the international community. The I.C.J. has had occasion to make it clear the *actio popularis* is unknown in international law. Referring to the alleged legal interest of Ethiopia and Liberia in the Second Phase of the contentious proceedings in the *South West Africa Cases* (1966) the Court said this:

"Looked at in another way moreover, the argument amounts to a plea that the Court should allow the equivalent of an 'actio popularis', or right resident in any member of a community to take legal action in vindication of a public interest. But although a right of this kind may be known to certain municipal systems of law, it is not known to international law as it stands at present: nor is the Court able to regard it as imported by the 'general principles of law' referred to in Article 38, paragraph 1(c) of its Statute." (*South West Africa, Second Phase, Judgment, I.C.J. Reports* 1966, p. 6, at p. 47.)

It does appear possible that if the vast majority of nations other than the United States established an International Seabed Authority which
they regarded as the sole trustee of the seabed, then such an Authority might ignore licenses issued by the United States and in fact issue licenses in direct conflict with existing licenses. States with licenses giving rise to competing claims with U.S. licenses would probably have a legal interest to come before the Court although here the initial issue would be whether such an ISA established by a vast majority of states could bind a nonparty state such as the United States.

Theodore Kronmiller’s extensive work, *The Lawfulness of Deep Seabed Mining*, presents a detailed and convincing argument that according to *lex lata* the proposed interim regime of the United States is an internationally legal one.¹⁰⁹ This position, however, must be tempered by two observations. First, it is very difficult to assess how the International Court of Justice will decide on matters before it. It has not always proceeded on solely the basis of *lex lata*, but rather has sometimes taken on the role of conciliator. Secondly, one must recognize that the issue of the deep seabed is in many ways more a political question than a legal one. Although a decision adverse to the United States would be a serious blow, a decision in its favor may do little to appease the political force of the developing world seeking what it perceives as a more just and equitable economic order.¹¹⁰

C. Economic/Political Retaliation. The potential forms that economic/political retaliation may take include condemnatory U.N. General Assembly resolutions, retaliatory unilateral claims (particularly in matters such as right of passage), the attempt to establish sanctions (particularly in oil), direct confrontation with ocean miners at sea, and the seizing of assets abroad of those companies engaged in mining. The range of opposition runs the gamut from diplomatic protest to armed conflict. In this period of strained relations with the USSR, it should be recognized that the USSR may strongly oppose such U.S. legislation so as to repair its Afghanistan-damaged image within the Third World. It must further be recognized that this is a period of an independent Europe which is highly sensitive to the pressures of economic sanctions. The forecast deep seabed legislation of West Germany, France, and the United Kingdom may, under strong opposition, simply not be forthcoming. Thus the stronger the opposition, the more likely that the United States will find itself not part of a network of reciprocating states, but rather alone in defense of its policy.
The exact level of the opposition to the enactment of municipal legislation will be greatly influenced by general North-South relations, the emergence of an opposition spokesman, and the provisions of the Act itself. It is this author's opinion that three factors will mitigate potential opposition to the Act. First, provisions of the Act will defuse many of the more drastic opposition measures simply because the bill will not authorize actual commercial recovery for several years, thereby preempting confrontation. Secondly, the desire of many nations to reach a successful conclusion to UNCLOS III will limit the strength of their opposition. Finally, close scrutiny of the Act reveals it overall to be a reasonable measure, grounded in existing principles of international law, committed to protection of the marine environment and conservation of resources, and providing recognition, in both a legal and a financial sense, of the status of deep seabed minerals as the common heritage of mankind. Diplomatically, this writer believes that the Deep Seabed Hard Mineral Resources Act, although reasonable, could have been drafted differently so as to be even more acceptable to the international community. In this sense, the licensing of only prototype operations, as in Representative Frazer's "Ocean Mining Incentive Act" mentioned above, would appear to have been diplomatically a wiser maneuver. Such a limited approach would have gained the same benefits for the United States (development of industry and strengthening of bargaining position) but would be even less likely to inspire strong opposition. Further, the cargo preference provision of the Act can only serve to alienate other potential reciprocating states from supporting the establishment of an interim deep seabed regime.

In conclusion, the passage of deep seabed legislation will probably not result in a breakdown of the UNCLOS III negotiations; if it did so, it can be argued that the no-treaty alternative is an acceptable option for the United States. The regime established by the Act will probably be challenged legally. Although the United States can put forward a strong case under public international law, it is not possible to predict how the International Court of Justice would rule upon such a matter. Finally, an array of opposition measures may be raised against such a deep seabed regime. However, it is asserted that the Act's provisions for delayed implementation, the reasonableness of the law, and the wish of a majority of nations to conclude a successful UNCLOS III treaty will mitigate such opposition.
Conclusions

Professor Barkenbus recommended in his study of the politics of deep seabed negotiations that the United States should assume a conciliatory position among the other nations of the world. This writer totally agrees that the United States should seek such a position if for no other reason than to assuage the ideological conflict between North and South. However, reasonableness and accommodation in international relations should not entail a denial of basic political and economic beliefs. Basic precepts of economics and government should in fact be an aim within international relations. It is defense of basic precepts that made the no-treaty alternative acceptable to Professor Darman:

But if an agreement cannot be reached on a satisfactory seabed regime, the United States should hardly despair. Contrary to the general view, time may be on the U.S. side. The recent history of ideological conflict notwithstanding, it is conceivable that as many newer states gain pragmatic experience and leave rigid ideology behind, they may come to appreciate the need for sound economic incentives, for decentralization, for greater tolerance of diversity, for a more flexible pluralism. If, on the other hand, it is assumed that the future evolution of states and attitudes is not likely to be in this direction, it is all the more reasonable for the United States to treat the principles of government and economics it thinks to be right as if they were precious.

In conclusion, the United States, after nine years of debate, finally chose to enact deep seabed legislation. This study concludes that this enactment will ensure development of a resource that may be vital in the U.S. future, and will probably give rise to a level of opposition tolerable to the United States. Further, it is this writer’s belief that the key aspect that led to enactment of the Deep Seabed Hard Mineral Resources Act was the perception of the U.S. Congress that the seabed proposals of UNCLOS III set a precedent regarding systems of governance that is contrary to basic American interests and beliefs.
APPENDIX A
Proposed U.S. Deep Seabed Mining Legislation

<table>
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<tr>
<th>Year</th>
<th>Cong.</th>
<th>Sess.</th>
<th>Bill Information</th>
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<tbody>
<tr>
<td>1971</td>
<td>92d</td>
<td>1st</td>
<td>S.2801 (Sen. Metcalf)</td>
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<tr>
<td>1972</td>
<td>93d</td>
<td>2d</td>
<td>H.R.13904 (Rep. Downing)</td>
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<td>1st</td>
<td>S.1134 (Sen. Metcalf)</td>
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<td>H.R. 9 (Rep. Downing)</td>
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<td>2d</td>
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<td>H.R.11879 (Reps. Murphy/Breaux)</td>
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<td>S.2053 (Sen. Metcalf)</td>
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<td>2d</td>
<td>H.R.12988 passed House (312 to 80)</td>
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<td>1979</td>
<td>96th</td>
<td>1st</td>
<td>S.493 passed Senate (Reps. Murphy/Breaux)</td>
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Notes


10. See Guenter Weissberg, "International Law Meets the Short Term National Interest: The Maltese Proposal on the Sea-Bed and the Ocean Floor—Its Fate in Two Cities," *International and Comparative Law Quarterly*, 18 (1969), 41. This excellent article is richly documented with Congressional opinions and statements from this period. See also W.T. Burke, "A Negative View of a Proposal for United Nations Ownership of Ocean Mineral Re-

11. Ibid.

12. Ibid. A variation of this essential question was repeated by Congressman McCloskey in "Domestic Legislation and the Law of the Sea Conference," Syracuse Journal of International Law and Commerce 6 (Winter 1978–79), 225, where he asked if the interests of world peace are best served by expanding international commercial relationships or by negotiating treaties.


"'During the period leading up to the May, 1970, White House decision on ocean policy, Mr. Walter Hickel was the Secretary of the Interior. Mr. Hickel was urged by his staff to visit Messrs. Ehrlichman and Kissinger and the President himself in order to present arguments to 'save the shelf' and preserve existing United States rights to mine the deep seabed (as opposed to the Defense Department's readiness to trade these off for free transit). The reader may recall that because of Hickel's criticism of Mr. Nixon's Vietnam policy and of the
excessive power of the White House staff, his relationship with the President was tenuous at best. As a result, Mr. Hickel did not press his cause beyond a discussion of shelf limits and deep seabed questions with Mr. Ehrlichman. At the same time, visits and telephone calls between high State and Defense Department officials and White House staff and the President were intensive. Had the Nixon-Hickel relationship been more cordial and had Mr. Hickel fought harder, a shelf decision other than the so-called ‘trusteeship zone’ decision regarding the continental margin, and an approach to the deep seabed other than the so-called ‘common heritage’ characterization might have evolved.’’

21. Ibid.
22. Ibid.
23. Ibid. It is interesting to recall that Ambassador Elliot Richardson was Under Secretary of State at this time.

24. It is important to remember that statements of the U.S. Executive Branch are not necessarily national policy. As Senator Metcalf said in 1973 (Supra n. 20):

“We in Congress happen to be of the persuasion that Congress has a legitimate and vital role to play in the formulation of U.S. policies—foreign and domestic. Before a policy is U.S. policy, it should represent more than the viewpoint of only one branch of government. . . . To state that proposed legislation is unacceptable because it does not conform to conventional administration wisdom is like arguing against legislation to ban U.S. bombing in Cambodia on the basis that it is inconsistent with U.S. Asian policy.”


Note also that Congress gave advance notice that the 1970 treaty was (to at least some of its members) unacceptable. On July 21, 1970, the then ranking
members of the Senate Committee on Interior and Insular Affairs wrote to the Secretary of State:

"In the short time that our members have had access to the sixty-six page draft, the Subcommittee is unanimous in expressing grave doubts about so many of its provisions. Therefore we strongly urge that you prevent its presentation . . . ."

27. See Barkenbus, supra n.3.
31. See Appendix A for a complete listing of U.S. proposed legislation for the deep seabed.
34. See Metcalf, supra n.20.
37. Supra n.32, Report of the Seabed Committee. It is interesting to note that at the time of this assertion, both Chile and Peru had claims to territorial seas of 200 miles. Barkenbus (supra n.3) asserts this is not merely a coincidence
but is rather a diplomatic/negotiating ploy whereby if the U.S. softened its protest of expanding coastal jurisdiction, Chile and Peru would ease its criticism of U.S. proposals for the deep seabed.

38. S.2801, sec. 1.
39. S.2801, sec. 4.
40. S.2801, sec. 2(c).
41. S.2801, sec. 5.
42. S.2801, sec. 7.
43. S.2801, sec. 2 (i) and 3.
44. S.2801, sec. 9.
45. S.2801, sec. 10.
48. Supra n.30, Laylin at 329.
49. Laylin, op. cit., p. 320.
50. Supra n.47, Hearings on S.1134, p. 22, pp. 70–72.
52. Supra n.3, Barkenbus at p. 95.
55. Ibid., 66.
56. Natural Resources Law Section of the American Bar Association,


63. Ibid. These two favorable committee reports greatly influenced the title of an article written by Northcutt Ely during this period: "Deep Seabed Mining: Congress Steams to the Rescue," *International Lawyer*, 10 (Summer 1976), 537.


67. John M. Murphy, and John B. Breaux, Foreword dated June 1, 1977 in


70. Testimony of Ambassador Elliot Richardson before the Senate Committee on Energy and Natural Resources, 95th Cong., 1st Sess. (July 26, 1977).


74. Barkenbus, supra n.3, p. 98.


76. Barkenbus, supra n.3, p. 96.


81. As quoted in supra n.69, 1481.

82. *Frankfurter Allg. Zeitung* 16.8.78 and 19.8.78, as cited in Lee Kim-
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83. Supra n.80.


87. The phrase "free science" has been argued to be redundant.


89. U.N. G.A. Res. 3281 (XXIX), U.N. Doc. A/Res. 3281 (XXIX), 15 January 1975; reprinted in *International Legal Materials*, 14 (1975), 251. Northcutt Ely, supra n.63 at 537, translated this article as reading "that the consumers of the world not only must accept price fixing by more OPECs; it is unlawful for them to dislike it."


92. However, fears of such cartels are still voiced, see "U.S. faces 'OPEC' over Aerospace metals," *The Times*, London, May 6, 1980, where cobalt is considered the possible object of an effective cartel.

93. Barkenbus, supra n.3, pp. 96-97.

94. See Richard G. Darman, "Legislative Policy for Deepsea Mining—In


99. See Barkenbus, supra n.3, chapter 1.

100. Supra n.98, 715.


102. Breaux, supra n.95.

103. Ibid., 261.

104. Ely, supra n.63, 541, quoting from Moynihan, "The United States in Opposition," *Commentary Magazine*.

105. Supra n.95. In Contrast see Charney, supra n.84.

106. Charney, supra n.84, 65.


110. For a discussion of the relationship between a political call for change
and the *lex lata* reflection of what is, not what should be, see E.D. Brown, "Iceland's fishery limits: the legal aspect," *The World Today*, 29 (February 1973), 68.

111. Barkenbus, supra n.3, Chapter 9.
112. Darman, supra n.95, 395.